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# THE NYU REVIEW OF LAW AND SECURITY

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## Prosecuting Terrorism: The Legal Challenge

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*committed to examining the legal dimensions of counterterrorism and national security in the age of terror*

## The NYU Review of Law and Security

Issue No. 7 / April 2006

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## ABOUT THE CENTER

The Center on Law and Security at NYU School of Law is a non-partisan research and policy institute established for the purpose of examining the legal dimensions of national security in the post 9/11 era. The Center brings together national and international experts including policymakers, law enforcement officials, legal scholars, journalists and others in an arena that generates local, national, and international awareness of security issues. The Center's work is focused on four main program areas:

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## *From the Editor*

# A Season of Reassessment

Four and a half years have passed since the attack on the World Trade Center in downtown New York City. As we look forward to the five-year anniversary of the attack, we find ourselves in the midst of a season of reassessment. This volume, issue no. 7 of the *NYU Review of Law and Security*, presents a range of perspectives on what has been achieved and how best to proceed in the legal realm in the war on terror. In these pages, contributors consider these questions: What have we learned since 9/11 about the effectiveness and legitimacy of our policies? Should we adhere to the reforms put in place quickly and in the throes of emergency or does the distance from the time of immediate emergency counsel different, less radical measures? Are there policies that have been instituted outside of the regular processes that need to be codified? Do we need to rethink the separation of powers or are we content to live with the protections currently guaranteed under the U.S. Constitution?

The country's legal system – the Constitution, the courts, and Congress – lies at the center of this debate that has captivated the nation. Congress is currently engaged in discussions about whether or not to extend the country's anti-terror legislation, the USA PATRIOT Act. The Senate has begun hearings on the limits of the Foreign Intelligence Surveillance Act (FISA) and is obtaining data on terrorists and

terrorist organizations. The courts, too, are reviewing their own strengths and weaknesses in the war on terror. The Hamdan case (see page 30) revives the question of whether or not foreign terrorist suspects have the right to file habeas corpus petitions. The Padilla case (see page 30) questions the president's ability to detain enemy combatants indefinitely. The legal discussion has also extended to the question of the legality of the war in Iraq. Does the president have the constitutional right to declare war, and if so, what role does Congress play?

In the following pages, leading figures involved in these discussions present their points of view. Joshua Dratel, Neil Katyal, Stephen Schulhofer and Richard Pildes share their thoughts on the importance of maintaining legal rigor in matters of suspected terrorists, be they at Guantánamo or on home soil. Andrew McCarthy, Tim Golden, Nat Hentoff, Donna Newman, and Burt Neuborne discuss, among other issues, whether or not enhanced secrecy, military commissions, and coercive interrogation have made the nation stronger and more effective than it might otherwise have been in confronting the threat of violent Islamic fundamentalism.

Each fall the Center runs the **Law and Security Colloquium**, a seminar open to NYU Law students in which distinguished experts are invited to address the class. This past fall, seminar

topics ranged from intelligence reform to law enforcement and counterterrorism. Paul Clement, Viet Dinh, Richard Posner, and David Cole were among the guest speakers who addressed the class on key issues in the now vigorous debate taking place in the area of national security.

Supplementing the focus on the legal system, this volume includes materials which help contextualize the nature of the discussion, including a chronological timeline of disrupted terrorist plots produced by the White House, which was then analyzed by researchers at the Center to determine how these incidents were or were not reported in the media (see page 16). Also included is a report prepared by the **Migration Policy Institute** (see page 32) which demonstrates the severe alterations in immigration policy that have occurred in the name of national security. Another report of note is a study conducted by the **German Marshall Fund** (see page 15) that compares the way Americans and Europeans perceive threats such as international terrorism, nuclear weapons and global warming.

All told, the pages that follow are designed to enhance the season of reassessment by providing some perspective on where we have come from and where we might be headed.

“ This is not,  
as the government  
has agreed, a  
traditional war.  
So, if it is not a  
traditional war,  
and it is a war that  
is going to last  
forever, are they  
saying that the  
laws of war allow  
us to hold some-  
body forever? ”

*Donna Newman*

## Transparency and the Courts

The U.S. government's war on terror and its detainment and prosecution of suspected terrorists have raised many questions and concerns regarding the amount of transparency in America's judicial system. When national security is at risk, is it acceptable for the government to withhold certain types of information? How much and what type of information should be released to the public? How can the U.S. courts strike a balance between safeguarding national security and maintaining judicial transparency? On March 23, 2005, the Center on Law and Security hosted an open forum, entitled "Transparency and the Courts" in which a panel of experts addressed these issues.

### Participants included:

**Tim Golden**, Investigative reporter for the *New York Times*

**Nat Hentoff**, Columnist for the *Village Voice*

**Andrew McCarthy**, Senior Fellow at The Foundation for the Defense of Democracies and former Assistant U.S. Attorney for the Southern District of New York

**Donna Newman**, Attorney representing enemy combatant Jose Padilla

**Burt Neuborne**, *Event Moderator*, Inez Milholland Professor of Civil Liberties at NYU School of Law and Legal Director of the Brennan Center for Justice



Baltasar Garzón, Burt Neuborne, Karen J. Greenberg, Nat Hentoff, Andrew McCarthy, Donna Newman, and Tim Golden





Tim Golden, Donna Newman, and Moderator Burt Neuborne

## Transparency vs. Security

### *Burt Neuborne*

The basic issue that we will be discussing tonight is the nature of transparency in the judicial system. Courts have always been a paradigm of openness in the American system, from the constitutional protection of a public trial to the various procedural protections of confrontation, cross-examination, and due process. These procedures are all aimed at ensuring that the judicial process operates in the open, in the view of the public. Yet, there are costs – namely, the information that comes to light at trial may be information that the government, for legitimate reasons, would rather not have in the public realm. We need to consider the collision between the government’s legitimate interest in controlling certain types of information and the extraordinarily powerful mandate that we have in the judicial system to operate completely openly, both to obtain public acceptance and to ensure a fair trial. The question

is, can we make these two values mesh? Are they irreconcilable, or is it possible for us to have both?

This is not the first time these questions have arisen. During the Cold War, espionage prosecutions had the same concerns. Prosecutions during ongoing investigations of certain types of organized crime figures also had many of the same concerns. Terrorism trials are, at a minimum, the third wave of prosecutions that have gone through the courts where there has been the necessity of balancing these two values.

## Origins of Terrorist Prosecution Policies in the U.S.

### *Tim Golden*

It is interesting to consider what we know about the thinking inside the Bush administration in the aftermath of 9/11, how the policies for prosecuting terrorism originated, and what they were intended to accomplish.

It is probably in the nature of this kind of government secrecy that con-

spiracy theories tend to carry the day in terms of shaping people’s perceptions. But it has been an extraordinary aspect of the past couple of years’ discussion of these policies that so much documentary information has come out. Another striking fact of this period, although maybe not a particularly surprising one, is how central a role lawyers have played in shaping the government’s response to al Qaeda and to other forms of terrorism.

There is a famous statement by Cofer Black [former Director of the CIA’s Counterterrorist Center] quoted in Bob Woodward’s first book about the war in Afghanistan [*Bush at War*]. “After 9/11, the gloves come off.” That is very much the impression I think most people have. When, in fact, some of the most important and aggressive players in this are a relatively small and nebbishy group of government lawyers – some of whom remain fairly anonymous people in the White House and the Justice Department – who were determined to respond to the shocking brutality of the attacks by pushing the law as far as it would go. This became most obvious to Americans with the Patriot Act, and that was what people primarily paid attention to at that time.

While that debate was going on, a series of other measures was being discussed, measures which only later came more clearly into focus. These measures had to do with the detention, interrogation and prosecution of terror suspects outside the United States and those coming from foreign countries. That discussion almost immediately rejected the federal courts as a viable option. In the first interagency discussion that took place, the people who dominated the conversation—who were not necessarily people with a great deal of experience in terrorism prosecutions—held the view

that terrorism prosecutions, which took place almost entirely in New York during the nineties, had been a less than successful endeavor. Some people had gotten away. Other people had evaded questioning by the FBI, primarily in the embassy bombings case. And there were people who were hard to prosecute.

While the results that came out were driven in part by a desire to throw the book at these people and exact justice, a primary goal was to gain information through interrogation. The core group of people who shaped the military's NCI rules on detention and interrogation and who created the structure of military tribunals at Guantánamo wanted to give interrogators more time. They wanted to get defense lawyers out of the mix, and they wanted to protect classified information at trial. Those were all primary goals.

But part of the documentary record shows that they saw the possibilities in terms of higher-order issues. They were people who had a very expansive view of presidential power, especially in war-time. They had an aggressive lack of regard for the strictures of international law, which has become evident from the debate over the Geneva Conventions.

And they had great impatience, not only with the Congress, but with the interagency process within the government.

It is not accidental, I think, that the group of largely young lawyers who came into the administration ended up in key positions on these issues: first and foremost, David Addington, Dick Cheney's counsel; Tim Flanigan, Deputy White House Counsel; Alberto Gonzales to a lesser extent; John Yoo at the Justice Department's Office of Legal Counsel; and a lesser known group of other people on the White House-Justice Department periphery. This group included people whose resumes and identities were forged in the political battles of the 1990s as well as in the academic discussions that were taking place at the time about the limits of international law. People excluded from these discussions included many people at the State Department, the Pentagon, and the Justice Department, who might have questioned the lack of due process in what was laid out. But, almost more importantly, the discussions excluded people at the Pentagon and/or in the military or in the CIA, who might have quarreled with these policies on practical grounds. I think they thought that parts

of this new approach would not work, that some of the powers that they were asserting were not entirely necessary, except perhaps in a small number of cases. And they realized that you risked such a public-relations backlash that you might create a problem as great or greater than the one that you were going to solve.

Those kinds of complaints are being heard now from some of those people publicly and from some of them more anonymously. They are not saying that the system is too harsh or too unjust, necessarily. They are not even saying that we should revert to the federal courts, or to military courts-martial to deal with the prosecution and detention of terrorists. What I think they are saying instead is that big parts of this new apparatus – interrogation methods, renditions, military commissions, even Guantánamo as a whole – are either not the most effective tools, or have become legally or politically untenable.

In the case of Guantánamo, more than three years after the president's November 13th military order establishing the Pentagon's role and establishing commissions as a way to prosecute people, not a single commission trial has

## *Fall 2005 Law & Security Colloquium*



**David Cole**, *Professor of Law, Georgetown University*

**Seminar topic: Security and Rights**

**"The Rule of Law should be viewed as an asset, not an obstacle, in the war on terror. The administration, unfortunately, does not see it that way."**

gone forward. Those cases may now be tied up in the appeals courts and the Supreme Court for at least another year. More than three years after the CIA and the Pentagon began trying to sort out interrogation rules, we are almost back to square one. That may be going too far, but a lot of things are now up in the air, and I think people in those agencies are very concerned about what they are supposed to do and how they are going to do it effectively.

The Pentagon is fairly desperate to empty out Guantánamo and is at a loss for ways to do it. It is unclear where, today, if you had two hundred new detainees seized abroad who were bona fide al Qaeda members, you would even put them. And so it seems to me that, like it or not – and the Congress has not by any means been clamoring as a whole for this discussion – society is now going to have this discussion in a much more open way, and that is what is starting to happen.

### **Burt Neuborne**

To what extent is the willingness to discuss this more openly today a function of the fact that a number of years have passed, and we are no longer in the post-9/11 situation where there was an almost desperate fear of where the next attack was coming from and there was a tremendous amount of anxiety and ignorance that may have resulted in policy driven by panic? The panic may have been justified at that point, but after a couple of years, aren't we now in a position to be able to take a more mature look at it?

### **Tim Golden**

I think that obviously there was that element of panic. I think you can read some of the documents that have come



Tim Golden

out (and some that I have seen that have not come out) in the back and forth between the White House Counsel's Office and the Office of Legal Counsel in the Justice Department, for example, in which very extraordinary measures are being considered. What do we do if another plane is hijacked and we think it is flying toward some kind of target? Do we shoot it down? If terrorists take over an apartment building full of people, what do we do? The solutions that people posit are fairly extreme ones. At the same time, I think that the fact that the original discussion was so secretive and so limited is also a defining element of the delay in this debate. Tim Flanigan told me that a sure way to set people against a policy is to exclude them from discussing it, and I think wise people like Flanigan, who endorsed a lot of what was done, feel that some tactical mistakes were made in that sense.

## **The U.S. and Uzbekistan: Partners in Interrogation**

### **Nat Hentoff**

The non-transparent CIA's extraordinary renditions have become less and less secret. What I want to focus on is how one of our partners in interrogation, Uzbekistan, operates under its rule of

law. Actually, there's a lot that United States interrogators can learn from their counterparts in Uzbekistan. One of the CIA's jet planes used to render purported terrorists to other countries where information is extracted by any means necessary, made ten trips to Uzbekistan. On CBS's recent *60 Minutes* program [March 9, 2005] on these torture missions, former British Ambassador to Uzbekistan, Craig Murray, told of the range of techniques used by Uzbek interrogators, including drowning and suffocation. Rape was used, as was the insertion of limbs into boiling liquid. Two nights later on ABC's *World News Tonight*, Craig Murray told of photos he received of an Uzbek interrogation which ended with the prisoner being boiled to death.

