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IMPROVING DETAINEE POLICY: HANDLING TERRORISM DETAINEES WITHIN THE AMERICAN JUSTICE SYSTEM

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WEDNESDAY, JUNE 4, 2008

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, Pursuant to notice, at 10:07 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Feingold, Cardin, Whitehouse, Kyl, and Sessions.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning, everyone. I appreciate this very good line-up here, and I have to be careful when I say "very good line-up" because I once had a job where, when we had line-ups, people were wearing numbers across their chests.

Senator Whitehouse, do you want to come up here? Please feel free.

For more than 6 years, this administration has made a mess of detainee policies. They rejected our courts. They twisted our laws. They certainly squandered our reputation. Interestingly, the most conservative Supreme Court in my lifetime has been the only check on the administration as it has repeatedly overruled the administration's legal theories.

Detainees have languished for years at Guantanamo, without access to meaningful judicial review. To date, not one accused terrorist has been tried, convicted, and punished by the dysfunctional military commissions that the administration has established; but prosecutors and judges are being replaced in ways that leave the impression that the proceedings are being engineered to guarantee a result rather than ensure fairness. Now we hear that the administration is intent on proceeding with high-profile trials, coincidentally, in the weeks leading up to the November election, such a serious matter turning trials into a partisan effort.

As we near the end of this administration, it is time to look forward. The next President and the next Congress will have to craft a new policy that is consistent with our values as a Nation and our respect for the law. A starting point is to examine the premise on which this administration based its policy, its conclusion that our criminal justice system is incapable of handling terrorism cases.

Obviously, I disagree. I think we have the greatest judicial system in the world, and we can handle any kind of case that comes before us.

So I am not one who wants to dismiss our systems of both civilian and military justice that have served us so well for so long. And one of the saddest legacies of this time and what the administration has done is its distrust of our constitutional system of justice. We cannot accept without examination the view that terrorism cases are too difficult for our courts. As a former prosecutor, I feel very strongly that we have to make sure terrorists are held accountable and punished for their actions. I suspect all Americans agree wt that. So today we begin the process of looking more carefully at what needs to be done with those suspected of being terrorists and what our courts—both military and civilian—are capable of doing.

One excellent contribution to this discussion is the report that Human Rights First released last week, titled "In Pursuit of Justice." The report is the result of an in-depth look at the capabilities of our criminal justice system. It concludes that our system here in America is sufficiently flexible and well equipped to handle international terrorism cases. We are fortunate to have one of the report's authors, James Benjamin, with us today.

We also welcome Judge John Coughenour. He is a respected judge who has significant experience with terrorism cases. He presided over the trial of the so-called Millennium Bomber, Ahmed Ressam. He speaks with authority on the capacity of our constitutional system to handle new challenges. The judge's written testimony includes a quote from Justice Jackson, a former Attorney General of the United States and our chief prosecutor at the Nuremberg trials after World War II, who said "the strength and vitality of the Constitution stem from the fact that its principles are adaptable to changing events." Judge, I agree with you on that. It is a critical point to remember in this discussion. Is handling terrorism under our current system really not possible? Or is it just hard? That means we have to adapt our procedures and that might require some work. I have the faith, which apparently some in the administration do not have, that our Constitution and our courts can adapt to meet the challenge.

Our Constitution and our courts have protected this great democracy from its inception, and most experts reject the decisions of the administration, including its effort to establish a system of detention, interrogation, and prosecution outside the law. Some propose instead to create "preventive detention" regimes and what they call "national security courts." Those making these proposals see them as more legitimate alternatives to the current extra-legal system. Their underlying assumption, though, is the same as this administration's—that our existing criminal and military justice systems are not capable of handling terrorism cases.

Before we start creating some new, separate mechanism designed to handle those accused of terrorism, we need to consider the serious impact this could have on our constitutional system of justice but also our reputation as a Nation, and on the fight against international terrorists. We have to ask the obvious question: Would it create more problems than it solves? Would the cur-

rent problems simply be replicated in a new, untested system? The current treatment of terrorism detainees has had a devastating impact on our national reputation. Anywhere you go in the world, you hear that. And that is something the next President, whoever that may be, will have to restore. Would creating a separate court for terrorist suspects help us set that right? We will listen to Tom Malinowski and others on that issue.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Now, our first witness, as I said, is Judge Coughenour. He is a United States District Judge for the Western District of Washington. He was nominated the Federal bench in 1981. He served as chief judge of the district from 1998 to 2004. In 2006, he assumed senior status. The workload did not cut down a bit, though, did it, Judge. Prior to joining the Federal bench, he served on the law faculty of the University of Washington, was a partner at the Seattle firm of Bogle & Gates. He served as Chair of the Ninth Circuit Working Groups on Jury Instructions and Gender Bias. He is past president of the Ninth Circuit District Judges Association.

Judge, please go ahead. I will just mention there is a little button in front of each of you. If the microphone is on, it will show red, and this young woman will have a much easier time keeping your record if you do that.

Go ahead, sir.

STATEMENT OF HON. JOHN C. COUGHENOUR, JUDGE, WESTERN DISTRICT OF WASHINGTON, SEATTLE, WASHINGTON

Judge COUGHENOUR. Thank you for this opportunity to testify about terrorism and the Federal courts. It goes without saying, I speak on my own behalf, not as a representative of the entire Federal judiciary, nor as a representative of the Judicial Conference U.S.

It is my firm conviction, informed by 27 years on the Federal bench, that the United States Courts, as constituted, are not only an adequate venue for trying suspected terrorists, but also a tremendous asset against terrorism. Indeed, I believe it would be a grave error with lasting consequences for Congress, even with the best of intentions, to create a parallel system of terrorism courts unmoored from the values that have served us so well for so long.

Before I explain how I arrive at this conclusion, I want to emphasize that I have great sympathy for those charged with the awesome responsibility of our national security. What I hope to convey in some small measure with my testimony today is that our leaders in the political branches need not view this as a choice between the existential threat of terrorism and the mere abstractions of a 200-year-old document. They need not mistake reliance on cherished values with complacency toward the new challenges of a dangerous world. Constitutional is not just a long walk in aid of regularity.

After spending the greater part of my career on the Federal bench, and having tried a high-profile international terrorism case in my courtroom, I think the choice is better understood as follows: Do we want our courts to be viewed as just another tool in the war on terror, or do we want them to stand as a bulwark against the

corrupt ideology upon which terrorism feeds? I believe our choice should be the latter.

Let me begin with the question of competence. Detractors of our current system argue that the Federal courts are ill-equipped for the unique challenges posed by terrorism trials. Objections of this kind frequently begin with a false premise. That is, some who argue that the Federal courts are not capable of trying suspected terrorists support this view by citing various procedural and evidentiary rules that constrain the prosecutor's ability to bring or prove a case. The threat of terrorism is too great, we are told, to risk an unsuccessful prosecution. This assumes that courts exist to advance the prerogatives of law enforcement, and that convictions are the yardstick by which a court's success is measured. Indeed, recently we have heard a government representative say, "Acquittals? We can't have any acquittals." Such a notion is inconsistent with our constitutional separation of powers, under which courts guarantee an independent process, not an outcome. Any tribunal purporting to do otherwise is not a court and does not deserve to be called a court.

This fallacy aside, the courts' detractors are also raising some more legitimate concerns about whether judges have sufficient expertise over the unique subject matter of terrorism trials, and whether the courts can adequately protect the government's interest in preserving classified documents for future intelligence-gathering purposes. These concerns are not insurmountable under the system we have in place. The argument about expertise ignores the fact that judges are generalists. Just as they decide cases ranging from employment discrimination to copyright to bank robbery, they are also capable of negotiating the complexities of a terrorism trial. As for the protection of classified information, courts are guided by the Classified Information Procedures Act, which played a prominent role during the trial of the so-called Millennium Bomber, Ahmed Ressam, in my courtroom in 2001. While I found the extensive precautions to be more than adequate in that case, I would submit that any shortcomings in the law can and should be addressed by further revision, rather than by undermining the institution of the judiciary itself. I would also add that courts are not insensitive to the compelling needs of the government in criminal cases and apply existing law and procedure with deference to those needs. As Justice Robert Jackson said in the quote the Senator referred to earlier, "the strength and vitality of the Constitution stem from the fact that its principles are adaptable to changing events."

In fact, there is good reason to think that the courts are not only competent, but also uniquely situated to conduct terrorism trials. Their insulation from the political branches, accumulated institutional knowledge, and fidelity to legal precedent ensure that no matter which way the prevailing political winds blow, critical decisions pitting the interests of community safety against individual liberty will be circumspect and legitimate. I worry that with specialized tribunals for suspected terrorists, governed by a separate set of rules and procedures, we would create institutions responsive to the perceived exigencies of the moment, upsetting the delicate system of balances and checks that deter abuse and promote faith in government. For example, if politically vulnerable actors start

redesigning courts, can we say with assurance that popular pressure will not someday demand the admission of hearsay evidence or statements obtained by harsh interrogation techniques? Might we see the day when counsel for the defendant cannot access information needed to mount a defense or cannot appear at a defendant's behest without undergoing a background check of undefined scope? Or when a defendant might be represented by somebody who is not even a lawyer? Such practices are not without recent historical precedent and cannot be dismissed as mere paranoia once we peg our judicial institutions to the ebb and flow of public opinion.

I also worry that special terrorism courts risk elevating the status of those who target innocent life. As I stated during sentencing of Mr. Ressam in 2001, we have the resolve in this country to deal with the subject of terrorism, and people who engage in it should be prepared to sacrifice a major portion of their life in confinement. Implicit in my remarks was the message that despite the supposed grandeur of their aims, these people surrender their liberty just like any criminal who has earned society's condemnation.

At the outset, I stated that the Federal courts are not just capable of trying suspected terrorists; they are an asset against terrorism. At a time when our national security is so intimately linked with our ability to forge alliances and secure cooperation from countries that share or aspire to our fundamental values, we can ill afford to send the message that those values are negotiable or contingent.

I recently returned from Russia, where I have worked over the past 25 years to promote judicial reform. The topic of this most recent trip was jury trials, and the 5-day seminar culminated in a mock trial conducted in the military court of Vladivostok. Serving as mock jurors were a group of Russian law students from Far Eastern University, no more than 19 or 20 years old, most with aspirations to be prosecutors in a system struggling to define a role for the courts that is independent from the state. That day, I felt that my ability to confidently share the virtues of our independent judiciary and Constitution with those who represent the future of Russia was more than a personal privilege; it was in our country's own strategic interest. I cannot help but wonder if I will be able to speak with the same authority on future occasions if we lose confidence in the very institutions that have made us a model for reform in the first place.

Thank you, Senator.

[The prepared statement of Judge Coughenour appears as a submission for the record.]

Chairman LEAHY. Thank you. You know, you mentioned being there in Russia, and I recently returned from a number of countries abroad, and I raised some of the same questions, especially countries that have become newly democratic nations, trying to determine how they will do their court system. And with the indulgence of Senator Whitehouse, I recall shortly after the break-up of the Soviet Union, a group of Russian jurists and others in my office were asking about our system. One of the questions they asked, "Is it true that people in the United States can actually sue the Government?" I said, "It happens all the time." And they said, "And

is it true that sometimes the Government loses?" I said, "It happens all the time." "And you then replace the judge?"

[Laughter.]

Chairman LEAHY. Very interesting questions. And when we explained why we do not, I think the light bulb went on.

James Benjamin is a partner in the Washington law firm of Akin Gump. He represents clients in a variety of Government regulatory investigations and litigation, focused on civil litigation and appellate work in State and Federal appeals courts. Prior to joining Akin Gump in 2001, Mr. Benjamin served in the U.S. Attorney's Office for the Southern District of New York for 5 years. During his time there, he served as deputy chief appellate attorney, was a member of the Securities and Commodities Fraud Task Force in 2000, received an award for superior performance from the Attorney General. He received his bachelor's degree from a neighboring State, from Dartmouth, and his law degree from the University of Virginia School of Law.

Mr. Benjamin, go ahead. And I should also note that all statements, full statements, will be placed in the record of each of you. Also, during the questions and answers—naturally, you will all get a copy of the transcript, and if you see things in there that you want to add to or may want to correct, just notify us, and that will be changed.

Mr. Benjamin?

STATEMENT OF JAMES J. BENJAMIN, JR., PARTNER, AKIN GUMP STRAUSS HAUER & FELD LLP, NEW YORK, NEW YORK

Mr. BENJAMIN. Mr. Chairman, members of the Committee, thank you very much for the opportunity to be here this morning. I am here to talk about a report on terrorism prosecutions that I co-authored along with my law partner and close friend, Richard Zabel, who is also present here this morning. Rich is sitting right behind me, but if we could do it, he should be here right next to me, because this was a team effort from beginning to end.

Rich and I practice law together at Akin Gump in New York City. Our area of expertise is white-collar criminal defense. Before coming to Akin Gump, the two of us collectively spent more than 13 years as Federal prosecutors in the Southern District of New York. And I know that I speak for Rich as well when I say that we are very proud of the time we spent working in the Southern District under our former boss, Mary Jo White, whom we admire greatly.

About a year ago, Human Rights First, a wonderful organization that is a longstanding pro bono client of our law firm, approached Rich and me and asked us to undertake a comprehensive study of the capability of the Federal courts to handle international terrorism cases. Last week, we published the results of that study. We prepared our report in the hope that we could make a contribution to the important public debate about how best to prosecute and punish individuals suspected of complicity in terrorism.

As the members of the Committee are well aware, in recent years a number of people, including some of the distinguished panelists here today, have proposed that terrorist criminals should be prosecuted outside of the civilian court system, either through the

use of untested military commissions or in an as yet undefined national security court. A significant premise of these arguments is that the existing court system is not equipped to handle terrorism cases. In our report, we set out to test that premise, and we found, contrary to the views of those who propose a new court system or a new detention regime, that the existing Federal system over the years has done a capable job of handling terrorism cases. In other words, prosecuting terrorism defendants in the court system has generally led to just, reliable results without compromising national security or sacrificing rigorous standards of fairness and due process.

Now, that does not mean that the justice system is perfect. In some of these cases, the system has been subjected to stresses and burdens. This was especially true in the 1990s, when some of the issues in these cases were being litigated and resolved for the first time. But the system has adapted to meet the challenges presented by internatural terrorism cases.

I also want to make clear that we do not for a minute believe that the criminal justice by itself is the answer to the problem of international terrorism. Obviously not. Terrorism is a complex and enormously important problem, and in combating it, the Government must have at its disposal the full range of military, intelligence, diplomatic, economic, and law enforcement resources.

In approaching our research, our goal was to look beyond rhetoric and generalizations and explore how the courts have actually fared in the scores of criminal cases that have actually been brought against alleged terrorists. In total, we identified 123 terrorism cases going back to the 1980s. We obtained detailed information about those cases. Based on that foundation, we undertook a detailed review of the key legal and practical issues that were presented in these 123 cases. Here are some of our findings in very, very brief summary.

One: Prosecutors can invoke a broad array of substantive statutes against alleged terrorists, including very important statutes that were adopted by Congress in the mid-1990s and thereafter.

Two: Over and over again, courts have successfully used CIPA and other tools to balance the defendant's right to be informed of relevant evidence against the need to preserve the secrecy of classified information.

Three: The Miranda rule is manageable and does not affect battlefield captures or intelligence interrogations.

Four: Courts have applied the Federal Rules of Evidence in a flexible, common-sense manner, consistent with longstanding precedent.

Five: Existing law provides an array of tools for the Government to detain individuals it believes are dangerous.

And, six: Courts have imposed severe sentences on persons convicted of terrorism crimes.

Mr. Chairman, we recognize that the project we set out to undertake was large and that the subject matter is controversial. We have done our best on a pro bono basis to prepare a report that is objective and balanced. We hope our report is of value in the ongoing debate about how best to reconcile our commitment to the

rule of law with the imperative of assuring security for all Americans.

Thank you.

[The prepared statement of Mr. Benjamin appears as a submission for the record.]

Chairman LEAHY. Well, thank you, Mr. Benjamin. And we have an advanced copy of the report, and I was able to go through it, as has my staff. It is an excellent report, and I appreciate it.

Mr. BENJAMIN. Thank you.

Chairman LEAHY. Professor Amos Guiora—did I pronounce that correctly?

Mr. GUIORA. That is a great start.

Chairman LEAHY. Good staff. He is a law professor at S.J. Quinney College of Law at the University of Utah, teaches a course in criminal law, "Global Perspectives in Counterterrorism," and religion and terrorism. He has also taught at Case Western Law School, and he is the founding director of the Institute for Global Security Law and Policy. Professor Guiora served for 19 years in the Israel Defense Force Judge Advocate General's Corps, held a number of senior command positions, including Commander of the IDF School of Military Law, Judge Advocate for the Navy and Home Front Command, and legal advisor to the Gaza Strip. He received his bachelor's degree from Kenyon College and law degree from Case Western Reserve University School of Law.

Professor, it is good to have you here. Please go ahead, sir.

STATEMENT OF AMOS N. GUIORA, PROFESSOR OF LAW, S.J. QUINNEY COLLEGE OF LAW, UNIVERSITY OF UTAH, SALT LAKE CITY, UTAH

Mr. GUIORA. Thank you for having me, Mr. Chairman.

Mr. Chairman, members of the Committee, it is indeed a pleasure and a privilege to be here this morning, and I hope you will find my comments helpful as we go forward with the question of where to try terrorists, or at least how do we go about trying suspected terrorists.

The question, when we ask ourselves where to try detainees, requires answering a number of preliminary questions.

First, how do we define the current situation? Is it is a war? Is it a police action? Is it an armed conflict short of war? Without answering those questions, it is going to be very difficult for this Committee to go forward with the question of where to try terrorists.

The second question that must be addressed, Mr. Chairman, is: What rights do we grant detainees?

And the third question is: How do we go about vetting the detainees? Depending on who you want to believe, according to a number of senior military officials, somewhere between 20,000 to 25,000 detainees are held worldwide either by the U.S. or on behalf of the U.S. And the question of how to go forward cannot be answered until we develop an objective criteria for determining if a particular detainee presents a current or future threat to the United States' national security. So those are the preliminary questions.

Once we have decided how to go forward, then two additional questions or two additional premises: One, I think that most people, Mr. Chairman, will agree that we need to close Guantanamo. But saying to close Guantanamo is an easy answer and an incorrect answer until we have come up with an alternative solution. What I propose, Mr. Chairman, in my few minutes here this morning, is the following: the establishment of an American Domestic Terror Court premised on the following:

One, that an international treaty-based terrorism court is going to be an unworkable solution because I think the nations of the world will be unable to define what terrorism is. If the FBI and the DOD and the State Department and the Department of Homeland Security cannot agree on what terrorism is, I think it is going to be a tall order for the nations of the world to define what terrorism is; and, therefore, an international treaty-based terror court is unacceptable, or at least unworkable.

The second obvious solution or option are the Article III courts, and I think I am going to respectfully disagree with my co-panelists. I think Article III courts are going to be an unworkable solution once we close Guantanamo. I think the numbers are such, even if there are, say, 25,000 and we vet and we are down to 10,000 detainees, I think Article III courts as they are presently constituted are going to be unworkable in terms of trying 10,000 people.

The Domestic Terror Court solution that I proposed, Mr. Chairman, has the following advantages, and those advantages, I immediately add, are also very problematic. One, they will enable the introduction of classified information that will be heard in camera. Neither the detainee nor the defendant nor his counsel will be in a position to hear that information. That classified information can be used to bolster conviction. It cannot be the sole basis of conviction.

In addition, Mr. Chairman, there will not be a jury trial. In essence, with the proposal based both on the lack of a jury trial and an introduction of classified information will enable the process of beginning to try the thousands upon thousands of detainees we are holding. You have to look at it, I suggest, in the following way, Mr. Chairman. We today are holding thousands of people in an indefinite detention which clearly violates the United States Constitution. To turn those people over to the Article III courts the way they are presently constituted means that the waiting line will be endlessly long, which means that we are going to completely keep the same process in place.

In proposing the Domestic Terror Court, what I suggest, Mr. Chairman, is to take the world I come from, the Israeli military, which you referred to in your introduction, taking the Israeli military courts in the West Bank and the Gaza Strip, along with the administrative detention process, merging the two together, and thereby establishing a Domestic Terror Court which would enable, on the one hand, a defendant to hear the evidence and, in addition, in those cases where it is necessary, to also introduce classified information, not to be the sole basis of conviction but to bolster conviction.

Is this a perfect solution? The answer, obviously, is no. On the other hand, having 25,000 people in worldwide detention is also very much of a wrong solution.

As we go forward, as we think about how do we go about beginning to solve this issue, I close with how I began. Without carefully defining what the current situation is, we are going to think of and view this issue tactically rather than strategically. We as lawyers ultimately have the responsibility, Mr. Chairman, to ask ourselves what situation are we in, and only then can we begin asking ourselves how do we go about trying these individuals. What is imperative is that we develop a process premised on the closing of Guantanamo after developing a solution, because absolutely it is wrong to hold 25,000 people in the present context, which is nothing more than indefinite detention.

And I propose, in conclusion, Mr. Chairman, that my suggestion about a Domestic Terror Court is going to be the most effective way within the context of the Constitution to begin the process of trying those individuals who are suspected of involvement in terrorism.

Thank you.

[The prepared statement of Mr. Guiora appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Professor.

Tom Malinowski is the Washington Advocacy Director for Human Rights Watch—a position you have held since 2001, I believe.

Mr. MALINOWSKI. Yes.

Chairman LEAHY. Prior to his work there, he served in the Clinton administration as Special Assistant to the President, senior director for foreign policy speechwriting at the National Security Council. From 1994 to 1998, Mr. Malinowski served as speechwriter for Secretaries of State Christopher and Albright, was a member of the State Department policy planning staff. He also served as an aide to the late Senator Daniel Patrick Moynihan, my neighbor for years in the Russell Building. He is a member of the Council on Foreign Relations. Mr. Malinowski holds degrees from the University of California at Berkeley and from Oxford University.

Please go ahead, sir.

STATEMENT OF TOM MALINOWSKI, WASHINGTON ADVOCACY DIRECTOR, HUMAN RIGHTS WATCH, WASHINGTON, D.C.

Mr. MALINOWSKI. Thank you, Chairman Leahy. Thank you for having us here to look at this very important issue.

You have heard today from several witnesses who have described the extraordinary strength of the American justice system in dealing with terrorism cases. I agree with them and with you whenever we have used the traditional criminal justice system in this country, we have succeeded in putting dangerous people away with both fairness and finality. When we have tried to use alternative means, we have mostly failed. Just one conviction in the last 6 years in the military commissions trials, for example, an extraordinary record of failure.

So why do we face any dilemma at all when we look at this question. I think there is one reason that is worthy of debate: the fear

that there are people out there who cannot be prosecuted because they have not yet committed a crime or because the evidence against them would not be admissible in a normal court, but who nonetheless frighten us because of their beliefs, their associations, or desire to do America harm. And it is to deal with such people that some people have proposed an alternative system of preventive detention.

Now, who are these people? There are not actually thousands. In Guantanamo, we are dealing with probably, at best, a few dozen people who might fit this profile and who might be a dilemma for us once the camp is closed. But it is important to note that the number of people living at large in the world who fit the same profile is probably in the tens or hundreds of thousands, people who passed through the camps in Afghanistan at some point in the last 10 years or who share the extremist ideology that gives rise to al Qaeda, who may fantasize on these websites and chat rooms about taking part in terrorist attacks.

Imagine if our troops went through a city like Kandahar, Afghanistan, today or Karachi, Pakistan, and randomly rounded up the first thousand young men that they met. I bet you that at least a few dozen would fit this profile of potentially dangerous but have not done anything yet. And if you took those thousand and you put them in Guantanamo for 6 years, the number deemed too frightening to release would probably rise even higher.

So here is the real question: If we are holding today in Guantanamo 10 or 50 or maybe even 100 of the countless thousands of potentially dangerous but difficult to prosecute people out there, should we set up a preventive detention system just for them? Keep in mind that we have never done this before as a country. Congress has never set up a formal system of detention without trial to deal with national security threats—not in the Civil War, not in the Second World War, not in the Cold War when the survival of this country was at stake. So would the benefit of incapacitating without charge or trial a very small number of people who wish us harm in the world be worth the cost of taking such an unprecedented step? I think before we do, there are some hard questions we would need to ask.

First, can Guantanamo detainees be moved to a new system of detention without trial here in the United States without making it seem as if we were simply transplanting Guantanamo, with all of its problems, to U.S. soil? I believe the answer is no. I believe that we would end up pretty much back where we are right now, with detainees held for years without trial based on evidence that they cannot see or confront, some of it possibly obtained through coercion, in a system that does not look like anything America has stood for or championed before. Inevitably, you would have errors because you are using unreliable intelligence, as all intelligence inherently is, to keep people incarcerated. Mistakes would be uncovered. Once again, people around the world would be focused on the injustices that we commit instead of the crimes that the terrorists commit.

A second question is whether we can create a new form of preventive detention without enduring more years of frustration and delay. Look at our experience with the military commissions in

Guantanamo. Six years into this experiment, they are still beset by delays, challenges, and embarrassments. Some of those are the result of a flawed plan, but many are simply the inevitable result of creating any new system from scratch. If we try again to create a new system from scratch, if we rely again on trial and error to make it work, the likely result is again going to be more error than trial.

Now, eventually, we might get a stable set of rules after we finish with all the legal challenges and the legislative re-dos. But how long are we prepared to wait for a system like that to work? Can we afford more years of controversy in this country about how to deal with suspected terrorists?

A third question is whether dangerous people are more or less likely to be actually released under such a system? Now, I think logically, if we were to set up a system where it would be easy to deal with someone without going to the trouble of a criminal trial, the Government would have a strong incentive to put people in that easier system, including people who probably can be prosecuted and put away in the traditional way. And then we end up with a situation like Guantanamo where the Government is under enormous pressure from around the world to deal with these people, including to release them, and dangerous people actually do get released sooner than they would be were they put through the criminal system.

Another question is whether a preventive detention system would effectively de-legitimize terrorists in the way that the criminal justice system does. One thing all terrorists have in common is that they do not want to be seen as ordinary criminals. They want to be thought of as soldiers. They want the attention and glory of being part of a great army at war with a superpower on the global battlefield. They use that to recruit more fighters. Remember how the 9/11 mastermind Khalid Sheikh Mohammed, in his special tribunal in Guantanamo, reveled in the status of being called an "enemy combatant." "You are darn right I am an enemy combatant," he said. He was proud of that. Contrast it to what happened to the Shoe Bomber, Richard Reid, when he got his Federal trial before a courtroom in Boston. He begged to be called a combatant, and the judge in that case said, "You are no soldier. You are just a terrorist." And he sentenced him to life in prison. Isn't that a better way to deal with such men, to let them fade into obscurity alongside the murderers and rapists in our Federal prisons?

[The prepared statement of Mr. Malinowski appears as a submission for the record.]

Chairman LEAHY. Thank you.

Our next witness is Benjamin Wittes. He is a Fellow and Research Director in Public Law at the Brookings Institution in Washington, a columnist with the New Republic online, and contributing editor to Atlantic Monthly. From 1997 to 2006, Mr. Wittes served as an editorial writer for the Washington Post, reported for the Legal Times, Slate, and the Weekly Standard. He has published numerous books, including the forthcoming "Law and the Long War: The Future of Justice in the Age of Terror." And Mr. Wittes graduated from Oberlin College.

Please go ahead, sir.

STATEMENT OF BENJAMIN WITTES, FELLOW AND RESEARCH DIRECTOR IN PUBLIC LAW, THE BROOKINGS INSTITUTION, WASHINGTON, D.C.

Mr. WITTES. Thank you, Mr. Chairman and members of the Committee, for inviting me to testify concerning what is, in my judgment, the single most important unresolved legal policy challenge affecting America's confrontation with international terrorism: the design of an appropriate regime for detaining alien terrorist suspects seized abroad.

It is difficult for me to overstate the scope and magnitude of our political system's collective failure in detention operations to date. A few years ago, in the winter of 2002, almost nobody doubted the very common-sense proposition that the United States is entitled to detain enemy forces in the war on terrorism. Today, doubt concerning the legitimacy of war-on-terrorism detentions is more the norm than the exception. The reason is simple, and it is not that the rationale for these detentions has grown less powerful. The current administration has very obtusely refused to tailor the detention system contemplated by the laws of war to the very unusual features of the current conflict. Congress has declined over a lot of years to create a better system legislatively. And the courts have so far provided next to no guidance on the ground rules for detention, save to emphasize the fact of their own habeas jurisdiction.

The result is a recipe for public and judicial suspicion, which is exactly what we have gotten: a system in which complex questions of fact get resolved in closed proceedings that produce a minimal administrative record based on information—some of it undoubtedly flawed—that detainees have virtually no opportunity to rebut.

So let me be as clear as I can be. That system has not worked, and it cries out for reform by this body to make detentions fairer, more transparent, and more defensible both before the public and the courts.

But let me be candid on another point as well: The appropriate reform will almost certainly not rely exclusively on civilian prosecutions in American Federal courts as the source of the power to detain the enemy. This is the case for two distinct reasons:

First, relying exclusively on Federal court prosecution would likely require the release of portions of the detainee population at Guantanamo whose continued detention prudence requires. Nobody outside of the executive branch knows exactly how many of the current detainees are too dangerous to release but could not face trial in Federal court. Without access to a great deal of material that remains classified, you can kind of only guess. But the number is almost certainly not trivial, and it is probably not even small. Even under the somewhat relaxed rules of the Military Commissions Act, prosecutors have estimated that they might under ideal circumstances—and I suspect this is optimistic—bring charges against only as many as 80 detainees. So excluding those current detainees already cleared for transfer from Guantanamo, that still leaves around 100 or so whom the military deems too dangerous to transfer yet against whom charges are not plausible. Even if we assume the military is being hopelessly conservative in clearing detainees for repatriation, there is almost certainly still a gap, and

that gap are a bunch of dangerous people who want to kill Americans.

The second reason, even if we could magically repatriate, resettle, or free all current detainees, a pure prosecution model would face prohibitive obstacles with respect to future captures. Specifically, American forces often obtain custody of detainees—either in the field or from allied governments or militias—without knowing precisely who they are. For example, Abu Zubaydah was captured by Pakistani forces in a safe house raid with a handful of people around him. You can plausibly imagine an extant warrant against, you know, such an al Qaeda bigwig himself. But it is highly implausible to imagine pending warrants against everybody who might accompany him or anybody we might pick up under, you know, circumstances like that. If the rule, however, is that anyone against whom charges are not either outstanding or imminent must go free, you have to ask the question what authority American forces would have even to take custody of future non-battlefield detainees whom opportunity might present to them. And I think the honest answer is that they would have none.

For all its errors, in other words, the current administration is not being eccentric in insisting on some authority to detain the enemy outside of the four corners of the criminal justice system. I do not think this necessity should be a matter of national shame or embarrassment. American law actually tolerates preventive detentions across a range of areas, many of them—in fact, all of them, in my opinion, less compelling than the situation of sworn military enemies of the country against whom Congress has authorized the use of force. That the laws of war apply uncomfortably to the task at hand does not mean that no detention authority here is appropriate at all. I think the next administration of either party is very unlikely to forswear the power to detain the enemy entirely. So the right question for this body is not whether to force it to do so, but what appropriate rules for detention ought to look like, what the substantive standards for detention ought to be, and how to construct appropriate mechanisms of judicial review for those detentions.

I want to emphasize that not all detainees require new law. The law of war applies comfortably to a huge percentage of, you know, those we are holding around the world. We are really talking about a small subset of, you know, terrorist suspects whom the laws of war apply to very uncomfortably. And defusing the controversy over such detentions requires the creation for each detainee of a rigorous set of factual findings and a documentary record justifying the decision to hold that person; that is a record available to the public and the press to the maximum extent possible and reviewable in the courts.

To that end, I make the following suggestions in my book, which I have fleshed out as well in my written statement:

First, to civilianize the detention regime by severing the authority to detain this limited class of terrorists from the laws of war and putting such detentions under judicial supervision.

Second, to greatly enhance the procedural protections for the accused.

And, third, to have whatever the judicial body that is supervising it retain jurisdiction over each detention for as long as it persists to ensure that detention remains necessary and conditions of confinement are humane.

And I believe, as Professor Guiora testified, that the best way to implement such a system would be through some kind of specialized terrorism court or national security court. It is an idea that others have proposed with varying levels of specificity. Such a court would put detentions in the hands of judges with all the prestige of the judicial system yet with particular expertise in applying rules designed to protect classified information and manage legitimate security concerns. It is also, in my view, the best venue in which to try terrorists accused of war crimes.

To sum up very briefly, the current administration's reliance on a pure law of war model here has been a very fateful error. But the attempt to revert to a prosecutorial model for disabling terrorists would supplant that error with a system unsuited to the challenges we currently face as a society. The right answer is—as it has been since September 11—to design the detention system we need to handle the unique situation that we face, and that is a task that only Congress can accomplish

[The prepared statement of Mr. Wittes appears as a submission for the record.]

Chairman LEAHY. Judge Coughenour, let me ask you about this, about the idea that we need some kind of a new legal regime to deal with terrorism cases. If we use the Federal courts, it may be too difficult. I have heard not just in testimony here but in letters I have received that our discovery rules are too generous, our evidence rules are too strict, the burden of proof is too high, there is too much risk of disclosing sensitive cases. But if we discuss what is the easiest way to prosecute a case, of course, you can reach those kinds of conclusions. I always thought when I was a prosecutor what is the easiest way to prosecute. It might not be the constitutional or legal way.

In your testimony, you say that it would be a grave error to create a parallel system for trying terrorism cases, but you thought our courts were uniquely suited to conduct terrorism cases. You mentioned the Ahmed Ressam case. Now, he was convicted. He was sentenced. He is now in jail.

Let's go into that a little bit. Was there anything—at any time during that did you doubt our ability to use our Federal courts, our Federal prosecutors, defense attorneys, our Federal system to prosecute that case?

Judge COUGHENOUR. Not for a heartbeat, Senator. We had occasion to use the Classified Information Protection Act, which was a cumbersome and difficult thing to work through in dealing with classified information.

I had two reactions to that: one was you just roll up your sleeves and you work your way through it, and we did; and, second, I was, frankly, taken aback by the amount of information that was considered to be classified for reasons that just struck me as being absurd. For example, it was considered to be classified that investigators stayed at a Holiday Inn in Algeria when they interviewed members of the Ressam family. We had a lot of difficult evidentiary

issues dealing with witnesses from Canada and the like. But, again, you just roll up your sleeves, and you work your way through it.

General Mukasey tried a very difficult trial in New York to a conviction. Kevin Duffy tried another major case in New York with difficult problems to a quite appropriate conviction.

It just chills me to the core to hear people talking about rounding up someone who is deemed too dangerous to be released. In the United States of America, do we stand for that proposition? And how long do we hold them? How long do we detain them? For the duration of the war on terror? Is there light at the end of the tunnel?

We have been holding people now for 6 years, and it just seems to me inconsistent with everything we stand for in the United States to be detaining people because we think they are dangerous but we do not have enough evidence to try them.

Chairman LEAHY. That is interesting you talk about the classified system. We now have spent several billions of dollar, many, many more billions of dollars to classify things than ever in our history, including when we were in world wars and so on. Matters at the National Archives that had been on their website for years and years are suddenly classified matters that are on various administration websites. They are open—actually used in speeches by administration officials, but suddenly when the Congress has to ask, well, what really happened, "Oh, it is classified," and it is off the website. I worry a little bit about that.