Craig Murray, appalled, had protested to the British Foreign Office in a confidential memorandum leaked to the *Financial Times* of London, not generally known as a left wing newspaper. This appeared on October 11, 2004. "Uzbek officials are torturing prisoners to extract information about reported terrorist operations, which is supplied to the United States and passed through its Central Intelligence Agency to the U.K.," said Mr. Murray. Prime Minister Tony Blair is apparently not terribly sensitive to human rights. Craig Murray was removed as Ambassador to Uzbekistan. On the BBC the next week, Steve Crenshaw, director of the London office of Human Rights Watch, spoke plainly about the president's continual ardent assurances that this country would never engage in torture. He once said, "It opposes our very soul as a nation." Said the human rights man in London, "You can't wash your hands and say, 'We didn't torture, but we'll use what comes out of torture.'"



This goes back in terms of media, among other places, to Dana Priest's story in the *Washington Post* toward the end of 2002 about what was happening not in rendition, but at Bagram Airbase itself. One official, not named, said, "After all, if you're not in the room, what blame is there on you?" As for our ally, Uzbekistan, run by the merciless dictator, Islam Karimov, Philip Stevens, an incisive columnist for the *Financial Times* noted in that paper on October 19th, "Uzbekistan provides a vital base for U.S. operations in neighboring Afghanistan. U.S. financial aid to Uzbekistan provides a bulwark against Russian influence." And, an October *Financial Times* editorial emphasizes that because the Bush administration supports the vicious government of President Karimov, the U.S. "has given it the confidence to sell a long-running campaign against internal dissidence as part of the campaign against al Qaeda."

In 2003, Fatima Mukhadirova showed photographs of her son, who had been tortured to death in an Uzbek prison. Her son's teeth were smashed. His fingers were stripped of nails. His body had been cut, bruised, scalded. His mother, as of the last I heard, which was last year, is on trial for infringement of the constitutional order so that she can shut up about what was done to her son. Meanwhile, Porter Goss, whose CIA benefits from information obtained by Uzbek torturers, told the Senate Armed Services Committee on March 17th that one of the CIA's own techniques, waterboarding, is "an area of what I call professional interrogation techniques." I wonder what the unprofessional ones are. Anyway, as Reed Brody, special counsel to Human Rights Watch, noted in a March 21st letter to the *New York Times*,

"Porter Goss claimed the CIA is not now using torture, and that waterboarding is a 'professional interrogation' technique. He can't have it both ways.

Waterboarding, known in Latin America as the 'submarino,' entails forcibly pushing a person's head under water until he believes he will drown. In practice he often does. Waterboarding can be nothing less than torture in violation of United States and international law." Reed Brody concluded, "Mr. Goss, by justifying the practice as a form of professional interrogation, renders dubious his broader claim that the CIA is not practicing torture today."

I cannot resist the temptation to repeat what George W. Bush said on International Day, June 26, 2003, in support of victims of torture, "The United States is committed to the worldwide elimination of torture, and we are leading this fight by example. I call on all governments to join with the United States in prohibiting, investigating, and prosecuting all acts of torture." To pursue that goal in Congress, however, is rather difficult, because in the Senate, although Jay Rockefeller is trying to get an independent investigation, Senator Roberts says he has blocked this, saying, "Let me assure you, the Senate Intelligence Committee is well aware of what the CIA is doing overseas in the defense of our nation, and they are not torturing detainees." CIA men may not be there when somebody is boiled to death, so I guess that is what George Orwell might have called "double speak." So, there is still a certain lack of transparency.

### **Burt Neuborne**

The easy point that you make, and I think that everybody would agree with, is that it would be a violation of every-

thing that we stand for to send somebody to a place where we have every reason to believe the person is going to be tortured, and then claim that we have no moral responsibility for it. But what if somebody is captured in some horrible place around the world where torture takes place and they torture information out of him, and the information is valuable in protecting the United States against a terrorist attack? Would you accept that information and use it to defend us?

### **Nat Hentoff**

Well, first of all, it seems to be an almost universal truth that torture, wherever it occurs, is hardly the most reliable form of interrogation. Colin Powell found that out when he made that famous, or not so famous, speech to the United Nations and included a piece of information that was obtained from a detainee who was held in a secret interrogation center by the CIA. The information was false. They had tortured it out of him by waterboarding.

So, no, I don't care where the torture takes place. First of all, it does violate those countries' adherence to international law. And, if we are going to take information given by that sort of country, it seems to me we are complicit in the violation, and more to the point, we don't know what the hell we are getting.

## **From the Founding Fathers to Jose Padilla**

### **Donna Newman**

I am going to start with our Founding Fathers, because that is where we in the Padilla case started (see page 30 for an update on the Padilla case). What astounded us was the position that the government took in our case, a position



contrary to everything that we had learned and had practiced. I begin with Ben Franklin, who said, “They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.” The government now has changed our concept of a fear of terror into a fear of freedom – that is, freedom to know what is happening, freedom to go to court. What we experienced in our case is that the government did everything possible to avoid the courts, and they are still doing that.

To this day, my client is not charged with a crime, and yet he is being detained in a naval brig in South Carolina. He was not allowed to see counsel until the government decided in their generosity after almost two years that he could see counsel. But, once again, to see my client I had to agree to certain conditions dealing with secrecy. In other words, I was precluded from having certain discussions with him. It came to the point where I said to my co-counsel, Andrew Patel, “Do you think we could ask him what he had for breakfast without divulging a national secret?” That is the nature of the limitation. When you think about an attorney being assigned to a case, and the value of an attorney, certainly it has to do with communication with their client. Yet the government argued at the very beginning of our case that such communication simply was unnecessary to pursue a habeas action. And while at first we thought it was laughable, absurd even, we went back to the Founding Fathers. We went back to English common law. We went back to the 1600s to look at the Writ of Habeas Corpus. What was the foundation? What were we talking about? They had what we considered the audacity to say that we had a right to pursue a habeas action

because Padilla was a citizen.

Initially, we were not able to communicate with our client, but eventually the court said, “Well yes, you can see your client.” The government, by the way, has never said that that is the law; they have simply said, “We allow you now out of the generosity of our heart to confer with your client under strict limitations.” Now we are able to see our client, but we have surveillance cameras watching our interactions with the client. We have somebody present in the room. Now, I certainly don’t look like a terrorist, and I don’t have a terrorist background. What was I going to do that made all that surveillance necessary? The answer is, to my mind, that they have a different approach to democracy, an approach that I suggest is contrary to that of our Founding Fathers and to what we as a nation believe at the very core is necessary for our freedom.

One of the doctrines that I found most offensive was what I call the “trust me” doctrine. I felt like I was a little girl again and my daddy was patting me on the head, and he was saying to me, “I know better. Don’t ask questions, just



Donna Newman

do what I say, because I know better.” This was actually how they conducted the beginning of this litigation. “You have no right to information. We will give you an affidavit based on hearsay, based on informants we agree are not particularly reliable, but we know better. This is a matter of national security. And you, despite the fact that you are counsel, despite the fact that you now have security clearance, trust me, you don’t need to know anything.” Our country is not based on “trust me.” The Founding Fathers, in fact, did not trust King George, the *other* King George. They set up separation of powers – checks and balances – for the very reason that they did not trust the imperial leader.

## *Bios of Note*

**Donna Newman** entered law school at the age of thirty-five, after having a career as a speech pathologist and English teacher and in the midst raising two children. She graduated cum laude from New York Law School, was the recipient of the Federal Litigation Award, and was a staff member of the *Human Rights Journal*. Currently, she is an attorney in the New York / New Jersey area, having opened her own practice in 1991. She predominantly practices in federal court, specializing in representing criminal defendants before the district court and the court of appeals. She has represented over five hundred clients in matters ranging from simple fraud to complex security fraud and racketeering. She currently represents Jose Padilla, who was designated an “enemy combatant” by President Bush in June 2002. She is a member of the National Association of Criminal Defense Lawyers, the American Bar Association – Criminal Division, the New Jersey Bar Association and the William J. Brennan Inns of Court.

There is another problem, and that is that the government keeps changing its story. What they said about my client in the beginning was that he was going to detonate a radioactive bomb. A year later it was, "He never intended to do that. He intended to blow up an apartment house. Or maybe it was gas stations. How does that sound?" I don't know whether it is because they received different information, or because, as I believed from the start, they had nothing on my client that was worth anything. Maybe, as Tim [Golden] said, what they really wanted to do was to interrogate him.

I will never forget the very first day after my client was taken and designated an "enemy combatant." I was astounded. I didn't even know what an enemy combatant was. I had never heard of it. But I did know one thing: that detaining somebody for the purpose of interrogation is unheard of. It is contrary to the principles laid out by the Founding Fathers. It is contrary to our rights. And, do you know what? They agreed with

me, to my astonishment. They agreed and admitted that they took him because they wanted to interrogate him. I simply say that this is a violation of the most essential part of our country's core beliefs.

What else did they use the Padilla case for? They used it so that when other people were taken as suspected terrorists, they could dangle "enemy combatant" before their eyes and say, "If you don't cooperate, if you don't give us the information that we want," again essentially the goal is interrogation, "we'll just stick you in the black hole. You will be the next enemy combatant." And we have specific examples of that. In the Lackawanna Six case, the attorneys reported that they were faced with the threat that, if their clients did not plead guilty, if their clients did not cooperate, then they would be designated enemy combatants, too. It is also interesting that Ali Saleh Kahlal al-Marri, who is not a citizen, when faced with a charge, refused to cooperate. He was threatened with being designated an enemy com-

batant and is now in the brig. I also want to point out one very significant example, and that is the case of John Walker Lindh. In his plea agreement it says that he will never be designated an enemy combatant. So, this policy had its inception at the beginning of the war on terror.

In sum, the Padilla case is simply a fine example of what happens when you change the way you view democracy. When you have a different slant on how to proceed, you can change the way we as a nation want to look at fear. Ironically we, as the terrorists wanted, fear our own freedom and are willing to give it up.

## Crime vs. War

### *Andrew McCarthy*

In my experience, terrorism is a zero sum game. If terrorists are not deterred, they are encouraged. If you convince people that if they attack you, if they engage in the mass homicide of civilian

## Fall 2005 Law & Security Colloquium



**Viet Dinh**, *Professor of Law, Georgetown University and one of the authors of the USA PATRIOT Act*

### **Seminar topic: Emergency Powers and the War on Terror**

*On why the USA PATRIOT Act was created:*

"We wanted to restore confidence to the American people. Congress wanted to show that they were doing something in order to maintain order and restore confidence in the rule of law in the face of this threat to national security."



Andrew McCarthy

populations, your reaction is going to be to file indictments, that is not much of a deterrent. And when they do it again – for example, when Osama bin Laden was indicted in the spring of 1998 and al Qaeda responded by blowing up our embassies in Kenya and Tanzania – if our only response with respect to bin Laden is to add another few counts to the indictment, that is not a deterrent. With respect to a war situation where the security of our people and our national security is at stake, it is simply not acceptable to tell the enemy, “If you do this, we are going to add six counts to the indictment.” It does not do anything to protect the American people. I think that this is probably a classic case of trying to put a round peg in a square hole.

What we are dealing with here are two very different species of executive power. In a domestic policing context, which is the context that the criminal justice system is made for, and is most apt for, the courts are imposed as a bulwark to protect Americans from oppressive action by the executive branch. We impose burdens of proof before the government can invade privacy or remove liberty. When government acts, it is not to suppress an existential threat, it is to stop an errant member of the body politic who has violated the society’s

laws. We presume innocence because the balance that our society has drawn is that it is preferable to see a guilty person go free than to see a single innocent person convicted of a crime. That is our criminal justice system. It is the envy of the world, and I do not think we should want it to be changed for anybody who is properly in it.

However, when we are dealing with national security, we are not dealing with the executive branch’s domestic policing power; we are dealing with its national security powers. Contrary to the situation of domestic policing, where our government has a monopoly on the legitimate use of force, in the national security arena other nations and sub-national organizations – militias, terrorist organizations – all claim the right to use massive and lethal force. We are not correcting an errant member of the body politic, we are dealing with external, existential threats to American society and to the American system itself. These are threats to the order on which all of our liberties are based. In the national

security context, where the safety and the existence of the country is at stake, the balance we have to draw is that the government cannot afford to lose, because if the government loses in that context, then none of the liberties that we enjoy are worthy of the name “liberties.”

So, I think that when we ask whether we are acting in a manner that is American, whether we are acting in a manner that is constitutional, the answer really depends on the paradigm. If you accept that we are at war, if you accept that this is national security, nothing that has been done is untraditional or un-American. Does that mean that mistakes haven’t been made, that excessive things haven’t happened? Of course, they happen. They always happen. But I think in this regard, context is everything.