But let me ask, in my time left here, Mr. Benjamin, this war on terror—and the judge referred to this—can justify a lot of things, including classifying everything, and perhaps intimidating people into accepting unnecessary restraints on our civil liberties and turning our backs on the U.S. court system. I want to just try to put the reality apart from the rhetoric in this area. The strength of your report, instead of beginning with a conclusion that our courts can handle terrorism, you did the hard work of actually examining the cases and the relevant data. In the hundred terrorism cases that you reviewed in your investigation, what did you find out about leaks of classified materials? Because Attorney General Mukasey, before he held his current job, referred to the problem of leaks in terrorism cases. He claimed specific examples. What did you find? And did you find the problem of leaks justified the creation of a national security court, some kind of alternative criminal justice system?

Mr. BENJAMIN. Thank you, Senator. Certainly the issue surrounding classified evidence is one of the features that people point to and say, "Well, that is why these cases are different," and so we looked quite closely at that issue in our research.

CIPA is the primary method for dealing with classified or sensitive evidence in terrorism prosecutions. It is not the only method. There are also protective orders that are routinely used. Things are filed under seal, as is often the case in all sorts of criminal prosecutions. And there are other more case-specific devices that have been invoked, such as the Fourth Circuit's very creative solution to some of the issues that were raised in this area in the *Moussaoui* case.

What we found, Senator, is that CIPA has been invoked over and over again in terrorism cases, including many of the most important high-profile cases, such as the *Ressam* case that Judge Coughenour so ably presided over; the *Rahman* case that Judge Mukasey presided over, involving the blind sheikh; and the embassy bombings case that Judge Sand presided over. CIPA has been broadly upheld as constitutional. And, Senator, we have not found a single instance of a security breach in any terrorism cases where CIPA was invoked.

You referred to the op-ed piece that Judge Mukasey wrote shortly before his nomination to become Attorney General. In that piece Judge Mukasey cited two examples of security breaches, but it bears noting that in neither case were the CIPA procedures invoked. The first instance arises from one of the cases in the early 1990s, the *Rahman* case, where the prosecutor sent a list of co-conspirators—quite a long list, I might add—to defense counsel prior to trial. That is consistent with the normal rules of disclosure in a case where a conspiracy is charged. And it turned out that that list of co-conspirators made its way to Osama bin Laden in Sudan. And actually, by the way, interestingly enough, the fact of the transmission of that co-conspirator list to bin Laden was later part of the Government's evidence in the embassy bombings case a few years later.

Now, it is not a good thing, obviously, that the co-conspirator list reached bin Laden, but it bears noting that the Government did not invoke a protective order in that case with respect to the co-conspirator list, did not make use of the tools that might have been available. And I would submit, Senator, that more importantly that incident is the exception that proves the rule. This was 13 years ago, and this is sort of the one example that is cited, and it is a case where CIPA was not even applied.

The other example that Judge Mukasey cites involves, as he described it, testimony in one of the two Ramzi Yousef trials. We have looked hard at those trials, have not been able to confirm the episode that Judge Mukasey recounts. There is some reason to think that Judge Mukasey may have been intending to refer to a different incident in the embassy bombings trial. In the white paper, we recount in quite a bit of detail the facts and circumstances from the embassy trial. And as we point out, when you look at the chronology and the timeline—and this involves phone records, satellite phone records—it is just not possible that the introduction of that phone record evidence had any effect on intelligence gathering because bin Laden had stopped using the phone years before the evidence was offered in court.

So, again, I have just tremendous respect and admiration for Judge Mukasey, and so I hesitate to suggest that that incident was misreported. There may be something else that he is referring to that we have not been able to confirm. But thank you.

Chairman LEAHY. Thank you very much, Mr. Benjamin.

I was going to call on Senator Sessions next, but he has left, so Senator Kyl.

Senator KYL. Thank you, Mr. Chairman.

Let me ask a question for all of the witnesses, and it is a long question, and I would ask unanimous consent, Mr. Chairman, that

the back-up material for the question be included in the record, along with my question. But I do not need to refer to it at this point.

Chairman LEAHY. Without objection.

Senator KYL. Last year, I wrote a minority report dissenting from the Committee report for a bill that would have extended civilian litigation rights to al Qaeda detainees, and the minority report began by noting the following: At least 30 detainees who have been released from the Guantanamo Bay detention facility have since returned to waging war against the United States and its allies. A dozen released detainees have been killed in battle by U.S. forces, while others have been recaptured. Two released detainees later became regional commanders for Taliban forces. One released Guantanamo detainee later attacked U.S. and allied soldiers in Afghanistan, killing three Afghan soldiers. Another former detainee has killed an Afghan judge. One released detainee led a terrorist attack on a hotel in Pakistan and also led a kidnapping raid that resulted in the death of a Chinese civilian. This former detainee recently told Pakistani journalists that he plans to fight America and its allies until the very end.

Since that Committee report was published last fall, we have seen another case of a Guantanamo detainee who was released by the U.S. military and subsequently returned to terrorism.

The following is from a May 8, 2008, article in the International Herald Tribune: A former Kuwaiti detainee at the United States prison camp at Guantanamo Bay, Cuba, was one of the bombers in a string of deadly suicide attacks in the northern Iraqi city of Mosul last month, the American military said Wednesday. Commander Scott Rye, a spokesman for the American military, identified one of the Mosul bombers as Abdullah Salim Ali al-Ajmi, a Kuwaiti man who was originally detained in Afghanistan and spent 3 years at Guantanamo Bay before being released in 2005. Al-Ajmi had returned to Kuwait after his release from Guantanamo Bay and traveled to Iraq via Syria, Rye said, adding that the man's family had confirmed his death.

Ajmi is one of several former Guantanamo detainees believed to have returned to combat status, said another American military spokesman, Commander Jeffrey Gordon, quoting, "Some have subsequently been killed in combat and participated in suicide bomber attacks," he said.

Now, here is my question for all of you. Do you generally agree that it is a bad thing that men like Ajmi, the Mosul suicide bomber, have been released from Guantanamo Bay? And do you agree that the United States should be allowed to detain such men to prevent them from returning to the battlefield, which in the case of terrorists, of course, could be almost anywhere? Since I suspect we have started down at the left hand, let me—and, by the way, for the record, Mr. Benjamin, I am not aware that there is a protective order exception to the Sixth Amendment confrontation right; you referred to the failure of the Government to get a protection order. Would you, for the record, confirm for me whether that is your understanding or not? But let's don't take time with that right now.

Let's start with Mr. Wittes and go on down the line.

Mr. WITTES. I do agree that there is a significant problem that there have been a number—and the exact number is, as I understand it, the subject of some dispute. But I agree that there is a significant problem with people being released and going back to the fight, absolutely. I further agree that it is a necessary component of an international conflict that you do get to detain the enemy in order to prevent that sort of thing.

I think I disagree with what I take to be the implication of your question, which is that there is—that as a consequence of those two points, that we should have a sort of unamended or untailored law of war or paradigm here which issues judicial review. I think one of the problems at Guantanamo has been—

Senator KYL. Excuse me. Let me just make it clear that is not implied. We have judicial review. We have an annual determination of status, and there is a determination for each of these individuals. So please do not read into my question—

Mr. WITTES. Fair enough. If that—

Senator KYL.—an absolutely free—

Mr. WITTES. If that was not the implication of your question, then I—

Senator KYL. Let me just add to it. Underlining the provisions that we already have in law for the determination of status and review of that status.

Mr. WITTES. Yes, fair enough. I mean, I guess my point is that I think one of the problems that we have had at Guantanamo, in my opinion, is that the doubt as to the legitimacy of these detentions has created enormous political pressure to release people, and I think has led in some instances to releases of people of whom I am, frankly, terrified. And I can give you specific examples of that, but I believe sort of the more process we create for Guantanamo—and, obviously, I am not talking about a Federal court trial here, but I think a more robust process would create more legitimacy and, therefore, lessen the pressure to do sort of precipitous releases, for which, I agree with you, we have paid a high price and I suspect we will pay a higher price to come.

Mr. MALINOWSKI. Thanks, Senator. Let me start by echoing—

Chairman LEAHY. I would ask each person, because of the time constraints, to answer the question, of course, but try and keep it within a shorter framework, And, of course, we will give you more—if you want to expand the record subsequently, that will be done.

Mr. MALINOWSKI. First, to agree with Mr. Wittes that it is precisely because of the perception that we have an illegitimate system that there is enormous pressure to release people, including people who perhaps should not have been released and I think probably would have been better dealt with in a system that is of unquestioned legitimacy.

I think the second way I would answer your question, Senator, is to point out that the fundamental problem we face in this conflict is that there is no shortage of misguided young men in the broader Muslim world who are willing and capable of blowing themselves up for that awful cause. We may have a few dozen in Guantanamo. There are thousands or tens of thousands out there. We released hundreds of such people, thousands at the end of the

conflict with the Taliban in Afghanistan, knowing that you cannot prevent terrorism completely by seeking to detain everyone in the world who wishes us harm, unless we are willing to build 10,000 Guantanamos; and that the problem of Guantanamo, and I think of any system that is perceived to be illegitimate, is that it is likely to create more such people than it takes off of the battlefield. And I think one glance at any of the jihadi websites that recruit people to the fight will confirm that statement. They use Guantanamo and they will use any system that looks like Guantanamo to recruit people to kill us. And that is the problem we need to deal with.

Mr. GUIORA. Senator Kyl, your question goes to the heart of my proposal about establishing a Domestic Terror Court. During the course of my 20 years' service in the Israel Defense Forces, I was involved in innumerable detainee release decisions. It ultimately requires objective criteria for who can and who should not be released predicated on an understanding of do they present a continuing threat to America's national security. Without articulating and subsequently implementing this objective criteria, we will be releasing people simply because, and, indeed, you are absolutely right, the chances of those people who have been released without a proper check into what kind of a threat they present, chances are that they will commit those same acts once again.

On the other hand, there is no doubt that the process of indefinite detention without robust, independent judicial review as to whether or not that individual presents a continuing threat to America's security is, at the end of the day, I think, both unconstitutional and also, frankly, immoral, meaning that if we are going to go forward in a rationale fashion, the first thing we absolutely must do is to develop this objective criteria. Then and only then can we begin the process of determining who we will release and who we will not release, and those who are not released, what judicial process they go forward with is obviously what we are talking about today. But without establishing criteria, it is very much a catch-as-you-can, which, at the end of the day, is extraordinarily dangerous to America's national security.

Mr. BENJAMIN. Senator, I could not agree more than when our troops are engaged in the field as they are, it is fundamental in the law of war that when they capture enemy fighters, they can and should detain them so that they do not return to the field. And the incident that you spoke about that was in the paper 2 weeks ago was tragic and horrible. And as I said earlier, we do not for a minute say that the criminal justice system by itself provides the answer to all of the challenges of terrorism. Certainly not. Rather, what we say is that for individuals that the Government has zeroed in on and said, "This is someone that we want to prosecute and punish—not someone that we want to disable from returning to the fight, but someone we want to prosecute and punish"—the existing system has proved that it is capable of handling those cases in the most challenging cases against the most dangerous people: Khalid Sheikh Mohammed's co-conspirators, Osama bin Laden's co-conspirators in the embassy bombings case, and some of the others.

So we do not for a minute propose that the justice system is a one-stop solution. Absolutely not.

Judge COUGHENOUR. I cannot add a whole lot to what has already been said and what I have already said, and that is that I still think it is entirely inconsistent with the ideals of this country to round people up because we think they might be dangerous and to hold them indefinitely for the duration of an ill-defined and undefined war, which could mean, in essence, that we hold them for the balance of their natural lives based upon a standard there that is they are dangerous. I just do not think that is consistent with what we stand for in the United States of America.

Chairman LEAHY. Thank you.

Senator Whitehouse?

Senator WHITEHOUSE. Thank you, Chairman. Welcome to all the witnesses. I appreciate the very thoughtful testimony that we have had here today. Like Senator Kyl, I would like to ask a question and then ask each of the witnesses to respond to it. Mine has to do with Guantanamo, which I think is pretty widely understood by essentially all rational Americans to be a terrible stain on our reputation and something that we would be well advised to close as rapidly as possible. And if we were to pursue that task, it would not be easy. This is not the simple kind of mess that you just pick up off the rug and it is over. I mean, we have kind of got ourselves in a lot worse to this problem as a result of the 6 years of the experience with Guantanamo.

As we unwind it, if we were to go about establishing a commission or a committee to advise us, to advise perhaps the next President, on what you would want to do to close Guantanamo—which would raise obviously military issues. It is being run, I think, better than ever before now by the U.S. military. It raises intelligence issues related to what remaining fragments of intelligence might be extracted from folks down there. It raises significant judicial issues as to what procedures should be imposed. It raises very live for Americans civil liberties and fairness issues. And it raises significant corrections issues as to where people who are going to be kept incarcerated should now be kept.

And in the midst of all of that, I just want to have each of you share with me your advice, if we were to establish such a body, what sort of a charge would you want to ensure that it had? What sort of expertise, what sort of make-up? Any ideas you might have about such a body that would just be advisory, but who should be on it? What should be on it? What issues should they be sure to look at? What should a legislative charge to it look like? Any thoughts you have in that area, I would be very grateful to hear. I think I will go in the other direction this time and start with Your Honor.

Judge COUGHENOUR. Well, I will give you one limited idea, and he will probably be upset with me, but he is an old enough friend that I can do this. I would suggest you have in this town a judge who is Chair of the FISA Court, Royce Lambert, who would be a superb person to give you the views of the judiciary on dealing with that problem.

Senator WHITEHOUSE. I am sure you have made his day.

[Laughter.]

Mr. BENJAMIN. And at the risk of singling out another friend, I would suggest that an experienced terrorism prosecutor from an of-

fice like the U.S. Attorney's Office for the Southern District of New York be included. And I would also suggest that if such a commission were established, it should not impede the decision to transfer some of the Guantanamo detainees into the existing system for trial if the evidence is deemed to be sufficient to bring civilian charges, as one would think it probably is for at least some of those people.

Senator WHITEHOUSE. I agree, and by the way, I appreciate your nice words about Mary Jo White. I was her colleague in Rhode Island while she served in New York. She is terrific.

Professor Guiora?

Mr. GUIORA. Senator, I am a big proponent of a comparative international perspective and analysis as to how to go forward, and I think that no one country has the answer to terrorism, no one country has the answer to counterterrorism. If you are going to have such a commission, which I think is an excellent idea, I would recommend having people who are equipped and able to take a very close look at how other countries are going forward in terms of their counterterrorism and legal policy efforts. You can take away certain things from certain countries, and you can also that way discern what works and what does not work in the American constitutional context. But I think if you are going to have only an American-only perspective, it will be very limited and ultimately ineffectual. And I think particularly in this day and age, it is going to be critical to truly have a very broad-based, comparative, international perspective, and what I call in the book I wrote, "Global Perspectives on Counterterrorism," I there looked at five different countries—Israel, America, Russia, Spain, and India. I think we can take something away from each of those countries, and we can very much adapt that or adopt that to the American constitutional context.

Senator WHITEHOUSE. To put it mildly, we do not have a record of success in America to justify relying only on our own experience.

Mr. GUIORA. I leave that to the Senator.

[Laughter.]

Senator WHITEHOUSE. It seems pretty universal among the witnesses' testimony. Mr. Malinowski?

Mr. MALINOWSKI. Well, if you would like me to nominate someone, I will suggest someone you may be surprised to hear me nominate.

Senator WHITEHOUSE. Well, not just people, but also ideas, charges, issues they should be sure to look at.

Mr. MALINOWSKI. First a person and then an idea. The person I would nominate is General Petraeus, somebody who has served on the front lines of the struggle, understands the non-traditional nature of the threat that we face, understands clearly, based on what he said and has written on the subject, the necessity of detaining people on the battlefield who wish our troops harm, but who has also spoken very eloquently about the fact that you cannot detain your way out of this problem and that you cannot win a non-traditional war or conflict like this unless you sustain the moral high ground. I would love to hear the perspective of the serving officer who has been through this reflected in that kind of discussion.

In terms of ideas, you know, the one point I would make is don't just focus on the nitty-gritty challenge of what to do with detainee 1 and 50 and 48 in Guantanamo, but ask the big question of who should we be detaining as part of this larger struggle and how does detention fit into a strategy for winning. And I think you might get some interesting answers that are different from what you might expect if you start from that perspective.

Senator WHITEHOUSE. I appreciate it.

Mr. Wittes?

Mr. WITTES. I would like to start by saying on the personnel question, I cannot imagine a better suggestion than Mr. Malinowski's.

On the substantive dimension, I would actually say having a very intense focus on Guantanamo detainee 1 and 50 and 48—I think were the examples that he used—you know—

Mr. MALINOWSKI. Don't look at 49.

Mr. WITTES. Just don't look at 49, right.

[Laughter.]

Mr. WITTES. I mean, I think the thing that really—when you peel all the layers of the onion away, the thing that separates his argument from mine, I think, is a sense of what the universe of the people who are unambiguously too scary to set free and not amenable to U.S. prosecution in U.S. Federal court where it actually looks like. And I think you feel very different about this question if you believe that that is a very small group about whom the risks are very manageable, than if you believe that it is a very large group or even a mid-sized group about whom the risks are not particularly manageable. And one of the real problems that has pervaded this entire discussion—and I do not mean the discussion in this room today; I mean the discussion over 6½ years—is that the quality of the information that is public about, you know, the universe of detainees is simply dreadful. And, you know, the administration has to take a lot of responsibility for that.

But I think one thing that any commission or advisory body that you put together needs to look at is, you know—and I notice that both Mr. Malinowski and I in our written statements specifically said that you cannot responsible identify what the universe of the population is at this stage, and that matters enormously, because, you know, if it is five people and we could just, you know, have the NSA and the CIA watching them very carefully, I might be persuadable. If it is 120 people and, you know, they are people who are different from Abu Zubaydah only in one level below in the hierarchy and with—you know, and the difference is really that the evidence that we have is inadmissible—not that the evidence that we have is not real—I think he might be persuadable if I—I don't know that. You would have to ask him. But I think it would change the discussion a lot if we knew what that universe of detainees looks like.

Senator WHITEHOUSE. Thank you, Chairman.

Chairman LEAHY. Of course, it does not help that the administration, even when they have talked about it, they have changed their numbers so many different times that their credibility is somewhat hurt. But then that falls into what I had said earlier about classifying things that had been on Government websites for

years, been in Government publications for years, even to the extent of things that had been published, and classifying them just before a court hearing, the credibility is not at its highest.

Mr. WITTES. I could not agree with you more.

Chairman LEAHY. Thank you.

Senator Feingold?

Senator FEINGOLD. Thank you, Mr. Chairman, for holding this hearing. I am sorry I could not be here earlier to hear the testimony. I was chairing a hearing of the Africa Subcommittee of the Foreign Relations Committee, but from what I understand, you have heard powerful arguments today for why the traditional American criminal justice system is a strong and effective tool for trying terrorism suspects. The United States has successfully prosecuted terrorist suspects in Federal courts, and courts have provided the flexibility needed to address complicated evidentiary and legal issues. The traditional military justice system, too, is available. There is no doubt that the administration's actions over the past 7 years have created a difficult situation at Guantanamo Bay with respect to a small number of detainees. But I am deeply concerned about establishing an entirely new regime, with rules that would not otherwise be tolerated in Federal court or military court-martial and that would be subject to years of challenges, to address this very narrow set of cases, when there is every indication that we can effectively use our long-established institutions.

Mr. Chairman, I ask that my full statement be placed in the record.

Chairman LEAHY. Of course, it will be.

Senator FEINGOLD. Mr. Benjamin, when Congress was considering the Military Commissions Act, some argued that we could not rely on the traditional criminal justice system to try terrorism suspects because it was unrealistic to expect soldiers to read *Miranda* warnings to those captured on the battlefield. Is this argument a red herring?

Mr. BENJAMIN. Yes, Senator, it is a red herring. I think there are many, perhaps, popular misconceptions about the *Miranda* rule. The *Miranda* rule does not apply to or regulate or restrict in any way what soldiers do on the battlefield or what intelligence officers do during intelligence interrogations. It is a rule of criminal procedure that says when a law enforcement officer conducts a custodial interrogation and when a person who is being interrogated makes admissions that the Government later wishes to offer in court, the person must receive the *Miranda* warnings up front.

Miranda does not apply when foreign officials are conducting interrogations. It was held in the embassy bombings case, presided over by Judge Sand, one of the very best judges in the Southern District, that *Miranda* applies when U.S. law enforcement officials are conducting interrogations overseas. But the FBI is trained to give *Miranda* warnings. They can give them. And I can tell you from my own experience as a prosecutor, lots and lots and lots of people waive their *Miranda* rights and make statements.

Senator FEINGOLD. Mr. Malinowski, would you like to comment on that?

Mr. MALINOWSKI. When I am asked this question, I always say that every experienced judge and prosecutor I speak to who has

handled these cases believes that that is a red herring, and we have heard from a judge and a prosecutor with far greater experience than I have. I think clearly the civilian system can handle these cases. When it has, it has succeeded. When we have used an alternative system, we have failed. That is a pretty clear track record.

Senator FEINGOLD. I thank you for that, Mr. Malinowski. Proposals for new preventative detention schemes have been put forward by some thoughtful, well-meaning individuals, including some of the witnesses here today. Some of these proposals have incorporated quite a few procedural safeguards, including a neutral decisionmaker and the right to counsel. Why doesn't the inclusion of these types of safeguards address your concerns about creating such a system?

Mr. MALINOWSKI. I think in theory you could continue to build procedural safeguards into the system until it looks virtually identical to our existing system of civilian criminal courts and military courts-martial, at which point it really does not look like Guantanamo anymore. But then what is the point? I mean, if you are going to do something that is very, very similar to what we already have, why go to the extraordinary trouble of creating a brand new system from scratch? And that is why every real proposal for creating a preventive detention system presumes such things as the defendant is not going to see or be able to confront some of the evidence that is being used to hold him potentially indefinitely, which I think inevitably leads to the kind of controversy that we want to avoid, the kinds of mistakes that end up haunting us, and the inevitability of a system that I think is unsustainable in the long term.

Senator FEINGOLD. Mr. Benjamin, do you want to comment on that?

Mr. BENJAMIN. Yes, I agree completely, and I think one of the great strengths of the existing system is its credibility and its adaptability. It is a system—and we speak of it as a "system" as if it is a monolith, but, of course, it is composed of judges and lawyers and agents, and it relies on statutes and case law and precedents and traditions that we have inherited from those who have gone before us and that have been adapted to deal with all of the changing circumstances that we confront. And the record of these cases in this particular area I think is particularly noteworthy for demonstrating that the courts do have the capacity in a credible, fair, reliable, and transparent way to handle these cases.

Senator FEINGOLD. Thank you very much.

Thanks, Mr. Chairman.

Chairman LEAHY. Thank you, Senator. And I could not help but think Judge Michael Luttig, who retired a few years ago to take a position in the private sector, was known as one of the most conservative judges on a conservative court, the Fourth Circuit. He was involved in the *Padilla* case a few years ago. He condemned shifting legal positions of the administration, which was a constantly moving position. And this, of course, involved an American citizen. He said the shifting and the moving has consequences "not only for the public perception of the war on terror but also for the Government's credibility before the courts in litigation ancillary to

that war." And he went on to say that this behavior in yielding to expediency left an impression that may ultimately prove to be at substantial cost to the Government's credibility. I mention that, but we could put in dozens of such quotes from judges across the political spectrum.

I thank you all for being here. Please, as you go through this, if you find there is something further you wanted to add based on questions, feel free to do so, and we will keep the record open for a few days for that purpose.

Thank you very, very much.

[Whereupon, at 11:33 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Kennedy Questions:

Questions for the Honorable John C. Coughenour

1. Do you think that the protections provided by the Classified Information Procedures Act are sufficient to allow for effective prosecution of terrorists without revealing classified information?

I do. The Ressam trial gave me an opportunity to apply the protections of the CIPA in a high profile terrorism case and in my estimation, the Act required the court to take substantial precautions regarding a wide range of material, of varying degrees of sensitivity. While it is not for me to pass judgment on classification decisions, it was clear that the Government is granted a wide berth under the Act for anything that, in its discretion, it deems classifiable.

2. At the hearing, you stated that detaining individuals for preventative reasons without a trial is fundamentally "un-American." Do you agree that the creation of a "national security court" in which there are lessened procedural protections for suspected terrorists could also pose a serious threat to American values?

Absolutely. The concerns I have about preventative detention are largely identical to those I have about a "national security court" with degraded procedural protections. Perhaps the fundamental tenet of our criminal jurisprudence is the presumption of innocence. The question you pose is whether we remain true to this commitment by presuming innocence with less than the full extent of our criminal process. I think not. When we hold the government to its constitutional obligation of avoiding unreasonable searches and seizures, or apprising suspects of their *Miranda* rights, or furnishing exculpatory material to the defense, we do so because these basic protections have been deemed inseparable from the presumption of innocence itself. Without them, "innocent until proven guilty" is but a platitude, and guilt may be nothing more than a *fait accompli*. When we are told that the threat of terrorism requires that we strike a different balance by withholding procedural protections long deemed necessary for "ordinary" crimes, it is another way of saying that suspected terrorists are presumed to be a little less innocent. Compelling as the need for public safety is and always has been, making this concession would betray our most fundamental of values.

3. Do you think that the creation of a parallel legal system with weakened protections for terrorism suspects would affect the public's view of the judiciary, as well as the view of America's judiciary in other countries? Is there a risk that the government would increasingly turn to the parallel track for more and more types of suspects and cases?

First, I think the kind of parallel legal system you suggest would negatively affect the American public's view of the judiciary. The newly created institutions would be perceived as mere tools of the political branches, and the message we would send as to the current Article III courts is that they offend those other branches at their own peril. Second, based on my work on legal reform in Russia, I think a parallel legal system would irreparably damage the perception of America's judiciary abroad. Russia, like so many countries today, is struggling to establish an independent judiciary after years of

authoritarian rule. My Russian colleagues marvel at how American courts enjoy the legitimacy they do without being beholden to political influence. The proposal you suggest would be seen for what it is: an abdication of principle for the sake of policy. Finally, I believe that sacrificing our constitutional ideals for the perceived exigencies of the moment would be a precedent that would be difficult to contain. You mention other types of suspects and cases; one might also ask why this practice could not spill out beyond the criminal law realm altogether. Once we decide that the solution to society's most challenging problems is to create new courts, the possible applications are virtually limitless.

4. How long would it take judges, prosecutors and defense attorneys to familiarize themselves with a new set of procedures that do not closely mirror those of either criminal or military courts, and how much of a trial-and-error period can reasonably be expected, particularly since the constitutionality of any such system would be vigorously contested?

Without knowing the exact nature of this new set of procedures, it is difficult to say. Frankly, change, in and of itself, is not the problem. Courts are constantly called upon to adjust to evolving circumstances. Whether it is new legislation from Congress, new interpretations of law or a changing landscape in which the law is applied, courts frequently have to make adjustments. The question you raise is how courts would cope with change of a more fundamental, systemic nature. I think there could be a significant trial-and-error period along with deleterious consequences. I say this not because I lack confidence in our judges, prosecutors and defense attorneys, but because asking those people to part ways with hundreds of years of accumulated experience and institutional knowledge could not be without a cost.

5. Do you think that we run the risk of weakening our existing justice system by creating a less rigorous alternative system?

I do. As I alluded to in Question 3, the first problem would be one of perception. If Congress sends the message that it lacks confidence in the courts we should be prepared for the public to reach the same conclusion. Secondly, I worry about a crossover effect between the parallel institutions you envision. Once we decide that our commitment to certain time-honored values is contingent and negotiable, it is difficult to see how those values could be upheld anywhere with the same rigor again. Institutions may be fractured and balkanized, but principles cannot.

1. *Do you believe that any changes to the Classified Information Procedures Act or other relevant statutes are needed to allow for effective adjudication of terrorism cases?*

In our recently-published study of the record of prosecuting terrorism cases in federal courts, written on behalf of Human Rights First, Richard Zabel and I examined the substantive and procedural statutes that are often invoked in such prosecutions. *See In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (Human Rights First 2008), available at http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf. As noted in our report, existing statutes and case law have generally proved adequate for the just and efficient adjudication of criminal terrorism cases without serious security breaches and without sacrificing rigorous standards of fairness and due process. This record of success reflects constructive action by Congress over the past 15 years (*e.g.*, in the adoption and refinement of the material-support statutes) as well as thoughtful and creative development of legal principles by the courts as they adapt to new situations and new challenges.

In particular, the Classified Information Procedures Act ("CIPA") has been successfully invoked in a large number of terrorism cases and has provided judges and lawyers with the tools necessary to safeguard the secrecy of classified information while also protecting the defendant's right to a fair trial. Nevertheless, in a few areas Congress may wish to consider modest amendments to CIPA.

For example, it may be advisable to amend CIPA so that the statute explicitly applies if the defendant seeks to obtain or offer witness testimony that could disclose sensitive national-security information. This scenario arose in the *Moussaoui* case and led to litigation in which the Fourth Circuit applied a CIPA-like solution even though CIPA did not technically apply. *See United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004). In our view, if Congress were to amend CIPA to cover this sort of situation, it should ensure that the amended statute includes a triggering mechanism such as a sworn affirmation or certification from a senior government official with responsibility for national security or intelligence. Such an affirmation or certification should state that the witness testimony would create a security risk at least equivalent to that posed by unauthorized disclosure of classified documents. Upon such a filing, an amended CIPA could provide the court with authority to use tools to help ensure that the sensitive information is protected without jeopardizing the defendant's right to a fair trial. Such tools could possibly include judicially-supervised depositions, use of pseudonyms, or the use of unclassified summaries in lieu of live testimony, as was done in the *Moussaoui* case.

Further, Congress may want to consider amending CIPA to provide for its application when a defendant proceeds *pro se*, as was the case at times in *Moussaoui*. In such a scenario, CIPA could expressly provide for standby appointed counsel with an appropriate security clearance to participate in proceedings under CIPA. Congress would need to draft this provision in light of the constitutional right to self-representation that was recognized in *Faretta v. California*, 422 U.S. 806 (1975), but we believe there is ample authority recognizing that this right is not unlimited and that standby counsel may discharge certain tasks when a defendant is proceeding *pro se*. *See, e.g., McKaskie v. Wiggins*, 465 U.S. 183 (1984) ("*Faretta* rights are also not infringed when standby counsel assists the *pro se* defendant in overcoming routine procedural or evidentiary obstacles to the completion of some specific task . . . . Nor are they infringed when

counsel merely helps to ensure the defendant's compliance with basic rules of courtroom protocol and procedure."); *United States v. Irorere*, 228 F.3d 816, 828 n.2 (7th Cir. 2000) ("When a criminal defendant decides to proceed *pro se*, it is generally advisable for the district court to appoint 'shadow counsel' to be available to assist the defendant if needed.").

Our report identifies several unsettled legal issues in areas unrelated to CIPA, but we believe it would be prudent for Congress to see how courts resolve these issues before considering the need for legislation.

2. *How long would it take judges, prosecutors and defense attorneys to familiarize themselves with a new set of procedures that do not closely mirror those of either criminal or military courts, and how much of a trial and error period can reasonably be expected, particularly since the constitutionality of any such system would be contested vigorously?*

Perhaps the best way to answer this question is to point to the dismal experience over the past six and a half years as the Bush Administration has sought to establish military commissions for the trial of accused terrorists at Guantanamo. Over that time, there has been abundant litigation at all levels of the federal court system, as well as dissension within the military command structure, but not a single completed trial at Guantanamo. Much of the delay has occurred as the courts have identified important defects in the military commission system and Congress and the Executive Branch have tried to correct those flaws. Whether the corrective measures are sufficient to cure the problems is as yet unknown. Further, because no trial has yet gone forward, it is impossible to predict how the lawyers and military judges at Guantanamo will be able to cope with the untested procedures that are presently in place, but the recent arraignment of Khalid Sheikh Mohammed and his co-defendants – in which a number of the defendants announced that they wished to proceed *pro se* – suggests that there will be continuing confusion and difficulty if these cases proceed.

Even if one were to look past the abysmal record of the Guantanamo military commissions, a new set of procedures would likely be challenged by vigorous defense lawyers at every available juncture. The reason is that defense lawyers would likely feel an obligation to test procedures that either individually, or as a system, have no record of reliability and judicial approval. Indeed, even a seemingly recognizable procedure might have questionable validity once it no longer exists in the same balance with other procedures that surround it in the long-established, well-developed framework of the civilian court system.

By contrast, one of the significant advantages of proceeding within the federal justice system is that it is established, stable, and largely predictable, with a reservoir of legal precedent and traditions that have been handed down over generations, as well as an experienced group of judges, prosecutors, and defense lawyers to guide the course of particular cases.

The issue of effectively training judges and lawyers in the procedures and practices of a new legal regime is a separate and important question. Federal judges and the lawyers who practice in federal courts spend many years, beginning in law school, immersing themselves in the detailed and nuanced provisions of the federal criminal rules of procedure and evidence, associated statutory provisions, and case law. Military judges and judge advocates practicing

before courts-martial also devote substantial portions of their careers learning the detailed requirements of the Manual for Courts-Martial. This commitment of time is critical for the participants in these proceedings to become proficient, and thus for the proceedings to be (and to be seen to be) fair and credible. The question's suggestion that judges and lawyers in a new court system would need merely to "familiarize" themselves with new rules and procedures has been one of the major defects of the military commissions, as it inevitably would be with a new court system created for these cases.

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Amos N. Guiora

Responses to questions from Committee members following the 6/4/2008 hearing entitled "Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System."

Question:

1) Did the Supreme Court's decision in Boumediene v. Bush, in ruling that the review procedures employed by Combatant Status Review Tribunals (CSRT) are inadequate and in noting among other deficiencies the inability of detainees to review or challenge the government's evidence or to have the assistance of counsel, give you pause about the wisdom of setting up yet another alternate legal regime?

Response:

The Supreme Court's decision in *Boumediene* articulated important principles regarding the right to *habeas corpus.* However, the decision did not address how or where to try individuals currently (and in the future) detained for suspicion of involvement in terrorism. With respect to the wisdom of proposing an alternative legal regime, my recommendation -- which is not made lightly-- is predicated on the fundamental requirement to preserve American judicial values, principles and morals.

The essence of my proposal is to ensure fair – and immediate – trials for the detainees, given the obvious illegality and immorality of the present regime (Guantanamo Bay, military commissions) and an institutional inability of Article III courts to provide immediate relief in jury trials (or even bench trials) for thousands of post 9-11 detainees.

But there are two important caveats to this proposal. First, we must create an institutional infrastructure to determine which detainees represent a present and/or future threat to America's national security using objective criteria. Second, classified information may be used only to bolster the prosecution's case for conviction. Classified information may not be used as a sole basis for a conviction. This is the fundamental objection to my proposal and without a doubt raises a significant constitutional issue. However, my proposal seeks to strike a balance between legitimate national security considerations and equally legitimate civil and political individual rights.

My proposal reflects the spirit of *Boumediene* in that it establishes a legal, practical proposal to what has been a difficult conundrum. While establishing alternative legal regimes should not be

lightly undertaken, current circumstances require "thinking outside the box" while respecting doing everything possible to maximize individual rights. The current situation is a "hybrid" between the traditional war and police paradigms and requires an alternative legal regime to maximize protection of both the state and the individual.

Boumediene, if anything, validates the need to develop a proper judicial solution to a regime of indefinite detention and basic violations of human rights. My proposal is in that spirit.

Question

2. In light of the Boumediene decision, please explain in more detail how you envision a national security court would actually work, specifically its legal structure. In what ways would the criminal rules and procedures differ from the current standards used in Article III courts, and what is your authority for asserting that that would be constitutional, particularly post-Boumediene? For example, the Supreme Court noted that one of the evidentiary deficiencies of the CSRT's is the lack of a substantive opportunity for detainees to confront witnesses because there are no hearsay limitations in these proceedings. How would criminal rules, such as the hearsay rule, differ in a national security court, from the standards used by Article III courts, but still be constitutional?

Response

This is, naturally, the heart of the issue and I welcome the opportunity to spell out in greater detail the essence of my proposal.

I envision a two-step process. The first step, akin to the traditional criminal law paradigm, includes interrogation (with *Miranda* rights guarantee), submission of charge sheet (subject to prosecutorial discretion), right to counsel (of the suspect's choice), and both direct and cross examination in open court of the evidence (according to Federal Rules of Evidence) submitted by the prosecutor.

The second step would occur if the prosecutor determined that available evidence was insufficient for a conviction and if classified information were available, then that classified information would be submitted to the court *ex parte*. But first, the prosecutor must determine that the information is reliable using a two-part test: that the source (human intelligence—HUMINET or signal intelligence—SIGINET) is reliable and that the information is valid, viable, reliable and preferably corroborated.

The court, in reviewing the information, will wear "two hats": one, judicial; the other, defense attorney. In doing so, the Court will cross-examine the representative of the relevant intelligence service to determine both source reliability and information validity, viability and reliability. The information can be used to bolster the criminal evidence, but it may not be the sole basis for conviction.

Because of the complexity in understanding intelligence information (as distinct from criminal evidence), I propose that the Foreign Intelligence Surveillance Act (FISA) Court be re-

constituted (requiring legislation) as a sitting Court (thereby expanding its authority and jurisdiction beyond issuing wire-tapping warrants). In addition—because of the number of detainees (even after the implementation of the previously recommended objective criteria mechanism for determining which detainees should be brought to trial and which should be released)—my proposal includes a recommendation that the number of judges who sit on the FISA court (as a sitting court) be significantly increased.

If the Court convicts a defendant, his appeal can be filed with the one of the United States Circuit Courts of Appeals.

Question

3. You propose that your "domestic terror courts" would be better than our Article III courts because they will allow the introduction of classified information in camera that would not be heard by either the defendant or his counsel. Especially in light of the recent Supreme Court decision in Boumediene v. Bush, noting detainees' inability to review and effectively challenge the government's evidence as one of the ways that the CSRT's are unconstitutional, wouldn't your proposal violate the defendant's confrontation rights under the Constitution?

Response:

My suggestion requires legislation enabling the introduction of classified information in addition to the available criminal evidence. As I state above, the classified information could only *bolster* the criminal evidence for conviction purposes. The proposed change affects the defendant's Sixth Amendment confrontation right, but—and the "but" is critical—indefinite detention that characterizes the current judicial regime clearly violates multiple basic constitutional rights.

Similarly, if defendants were to be brought before Article III courts (requiring trial by jury and limited to criminal evidence), the process would be excruciatingly slow (thereby violating the defendant's right to a fair and speedy trial) and would result in the release of detainees deemed to present a threat to America's national security (after the previously referred to screening process).

My proposal, albeit problematic and clearly requiring legislation, reflects a balanced approach that seeks to maximize individual rights while simultaneously protecting the public. The confrontation clause is a vitally important principle, as is the right to a fair and speedy trial. My proposal would enable both principles—subject to legislation—to be met while seeking to maximize both the rights of the individual and the rights of the public.

Answers to questions from Senator Leahy

1. Over the past several years, the administration has offered many competing estimates of how many released Guantanamo detainees have "gone back to the fight" or resumed militant activities against the United States, from as few as six to as many as 50. The claim of "at least 30" is just one of many, and, like all of the higher estimates, has not been backed by evidence.

   As far as I can tell, the source of this figure is a fact sheet distributed by the Pentagon in July, 2007, which states: "Our reports indicate that as of 2007 at least 30 former GTMO detainees have taken part in anti-coalition militant activities after leaving U.S. detention." The same document, however, suggests that the Pentagon is including in these estimates not just former detainees who have engaged in violence, but those who have "participated in anti-US propaganda or other activities." In this category, it cites, among other examples, the ethnic Uighur prisoners who the United States resettled to Albania and who did nothing more than complain to reporters about their treatment in Guantanamo. My understanding is that the Pentagon has acknowledged to journalists who followed up on this story that it was including in the higher estimates former detainees who engaged in the "hostile act" of speaking out about conditions in the camp.

   The same document only provides specific information about seven former detainees who allegedly engaged in violence after release. Earlier this year, the Pentagon submitted a new list to a member of Congress naming 11 former detainees who it claims have been killed or arrested in their home countries, and one who allegedly renewed his association with militant groups who is still at large. Even this list should be treated with caution, however. It cites detainees who were arrested or killed by security forces in countries like Russia, Morocco, and Turkey in circumstances that are not explained. Were these released prisoners at war with the United States when they were killed or captured, or engaged in an unrelated fight with their own governments? Should we rely at face value on reports from, say, the Russian security services in determining what actually happened in these cases?

   That said, I have no reason to doubt that some small number of released detainees have resumed (or perhaps commenced for the first time) violent, militant activities. If more detainees are transferred to their home countries as part of a closure of Guantanamo, it is impossible to guarantee that none will engage in violence. In discussing this danger, however, I would urge Senators not to cite any particular numbers, unless they are certain that those numbers are backed by hard evidence that the Congress has been able to examine. And I would suggest that the danger must be weighed against the likelihood that maintaining Guantanamo aids al Qaeda in recruiting more fighters for terrorist acts.

2. The Boumediene decision does not speak directly to whether a national security court would be constitutional. It does suggest to me that any new system designed to authorize the detention of terrorism suspects would have to provide those suspects

with a high degree of due process, including the right to confront the evidence being used against them. If a national security court were established with such protections, it might survive constitutional scrutiny, but it would also look so much like existing civilian courts that I wonder why the government would want to go to the trouble of creating it.

What is certain is that any new national security court would be subject to the same legal scrutiny and challenges as the new, experimental system the administration created in Guantanamo. However the Supreme Court would ultimately rule, those challenges would likely take years to play out, just as they have with military commissions and the denial of habeas corpus. Seven years after the 9/11 attacks, I don't think the United States can afford to waste more time creating yet another new legal regime for dealing with suspected terrorists, especially when its existing civilian courts have risen to the challenge successfully whenever asked.

Answers to Questions by Senator Kennedy

1. If the government has a choice between going to the trouble of prosecuting suspected terrorists before a federal court, or processing them through a system that grants defendants far fewer procedural safeguards and requires only a showing that a defendant may be dangerous – then the government will be tempted to use the easier system as often as possible, even in cases where prosecution is a viable option. There would be several negative consequences. First, we would lose the opportunity to put terrorists away with the legitimacy and finality that federal courts provide. Second, a parallel system with lower evidentiary standards would allow the government to make mistakes (for example, believing unreliable intelligence, or imprisoning innocent people) that would be uncovered and corrected by the federal courts. Those mistakes, once uncovered, would do further damage to America's counter-terrorism efforts and its reputation as a nation of laws. Finally, a parallel system would inevitably face legal challenges and criticism and could collapse under those pressures, just as the Guantanamo system appears to be doing. If so, then the government might face the difficult prospect of having to release detainees processed through it, even those who could have been prosecuted successfully in federal court.

2. The creation of a new judicial system would be a vote of no confidence in our established judicial institutions, even though those institutions have dealt with terrorism cases successfully whenever asked. It would be a rejection of traditional American notions of justice that have survived far greater threats to America's national security. It could also make it much harder for the United States to promote the rule of law effectively around the world. The United States has traditionally opposed the use in other countries of emergency laws and special courts that afford suspects decreased procedural protections. I imagine that the U.S. government under any administration would object to an American citizen being brought before such a court in a foreign country, and reject any argument that the national security concerns of that country required such treatment.

KENNEDY QUESTIONS

1. In your testimony, you suggested that it was difficult to determine the necessity of a national security court system without a better understanding of the number of current detainees who could not be prosecuted or detained under existing criminal or military law. How would you propose that this information be provided to Congress in order to inform our consideration of detainee policy?

As a starting point, the executive branch should make far more information about detainees available both to Congress and to the public at large. I see no good reason why the executive branch cannot specifically identify the current detainee population at Guantanamo, as well as the subset of those detainees it believes to be amenable to criminal trial and the subset of those detainees it has cleared for release or transfer. This information alone would identify the class of detainees for whom, in the administration's judgment, an administrative detention apparatus—whether under the laws of war or some other framework—is necessary.

Congress would, of course, then have to evaluate whether the policy problem posed by these detainees is as severe as the administration believes it to be—that is, whether the administration is correct in its assertion that these detainees cannot either be prosecuted for war crimes or safely released. This inquiry would require additional information, such as the threat assessment associated with each detainee and any evaluation of the evidence against him for criminal purposes. This sort of information probably cannot be released publicly. That said, I doubt that an executive branch wishing to work with Congress on solving the problem of detainees could not develop a method of sharing it with the legislature. None of this, after all, is grand jury information, and the executive routinely shares classified material with appropriate congressional committees.

2. Given that you describe these individuals as people whom military officials believe pose a threat but cannot detain under the law of war or prosecute using evidence that's acceptable in a court of law, what statutory criteria would make these reviews amount to anything more than rubber stamps for indefinite detention? Given the severe limitations on the ability of detainees to obtain evidence regarding their detentions, what types of new evidence do you envision coming to light that would lead to the release of a detainee after the initial determination is made?

First, a point of clarification: I have never doubted that the United States military can detain enemy combatants under the laws of war. The authority of a warring government to detain the enemy is a matter of clear law, one the Supreme Court has explicitly acknowledged in both the *Hamdi* and *Boumediene* decisions. My argument is not that Guantanamo detainees, and future detainees like them, cannot be treated under the laws of war, but rather, that the Geneva Conventions fit them only awkwardly, having been designed for a type of warfare with fundamentally different premises from those of the current conflict. The traditional law of war detention anticipates, for example, a reasonably forseeable end of hostilities that is, in this context, something of a fiction.

Detentions in the current conflict differ in other ways as well, as I explain at length in my book, *Law and the Long War*:

> In the criminal arena, the law serves a punitive purpose, and it therefore requires the government to prove beyond a reasonable doubt all material facts it alleges against an individual to support his incarceration. Detention of a combatant in wartime, by contrast, imputes no wrongdoing to the detainee, yet the laws of war also require far less by way of establishing his amenability to detention in the first instance than does the criminal law. In fact, the laws of war generally presume that there exists little or no doubt that a captured enemy fighter is, indeed, a captured enemy fighter. This premise, in the context of the war on terrorism, is simply false. Detentions in the current conflict are rife with factual ambiguity and uncertainty—precisely because of the irregularity of the battles and the contempt Al Qaeda harbors for rules of warfare. . . . Indeed, the laws of war presuppose detentions to be a temporary incapacitation of the fighters until the warring parties make peace and arrange their repatriation. No such presumption makes any sense here either.

My point, in short, is not that these detainees are individuals whom the military "cannot detain under the law of war," just that the laws of war don't provide a legal framework effectively tailored for the situation at hand and that a well-drawn statutory framework could serve both security and humanitarian objectives better.

That said, I do believe that one feature that our current conflict shares with traditional warfare is the necessity of extra-criminal detention of some kind. Many of the detainees at Guantanamo have plausibly been designated enemy combatants and pose a significant danger to national security, yet may not have committed war crimes or violated U.S. laws—at least as the law stood in 2001 and 2002. Still others may have committed such crimes but may not be prosecutable under the evidentiary standards that prevail even in military commissions. For these classes of detainees, defining appropriate statutory criteria for detentions is—as your question implies—critical to making judicial review more than a mere rubber-stamp procedure.

I have never sought to draft legislative language embodying these criteria, and I cannot pretend to do more than lay out principles that might guide such a project. In my view, however, those principles would hybridize elements of the laws of war, the criminal law, and importantly, the law of mental illness—which authorizes non-criminal detentions in certain instances on an explicitly preventative basis.

Such a regime, which I lay out in more detail in Chapter 6 of the book, would include elements along the following lines:

(a) The government would bear the burden of proof of establishing the propriety of a detention.
(b) It would make this showing in a contested and adversarial process in which the detainee has access to competent counsel.
(c) That counsel would have access to all of the evidence against his or her client as well as evidence that tends to exculpate the client.
(d) The government would be obliged to prove that the detainee is either a member or has a significant degree of affiliation with Al Qaeda or some other foreign entity against whom Congress has authorized the use of military force

and that the detainee poses a danger to the United States that cannot be neutralized by means short of detention.

(e) The reviewing judge would evaluate whether the government has met its burden using all evidence that would be probative to a reasonable person and would authorize the detention if and only if he or she were satisfied that it had.

Regarding the second part of your question, under such a statutory regime the "severe limitations on the ability of detainees to obtain evidence regarding their detentions" to which you refer would no longer exist. Detentions from the outset would benefit from a fuller examination of the relevant evidence, one in which detainees had a meaningful ability both to attack the government's case and to present evidence of their own. The result would be more accurate and fairer determinations.

Still, it is essential that the court authorizing each detention retains jurisdiction over it—and that the government remains under some burden to regularly justify the continued necessity of detention. The reason, quite simply, is that circumstances change, and new information may come to light. Particularly in cases involving intelligence data in an ever-shifting conflict, keeping the record open can offer an important stop-gap against error. And critically, not all new evidence that might trigger a release from U.S. custody at the review stage needs to be evidence about the detainee himself. Certain foreign governments, notably Saudi Arabia, have grown willing and able to take responsibility for their nationals as the war on terrorism has worn on. The sharp decline in the Guantanamo population suggests that the necessity of detention is not a binary judgment but one that evolves over time. In a properly designed system, attorneys for detainees ought to be able to argue both that new evidence casts doubt on earlier detention judgments and that new circumstances make continued detention unnecessary.

LEAHY QUESTIONS

1. Did the Supreme Court's decision in *Boumediene v. Bush*, which, in ruling that the review procedures employed by CSRTs are inadequate, noted among other deficiencies the inability of detainees to review or challenge the government's evidence or to have the assistance of counsel, give you pause about the wisdom of setting up yet another alternate legal regime?

No. To the contrary, *Boumediene* reinforces my belief that we need a new legal apparatus to handle war on terrorism detentions. Precisely because the CSRTs provide such a weak front-end system of review, the justices showed them little deference. They threw open the federal courts for habeas corpus petitions by Guantanamo detainees to ensure that appropriate judicial review of detentions was available. But *Boumediene* left open such important questions as what standards courts should apply, which side bears what burdens, and how to handle sensitive classified information.

The purpose of the legislation I envision is to correct the central malady the court found in *Boumediene*: the absence of a rigorous review system in which courts might repose confidence.

Importantly, nothing in *Boumediene* questions the authority of Congress to create a detention regime outside of the criminal justice system. In fact, the Court presumed precisely the opposite: that such a detention system, with appropriate review, was lawful. The problem the court found with the CSRTs was not their status as an alternative detention regime, but the protections they offered detainees both substantively and procedurally. The regime I advocate would not suffer from these defects. It is the regime of which the Court in *Boumediene* complains that the CSRTs fall short.

2. In light of *Boumediene*, explain in more detail how you envision a national security court would actually work, specifically its legal structure. In what ways would the criminal rules and procedures differ from the current standards used in Article III courts, and what is your authority for asserting that that would be constitutional, particularly post-*Boumediene*? For example, the Supreme Court noted that one of the evidentiary deficiencies of the CSRTs is the lack of a substantive opportunity for detainees to confront witnesses because there are no hearsay limitations in these proceedings. How would criminal rules, such as the hearsay rule, differ in a national security court, from the standards used by Article III courts, but still be constitutional?

The principal function of the tribunal I envision would be to review detention judgments, not to conduct criminal trials. Such a tribunal might also replace the existing military commissions to try those detainees amenable to prosecution for war crimes, but it is important to keep these functions distinct.

Let me address the structure of the detention function first. Modeled on the FISA court, which now authorizes surveillance for security purposes, the court would integrate features from both the military and civilian law enforcement traditions. Crucially, it would put detentions in the hands of judges with all the prestige of the federal court system and independence from the executive branch, yet with particular expertise applying rules designed to protect classified information and manage legitimate security concerns.

To pass public and judicial scrutiny, any legislative detention scheme must incorporate a core set of procedural safeguards that are absent from the CSRTs. These include an impartial fact finder; legal counsel cleared to see all classified evidence (in contrast to the "personal representatives" of the CSRTs, who lack legal training and are not charged with zealously defending their clients); a meaningful opportunity for the detainee to respond to evidence against him; a record explaining and justifying the court's detention judgments, available to the public and press to the maximum extent possible; and continuing jurisdiction by the federal courts that would force the government to periodically argue for the continued necessity of detention.

However, given the difficulty of using evidence collected in the rough-and-tumble of warfare, some deviations from traditional criminal procedures will be necessary for detentions. I describe these in my book as follows:

> The law should bar the Court considering a detention from admitting statements obtained by torture or conduct just short of it. But beyond that, probative material—even hearsay or physical evidence whose chain of custody or handling would not be adequate in a criminal trial—ought to be fair game. While the government should carry the burden of proof and that burden should be relatively exacting in comparison with combatant detentions under the laws of war, the rules should not preclude the

government from using certain intelligence data that it could never introduce in federal court. Rather, they should permit the use of secret material, attacked in closed session by the detainee's counsel, and they should be open to all evidence probative to a reasonable person.

Boumediene presents no obstacle to this sort of detention arrangement. To the contrary, it assumes that some extra-criminal detention authority is legitimate, and the procedural protections I would grant to detainees considerably exceed those the court required. As the scheme I outline would invite, not limit, judicial review, it seems fully compatible with *Boumediene*.

To the extent this court will also serve as a trial forum, its constitutional status is admittedly trickier. Still, I believe Congress has latitude to create a tribunal that offers more flexibility than the federal courts offer in criminal cases. Such a tribunal should draw its legal authority from the line of Supreme Court precedents upholding military commissions and their deviations from civilian court trial norms in the prosecution of war crimes. As such, the tribunal in question should have jurisdiction only over war crimes and only over unlawful enemy combatants. At the same time, it should carefully incorporate certain civilian trial elements both to make the trials as fair as possible and to invest those relaxations of conventional procedural rules that are necessary with the public legitimacy of federal court trials. In broad strokes, I believe a federal judge should preside over these cases, which should proceed according to procedural rules broadly similar to those authorized under the Military Commissions Act. Convictions should be appealed directly up the appellate ladder.

Again, I don't believe that *Boumediene* or *Hamdan* (which dealt directly with military commissions) pose a substantial barrier to such a trial system. Indeed, I proposed this trial mechanism in my book specifically anticipating the *Boumediene* decision and arguing *against* relying in any way on Guanatanamo's insulation from federal court jurisdiction to shield it from constitutional scrutiny. The Supreme Court has upheld military commissions in the past and strongly implied in *Hamdan* that, with an appropriate act of Congress, it would regard them as proper now, too. The Court's having said all this, it would be exceptionally odd for it then to object to tribunals modeled on traditional military commissions yet with procedural protections *added* to make them fairer and more like regular courts.

3. In your testimony you based your support for the creation of some form of national security court in part because it would "put detentions in the hands of judges." What would be the extent of the role of judges in this new court system? Would they assume some of the responsibilities of defense counsel in reviewing classified material? Do you believe that this would be constitutional?

The role of judges in the detention system I envision would be to decide whether the government has met its burden of establishing that a given detainee meets the statutory threshold for detention under rules laid out by Congress. Judges would, furthermore, decide whether the system itself comports with constitutional requirements. They would *absolutely not assume any of the responsibilities of defense counsel.* Defense counsel would play the role of defense counsel and would have access to—and a full opportunity to rebut—all of the evidence against their clients.

4. Do you believe that preventive det ntion n ds to be authorized in order to

allow interrogation of detainees without lawyers? If so, and again in light of the *Boumediene* decision noting the detainees' failure to have counsel as one of the deficiencies of CSRTs, you believe that interrogation without counsel would be constitutional?

Intelligence gathering, in my opinion, cannot on its own justify a preventive detention. As I have stated above, the proper basis for any administrative detention is that a detainee poses an individual, prospective security threat based both on his affiliation with a specific enemy designated by Congress and on his own personal commitment to fighting the United States. Once an individual is deemed subject to detention under that standard, however, intelligence agencies should not be barred from interrogating him to glean information he may possess about fellow terrorists and their plots.

I do not, however, believe in restricting access to lawyers. Detainees, in my judgment, should be granted counsel to advise them about their detentions and to assist them in challenging those detentions. The one exception to this rule is that there may need to be, in certain instances, latitude to defer access to counsel by some high-intelligence-value detainees for some period of time. As I put it in the book:

> It is, in my judgment, perfectly reasonable for the CIA to nab someone abroad in a secret intelligence operation—or to obtain custody of a suspect from some foreign intelligence service—and then give itself a little time to find out what he knows. This was normal fare during the Cold War; it's a part of what a clandestine service does. It is not reasonable, however, for the agency to operate a parallel Guantanamo, a detention system meant to skirt the normal rules of either warfare or counter-terrorism. I don't pretend to know what the outer time limit should be; any fixed period of time is ultimately arbitrary. But Congress ought to impose one so that the United States has only a single system for long-term detentions and does not run "secret prisons" at "black sites" around the world.

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OPENING ARGUMENT FEBRUARY 27, 2007

For the good of the war on terrorism, the United States needs to create a National Security Court to try enemy combatants.

BY STUART TAYLOR JR.

The Case for a National Security Court

This problem is one that only Congress can solve: how to handle appeals by foreigners who are detained indefinitely as enemy combatants by U.S. forces abroad but who claim to be innocent civilians. Despite two new laws over the past 14 months, Congress has not yet devised a process that is either effective in catching and incarcerating bad guys or fair in the exacting eyes of world opinion.

The justices cannot solve this problem without unseemly gymnastics, because current law presents them with two bad alternatives. The first would be to uphold the sharp restrictions on federal judicial review of appeals by militarily detained terrorism suspects that Congress imposed in the October 2006 Military Commissions Act. That's what a sharply divided three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit did on February 20, in *Boumediene v. Bush*.

But as my December column details, the MCA, even if constitutional, is neither fair to detainees nor credible to world opinion. It is thereby self-defeating, because it makes it harder to get other nations to help us get our hands on bad guys in the first place.

For these reasons the justices may well reverse the D.C. Circuit and strike down the relevant MCA provisions. Such a decision could, if written broadly, give every suspected terrorist captured anywhere in the world a historically unprecedented federal constitutional right to file a habeas corpus petition in federal district court demanding legal representation, release, a ban on interrogation, and/or nicer conditions of confinement. Such an outcome might (or, in these times, might not) satisfy world opinion.

But it might also make it unduly hard to keep bad guys locked up and to get information from them, by inviting disruptive and costly judicial interference in military decisions that most judges are ill-equipped to second-guess. Who would decide, for instance, whether terrorism suspects newly captured abroad, who may know of planned attacks or the location of their confederates, immediately get *Miranda* warnings and lawyers, who will tell them to answer no questions?

Consider a published boast (in *Mother Jones*) by Michael Ratner, head of the left-leaning Center for Constitutional Rights, which has coordinated the legal representation of hundreds of detainees at the military's Guantanamo Bay prison camp: "We have over 100 lawyers now from big and small firms working to represent these detainees. Every time an attorney goes down there, it makes it that much harder [for the U.S. military] to do what they're doing. You can't run an interrogation ... with attorneys. What are they going to do now that we're getting court orders to get more lawyers down there?"

Should detainees, who may end up being released, get access to sensitive national security secrets that are arguably relevant to their cases? Should their lawyers? Should such secrets be aired in public proceedings?

Consider the list of almost 200 unindicted co-conspirators, including the then-obscure Osama bin Laden, that prosecutors in the 1995 trial of 11 subsequently convicted Islamist terrorists were legally required to send to defense counsel. "That list was in

downtown Khartoum within 10 days," U.S. District Judge Michael B. Mukasey of Manhattan, who tried the case, recalled in a recent panel discussion. "And he [bin Laden] was aware within 10 days ... that the government was on his trail."

In another judge's case, Mukasey recalled, "there was a piece of innocuous testimony about the delivery of a battery for a cellphone"; this tipped off terrorists to government surveillance "and as a result [their] communication network shut down within days and intelligence was lost to the government forever, intelligence that might have prevented who knows what." Yet another cost of the criminal-justice approach: For 11 years, federal marshals had to provide 24-hour protection to the two judges.

Should a Marine sergeant be pulled out of combat in Afghanistan and flown around the world to testify at a detention hearing about when, where, how, and why he had captured the detainee? What if the Northern Alliance or some other ally made the capture? And should the military be ordered to deliver high-level Qaeda prisoners to be cross-examined by other detainees and their lawyers?

In our criminal-justice system, judges are trained to follow precedents that tilt against the government on such questions. The process is appropriately designed to avoid wrongful convictions in ordinary criminal cases by guaranteeing defendants elaborate procedural protections and full disclosure of all possibly relevant evidence.

But the question whether to detain a suspected foreign terrorist calls for striking different balances. It's one thing to err, when in doubt, on the side of releasing a burglary suspect, or a suspected tax cheat, mobster, or even murderer. It would be something else to err on the side of releasing a man who might then mass-murder dozens, hundreds, or thousands of innocent people, possibly with a chemical, biological, or nuclear weapon.

If our judges were all as good as Mukasey—who spanked the Bush administration in 2003 for its lawless, long-term, incommunicado imprisonment and interrogation of suspected terrorist Jose Padilla—this country might not face much risk of judicial insensitivity to national security concerns.

But some other judges have been so reflexive in applying the criminal-justice mind-set, plus impossibly vague international human-rights standards, as to suggest that review of military detentions and trials should be *very* tightly constrained by congressionally specified rules and done by experts.

Congress moved in this direction in both the December 2005 Detainee Treatment Act and the October 2006 MCA. But as noted earlier, Congress went too far.

Even Andrew McCarthy, a conservative expert who sees the current process as a good one, admits that it has failed in the "imperative to demonstrate to national and international audiences that it was capable of dealing fairly and expeditiously with alien combatants," partly because of the "poor performance of the executive branch."

McCarthy, who once prosecuted big terrorism cases and is now director of the Center for Law and Counterterrorism at the Foundation for Defense of Democracies, adds this: "If other nations, unwilling to prosecute and sufficiently punish terrorists themselves, become similarly unwilling to extradite them to the United States due to what they regard as a lack of fundamental fairness and independence in the prospective trial proceedings, it will be cold comfort indeed that those proceedings are perfectly adequate (even exemplary) under our Constitution and laws."

He thinks the best solution is for Congress to create a new National Security Court independent of the executive branch. Other leading experts agree. They include moderate Democrat Neal Katyal, the Georgetown law professor who (much to McCarthy's regret) won the Supreme Court ruling last June that President Bush's military commissions were illegal.

These and other experts disagree on the difficult details. But most agree that the new court should be staffed by already serving federal judges from around the country, to be chosen by the chief justice based on their fitness for the assignment. The judges would take time from their regular duties to review military detentions, plus any war-crimes convictions by the

congressionally reconstituted military commissions.

Some see the 29-year-old Foreign Intelligence Surveillance Court as a model. It hears (in secret) requests for warrants to intercept communications from or to search through the possessions of suspected international terrorists and spies. National Security Court judges would become expert in assessing the security costs of requiring various procedural protections for detainees.

"Right now, these cases are heard by different courts, with different defense lawyers and different prosecuting attorneys," Katyal says. "None of them are really repeat players; none of them have the incentive to moderate their claims in order to build credibility. Creating a National Security Court, with repeat-player lawyers and judges, will change the entire dynamic, and help avoid the excessive rhetoric that has characterized both sides in the war on terror. It would also send a signal to the world that we have a serious process in place, one that we would feel comfortable applying to our own citizens."

Many libertarians and human-rights activists, on the other hand, would settle for nothing less than the full panoply of protections afforded to ordinary criminal defendants. They should be careful what they wish for. As McCarthy points out:

"Enemy combatants are often in a position to be killed or captured. Capturing them is the more merciful option, and making it more difficult or costly would almost certainly effect an increase in the number killed."

U.S. Senate Judiciary Committee
Hearings on "Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System"
June 4, 2008
Testimony of James J. Benjamin, Jr.

Mr. Chairman, members of the Committee, thank you for the opportunity to be here this morning. You have asked me to talk about a report on terrorism prosecutions that I co-authored along with my law partner and close friend, Richard Zabel, who is also present here this morning. I will outline the findings of our report, and I ask that the executive summary of the report, as well as the report itself, be included in the record.

Rich and I practice law together at Akin Gump Strauss Hauer & Feld in New York. Our area of expertise is white-collar criminal defense. We are not academics; we are not policy experts; and we do not litigate terrorism cases ourselves. But between us, we spent more than 13 years as federal prosecutors in the Southern District of New York. We have considerable experience investigating and trying cases in federal court, and over the years, we have developed a thorough understanding of the way that the federal criminal justice system functions on a practical, everyday level. We also have a deep respect for our nation's system of justice, which in so many ways represents the very best of our cultural traditions. And of course, like so many millions of Americans, we are deeply concerned about the threat posed to our nation by international terrorist organizations.

About a year ago, Human Rights First, a longstanding pro bono client of our firm, approached Rich and me and asked us to undertake a comprehensive study of the capability of the federal courts to handle international terrorism cases. Last week, we published the results of that study, entitled *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts.* Human Rights First has provided the report to the members of this Committee and it is available

on the HRF website. Although Akin Gump is proud of the firm's commitment to pro bono work, the views expressed in our report are those of Rich and myself and of Human Rights First; they are not the views of Akin Gump as a whole or of other Akin Gump attorneys.

I want to say at the outset that, while Rich and I are proud to have served as prosecutors in the federal system, we certainly acknowledge that the system is not perfect. It sometimes stumbles, and terrorism cases have, in some instances, posed significant strains and burdens on the justice system. This was especially true in the 1990s, when many of the issues that are presented in terrorism cases were being litigated and resolved for the first time. And I also want to make clear that we don't believe the criminal justice system by itself is "the answer" to the problem of international terrorism. Terrorism is a complex problem, and in combating it the government must have at its disposal the full range of military, intelligence, diplomatic, economic, and law enforcement resources. When armed conflict is necessary, there can be an important role for the military justice system and for military detention under the law of war.

We prepared *In Pursuit of Justice* in the hope that we could make a contribution to the important public debate about how best to prosecute and punish individuals suspected of complicity in terrorism. As members of this Committee are well aware, in recent years some have argued that terrorist criminals should be prosecuted outside of the civilian court system, either in special military commissions or in an entirely new "national security court." A significant premise of these arguments is that the traditional court system is not equipped to handle terrorism cases. In our report, we set out to test that premise. After all, it is no small thing to dramatically reshape the justice system, creating a parallel system from scratch. There are obvious advantages to sticking with the existing court system, unless, of course, it is not up to the job. In fact, however, our extensive review of international terrorism cases in the federal

criminal justice system points to the opposite conclusion: over the years, the federal system has in general capably handled challenging terrorism cases without compromising national security or sacrificing rigorous standards of fairness and due process.

I want to say a few words about how we went about this study. First and foremost, we approached this project from an empirical perspective. We focused on terrorism that is associated – organizationally, financially, or ideologically – with self-described "jihadist" or Islamist extremist groups such as al Qaeda. Since the late 1980s, the government has brought scores of criminal prosecutions against defendants who are alleged to have been involved in Islamist terrorism. In preparing our report, we set out to identify and examine every case involving Islamist terrorism that has been prosecuted in federal courts in recent years.

This was a challenging task because there is no single, definitive list of terrorism prosecutions. The Justice Department itself has two separate lists, with different numbers, and the Administrative Office of the U.S. Courts has yet a third list. In order to come up with our own list, we spent months combing through the available government reports plus court records, news accounts, and other sources. Based on that effort, we identified 123 international terrorism cases that have been brought since the 1980s. It is likely that we missed some cases, but we believe we were able to generate a reasonable body of data that permits us to draw sound conclusions about the efficacy of the criminal justice system.

Our data set of 123 cases includes the celebrated mega-trials from before 9/11, which were mainly (but not exclusively) brought in the Southern District of New York (*e.g.* the first World Trade Center bombing trials, the prosecution of Sheikh Rahman and his co-conspirators; the Philippine airline "Bojinka" case; the Embassy Bombings trial; and the trial of Ahmed Ressam, the so-called "Millennium Bomber") as well as a range of cases prosecuted in federal

courts across the country since then. The post-9/11 cases include the prosecutions of Richard Reid and Zacarias Moussaoui, numerous prosecutions for material support of terrorist organizations (including, for example, the *al-Moayad* case in Brooklyn, the Lackawanna Six case from upstate New York, and terrorist financing cases such as the *al-Arian* case in Florida and the Holy Land Foundation case in Texas). We also include cases brought under a variety of criminal statutes, including generally applicable statutes such as credit card fraud, false statements, and the like, so long as there was something in the public record that demonstrated a link to Islamist terrorism. Our list of 123 cases, and a more detailed explanation of how we identified the cases, is contained in the report.

Once we identified the universe of cases, we proceeded to examine them in detail. We looked through the docket sheets, talked to lawyers – both prosecutors and defense attorneys – who participated in some of those cases, read extensively what has been written about the cases in the media and in scholarly journals, and built a database that captures important information about each case. Our report contains data in the form of charts and graphs categorizing the post-9/11 cases.

For each of these cases, we undertook a detailed examination of the key legal and practical issues that were presented. In particular, we focused on the issues that critics have suggested impede effective prosecution of terrorism suspects: the scope of the substantive law; securing the defendant's presence in court; detention of suspects; dealing with classified or other sensitive evidence; the government's discovery obligations; Miranda and the right to remain silent; evidentiary and speedy trial issues; sentencing; and the physical safety of trial participants. Each of these issues has its own chapter in our report, but in summary, our findings are the following:

- Prosecutors have invoked a host of specially-tailored anti-terrorism laws as well as longstanding, generally applicable federal criminal statutes to obtain convictions in terrorism cases, and that the decision not to prosecute has rarely, if ever, been based on the unavailability of a criminal statute under which to do so. The federal criminal laws aimed at terrorism now reach conduct that may be merely preparatory to violent incidents, for example the material support statutes, as well as criminal offenses committed abroad through statutes with extra-territorial reach. In addition to terrorism crimes, prosecutors have been able to successfully charge terrorist suspects with criminal offenses not directly related to terrorist activity, such as immigration violations, false statements, credit card fraud and the like.

- Obtaining jurisdiction over terrorist defendants has not posed a significant impediment to prosecutions. Courts have consistently exercised jurisdiction over defendants brought before them, even those defendants apprehended by unconventional or forcible means. There is language in some lower-court cases suggesting that a federal court might not have jurisdiction over a defendant if U.S. officials participated in conduct that is "shocking and outrageous," but no case has ever been dismissed on this ground.

- Federal authorities have exercised a wide range of powers, through existing criminal statutes and immigration laws, including the material witness statute, to detain and monitor suspects in the vast majority of known cases.

- Courts have used the Foreign Intelligence Surveillance Act (FISA) and the Classified Information Procedures Act (CIPA) successfully to balance the need to protect national security information, including the sources and means of intelligence gathering, with defendants' rights to receive exculpatory evidence and other discovery. CIPA outlines a comprehensive process for dealing with classified evidence and our extensive case review uncovered not a single terrorism case in which CIPA procedures failed and a serious security breach occurred.

- *Miranda* warnings are not required in battlefield and non-custodial interrogations or interrogations conducted purely for intelligence gathering purposes, and the *Miranda* issue has not had significant implications for criminal terrorism prosecutions.

- The Federal Rules of Evidence, including rules that govern the authentication of evidence collected abroad and admissibility of hearsay evidence, have provided a common-sense, flexible framework for guiding admissibility decisions.

- The Federal Sentencing Guidelines and other applicable sentencing laws prescribe severe sentences for many terrorism offenses, and experience shows that terrorism defendants have generally been sentenced to lengthy periods of incarceration.

- With some exceptions, courts have generally been able to assure the safety and security of trial participants and observers.