### ***Burt Neuborne***

The way you have described the process, national security becomes a trump card that can be played by the government in many different contexts that takes what would ordinarily be something that

## *Secrecy*

The Bush White House, for the most part, has been known for keeping a tight lid on leaks. Vice President Cheney defended that very secrecy in court and won (*Cheney v. U.S. Dist. Court*, 124 S. Ct. 2576 (2004)). That emphasis on secrecy extends far past the White House. For example, consider the Bush administration:

- More documents have been classified by the Bush administration than ever before. In 2004, 16 million documents were marked classified, the most since the government began keeping statistics in 1980.
- Numerous government agencies, like the Nuclear Regulatory Commission and the Department of Defense, have begun taking down or limiting the amount of unclassified information they make available to the public through their websites.
- The United States District Court for the Southern District of Florida has been publicly reprimanded by the Eleventh Circuit Court of Appeals for its use of secret dockets in sensitive, terrorism related cases. This is in spite of the fact that the Eleventh Circuit itself used closed proceedings when hearing the appeal of a similar case (*United States v. Ochoa-Vasquez*, No. 03-14400 (11th Cir. October 20, 2005)).

would go through the criminal justice system with all of its protections, and moves it over into a kind of shadow area where the executive has internal controls. Are you not just too lightly shrugging your shoulders and saying, “Well, mistakes may be made under those circumstances, but we have to do it?” Isn’t that what they told us when they said that we had to put Japanese Americans into concentration camps during World War II? Isn’t that what they told us when they said that you have to go to a national security state during the McCarthy era and do all sorts of dreadful things to people that turn out to be things we wish we hadn’t done? How many times do we have to watch somebody play the national security trump card, and then ten years later feel terrible about what the inevitable consequences of that will be to people’s lives?

### *Andrew McCarthy*

I think what you don’t give due weight to, number one, is a confidence in the American people and the ability of the American people and the American government, particularly the Congress, in exercising its oversight authority to grow and to learn on the basis of what has gone on in our national history. The Japanese internment example is a very fine one. We had over one hundred thousand people interned. What are we talking about today, particularly in connection with the enemy combatants? We have exactly two United States citizens who have been held as unlawful enemy combatants in a country of three hundred million people. This is after four years of war, four years after 9/11.

Now, with respect to all the other suspected terrorists in detention, those are enemy operatives who were captured on the battlefield. With respect to capturing

## *Bios of Note*

**Patrick J. Fitzgerald** is the U.S. Attorney for the Northern District of Illinois, a position he was appointed to in 2001. He is currently serving as the special prosecutor investigating the leak of covert CIA operative Valerie Plame’s name to reporter and columnist Robert Novak. In October 2005 he brought an indictment for five counts of false statements, perjury, and obstruction of justice against Lewis “Scooter” Libby, the former Chief of Staff for Vice President Dick Cheney, in conjunction with the Plame affair.

Mr. Fitzgerald began his career practicing civil law. In 1988 he became an Assistant U.S. Attorney in New York City, where he handled drug-trafficking cases and assisted in the prosecution of mafia crime boss, John Gotti. In 1994, he prosecuted the case against Sheikh Omar Abdel Rahman and eleven other suspects charged in the 1993 World Trade Center bombing. Three years later, as the National Security Coordinator for the Office of the U.S. Attorney for the Southern District of New York, he served on a team of prosecutors investigating Osama bin Laden and was the chief counsel in prosecutions related to the 1998 U.S. embassy bombings in Kenya and Tanzania.

and holding them, there is nothing at all novel about that. That has gone on in every war the United States has ever fought. It has gone on, frankly, in every war that any other country has ever fought, and it will go on in every war that is fought hereafter. The laws of war permit, very sensibly, the capture and holding of enemy troops for two reasons. One is to try to obtain and exploit intelligence. Frankly, when you are told that, I do think the government is to be criticized somewhat for the way they have handled some of this. I think there is a period of time for exploiting intelligence and there is a period of time for diminishing returns. If you haven’t gotten the good stuff after a reasonably prompt period of time, you are not likely to get it.

The other, more sensible, reason that you hold people is so that they do not join the enemy again. Now, if we are in a domestic policing context, you are absolutely right. They have no right to hold people. But if we are actually in a hot war, and I would point out here that we are in a hot war, and Congress cer-

tainly has accepted that, then the laws of war apply and you are allowed to hold people until the hostilities have ended.

### *Donna Newman*

This is not, as the government has agreed, a traditional war. So, if it is not a traditional war, and it is a war that is going to last forever, are they saying that the laws of war allow us to hold somebody forever? Well, of course not. That is not what the laws of war say. For example, they like to use some of the laws of war and then throw out the ones that they don’t like. An enemy combatant, an unlawful combatant, is somebody who is actually on the battlefield who takes up arms but is not authorized to take up arms. That is where you get the concept that uniforms must be worn. If they are civilians and they decide to take up arms and they are not authorized, then they are considered unlawful combatants, because they do not have the privileges of somebody who has immunity for killing because



he is a soldier. There are actually rules that we abide by when we kill people on the battlefield. However, the laws of war say, "Once that civilian then puts down his arms and now is no longer an unlawful combatant, you cannot hold him." So, they cannot use the term "enemy combatant," change its meaning, and then say, "Well, let's look back at what the laws of war have traditionally done."

This is not the first war that we have engaged in. And, as Justice Sandra Day O'Connor said, "You do not throw out the Constitution because we are at war." In fact, this is not the first president who has tried to overuse his authority by claiming it is a wartime authority, and the courts have responded, "Whoa, settle back. You cannot do that." Why? Because, we are a body of laws and nobody, no matter what, is above the rule of law. So you have to find a basis, and the courts have said there is no basis to say we are in a war. Find for me where in the Constitution you have the basis to detain American citizens. I don't care what you call them. Tell me where it is. You cannot find it. So, I wanted to mention the laws of war, because the government is not using them properly.

With respect to the Padilla case, of course, he was captured here on American soil with no arms. He was actually seized from the Metropolitan Correction Center in New York. I do not think he was much of a danger there. But, be that as it may, it goes back to what I am saying, that the government says that in this new paradigm, they are allowed to detain somebody for interrogation. Now if that is what they want, and they say they have a right, I say if it is so new and it is so strange, don't make up the rules. Go to Congress, that is who makes the laws.



Nat Hentoff

### ***Nat Hentoff***

Andrew, there was a telling point you made when you said the government cannot afford to lose. It seems to me, in that context, that it implies that there are times when there are no constitutional limits. Or, as Justice Sandra Day O'Connor famously said in the Hamdi case before the Supreme Court, "Even

in this war on terrorism, the president does not get a blank check." So I wonder how you respond to Professor John Yoo's comment that there is no limit on the president if he wants to order torture. And in that case, what do you think of these extraordinary renditions?

### ***Andrew McCarthy***

We could have a whole session on torture because that is a topic that would certainly be worthy of one. I guess I have a strange position on torture in that I disagree with everyone. I do not believe the president can order torture on his own hook, because the law of the United States bars torture. Torture is against the law. I am uncomfortable with the argument that has been made that there is some reservoir of authority that the executive has to override laws that the executive actually signs into law. And in fact, I think that was pretty much decided in *United States v. Nixon*. I don't see that principle going away.

## ***Markey Amendment***

On June 16, 2005 the U.S. House of Representatives overwhelmingly passed an amendment sponsored by Representative Edward J. Markey (D-MA) to the Science, State, Justice Appropriations bill by a vote of 415-8-1. The Amendment prohibits the use of any funds included in the bills to be used in contravention of legal obligations under the Convention Against Torture, including the practice of "extraordinary rendition." The House has also approved identical Markey amendments to the Department of Defense Appropriations bill on June 20, 2005 and to the Emergency Supplemental Appropriations bill on March 16, 2005. A modified version of the latter bill was signed into law by President Bush on May 11, 2005.

Representative Markey has also authored the Torture Outsourcing Prevention Act, which aims to "permanently end the current practice of rendering prisoners to countries that have been determined by the U.S. State Department to routinely engage in torture and bar reliance on 'diplomatic assurances' from countries that practice torture as the basis for rendering persons to that country." The bill was introduced on February 17, 2005 and is currently being reviewed in subcommittee.

I do think, however that we really ought to have a mature conversation about torture that is not infected with rhetoric and stridency. If you ask the average person, anyone sensible, whether or not they favor torture, they will probably look at you like you have three heads. They are going to say, "Of course not, you are nuts." If you then say to that same sensible person, "Okay, a device about to be exploded in New York Harbor could kill one hundred thousand people, maybe more, and the only way that we can get information is from someone we are holding, who we know is a terrorist and we know is complicit in the plot, but is not being cooperative. But if we get a little rough with him, we may be able to wring some information out of him." I think suddenly the percentages change a great deal between the people who tell you in the first instance, "I'm absolutely opposed morally under all circumstances

to torture" and the people who then say, "Well are you talking about a non-lethal application of force to somebody who is not a moral innocent in order to wring information that you have a good reason to think under the circumstances will save perhaps hundreds of thousands of lives?" I think that is a different calculation.

It would help this country, I think, if we had a real conversation, not a charged conversation about what we are willing to accept and what we are not willing to accept, and then tried to codify that to really enforce it. But I think that when you start throwing words like terrorism and torture around, you cannot even have a sensible conversation.

**Nat Hentoff**

Well then, you agree with my friend Alan Dershowitz's ticking bomb approach.

**Andrew McCarthy**

I do.

**Nat Hentoff**

But the question I have always wanted to ask Alan is what then, are the limits, if any, within our system of law and international treaties?

**Andrew McCarthy**

I think, first of all, that the thing I disagree with most, with the people whom I ordinarily agree with, is that you need to do this in a straightforward and honest way. I do not agree with an approach that basically takes the word torture and tries to define it out of existence by saying that it has to be the pain associated with organ failure or death or whatever the definition was as in the Bybee Memo. I think you have to be honest, but I think what we need to do is to decide what we are willing to tolerate and then we need to codify it. And if that means that we have to abandon some of our treaty obligations, let's do that in a forthright way rather than try

## *Fall 2005 Law & Security Colloquium*



**Paul Clement, Solicitor General of the United States**

**Seminar topic: Law Enforcement and Counterterrorism**

*On enemy combatants:*

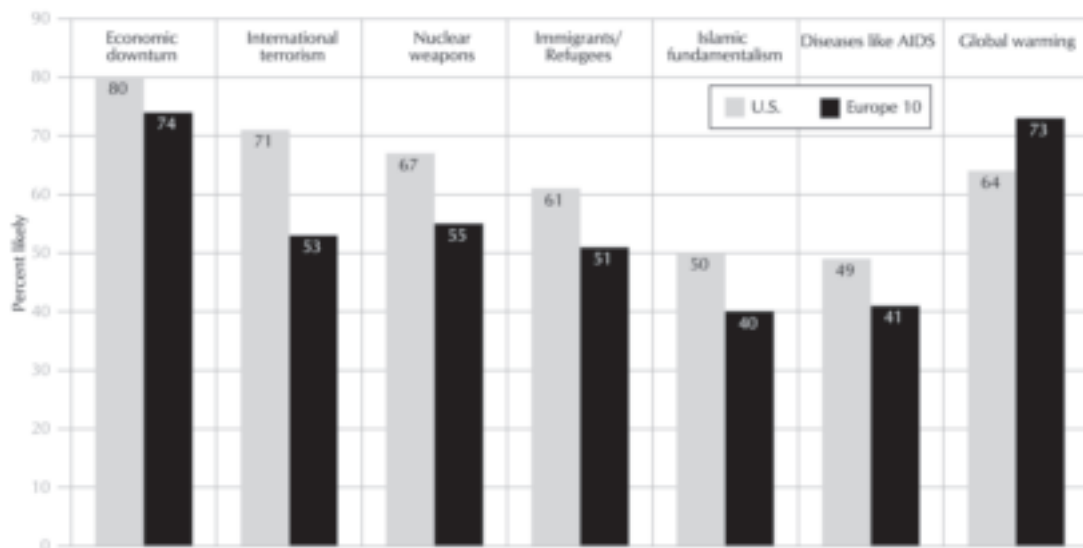
"One of the primary motivating factors—as a policy matter—that underlies the interest in designating somebody an enemy combatant is a sense that what is really important about this person is not so much that he be brought to justice (at least in the short run),

but that we think this person has information that we desperately need to save lives as part of the operational war on terror."

## Reports of Note: Transatlantic Trends 2005

This chart compares American and European perceptions of how likely they will be personally affected by various threats.

Transatlantic Trends 2005 is a project of the German Marshall Fund of the United States and the Compagnia de San Paolo, with additional support from Fundação Luso-Americana and Fundación BBVA.



to define terms out of existence and pretend that we are all comfortable with what we are doing under the present framework.

### Tim Golden

I don't think that the interrogators and intelligence people that I talk to would, by any stretch, agree, Nat, that interrogation is an ineffective tool or that because it is unreliable we should not use it. I think that, among the people who support very coercive interrogation techniques, the view is that the information gained is unreliable so you have to corroborate that information. But because the information is unreliable does not necessarily mean it is not good.

I actually had somebody say that to me – and I think one thing that is amazing to me about this whole lengthy discussion that is going on now – is that years into this, as far as I can tell, nobody in the government, at the CIA, or almost certainly the DoD, has really gone back and done a serious study of what has worked. What techniques of the many used have been most reliable? The Israelis have obviously taken decades to get to this same point, and

we've sort of front-loaded it. I guess my thought on the enemy combatant issue is that it is a similarly haphazard solution to the problem.

The flip side of Andrew's idea, I guess, is that the government has failed utterly to demonstrate the need or the value of holding Padilla or Hamdi. It is not clear that the information that Padilla has provided since being held as an enemy combatant has been vital or that they have been able to protect information or evidence in that case in some essential way. And the application of that law has been so haphazard that it has almost erased any possible precedent going forward. For example,

John Walker Lindh, an American captured overseas, was tried in federal court. Then Zacharias Moussaoui, a foreigner, was captured in the United States but the DoD would not take him. Then there is Hamdi, who was captured in Afghanistan and said that he is an American citizen. It is not until he gets to Guantánamo and that fact is corroborated that he is taken out of Guantánamo and is put in the brig in South Carolina. And then Jose Padilla is grabbed coming into the country, held briefly in federal custody and then turned over to the military. So there is no standard application of the law in these cases.