We recognize that the project we have undertaken is large and that the views on this subject are charged and will vary. We do not profess to have found definitive answers, only to have undertaken a serious and objective review of the subject. We hope our findings and analysis are of value in the ongoing debate about how best to reconcile our commitment to the rule of law with the imperative of assuring security for all Americans.

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In an effort to provide a more complete description of *In Pursuit of Justice*, we offer the following executive summary of the report:

Executive Summary

In attempting to eradicate the threat of international terrorism by Islamist extremists, our country faces enormous challenges. Among the more difficult problems is what to do with individuals who come into the custody of the U.S. government and who are suspected of complicity in terrorist acts. Some detainees may properly be held under the law of war for the duration of active hostilities to prevent them from returning to the field of battle, and without any effort by the government to file charges or impose punishment. However, for some suspected terrorists, military detention is not appropriate and, even if it is, the government may find it both desirable and necessary, at some point, to bring formal charges in the civilian court system with a view toward imposing punishment.

Recently, some commentators have proposed an entirely new "national security court" to handle some or all international terrorism prosecutions. Although proposals vary, many offer novel features that would give the government more power and make it easier for the government to secure convictions. However, creating a brand new court system from scratch would be expensive, uncertain, and almost certainly controversial. Indeed, there is the risk that

the very same issues now debated simply would be transferred to a new arena for resolution. In our view, before dramatic changes are imposed—such as the creation of an entirely new court or new detention scheme—it is important to take a step back and evaluate the capability of the existing federal courts and the existing body of federal law to handle criminal cases arising from international terrorism. Given the strength and vitality of our existing court system—and the fact that it reflects in many ways the best aspects of our legal and cultural traditions—there are obvious advantages to relying on the existing system, provided that it is up to the job.

In *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, available online at www.humanrightsfirst.org, Richard Zabel and I set out to analyze the capability of the federal courts to handle criminal cases arising from international terrorism. *In Pursuit of Justice* is based heavily on the actual experience of more than 100 international terrorism cases that have been prosecuted in federal courts over the past fifteen years. Based on our review of that data and our other research and analysis, *In Pursuit of Justice* concludes that, contrary to the views of some critics, the court system is generally well-equipped to handle most terrorism cases. A high-level summary of our analysis follows immediately below.

Discussion of Data Collection

In preparing *In Pursuit of Justice*, we sought to avoid abstract or academic approaches, focusing instead on the rich body of actual experience with terrorism cases in the federal courts. We sought to identify all cases arising from terrorism that is associated—organizationally, financially, or ideologically—with Islamist extremist terrorist groups like al Qaeda. With that as our focus, we combed through a number of sources in an effort to identify all such cases that have been brought in federal courts since 9/11, as well as the most significant cases from the 1990s. To the extent that materials were publicly available, we obtained docket sheets, motion

papers, and judicial opinions from these cases, as well as press accounts and other information, in an effort to understand the major issues that were presented in each case. Although our data collection effort was not foolproof and, indeed, was almost certainly incomplete, we believe that we gathered a reasonable set of data that permits us to draw reasonable conclusions about the way the court system has dealt with a whole array of substantive and procedural issues in terrorism cases. In Appendix A of *In Pursuit of Justice*, we include a list of all of the terrorism cases that we have identified and examined.

Substantive Law

Over the years, and especially since 1996, Congress has enacted a host of anti-terrorism laws. Prosecutors have successfully invoked many of these specially tailored terrorism laws to obtain convictions in all manner of criminal terrorism cases. In addition, prosecutors have relied on the large body of generally applicable criminal statutes in cases against accused terrorists, including statutes that criminalize murder, bombings, conspiracy, money laundering, and other unlawful conduct. Experience has shown that the existing array of federal criminal statutes contains a more-than-adequate set of tools for prosecutors to invoke against accused terrorists. Some of the most important criminal statutes in terrorism cases are those prohibiting "material support" of terrorist organizations. Under these statutes, it is unlawful for a person to provide money, personnel, or any other support to an organization if the person knows or intends that the organization is planning to commit a terrorist act or if the person knows that the organization has engaged in terrorism or has been designated, by the U.S. government, as a terrorist organization. The material support statutes initially were drafted very broadly, causing concerns that they could be used to penalize individuals for exercising legitimate First and Fifth Amendment rights,

but over the years the courts have construed and Congress has amended the statutes so that they are less susceptible to abuse.

Because material support prosecutions do not require that any act of terrorism actually occurred, they have been a pillar of the government's post-9/11 strategy of preventive prosecutions. Material support cases have been brought against persons who enrolled at terrorist training camps, who acted as messengers for terrorist leaders, who intended to act as doctors to terrorist groups, or who raised money to support terrorist organizations. Although these cases can potentially result in overreaching, and although not all material support cases have resulted in convictions, the government's overall record of success in this area is impressive, and most if not all of the convictions seem sound.

Another key approach, since 9/11, has been for law enforcement to charge terrorism defendants with violations of "alternative statutes"—i.e., generally applicable crimes that are not directly related to terrorism such as immigration violations, false statements, credit card fraud, and the like. Prosecutors have used a similar strategy for many years in other areas of criminal law, and we believe that it is both appropriate and effective to deploy it against terrorists. Individuals who are involved in terrorism will often violate a number of generally applicable criminal laws—for example, by traveling with a forged passport or using stolen credit cards—and prosecutors have been able to bring successful and largely uncontroversial cases against them for engaging in these violations.

Other statutes, such as those prohibiting seditious conspiracy and terrorism-related homicide, have been used in important cases such as the prosecutions of Sheikh Omar Abdel Rahman and the Embassy Bombers. The government rarely has charged terrorism defendants with treason but that statute, too, offers a powerful tool in certain cases. Other statutes, such as

detailed criminal laws regarding biological weapons and radiological dispersal devices, have not yet been used, one hopes because those weapons are still not easy for terrorists to obtain. Finally, the government has brought several important cases against authority figures who have engaged in criminal incitement by urging their followers to commit acts of violence against the United States. Although such cases need to be carefully considered in light of the First Amendment implications, to date, courts and prosecutors have ensured that incitement cases are brought within proper constitutional boundaries and in appropriate cases.

Securing the Defendant's Presence in Court

In many terrorism cases, the defendant is brought to court to face criminal charges after being arrested by a federal law enforcement officer or after traditional extradition proceedings. These cases present no novel issues. In some cases, however, defendants have been brought into the justice system by unconventional means, including transfer by U.S. military authorities or informal "rendition" by foreign officials outside the extradition process. In some scenarios, the circumstances surrounding the defendant's apprehension may be murky, and the defendant may allege that he was subjected to forcible treatment or prolonged detention.

Under longstanding Supreme Court precedent embodied in the so-called *Ker-Frisbie* doctrine, irregularities in the manner in which a defendant was captured and brought to court do not generally prevent federal courts from exercising jurisdiction over the case. Over the years, lower courts have identified two narrow circumstances in which a defendant's irregular abduction might cause a federal court to lose jurisdiction over a criminal case—(i) if the abduction violates an explicit term in an extradition treaty or (ii) if it is accompanied by torture or other extreme conduct that "shocks the conscience" of the court. However, to our knowledge the courts have never dismissed a case under either of these exceptions, and case law indicates

that both exceptions are narrow. Indeed, the first exception is so narrow as to be virtually invisible given the manner in which U.S. extradition treaties generally are drafted. There is a possibility that a federal court might decline to exercise jurisdiction under the second exception if U.S. officials were shown to have participated in torture, but no court has ever dismissed a case on this basis.

Detention of Individuals Suspected of Involvement in Terrorism

Some commentators have argued that the existing legal system does not give the government enough authority to detain individuals who are suspected of terrorism, but we believe that this criticism is overstated. There are at least four well-established and lawful means by which the government can detain persons whom it suspects of participating in terrorism. Three of these approaches do not require the government to file criminal charges:

- Under the law of war, the government has ample authority to detain combatants under the Third Geneva Convention on POWs and civilians who participate in hostilities or otherwise pose a serious security risk and who fall within the Fourth Geneva Convention, in order to prevent them from rejoining the battle.

- Whether in situations of armed conflict or peacetime, the government has broad latitude to arrest and seek detention of suspected terrorists as soon as it is prepared to file criminal charges against them. After arresting a defendant, the government must promptly bring the defendant before a magistrate judge, who decides whether the defendant should be detained or released on bail. But the government is entitled to a presumption that terrorism defendants should be detained, and judges have often ordered detention of defendants charged in such cases.

- In cases involving aliens who are alleged to have violated the immigration laws, the government has broad latitude to arrest and detain aliens pending a decision on whether they should be removed from the country. Thus, under the immigration laws, the government can arrest and detain many suspected terrorists (excluding U.S. citizens, of course) without filing criminal charges. Under the immigration statutes, the courts have no power to review the Executive Branch's discretionary decision to detain an alien charged with immigration violations.

- When a grand jury investigation is under way, the government may apply to a federal judge for authority to arrest an individual who is deemed to be a "material witness" in the investigation. This provision allows the government to arrest and seek detention

of individuals who are charged neither with crimes nor with immigration violations. However, the material witness procedure is subject to close judicial oversight, carries a number of procedural protections, and may only be used for a limited period of time.

As experience shows, each of these procedures has at times been put to widespread use in the years since 9/11. In general, detention in criminal and immigration cases is uncontroversial and based on well-settled principles. There has been some controversy surrounding the use of the material witness statute, but the procedure is well-established in our existing legal system and is subject to close judicial oversight. Together, these various tools have given the government the authority to detain the overwhelming majority of individuals whom it has arrested in connection with terrorism.

We acknowledge the possibility that, on rare occasions, the government may believe that an individual is dangerous and is closely associated with terrorism, but may lack the legal authority to detain the person. For example, consider the hypothetical possibility of a U.S. citizen where the government has valid intelligence information suggesting a link to terrorism but insufficient admissible evidence to bring criminal charges, and where the material witness procedure has expired or is otherwise unavailable. In such a case, the government would face a dilemma and existing legal tools would probably not afford a means of detaining the individual. However, we believe that this hypothetical scenario is an unlikely one. Given the breadth of the federal criminal code, the energy and resourcefulness of law enforcement agents and federal prosecutors, and the fact that terrorists, by definition, are criminals who often violate many laws, we believe that it would be the rare case indeed where the government could not muster sufficient evidence to bring a criminal charge against a person it believes is culpable. And experience reflected in the public record bears out this conclusion. The empirical data we have reviewed from actual terrorism cases reveals only a tiny handful of cases where, potentially,

existing tools may have been insufficient to secure the detention of a suspected terrorist. Those exceptional cases, *Padilla* and *al-Marri*, merit discussion and analysis, but we believe that they are anomalous and provide a poor basis to draw broader conclusions about the efficacy of the justice system. To the contrary, the overall body of cases strongly suggests that existing tools provide an adequate basis for the lawful detention of suspected terrorists.

We recognize further that the public record may not fully reflect all the occasions during which prosecutors could not charge and detain a dangerous individual. While it is not possible for us to assess the magnitude of the non-public record of this problem, there are likely to be those who will invoke it to argue for additional means of detaining individuals even where they cannot be charged, as is done in certain European jurisdictions. Putting aside as beyond the scope of this White Paper the very serious constitutional questions such an administrative detention scheme would raise, two practical considerations bear mentioning. First, even where law enforcement cannot charge and detain an individual, it is not powerless. It may confront the individual and disrupt and/or monitor in a variety of ways that individual's conduct. Second, in our experience, most prosecutors with whom we have discussed the issue agree that the ability to administratively detain an individual for several days or even weeks, as can be done in some European jurisdictions, would not materially help them beyond the available tools in developing a case against an individual who posed the problems Jose Padilla did. Therefore, anyone who is arguing for an administrative detention scheme to address the dilemma of a defendant like Padilla, will likely be arguing for a long-term scheme that would mark a dramatic departure from our country's longstanding ideals and practices.

The Challenge of Dealing with Sensitive Evidence that Implicates National Security

In many terrorism cases, the government seeks to rely on evidence that is probative of the defendant's guilt but which implicates sensitive national security interests, particularly intelligence sources, means of intelligence gathering, and even the state of our intelligence on other subjects or intelligence priorities. Dealing with classified or sensitive evidence can be one of the most important challenges in terrorism cases. Over the years, however, courts have proved, again and again, that they are up to the task of balancing the defendant's right to a fair trial, the government's desire to offer relevant evidence, and the imperative of protecting national security.

The Foreign Intelligence Surveillance Act ("FISA"), provides a lawful means for the government to conduct wiretaps and physical searches within the United States in terrorism investigations without satisfying the normal Fourth Amendment requirement of probable cause that a crime was committed. Under FISA, the government must make an ex parte application to a special FISA court, composed of a select group of federal judges, and must satisfy a number of technical requirements before the FISA court can give authority to conduct a FISA wiretap or a FISA search. The FISA procedures are very different from those used in normal criminal investigations.

In the years before 9/11, the Department of Justice imposed an internal "wall" that made it difficult for FISA evidence to be used in court. Under the "wall" procedures, the government erected barriers between intelligence gathering, on one hand, and criminal prosecution on the other. As a result, it was difficult for the government to use FISA evidence in court, since it was deemed to be the province of the intelligence community. FISA itself, however, did not require the "wall"; to the contrary, from its inception the statute envisioned that FISA evidence could be

used in court. After 9/11, Congress amended FISA to make it clear that the "wall" should be dismantled and FISA evidence could be shared with criminal investigators and prosecutors. Courts have found the amendments constitutional, and in the years since 9/11, FISA evidence has been used without incident in many criminal terrorism cases.

A separate statute, the Classified Information Procedures Act ("CIPA"), outlines a comprehensive process for dealing with instances in which either the defendant or the government seeks to use evidence that is classified. Before CIPA was adopted in 1980, some criminal defendants, mainly in espionage cases, sought to engage in "graymail," the practice of threatening to disclose classified information in open court in an effort to force the government to dismiss the charges. CIPA was intended to eliminate this tactic and, more broadly, to establish regularized procedures and heavy involvement by the presiding judge, so that the defendant's right to a fair trial would be protected while national security would not be jeopardized by the release of classified information.

Under CIPA's detailed procedures, classified evidence need not be disclosed to the defense in discovery unless the court finds, based on an in camera review, that it is relevant under traditional evidentiary standards. If the government still objects to the disclosure after a finding that the information is relevant, then the court enters a non-disclosure order and determines an appropriate sanction for the government's failure to disclose. Absent a non-disclosure order, the judge enters a protective order and the information is disclosed only to defense counsel, who must obtain a security clearance, but not to the defendant. Alternatively, the judge may find that the information can be provided directly to the defendant in a sanitized form—e.g., through a summary or redacted documents.

As trial draws near, if either the government or the defense seeks to use classified information at trial, a separate proceeding occurs, in private, in which the judge and the lawyers for both sides (but not the defendant himself) attempt to craft substitutions for the classified evidence—using pseudonyms, paraphrasing, and the like—which must afford the defendant substantially the same ability to make his defense as if the original evidence were used. If it proves impossible to craft an adequate substitution, then the court must consider an appropriate sanction against the government, ranging from the exclusion of evidence to findings against the government on particular issues to dismissal of the indictment in extreme cases. Under CIPA, all of these proceedings are conducted in secure facilities within the courthouse, and sensitive documents are carefully safeguarded pursuant to written security procedures.

CIPA repeatedly has been upheld as constitutional, and it has been used successfully in scores of terrorism prosecutions. We are aware of only two reported incidents in which sensitive information was supposedly disclosed in terrorism cases, but we have not been able to confirm one of those incidents and in the other it is our understanding that the government did not try to invoke non-disclosure protections. Based on our review of the case law, we are not aware of a single terrorism case in which CIPA procedures have failed and a serious security breach has occurred. This is not to say that CIPA is perfect, and in *In Pursuit of Justice* we note some potentially problematic situations—e.g., where a defendant seeks to proceed pro se such as Zacarias Moussaoui—as well as some areas for possible improvement in the statute.

Brady and the Government's Other Discovery Obligations

One of the core elements of our criminal justice system is the requirement, under *Brady v. Maryland*, that the government disclose exculpatory information to the defense so that it can be effectively used at trial. The government also must comply with other discovery obligations,

including the requirement that it turn over prior statements of government witnesses before those witnesses testify during trial. The government's *Brady* and discovery obligations are fundamental, and violations, such as those which occurred in the Detroit Sleeper Cell case, can have disastrous consequences for the effectiveness and reputation of the criminal justice system.

In the *Moussaoui* case, the courts wrestled with a difficult *Brady* problem when Moussaoui demanded to interview notorious terrorism figures who were detained in U.S. custody outside the criminal justice system. The government understandably objected, on grounds that allowing Moussaoui or his counsel to interview these individuals would disrupt intelligence-gathering and jeopardize national security. At the same time, the defense reasonably contended that these individuals could potentially have evidence that would help Moussaoui show that his involvement in al Qaeda activities with which he was charged was limited. After extensive litigation, the Fourth Circuit devised a CIPA-like compromise under which Moussaoui would not be given direct access to the detained individuals, but his counsel would be able to propose summaries from intelligence reports that would be read to the jury, conveying the essence of the exculpatory information. Although Moussaoui ultimately decided to plead guilty, this procedure was employed on his behalf in his sentencing trial. In addition, in a subsequent case in the Southern District of New York, the presiding judge adopted essentially the same approach, and defense counsel consented to the procedure. We believe that the Fourth Circuit's creative approach demonstrates the adaptability of the court system to handle difficult challenges presented by terrorism cases.

Other terrorism cases have presented different *Brady* problems. For example, in some cases the defense has been deluged by thousands of hours of un-transcribed FISA recordings and has been forced to wade through the evidence to see if it contains anything exculpatory. Although

it is indeed a challenge to handle a case with voluminous evidence, courts have generally afforded adequate time for defense counsel to do the job. Another issue is the scope of the government's obligation to search for *Brady* material. In a multi-agency, and sometimes multi-government, investigation involving intelligence and military authorities, how widely must the prosecutors search in order to discharge their *Brady* obligations? These situations are sometimes challenging because of the complicated record-keeping systems and far-flung operations of intelligence and military agencies. And previously unknown problems sometimes emerge, as exemplified by the recent disclosure in the *Moussaoui* case of three CIA recordings which were not previously known to the prosecutors or the defense. Nevertheless, courts have generally adopted common-sense approaches to these problems, and there is no indication that prosecutors experience major or recurring obstacles to conducting proper review of the evidence for *Brady* material.

Miranda and the Right to Remain Silent

The famous *Miranda* warnings—"You have the right to remain silent" and so on—are deeply ingrained in domestic law enforcement and, more broadly, in our national culture. In general, if a law enforcement officer procures a confession from a defendant who is being questioned while in custody, the confession is admissible in court only if the officer read the *Miranda* warning at the beginning of the interrogation and the defendant agreed to waive his *Miranda* rights. Where a terrorism defendant is arrested in the United States by law enforcement, compliance with the *Miranda* warnings is easy. But what happens when an individual is arrested overseas?

If the questioning is conducted by foreign officials, then under well-settled case law, *Miranda* does not apply, and a defendant's post-arrest confession is admissible so long as it was

voluntarily given. However, in the Embassy Bombings case, the presiding judge broke new ground by holding that when U.S. law enforcement questions a detained suspect overseas, the U.S. officers must administer a variant of the *Miranda* warnings even though the questioning is occurring outside the United States.

Some have criticized this holding, invoking the absurdity of soldiers administering *Miranda* warnings to fighters who are captured on the battlefield. We agree that soldiers need not administer *Miranda* warnings in the heat of battle, but we do not believe that this scenario has significant implications for criminal terrorism prosecutions. As an initial matter, few individuals have been placed on trial following a battlefield capture; the vast majority of confessions in terrorism cases have resulted from traditional interrogation by law enforcement officers rather than soldiers. (The case of John Walker Lindh is an interesting exception that we discuss in this Paper.) Should this issue ever arise in a battlefield situation, however, we believe the courts likely would find that *Miranda* does not apply. Finally, it is worth noting that consequences of a failure to issue a *Miranda* warning arise only if a statement of the accused is sought to be introduced in a criminal trial. Thus, the failure to administer *Miranda* warnings where required will not impede interrogation for intelligence gathering purposes nor prevent the introduction at trial of other evidence.

Evidentiary and Speedy Trial Issues

Some commentators have posited that the Federal Rules of Evidence, which are applied in criminal cases, would somehow make it difficult or impossible for the government to present probative evidence in terrorism cases. Among the alleged problems are those surrounding the authentication of physical evidence, sometimes referred to as "chain of custody problems," and the alleged unavailability of witnesses who are deployed around the world. We believe that these

objections are significantly overstated. The Federal Rules of Evidence, including the rules that govern authentication of physical evidence, generally provide a common-sense, flexible framework to guide the decision whether evidence is admissible in court. We are not aware of any terrorism case in which an important piece of evidence has been excluded on authentication or other grounds. Further, the government generally can arrange for its personnel to travel long distances to court to testify if needed, and has done so in some important cases, including the *al-Moayad* case in Brooklyn.

Terrorism cases also do not present unique or insuperable speedy trial problems. It is true that some of the larger terrorism cases can drag on for years before they are resolved, but courts have repeatedly recognized that delays are permissible in complex cases. Indeed, in one important terrorism case, the *al-Arian* material support prosecution in Florida, the presiding judge overruled the defendant's speedy trial objections and established a reasonable schedule for the case.

Sentencing

In the federal criminal system, the presiding judge has the job of imposing the sentence except in capital cases. The judge possesses significant discretion, but that discretion is guided by a series of legal provisions including the Federal Sentencing Guidelines. The applicable legal principles prescribe severe sentences for many terrorism crimes, and experience has shown that terrorism defendants have generally received very stiff sentences. In general, the sentencing of terrorism defendants has not presented unique or unusual problems.

One important feature of the federal sentencing regime is that it offers leniency to defendants who choose to cooperate with the government and assist in the investigation and prosecution of others. The cooperation process is extremely well-defined in federal criminal

practice; judges and lawyers are familiar, on an everyday basis, with the proper method for approaching cooperation and for the process that a prospective cooperator must go through before he is accepted by the government. Some significant terrorism defendants have decided to cooperate, after consulting with their lawyers, in an effort to achieve leniency. This is yet another benefit of using the existing court system.

Safety and Security of Trial Participants and Others

Finally, some terrorism prosecutions present real security risks for judges, jurors, witnesses, prison guards, and others. As exemplified by a horrible attack on a prison guard in the Embassy Bombings case, some terrorism defendants are violent killers who will not hesitate to harm others if given the chance. As a result, court officers, judges, and prison officials face a challenge in maintaining a secure and safe environment for terrorism cases to proceed. However, the challenges of maintaining security are hardly unique to terrorism cases. For many years the court system has dealt with all manner of violent individuals, including gang members and others. There are well-recognized tools, such as extra security screening, anonymous juries, shackling the defendants, and out-of-court protection by the Marshals Service, that can be used to ensure security. These methods are costly and disruptive, and they are certainly not foolproof, but in general they work reasonably well in terrorism cases and many other cases where trial participants present a risk of violence.

Within the prison system, the Bureau of Prisons, upon direction of the Attorney General, has authority to impose Special Administrative Measures, or SAMs, to ensure security for highly dangerous defendants. SAMs are intended to prevent acts of violence within the prison system and also to prevent defendants from communicating with others outside of prison in a manner that may lead to death or serious injury. SAMs are inmate-specific and may be imposed only

pursuant to special procedures. They generally encompass housing a prisoner in segregation and denying him privileges such as correspondence, visits with persons other than his counsel or close family members, and use of the telephone. Courts have generally upheld the use of SAMs, although they have tended to modify the SAMs to make sure that the prisoner is able to communicate effectively with counsel. In the highly publicized Lynne Stewart case, Stewart was convicted of serious crimes after the jury found that she had violated the SAMs by helping her client, Sheikh Abdel Rahman, deliver terrorism-related messages to the news media. The Stewart case stands as a stark reminder of the government's determination to ensure strict compliance with SAMs.

Conclusion

As we look ahead to the coming years, it is a grim and undeniable reality that our country is threatened by violent extremists, claiming to act in the name of religious piety and bent on attacking our country, killing our fellow citizens, and damaging or destroying important national symbols and institutions. Confronting this threat is among the greatest challenges that we face as a nation. After 9/11, it is incontestable that the government must pursue a multi-faceted counter-terrorism strategy involving the use of military, diplomatic, economic, cultural, and law-enforcement tools. No single response can serve as "the answer" to international terrorism. However, as we strive for a vigorous and effective response to terrorism, we should not lose sight of the important tools that are already at our disposal, nor should we forget the costs and risks of seeking to "break new ground" by departing from established institutions and practices. *In Pursuit of Justice* concludes that the justice system generally deserves credit, not criticism, for the manner in which it has handled terrorism cases. Although the justice system is far from perfect, it has proved to be adaptable and has successfully handled a large number of important

and challenging terrorism prosecutions over the past twenty years without sacrificing national security interests or rigorous standards of due process and fairness.

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Full text of *In Pursuit of Justice* follows

II.
Executive Summary

In attempting to eradicate the threat of international terrorism by Islamist extremists, our country faces enormous challenges. Among the more difficult problems is what to do with individuals who come into the custody of the U.S. government and who are suspected of complicity in terrorist acts. Some detainees may properly be held under the law of war for the duration of active hostilities to prevent them from returning to the field of battle, and without any effort by the government to file charges or impose punishment. However, for some suspected terrorists, military detention is not appropriate and, even if it is, the government may find it both desirable and necessary, at some point, to bring formal charges in the civilian court system with a view toward imposing punishment.

Recently, some commentators have proposed an entirely new "national security court" to handle some or all international terrorism prosecutions. Although proposals vary, many offer novel features that would give the government more power and make it easier for the government to secure convictions. However, creating a brand new court system from scratch would be expensive, uncertain, and almost certainly controversial. Indeed, there is the risk that the very same issues now debated simply would be transferred to a new arena for resolution. In our view, before dramatic changes are imposed—such as the creation of an entirely new court or new detention scheme—it is important to take a step back and evaluate the capability of the existing federal courts and the existing body of federal law to handle criminal cases arising from international terrorism. Given the strength and vitality of our existing court system—and the fact that it reflects in many ways the best aspects of our legal and cultural traditions—there are obvious advantages to relying on the existing system, provided that it is up to the job.

Our analysis of the capability of the federal courts to handle criminal cases arising from international terrorism is based heavily on the actual experience of more than 100 international terrorism cases that have been prosecuted in federal courts over the past fifteen years. Based on our review of that data and our other research and analysis, we conclude that, contrary to the views of some critics, the court system is generally well-equipped to handle most terrorism cases. We reach this conclusion based on the broad analysis conducted in this White Paper. A high-level summary of that analysis follows immediately below.

A. Discussion of Data Collection

In preparing this White Paper, we have sought to avoid abstract or academic approaches, focusing instead on the rich body of actual experience with terrorism cases in the federal courts. We have sought to identify all cases arising from terrorism that is associated—organizationally, financially, or ideologically—with Islamist extremist terrorist groups like al Qaeda. With that as our focus, we have combed through a number of sources in an effort to identify all such cases that have been brought in federal courts since 9/11, as well as the most significant cases from the 1990s. To the extent that materials were publicly available, we have obtained docket sheets, motion papers, and judicial opinions from these cases, as well as press accounts and other information, in an effort to understand the major issues that were presented in each case. Although our data collection effort is not foolproof and, indeed, is almost certainly incomplete, we believe that we have gathered a reasonable set of data that permits us to draw reasonable conclusions about the way the court system has dealt with a whole array of substantive and procedural issues in terrorism cases. In Appendix A of this Paper, we include a list of all of the terrorism cases that we have identified and examined.

B. Substantive Law

Over the years, and especially since 1996, Congress has enacted a host of anti-terrorism laws. Prosecutors have successfully invoked many of these specially tailored terrorism laws to obtain convictions in all manner of criminal terrorism cases. In addition, prosecutors have relied on the large body of generally applicable criminal statutes in cases against accused terrorists, including statutes that criminalize murder, bombings, conspiracy, money laundering, and other unlawful conduct. Experience has shown that the existing array of federal criminal statutes contains a more-than-adequate set of tools for prosecutors to invoke against accused terrorists.

Some of the most important criminal statutes in terrorism cases are those prohibiting "material support" of terrorist organizations. Under these statutes, it is unlawful for a person to provide money, personnel, or any other support to an organization if the person knows or intends that the organization is planning to commit a terrorist act or if the person knows that the organization has engaged in terrorism or has been designated, by the U.S. government, as a terrorist organization. The material support statutes initially were drafted very broadly, causing concerns that they could be used to penalize individuals for exercising legitimate First and Fifth Amendment rights, but over the years the courts have construed and Congress has amended the statutes so that they are less susceptible to abuse.

Because material support prosecutions do not require that any act of terrorism actually occured, they have been a pillar of the government's post-9/11 strategy of preventive prosecutions. Material support cases have been brought against persons who enrolled at terrorist training camps, who acted as messengers for terrorist leaders, who intended to act as doctors to terrorist groups, or who raised money to support terrorist organizations. Although these cases can potentially result in overreaching, and although not all material support cases have resulted in convictions, the government's overall record of success in this area is impressive, and most if not all of the convictions seem sound.

Another key approach, since 9/11, has been for law enforcement to charge terrorism defendants with violations of "alternative statutes"—i.e., generally applicable crimes that are not directly related to terrorism such as immigration violations, false statements, credit card fraud, and the like. Prosecutors have used a similar strategy for many years in other areas of criminal law, and we believe that it is both appropriate and effective to deploy it against terrorists. Individuals who are involved in terrorism will often violate a number of generally applicable criminal laws—for example, by traveling with a forged passport or using stolen credit cards—and prosecutors have been able to bring successful and largely uncontroversial cases against them for engaging in these violations.

Other statutes, such as those prohibiting seditious conspiracy and terrorism-related homicide, have been used in important cases such as the prosecutions of Sheikh Omar Abdel Rahman and the Embassy Bombers. The government rarely has charged terrorism defendants with treason but that statute, too, offers a powerful tool in certain cases. Other statutes, such as detailed criminal laws regarding biological weapons and radiological dispersal devices, have not yet been used, one hopes because those weapons are still not easy for terrorists to obtain. Finally, the government has brought several important cases against authority figures who have engaged in criminal incitement by urging their followers to commit acts of violence against the United States. Although such cases need to be carefully considered in light of the First Amendment implications, to date, courts and prosecutors have ensured that incitement cases are brought within proper constitutional boundaries and in appropriate cases. In Appendix B of this Paper, we include an historical timeline of significant statutes that have been enacted to address terrorism-related offenses.

C. Securing the Defendant's Presence in Court

In many terrorism cases, the defendant is brought to court to face criminal charges after being arrested by a federal law enforcement officer or after traditional extradition proceedings. These cases present no novel issues. In some cases, however, defendants have been brought into the justice system by unconventional means, including transfer by U.S. military authorities or informal "rendition" by foreign officials outside the extradition process. In some scenarios, the circumstances surrounding the defendant's apprehension may be murky, and the defendant may allege that he was subjected to forcible treatment or prolonged detention.

Under longstanding Supreme Court precedent embodied in the so-called *Ker-Frisbie* doctrine, irregularities in the manner in which a defendant was captured and brought to court do not generally prevent federal courts from exercising jurisdiction over the case. Over the years, lower courts have identified two narrow circumstances in which a defendant's irregular abduction might cause a federal court to lose jurisdiction over a criminal case—(i) if the abduction violates an explicit term in an extradition treaty or (ii) if it is accompanied by torture or other extreme conduct that "shocks the conscience" of the court. However, to our knowledge the courts have never dismissed a case under either of these exceptions, and case law indicates that both exceptions are narrow. Indeed, the first exception is so narrow as to be virtually invisible given the manner in which U.S. extradition treaties generally are drafted. There is a possibility that a federal court might decline to exercise jurisdiction under the second exception if U.S. officials were shown to have participated in torture, but no court has ever dismissed a case on this basis.

D. Detention of Individuals Suspected of Involvement in Terrorism

Some commentators have argued that the existing legal system does not give the government enough authority to detain individuals who are suspected of terrorism, but we believe that this criticism is overstated. There are at least four well-established and lawful means by which the government can detain persons whom it suspects of participating in terrorism. Three of these approaches do not require the government to file criminal charges:

- Under the law of war, the government has ample authority to detain enemy fighters who are captured during hostilities in order to prevent them from rejoining the battle. More aggressive and controversial theories of military detention are outside the scope of this White Paper.
- Away from the battlefield, the government has broad latitude to arrest and seek detention of suspected terrorists as soon as it is prepared to file criminal charges against them. After arresting a defendant, the government must promptly bring the defendant before a magistrate judge, who decides whether the defendant should be detained or released on bail. But the government is entitled to a presumption that terrorism defendants should be detained, and judges have often ordered detention of defendants charged in such cases.
- In cases involving aliens who are alleged to have violated the immigration laws, the government has broad latitude to arrest and detain aliens pending a decision on whether they should be removed from the country. Thus, under the immigration laws, the government can arrest and detain many suspected terrorists (excluding U.S. citizens, of course) without filing criminal charges. Under the immigration statutes, the courts have no power to review the Executive Branch's discretionary decision to detain an alien charged with immigration violations.
- When a grand jury investigation is under way, the government may apply to a federal judge for authority to arrest an individual who is deemed to be a "material witness" in the investigation. This provision allows the government to arrest and seek detention of individuals who are charged neither with crimes nor with immigration violations. However, the material witness procedure is subject to close judicial oversight, carries a number of procedural protections, and may only be used for a limited period of time.

As experience shows, each of these procedures has at times been put to widespread use in the years since 9/11. In general, detention in criminal and immigration cases is uncontroversial and based on well-settled principles. There has been some controversy surrounding the use of the material witness statute, but the procedure is well-established in our existing legal system and is subject to close judicial oversight. Together, these various tools have given the government the authority to detain the overwhelming majority of individuals whom it has arrested in connection with terrorism.

We acknowledge the possibility that, on rare occasions, the government may believe that an individual is dangerous and is closely associated with terrorism, but may lack the legal authority to detain the person. For example, consider the hypothetical possibility of a U.S. citizen where the government has valid intelligence information suggesting a link to terrorism but insufficient admissible evidence to bring criminal charges, and where the material witness procedure has expired or is otherwise unavailable. In such a case, the government would face a dilemma and existing legal tools would probably not afford a means of detaining the individual.

However, we believe that this hypothetical scenario is an unlikely one. Given the breadth of the federal criminal code, the energy and resourcefulness of law enforcement agents and federal prosecutors, and the fact that terrorists, by definition, are criminals who often violate many laws, we believe that it would be the rare case indeed where the government could not muster sufficient evidence to bring a criminal charge against a person it believes is culpable. And experience bears out this conclusion. The empirical data we have reviewed from actual terrorism cases reveals only a tiny handful of cases where, potentially, existing tools may have been insufficient to secure the detention of a suspected terrorist. Those exceptional cases, *Padilla* and *al-Marri*, merit discussion and analysis, but we believe that they are anomalous and provide a poor basis to draw broader conclusions about the efficacy of the justice system. To the contrary, the overall body of cases strongly suggests that existing tools provide an adequate basis for the lawful detention of suspected terrorists.

We recognize further that the public record may not fully reflect all the occasions during which prosecutors could not charge and detain a dangerous individual. While it is not possible for us to assess the magnitude of the non-public record of this problem, there are likely to be those who will invoke it to argue for additional means of detaining individuals even where they cannot be charged, as is done in certain European jurisdictions. Putting aside as beyond the scope of this White Paper the very serious constitutional questions such an administrative detention scheme would raise, two practical considerations bear mentioning. First, even where law enforcement cannot charge and detain an individual, it is not powerless. It may confront the individual and disrupt and/or monitor in a variety of ways that individual's conduct. Second, in our experience, most prosecutors with whom we have discussed the issue agree that the ability to administratively detain an individual for several days or even weeks, as can be done in some European jurisdictions, would not materially help them beyond the available tools in developing a case against an individual who posed the problems Jose Padilla did. Therefore, anyone who is arguing for an administrative detention scheme to address the dilemma of a defendant like Padilla, will likely be arguing for a long-term scheme that would mark a dramatic departure from our country's longstanding ideals and practices.