## Bios of Note

**Alice S. Fisher** is the Assistant Attorney General in the Criminal Division of the Department of Justice, a position to which she was nominated by President Bush in April 2005. She was formerly a Partner with Latham & Watkins, LLP. She previously served as Deputy Assistant Attorney General in the Criminal Division of the Department of Justice. Earlier in her career, Ms. Fisher served as Deputy Special Counsel to the U.S. Senate Special Committee to Investigate Whitewater Development and Related Matters. She earned her bachelor's degree from Vanderbilt University and her J.D. from the Catholic University of America.





West Coast Airliner Plot:  
The Library Tower in Los Angeles

# Thwarted Terrorist Attacks

On October 6, 2005, President Bush gave a speech at the National Endowment for Democracy where he stated that “the United States and our partners have disrupted at least ten serious al Qaeda terrorist plots since September 11 – including three al Qaeda plots to attack inside the United States. We have stopped at least five more al Qaeda efforts to case targets in the United States or infiltrate operatives into our country.” Soon afterwards, the White House released a list of those disrupted plots (see [www.whitehouse.gov/news/releases/2005/10/20051006-7.html](http://www.whitehouse.gov/news/releases/2005/10/20051006-7.html)). The response from the media and the intelligence community was lukewarm. Many questioned the seriousness, and even the existence, of some of the plots included. Others wondered why some arguably more noteworthy successes, such as the arrest of Richard Reid, were left off the list. What follows is a chronology of fifteen (ten plots, five taskings) acts of terrorism allegedly disrupted by the U.S. and its allies since September 11.

## Summary of Findings Regarding 15 Plots / Taskings

No public record of any detention or legal proceeding			Total	8
Detained			Total	5
Convicted			Total	2

1. 2001 Tasking	Ali S. Kahlah al-Marri detained although charges were dropped
2. West Coast Airliner Plot	No public record of any detention or legal proceeding
3. Jose Padilla Plot	Jose Padilla detained with trial pending
4. 2002 Straits of Hormuz Plot	No public record of any detention or legal proceeding
5. 2002 Arabian Gulf Shipping Port Plot	Abd al-Rahim al-Nashri convicted and sentenced to death in Yemen
6. 2003 Tourist Site Plot	No public record of any detention or legal proceeding
7. Heathrow Airport Plot	No public record of any detention or legal proceeding
8. 2003 Karachi Plot	No public record of any detention or legal proceeding
9. East Coast Airliner Plot	No public record of any detention or legal proceeding
10. 2003 Tasking	No public record of any detention or legal proceeding
11. Gas Station Tasking	Majid Khan detained in Pakistan
12. Brooklyn Bridge Tasking	lyman Faris convicted on material support charges
13. US Government and Tourist Sites Tasking	No public record of any detention or legal proceeding
14. 2004 UK Plot	Nine men of Pakistani descent detained in Britain with trial pending
15. UK Urban Targets Plot	Eight men including Issa al-Hindi detained in Britain with trial pending



*For each event, we have included the White House description of the event, followed by what was reported in the media at the time the event took place, followed by subsequent media reports.*

## 1. 2001 Tasking

**Date:** 2001

### **White House Description:**

In 2001, al Qaeda sent an individual to the United States to facilitate post-9/11 attacks there. U.S. law enforcement authorities arrested the individual.

### **Initial media reports:**

Ali S. al-Marri, a thirty-seven year old Qatari graduate student, arrived in the United States on September 10, 2001. In the fall of 2001 he was questioned by the FBI and held as a material witness. He was arrested on credit card fraud charges in January 2002 and in December 2002 was charged with lying to the FBI for his denial that he made calls to an individual in the United Arab Emirates who was alleged to be a key coordinator of the 9/11 attacks.

### **Subsequent media reports:**

In June 2003, the criminal charges against Ali S. al-Marri were dropped. He was designated an enemy combatant and moved to the Naval Brig in South Carolina. This was possibly related to intelligence gathered from captured al Qaeda leader, Khalid Sheikh Mohammed, who identified him as “the point of contact for [al Qaeda] operatives arriving in the U.S. for September 11 follow-on operations.”  
*Newsweek*, June 23, 2003

## 2. The West Coast Airliner Plot

**Date:** Mid-2002

### **White House Description:**

In mid-2002, the U.S. disrupted a plot to attack targets on the West Coast of the United States using hijacked airplanes. The plotters included at least one major operational planner involved in planning the events of 9/11.

### **Initial media reports:**

This plot was not specifically disclosed at the time, though it was widely believed that a second wave of attacks had been planned. In 2003, Los Angeles law enforcement was alerted to the fact that several sites in the city, including the Library Tower, had been targets of al Qaeda.

### **Subsequent media reports:**

“The second wave apparently never rose to the level of a coordinated plan. The September 11 commission report [sic] said that Khalid Sheikh Mohammed, believed to be the mastermind behind the 2001 terrorist attacks, became ‘too busy’ to complete the planning for subsequent strikes and that the plots did not progress beyond theoretical stages.”  
*Los Angeles Times*, October 7, 2005

## 3. The Jose Padilla Plot

**Date:** May 2002

### **White House Description:**

In May 2002, the U.S. disrupted a plot that involved blowing up apartment buildings in the United States. One of the plotters, Jose Padilla, also discussed the possibility of using a dirty bomb in the U.S.

### **Initial media reports:**

“We have captured a known terrorist who was exploring a plan to build and explode a radiological dispersion device, or ‘dirty bomb,’ in the United States.” – Attorney General John Ashcroft  
*Chicago Sun-Times*, June 10, 2002

“There was not an actual plan...We stopped this man in the initial planning stages.” – Deputy Defense Secretary Paul D. Wolfowitz  
*Washington Post*, June 11, 2002

### **Subsequent media reports:**

“Senior federal law enforcement officials, who asked to remain anonymous because of departmental guidelines, said later that although Padilla was believed to have discussed terrorist attacks in the United States with the senior al Qaeda leadership in Pakistan, they hadn't found any evidence of co-conspirators inside the U.S. or other indication that the plot had developed into any kind of operational plan.”  
*Los Angeles Times*, October 7, 2005

## 4. 2002 Straits of Hormuz Plot

**Date:** 2002

### **White House Description:**

In 2002, the U.S. and its partners disrupted a plot to attack ships transiting the Straits of Hormuz.

### **Initial media reports:**

There was no report of any such plot at the time. However, President Bush did make reference to disrupting this plot in his State of the Union Address on January 28, 2003: “America and coalition countries have uncovered and stopped terrorist conspiracies targeting the Embassy in Yemen, the American Embassy in Singapore, a Saudi military base, ships in the Strait of Hormuz and the Strait of Gibraltar. We have broken al Qaeda cells in Hamburg, Milan, Madrid, London, Paris as well as Buffalo, N.Y.”

### **Subsequent media reports:**

This plot has not been further reported or analyzed.

## 5. The 2002 Arabian Gulf Shipping Plot

**Date:** Late 2002 and 2003

**White House description:**

In late 2002 and 2003, the U.S. and a partner nation disrupted a plot by al Qaeda operatives to attack ships in the Arabian Gulf.

**Initial media reports:**

The U.S. Navy issued a general warning on the first anniversary of the 9/11 attacks about possible threats to shipping in the region. The warning stated that “according to unconfirmed reports circulating within the regional shipping community, the al Qaeda terrorist group has planned attacks against oil tankers transiting the Arabian Gulf and Horn of Africa areas.”

“While the U.S. Navy has no specific details on the timing or means of the planned attacks, and there are no indications that an attack is imminent, the threat should be regarded seriously.”

*The Scotsman*, September 11, 2002

In October 2002, off the coast of Yemen, the French oil tanker, *Limburg*, was racked by explosions now confirmed to have been caused by al Qaeda terrorists.

**Subsequent media reports:**

This entry on the list may refer to the arrest of Abd al-Rahim al-Nashiri in the United Arab Emirates in December 2002. Believed to be the mastermind behind the 2000 attack on the *U.S.S. Cole*, “he was said by the United Arab Emirates to be planning new terror strikes against United States interests in the Persian Gulf at the time of his capture, including shipping targets.”

*New York Times*, December 23, 2002

In September 2004, al-Nashiri was sentenced to death in absentia by a Yemeni court for his role in the *U.S.S. Cole* bombings.

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## 6. The 2003 Tourist Site Plot

**Date:** 2003

**White House description:**

In 2003, the U.S. and a partner nation disrupted a plot to attack a tourist site outside the United States.

**Media reports about this plot:**

This plot has not been publicly reported or analyzed.

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## 7. The Heathrow Airport Plot

**Date:** February 2003

**White House description:**

In 2003, the U.S. and several partners disrupted a plot to attack Heathrow Airport using hijacked commercial airliners. The planning for this attack was undertaken by a major 9/11 operational figure.

**Initial media reports:**

The threat was apparently taken so seriously that the British government dispatched hundreds of troops and armored vehicles to the airport and considered temporarily shutting it down. British intelligence sources at the time said, “We wouldn’t do this without extremely good reason, I can assure you...Our aim is to disrupt a potential terrorist attack.” The plot was also described as “the most worrying threat to Britain since September 11.”

*The Guardian*, February 12, 2003



**Subsequent media reports:**

In response to the White House’s release of this list, the British government provided details of this plot, said to have been organized by Khalid Sheikh Mohammed. The British intelligence service, MI5, had received “detailed intelligence” about a two-pronged attack involving launching shoulder fired rockets at departing planes and crashing planes hijacked in Eastern Europe into the airport terminal. It is not clear how far along the plot was, but Mohammed admitted that operatives had been given money to begin casing the airport to determine weaknesses.

*Sunday Times*, October 9, 2005

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## 8. The 2003 Karachi Plot

**Date:** Spring 2003

**White House description:**

In the Spring of 2003, the U.S. and a partner disrupted a plot to attack Westerners at several targets in Karachi, Pakistan.

**Media reports about this plot:**

It is unclear to what this refers but presumably this plot has not been publicly reported or analyzed.

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## 9. The East Coast Airliner Plot

**Date:** Mid-2003

**White House description:**

In mid-2003, the U.S. and a partner disrupted a plot to attack targets on the East Coast of the United States using hijacked commercial airplanes.

**Initial media reports:**

In July of 2003, the Department of Homeland Security issued a warning of possible hijackings planned for commercial airliners on the East Coast. However, even at the time, “[t]he officials emphasized that the credibility of the informa-

tion from the terrorists was not verified, and that there was no plan to raise the color-coded national threat level.”

*New York Times*, July 30, 2003

### ***Subsequent media reports:***

In response to the inclusion of the East Coast plot on the list, “two other U.S.-based plots cited by the White House involved plans to use hijacked airplanes to attack targets on the West Coast in 2002 and the East Coast in 2003.

Senior law-enforcement officials said that while they know of no instance in which such a terrorist plot was disrupted, the White House mention of the 2002 plot apparently was a reference to the so-called second wave of suicide hijackings that was first disclosed last year by a commission investigating the September 11 attacks.”

*Chicago Tribune*, October 7, 2005

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## **10. 2003 Tasking**

***Date: 2003***

### ***White House description:***

In 2003, an individual was tasked by an al Qaeda leader to conduct reconnaissance on populated areas in the U.S.

### ***Media reports about this plot:***

It is unclear to what this refers, but it has presumably not been publicly reported or analyzed. It could refer to the surveillance of the financial sector conducted by Issa al-Hindi [see number 15 on next page].

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## **11. The Gas Station Tasking**

***Date: approximately 2003***

### ***White House description:***

In approximately 2003, an individual was tasked to collect targeting information on U.S. gas stations and their support mechanisms on behalf of a senior al Qaeda planner.



lyman Faris Plot: A police officer patrols the Brooklyn Bridge.

### ***Initial media reports:***

“According to Justice Department documents describing Khalid Sheikh Mohammed’s interrogation, he ‘tasked’ a former resident of Baltimore named Majid Khan to ‘move forward’ on Khan’s plan to destroy several U.S. gas stations by ‘simultaneously detonating explosives in the stations’ underground storage tanks.’ KSM was intimately involved in the details. When Khan reported that the storage tanks were unprotected and easy to attack, KSM wanted to be sure that explosive charges would cause a massive eruption of flame and destruction. Khan – a ‘confessed AQ [al Qaeda] member’ who was apparently captured in Pakistan, according to intelligence sources – traveled at least briefly to the United States, where he tried unsuccessfully to seek asylum. His family members, intelligence documents say, are longtime Baltimore residents and own gas stations in that city (a detail *Newsweek* was able to confirm).” *Newsweek*, June 23, 2003

### ***Subsequent media reports:***

There has been limited reporting on Khan except to note that he has been captured in Pakistan. He was a central

player in the trial of Uzair Paracha who was tried and convicted on charges of conspiracy to provide material support to al Qaeda.

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## **12. lyman Faris and the Brooklyn Bridge Tasking**

***Date: April 2003***

### ***White House description:***

In 2003, in conjunction with a partner nation, the U.S. government arrested and prosecuted lyman Faris, who was exploring the destruction of the Brooklyn Bridge in New York. Faris ultimately pleaded guilty to providing material support to al Qaeda and is now in a federal correctional institution.