E. The Challenge of Dealing with Sensitive Evidence that Implicates National Security

In many terrorism cases, the government seeks to rely on evidence that is probative of the defendant's guilt but which implicates sensitive national security interests, particularly intelligence sources, means of intelligence gathering, and even the state of our intelligence on other subjects or intelligence priorities. Dealing with classified or sensitive evidence can be one of the most important challenges in terrorism cases. Over the years, however, courts have proved, again and again, that they are up to the task of balancing the defendant's right to a fair trial, the government's desire to offer relevant evidence, and the imperative of protecting national security.

The Foreign Intelligence Surveillance Act ("FISA"), provides a lawful means for the government to conduct wiretaps and physical searches within the United States in terrorism investigations without satisfying the normal Fourth Amendment requirement of probable cause that a crime was committed. Under FISA, the government must make an ex parte application to a special FISA court, composed of a select group of federal judges, and must satisfy a number of technical requirements before the FISA court can give authority to conduct a FISA wiretap or a FISA search. The FISA procedures are very different from those used in normal criminal investigations.

In the years before 9/11, the Department of Justice ("DOJ") imposed an internal "wall" that made it difficult for FISA evidence to be used in court. Under the "wall" procedures, the government erected barriers between intelligence gathering, on one hand, and criminal prosecution on the other. As a result, it was difficult for the government to use FISA evidence in court, since it was deemed to be the province of the intelligence community. FISA itself, however, did not require the "wall"; to the contrary, from its inception the statute envisioned that FISA evidence could be used in court. After 9/11, Congress amended FISA to make it clear that the "wall" should be dismantled and FISA evidence could be shared with criminal investigators and prosecutors. Courts have found the amendments constitutional, and in the years since 9/11, FISA evidence has been used without incident in many criminal terrorism cases.

A separate statute, the Classified Information Procedures Act ("CIPA"), outlines a comprehensive process for dealing with instances in which either the defendant or the government seeks to use evidence that is classified. Before CIPA was adopted in 1980, some criminal defendants, mainly in espionage cases, sought to engage in "graymail," the practice of threatening to disclose classified information in open court in an effort to force the government to dismiss the charges. CIPA was intended to eliminate this tactic and, more broadly, to establish regularized procedures and heavy involvement by the presiding judge, so that the defendant's right to a fair trial would be protected while national security would not be jeopardized by the release of classified information.

Under CIPA's detailed procedures, classified evidence need not be disclosed to the defense in discovery unless the court finds, based on an in camera review, that it is relevant under traditional evidentiary standards. If the government still objects to the disclosure after a finding that the information is relevant, then the court enters a non-disclosure order and determines an appropriate sanction for the government's failure to disclose. Absent a non-disclosure order, the judge enters a protective order and the information is disclosed only to defense counsel, who must obtain a security clearance, but not to the defendant. Alternatively, the judge may find that the information can be provided directly to the defendant in a sanitized form—e.g., through a summary or redacted documents.

As trial draws near, if either the government or the defense seeks to use classified information at trial, a separate proceeding occurs, in private, in which the judge and the lawyers for both sides (but not the defendant himself) attempt to craft substitutions for the classified evidence—using pseudonyms, paraphrasing, and the like—which must afford the defendant substantially the same ability to make his defense as if the original evidence were used. If it proves impossible to craft an adequate substitution, then the court must consider an appropriate sanction against the government, ranging from the exclusion of evidence to findings against the government on particular issues to dismissal of the indictment in extreme cases. Under CIPA, all of these proceedings are conducted in secure facilities within the courthouse, and sensitive documents are carefully safeguarded pursuant to written security procedures.

CIPA repeatedly has been upheld as constitutional, and it has been used successfully in scores of terrorism prosecutions. We are aware of two reported incidents in which sensitive information was supposedly disclosed in terrorism cases, but we have not been able to confirm one of those incidents, and in the other it is our understanding that the government did not try to invoke non-disclosure protections. Based on our review of the case law, we are not aware of a single terrorism case in which CIPA procedures have failed and a serious security breach has occurred. This is not to say that CIPA is perfect, and in this White Paper we note some potentially problematic situations—e.g., where a defendant seeks to proceed pro se such as Zacarias Moussaoui—as well as some areas for possible improvement in the statute.

F. *Brady* and the Government's Other Discovery Obligations

One of the core elements of our criminal justice system is the requirement, under *Brady v. Maryland*, that the government disclose exculpatory information to the defense so that it can be effectively used at trial. The government also must comply with other discovery obligations, including the requirement that it turn over prior statements of government witnesses before those witnesses testify during trial. The government's *Brady* and discovery obligations are fundamental, and violations, such as those which occurred in the Detroit Sleeper Cell case, can have disastrous consequences for the effectiveness and reputation of the criminal justice system.

In the *Moussaoui* case, the courts wrestled with a difficult *Brady* problem when Moussaoui demanded to interview notorious terrorism figures who were detained in U.S. custody outside the criminal justice system. The government understandably objected, on grounds that allowing Moussaoui or his counsel to interview these individuals would disrupt intelligence-gathering and jeopardize national security. At the same time, the defense reasonably contended that these individuals could potentially have evidence that would help Moussaoui show that his involvement in al Qaeda activities with which he was charged was limited. After extensive litigation, the Fourth Circuit devised a CIPA-like compromise under which Moussaoui would not be given direct access to the detained individuals, but his counsel would be able to propose summaries from intelligence reports that would be read to the jury, conveying the essence of the exculpatory information. Although Moussaoui ultimately decided to plead guilty, this procedure

was employed on his behalf in his sentencing trial. In addition, in a subsequent case in the Southern District of New York, the presiding judge adopted essentially the same approach, and defense counsel consented to the procedure. We believe that the Fourth Circuit's creative approach demonstrates the adaptability of the court system to handle difficult challenges presented by terrorism cases.

Other terrorism cases have presented different *Brady* problems. For example, in some cases the defense has been deluged by thousands of hours of un-transcribed FISA recordings and has been forced to wade through the evidence to see if it contains anything exculpatory. Although it is indeed a challenge to handle a case with voluminous evidence, courts have generally afforded adequate time for defense counsel to do the job. Another issue is the scope of the government's obligation to search for *Brady* material. In a multi-agency, and sometimes multi-government, investigation involving intelligence and military authorities, how widely must the prosecutors search in order to discharge their *Brady* obligations? These situations are sometimes challenging because of the complicated record-keeping systems and far-flung operations of intelligence and military agencies. And previously unknown problems sometimes emerge, as exemplified by the recent disclosure in the *Moussaoui* case of three CIA recordings which were not previously known to the prosecutors or the defense. Nevertheless, courts have generally adopted common-sense approaches to these problems, and there is no indication that prosecutors experience major or recurring obstacles to conducting proper review of the evidence for *Brady* material.

G. *Miranda* and the Right to Remain Silent

The famous *Miranda* warnings–"You have the right to remain silent" and so on–are deeply ingrained in domestic law enforcement and, more broadly, in our national culture. In general, if a law enforcement officer procures a confession from a defendant who is being questioned while in custody, the confession is admissible in court only if the officer read the *Miranda* warning at the beginning of the interrogation and the defendant agreed to waive his *Miranda* rights. Where a terrorism defendant is arrested in the United States by law enforcement, compliance with the *Miranda* warnings is easy. But what happens when an individual is arrested overseas? If the questioning is conducted by foreign officials, then under well-settled case law, *Miranda* does not apply, and a defendant's post-arrest confession is admissible so long as it was voluntarily given. However, in the Embassy Bombings case, the presiding judge broke new ground by holding that when U.S. law enforcement questions a detained suspect overseas, the U.S. officers must administer a variant of the *Miranda* warnings even though the questioning is occurring outside the United States.

Some have criticized this holding, invoking the absurdity of soldiers administering *Miranda* warnings to fighters who are captured on the battlefield. We agree that soldiers need not and should not administer *Miranda* warnings in the heat of battle, but we do not believe that this scenario has significant implications for criminal terrorism prosecutions. As an initial matter, few individuals have been placed on trial following a battlefield capture; the vast majority of confessions in terrorism cases have resulted from traditional interrogation by law enforcement officers rather than soldiers. (The case of John Walker Lindh is an interesting exception that we discuss in this Paper.) Further, we believe in a battlefield situation, the courts would likely find that *Miranda* does not apply.

H. Evidentiary and Speedy Trial Issues

Some commentators have posited that the Federal Rules of Evidence, which are applied in criminal cases, would somehow make it difficult or impossible for the government to present probative evidence in terrorism cases. Among the alleged problems are those surrounding the authentication of physical evidence, sometimes referred to as "chain of custody problems," and the alleged unavailability of witnesses who are deployed around the world. We believe that these objections are significantly overstated. The Federal Rules of Evidence, including the rules that govern authentication of physical evidence, generally provide a common-sense, flexible framework to guide the decision whether evidence is admissible in court. We are not aware of any terrorism case in which an important piece of evidence has been excluded on authentication or other grounds. Further, the government generally can arrange for its personnel to travel long distances to court to testify if needed, and has done so in some important cases, including the *al-Moayad* case in Brooklyn.

Terrorism cases also do not present unique or insuperable speedy trial problems. It is true that some of the larger terrorism cases can drag on for years before they are resolved, but courts have repeatedly recognized that delays are permissible in complex cases. Indeed, in one important terrorism case, the *al-Arian* material support prosecution in Florida, the presiding judge overruled the defendant's speedy trial objections and established a reasonable schedule for the case.

I. Sentencing

In the federal criminal system, the presiding judge has the job of imposing the sentence except in capital cases. The judge possesses significant discretion, but that discretion is guided by a series of legal provisions including the Federal Sentencing Guidelines. The applicable legal principles prescribe severe sentences for many terrorism crimes, and experience has shown that terrorism defendants have generally received very stiff sentences. In general, the sentencing of terrorism defendants has not presented unique or unusual problems.

One important feature of the federal sentencing regime is that it offers leniency to defendants who choose to cooperate with the government and assist in the investigation and prosecution of others. The cooperation process is extremely well-defined in federal criminal practice; judges and lawyers are familiar, on an everyday basis, with the proper method for approaching cooperation and for the process that a prospective cooperator must go through before he is accepted by the government. Some significant terrorism defendants have decided to cooperate, after consulting with their lawyers, in an effort to achieve leniency. This is yet another benefit of using the existing court system.

J. Safety and Security of Trial Participants and Others

Finally, some terrorism prosecutions present real security risks for judges, jurors, witnesses, prison guards, and others. As exemplified by a horrible attack on a prison guard in the Embassy Bombings case, some terrorism defendants are violent killers who will not hesitate to harm others if given the chance. As a result, court officers, judges, and prison officials face a challenge in maintaining a secure and safe environment for terrorism cases to proceed.

However, the challenges of maintaining security are hardly unique to terrorism cases. For many years the court system has dealt with all manner of violent individuals, including gang members and others. There are well-recognized tools, such as extra security screening, anonymous juries, shackling the defendants, and out-of-court protection by the Marshals Service, that can be used to ensure security. These methods are costly and disruptive, and they are certainly not foolproof, but in general they work reasonably well in terrorism cases and many other cases where trial participants present a risk of violence.

Within the prison system, the Bureau of Prisons, upon direction of the Attorney General, has authority to impose Special Administrative Measures, or SAMs, to ensure security for highly dangerous defendants. SAMs are intended to prevent acts of violence within the prison system and also to prevent defendants from communicating with others outside of prison in a manner that may lead to death or serious injury. SAMs are inmate-specific and may be imposed only pursuant to special procedures. They generally encompass housing a prisoner in segregation and denying him privileges such as correspondence, visits with persons other than his counsel or close family members, and use of the telephone. Courts have generally upheld the use of SAMs, although they have tended to modify the SAMs to make sure that the prisoner is able to communicate effectively with counsel. In the highly publicized Lynne Stewart case, Stewart was convicted of serious crimes after the jury found that she had violated the SAMs by helping her client, Sheikh Abdel Rahman, deliver terrorism-related messages to the news media. The Stewart case stands as a stark reminder of the government's determination to ensure strict compliance with SAMs.

"Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System"

Opening Comments by Judge John C. Coughenour
June 4, 2008

Senator Leahy, distinguished members of the Committee, good morning and thank you for this opportunity to testify about terrorism and the federal courts. It is my firm conviction, informed by 27 years on the federal bench, that the United States Courts, as constituted, are not only an adequate venue for trying suspected terrorists, but also a tremendous asset against terrorism. Indeed, I believe it would be a grave error with lasting consequences for Congress, even with the best of intentions, to create a parallel system of terrorism courts unmoored from the constitutional values that have served us so well for so long. Before I explain how I arrive at this conclusion, I want to emphasize that I have great sympathy for those charged with the awesome responsibility of our national security. What I hope to convey in some small measure with my testimony today is that our leaders in the political branches need not view this as a choice between the existential threat of terrorism and the mere abstractions of a two hundred year old document. They need not mistake reliance on cherished values with complacency toward the new challenges of a dangerous world. After spending the greater part of my career on the federal bench, and having tried a high profile international terrorism case in my courtroom, I think the choice is better understood as follows: Do we want our courts to be viewed as just another tool in the "war on terror," or do we want them to stand as a bulwark against the corrupt ideology upon which terrorism feeds? I believe our choice must be the latter.

Let me begin with the question of competence. Detractors of our current system argue that the federal courts are ill-equipped for the unique challenges posed by terrorism trials.

Objections of this kind frequently begin with a false premise. That is, some who argue that the federal courts are not capable of trying suspected terrorists support this view by citing various procedural and evidentiary rules that constrain the prosecutor's ability to bring or prove a case. The threat of terrorism is too great, we are told, to risk an "unsuccessful" prosecution. This assumes that courts exist to advance the prerogatives of law enforcement, and that convictions are the yardstick by which a court's "success" is measured. Such a notion is inconsistent with our constitutional separation of powers, under which courts guarantee an independent process, not an outcome. Any tribunal purporting to do otherwise is not a court in the American sense.

This fallacy aside, the courts' detractors also raise some more legitimate concerns about whether judges have sufficient expertise over the unique subject matter of terrorism trials, and whether the courts can adequately protect the government's interest in preserving classified documents for future intelligence-gathering purposes. These concerns are not insurmountable under the system we have in place. The argument about expertise ignores the fact that judges are generalists. Just as they decide cases ranging from employment discrimination to copyright to bank robbery, they are also capable of negotiating the complexities of a terrorism trial. As for the protection of classified information, courts are guided by the Classified Information Procedures Act, which played a prominent role during the trial of the so-called "Millennium Bomber," Ahmed Ressam, in my courtroom in 2001. While I found the extensive precautions to be more than adequate in that case, I would submit that any shortcoming in the law can and should be addressed by further revision, rather than by undermining the institution of the judiciary itself. I would also add that courts are not insensitive to the compelling needs of the government in criminal cases, and apply existing law and procedure with deference to those needs. As Justice

Robert Jackson once wrote, "the strength and vitality of the Constitution stem from the fact that its principles are adaptable to changing events."

In fact, there is good reason to think that the courts are not only competent, but also uniquely situated to conduct terrorism trials. Their insulation from the political branches, accumulated institutional knowledge, and fidelity to legal precedent ensure that no matter which way the prevailing political winds blow, critical decisions pitting the interests of community safety against individual liberty will be circumspect and legitimate. I worry that with specialized tribunals for suspected terrorists, governed by a separate set of rules and procedures, we would create institutions responsive to the perceived exigencies of the moment, upsetting the delicate system of checks and balances that deter abuse and promote faith in government. For example, if politically vulnerable actors start redesigning courts, can we say with assurance that popular pressure will not someday demand the admission of hearsay evidence, or statements obtained by harsh interrogation techniques? Might we see the day when counsel for the defendant cannot access information needed to mount a defense, or cannot appear at a defendant's behest without undergoing a background check of undefined scope? Such practices are not without recent historical precedent, and cannot be dismissed as mere paranoia once we peg our judicial institutions to the ebb and flow of public opinion. I also worry that special terrorism courts risk elevating the status of those who target innocent life. As I stated during sentencing of Mr. Ressam in 2001, "we have the resolve in this country to deal with the subject of terrorism, and people who engage in it should be prepared to sacrifice a major portion of their life in confinement." Implicit in my remarks was the message that despite the supposed grandeur of their aims, these people surrender their liberty just like any criminal who has earned society's opprobrium.

At the outset, I stated that the federal courts are not just capable of trying suspected terrorists; they are an asset against terrorism. At a time when our national security is so intimately linked with our ability to forge alliances and secure cooperation from countries that share or aspire to our fundamental values, we can ill afford to send the message that those values are negotiable or contingent. I recently returned from Russia, where I have worked over the past twenty years to promote judicial reform. The topic of this most recent trip was jury trials, and the five day seminar culminated in a mock trial conducted in the military court of Vladivostok. Serving as mock jurors were a group of Russian law students from Far Eastern University, no more than 19 or 20 years old, most with aspirations to be prosecutors in a system struggling to define a role for the courts that is independent from the state. That day, I felt that my ability to confidently share the virtues of our independent judiciary and Constitution with those who represent the future of Russia was more than a personal privilege; it was in our country's own strategic interest. I cannot help but wonder if I will be able to speak with the same authority on future occasions if we lose confidence in the very institutions that made us a model for reform in the first place.

With that, I welcome your questions.

U.S. Divulges New Details on Released Gitmo Inmates
CNN May 14, 2007

WASHINGTON (Reuters) -- The Pentagon on Monday released the names of six former Guantanamo detainees who U.S. officials say re-emerged as Islamist fighters in Afghanistan after their release from the U.S. military prison in Cuba.

The Defense Department said three of those released from the prison for suspected militants resurfaced as senior Islamist fighters in Afghanistan while a fourth was later identified as having been a Taliban deputy defense minister.

The six were among 30 former detainees who the Pentagon said have rejoined the fight against U.S. and coalition forces since their release from Guantanamo. All told, about 390 detainees have been released or transferred from the prison.

"While we have long maintained that we would like to close Guantanamo, there are a number of highly dangerous men who if released would pose a grave danger to the public," explained Pentagon spokesman, Navy Cmdr. J.D. Gordon.

Pentagon officials said the detainees lied about their past by claiming to be farmers, truck drivers, cooks, small-scale merchants or low-level combatants -- assertions that were sometimes backed up by fellow inmates.

The disclosure comes as the Pentagon prepares a major analysis of classified detainee records that could be used to rebut critics who have called for the prison's closure by saying many of the 775 detainees who have been held at Guantanamo are innocent.

Defense officials said the large-scale analysis has been under way for several months and could result in the release of new unclassified information on detainees by early summer.

The Guantanamo prison now has about 385 inmates. Records on 517 current and former detainees show that 95 percent have been members of or associated with al Qaeda or the Taliban and that 73 percent participated in hostilities against U.S. or coalition forces, defense officials said.

The analysis is a response to a series of highly critical reports by Seton Hall University law professor Mark Denbeaux, which determined only a small number of Guantanamo detainees had fought against U.S. forces.

Among the six detainees identified on Monday was Mohamed Yusif Yaqub, who the Pentagon said assumed control of Taliban operations in southern Afghanistan after his release from Guantanamo, and died fighting U.S. forces on May 7, 2004.

Abdullah Mahsud was released only to become a militant leader within the Mahsud tribe in southern Waziristan with ties to the Taliban and al Qaeda. He directed the October 2004 kidnapping of two Chinese engineers in Pakistan, the Pentagon said.

Maulavi Abdul Ghaffar became the Taliban's regional commander in Uruzgan and Helmand provinces after his release and was killed in a raid by Afghan security forces on September 25, 2004, the Pentagon said.

Abdul Rahman Noor was released in July 2003 and was later identified as the man described in an October 7, 2001, interview with Al Jazeera television network as the "deputy defense minister of the Taliban," the Pentagon said.

Statement of U.S. Senator Russ Feingold
Senate Judiciary Committee
Hearing on "Improving Detainee Policy:
Handling Terrorism Detainees Within The American Justice System"
June 4, 2008

Since 9/11, America has faced a great challenge: responding aggressively to those infamous acts of terrorism, and to the very real threat posed by al Qaeda, without abandoning our freedoms and democratic values.

Unfortunately, this administration has not successfully met that challenge, and the policies implemented at Guantanamo Bay are a major reason for that failure. We now live in a country where the government claims the right to pick up anyone, even an American citizen, anywhere in the world; designate that person a so-called "enemy combatant" even if he never engaged in any actual hostilities against the United States; and lock that person up possibly for the rest of his life unless he can prove, without a lawyer and without access to all, or sometimes any, of the evidence against him, that he is not an "enemy combatant."

All of this has been done far outside the bounds of the traditional American justice system, civilian or military, and indeed outside the bounds of traditional notions of the law of war.

Some in this administration have forgotten the very reasons for the due process protections enshrined in our Constitution. These protections are in place, not to coddle the guilty, but to protect against executive overreaching or even simple human error. You do not need to oppose this administration or even disagree with its policies to conclude that at least some of the 750-plus people detained in Guantanamo – only one of whom has been convicted of any crime by the U.S. – were incorrectly designated "enemy combatants." After all, any government, including this one, is capable of making mistakes.

That is why our legal system has long relied on review by an independent and neutral decision-maker as the one true safeguard against wrongful executive detention. This month, the Supreme Court will determine whether the detainees held at Guantanamo Bay are entitled under the Constitution to the great writ of Habeas Corpus. I hope that the Supreme Court will reject the Administration's cramped reading of the Constitution, and strike down the provision of the Military Commissions Act purporting to deny habeas rights to the Guantanamo detainees.

Some have proposed that Congress should establish an entirely new system of preventive detention and trial for terrorism detainees under the purview of a special national security court, arguing that our traditional justice system is

inadequate to deal with the special circumstances presented by terrorism. But as demonstrated by the thoughtful report issued last week by Human Rights First and by the testimony of Judge Coughenor, who presided over the 2001 terrorism trial of Ahmed Ressam, the United States has successfully prosecuted terrorist suspects in federal courts, and courts have provided the flexibility needed to address complicated evidentiary and legal issues. The traditional military justice system, too, is available. There is no doubt that the administration's actions over the past seven years have created a difficult situation at Guantanamo Bay with respect to a small number of detainees. But I am gravely concerned about establishing an entirely new regime, with rules that would not otherwise be tolerated in federal court or military court-martial and that would be subject to years of challenges, to address this very narrow set of cases, when there is every indication that we can effectively use our long-established institutions.

We can – and must – combat al Qaeda aggressively while maintaining our principles and our values.

Testimony of Prof. Amos N. Guiora

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"Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System"

Senate Judiciary Committee

June 4, 2008

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Prof. Amos N. Guiora*
S.J. Quinney College of Law, University of Utah

IMPROVING DETAINEE POLICY: HANDLING TERRORISM DETAINEES WITHIN THE AMERICAN JUSTICE SYSTEM

I. INTRODUCTION

Mr. Chairman, Senator Specter, and Members of the Committee, my name is Amos N. Guiora and I am a Professor of Law at the S.J. Quinney College of Law, The University of Utah. Prior to my appointment at The University of Utah, I served for 19 years in the Judge Advocate General Corps of the Israel Defense Forces where I was involved in the legal and policy aspects of operational counterterrorism. I was posted as a military prosecutor in the West Bank Military Court, as a Judge in the Gaza Strip Military Court and as the Legal Advisor to the Gaza Strip Military Commander. In three and a half years in academia I have published widely on the issues before the Committee today. My publications, relevant to my testimony include, Where are Terrorists to be Tried - A Comparative Analysis of Rights Granted to Suspected Terrorists, *Catholic University Law Review, Vol. 56, No. 2, Spring 2007;* Quirin to Hamdan: Creating a Hybrid Paradigm for the Detention of Terrorists *Florida Journal of International Law*, 19 FLA. J. INT'L L. 2 (2008). and Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists *University Pennsylvania Law Review PENNUMBRA, Vol. 156, Spring 2008.*

Almost seven years after 9/11, nearly two years after *Hamdan v. Rumsfeld* and the Military Commissions Act (MCA), one of the critical questions of the "post-9/11 world" has still gone unanswered: where do we try terrorists? More accurately, where do we try the thousands of individuals held world-wide either by the US or on behalf of the US *suspected* of terrorism?

I deliberately emphasized the word "suspected" because it is important to recall that the individual in question is no more than that—a suspect. He or she may be the "worst of the worst"

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(as then Sec. of Defense Rumsfeld described **all** individuals held at GITMO) *or* they may be like the hundreds of detainees released from GITMO who had no reason to be detained in the first place.

My testimony begins with the following questions: who is the detained individual? What has he done? Why did we detain him? What are his rights? When may an individual may be detained; under what conditions (and how) may he be interrogated; what evidence (and how) may be introduced into a court of law; whether (and when) does he know the charges against him and if convicted, where may he appeal?

All of these lead to the following question: how do we define the detained individual?

II. DEFINING DETAINEES

My fundamental premise is that the detainees are neither criminals as understood in the criminal law paradigm nor Prisoner's of War. However, without a defined status, we cannot discuss what rights and privileges they are to be granted

If the individual is neither a criminal nor a POW, what is he? Various terms have been suggested including enemy combatant, illegal combatant, illegal belligerent, and enemy belligerent. Although all have failed to contribute to the establishment of a workable rights-based regime, the starting points are as follows: all individuals have rights and all individuals must be defined. Furthermore, the individual's rights cannot be determined until we define the conflict itself. Is this a war? Is this a "war on terrorism"? Is this a "police action"?

In numerous decisions (*Rasul v. Bush*[1], *Rumsfeld v. Padilla*[2], *Hamdan v. Rumsfeld*[3], *Hamdi v. Rumsfeld*[4]) the US Supreme Court has failed to articulate how to define what rights to

[1] Rasul v. Bush, 542 U.S. 466 (2004).
[2] Rumsfeld v. Padilla, 542 U.S. 426 (2004).
[3] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
[4] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

grant the suspected terrorists. Similarly, Congress has failed in its constitutionally granted oversight powers.

Into that vacuum, I propose that the post-9/11 detainees are a "hybrid," neither POW nor criminal. A "hybrid" suggests adopting aspects from both the POW and criminal law paradigm and thereby creating a new paradigm. This proposed model would establish a mechanism and infrastructure enabling going forth with fair trials for those detained post-9/11.

I suggest adopting the term used by the Israel Supreme Court: armed conflict short of war. Such a term reflects that the conflict is not a classic war (which according to international law can only be conducted between states) and is also does not fall within the traditional criminal law paradigm. That is the essence of the recommended hybrid paradigm.

The hybrid paradigm is philosophically and jurisprudentially founded on the principle that the accused must be brought to some form of trial, but that the American criminal law process is inapplicable to the current conflict. Accordingly, in order to guarantee the suspect *certain* rights and privileges, the hybrid paradigm will be predicated on the following: the use of intelligence information, interrogation methods that do not include torture, the right to appeal to an independent judiciary, the right to counsel of the suspect's own choosing, known terms of imprisonment, and procedures to prevent indefinite detention.

First, the hybrid paradigm must enable the prosecution to introduce intelligence information which the judge would review and use for purposes of deciding guilt or innocence. While intelligence information cannot be the sole basis for the decision, it can be used to strengthen the holding. This provision is the most severe break from the criminal law paradigm. Unlike the criminal law process, where the prosecutor is obligated to put forth all available evidence, the hybrid paradigm recognizes that in the world of counterterrorism, it is not always possible to do so.

However, this standard needs to be restricted whereby the prosecution may not use the intelligence information *unless and until* a judge has determined[5] that presenting the information to the defendant poses a significant threat to national security. Further, if traditional evidence is available and sufficient for the court to order the suspect's continued detention, the state must submit the criminal law evidence, rather than relying on the classified intelligence information.

In the hybrid paradigm, the judge's determination on these questions of admissibility must favor the defendant's rights. Despite Justice O'Connor's unfortunate words in *Hamdi*, where she indicated that "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided," [6] I argue that on the contrary, the constitution does not contain a rebuttable presumption that favors the state at the expense of a defendant's rights.

III. TRYING SUSPECTED TERRORISTS: 9/11/2001-6/4/2008

To date: the military commissions (whether in their original construction or revamped post *Hamdan* and the Military Commissions Act) have not proven successful. Thus far, only **one** detainee has been convicted. Furthermore, the Legal Advisor to the Convening Authority for the Military Commissions, Brig. Gen. Thomas W. Hartmann testified before Congress that evidence obtained from a detainee subjected to water-boarding could be admitted—this, despite universal condemnation of water-boarding as torture. These facts speak resoundingly to the military commission's failure to establish adequate safeguards for suspected terrorists. It is clear that even in their re-vamped format these safeguards are, in a word, non-starters.

On the other hand, as the US is responsible for the detainees it holds (either directly or indirectly), it must develop (quickly) a workable judicial process. Given that **some** of the detainees present a genuine threat to American national security and that indefinite detention violates constitutional principles and fundamental concepts of morality, this is a must.

[5] The judge shall construe all the information in a manner most favorable to the defendant.
[6] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

IV. PROPOSED ALTERNATIVES

In proposing alternatives to the military commissions established in the immediate aftermath of 9/11, the following are critical fundamental premises: indefinite detention of *suspects* is unconstitutional regardless of citizenship; a "vetting" process must be immediately established to determine whether a detainee presents a continuing threat to America's national security and if not, the individual must be released (this, understandably, requires development of an infrastructure enabling the return of the particular detainee to his home country or safe haven in accordance with international law. Admittedly, this is a complex issue but logistical considerations cannot serve as an impediment to the granting both of substantive and procedural rights); a formalized "vetting" procedure will result in a significant reduction of the number of detainees which will enable the constituting of a viable judicial process.

There are, I suggest, three workable legal-judicial models for the "post-9/11 detainees"; GITMO, whether in its present format or in some re-articulated or re-constituted framework, is an unacceptable model for the military commission process and has been permanently and irrevocably tainted.

V. TREATY BASED INTERNATIONAL TERROR COURT

While attractive sounding from a globalization perspective, the concept is largely a non-starter. The reason is simple: in order to establish such a court, the nations of the world (at least those who would be party to such a court) would need to agree on a definition of the term "terrorism." As has been documented elsewhere, agreeing upon a definition of terrorism eludes the FBI, and the State and Defense Departments. The UN's role post-9/11 is extraordinarily limited as member nations similarly cannot agree upon a definition of terrorism.

Supposing that this enormous stumbling block could be overcome, member nations would then need to address a laundry list of issues. To mention but a few: imposition of the death penalty, jurisdiction over domestic terrorism (of another nation), cooperation regarding intelligence gathering and sharing, rules of evidence and prison conditions. While only a partial

list, the point is clear: the establishment of such a court (though perhaps worthwhile) will not be an immediate development. In the meantime, there are detainees awaiting trial.

VI. ARTICLE III COURTS

Bringing thousands of post-9/11 detainees to a traditional criminal trial is also a non-starter. The trial of Zacarias Moussaoui—held out by some as an example justifying the effectiveness of Article III courts for terrorists—highlights the many problems attendant with trying suspected terrorists in an Article III Court. Moussaoui, often referred to as "the 20th hijacker," was suspected of training with al-Qaeda in preparation for the 9/11 attacks and later pled guilty to six counts of conspiracy. While initially denying involvement, he ultimately confessed that he was supposed to fly a fifth plane into the White House. Grandstanding throughout the trial, Moussaoui largely turned the trial into a farce. The court—particularly when Moussaoui chose to represent himself—was largely unequipped to respond or prevent his "antics" which significantly affected public perception of the judicial process.

Furthermore, Moussaoui's trial raised Sixth Amendment compulsory due process concerns.[7] Preparing his defense, Moussaoui asked for access to "alleged terrorist ringleader Ramzi bin al-Shibh"[8] in federal custody who he believed could provide exculpatory evidence. The government argued that giving Moussaoui access to al-Shibh would compromise national security.[9] The court, however, agreed with Moussaoui, holding that "the Sixth Amendment right to compulsory process is not outweighed by claims that the government's intelligence-gathering efforts would be undermined."[10] The court's decision highlights the ongoing conflicts between a suspected terrorist defendant's rights and the government's security concern.

The fundamental deficiencies with trying Article III in a terrorist context are inherent. First, much of the evidence available against suspected terrorists is predicated on intelligence information. Article III courts, however, are based on certain constitutional rights, including the

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[7] *See* Hon. Shira A. Scheindlin & Matthew L. Schwartz, *With all Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFSTRA L. REV. 795 (Spring2004).
[8] *Id* at 835 -836.
[9] *Id.* at 835.
[10] *Id.*

right to "confront one's accuser," as upheld by the Supreme Court in *Pointer v. Texas*. This right explicitly places a limitation on the prosecution. It deprives the prosecutor of the ability to go forth with *all* available (and confidential) intelligence information which the defendant would not be able to confront because of the state's absolute requirement to protect its intelligence sources (both their identity and how the information was received).

In addition, a defendant has a right to trial by a "jury of his peers."[11] Put simply: if Osama Bin-Laden were detained today and brought before a court of law, would it be possible to find a "jury of his peers"? Would it be possible to find 12 members of the community willing to sit in judgment of Bin-Laden?

While an instinctual, reflexive revenge based answer is "yes," closer scrutiny suggests that fears of retribution from OBL supporters would drive the overwhelming majority of potential jurors literally "underground." Two principle staples of Article III courts are—in essence—incompatible with terrorism related trials: the right to confront accusers and trial by a jury of one's peers.

VII. THE SOLUTION: DOMESTIC TERROR COURTS

The proposed domestic terror courts resolve two issues-- the suspected terrorists right to confront his accusers and the right to a trial by a jury of one's peers --critical to the criminal law paradigm while establishing a paradigm that guarantees a fair trial, admittedly with less rights for the defendant than in Article III Courts. By enabling the government to introduce available intelligence information, the proposal enables the Court to hear the government's case in full. Does this affect the rights of the defendant? In full candor, the answer is yes. But, the proposed court will protect the defendant by ensuring that the Court will not automatically accept the introduced intelligence into the record. That is, the government will have to show that the intelligence information is *valid, viable, relevant and corroborated.* Strict scrutiny that balances

[11] *See* Carter v. Jury Commission of Greene County, 396 U.S. 320, 330 (1970) (defining "peers" as "equals of the person whose rights it is selected or summoned to determine ... of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.").

the legitimate rights of the individual with the equally legitimate national security rights of the state is one of the significant advantages of the proposed domestic court.

How will the intelligence information be presented? *In camera* by the prosecutor and a representative of the intelligence services that will be subject to rigorous cross examination by the Court. The judges who will sit on the domestic terror court will be trained in understanding intelligence information. In addition, the bench will be expected to fulfill a "double role," that of fact-finders and defense counsel alike. As the latter will be barred from attending the hearings when intelligence information is submitted, the Court *must* proactively engage the prosecutor. The burden on the Court is enormously significant because the defendant (not present) does not have counsel representing him when the prosecutor seeks to introduce classified intelligence information.

This is a major stumbling point regarding domestic terror courts. Based on my experience (sitting as judge in administrative detention hearings of Palestinian's suspected of involvement in terrorism, where the only evidence relevant to the detainee was intelligence information), the burden on the judge is significant. However, it is the *only* manner in which intelligence information can be submitted.

It is important to emphasize that the intelligence information can *only* be used to buttress a conviction; it cannot be the sole basis of conviction. Simply put: if the only information available with respect to a particular detainee is intelligence, he must be released *unless* an administrative detention process (subject to independent judicial review) is established in addition to the proposed domestic terror court.

Based both on my scholarship and professional experience in the Israel Defense Forces Judge Advocate General Corps, it is critical that the role of intelligence information be fully understood with respect to individual's suspected of involvement in terrorism: it is all but impossible to conduct a terrorism related case without it.

Without making intelligence information available, the court will not be able to fully understand or appreciate the role a particular defendant played in a terrorist cell nor understand its inner workings, goals, missions and motivations. Simply put: without that information, the court will be—in essence—groping in the dark.

Those in favor of Article III courts suggest that:

> The difficulties involved in using classified evidence in terrorism prosecutions do not provide compelling support for an argument that the criminal justice system should be abandoned in terrorism cases; these difficulties are entirely self-imposed...If the government determines that it is more important to national security that a piece of information remain secret than to prosecute the terrorist, it can simply choose not to use that information or not to charge that terrorist until some unclassified evidence of his guilt can be presented. If the government determines that it is more important to national security to prosecute the terrorist than to keep the information in question secret--perhaps to prevent him from carrying out a terrorist attack--it can simply declassify the information and use it as evidence against him.[12]

While this argument is true, it is inherently limiting that the government must choose between prosecuting a terrorist or keeping intelligence information classified. In such a context, the government is caught in an all-or-nothing situation. This highlights both the importance of intelligence information (essential in order to try terrorists) and the Article III Court's inability to properly account for its importance. Domestic Terror Courts, on the other hand, allow the government to both maintain the secrecy of intelligence information *and* try suspected terrorists.

> The necessity of procuring good Intelligence is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprises of the kind, and for want of it, they are generally defeated, however well planned and

[12] Michael German, *Trying Enemy Combatants in Civilian Courts*, 75 GEO. WASH. L. REV. 1421, 1426-1427 (2007)

promising a favourable issue.

-George Washington, July 26, 1777[13]

VIII. FINAL THOUGHT

Domestic terror courts are not problem-free, far from it. However, the suggested proposal would enable trying an individual suspected of terrorism in a court of law while simultaneously balancing his legitimate rights with the state's equally legitimate national security rights. The other available models—GITMO, international terror court and Article III courts—for the reasons above would not and do not meet this requirement. While the proposal is not "problem free", particularly with respect to the defendant's constitutionally guaranteed right to confront his accuser, the alternatives pale in comparison. Premised on the understanding that GITMO is, today, a "non-starter" the available alternatives are not ideal. That being said, the requirement to immediately develop a workable judicial model is absolute. While Article III Courts present a tempting solution, the reality of operational counterterrorism suggests that constitutionally guaranteed rights are impractical with respect to all detainees. While the right to confront may be applicable in some cases, it is not relevant in all cases. That is the fundamental basis for the proposed recommendation of establishing domestic terror courts.

Such a properly constituted court, comprised of judges schooled in understanding classified intelligence reports would be fully competent to protect the rights of the defendant whose rights—without a doubt—will be negatively impacted by his or counsel's inability to confront his accuser. However, in an effort to maximize both the state's obligation with respect to national security and the detainees right to a fair trial, a domestic terror court competently meets this critical two-part test.

[13] Letter from George Washington to Col. Elias Dayton (July 26, 1777), in 8 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, at 479 (John C. Fitzpatrick ed., 1931) [hereinafter WRITINGS OF GEORGE WASHINGTON], cited in Nathan Alexander Sales, *Secrecy and National Security Investigations,* 58 ALA. L. REV. 811, 811 (2007).

INTERNATIONAL
Herald Tribune

Former Guantánamo detainee tied to Mosul suicide attack

By Alissa J. Rubin
Thursday, May 8, 2008

BAGHDAD: A former Kuwaiti detainee at the United States prison camp at Guantánamo Bay, Cuba, was one the bombers in a string of deadly suicide attacks in the northern Iraqi city of Mosul last month, the American military said Wednesday.

Meanwhile, the Iraqi foreign minister, Hoshyar Zebari, urged American and Iranian officials to return to talks about Iraqi security, but he said he understood that it was a difficult moment for reconciliation between the countries.

Commander Scott Rye, a spokesman for the American military, identified one of the Mosul bombers as Abdullah Salim Ali al-Ajmi, a Kuwaiti man who was originally detained in Afghanistan and spent three years at Guantánamo Bay before being released in 2005. "Al-Ajmi had returned to Kuwait after his release from Guantánamo Bay and traveled to Iraq via Syria," Rye said, adding that the man's family had confirmed his death.

Ajmi is one of several former Guantánamo detainees believed to have returned to combatant status, said another American military spokesman, Commander Jeffrey Gordon. "Some have subsequently been killed in combat and participated in suicide bomber attacks," he said.

Rye said it was rare to find Kuwaiti foreign fighters and suicide bombers in Iraq. "Although 90 percent of all suicide bombers in Iraq have been foreigners, historically, Kuwaitis have comprised less than 1 percent of foreign fighters in Iraq," he said.

The circumstances of the attack in which Ajmi was involved remained unclear, he said. There have been a number of suicide attacks in Mosul recently, and the city has become a center of activity for the insurgent group Al Qaeda in Mesopotamia, American and Iraqi officials say.

In Baghdad, Zebari acknowledged in a news conference that recent tensions over Shiite militia activity in Iraq, which the United States has accused Iran of supporting, had made it difficult for American and Iranian officials to sit down together. But, he said, "We believe it is very important to bring both parties to the negotiating table to discuss Iraqi security issues."

"We can't currently make this happen with both countries trading accusations against each other," he said. The two countries held three rounds of talks, but were unable to agree on a date for a fourth round "because of scheduling problems and a lack of enthusiasm," he said.

If the Iranians are organizing the training of Shiite militias as well as financing them and supplying them with weapons as the American military asserts, "This is unacceptable, of course," said Zebari, who said he had summoned Iran's ambassador to Iraq to the Foreign Ministry in the past two days for "a long conversation." But he underscored the point made by several Shiite members of Parliament who recently visited Iran, that Iraq must have a working relationship with its eastern neighbor.

"Our destiny is that we live together," Zebari said. "We are neighbors. And no matter what the problems are we need to resolve them. The history of Iraq-Iran relations is not easy."

The American military announced Wednesday that a soldier was killed in Anbar Province on Tuesday while on patrol.

Statement of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing On "Improving Detainee Policy: Handling Terrorism Detainees
within the American Justice System"
June 4, 2008

For more than six years this administration has made a mess of detainee policies by rejecting our courts, twisting our laws, and squandering our reputation. A conservative Supreme Court has been the only check on the administration as it has repeatedly overruled the administration's legal theories.

Detainees have languished for years at Guantanamo, without access to meaningful judicial review. To date not one accused terrorist has been tried, convicted and punished by the dysfunctional military commissions that the administration has established; but prosecutors and judges are being replaced in ways that leave the impression that the proceedings are being engineered to guarantee a result rather than ensure fairness. Now we hear that the administration is intent on proceeding with high profile trials in the weeks leading up to the November election in what appears to be another partisan effort.

As we near the end of this administration, it is time to look ahead. The next President and Congress will have to craft a new policy that is consistent with our values as a nation and our respect for the rule of law. A starting point is to examine the premise on which this administration based its policy, its conclusion that our criminal justice system is incapable of handling terrorism cases.

I am not so quick to dismiss systems of civilian and military justice that have served us so well for so long. One of the saddest legacies of this administration is its distrust of our constitutional system of justice. We cannot accept without examination the view that terrorism cases are too hard for our courts. So today we begin the process of looking more carefully at what needs to be done with those suspected of being terrorists, and what our courts – civilian and military – are capable of doing.

One excellent contribution to this discussion is the report that Human Rights First released last week, titled "In Pursuit of Justice." This report is the result of an in-depth look at the capabilities of our criminal justice system. It

concludes that the system is sufficiently flexible and well-equipped to handle international terrorism cases. We are fortunate to have one of the report's authors, James Benjamin, with us today.

We also welcome Judge John Coughenour [ph: Coo-nowr]. He is a respected judge who has significant experience with terrorism cases, having presided over the trial of the so-called "millennium bomber" Ahmed Ressam. He speaks with authority on the capacity of our constitutional system to handle new challenges. Judge Coughenour's written testimony includes a quote from Justice Jackson, a former Attorney General of the United States and our chief prosecutor at the Nuremberg trials after World War II, who said "the strength and vitality of the Constitution stem from the fact that its principles are adaptable to changing events." I agree. It is a critical point to remember in this discussion. Is handling terrorism under the current system really not possible? Or is it just hard and will adapting our procedures require some work? I have the faith, which this administration apparently lacks, that our Constitution and our courts can adapt and meet the challenge.

Most experts reject the decisions of this administration, including its effort to establish a system of detention, interrogation and prosecution outside the law. Some propose instead to create "preventive detention" regimes and what they call "national security courts." Those making these proposals see them as more legitimate alternatives to the current extra-legal system. Their underlying assumption, though, is the same as this administration's – that our existing criminal and military justice systems are not capable of handling terrorism cases.

Before we create some new, separate mechanism designed to handle those accused of terrorism, we need to consider the serious impact this could have on our constitutional system of justice, our reputation, and on the fight against international terrorists. Would such a change create more problems than it solves? Would the current problems simply be replicated in a new, untested system? The current treatment of terrorism detainees has had a devastating impact on our national reputation, something the next President will need to restore. Would creating a separate court for terrorist suspects help us set that right? I look forward to hearing from Tom Malinowski of Human Rights Watch and the other witnesses on these and other issues.

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Testimony of Tom Malinowski
Washington Advocacy Director, Human Rights Watch

Hearing on Improving Detainee Policy:
Handling Terrorism Detainees within the American Justice System
Senate Judiciary Committee
June 4, 2008

Mr. Chairman, thank you for calling us together today and for inviting me to testify.

You have heard today from witnesses who described the strength of the American justice system and its success in handling terrorism cases. I fully agree that America's traditional institutions of justice, including federal civilian courts and military courts martial, both can and should be used to deal with those who have committed, planned or conspired to commit acts of terrorism. These courts have developed procedures to handle these complex cases effectively, striking a pragmatic balance between the government's interest in protecting classified information, and the need to protect the rights of defendants and to preserve the fairness and legitimacy of criminal proceedings.

Had the Bush administration used the American justice system to deal with terrorism detainees, instead of pushing it aside after September 11, 2001, America's reputation would be stronger today and its terrorist enemies would be weaker. The harm caused by Guantanamo and the dilemma of how to close it would have been avoided. There would be no need for you to hold this hearing today.

When it comes to the relative strength of traditional courts in dealing with terrorism, the record of the last six-and-a-half years speaks for itself. In that time, the federal civilian courts have prosecuted dozens of people accused of involvement in international terrorism, both inside and outside the United States. These trials have often been complicated and difficult. Some have been messy. But time and again, they have succeeded. They have disrupted conspiracies and attacks. They have put dangerous people away. They have given us finality in a way that is widely seen as fair.

In contrast, every alternative to the traditional system – whether detention without charge in Guantanamo or in secret CIA facilities, or trial by military commission – has failed. In six years, the military commissions have convicted only one person – an Australian kangaroo-trapper named David Hicks who was at best a bit player in al-Qaeda, and who is now free after serving his sentence.

If the record is so clear, why do we face any dilemma at all? Why are we still debating alternatives to a system that works?

Some of the reasons for distrusting the traditional American system of justice can easily be dismissed. They are put forward by partisans who do not wish to admit that what the Bush administration did was wrong, or by ideologues who believe that criminal justice undermines the idea of a war on terror. But one remaining reason is worthy of debate: the fear that there are people in Guantanamo, or at loose in the world, who cannot be prosecuted – because they have not yet committed a crime or because the evidence against them would not be admissible in a normal court – but who nonetheless are so dangerous that they must be held. To deal with such people, some have proposed that the United States establish through legislation a formal system of preventive detention, which would permit the long-term, potentially indefinite detention of suspects after some sort of hearing but without the filing of criminal charges or a trial.

What do we do with people who are hard to prosecute but who nonetheless scare us, because of their beliefs, their associations, and desire to do the United States harm? There may be a few dozen such people in Guantanamo today (though no one should claim to be sure about this, given the at best uncertain and at worst deeply tainted intelligence that is the basis for many of the detentions there). There are not likely to be many more in the future – those few detainees who have been brought to Guantanamo in the last two years have been accused of serious involvement in al-Qaeda that clearly renders them candidates for prosecution. But the number of people living at large in the world who fit the same profile is vastly more than a few dozen – it is probably in the tens or hundreds of thousands.

After all, many thousands of young men committed to helping the Taliban passed through Afghanistan before 2001, staying in the same camps and guest houses and developing the same associations as those now detained in Guantanamo. Many more subscribe to the extremist ideology that gave rise to al-Qaeda; they read the literature, surf the websites, watch the videos, and may be potential recruits to suicide squads or terror cells. If US

troops swept today through a city like Kandahar, Afghanistan or Karachi, Pakistan, and detained and interrogated the first thousand young men they encountered, they would probably find at least a few dozen who fit the profile of scary-but-not-prosecutable that we are discussing today. Leave those thousand men in a place like Guantanamo for six years, and the number deemed too frightening to release would likely rise even further.

So here is the question: If the United States is holding in Guantanamo 20 or 50 or even a hundred of these countless thousands of potentially dangerous, but difficult to prosecute, men, should it set up a preventive detention system to keep that small number from joining the larger pool? Keep in mind that the US Congress has never in its history formally established a system of detention without trial to deal with national security threats. Not during the Civil War. Not during World War II or the Cold War when the survival of the nation was clearly at risk. (And all of the few executive-branch experiments with such programs – the quickly-reversed suspension of habeas corpus during the Civil War, the Palmer Raids of 1919-1920, and the internment of citizens with Japanese ancestry during World War II – were, like Guantanamo, repudiated as mistaken experiments that violated America's commitment to the rule of law).

The benefit of experimenting with such a system now is that it would help incapacitate a few dozen people who may wish the United States great harm, out of thousands like them who would remain at large in the world. Would that benefit be worth the cost of taking such a historically unprecedented step?

The cost of establishing a preventive detention system to deal with terrorism detainees would, in my view, be extremely high. If the Committee is ever asked to consider such a proposal, let me suggest a few hard questions that I hope you will ask.

First, can Guantanamo detainees be moved to a new system of detention without trial in the United States without making it seem like Guantanamo was being transplanted to US soil? Would such a new system repair the damage Guantanamo has done to America's reputation, or perpetuate it?

Closing Guantanamo would bring the United States plenty of short-term credit. But the price America has paid for Guantanamo is not fundamentally related to its physical location. What concerns American and foreign critics of the camp is that the United States is holding prisoners indefinitely without trial or charge, based on evidence that may have been

obtained through coercion, which they are not allowed to confront, in a way that offends traditional American and international principles of justice.

Theoretically, one could design a system of preventive detention that affords detainees such a high level of due process that it would not look like Guantanamo, or even Guantanamo-lite. But if you allow protections similar to those already provided by federal courts and courts martial, why go to the trouble of creating a new system at all?

The only point of establishing a preventive detention system is to lower standards to a point where it can deal with people who cannot be prosecuted in the criminal system. That' s why almost all proposed preventive regimes assume, for example, that the person presiding could consider classified evidence never presented to the suspect. This would make it virtually impossible for defendants to challenge that evidence, and statements obtained through coercion could easily be concealed and relied upon.

The temptation would be enormous to exploit the proceedings' secrecy and lax standards of evidence to pursue people with only tenuous connections to terrorist activity. Inevitably, errors would be made; some innocent people would be detained based on faulty intelligence or mistaken identity. Just as inevitably, journalists and lawyers would uncover these mistakes. And once again, people around the world would be focused on the injustices the United States commits, not on the crimes the terrorists commit. Except this time, the principle of detention without charge would be part of the regular practice of the US government and embedded in the law of the land forever. This would not solve Guantanamo; it would make the problem permanent.

A second question is whether one can create a new form of preventive detention without enduring more years of frustration and delay?

The military commissions system currently in place was invented by White House lawyers after 9/11, then reinvented after it was challenged by critics within and outside the administration, then reinvented again after the Supreme Court's Hamdan decision. It may have to be reinvented yet again after the Supreme Court reviews the habeas-stripping provisions of the Military Commissions Act this summer. Meanwhile, the commissions have experienced enormous delays and embarrassments. Trials have started and stopped abruptly. Key participants, including the former chief prosecutor, have denounced the system as unfair. Most recently, charges against the alleged 20th 9/11 hijacker had to be

dismissed, likely because evidence was tainted by torture. As I mentioned, there has only been one conviction in six years.

Some of these problems are due to the inherent flaws of the system. But many are the inevitable result of creating any new system from scratch, especially one that deviates so much from standards with which American courts are comfortable and American lawyers are familiar. America's civilian criminal system, on the other hand, has been around for more than 200 years. The Uniform Code of Military Justice has been around for almost 60. We've had all that time to get the kinks out of the system, to establish stable rules, to train a cadre of lawyers and judges who know those rules, and to develop special procedures for special kinds of cases, including those involving terrorism.

If we try again to create a new system from scratch, if we rely again on trial and error to work out the rules, the result will again likely be more error than trial. Eventually, a stable set of rules may emerge, after all the legal challenges and legislative re-dos are exhausted. But how long would you be prepared to wait to get to that point, Mr. Chairman? Five years? Ten years? Can the United States afford more years of controversy over how to detain suspected terrorists?

A third question I hope you'll ask is whether the risk of releasing truly dangerous people would be lower with a preventive detention system, or higher?

Now, that may sound like a counterintuitive question. Surely, the whole point of a preventive system is to detain people who might otherwise be released by ordinary courts, with their higher standards of evidence and due process. But the answer is not as obvious as it may seem.

If a system of preventive detention is established, it will always be easier in the short term for the government to put suspected terrorists through such a system than to prosecute them before civilian courts. The government will have a strong incentive to use this parallel system even for those detainees who could be prosecuted in criminal courts. After all, why go to the trouble and expense of a trial, which might require declassifying evidence, and even the risk of an acquittal, when you have a more expedient option?

At the same time, because a new preventive system would likely face tremendous legal challenges as well as domestic and international criticism, the government will eventually feel pressure to move detainees out of it. This is precisely what has happened in

Guantanamo. At first, setting up the camp looked like a good way to avoid the uncertainties of the criminal justice system; the administration could put who it pleased there and control their fate for as long as it pleased. When Guantanamo became controversial, the administration started trying to move people out of it. It sent hundreds of detainees back to their home countries, including a number of apparently very dangerous men who might well be sitting in a federal prison right now had they been brought before a criminal court at the start. Any system that lacks legitimacy is likely to result in more potentially dangerous people being released sooner than a system that is unassailable, like our criminal courts. The lesson is that here, as in so many aspects in life, the short-term expedient solution is self-defeating in the long term.

A fourth question is whether a preventive detention system would effectively delegitimize terrorists in the way that the criminal justice system does?

One thing all terrorists have in common is the desire not to be seen as ordinary criminals. Al-Qaeda members clearly want to be thought of as soldiers, as part of a great army at war with a superpower on a global battlefield. They crave the attention and, in their own minds, the glory that comes with that status; and they use it to recruit more misguided young men to join their cause. Remember how the 9/11 mastermind Khalid Sheikh Mohammed behaved before his "Combatant Status Review Tribunal" at Guantanamo Bay. He wore his designation as "enemy combatant" proudly, comparing himself to George Washington and saying that had Washington been captured by the British, he, too, would have been called an "enemy combatant." In a sense, the Guantanamo tribunal gave Khalid Sheikh Mohammed exactly the status that he wanted.

In contrast, consider how upset the convicted "shoe bomber," Richard Reid, was to be brought before an ordinary court in Boston, how he demanded to be treated as a combatant, and how the judge in that case, William Young, put him in his place by saying: "You're no warrior. I know warriors. You are a terrorist" – as he sentenced Reid to life in prison. Isn't this a far better way to deal with such men, to let them fade into obscurity alongside the murderers and drug traffickers who populate our federal prisons?

As counterterrorism expert Mark Sageman has written: "Any policy or recognition that puts such people on a pedestal only makes them heroes in each others' eyes – and encourages others to follow their example." The best system for dealing with suspected terrorists is the system that makes them feel the least special. The criminal justice system passes that test. A brand new system of preventive detention designed just for members of

al-Qaeda would fail it miserably. It would fuel the notion that these men deserve special treatment and risk elevating their status. The risk would be compounded by the likelihood that such detainees would receive regular reviews of their detention – keeping their names and cases in the press and making them poster children for advocacy and recruitment efforts alike. By comparison, the criminal justice system provides closure, allowing convicted terrorists to largely disappear from the public eye.

That leads me to a final question: Would a preventive detention system actually prevent terrorism?

Again, if you believe that incapacitating a few dozen potentially dangerous young men out of the thousands of such people at large in the world weakens al-Qaeda, then the answer is "yes."

But if you agree with General Petraeus that the fight against non-traditional foes like al-Qaeda "depends on securing the population, which must understand that we – not our enemies – occupy the moral high ground," the answer is clearly "no." It is "no" if you believe the US Army's Counterinsurgency Manual, which warns that "punishment without trial" is an illegitimate action that enemies exploit to replenish their ranks. It is "no" if you look at the websites that use images of Guantanamo to recruit more fighters to the terrorists' ranks. It is "no" if you believe the April 2006 National Intelligence Estimate, which argues that to defeat al-Qaeda, the United States needs to "divide [terrorists] from the audiences they seek to persuade" and make "the Muslim mainstream... the most powerful weapon in the war on terror."

There is, unfortunately, no shortage of potential suicide bombers in the world. Guantanamo has made that problem worse, not better, probably creating far more enemies than it has taken off the battlefield. If a new system of preventive detention is seen as another departure from America's commitment to the rule of law, the problem would be compounded.

The experience of America's allies is often cited to justify preventive detention regimes. But that experience is far from encouraging. Between 1971 and 1975, for example, the British army rounded up close to 2,000 people it believed to be associated with the Irish Republican Army (IRA) and interned them in prison camps, where they were held without charge. Violence increased as anti-detention anger helped fuel the conflict.

Years later, the home secretary, Reginald Maudling, who sanctioned the internments, said the experience "was by almost universal consent an unmitigated disaster which has left an indelible mark on the history of Northern Ireland." In the words of former British Intelligence officer Frank Steele, who served in Northern Ireland during this period: "[Internment] barely damaged the IRA's command structure and led to a flood of recruits, money and weapons." Even Edward Heath, the British Prime Minister in 1971, when internment was introduced, later called it a "mistake" which "gave the IRA a way to recruit from amongst people who had been interned, and... proved impossible to stop."

Mr. Chairman, there are no easy, expedient answers to the question of what to do with the remaining detainees in Guantanamo, and others like them who may be detained in the future. But for those who are not sent home (which is likely the best answer for most), the American criminal justice system offers the best alternative.

In a sense, the United States has been running a controlled experiment for the last six years in how best to bring suspected terrorists to justice. And the results are clear.

Those accused men who have been brought into the civilian system are, to use one of President Bush's favorite expressions, no longer a problem for the United States. If guilty, they have been convicted, put away, and largely forgotten. They are not being used for propaganda purposes by groups like al-Qaeda. Their treatment has reinforced America's status as a nation of laws, not undermined it.

Meanwhile, every single person who remains in the alternative system at Guantanamo remains an enormous problem for the United States.

The lesson is equally clear. We should stop experimenting. We should not build yet another untested structure on a foundation of failure. We should use the system that works.

Submission for AEI

We Need a National Security Court

By Andrew C. McCarthy and Alykhan Velshi[1]

Introduction

Even in the chaotic aftermath of the attacks of September 11, 2001, one thing was abundantly clear: the American counter-terrorism strategy of the 1990s, which had made prosecution in the criminal justice system the primary method for responding to the international terrorist threat, had failed. A new approach was needed. It was essential that any new paradigm involve not only a strategy for taking the fight to the terror network by militarily attacking its overseas redoubts, but a rethinking of how captured terrorists should be handled.

There was reason for optimism that a thorough-going reevaluation was underway when, on November 13, 2001, President Bush issued an executive order providing for trials by military commission for captured alien enemy combatants.[2] But hope has long since faded. Notwithstanding the administration's directive, Zacarias Moussaoui, then the only person in American custody believed to be directly complicit in the 9/11 attacks, was indicted and tried in the criminal justice system. Moreover, in the more than five years since the executive order, the military justice system has charged only a handful of the hundreds of combatants it has detained and has not completed a single military commission trial. The cases in which charges were filed have proceeded fitfully, breaking down in procedural confusion and due to stays for litigation in the civilian courts over their propriety. This extraordinary delay – which culminated in the Supreme Court's rejection of the Commissions in June 2006 and new legislation to validate and move them forward in October 2006 – has given momentum to the vigorous arguments leveled against military tribunals by human rights activists. Regrettably, those arguments have

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[2] 66 Fed. Reg. 57,833.

not been rebutted by what would have been the most convincing answer of all: completed commissions that demonstrated the system's inherent fairness.

While the legislation in 2006 and late 2005 has been a significant improvement over the uncertainty that reigned before it was enacted, it is an incomplete solution. Primarily, it focuses on processing the approximately 435 alien enemy combatants still detained at Guantanamo Bay, Cuba. To be sure, it was urgent that these detainees be addressed. Nevertheless, the war on terror is likely to ensue for many years, perhaps decades. Going forward it is certain to involve many more enemy combatants, apprehended both overseas and in the United States. We must have a long-range plan.

Congress should use its authority under Article I, Section 8, of the Constitution to create a new National Security Court. Such a court could subsume, and expand on the jurisdiction and duties of, the existing federal Foreign Intelligence Surveillance Court. This new tribunal would be responsible for terrorism trials, as well as the review and monitoring of the detention of alien enemy combatants. It would inject judicial participation into the process to promote procedural integrity and international cooperation, but would avoid the perilous prospect of judicial micromanagement of the executive branch's conduct of war on terror.

Why is a National Security Court Needed?

1993-2001: The Emerging Threat

The United States has been under an onslaught of militant Islamic terrorism since February 26, 1993, when the World Trade Center was bombed, killing six Americans.[3] From that time through the suicide hijacking attacks of September 11, 2001, our government regarded international terrorism as a law enforcement issue to be addressed by criminal prosecution in federal court.

It was appropriate to take this tack at the beginning. The intentions and capacity of our enemies did not fully reveal themselves in the first instance. The WTC bombing,

[3] This is not to suggest that the WTC bombing was the first attack by militant Islam against American interests. During the 1970's and 80's there were numerous acts of terrorism and other violence, most notably the Iranian Hostage Crisis of 1979 and Hezbollah's destruction of the marine barracks in Lebanon in 1983. *See, e.g.,* Norman Podhoretz, "World War IV: How It Started, What It Means, and Why We Have to Win," *Commentary Magazine* (Sept. 2004 ed.); Timothy Naftali, *Blindspot: The Secret History of American Counterterrorism* (Basic Books 2005). The WTC attack, however, marked an important turning point in that it was the most significant domestic strike by a foreign enemy since Pearl Harbor and it ushered in the era of prosecution in the federal courts as America's principal counterterrorism strategy.

though best understood now as a declaration of war, appeared at the time as a crime – among the most heinous ever committed on American soil, but still a crime, not an act of war. It was thus investigated aggressively and competently, most (though not all) of the perpetrators were quickly apprehended, and by a little over a year after the attack, four bombers stood convicted after a seven-month trial.

Nevertheless, it became apparent in short order that the WTC bombing had in fact been a declaration of war against the United States by a global network of jihad organizations, of which al Qaeda was a major, but by no means the only, propelling force. By late spring 1993, only a few months after the bombing, it emerged that the same elements were plotting an even more spectacular campaign: bombings of the United Nations complex, the Lincoln and Holland Tunnels, and the Javits Federal Building that houses the FBI's New York Field Office – a plot that was thwarted only because the FBI infiltrated the terror conspiracy with an informant.

In 1994 and 1995, Ramzi Yousef (the technical mastermind of the WTC bombing who had successfully fled the United States), Khalid Sheik Mohammed (who would later become the operations chief of al Qaeda and design the 9/11 attacks), and others developed an overseas scheme that, among other things, contemplated murdering President Clinton, as well as carrying out near-simultaneous bombings of a dozen U.S. airliners while in flight over the Pacific (sometimes referred to as the "Manila Air" or the "Bojenka" plot). They were stopped principally because an alert Filipino police officer noticed smoke coming from an apartment where Yousef and an accomplice had had an accident experimenting with explosives – a mishap that led to Yousef's flight and eventual capture in Pakistan.

The following year featured attacks against American interests in Saudi Arabia, most notoriously the Khobar Towers bombing in which nineteen U.S. airmen lost their lives. These operations are currently thought to have been the work of Hezbollah, although the 9/11 Commission has suggested the possibility of an al Qaeda role.[4] Also in 1996, al Qaeda leader Osama bin Laden issued his "Declaration of Jihad Against the

[4] *See The 9/11 Commission Report* (Norton 2004) at 60 & n.48. Although Hezbollah is primarily a Shiite organization while al Qaeda affiliates are overwhelmingly Sunni, they have cooperated together against the U.S. in other contexts. *See, e.g., id.* at 68 (Hezbollah training of al Qaeda's top military committee members and several operatives who were involved with its Kenya cells prior to the 1998 embassy bombings).

Americans Occupying the Land of the Two Holy Mosques [*i.e.*, Saudi Arabia]," calling on militant groups to pool resources to better accomplish a single goal: killing Americans. Bin Laden's directives were echoed in the United States, where Sheikh Omar Abdel Rahman, the blind Islamic cleric who led both a nascent jihadist movement in the New York area and the brutal Egyptian terror organization *Gama'at al Islamia* (the Islamic Group), had been sentenced to life imprisonment after his conviction for terrorist crimes related to the 1993 World Trade Center bombing. Of Americans, Abdel Rahman decreed from federal prison in 1996, "Muslims everywhere [should] dismember their nation, tear them apart, ruin their economy, provoke their corporations, destroy their embassies, attack their interests, sink their ships, . . . shoot down their planes, [and] kill them on land, at sea, and in the air. Kill them wherever you find them."[5]

In February 1998, bin Laden issued his better known fatwa, calling for Muslims to kill Americans, including civilians, anywhere in the world where they could be found. That spring, the U.S. filed a sealed indictment against bin Laden, but he was not apprehended. On August 7, 1998, al Qaeda carried out simultaneous bombings against the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, killing over 220 people (including 12 Americans) and injuring thousands.

Shortly before the Millennium celebration in late 1999, Ahmed Ressam was apprehended attempting to enter the U.S. from Canada in possession of explosives that he and several conspirators were planning to deploy in a bombing of the Los Angeles International Airport. A few weeks later, in early January 2000, two critical events sowed the seeds for later devastation.

First, al Qaeda attempted to bomb the U.S.S. *The Sullivans* as it was docked in Aden, Yemen. The plot failed because the transport vessel sunk from the weight of the explosives, but the terrorists learned from the experience. Ten months later, on October 12, 2000, they succeeded, bombing the U.S.S. *Cole* as it docked in Aden, killing 17 U.S. naval personnel. Second, a group of conspirators met in Kuala Lampur, Malaysia, in what

[5] *See United States* v. *Ahmed Abdel Sattar*, Indictment 02 Cr. 395 (S.D.N.Y. Nov. 19, 2003) (available at http://news.lp.findlaw.com/hdocs/docs/terrorism/uslstwrt111903sind.html) at 4, para. 7.

is believed to have been the first planning session for what became the 9/11 attacks, which killed nearly 3000 Americans in New York, Virginia and Pennsylvania.[6]

The Folly of Criminal Prosecution

It is rare indeed for those who support approaching terrorism as primarily a criminal-justice problem to note that the leader of al Qaeda has actually been under indictment in this country for eight years – *i.e.*, throughout an unprecedented and undeterred spree of savage attacks from the embassy bombings, through the Cole, and finally through 9/11 and its aftermath. Nevertheless, the brief overview above outlines the steady emergence of a military enemy dedicated in the short term to forcing changes in U.S. foreign policy and ultimately – albeit fantastically – to posing an existential threat to the United States in pursuit of establishing a worldwide Caliphate. Al Qaeda and its affiliated organizations do not have a standing army, navy or air force in the conventional sense (although they have managed to carry out ground, marine and air attacks). But they have proved to be a highly capable adversary for a variety of reasons that go to the heart of matters under our present consideration.

1. ***Criminal prosecution, by itself, is a grossly inadequate response to the military challenge of international terrorism.*** First, while the actual size and expanse of the al Qaeda network is the subject of dispute,[7] it is obvious that in the eight years

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[6] *See The 9/11 Commission Report* at 156-60.

[7] The Council on Foreign Relations, for example, while acknowledging that "[i]t's impossible to say precisely" how large al Qaeda is, estimates that membership ranges "from several hundred to several thousand[.]" CFR Backgrounder: al-Qaeda (July 7, 2005) (http://www.cfr.org/publication/9126/#5). The *Los Angeles Times*, purporting to rely on hearsay accounts of debriefings of captured terrorists (such as Khalid Sheik Mohammed), has reported that the core group never had more than a couple of hundred members. "How menacing is Al Qaeda?" (July 17, 2005) (http://www.latimes.com/news/opinion/commentary/la-op-burningquestion17jul17,0,6336790.story?coll=la-news-comment-opinions). But as it concedes, formal membership has never necessarily been a prerequisite to participation in terrorist acts. (Khalid Sheik Mohammed himself, for example, is reported to have admitted to being involved in terrorism well before formally joining; Mohamed Daoud al-'Owhali, one of the embassy bombers, claimed that he never formally joined). On the higher end, the State Department has estimated that al Qaeda has several thousand members, *Patterns of Global Terrorism 2002*, at 119, and, in 2003, the Congressional Research Service acknowledged estimates that somewhere between 20,000 and 60,000 people – some unknown percentage of which actually joined the terror network – had received paramilitary training in al Qaeda camps. Audrey Kurth Cronin (CRS), "Al Qaeda After the Iraq Conflict" (May 23, 2003) (http://fpc.state.gov/documents/organization/21191.pdf).

between the WTC bombing and 9/11, the international ranks of militant Islam swelled, and its operatives successfully attacked U.S. interests numerous times, with steadily increasing audacity and effectiveness. Cumulatively, in an age when weapons of mass destruction have become more accessible than ever before, militant Islam may actually pose an existential threat to the United States. At a minimum, it constitutes a formidable strategic threat. And in any event, this threat is manifestly more menacing than such quotidian blights as drug trafficking and racketeering, which a strong society can afford to manage without forcibly eradicating. Simply stated, international terrorism is not the type of national challenge the criminal justice system is designed to address.

Yet, during the eight-year period under consideration, the virtually exclusive U.S. response was criminal prosecution. This proved dismally inadequate, particularly from the perspective of American national security. The period resulted in less than ten major terrorism prosecutions. Even with the highest conceivable conviction rate of 100 percent, *less than three dozen terrorists* were neutralized – at a cost that was staggering and that continues to be paid, as several of these cases remain in appellate or habeas litigation.[8]

Stopping less than three dozen terrorists is a patently insufficient bottom line in dealing with a global threat of such proportions. Nonetheless, equally alarming from the standpoint of what may reasonably be expected from criminal prosecutions, the system could not have tolerated many more terrorism cases.[9]

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[8] The WTC bombing resulted in three related prosecutions: the 1993-94 trial of the four originally captured bombers, the 1995 seditious conspiracy case against Sheik Omar Abdel Rahman and eleven others, and a 1997 trial of Ramzi Yousef and another former fugitive. The Manila Air plot resulted in a 1996 trial of Ramzi Yousef and two others. Only six of the numerous defendants indicted in connection with the embassy bombings have appeared in the U.S. after arrest and/or extradition; of these, one pled guilty, four were convicted at trial, and one, Mamdouh Mahmud Salim (a/k/a Abu Hajer al Iraqi) – who was the most important terrorist charged given his high rank in al Qaeda – was severed after a barbaric escape attempt in 2000, during which he plunged several inches of a shiv through the eye of a prison guard, nearly killing him. He was later convicted of this attempted murder, but whether he will ever be tried for the embassy bombings is unknown. The Millennium plot resulted in the convictions of three terrorists. The attacks on the *Cole* and on Khobar Towers finally resulted in indictments – each many years after the fact (and the *Cole* long after 9/11) – but no American prosecutions. One defendant, Zacarias Moussaoui, was convicted in the U.S. for participation in the 9/11 plot. His trial and sentencing (to life imprisonment after the jury could not agree on the death penalty) took nearly five years to complete due to interminable delays over discovery issues (of the type we shall address shortly), and, in fact, might still be unresolved today but for the fact that he elected to plead guilty (and bray about his anti-American terrorism) rather than put the government to what promised to be a lengthy, complex trial.