Faris, an Ohio truck driver at the time of his arrest, had traveled through Pakistan and Afghanistan and accomplished a variety of tasks for al Qaeda leaders. In 2003, he was tasked by Khalid Sheikh Mohammed to research a variety of potential plots in the United States, including derailing trains and bringing down the Brooklyn Bridge by cutting the suspension cables with gas torches. Though he scouted the bridge



site, he quickly determined that the plan was not feasible due to security and the bridge's structure and wrote a coded e-mail back to his superiors that winter that "the weather is too hot." His plea agreement involved cooperating with the federal authorities as an informant.

#### ***Initial media reports:***

"In a news conference here today, Attorney General John Ashcroft said that the authorities took Mr. Faris's plot very seriously and that the case 'highlights the very real threats that still exist here at home in the United States of America in the war against terrorism.'"

The New York City Police Department, which was told of the plot in March, said it considered the threat so serious that it had increased land and marine patrols around the Brooklyn Bridge several months ago. "He is the principal reason why we have the kind of security you see on the Brooklyn Bridge," a law enforcement official said of Mr. Faris.

An FBI official said investigators were still seeking to determine just how far the plot proceeded and how serious a threat Mr. Faris posed. "Obviously he had contacts with people at al Qaeda so he has to be considered somewhat important, but to say whether he really could have accomplished this or not, we're still not sure," the official said.  
*New York Times*, June 20, 2003

#### ***Subsequent media reports:***

Faris remains in prison and the Bush administration has repeatedly cited his case as evidence of the efficacy of the Patriot Act.

### **13. The U.S. Government and Tourist Sites Tasking**

***Date: 2003 and 2004***

#### ***White House description:***

In 2003 and 2004, an individual was tasked by al Qaeda to case important U.S. government and tourist targets within the United States.

#### ***Media reports about this tasking:***

It is unclear to what this refers, but it has presumably not been publicly reported or analyzed.

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### **14. The 2004 U.K. Plot**

***Date: March 2004***

#### ***White House description:***

In the spring of 2004, the U.S. and partners, using a combination of law enforcement and intelligence resources, disrupted a plot to conduct large-scale bombings in the U.K.

In March and April 2004, in a series of raids involving hundreds of officers, British police arrested nine men of Pakistani descent and seized half a ton of ammonium nitrate fertilizer, which could be used to make a bomb. Six of them were charged with a combination of conspiracy and terrorism charges.



Secretary David Blunkett, right, and Secretary of Homeland Security Tom Ridge, background, speak to reporters following their meeting on United States-United Kingdom joint efforts to combat terrorism.

#### ***Initial media reports:***

"A plot by suspected al Qaeda terrorists to blow up a target in Britain, possibly a shopping complex near the M25, is believed to have been foiled in the biggest operation carried out by MI5 against suspected Islamic extremists... Anti-terrorist sources believe that they have prevented the first attack on British soil by followers of al Qaeda."  
*The Independent*, March 31, 2004

#### ***Subsequent media reports:***

The men remain in British custody but further details of the plot have yet to emerge. The first major Islamist terror attack in Britain took place July 7, 2005 with the simultaneous bombings of subway cars and a bus.

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### **15. The 2004 U.K. Urban Targets Plot**

***Date: August 2004***

#### ***White House description:***

In mid-2004 the U.S. and partners disrupted a plot that involved urban targets in the United Kingdom. These plots involved using explosives against a variety of sites.

On August 3, 2004, spurred by new-found Pakistani intelligence, British police arrested thirteen men in raids across the country. One of the men arrested was believed to be senior al Qaeda leader, Issa al-Hindi (a.k.a. Eisa al-Britani), whose alleged surveillance of buildings in the United States had led to the raising of the terror alerts for financial sector buildings in New York, New Jersey and Washington, D.C., that summer when the results of the surveillance were discovered on the computer of an apprehended al Qaeda suspect in Pakistan.



Eight of the men were ultimately charged with conspiracy to commit murder and conspiracy to commit a public nuisance using “radioactive materials, toxic gases, chemicals and/or explosives to cause disruption.” Three of those eight, including al-Hindi, were charged with terrorism charges based on their possession of the reconnaissance materials.



2004 UK Urban Targets Plot: Police officers with assault rifles guard the entrance to the Prudential Financial building in Newark, N.J., Sunday, Aug. 1, 2004, after federal authorities warned of a possible terrorist attack.

### ***Initial media reports:***

“The British were very concerned,’ a senior European counterterrorism official said. ‘They have apprehended what they feel is a live cell.’ But it remains unclear what, if any, actions were taken by those arrested in preparation for any specific terrorist act.”

*New York Times*, August 19, 2004

### ***Subsequent media reports:***

The eight men remain in prison in Britain. In April 2005, the three charged with terrorist offenses were also indicted in the United States for conspiracy and providing material support for terrorism due to their surveillance of the financial sector targets.

## ***Report Card***

*Below are the grades given in the Final Report on the 9/11 Commission Recommendations, from the 9/11 Public Discourse Project, released December 5, 2005.*

### **HOMELAND SECURITY AND EMERGENCY RESPONSE**

Radio Spectrum for first responders	F/C*
Incident Command System	C
Risk-based homeland security funds	F/A*
Critical infrastructure assessment	D
Private sector preparedness	C
National Strategy for Transportation Security	C-
Airline passenger pre-screening	F
Airline passenger pre-screening	F
Airline passenger explosive screening	C
Checked bag and cargo screening	D
Terrorist travel strategy	I
Comprehensive screening system	C
Biometric entry-exit screening system	B
International collaboration on borders and document security	D
Standardize secure identifications	B-

### **INTELLIGENCE AND CONGRESSIONAL REFORM**

Director of National Intelligence	B
National Counterterrorism Center	B
FBI national security workforce	C
New missions for CIA Director	I
Incentives for information sharing	D
Government-wide information sharing	D
Northern Command planning for homeland defense	B-
Full debate on PATRIOT Act	B
Privacy and Civil Liberties Oversight Board	D
Guidelines for government sharing of personal information	D
Intelligence oversight reform	D
Homeland Security Committees	B
Unclassified top-line intelligence budget	F
Security clearance reform	B

### **FOREIGN POLICY AND NONPROLIFERATION**

Maximum effort to prevent terrorists from acquiring WMD	D
Afghanistan	B
Pakistan	C+
Saudi Arabia	D
Terrorist sanctuaries	B
Coalition strategy against Islamist terrorism	C
Coalition detention standards	F
Economic policies	B+
Terrorist financing	A-
Clear U.S. message abroad	C
International broadcasting	B
Scholarship, exchange, and library programs	D
Secular education in Muslim countries	D
*If pending legislation passes	

“...the hardest problem in a lot of these criminal court cases is the question of producing witnesses that the government may currently hold overseas, some of whom may be the highest level al Qaeda people who have been captured.”

*Richard Pildes*

## Prosecuting Terrorism: The National Challenge

On April 14, 2005, the Center on Law and Security hosted an open forum entitled “Prosecuting Terrorism: The National Challenge.” The forum’s panelists addressed the question of whether or not circumvention of the criminal justice system is necessary in order to effectively interrogate and prosecute suspected terrorists. The discussion hinged not only on the courts’ ability to process highly sensitive information and the balance between the government’s right to protect its citizens and the right to privacy, but also on whether or not terrorism should be thought of as crime or an act of war.

### Debating these issues were:

**Joseph Bianco**, Deputy Assistant Attorney General recently appointed to a federal judgeship in Brooklyn

**Joshua Dratel**, Attorney in New York City who defended al Qaeda member Wadih el Hage and is assisting in the defense of Australian detainee David Hicks

**Kenneth M. Karas**, Judge for the U.S. District Court, Southern District of New York

**Neil Katyal**, Professor of Law at Georgetown University and counsel for detainee Salim Hamdan

**Stephen Schulhofer**, Robert B. McKay Professor of Law at NYU School of Law

**Richard Pildes**, *Event Moderator*, Sudler Family Professor of Constitutional Law at NYU School of Law



Joe Bianco and Kenneth Karas



Neil Katyal



Richard Pildes



Stephen Schulhofer



Joshua Dratel

## Crime or War: Framing the Institutional Response to Terrorism

*Richard Pildes*

For those of us who are inside the legal system or think about the legal system, terrorism poses a very difficult set of questions, both conceptual and institutional, about how we deal with the kinds of issues that arise with terrorism. One way these questions are often framed is whether terrorism should be thought of as crime. It is obviously crime, but should it be thought of exclusively through the model of the criminal justice system? Is it analogous to an act of war, or is it an act of war? And should it be thought of in the way we think of acts of war and dealt with institutionally in the way we have tended to deal with that issue? More generally, as institutions constantly have to adapt in response to changing problems and changing circumstances, terrorism raises questions about our existing institutional structures: whether they are appropriate; whether they ought to be modified, and if so, for what reasons and in what particular ways. So the large question that I hope our discussion today will be framed around is that set of questions about

institutional structures for dealing with terrorism. There are courts. There are military tribunals. There are courts-martial. There are intermediate institutions that one might imagine being created. There is the congressional role, the presidential role, and the judicial role.

## Terrorism and the Post 9/11 Criminal Justice System

*Joshua Dratel*

I would like to debunk the notion that I think underlies the abandonment of the court process which is that somehow the threat of terrorism, and al Qaeda in particular, presents a new and unique paradigm that requires something outside the rules as we know them. I do not think it does. Certainly al Qaeda does not present militarily a challenge any worse or more threatening than, let's say, the Nazis or the Japanese Empire in World War II. Certainly as a military issue, it cannot be considered even close to that kind of threat. As a question of policy or a question of global control, I don't think it is comparable to the threat that was perceived from the Soviet Union. And with respect to civilian casualties, a critical element of our entry into World War I was the sinking of the Lusitania. And in the conflict

with Spain at the turn of the twentieth century, Americans saw searches of U.S. civilians by Spanish authorities as being degrading and demeaning treatment, some of which made it into newspapers.

So this time is not unique. It does not require an abandonment of rules. And I think it indicates, on the part of those who have made a decision essentially to forgo the courts and try to devise an entirely new system without any legitimate analogue, a concept based on two things. One is obviously a lack of historical perspective and a lack of recognition. The other is a panicked bureaucratic reflex. Neither is particularly sanguine for us going forward. The irony is that, in abandoning the context of the pre-9/11 approach to terrorism, they are essentially saying that because the criminal justice system did not work, we are now going to move to another methodology.

Actually, the irony is that the pre-9/11 context, among the various approaches to terrorism, was the only one that was comprehensive and successful in using the criminal justice system. I think the military and diplomatic approach prior to 9/11 was a complete failure for many reasons: a lack of will; a lack of recognition; a lack of industriousness on the issue; and a short-term political view rather than a long-term security view. The fact that we have added military and diplomatic measures with some teeth to them does not mean that we should abandon the thing that was actually successful. Looking at the pre-9/11 criminal justice system approach to terrorism, it was, in fact, successful. It incapacitated a significant number of people in terms of jail and conviction, regardless of whether those convictions were valid and will stand up on appeal. But there was also tremendously reliable

“ In looking for a scapegoat for 9/11 failures, the bureaucratic reflex was to cast blame somewhere and say that the criminal justice system does not work because it is either inefficient or has problems with secrecy.” *Joshua Dratel*



and valuable intelligence that was gleaned from those cases that did not offend the conscience of the nation as do certain methodologies that are being employed now.

In this context, I think it is unfortunate that in looking for a scapegoat for 9/11 failures, the bureaucratic reflex was to cast blame somewhere and say that the criminal justice system does not work because it is either inefficient or has problems with secrecy. Yet there's not really a single case of a classified piece of information leaking from any of these cases. In the embassy bombings case, we litigated an extraordinary and probably unprecedented amount of classified hearings with CIPA [Classified Information Protection Act]. I think the only case that will probably eclipse it by the time it is done is that of Moussaoui, if it ever goes to trial. But the point is that there was not a single case of leaking. I think the U.S. Attorney's office in that case was really the gold standard in terms of leaking.

Another problem with abandoning the criminal justice system for other systems that do not have the same levels of due process and fairness is that the lack of transparency hurts the United States in making its case against terrorism. One of the most demonstrable pieces of evidence of the existence, the intentions, and the conduct of al Qaeda was the embassy bombings trial and the testimony and public information that came from that trial. Without that information, you would not have had the ability to make a global case for al Qaeda's responsibility for 9/11. Without that kind of transparency, without the public trials that are necessary to build confidence, you lose not only the context of the results that have occurred but the confidence that they are the right results and that you are prosecuting the right people. I do not think that you would have this confidence without such a public trial. We are losing that opportunity now, and we see it globally in the lack of confidence across the board in

the United States' decision-making, regardless of whether that decision-making is right or wrong.

## Post 9/11 Tools for Fighting Terrorism

[Editor's note: In an excised portion of this transcript, a participant describes the following hypothetical: the U.S. Attorney General receives reliable information from a foreign government that a suspect has plans to launch a biological attack in the U.S. However, the foreign government says that they obtained this information from their intelligence service, and they do not want it used in any court proceeding because that would destroy the intelligence operation in their country. In this case, what can the Attorney General do?]