[9] Most of the trials alluded to in the preceding note took many months to complete (*e.g.*, the blind sheik case took nine months, the embassy bombing and the first WTC trial took seven months), often at the

2. ***Terrorism prosecutions confound importantly distinct governmental roles.*** The sheer numbers, while arresting, are themselves merely a symptom of what has been a wrongheaded counterterrorism philosophy that, not surprisingly, has numerous harmful consequences. Essentially, we have shifted what are national-security (as opposed to police) functions from the ambit in which executive discretion to respond to threats is necessarily broad to the ambit in which executive action is heavily regulated and the federal courts, by performing their ordinary functions, actually empower our enemies.

In the constitutional license given to executive action, a gaping chasm exists between the realms of law enforcement and national security. In law enforcement, as former U.S. Attorney General William P. Barr explained in October 2003 testimony before the House Intelligence Committee, government seeks to discipline an errant member of the body politic who has allegedly violated its rules. That member, who may be a citizen, an immigrant with lawful status, or even, in certain situations, an illegal alien, is vested with rights and protections under the U.S. constitution. Courts are imposed as a bulwark against suspect executive action; presumptions exist in favor of privacy and innocence; and defendants and other subjects of investigation enjoy the assistance of counsel, whose basic job is to put the government to maximum effort if it is to learn information and obtain convictions. The line drawn here is that it is preferable for the government to fail than for an innocent person to be wrongly convicted or otherwise deprived of his rights.

Not so in the realm of national security. There, government confronts a host of sovereign states and sub-national entities (particularly international terrorist organizations) claiming the right to use force. Here the executive is not enforcing American law against a suspected criminal but exercising national defense powers to

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conclusion of, literally, *years* of pretrial discovery and court proceedings. Typically, the appeals also take years to complete. (*E.g.*, the embassy bombing trial, completed over six years ago, is still on direct appeal, no doubt with years of habeas challenges ahead assuming the convictions are upheld.) Moreover, even assuming *arguendo*, and against all indications, that there were appreciably more than three dozen terrorists (a) who could practically have been captured and rendered to the U.S. for trial; (b) as to whom evidence existed that could have been used without irresponsibly compromising national security; and (c) as to whom such evidence would have been sufficient to satisfy the demanding proof hurdles for prosecution; there would of course remain the problem of securing courthouses, jail facilities, and trial participants throughout the United States.

protect the nation against external threats. Foreign hostile operatives acting from without and within are generally not vested with rights under the American constitution – and treating them as if they were can have disastrous consequences.[10] The galvanizing concern in the national security realm is to defeat the enemy, and as Mr. Barr puts it, "preserve the very foundation of all our civil liberties." The line drawn here is that government cannot be permitted to fail.

3. ***Terrorism prosecutions create the conditions for more terrorism.*** The treatment of a national security problem as a criminal justice issue has consequences that imperil Americans. To begin with, there are the obvious numerical and motivational results. As noted above, the justice system is simply incapable, given its finite resources, of meaningfully countering the threat posed by international terrorism. Of equal salience, prosecution in the justice system actually increases the threat because of what it conveys to our enemies. Nothing galvanizes an opposition, nothing spurs its recruiting, like the combination of successful attacks and a conceit that the adversary will react weakly. (Hence, bin Laden's well-known allusion to people's instinctive attraction to the "strong horse" rather than the "weak horse," and his frequent citation to the U.S. military pullout

[10] The discovery issues are addressed below. The problem of letting the guilty terrorist (as opposed to, say, the guilty tax cheat) go free because of insufficient evidence is obvious. One other example is noteworthy. In 2000, a superb district judge in New York, the Hon. Leonard B. Sand, came extremely close to suppressing the confession of Mohammed Daoud al-`Owhali, the bomber of the U.S. embassy in Nairobi responsible for well over 200 murders and untold other injuries and damage. In originally ordering the confession excluded, Judge Sand ruled that although al-`Owhali's admissions had been voluntary, federal agents had failed to give al-`Owhali *Miranda* warnings. In truth, al-`Owhali had no rights under the U.S. Constitution. He was a Saudi (pretending at the time to be a Yemeni) who was in the custody not of the U.S. but of Kenya (which does not follow *Miranda* or, for example, guarantee counsel at public expense during custodial interrogation), and whose only contact with the U.S. was to bomb our embassy. He had never set foot in this country or made application of any kind under the immigration laws. Even if one were, not unreasonably, to conclude that American agents minimally owe due process when they act overseas, this would mean only that they owed the process that is due under the circumstances that obtain. Moreover, it is clear that the American presence actually afforded al-`Ohwali *more* protections than he would have had if only the Kenyan authorities had been interested in him. (Here, it is worth pausing to note that he killed many more Kenyans than Americans.) But Judge Sand initially concluded that al-`Owhali had a Fifth Amendment privilege against self-incrimination and thus – reasoning from the Supreme Court's then-recent decision in *Dickerson* v. *United States*, 530 U.S. 428 (2000) – that this privilege included a right to compliance with *Miranda*, which was utterly unrealistic in Kenya. The judge ultimately reversed himself and permitted the confession to be admitted – albeit in an opinion that dangerously assumes foreign alien combatants have rights under the Fifth Amendment. *See United States* v. *Bin Laden (al-`Owhali)*, Dkt. No. 98 Cr. 1023 (LBS) (Feb. 13, 2001, as amended Feb 16, 2001) (available at http://cryptome.org/usa-v-ubl-mwo.htm). That ruling is currently on appeal. Without the confession, al-`Owhali would almost certainly have been acquitted.

from Lebanon after Hezbollah's 1983 attack on the marine barracks, and from Somalia after the 1993 "Black Hawk Down" incident). For militants willing to immolate themselves in suicide-bombing and hijacking operations, mere prosecution is a provocatively weak response. Put succinctly, where they are the sole or principal response to terrorism, trials in the criminal justice system inevitably cause more terrorism: they leave too many militants in place and they encourage the notion that the nation may be attacked with relative impunity.

4. ***Prosecutions in the criminal justice system arm international terrorist organizations with a trove of intelligence that both identifies methods and sources of information and improves their ability to harm Americans.*** Equally perilous to national security as the general philosophy of combating terror by trials are the nuts-and-bolts of trial practice itself.

Under discovery rules, the government is required to provide to accused persons, among many other things, any information in its possession that can be deemed "material to preparing the defense."[11] Moreover, under current construction of the *Brady* doctrine, the prosecution must disclose any information that is even arguably material and exculpatory,[12] and, in capital cases, any information that might induce the jury to vote against a death sentence, whether it is exculpatory or not (imagine, for example, the government is in possession of reports by vital, deep-cover informants explaining that a defendant committed a terrorist act but was a hapless pawn in the chain-of-command).[13] The more broadly indictments are drawn, the more revelation of precious intelligence due process demands – and, for obvious reasons, terrorism indictments tend to be among the

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[11] Rule 16(a)(1)(E), Fed. R. Crim. P.

[12] *Brady* v. *Maryland*, 373 U.S. 83 (1963); *see also United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (discussing materiality as information with potential to undermine confidence in the outcome); *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995) ("showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal"); and *see id.*, at 437 (even when the prosecutor's office and the investigating agency do not know of exculpatory information, they have an obligation to seek out and disclose any such information that may be in the wider government's possession).

[13] *Brady* v. *Maryland*, 373 U.S. at 87; *see also Moore* v. *Illinois*, 408 U.S. 786, 794-95 (1972).

broadest.[14] The government must also disclose all prior statements made by witnesses it calls,[15] and, often, statements of even witnesses it does not call.[16]

This is a staggering quantum of information, certain to illuminate not only what the government knows about terrorist organizations but the intelligence community's methods and sources for obtaining that information. When, moreover, there is any dispute about whether a sensitive piece of information needs to be disclosed, the decision ends up being made by a judge on the basis of what a fair trial dictates, rather than by the executive branch on the basis of what public safety demands.

Finally, the dynamic nature of the criminal trial process must be accounted for. The discovery typically ordered, virtually of necessity, will far exceed what is technically required by the rules. As already noted, terrorism trials are lengthy and expensive. The longer they go on, the greater is the public interest in their being concluded with finality. The Justice Department does not want to risk reversal and retrial, so it tends to bring close questions of disclosure to the presiding judge for resolution. The judge, in turn, does not wish to risk reversal and, of course, can never be reversed in our system for ruling against the government on a discovery issue. Thus, the incentives in the system press on participants to disclose far more information to defendants than what is mandated by the (already broad) rules. These incentives, furthermore, become more powerful as the trials proceed, the government's proof is admitted, it becomes increasingly clear that the defendants are probably guilty, and the participants become

[14] A terrorist who is acquitted due to insufficient evidence is not a person who will simply return to the commission of crimes; he is a danger to return to acts of war and indiscriminate mass homicide. The incentive for the Justice Department is thus to use every appropriate means to ensure conviction. One of the most appropriate is to present elaborate proof of the dangerousness of the terrorist enterprise of which the defendant is an operative. This approach has the dual benefit of placing acts in their chilling context while expanding the scope of evidentiary admissibility (particularly by resort to liberal rules for the admission of co-conspirator statements under Rule 801(d)(2)(E) and background evidence). While focus on the enterprise greatly enhances the prospects for conviction, however, it exponentially expands the universe of what may be discoverable.

[15] 18 U.S.C. Sec. 3500.

[16] Rule 806, Fed. R. Evid.

even less inclined to put a much-deserved conviction at risk due to withheld discovery – even if making legally unnecessary disclosure runs the risk of edifying our enemies.[17]

It is freely conceded that this trove of government intelligence is routinely surrendered along with appropriate judicial warnings: defendants may use it only in preparing for trial, and may not disseminate it for other purposes. To the extent classified information is implicated, it is also theoretically subject to the constraints of the Classified Information Procedures Act.[18] Nevertheless, and palpably, people who commit mass murder, who face the death penalty or life imprisonment, and who are devoted members of a movement whose animating purpose is to damage the United States, are certain to be relatively unconcerned about violating court orders (or, for that matter, about being hauled into court at all). Our congenial rules of access to attorneys, paralegals, investigators and visitors make it a very simple matter for accused terrorists to transmit what they learn in discovery to their confederates – and we know that they do so.[19]

5. ***The discovery requirements endanger national security by discouraging cooperation from our allies.*** As illustrated by the recent investigations conducted by Congress, the Silberman/Robb Commission, and the 9/11 Commission regarding pre-

[17] The burdens of post-trial litigation factor in here as well. Virtually *any* information that emerges post-trial but which was not disclosed at trial will become grist for a new trial claim based on allegedly "newly discovered evidence." *See* Rule 33, Fed.R.Crim.P.; *see also* 28 U.S.C. Sec. 2255 (permitting collateral challenge based on alleged errors in the proceedings leading to conviction). While most of these motions are frivolous, they are almost always resource-intensive – frequently coming years later and forcing the prosecutor's office (and sometimes the court) to assign new personnel who must master these voluminous records in order to demonstrate why the newly revealed information would not have made a difference in the outcome of the trial.

[18] 18 U.S.C. App. 3 (Pub.L. 96-456, Oct. 15, 1980, 94 Stat. 2025).

[19] A single example here is instructive. In 1995, just before trying the aforementioned seditious conspiracy case against the blind sheik and eleven others, one of the authors duly complied with Second Circuit discovery law by writing a letter to defense counsel listing 200 names of people and entities who might be alleged as unindicted co-conspirators – *i.e.*, people who were on the government's radar screen but whom there was insufficient evidence to charge. Six years later, that letter became evidence in the trial of those who had bombed our embassies in Africa. Within a short time of its being sent, the letter had found its way to Bin Laden in Sudan. It had been fetched for him by al-Qaeda operative Ali Mohammed who, upon obtaining it from one of his associates, forwarded it to al Qaeda operative Wadih El Hage in Kenya for subsequent transmission to bin Laden. Mohammed and El Hage were both convicted in the embassy bombing case. (*See* excerpts from Mohammed's guilty plea allocution made available by the State Department at http://usinfo.state.gov/is/Archive_Index/Ali_Mohamed.html.)

9/11 intelligence failures, the United States relies heavily on cooperation from foreign intelligence services, particularly in areas of the world from which threats to American interests are known to stem and where our own human intelligence resources have been inadequate. It is vital that we keep that pipeline flowing. Clearly, however, foreign intelligence services (understandably, much like our own CIA) will necessarily be reluctant to share information with our country if they have good reason to believe that information will be revealed under the generous discovery laws that apply in U.S. criminal proceedings.

6. ***Forcing the criminal justice system to deal with the non-criminal-justice problem of international terrorism reduces the quality of justice the system accords to ordinary Americans accused of crimes and presumed innocent.*** Finally, there is a profound but often undetected corrosion of our justice system when we force the square peg of terrorism into its round hole. Our reluctance to treat terrorists as criminals, far from being caused by disdain for the rigorous demands of criminal justice, is instead a reflection of abiding reverence for our system's majesty.

Islamic militants are significantly different both in make-up and goals from run-of-the-mill citizens and immigrants accused of crimes. They are not in it for the money; they desire neither to beat nor cheat the system, but rather to subvert and overthrow it; and they are not about getting an edge in the here and now – their aspirations, however grandiose they may seem to us, are universalist and eternal, such that the pursuit is, for the terrorist, more vital than living to see them attained. They are a formidable foe, and, as noted above, the national security imperatives they present are simply absent from the overwhelming run of criminal cases.

As a result, when we bring them into our criminal justice system, we have to cut corners – and hope that no one, least of all ourselves, will discern that with the corners we are cutting important principles. Innocence is not so readily presumed when juries, often having been screened for their attitudes about the death penalty, see intense courtroom security around palpably incarcerated defendants and other endangered trial participants. The legally required showing of cause for a search warrant is apt to be loosely construed when agents, prosecutors, and judges know denial of the warrant may

mean a massive bombing plot is allowed to proceed. For reasons already elaborated on, key government intelligence that is relevant and potentially helpful to the defense – the kind of probative information that would unquestionably be disclosed in a normal criminal case – may be redacted, diluted, or outright denied to a terrorist's counsel, for to disseminate it, especially in wartime, is to educate the enemy at the cost of civilian and military lives.

Since we obdurately declare we are according alleged terrorists the same quality of justice that we would give to the alleged tax cheat, we necessarily cannot carry all of this off without ratcheting down justice for the tax cheat – and everyone else accused of crime. Civilian justice is a contained, zero-sum arrangement. Principles and precedents we create in terrorism cases generally get applied across the board. This, ineluctably, effects a diminution in the rights and remedies of the vast majority of defendants – for the most part, American citizens who in our system are liberally afforded those benefits precisely because we presume them innocent. It sounds ennobling to say we treat terrorists just like we treat everyone else, but if we really are doing that, everyone else is necessarily being treated worse. That is not the system we aspire to.

Worse still, this state of affairs incongruously redounds to the benefit of the terrorist. Initially, this is because his central aim is to undermine our system, so in a very concrete way he succeeds whenever justice is diminished. Later, as government countermeasures come to appear more oppressive, it is because civil society comes increasingly to blame the government rather than the terrorists. In fact, the terrorists – the lightening rod for all of this – come perversely to be portrayed, and to some extent perceived, as symbols of embattled liberal principles, the very ones it is their utopian mission to eradicate. The ill-informed and sometimes malignant campaigns against the Patriot Act and the NSA's terrorist surveillance program are examples of this phenomenon.

In sum, trials in the criminal justice system don't work for terrorism. They work for terrorists.

Detention and Trial of Foreign Enemy Combatants

1. *Introduction.* Following the 9/11 attacks, the United States drastically and aptly revised its counterterrorism strategy. It began to regard al Qaeda and its affiliates as a military threat worthy of a comprehensive government response (not merely a criminal justice response), including military action. The new approach addressed a number of the difficulties – *e.g*, the growing number of terrorists, their enhanced motivation due to our previously weak response, and the threat terror organizations can pose when they are allowed to have relatively undisturbed command-and-control structures. Nevertheless, the new enforcement paradigm also gave rise to a new set of serious problems.

The most urgent of these was the intrusion of the federal courts into the management of military operations – specifically the detention and interrogation of enemy combatants captured overseas. Much of this initially came to a head in June 2004, when the Supreme Court decided both *Hamdi* v. *Rumsfeld*[20] and *Rasul* v. *Bush*.[21] For present purposes, the more significant of these is *Rasul*, in which the Court held for the first time that foreign enemy combatants captured by the U.S. military overseas had a right, even as the war proceeds, to challenge their detention in federal habeas corpus proceedings.

The driving force behind the breathtaking *Rasul* decision, and, indeed, behind the broader movement to vest our enemies with rights even as they attack our forces and plot against our civilians, has been the contention that no one can say with certainty when the war on terror will end; that detention of any captives is thus "indefinite"; and that such indefinite detention, absent a judicial determination that adequate grounds exist to detain, is at least un-American, if not flatly unconstitutional and a violation of human rights. Simply stated, this is absurd.

Under the laws and customs of war, which long predate our Republic, it has always been appropriate to capture and hold enemy combatants. This is reflective of common sense as much as law. Enemy combatants are often in a position to be killed or captured. Capturing them is the more merciful option, and making it more difficult or costly would almost certainly effect an increase in the number killed – a strange result

[20] 542 U.S. 507 (2004).

[21] 542 U.S. 466 (2004).

given that the civilizing impulse of international compacts such as the Geneva Conventions dictates *minimizing* carnage.

Capture, moreover, is permitted to prevent the captives from rejoining the enemy, which would endanger our forces, prolong war, and increase casualties; and to gather intelligence, which also protects our forces, makes it more likely they will attack enemy targets of military significance rather than civilian infrastructure, and, again, ends war more quickly and with less damage and death.

Further, while a war on a stateless terror network is obviously different in significant ways from conventional state-on-state wars, no war ever has a definite end date. The fact that the combatants at issue do not have an expectation about precisely how long they will be detained puts them in the same position as virtually all captured combatants in history, including American service personnel (who, when captured, have never been able to resort to the courts, if any, of our enemies).[22]

The intrusion of the regular U.S. civilian courts created structural and practical problems analogous to those addressed above with respect to terrorist trials. To observe that this was inevitable is not to besmirch the judiciary or the justice system. The primary task of the judiciary is not to vouchsafe the national security of the United States. That, instead, is a byproduct of what the judiciary accomplishes, on a daily basis, by vindicating the rule of law in the domestic setting. In sum, judges principally have a duty to ensure that justice is done for the parties who come before the court.

In the international arena, to the contrary, our national priority is not to do justice for individual litigants; it is to protect the public welfare of the American body politic. This is a function committed primarily in our system to the executive branch. Thus, for example, did Justice Oliver Wendell Holmes Jr. write for a unanimous Supreme Court in 1909, "When it comes to a decision by the head of the State upon a matter involving its

[22] Indeed, the entire theory of permitting a challenge to detention works only, and perversely, to the advantage of terrorists. Lawful combatants, who bear that privileged distinction because they follow the laws and customs of war, will virtually never be able to challenge the appropriateness of their capture and detention because *they wear uniforms*. As the Hague Convention requires, they distinguish themselves from the civilian (*i.e.*, non-combatant) population, and thus the adversary and the world know that they are military personnel who may properly be held until the war is concluded. Terrorists, to the contrary, eschew uniforms and by so doing conduct their operations in a way that gravely endangers the civilian population. Because they are without uniforms, they are in a position to claim, falsely, that they were not really combatants. This is the charade at the root of this issue.

life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."[23]

The handling of detainees captured in international military operations is precisely such a national security matter, and it has long been deemed part of the conduct of war, which is a predominantly executive branch function,[24] supported and given structure by Congress in the coordinate exercise of its Article I regulatory authority.[25] The judicial function here is counterintuitive, and especially undesirable in matters of national security is the sort of free-wheeling judicial rule-making that commonly – and often, but by no means always, beneficially – fills in the procedural interstices of the domestic criminal justice system.

This does not mean that there could be no conceivable, valuable role for Article III courts in national security matters. But the post-*Rasul* experience demonstrates that any such role would have to be heavily regulated (*i.e.*, it would leave little room for judicial creativity). The presumptions intentionally favoring the accused in the criminal justice system would be utterly inappropriate in a system designed to deal with alien enemy combatants. The latter system would not exist for the benefit of those vested with constitutional protections and, more centrally, would be conceived for the purpose of providing the minimum of due process necessary to ensure integrity in the outcome – not, as is the case in the judicial system, to ensure that the guilty go free to the extent necessary to avoid a single wrongful conviction. Such a reversal of the presumptions would be antithetical to the everyday practice of judging, and would consequently have to be spelled out with rigor.

The *Rasul* experiment in judicial oversight of the executive's wartime decisions regarding enemy detentions has largely, and thankfully, been undone by Congress. At the close of 2005, the Detainee Treatment Act was signed into law, essentially removing the detainee challenges from the federal district courts. Subsequently, Congress passed, and

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[23] *Moyer* v. *Peabody*, 212 U.S. 78, 85 (1909).

[24] *Yamashita* v. *United States*, 327 U.S. 1, 11 (1946).

[25] *See, e.g.*, 10 U.S.C. 821 and 836 (codifying military commissions); *see also Ex Parte Quirin*, 317 U.S. 1, 28-29 (1942) (upholding military commission based, in part, on Congress's codification of same). *See also Hamdan v. Rumsfeld* 126 S. Ct 2749 (2006) and Military Commissions Act of 2006.

the President signed, the Military Commissions Act of 2006, that further restricted the ability of federal courts to interfere in wartime detention policies. Regrettably, however, this has not brought closure to the issue of combatant-detention, which continues to reverberate politically and diplomatically. Despite an imperative to demonstrate to national and international audiences that it was capable of dealing fairly and expeditiously with alien combatants, the executive branch has failed to bring a single military commission to conclusion in the nearly five years since President Bush's executive order.

While there remains a good argument that military proceedings are the optimal way to address wartime prisoners, that would best have been demonstrated by having them and proving they work. Given the stakes involved, it can no longer be taken as an article of faith. In addition, while the Military Commissions Act and the Detainee Treatment Act are improvements, they principally address the challenges attendant to processing detainees at Guantanamo Bay. They are not a comprehensive solution to legal issues sure to arise in the future in a struggle against militant Islam that may last for decades. Thus, the time has come for Congress to consider the creation of a national security court for the war on terror.

2. ***While alien enemy combatants, who are neither U.S. citizens nor lawful aliens, have no rights under the U.S. constitution, judicial oversight of their cases without thoughtful consideration of the standards and procedures under which those cases should proceed, is a prescription for turning those cases into full-blown criminal trials.*** Even the *Rasul* decision recognized the inarguable point that persons who are neither citizens nor aliens lawfully resident in the United States do not enjoy the protections of our Constitution, including its habeas corpus provision. The majority argued that the alien combatants' right of access to U.S. courts for the purpose of challenging their detention under habeas corpus was statutory (*i.e.*, derived from the federal habeas statute, 28 U.S.C., 2241 *et seq.*).[26]

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[26] This contention was convincingly rebutted in Justice Scalia's dissent. Justice Stevens's majority opinion argued that cases post-dating *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950) supported an inference that a statutory habeas challenge to detention might be available even if aliens could not claim a constitutional entitlement. The dissent, however, demonstrated that those cases are easily distinguishable, and that *Eisentrager,* which is directly on point, expressly rejected *both* the constitution and the habeas statute as bases for aliens outside U.S. territory to seek habeas relief.

This distinction, though seemingly salient, proved in the event to be of little moment. Regardless of their lack of constitutional entitlements, experience shows that once alien combatants are permitted access to our courts, judges, under the rubric of due process, will effectively treat them as if they are every bit as vested as citizens with substantive and procedural protections – even in wartime and regardless of the what this portends for national security. Only firm instructions to the contrary could have bucked this inevitability. The Supreme Court's decision in *Rasul* failed to provide any guidance to lower courts, and the guidance provided in this regard by Congress since late 2005 has been insufficient.

Some explanation is in order here. In the other 2004 Supreme Court case noted above, *Hamdi* v. *Rumsfeld*, at issue was the very different scenario of the rights of *American citizens* captured and detained in the course of fighting against the U.S. in wartime. The Justice Department did not dispute that such citizen combatants had a constitutional right to file habeas claims. To the contrary, at issue were the questions whether they could compel a judicial review of the executive's decision to detain, and how searching that review should be. The case is instructive for present purposes because the court, in holding that judicial review was available, also indicated that the habeas proceedings in connection with U.S. citizens would be very deferential to the executive branch, to the point of indicating that a military determination would be accepted by the court as long as the citizen combatant had received adequate notice and a meaningful opportunity in the military proceeding to contest his detention.[27]

Of course, the entitlement of *alien* enemy combatants – assuming they have any rights (other than the right not to be tortured, which is provided by both U.S. and international law[28]) – should be dramatically less substantial than the very limited rights the Supreme Court accorded to American citizens in *Hamdi*. Predictably, however, that is not what developed in the district courts when they considered alien combatants detained at Guantanamo Bay on the basis of a decision, *Rasul*, which opened the courthouse doors

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[27] *Hamdi*, 542 U.S. at 533-534.

[28] *See* 18 U.S.C. Sec. 2340 *et seq.; see also* United Nations Convention Against Torture and Cruel, Inhuman and Degrading Treatment (ratified in 1994) and Sen. Exec. Rpt. 101-30, Resolution of Advice and Consent to Ratification, (1990).

but gave district judges no substantive or procedural guidance. Until Congress finally stepped in and put a stop to the experiment, the trajectory was toward an array of judicially fashioned rights approximating not merely those of citizens but, indeed, those accorded to American criminal defendants.

In *Odah* v. *United States*,[29] for example, the district court held that enemy combatants should be given counsel at the expense of the American taxpayer (putting them actually in a better position than the vast majority of *American* habeas petitioners, who have no right to counsel and who must pursue their claims *pro se*). Without authority in the habeas statute, the court broadly construed the All Writs Act and the Criminal Justice Act to sanction it, reasoning that it was exceedingly important for these particular petitioners to have publicly-subsidized lawyers because they had "clearly presented a nonfrivolous claim."[30] In the Court's view, what rendered these claims "non-frivolous" was the fact that the detainees "have been detained virtually incommunicado for nearly three years without being charged with any crime." Such a standard – bereft of any fact-specific circumstance that actually rendered the captures or detentions at issue unusually complex – could embrace any enemy combatant held in any war.

Further exercising its discretion to elevate the purported rights of alien enemy combatants over national security, the court invalidated a number of Defense Department guidelines, including the monitoring of combatant-counsel communications, adopted to ensure that detainees were not communicating with enemy forces on the outside.[31]

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[29] No. 02-828 (D.C. Oct. 20, 2004) (http://www.dcd.uscourts.gov/02-828a.pdf).

[30] Ibid, op. 7-12 (finding the claim "nonfrivolous," and discussing both the All Writs Act, 28 U.S.C. Sec. 1651, and the power of the court to direct the appointment of counsel at public expense under the Criminal Justice Act, 18 U.S.C. Sec. 3006).

[31] Many of the detainees had lawyers volunteering to represent them. The monitoring entailed observing meetings and examining the content of written materials brought in or out of the holding facility by lawyers. The protective measures were carefully designed to avoid compromising the ability of the detainees and their counsel to communicate meaningfully: all of the aforementioned monitoring and examination was to be carried out by military personnel who were walled-off from participation in any litigation and whose sole purpose was to ensure that enemy communications during wartime were not passed out of the holding facility. Op. 13-16. The safeguards were similar to special administrative measures commonly applied in civilian prisons to convicted terrorists who have various legal reasons, including the preparation of habeas petitions, for meeting with counsel. *See United States* v. *Ahmed Abdel Sattar*, Indictment 02 Cr. 395 (S.D.N.Y. Nov. 19, 2003) (available at http://news.lp.findlaw.com/hdocs/docs/terrorism/uslstwrt111903sind.html) at 10-11, para. 25-26 (describing special administrative measures imposed on inmate convicted of terrorist crimes).

Notwithstanding that the alien combatants at issue were not entitled to counsel (under either the Sixth Amendment or the habeas statute), the court found that the attorney-client privilege not only applied but overrode wartime security concerns, and reasoned that monitoring would undermine the administration of justice, chill meaningful communication, and deprive attorneys of the "certain degree of privacy" that was "essential" to their work.[32]

Notably, the right to counsel for alien enemy combatants, as permitted and expanded on in *Odah* and other rulings,[33] was a core part of the Congress's impetus to remove the cases from the district courts. Senators John Kyl and Lindsey Graham, two of the principal sponsors of the eventual Detainee Treatment Act, have described how catastrophic the provision of counsel to enemy combatants was to vital intelligence collection. As Senator Kyl observed:

> Keeping war-on-terror detainees out of the court system is a prerequisite for conducting effective and productive interrogation, and interrogation has proved to be an important source of critical intelligence that has saved American lives.... Giving detainees access to federal judicial proceedings threatens to seriously undermine vital U.S. intelligence-gathering activities. Under the new *Rasul*-imposed system, shortly after al-Qaida and Taliban detainees arrive at Guantanamo Bay, they are informed that they have the right to challenge their detention in Federal court and the right to see a lawyer. Detainees overwhelmingly have exercised both rights. The lawyers inevitably tell detainees not to talk to interrogators.... Effective interrogation requires the detainee to develop a relationship of trust and dependency with his interrogator. The system imposed last year as a result of *Rasul* – access to

[32] The court permitted the detainees unmonitored communications with counsel, and placed the lawyers on their honor not to disclose the substance of communications to third parties, leaving it up to the lawyers to report – if they chose to – any communications indicating that future terrorist acts were being planned. Op. 16-22. It bears emphasizing here that in *Hamdi*, a majority of the Supreme Court – Justice O'Connor's four-judge plurality and, inferentially, perhaps all the dissenters except Justice Thomas – indicated that an *American citizen* combatant would have a right to counsel in a proceeding to challenge his detention. *See Hamdi*, 542 U.S. at 539 (Opinion of Justice O'Connor). That right to counsel, of course, is rooted in the protections of the Constitution, to which American citizens are entitled. In contrast, the district court in *Odah*, a case involving enemy aliens with no claim on constitutional protections who were actively at war with the United States, not only invented a right to counsel but appears to have made it more muscular than anything conceived of by the high court for U.S. citizens in *Hamdi*.

[33] *See, e.g., In re Guantanamo Detainee Cases*, Nos. 02-0299, etc., Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba (D.D.C. Nov. 8, 2004) (Joyce Hens Green, U.S.D.J.) (available at http://www.globalsecurity.org/security/library/policy/national/02-299a_08nov2004.pdf) (outlining counsel's access to classified national security information and noting the "well-reasoned opinion addressing counsel access procedures" in *Odah*) (Ord. 9).

> adversary litigation and a lawyer – completely undermines these preconditions for successful interrogation.[34]

Senator Graham's responsive comments, directed to the actual practice at Guantanamo Bay, were startling in their account of the brazenness of detainee counsel:

> I agree entirely. If I could add one thing on this point: perhaps the best evidence that the current *Rasul* system undermines effective interrogation is that even the detainees' lawyers are bragging about their lawsuits' having that effect. Michael Ratner, a lawyer who has filed lawsuits on behalf of numerous enemy combatants held at Guantanamo Bay, boasted in a recent magazine interview about how he has made it harder for the military to do its job. He particularly emphasized that the litigation interferes with interrogation of enemy combatants:
>
> > The litigation is brutal [for the United States]. We have over one hundred lawyers now from big and small firms working to represent these detainees. Every time an attorney goes down there, it makes it that much harder [for the U.S. military] to do what they're doing. You can't run an interrogation ... with attorneys. What are they going to do now that we're getting court orders to get more lawyers down there?[35]

Perhaps more alarming than the district court's enemy-friendly procedures for access to counsel and other discovery was its treatment of the military commissions prescribed by the President's executive order. *Hamdan* v. *Rumsfeld*[36] involved a habeas petition filed by Salim Ahmed Hamdan, a Yemeni national captured in Afghanistan and detained in Guantanamo Bay. Hamdan was so trusted a member of al Qaeda's inner circle that he served as the personal driver of Osama bin Laden (who, for years, has had a multi-million dollar bounty on his head but has successfully evaded capture by exercising extreme care in ensuring the devotion and terrorist credentials of those with access to him).

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[34] Congressional Record, S14260 (Dec. 21, 2005).

[35] Congressional Record, S14261 (Dec. 21, 2005); Michael Ratner heads the radical Center for Constitutional Rights. The interview to which Senator Graham referred occurred on March 21, 2005, and was published in *Mother Jones*. (http://www.motherjones.com/news/qa/2005/03/ratner.html).

[36] *Hamdan v. Rumsfeld* 126 S. Ct 2749 (2006).

Like other detainees, Hamdan was confirmed by a U.S. military "combatant status review tribunal" (CSRT) to be an enemy combatant who had taken up arms against the United States in the war on terror. He was designated for trial by military commission and ultimately charged with serving as the al Qaeda leader's bodyguard, transporting him to training camps and safe havens, delivering weapons for the terror network, and training to commit terrorist acts.

Hamdan's commission, however, has been long delayed. On November 8, 2004, after the detainee took up *Rasul*'s invitation to file a habeas corpus petition challenging the proceedings against him, the district court issued an astounding decision, inconsistent with over half a century of Supreme Court precedent supporting the use of military commissions to try and punish enemy combatants accused of war crimes.[37] It held that Hamdan was presumptively entitled to prisoner-of-war protections under the 1949 Geneva Conventions, that the CSRT's contrary determination was not competent, and that the military commission was thus impermissible.[38] This ruling was sweepingly reversed a year later by the D.C. Circuit. The panel was particularly emphatic in rejecting the grant of prisoner-of-war Geneva Convention protections, reserved in this instance to honorable soldiers, to an obviously unprivileged combatant in the form of an al Qaeda operative.[39] The Supreme Court took certiorari in Hamdan's case and reversed the Court of Appeals on June 29, 2006.[40]

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[37] *See Yamashita* v. *United States*, 327 U.S. 1, 11 (1946); 10 U.S.C. Sections 821, 835(a). *See also Ex parte Quirin*, 317 U.S. 1, 28-29 (1942) (upholding use of military commission for enemy combatants, including a U.S. citizen, based on the predecessor of Section 821).

[38] *Hamdan* v. *Rumsfeld*, No. 04-1519 (Nov. 8, 2004) (http://www.dcd.uscourts.gov/04-1519.pdf), rev'd, 415 F.3d 33 (D.C. Cir. 2005).

[39] Reviewing the relevant authorities the district court had misconstrued or ignored, the appellate court bluntly concluded that appeal to the Geneva Conventions was unavailable for several reasons. First was the bedrock principle that international agreements do not generally create private, judicially enforceable rights. As the panel elaborated, alleged treaty violations are resolved by "international negotiations and reclamation," not by lawsuits. *Hamdan*, 415 F.3d at 39-40. The court added that even if Hamdan were not foreclosed from litigating his Geneva Convention-related claims, the treaty would not help him. First, Hamdan did not fit Geneva Conventions' definition of a privileged combatant because al Qaeda members do not wear uniforms and fail to "conduct their operations in accordance with the laws and customs of war." Second, al Qaeda obviously is not a party to the Geneva Conventions, nor does it fall into either of two recognized exceptions to that requirement. Id. at 40-43.