### Stephen Schulhofer

In this hypothetical, there is probable cause to make an arrest. There is no doubt about that. You don't have to

## Fall 2005 Law & Security Colloquium



**Owen Bonheimer**, *Co-wrote Amicus brief filed in 2004 in the Hamdan case*

**Joshua Dratel**, *Defense Attorney for Guantánamo Detainee, David Hicks*

**Donna Newman**, *Defense Attorney for Jose Padilla*

### Seminar topic: Hamdi, Padilla, Hamdan and the Matter of Detainees

"The Iraqi tribunal that is trying Hussein and the commission in Guantánamo are the direct result of the president's commander-in-chief power and his exercise of his authorization to use force. The process through which these trials are conducted will really affect the rule of law everywhere." — Owen Bonheimer



“...in actual practice, it has turned out that CIPA has provided a mechanism for preserving a completely vigorous adversary system without threatening the government's legitimate interest in protecting confidential national security information.” *Stephen Schulhofer*

disclose the source. What happens after that is another issue. CIPA might provide a mechanism. Another alternative could be preventive detention, which also is possible on the basis of hearsay evidence, but subject to control in an Article III court. This takes us many steps down the road before we have to worry about turning loose a completely dangerous person. There is massive Supreme Court case law granting the police huge discretion to use reliable tips from unidentified informants as a basis for arrest.

I want to discuss claims regarding Section 215 of the Patriot Act and the material witness statute. Section 215 is captioned for certain business records. But that caption predates the Patriot Act. What the Patriot Act did was to change the content of the section which referred to certain business records, and to change that language so that it now referred to any tangible thing. It is the Justice Department's position that Section 215 of the Patriot Act is no longer limited to certain business records. The Justice Department says, for example, that it can include even the key held by a landlord to a tenant's apartment. It includes not only library books – which is something that has produced an uproar in middle America – but it also includes the membership lists of political organizations. It includes the membership lists of synagogues, churches and mosques. It

includes the lists of contributors to every charity in which the government might be interested, including many that are very much affected by this because they are engaged in human rights work and relief work overseas; the World Church Council, for example. So it touches on things quite a bit more sensitive than business records.

Some people say the allegations that people are held incommunicado with no opportunity to contact their counsel and that they are held in that situation for years is simply not the case. Well, it's simply not the case that it's simply not the case because Padilla has been held incommunicado since June 9, 2002. I think the issue we want to focus on is whether the courts should be the focus for trying people accused of terrorist offenses. Those of us who believe, as I do, that these cases should be kept in the courts certainly do not suggest that

the courts can solve every problem. I don't know anybody who suggests that we did not need to attack the Taliban in Afghanistan. None of us are saying that the courts are a substitute for military action overseas. The question is whether the courts can handle cases and whether the Article III courts can handle cases that require some kind of adjudication and some kind of punishment for an individual who has been captured.

There are dilemmas, and although some hypotheticals perhaps have answers, I am sure there are hypotheticals that are hard to answer and that pose real dilemmas. But, in actual practice, it has turned out that CIPA has provided a mechanism for preserving a completely vigorous adversary system without threatening the government's legitimate interest in protecting confidential national security information. And even where it has perhaps posed a

## *Graham-Levin Amendment*

On November 15, 2005, in a 84-14 vote, the Senate passed an amendment sponsored by Senators Lindsey Graham (R-SC) and Carl Levin (D-MI) that potentially bars foreign terror suspects from challenging their detentions in American courts. Under the provision, Guantánamo Bay detainees would be allowed to appeal their “enemy combatant” status one time to the Court of Appeals for the District of Columbia Circuit in Washington, but they would not be able to file writs of habeas corpus, which is a writ used to challenge unlawful detentions that may be filed in any federal court.

There is currently a dispute in the courts and the Amendment's sponsors over whether it applies to habeas corpus petitions already filed or only new petitions.

dilemma, a hard one, like in the Moussaoui case, at least we can be confident that the effort to solve that dilemma is being handled by the individuals in whom we have, in our governmental structure, the most confidence. That is not officers trained to fight wars, but judges. They may not make perfect decisions every time, but it is the best mechanism we have. So I think there has been no case made for abandoning this system that demands confidence and the throwing of cases into a new and untried system staffed by people who lack all the characteristics and features that give justice legitimacy.

#### ***Richard Pildes***

Let me ask one follow-up question before we turn to military tribunals and Neal Katyal. It seems to me that the hardest problem in a lot of these criminal court cases is the question of producing witnesses that the government may currently hold overseas, some of

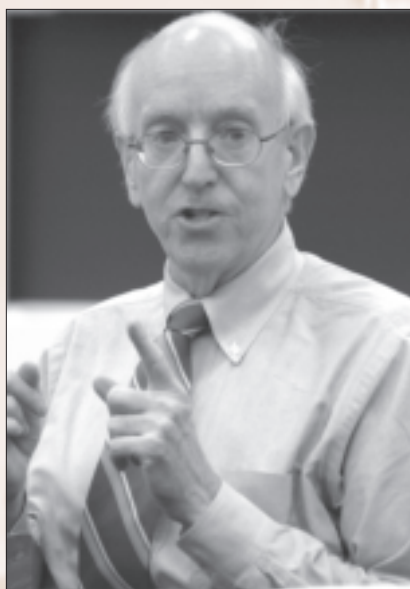
whom may be the highest level al Qaeda people who have been captured. In the background of these cases, whether it is the Moussaoui case, which has been tied up over this issue, or the Padilla case, one of the hardest problems is the question of whether the government should have to produce witnesses whom the defendants want to bring forward and whom they say will have exculpatory evidence. The government says they have very profound reasons for not producing these witnesses. Maybe they are legitimate reasons or maybe they are not legitimate reasons. The most common justification is that we want to be able to continue the process of interrogating some of these high level al Qaeda people without the interrogation process being interrupted in a way that will compromise it. It seems to me that one of the big questions that has to be confronted here is about whether the ordinary criminal courts can be used.

So what would your answer be to the question, not just about whether we are going to have a good dialogue about this in the federal courts, but whether criminal prosecution should be able to go forward in the absence of producing those witnesses? Do you think those witnesses have to be produced to have a legitimate criminal trial? Is there some substitute for their testimony that you would find acceptable and still allow this to stay in the Article III court system?

#### ***Stephen Schulhofer***

That question puts the spotlight on CIPA and on the details of how CIPA functions. The hypothetical that you are posing is very much like the dilemma that has in fact arisen in the Moussaoui case. Moussaoui wants to call as a witness at his trial Khalid Sheikh Mohamed and several other al Qaeda operatives. Normally, absent some particularly sensitive situation like this, a

## *Fall 2005 Law & Security Colloquium*



### **Judge Richard Posner**

*Senior Lecturer in Law, University of Chicago*

#### **Seminar topic: Intelligence Reform**

"As the intelligence system became more complicated and more agencies were established, it was no longer feasible to have the head of the Central Intelligence Agency also try to coordinate the activities of all the other fifteen or so agencies. So the challenge of intelligence coordination remains."

criminal trial could not go forward without that. The defendant has a constitutional right to compulsory process, to produce witnesses in his favor. The purpose of CIPA is to try to deal with situations like this. CIPA, in fact, was not really designed to deal with a situation of this type; it was designed to deal with other situations which are analogous in the sense that there would be a constitutional right to produce evidence that is, in fact, classified or too sensitive.

The hypothetical that you are describing is something that probably was not anticipated under CIPA. What the courts have done is to model solutions analogous to the ones that CIPA lays out. To try to give a short answer to what the court gave a thirty or forty page answer for, the trial judge said that the solution is that you cannot bring them into court but you can take their depositions by videotape and have a delay mechanism so that if something is said that should not be heard it can be bleeped out. The same thing was done during the trial of Admiral Poindexter with the testimony of President Reagan.

## **Presidential Powers and Military Commissions**

### ***Neal Katyal***

I am inclined to defer to the president on certain things. If the president thinks al Qaeda is a serious threat, so be it. What I am not inclined to do is to use that deference to bootstrap wholesale the U.S. Constitution and the Declaration of Independence in the process. What you have with military commissions is a complete bypassing of traditional constitutional procedures, with courts established by the U.S. Congress. Those courts are either Article III courts, or courts-martial, which are

“ The president is acting as prosecutor, as defense attorney, as jury, as judge, as sentencer, and as appeals court. This is not just a question of some minor technical tinkering with Sixth Amendment rights to justify a new system. This is a wholesale revolution in the way we do things.” *Neal Katyal*

the other alternatives that nobody has discussed here. Congress has explicitly said that courts-martial can try violations of the laws of war. So there exists this whole other alternative, yet the administration has moved to resurrect a system from the 1940s. The system did not work well then, and after that it was made even worse with procedures that were more problematic than those of the 1940s.

It seems to me that the move to military commissions is emblematic of a larger problem, with a larger revolution in constitutional law. You can call it the unrooted presidency, or the elevation of the president so that he is beyond Congress, beyond treaties, and beyond standard principles that have guided the way we have done things since the founding. The pinnacle of this is, of course, the “torture memo,” which said that the president is above all of these traditional constraints on law.

I am not one of these people who believes, for example, that the president should be largely fettered in his power to detain enemy combatants. I actually think that the solution to hypotheticals

putting national security against power, is that the president does have a broad, robust military detention power. But that power cannot justify what the administration is now doing or not doing. It is not looking prospectively, but rather retrospectively, to say that we are going to set up an entirely new system to assess guilt and innocence, a system that is done not by Congress but by the administration wholesale. The president and these military commissions at Guantánamo are, after all, criminal trials where death is on the line as is life imprisonment and where the president is acting as the architect of the tribunals, the person who defines what is triable in a military commission. Some bureaucrat at the Pentagon wrote a twenty-one page list of offenses as to what should be tried. The president is acting as prosecutor, as defense attorney, as jury, as judge, as sentencer, and as appeals court. This is not just a question of some minor technical tinkering with Sixth Amendment rights to justify a new system. This is a wholesale revolution in the way we do things.



I believe in a unitary executive. I believe in a strong president. But I actually think that people who believe in a strong presidency should abhor what is going on at Guantánamo. Because if it is allowed to persist in the way it is, the presidential power, the idea of a unitary presidency, is going to collapse of its own weight. The claim is not what you hear here, which is that the U.S. Constitution and CIPA constrain us, but that the government is saying that they get to bypass all of that. And they do not just bypass it with Congress' blessing, but, rather, the president's mere say-so that this threat is enough to justify what is going on at Guantánamo.

If the threat is as severe as these gentlemen make it out to be and as the president does too, then it should be really quite easy to do what they did with the Patriot Act and to go get approval from Congress for these dramatic departures from standard criminal procedural arrangements. The commissions going on at Guantánamo Bay guarantee no one the right to be present. They can be excluded by the request of the prosecutor. To my knowledge, this is the first time in American history in which a criminal trial has been closed to a defendant.

A couple of other things I find particularly problematic about military commissions is that, in instances where there was an authorization by Congress in one form or another, military commissions were always applied symmetrically both to citizens and to aliens. President Bush's November 13th order excludes U.S. citizens from its reach. This is the first time since the Civil War, to my knowledge, in which the government has so dramatically distinguished between citizens and aliens on a matter as fundamental as justice and what tri-

bunal one will face. We have seen discrimination in terms of who can get some plum federal job or welfare benefits or the like, but there is a reason why our federal government has not made these distinctions in this way since the Civil War.

The writers of the Equal Protection Clause, unlike when they guaranteed privileges and immunities to all citizens, guaranteed equal protection to all persons. They used the phrase "all persons" for a very simple reason: they wanted to overrule the 1857 decision in *Dredd Scott* which said the Constitution only applies to and only guarantees citizens' rights. The writers wanted to ensure that rights are given to all. The November 13th military order, for the first time in any military commission with which we are historically familiar, excludes citizens. It says if you are a U.S. citizen, then you get the Cadillac version of justice—Article III courts—and all of its nice procedural protections. If you are an alien, you get this other rough, inferior system of justice.

One last point to make about the military commissions is that they are trampling on international law. I have to believe that the Justice Department resurrected these commissions using the World War II format without somehow realizing that the Geneva Conventions of 1949, enacted in the interim, dramatically changed the way in which the government can do things. One thing that changed is that you now have to give people Article V hearings if there is doubt about whether or not they are a prisoner of war. Until you grant these hearings, you are bound by Article 102 of the Geneva Conventions, which says you must treat these people the way you would an ordinary serviceman in a court-martial proceeding.

And so the bypassing of treaties and

of statutes of the Constitution is so far from the realm of minor article issues, like Sixth Amendment confrontation rights, and the nice hypotheticals with which we have been dealing. It very well may be that we might need to have departures, but first I would want to see that the court-martial system is incapable of addressing the problem. Secondly, I would like to at least see Congress authorize those departures rather than merely relying on the executive say-so.

### ***Richard Pildes***

These military commissions have been used in the past to deal with what are called enemy combatants or unlawful combatants. My impression is that, in some respects at least, there is a lot more procedural protection in the current version of these commissions than has existed in the past when they have been used. So you point out at least one thing that you think is very disturbing about the structure, the lack of the right to be present for substantial periods of time. What are the other big defects that you see? Is it wrong that there is much more procedural protection in these commissions than has been the case historically?

### ***Neal Katyal***

There are literally no procedural protections in the commissions. Yes, there is an order that the Secretary of Defense wrote that said you have the right to be present unless the prosecution says otherwise. But the very last lines of that order suggest that it confers no rights that are enforceable in any court or military commission proceeding, and that it can be changed at any time.

Of course, the historical benchmark for military commissions has been the

rules for courts-martial. Every military treatise that you look at for military commissions says that the procedures for military commissions are the rules for courts-martial. What the administration has tried to do is to write a new set of rules because they think that the court-martial rules are not fair enough to the prosecution.

There are other fundamental problems as well. For example, the defendant's right to be present at trial. The government last week in the Hamdan argument claimed that this is the first war in which intelligence has been so important that there is a need to keep defendants from the courtroom simply because of the value of this national security information. The *Ex Parte Quirin* case took place in the midst of World War II. There is no information more valuable than how we captured the eight defendants in that case because President Franklin D. Roosevelt had created a whole myth that it was the FBI's bravado and our monitoring of the beaches that led to the capture of the eight Nazi saboteurs on the beach. In truth, it was the fact that one of them had misgivings and defected. For that reason, in World War II the commission proceedings were closed to the public entirely. Everything was classified, but the defendants stood in that proceeding day-in and day-out, everyday.

It is spectacularly implausible that there would have been some greater

## McCain Amendment

Senator John McCain (R-AZ) has sponsored an Anti-Torture Amendment to the Department of Defense Appropriations Act of 2006. The Anti-Torture Amendment contains two separate provisions. The first provision describes standards for the interrogation of people detained by the U.S. Department of Defense. These guidelines "expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation."

The second provision creates a general prohibition on cruel, inhuman, or degrading treatment of any person in the custody or under the control of the U.S. Government. The language extends protections to all individuals held by any agency of the U.S. Government, not just the Department of Defense. It also defines cruel, unusual, and inhuman treatment or punishment as that which is prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

The Anti-Torture Amendment was passed in the Defense Appropriations Bill. President Bush signed this bill on December 30, 2005, he wrote the following: "The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks." The effect of the signing statement on the implementation of the McCain Amendment is still unknown.

national security threat in the trial of bin Laden's alleged driver than in the Nazi saboteur trial. We had an amicus brief in our case by another professor at NYU, Noah Feldman, who helped write the rules for the Iraqi tribunals which the Defense Department oversaw. Lo-and-behold, these tribunals

guaranteed Saddam Hussein and all of his accomplices the right to be present at trial. Again, the idea that national security information is not going to come out there but will come out in the trial of these really minor players detained at Guantánamo Bay is just ludicrous.



For more information about U.S. courts and the war on terror, read the *NYU Review of Law and Security*, Issue no. 4, April 1, 2005, "Torture, the Courts and the War on Terror." Visit our Web site at [www.law.nyu.edu/centers/lawsecurity/publications](http://www.law.nyu.edu/centers/lawsecurity/publications)

# Terrorist Trial Updates

The following are notable cases in the U.S. government's war on terror. These trial updates are current as of April 1, 2006. For continuing updates on these and other cases, please visit our Web site at [www.law.nyu.edu/centers/lawsecurity/trials](http://www.law.nyu.edu/centers/lawsecurity/trials).

## Ahmed Omar Abu Ali

Ahmed Omar Abu Ali, born in Houston and a resident of Northern Virginia, was charged with conspiracy to assassinate the president, providing material support to al Qaeda, conspiracy to commit aircraft piracy, and other associated crimes.

In a 113-page decision, U.S. District Judge Gerald Bruce Lee ruled on October 24, 2005 that prosecutors can use a confession by the defendant. The ruling was a result of a six-day hearing in which the defendant testified that he was tortured by the Mubahith (Saudi security forces) while detained in Saudi Arabia in June of 2003. The deposition of Saudi security agents refuted that claim, suggesting instead that Abu Ali confessed voluntarily after being confronted with evidence obtained from other cellmates.

In the confession, Abu Ali suggested that he joined al Qaeda out of his hatred for the United States' support for Israel. The jury was allowed to hear the defendant's claim of torture, but testimony from a Briton and a Canadian man who also claimed to have been tortured by Saudi authorities was excluded. In November 2005, Abu Ali was found guilty of all nine counts.

## Jose Padilla

On September 9, 2005, a three-judge panel of the U.S. Circuit Court of Appeals for the Fourth Circuit ruled that President Bush does indeed have

the authority to detain Jose Padilla, a former gang member and U.S. citizen who was arrested in Chicago in 2002 and was designated an enemy combatant by President Bush one month later.

The government contends that Padilla trained at al Qaeda camps and was planning to detonate a radioactive dirty bomb to blow up apartment buildings in the United States. Padilla has been held without trial in a U.S. naval brig for more than three years. The unanimous opinion, written by Judge J. Michael Luttig, cited the joint resolution by Congress authorizing military action following the September 11, 2001, attacks in New York, as well as the June 2004 ruling concerning Yaser Hamdi.

The ruling limits the president's power to detain Padilla to the duration of hostilities against al Qaeda, but the Bush administration has said that the war could go on indefinitely. Padilla's lawyers have appealed to the Supreme Court. On December 28, 2005, the government asked the Fourth Circuit to authorize Padilla's transfer to federal prison, out of military custody. The Fourth Circuit, in an almost unheard of move, denied the request, arguing that it appeared the government was seeking to evade Supreme Court review of its September 9, 2005 opinion. The Supreme Court ordered Padilla's transfer. In January 2006, he pled not guilty to an eleven count indictment charging him with providing material support to terrorists.



## Salim Hamdan

The Supreme Court decided to hear *Hamdan v. Rumsfeld*, a case challenging the government's use of military tribunals to try foreigners suspected of war crimes.

Salim Hamdan, a Yemeni man said to be Osama bin Laden's former driver, is being held

at the U.S. detention camp in Guantánamo Bay, Cuba. His lawyers argue that military trials due to be held there are unconstitutional as they deny defendants their basic legal rights and are in breach of the U.S. Constitution. Chief Justice Roberts has said in U.S. Senate testimony that he would recuse himself if the Hamdan case is heard by the Supreme Court due to his involvement in the case at the U.S. Court of Appeals for the DC Circuit. After the passage of the "Graham-Levin" amendment, which limited the ability of federal courts to review habeas corpus petitions of Guantánamo detainees, the government asked the Supreme Court to dismiss Hamdan's case.

Hamdan's case was heard by the Supreme Court on Tuesday, March 28th. A ruling will probably be handed down this summer.





### David Hicks

David Hicks, an Australian held in Guantánamo, was scheduled to be tried by a military tribunal at the end of last year. All military tribunals at

Guantánamo were held, however, pending the Supreme Court review of the tribunal system in the Hamden case. In addition, Hicks has been trying to get relief from the British government.

Recently, Hicks's attorneys have been attempting to obtain British citizenship for their client. The British High Court found that he has a right to British citizenship, but the British Home Secretary has appealed the ruling. Britain has refused to allow its citizens to be tried by U.S. military commission and the British Attorney General, Lord Goldsmith, has publicly criticized the military tribunals.



### Ali Saleh Kahlah al-Marri

Three months after 9/11, Ali al-Marri was arrested in Peoria, Illinois on charges of credit card fraud and making

false statements to the FBI. In June 2003, on the eve of a hearing to suppress crucial evidence against him that his lawyers argued had been illegally obtained, al-Marri's charges were dropped and he was moved to the Charleston Naval Consolidated Brig (CNCB) in South Carolina after being declared an enemy combatant by President Bush.

Government officials claim al-Marri was a sleeper cell operative who had communications with high-ranking members of al Qaeda and worked to settle foreign terrorists in the United States. The Defense Department has denied in court papers filed that al-Marri was "subjected to any inhumane, degrading or dangerous conditions" while detained at the CNCB. The plaintiff, however, alleges that the staff at the CNCB purposefully kept his cell excessively cold, psychologically brutalized him in interrogations, limited sanitation in his cell, denied him basic medical care and put him in solitary confinement with little to no recreational time.

### Sami al-Arian



A former University of South Florida professor, Sami al-Arian and co-defendants Sameeh Hammoudeh, Hatem Fariz and Ghassan Ballut are

accused of using Islamic charities as fronts in a conspiracy to finance terrorist attacks by Palestinian Islamic Jihad (PIJ) in Israel and the occupied territories. The men deny they supported violence and say they are being persecuted for views that are unpopular in the United States.

After the prosecution rested, U.S. District Judge James Moody denied motions to find al-Arian and Hammoudeh not guilty of the conspiracy charges. Defense lawyers for al-Arian and Ballut rested their cases without calling any witnesses. Counsel for Hammoudeh and Fariz presented their witnesses and rested their cases shortly thereafter. In December 2005, al-Arian's

jury acquitted him of most charges, but deadlocked on nine charges. It is unclear at this time whether he will be retried on the deadlocked charges.

## Statistics of Note

### Guantánamo Bay Statistics as of March 16, 2006:

- 490 Total Detainees\*
- At least 100 are from Saudi Arabia
- 80 are from Yemen
- 65 are from Pakistan
- 50 are from Afghanistan
- 2 are from Syria
- 358 have had Administrative Review Board hearings
- 187 former Guantánamo prisoners have been released
- 87 have been transferred to other countries.
- 37% of those hearings resulted in decisions to continue to detain the prisoner
- 20% of those hearings resulted in decisions to transfer the prisoner
- 40% of those hearings have no decision
- 3% of those hearings resulted in decision to release the prisoner
- At least one of the prisoners found innocent remains in detention because the United States cannot find a country willing to accept him. \*\*

Sources:

*Wall Street Journal*

\*U.S. Military Detainee Affairs Website

\*\**Washington Post*



# From the Student's Corner

## Material Support Statutes and the Role of Congress

*By Andrew Peterson*

*(1) the term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, except medicine or religious materials;—18 U.S.C. § 2339A*

There has been a lot of criticism lately about the Department of Justice's use of the material support statutes, 18

U.S.C. § 2339A and 18 U.S.C. § 2339B, which criminalize the provision of "material support" to terrorists or foreign terrorist organizations. The broad and increasing use of these statutes, in cases which are obviously terror-related and many which are not, has been criticized as an affront to constitutional rights, an attack on civil liberties, and a massive expansion of executive power in the name of security. These claims may or may not be warranted, but the purpose of this essay is not to restate or refute them; it is to direct them toward their proper target. Credit or blame for the use of the material support statutes

lies not with the Department of Justice, but with Congress.

The crime of providing "material support" is unique to the context of terrorism. To practitioners of federal criminal law (or those who regularly watch "Law and Order"), the familiar term used to describe prohibited assistance to criminals is "aiding and abetting." To "aid and abet" a crime, there must be a connection between the assistance provided and the crime that occurred. The defendant must also have the criminal intent necessary to commit the crime. For terrorists, however, that approach was deemed insufficient. Congress wanted to reach

## Reports of Note

### Blurring the Lines: A Profile of State and Local Police Enforcement of Immigration Law Using the NCIC Database, 2002-2004

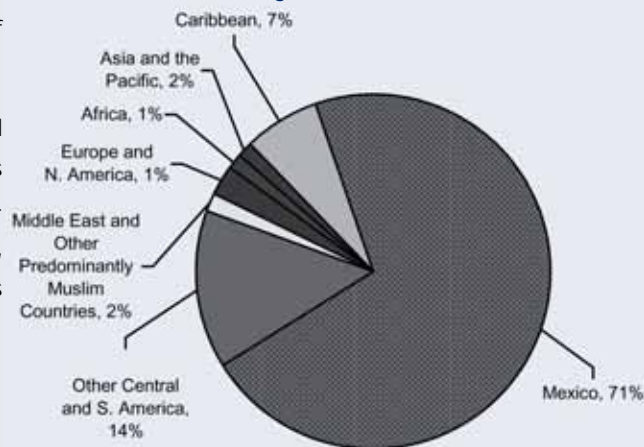
By Hannah Gladstein, Annie Lai, Jennifer Wagner, and Michael Wishnie

The findings contained in this report confirm that the immigration records in the National Crime Information Center (NCIC) are not effective for widespread use. Not only do these inaccurate records clutter the database, they also appear to divert officer time and attention from local public safety priorities. The increasing frequency of local police recording NCIC immigration hits almost certainly results in more police detentions and arrests for civil immigration violations, consuming increasing amounts of police resources over time. Wrongful detentions and the high rate of absconder arrests seem likely to undermine community trust in local police forces. Additionally, demographic information of immigrants identified by NCIC indicates that the NCIC immigration files are not being used to further a targeted anti-terrorism agenda, the principal justification offered for the Department of Justice's policy. Rather, the use of these records has mostly resulted in indiscriminate arrests of Mexican and other Latin American nationals.

While immigration enforcement currently constitutes a modest portion of state and local law enforcement NCIC activity, the number of immigration identifications is rapidly growing. This information indicates that now, while police engage in immigration enforcement but only modestly, is a critical time to reevaluate the nature, purpose, and on-the-ground effects of making enforcement of immigration laws the responsibility of state and local law enforcement.

*This report was written by Washington Square Legal Services, Inc. at New York University School of Law for the Migration Policy Institute. For a full copy of the report, go to [www.migrationpolicy.org](http://www.migrationpolicy.org)*

**Region/Country of Origin of Confirmed NCIC Immigration Violations**



persons not directly involved with terrorist acts, such as those who raised funds or who were members of terrorist groups.

Congress first used the phrase “material support” in the 1990 Immigration Act, and it was the product of extensive debates over just how much interaction with terrorists or terrorist organizations should be acceptable. The Immigration Act rewrote the grounds upon which the government could exclude or deport immigrants. An early version of the bill stated that those who had “organiz[ed], abet[ed], or participat[ed] in terrorist activity” should be excluded. This language, criticized by opponents for not reaching members of groups like the Irish Republican Army or the Palestinian Liberation Organization, was defended by its drafter, Representative Barney Frank, as much broader than the traditional “connection” approach associated with criminal “aiding and abetting.”

[W]e did not want to have a narrow thing where you had to prove that they were going to do this – we do not have the criminal standard here, we have much more flexibility in keeping people out – we picked up some legal definitions of terrorism, including organizing, abetting, or participating...It was clearly our intention...to cover fund raisers as people who abet. I would say that if you raise money to buy the sustenance – whether it is guns or food – for people who are engaged in terrorist activity, you are abetting...that is both prospective and retroactive...I would think that, for most members of the IRA, you would be able to show that they had abetted terrorists in the past by their membership and activity.<sup>1</sup>

The “abetting” language was rejected, and, in its place, the committee used “material support.”

At first, “material support” was proba-

bly intended to require some sort of connection between the aid given and the terrorist act, but less of a connection than the criminal standard. That Congress chose a broader standard than “aiding and abetting” for the terrorist immigration exclusion is understandable. There is no need for criminal levels of proof, as no criminal punishment results from an immigration action. In addition, in the area of exclusion actions, there are hundreds of thousands of immigrants seeking entry to the United States each year, and Congress cannot be faulted for choosing only to admit those who are not suspected of any terrorist involvement whatsoever. Problems arose, however, when Congress chose to import this category of prohibited acts from the immigration context to the criminal context.

After the World Trade Center bombings in 1993, Congress imported the material support standard from the Immigration Act into the criminal code. Although it excluded humanitarian and religious assistance, for a criminal prohibition the language was incredibly broad. It has not narrowed. Instead, Congress has responded to domestic terrorist attacks by repeatedly broadening the definition of what constitutes criminal material support of terrorism. The humanitarian assistance exclusion now includes only “medicine,” and the list of prohibited support includes every type of property or service.

The Department of Justice has also encountered problems with the breadth of the statute. Courts have responded to the massive breadth of the material support statutes by striking down some parts of the definition as unconstitutionally vague.<sup>2</sup> In response, Congress passed new, slightly more precise definitions of its already broad terms. Now,

instead of explaining how any type of “support” becomes “material” (thus providing a working operational definition of this relatively new statutory term), Congress has simply provided a list of the prohibited items that may never be given to any terrorist or designated terrorist organization. There is still no strong explanation for exactly what the difference is between “material support” and “aiding and abetting,” and “material support” lacks a common law history to flesh out any potential limits. The list approach makes the statute incredibly broad, and also prevents courts from limiting its scope.<sup>3</sup>

It should come as no surprise, then, that the Department of Justice is able to charge large numbers of people with material support of terrorism or terrorist organizations. The statute is drawn so broadly that if the government can draw a line from a terrorist’s property to any individual, that individual can be charged with support for terrorism. Although this is obviously a powerful tool in the prosecutor’s toolbox, the uncertainty surrounding the statute makes it prone to over-extension. Both civil libertarians and the Department of Justice would benefit from a more clearly defined statute. Until Congress provides a useful measure to determine when support is “material,” challenges of these statutes will continue.

<sup>1</sup> *Exclusion and Deportation of Aliens: Hearing on H.R. 1119 Before the House Comm. on the Judiciary*, 100th Cong. 191 (1987) (statement of Rep. Barney Frank, Member, House Comm. on the Judiciary).

<sup>2</sup> See, e.g., *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000).

<sup>3</sup> *United States v. Singh-Kaur*, 385 F.3d 293 (3rd Cir. 2004) (holding that provision of food to militants is “material support” under the terms of the statute regardless of the connection to actual terrorist violence).





# CLS Intern Reports

## Interpol



### Gina Magel

Interpol is the world's largest international police organization, with 184 member countries. It was established in 1923 to

enhance and promote cross-border police cooperation. Interpol's stated mission is "To be the world's pre-eminent police organization in support of all organizations, authorities and services whose mission is preventing, detecting, and suppressing crime."

While at Interpol, I worked in the Office of Legal Affairs (OLA). I was assigned to the Article 3 Task Force, whose job it was to verify that Red Notices (international arrest warrants) issued by countries did not violate Article III of Interpol's Constitution. His article states that "It is strictly forbidden for the Organization to undertake any intervention of activities of a political, military, religious or racial character." Therefore any Red Notices that presented a political, military, religious or racial question had to be reviewed by OLA to ensure that Interpol was not interfering in areas that were outside its constitutional authority.

I was also tasked to draft legal memoranda regarding the application of a dependent territory to become a member country of Interpol. This presented interesting legal questions as to Interpol's membership procedures and requirements for territories that were

classified as "dependent." The project involved analysis of Article IV of Interpol's Constitution, which outlines membership requirements, and its application to dependent territories. I was called on to make recommendations regarding what the essential characteristics of membership status should be when dealing with dependent territories. These questions required the review of past precedent of other dependent territories that currently have membership status in Interpol, namely Aruba and the Netherlands, Antilles as well as analyzing the political situation involved in granting member status to this particular dependent territory.

### Sheridan England



Having established a strong trust with Interpol, the Center on Law and Security was able to secure a year-long post-

doctoral fellowship for NYU Law Students. I was fortunate to be awarded the first for the 2004-2005 year.

My practice began as an Article III specialist. Recognizing the sensitivity of coordinating police efforts with 184 Member Countries, each with differing legal systems, Interpol created Article III to allow the Organization to be flexible enough to facilitate police cooperation without infringing on international human rights. Article III, in sum, pro-

hibits the Organization from engaging in activities of political, racial, religious, or military natures.

Article III cases come to the Office of Legal Affairs via two principle means. First, Interpol specialists will review confidential police information in determining whether the underlying circumstances of the case indicate there may be an Article III issue. If a member country requests information regarding a suspect, a suspect may petition Interpol directly to challenge that request. My role in Article III work was to review the cases, and outline opinions based on Interpol legal texts, national, and international law.

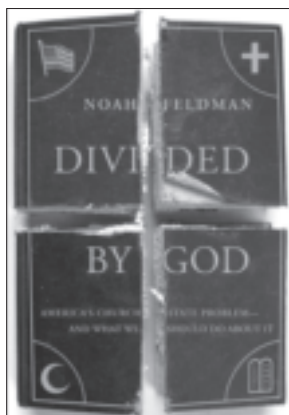
Later in the fellowship, I was tasked by Secretary General Ron Noble to attend each of the Interpol Regional Conferences. In Cyprus, Peru, and Ghana, I was principally tasked to draft, edit, and modify Interpol Regional Conference Recommendations, which are submitted to the General Assembly. This process was handled through an elected Ad Hoc Committee, which I chaired in Peru, and second seated in Cyprus and Ghana.

*Announcing our Current Fellow in Global Counterterrorism at Interpol:*

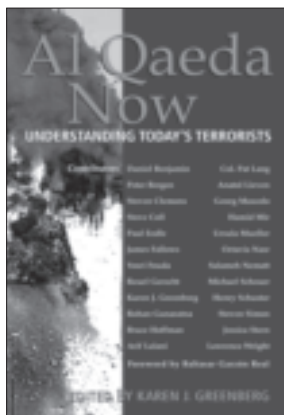
### Yaron Gottlieb

Yaron began his Post-Doctoral Fellowship in September 2005. He received his L.L.M. Degree at NYU School of Law in May 2004.

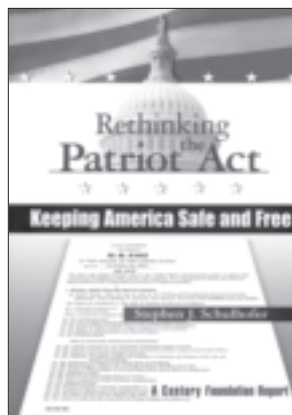
# Books of Note



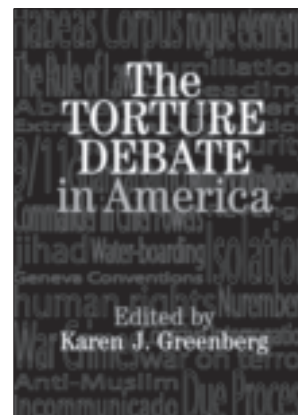
**DIVIDED BY GOD:**  
America's Church-State  
Problem--and What We  
Should Do About It  
*by Noah Feldman*



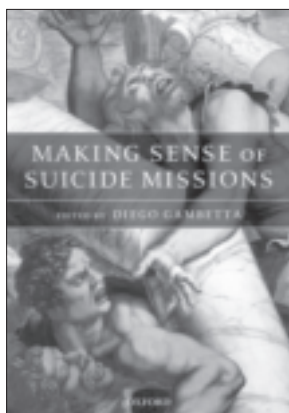
**AL QAEDA NOW:**  
Understanding  
Today's Terrorists  
*edited by*  
*Karen J. Greenberg*



**RETHINKING THE  
PATRIOT ACT:**  
Keeping America  
Safe and Free  
*by Stephen Schulhofer*



**THE TORTURE DEBATE  
in America**  
*edited by*  
*Karen J. Greenberg*



**MAKING SENSE OF  
SUICIDE MISSIONS**  
*edited by*  
*Diego Gambetta*  
*with an essay by*  
*Stephen Holmes,*  
*"Al-Qaeda,*  
*September 11, 2001"*

For more information about the Center on Law and Security's publications and to download past issues of *The NYU Review of Law and Security*, visit our Web site at [www.law.nyu.edu/centers/lawsecurity/publications](http://www.law.nyu.edu/centers/lawsecurity/publications).

## *Terrorism Blogs of Note*

### **Balkinization: [balkin.blogspot.com](http://balkin.blogspot.com)**

Both Jack Balkin and Marty Lederman, bloggers at this sight, frequently post comments about changes in government policy that relate to torture and detainees at Guantánamo Bay. Mr. Balkin is a professor at the Yale Law School and Mr. Lederman was an attorney-advisor in the Department of Justice's Office of Legal Counsel. Other contributors comment on terrorism policy as well.

### **The Volokh Conspiracy: [www.volokh.com](http://www.volokh.com)**

Orin Kerr, a professor of law at George Washington University, posts frequently on national security law issues and the war on terror.

### **SCOTUSBLOG: [www.scotusblog.com](http://www.scotusblog.com)**

Lyle Denniston, an independent legal reporter, posts frequent updates on the progress of legal cases related to the war on terror in the federal court system.

### **The Counterterrorism Blog: [counterterrorism.typepad.com](http://counterterrorism.typepad.com)**

Numerous experts on terrorism policy posts frequent updates on the conflicts in Afghanistan and Iraq, and the Global War on Terror. This blog focuses on policy, not law although some of the contributors have legal backgrounds as well.

# Upcoming Events at the Center

## Conferences

### Presidential Powers: An American Debate

Leading figures in law, history, journalism, and public policy will discuss fundamental questions facing Congress, the courts and the American People.

#### *Speakers include:*

John Dean, John Brademas, Viet Dinh, Noah Feldman, Barton Gellman, David Golove, Nat Hentoff, Stephen Holmes, Bob Kerrey, Marty Lederman, Anthony Lewis, Donna Newman, Patrick Philbin, Richard H. Pildes, Richard Posner, Dean Richard Revesz, Jeffrey Smith, Suzanne Spaulding, Jeffrey Toobin, Michael Vatis and Sean Wilentz

**April 25th 2006, 9:15 am – 5:15 pm**

Greenberg Lounge, Vanderbilt Hall  
40 Washington Square South, New York, NY

*Co-sponsored with The Henry Luce Foundation and the John Brademas Center for the Study of Congress at NYU's Robert F. Wagner Graduate School of Public Service*

### Prosecuting Terrorism: The Global Challenge

*At this year's annual spring conference, the following topics will be addressed:*

- New York, London, Madrid: Lessons Learned
- Al Qaeda and the Radicalization of Islam: Recruitment of Today's Terrorists
- Secrecy and Democracy in Europe and the United States: A Comparison
- Terrorism and Security: Cooperation and Coordination
- Black Sites and Europe as a Transfer Point for Renditions.

For more information on upcoming events at the Center on Law and Security, visit our Web site at [www.law.nyu.edu/centers/lawsecurity/events](http://www.law.nyu.edu/centers/lawsecurity/events).

## Fall 2006 Schedule

*Locations TBA*

### September 15

#### **Terrorism and the Laws of War**

Jeremy Waldron  
*Professor, Columbia University School of Law*

### September 29

#### **Combatants and the Commander in Chief**

Mary Ellen O'Connell  
*Professor, University of Notre Dame Law School*

### October 13

#### **Is al-Qaeda the Product of Saudi Arabia's Politics and Wahhabi Religious Ideology?**

Bernard Haykel  
*Assistant Professor of Islamic Studies  
New York University*

### October 27

#### **Detainee Abuse: The Role of Female Torturers and Interrogators**

Tara McKelvey  
*Senior Editor, The American Prospect*

### November 3

#### **Inside the Black Box: Social Processes within Terrorist Groups**

Dr. Ami Pedahzur  
*Professor of Government and Middle Eastern Studies, University of Texas*

### Date TBD

#### **How Bush Rules: Chronicles of a Radical Regime**

Sidney Blumenthal  
*Senior Fellow, Center on Law and Security at NYU School of Law*



**NYU Center on Law and Security**

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