[40] Only eight Justices considered the *Hamdan* case, with Chief Justice John G. Roberts having recused himself because he was on the D.C. Circuit panel whose decision was being reviewed.

The Supreme Court reasoned that the Constitution allocated to Congress the principal authority to set up military commissions.[41] The leading opinion held that in the absence of authorization by a separate statute, military tribunals were to be governed by Article 21 of the Uniform Code of Military Justice. Because, the Court reasoned, neither the Authorization for Use of Military Force nor the Detainee Treatment Act contemplated the kind of military commissions to which Hamdan was being subjected, Article 21 of the Uniform Code of Military Justice governed. Under this analysis, the military commissions were illegal because they did not conform to the full panoply of procedures contemplated by Article 21, which, according to the Court, includes recourse to Common Article 3 of the Geneva Conventions.[42]

3. ***Congress should use its regulatory authority to avoid the development of any system which, like* Rasul*, converts American courts into part of the arsenal used against our forces by the enemy in wartime.*** The U.S. Constitution is a compact between a primary source of power, the people of the United States, and the government they created. It is not a treaty between the United States and the rest of the world – indeed, it explicitly presumes that the rest of the world will include enemies of the United States who must be brought to heel.[43] In the Framers' construct, the courts of the United States are supposed to be a bulwark protecting members of the uniquely American community – *i.e.*, citizens of the United States and those aliens who, by their lawful participation in our national life, have immersed themselves into the fabric of American society[44] – from the excesses of an oppressive executive or a legislature insufficiently heedful of their rights.

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[41] *Hamdan*, 126 S. Ct 2749 at 2774 n.21. *See also*, *Hamdan* at 2799 (Kennedy, J., concurring).

[42] Common Article 3 proscribes "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." The Court questioned whether the military commissions prescribed by the president were "regularly constituted court[s]," and whether the judicial guarantees afforded were sufficient – at least in the absence of more specific congressional approval.

[43] The only federal crime spelled out in the Constitution is treason, defined, in Article III, Section 3, to include conduct that "adher[es] to" or gives "Aid and Comfort" to "Enemies" of the United States.

[44] *See United States* v. *Verdugo-Urqidez*, 494 U.S. 259, 269 (1990); *Johnson* v. *Eisentrager*, 339 U.S. 763, 770 (1950).

It is the institution that ensures the law and order a free people must have in order to thrive.

Nevertheless, in the role initiated by *Rasul* and dramatically expanded thereafter by the district courts, the judiciary was no longer a neutral arbiter in place to ensure that Americans got a fair shake from their government and its laws. Instead, until the Military Commissions Act of 2006 intervened, the judiciary was morphing into an *international* arbiter, ensuring that the world – including that part of it energetically trying to kill Americans – had a free-flow forum in which to press its case against the United States. This was as irrational as the afore-described incongruity of treating a war against international terrorists as a criminal justice issue.

The federal courts are a crucial component of the United States government. That government, and the American people, are at war with al Qaeda and its affiliated organizations. Indeed, a week after the 9/11 attacks, the Congress overwhelmingly passed the aforementioned Authorization for the Use of Military Force, authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks tat occurred on September 11, 2001.[45] Congress plainly took that drastic step because it is vital for the United States to achieve victory in this struggle.[46] It makes no sense for the political branches to be pressing for the successful conduct of the war while the judicial branch is made available to the enemy to frustrate the decision of the executive branch to detain enemy forces – an outcome curbed but by no means eliminated in the Detainee Treatment Act and the Military Commissions Act.

Finally, separation of powers principles must weigh heavily. The fact that the courts may be the final arbiter of what the Constitution says does not make them the proper source for resolving matters far removed from their institutional competence.[47]

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[45] Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001), 50 U.S.C.A. Sec. 1541 nt.

[46] Compare *Ex Parte Quirin*, 317 U.S. 1, 28 (1942) ("the adoption of measures by the military command ... to repel and defeat the enemy" are among the principal purposes of the "conduct of war").

[47] *See, e.g.*, *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948) ("the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a

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OP-ED CONTRIBUTORS

The Terrorists' Court

By JACK L. GOLDSMITH and NEAL KATYAL

NEARLY six years after 9/11, the government's system for detaining terrorists without charge or trial has harmed the reputation of the United States, disrupted alliances, hurt us in the war of ideas with the Islamic world and been viewed skeptically by our own courts.

The two of us have been on opposite sides of detention policy debates, but we believe that a bipartisan solution that reflects American values is possible. A sensible first step is for Congress to establish a comprehensive system of preventive detention that is overseen by a national security court composed of federal judges with life tenure.

Such a court would have a number of practical advantages over the current system. It would operate with a Congressionally approved definition of the enemy. It would reduce the burden on ordinary civilian courts. It would handle classified evidence in a sensible way. It would permit the judges to specialize and to assess over time the trustworthiness of the government and defense lawyers who appear regularly before them. Such a court, explicitly sanctioned by Congress, would have greater legitimacy than our current patchwork system, both in the United States and abroad.

Criminal prosecutions should still take place where they can. But they are not always feasible. Some alleged terrorists have not committed overt crimes and can be tried only on a conspiracy theory that comes close to criminalizing group membership. In addition, the evidence against a particular detainee may be too difficult to present in open civilian court without compromising intelligence sources and methods. And the standards of proof for evidence collected in Afghanistan might not meet every jot and tittle of American criminal law.

A Congressionally sanctioned system of preventive detention, which would supplement the criminal process, is far from unprecedented. The Supreme Court has recognized that the president can detain traditional enemy combatants during wartime. The court has also long approved preventive detention for people who are dangerous to society — the insane, child molesters, people with infectious diseases, and the like — but who have not committed crimes.

Congress should draw the national security court's judges from a pool of current federal judges, the same process used for the special court we already have to issue intelligence warrants. The court would have a permanent staff of elite defense lawyers with special security clearances as part of its permanent staff. Defense lawyers trained in the nuances of taking apart interrogation statements, particularly translated statements, are crucial because often the legal proceedings will involve little else in the way of evidence.

Congress should require the national security court to make sure that there is a continuing rationale to detain people years after their initial cases were heard. Congress should also insist on rights of appeal for detainees,

ensuring scrupulous review by a second layer of specialized, repeat judges who will keep the initial judges on their toes. And consistent with the values enshrined in the Constitution's equal protection clause, Congress should insist that the same rules apply to citizen and non-citizen terrorist detainees.

Detainees, however, need not be given the full panoply of criminal protections. A detainee may not be able to meet his lawyer right away, particularly if interrogation has just begun. A terrorist captured in Afghanistan should not be able to seek release because he was not read his Miranda rights. A national security court, while it would operate in public, would not have the same public and press access as an ordinary criminal trial.

We already have specialized federal courts to deal with matters like bankruptcy, taxes and patents; the case here is far more compelling. In the past, Americans might have hoped that a national security threat would abate over time, and so the pressures on the civilian courts, whatever they were, would subside. Today we have no such luxury. We must create sensible institutions for the long haul.

Jack L. Goldsmith, a Harvard law professor, was an assistant attorney general from 2003 to 2004. Neal Katyal, a Georgetown law professor, represented the plaintiff in the 2006 Supreme Court case that struck down the Guantánamo tribunals.

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The Philadelphia Inquirer

OPINION

Posted on Mon Jun 2, 2008

Report on FBI interrogations omits the Lindh case of torture

Jesselyn Radack is Homeland Security Director for the Government Accountability Project, a nonprofit whistleblower organization

Late last month, the Department of Justice Office of Inspector General issued a positive report on the FBI's involvement in detainee interrogations in Afghanistan, Guantánamo Bay and Iraq.

I applaud the OIG's recognition of a handful of career Justice attorneys and FBI officials who challenged abusive interrogation techniques - and warned correctly that torture would likely taint any legal proceedings against suspected terrorists. But praise for OIG's demi-candor in an atmosphere of absolute secrecy obscures the whitewash that the report really is. The report finds, "We believe the FBI should be credited for its conduct and professionalism in detainee interrogations." But to reach this conclusion, the OIG omits one of the earliest and most obvious cases of torture and FBI misconduct - that of "American Taliban" John Walker Lindh.

In 2001 (a period covered by the report), Lindh, an American citizen, was found shot in the leg and barely alive U.S. soldiers threatened him with death, blindfolded him, duct-taped him naked to a board, scrawled expletives on him, and posed with him for pictures - before holding him in an unlit metal shipping container for two days. Yet, the OIG report states in its executive summary: "We found no instances in which an FBI agent participated in clear detainee abuse of the kind that some military interrogators used at Abu Ghraib prison."

I know otherwise because I was the Justice Department ethics advisor in the Lindh case. In 2001, I told the Criminal Division, which was advising the FBI in Afghanistan, that Lindh could not be interrogated without his counsel. That was on a Friday. The Criminal Division called back on Monday and said that the FBI had interrogated him anyway. They wanted to know what to do. I advised that the interview would have to be sealed and used only for national security purposes or intelligence-gathering, not criminal prosecution. Again, my advice was ignored.

Three months later, I inadvertently learned of a discovery order, which had been deliberately concealed from me, for all Justice Department correspondence related to Lindh's interrogation. When I went to comply, my e-mails had been purged from the file. With the help of technical support, I recovered them from my computer, turned them over to my boss, took home a copy in case they "disappeared" again, and resigned.

As the criminal case barreled toward trial, the Justice Department continued to assert that Lindh was never represented by counsel and that his rights had been "carefully, scrupulously guarded." I did not believe the

Justice Department would have the temerity to make public statements contradicted by its own court filings if my e-mails had indeed reached the court. So I blew the whistle, which unleashed a cascade of retaliation.

Unbeknownst to me until a few weeks ago, the White House had decided not to turn over any documents to Lindh's defense lawyers. The Defense Department, apoplectic that its new policy on the torture of captives in the war on terrorism was going to be exposed, leaned on the Justice Department to offer Lindh a deal. On the eve of the suppression hearing that was going to expose his mistreatment, Lindh pleaded guilty to two relatively minor charges that landed him in prison for 20 years. As part of the plea bargain, he had to sign a statement swearing that he had "not been intentionally mistreated" by his U.S. captors, and waiving any future claim of torture.

In 2002, my lawyer made it abundantly clear to the OIG that I took several steps to thwart efforts to conceal material regarding Lindh's interrogation from the court. In January 2003, Inspector General Glenn Fine, who issued the recent FBI report, told my attorney that the OIG had looked into my whistleblower allegations and was not going to pursue them. (OIG did not look too searchingly because it did not even bother to interview me, the complainant.) To add insult to injury, OIG turned my case over for criminal prosecution, which eventually closed with no charges ever being brought. But the Justice Department was not through with me yet. It put me on the "No-Fly List" and referred me to the state bars in which I'm licensed as an attorney, based on a secret report - by the OIG - to which I did not have access.

Needless to say, the current OIG report does not mention FBI agent Christopher Reimann, who admits that when informing Lindh of his right to counsel, he ad-libbed, "Of course, there are no lawyers here . . . " When OIG catalogs a gruesome list of "techniques" used on detainees in Afghanistan - including abusive handling, harsh restraints, deprivation of clothing, blindfolding, humiliation and isolation - it does not reference Lindh. In fact, the report makes no mention of John Walker Lindh at all.

While I applaud the handful of people identified in the report who repeatedly challenged harsh interrogation tactics, I question the motive of the OIG report in propping them up as revisionist evidence that the Justice Department's and FBI's role in torture was somehow "not so bad." It must be remembered that the same Justice Department's Office of Legal Counsel, which writes legal opinions considered binding on federal agencies and departments, authored the infamous torture memo that gave Justice's imprimatur to such conduct in the first place. No OIG report has been issued on that.

E-mail Jesselyn Radack at jradack@whistleblower.org.

United States Senate Committee on the Judiciary

"Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System"

June 4, 2008

Written Testimony for the Record

Jesselyn A. Radack
Homeland Security Director
Government Accountability Project

Thank you for including my testimony in the written record of today's important hearing. I have direct, personal expertise on this topic because I was the Justice Department ethics advisor in the case of "American Taliban" John Walker Lindh. In 2001, I told the Criminal Division, which was advising the FBI in Afghanistan, that Lindh could not be interrogated without his counsel. That was on a Friday. The Criminal Division called back on Monday and said that the FBI had interrogated him anyway. They wanted to know what to do. I advised that the interview would have to be sealed and used only for national security purposes or intelligence-gathering, not criminal prosecution. Again, my advice was ignored and he was prosecuted.

Three months later, I inadvertently learned of a discovery order, which had been deliberately concealed from me, for all Justice Department correspondence related to Lindh's interrogation. When I went to comply, my e-mails had been purged from the file. With the help of technical support, I recovered them from my computer, turned them over to my boss, took home a copy in case they "disappeared" again, and resigned.

Despite my experience, I still believe that the civilian courts are the best way to handle terrorism detainees, with two caveats: first, do not taint legal proceedings against suspected terrorists by engaging in torture or abusive interrogation techniques; second, follow the rule of law.

The reason that the case against Lindh imploded was because, although the Justice Department was eager to prosecute Lindh in the criminal courts, both of these tenets were disregarded. As an initial matter, Lindh was blindfolded, duct-taped naked to a board, and held in an unlit shipping container for days. The Department of Defense knew that this evidence would come out at Lindh's suppression hearing, and leaned on the Justice Department to offer an eleventh-hour plea deal in order to prevent early exposure of its new policy on the torture of captives in the war on terrorism. As part of the plea, Lindh had to swear that he had "not been intentionally mistreated" and waive any future claim to torture. Abusive interrogation techniques and torture will likely taint

any legal proceedings against suspected terrorists.

The second reason the Lindh case collapsed was due to flouting the rule of law. Pulitzer-prize winning journalist Eric Lichtblau's book, Bush's Law, recently documented a clash that had never before become public. Alberto Gonzales, who was then White House counsel, made it clear that the White House was calling the shots and that he, as White House counsel, had decided not to turn anything over to Lindh's defense lawyers in the way of documents.

The White House improperly inserting itself into the judicial process, and the Justice Department incompletely complying with discovery, is just one of many examples of not following the rule of law. Another example is FBI agent Christopher Reimann, who admits that when informing Lindh of his right to counsel, he ad-libbed, "Of course, there are no lawyers here . . ." Cutting corners in the judicial process undermines the legitimacy of the criminal justice system and is unacceptable.

Our government has experience and success in using civilian criminal courts to combat organized crime and terrorism -- prosecuting Mafia bosses, drug kingpins, domestic terrorists such as Timothy McVeigh and Ted Kaczynski, and foreign terrorists. Ramzi Yousef, mastermind of the first World Trade Center bombing, was convicted for the 1993 attack in a federal criminal court. Wadih el-Hage, an American citizen, was convicted in a civilian court for bombing the American embassies in Kenya and Tanzania. Despite some procedural bumps, French national Zacarias Moussaoui, and American citizen Jose Padilla, have been convicted in civilian court during the current war on terrorism. The military tribunals that have been established on Guantánamo Bay have proven to be a poor substitute for the federal criminal courts, which are well-equipped to handle such cases.

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Prepared Statement of Benjamin Wittes
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Senate Committee on the Judiciary
"Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System"
June 4, 2008

Thank you, Mr. Chairman and members of the committee, for inviting me to testify concerning what is probably the single most important unresolved legal policy challenge affecting America's confrontation with international terrorism: The design of an appropriate regime for detaining alien terrorist suspects seized abroad.

I am a Fellow in Governance Studies and Research Director in Public Law at the Brookings Institution. I am the author of the book, *Law and the Long War: The Future of Justice in the Age of Terror*, which is forthcoming this month and from which this testimony is partly adapted. I have written extensively on the challenges to the legal system posed by the detention operations that became necessary after the September 11 attacks. I also serve on the Hoover Institution Task force on National Security and the Law. The views I am expressing here are my own.

It is difficult to overstate the scope and magnitude of our political system's collective failure in detention operations to date. In the fall of 2001 and the winter of 2002, almost nobody doubted the proposition that in an international conflict involving a congressionally-authorized use of force and characterized by repeated military engagements, the United States is entitled to detain enemy forces. Yet today, doubt concerning the legitimacy of war-on-terrorism detentions is more the norm than the exception. The reason is simple, and it is not that the rationale for these detentions has grown less powerful. The current administration has refused to tailor the detention system contemplated by the laws of war to the unusual features of the current conflict—a set of circumstances that demand more nuanced fact-finding than does traditional warfare and consequently also demand greater procedural protections for detainees. Congress has declined to create a better system legislatively. And the courts have so far provided next to no guidance on the ground rules for detention, other than to emphasize the fact of their own habeas jurisdiction.

The result is a recipe for public and judicial suspicion: A system in which complex questions of fact get resolved in closed proceedings that produce a minimal administrative record based on information—some of it undoubtedly flawed—that detainees have had virtually no opportunity to rebut.

Let me be as clear as I can: The current system has not worked and it cries out for reform by this body to make detentions fairer, more transparent, and more defensible both before the public and the courts.

But let me be candid on another point as well: The appropriate reform will almost certainly *not* rely exclusively on civilian prosecutions in American federal courts as the source of the power to detain the enemy. This is the case for two distinct reasons:

First, relying exclusively on federal court prosecution would likely require the release of portions of the detainee population at Guantanamo whose continued detention prudence requires. Nobody outside of the executive branch knows exactly how many current detainees are too dangerous to release yet could not face criminal charges in federal court—because they have not committed crimes cognizable under American law, because evidence against them was collected in the rough and tumble of warfare and would be excluded under various evidentiary rules, or because the evidence is tainted by coercion. Without access to a great deal of material that remains classified, one can only guess how many such detainees there are. But the number is almost certainly not trivial. Even under the somewhat relaxed rules of the Military Commissions Act (MCA), military prosecutors have estimated that they might under ideal circumstances be able to bring to trial only as many as 80 detainees. Excluding those current detainees already cleared for transfer from Guantanamo, that still leaves roughly 100 whom the military deems too dangerous to transfer yet against whom charges are not plausible. Even if we assume the military is being hopelessly conservative in clearing detainees for repatriation, there is almost certainly still a gap. That gap involves dangerous men who want to kill Americans.

Consider, for example, the case of Mohamed Al Kahtani, an alleged September 11 conspirator against whom the military recently dropped criminal charges. According to the 9/11 Commission, Kahtani flew to Orlando International Airport, where Mohammed Atta was waiting to meet him. Kahtani did not end up on a plane on 9/11 only because he was denied entry to the United States that day. This is a man, in other words, who allegedly took active steps to kill large numbers of Americans. Yet the brutal circumstances of his interrogation make his prosecution now difficult, perhaps even impossible. If that proves to be the case, American forces would likely have to set him free absent some extrinsic non-criminal detention authority. Whatever the right remedy may be for the interrogation tactics used upon Kahtani, such an outcome seems to me maladaptive for any society with an instinct for self-preservation.

Second, even if we could magically repatriate, resettle, or free all current detainees, a pure prosecution model would face prohibitive obstacles with respect to future captures. Specifically, American forces often obtain custody of detainees—either in the field or from allied governments or militias—without knowing precisely who they are. Abu Zubaydah, for example, was captured in a safe-house raid by Pakistani forces along with a handful of other people. While we can plausibly imagine an extant warrant permitting American forces to take custody of such an Al Qaeda bigwig himself, it is highly implausible to imagine pending warrants against all those who may accompany him. If the rule, however, is that anyone against whom charges are not either outstanding or imminent must go free, what authority would American forces have even to take custody of future non-battlefield detainees whom opportunity might present to them? The honest answer is that they would have none.

To put the matter bluntly, there simply has to be some detention authority broader than the four corners of the criminal justice system. This necessity should not be a matter for national shame or embarrassment. American law authorizes preventive detentions across a range of areas, many less compelling than the situation of sworn military enemies of the country against whom Congress has authorized the use of force. That the laws of war apply uncomfortably to the task at hand does not mean that *no* detention authority is appropriate here at all.

For all its errors, in other words, the current administration is not being eccentric in insisting on some authority to detain the enemy outside of the conventional justice system. While I try to avoid making predictions, I believe the next administration—of either party—is most unlikely to forswear this power entirely. The right question for this body is not whether to force it to do so, but what appropriate rules for detention ought to look like, what the substantive standards for detention ought to be, and how to construct appropriate mechanisms of judicial review for those detentions.

Not all detainees require new law. The laws of war work well for the preponderance of those in American custody around the world. A relatively small subset, however, comprises detainees for whom release at the termination of hostilities, an endpoint key to law of war detention, is something of a fiction—detainees whom, even if they have committed no crime, American forces cannot and will not blithely set free. This type of fighter, who generally hides among civilians, can be much harder to identify accurately than the traditional detainee, whom the laws of war assume will identify himself by wearing a uniform. So relying for these detentions on the laws of war produces at once too low a threshold for the detention itself and paradoxically a requirement for release that is quite unsuited to a global fight with a non-state actor. The hallmark of this type of detainee is that one regards him as dangerous not merely as an arm of a particular military force but in his individual capacity as well—and that one cannot imagine relinquishing custody of him without some mechanism to manage the danger that he poses.

Defusing the controversy over such detentions requires the creation for each detainee of a rigorous set of factual findings and a documentary record justifying the decision to hold the person, a record available to the public and the press to the maximum extent possible and reviewed by an independent judicial body.

Towards that end, I make the following suggestions in my book:

First, civilianize the detention regime by severing the authority to detain this limited class of terrorists from the laws of war and putting such detentions under judicial supervision. The premises of these detentions differ considerably from those of traditional wartime captures. So the reviewing body should be a civilian federal court assessing whether each detainee meets a legislatively prescribed standard, not a military panel assessing whether or not the detainee meets the definition of an "unlawful enemy combatant."

Second, enhance the procedural protections for the accused. A solid legislative scheme requires a few core elements not present in the current Combatant Status Review Tribunals (CSRT), all designed to make the process more adversarial and courtlike and to produce an outcome that speaks with enough authority to support a detention in the public and judicial arenas. The first of these is an impartial finder of fact, specifically a federal judge. The detainee should also receive representation from competent counsel. Lawyers for the detainees should be cleared to see the evidence against their clients, including classified information and all exculpatory materials. The detainee himself should be given a more detailed summary of the evidence against him, one sufficiently specific to provide a fair opportunity for rebuttal. The detainee should also receive a more meaningful opportunity than the current CSRT process offers to present evidence, obtain witnesses, compel testimony, cross-examine witnesses against him, and respond to evidence admitted against him.

Third, the Court must retain jurisdiction over each detention for as long as it persists to ensure that detention remains necessary and that the conditions of detainees' confinement are humane. The government should be obliged on a regular basis to argue for the continued necessity of detention, and counsel for each detainee should have the opportunity to argue that, for one reason or another, his client no longer meets the statutory criteria for detention: that, as an alien terrorist, he poses a substantial threat to the security of the United States.

The best way to implement such a system would be through some kind of specialized national security court, an idea others have proposed with varying levels of specificity. Modeled on the special court that authorizes surveillance in national security cases, such an arrangement would maximize the public and international legitimacy of detention decisions. It would put detentions in the hands of judges with all the prestige of the federal court system yet with particular expertise applying rules designed to protect classified information and manage legitimate security concerns. Such a court is also, in my view, the best venue in which to try terrorists accused of war crimes, using rules that hybridize the current Military Commissions Act with normal federal court practice.

In sum, the current administration's reliance on a pure law of war model for detentions has been a fateful error. But the attempt to revert to a prosecutorial model for disabling terrorists would supplant that error with a system unsuited to the challenges we currently face as a society. The right answer is—as it has been since September 11—to design the detention system we need to handle the unique situation of global jihadist terrorism. That is a task only Congress can accomplish and it is long overdue.

Terror trials have flaws but need to be tested

Best way to find out whether system is fair is to see how it works.

Nearly seven years after 9/11, the alleged mastermind of the attack, Khalid Sheikh Mohammed, and four co-conspirators are finally on the verge of trial. On Thursday, they're scheduled to be arraigned before a military commission at Guantanamo Bay, Cuba, and prosecutors are pushing for a September trial date.

A debate over whether such trials can be fair has wound through the Supreme Court, Congress, the White House and now back to Guantanamo. We still have serious reservations about the system, which faces one more hurdle in a Supreme Court case expected to be decided this month. If the court allows the trials to proceed, it's time to give them an opportunity to work. The only way to find out whether they can is to move from endless theoretical arguing about trials to the reality of having them.

Civil libertarians and human rights activists who've denounced the system prefer to overlook two key points:

•There is a terrible price in continuing to seek perfection. Many detainees have been held for more than six years with no access to a court or public scrutiny. This is damaging to them and to U.S. standing in world opinion. Nor does further delay serve the cause of justice for the nearly 3,000 people murdered on Sept. 11, 2001, and other terror victims.

•The alternative recommended by some critics — full-blown trials in federal court, with all the protections afforded to U.S. citizens — is not viable. For instance, many witnesses are scattered around the world. Although defendants should have the right to confront their accusers, as criminal trials demand, that might not always be possible in terror cases. Would critics allow credible cases to be dismissed and terrorists freed? And surely there are limits to the intelligence the defendants should be able to see.

The system has come a long way since the Bush administration created military tribunals shortly after 9/11 that were so stacked against the accused that the Supreme Court struck them down for violating U.S. military law and the Geneva Conventions. The new law, passed in 2006, is better than what it replaced, though still not without flaws. One is that prosecutors may be able to use coerced testimony, obtained by means akin to torture, against a defendant unless a military judge prevents it. Another is the defendants may not see all the evidence gathered against them.

As a result, justice will depend on the judgment of prosecutors and the independence of judges who have the courage to preserve defendants' rights. There's already troubling evidence that prosecutors and judges (both are drawn from the military) are under political pressure to produce convictions and that the most even-handed cannot survive. Last year, the chief prosecutor, Air Force Col. Morris Davis, resigned, and later wrote in the *Los Angeles Times* that interference from political appointees made "full, fair and open trials" impossible. Even now, the Sept. 15 trial date sought by prosecutors in the 9/11 case carries a whiff of politics: It would open at the height of the presidential election campaign.

If politicians get out of the process, if independent judges and prosecutors are valued, and if the hearings are open and transparent, justice can prevail. The Supreme Court clearly has shown an interest in monitoring terrorism cases. Unless its pending ruling prompts new delays, it is time to test the promises made by the system's advocates and let the first trials go forward under careful scrutiny. Only if the critics' fears are confirmed should the system be scrapped.

U.S.News & WORLD REPORT

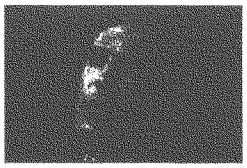
Wednesday, June 4, 2008

A Top Military Adviser Talks About War Crimes

Thomas Hartmann discusses military commissions on the eve of a 9/11 arraignment

By Emma Schwartz
Posted June 2, 2008

The military commission process at the U.S. prison at Guantánamo Bay, Cuba, has come under criticism over whether it can be fair to detainees who have been held there for years without charge. But several cases are moving forward to trial. The first, against Salim Hamdan, a former driver for Osama bin Laden, is scheduled to begin in July. And this week, the five defendants charged with crimes related to the attacks of Sept. 11, 2001, will be arraigned before the military judge. Air Force Brig. Gen. **Thomas Hartmann**, a longtime military lawyer, is the legal adviser for the military commission process. He oversees the chief prosecutor and provides advice to the convening authority. In supervising the first war crimes cases in the United States since World War II, Hartmann also coordinates the cases on the island naval base and works to persuade the public that the oft-maligned system is fair. Hartmann, however, was removed from overseeing the Hamdan case because of allegations by a former prosecutor that he urged prosecutors to use secret evidence in closed-door proceedings as well as evidence derived from what critics say is torture. In an interview with *U.S. News*, Hartmann explained his role and belief in the process. Excerpts:



Air Force Brig. Gen. Thomas

In announcing the charges against the 9/11 detainees, you said "there will be no secret trials." But you were dismissed from the Hamdan case over allegations you encouraged closed-door proceedings. Do you think the removal was fair? Do you think you could continue to be a fair arbitrator in these other

Hartmann
(Brendan Smialowski/Getty Images)

cases?

I can't comment on the Hamdan case or any specifics with regard to any of the cases where there are motions with regard to this. But I will say that I would not and have not directed anybody to use any particular form of evidence. It would not be appropriate for me to do that. So I think that answers your question. But that's a general comment.

The tribunal has come under criticism for the use of evidence. Do you think the past treatment of these five detainees—including the waterboarding of Khalid Shaikh Mohammed—will hinder the prosecution and the use of evidence?

I will not comment on any specifics of the 9/11 trial simply because that is the purpose of the trial. It is to allow the prosecution to present its evidence, for the defense to exercise the protections and the discovery rights that are available to them so they can find out what evidence they need to vigorously defend their client. I think the trial process is the fairest process on Earth that exists to resolve divergent issues of facts and law and come to a reasoned and solid and just conclusion, and that's what we'll apply here.

Do you anticipate controversy over the kinds of evidence that can be used in these trials?

I expect you'll see across the board, as these cases go forward, vigorous activity by the military defense counsel, by the civilian defense counsel. And you'll see vigorous activity by the prosecutors as they attempt to achieve their burden of proof beyond a reasonable doubt. That's the clash of ideas, the clash of fact, the clash of law. You call it controversy, and I call it a trial.

What trouble do you anticipate with allowing defense lawyers to call witnesses, including other detainees?

The accused in this case will have the opportunity to call witnesses. There are many ways to call witnesses. If the witness is not available to travel, they could be made available by video. The availability of witnesses is always a challenge, and I assume it will be a challenge in some of these cases.

One other criticism has been the limited resources given to defense counsel in the 9/11 cases. Do you agree with the criticism? Could more be done?

There are 17 on the defense side and five prosecutors [in the 9/11 cases]. If you look a little larger than that, beyond the 9/11, at the present there are today in the total defense community 17 military officers—17 JAGS—four DOD civilians, and 17 civilian counsel. So that adds up to 38. The prosecution side [has] a total of 32, with 20 unformed and 12 civilian counsel. The defense has nine paralegals, the prosecution has eight. The defense has 11 analysts and more are on the way.

The defense has a secured location at Guantánamo Bay in exactly the same circumstances that prosecution has—with computers, secured access to classified information, etc. In Washington, they have a secure facility as well. I'll be frank with you—it's rather small, and we've worked to make that grow larger. And I'm very dissatisfied with the pace that we've been able to bring that to the defense. We're putting some intensity on it and expect it to move much more quickly.

In addition, each of the prosecution and the defense will grow by 20 uniformed lawyers and 20 uniformed paralegals over the next three months. And that is in part because the deputy secretary of defense has determined that the No. 1 legal services mission in the Department of Defense is the military commissions.

And what do you think about the criticism about the delays in providing security clearances to defense lawyers?

There are 10 uniformed lawyers in the 9/11 cases. Eight of them have the necessary security clearance and two are being worked through. Of the seven civilian defense counsel, two have it. Two haven't done their paperwork. And you can't get a security clearance without paper. There's no other way around it. And three are in the process. I think if you talk to anyone who has a particular level of security clearance, they'll say it takes a year to 18 months. We're trying to do it in one to two months. So that's an effort to streamline the process as much as humanly possible.

Some have said that having the 9/11 trials—even if the men are convicted—will turn them into martyrs for the cause. Do you think this could hurt the broader U.S. effort in the war on terror?

The mission of the military commissions is to provide fair, just, and transparent trials. And we will do that. And I'll tell you these protections we are making available [to the accused] are unprecedented in the history of warfare. They exceed what was available at

Nuremberg. They exceed the international criminal tribunals at Rwanda, Sierra Leone, and Yugoslavia. They are in many, many ways virtually identical and at least parallel to the rights we provide to our soldiers, sailors, airmen, and marines, which is a tremendous reflection on the American attitude toward justice and the American justice system.

Tags: 9/11 | crime | Guantánamo Bay | military

THE WALL STREET JOURNAL. ONLINE

June 4, 2008

OPINION

Guantanamo Is a Model Prison (Really)

By MARK H. BUZBY
June 4, 2008; Page A19

There is much talk in the media, in our capital and elsewhere about the detention facility at Guantanamo Bay, Cuba. I have paid close attention to this dialogue, and after a year in command, it is clear that there are two Guantanamos: the one that exists in popular culture, and the one most discover when they actually see conditions there.

We house enemy combatants in one of several facilities according to their compliance with camp rules. Highly compliant detainees, approximately 20% of the population, live in Camp 4. Here they enjoy a communal, barracks-style environment, with movie nights, classes in Pashtu, Arabic and English, shared meals and prayers, and up to 12 hours of recreation per day.

Many of the enemy combatants, however, fail to comply with established rules. Offenses often include head-butting, kicking, biting and splashing young soldiers and sailors with feces and urine "cocktails."

These detainees are housed in Camps 5 and 6 – modern, climate-controlled facilities modeled after existing U.S. prison facilities in the Midwest. They get a minimum of two, soon to be three, hours of outdoor recreation per day adjacent to three to five other detainees. And they are held in a block of single-occupancy cells where they communicate with other detainees, guards, medical staff, library assistants and mail delivery personnel. Prayers are led five times a day by a detainee-appointed Imam. Each cell contains an arrow that points to Mecca.

All detainees receive three-meals per day, a 4,000-calorie diet selected from six different menus that meet the halal cultural dietary requirements, and which provide for special needs such as low sodium, vegetarian or diabetic. We provide comfort items including sheets and bedding, uniforms, shoes, prayer beads, prayer rugs, toiletries and bottled water. Each detainee is issued a Quran in Arabic and one in his native language. An ever-expanding, 5,000 volume library is available for a weekly choice of reading material.

Detainees sent and received more than 27,000 pieces of mail last year. In addition to humanitarian phone calls, which have long been permitted, we allow annual phone calls to family members. Last year, more than 1,200 attorney visits were conducted. Suggestions that detainees are being held "incommunicado" are simply not true.

Medical-care standards afforded to detainees are the same that my troopers receive. Access to treatment is 24/7, with a detainee-to-medical-staff ratio of three-to-one that far exceeds Federal

Bureau of Prison standards, and is frankly better than what most Americans enjoy.

Joint Task Force doctors have performed more than 370 surgeries, including restorative eye procedures, and a recent back surgery that restored movement and avoided possible paralysis for a detainee. Shortly after, that detainee sent me a note saying "Thank you, I have been wrong about Americans."

Our mental health facility, staffed by a variety of mental health-care professionals, includes a psychiatrist and a psychologist. Approximately 15% of our detainees are seen for such issues on a regular basis, about half the average experienced in the U.S. prison population.

We enjoy a very positive relationship with the International Committee of the Red Cross. Its professionals have access to all detainees and facilities, and they provide us with useful and supportive confidential comments and suggestions – which have helped in furthering the development of our detention programs.

An important part of the Guantanamo story routinely underreported by many in the media – but readily apparent to most who visit – is the dedication and professionalism exhibited every single day by the more than 2,200 soldiers, sailors, airmen, Marines, Coast Guardsmen and civilians who provide for the safe and humane care and custody of very dangerous men.

Regardless of what international opinion says, my troopers perform their mission honorably, professionally and to a level that would make any American proud. I had the very great privilege of leading these sons and daughters of America; that is the Guantanamo I know.

Rear Adm. Buzby was commander of Joint Task Force Guantanamo from May 2007 until last week.

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THE WALL STREET JOURNAL.

AT WAR

Jose Padilla Makes Bad Law

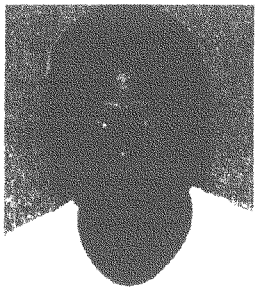
Terror trials hurt the nation even when they lead to convictions.

BY MICHAEL B. MUKASEY
Wednesday, August 22, 2007 12:01 a.m.

The apparently conventional ending to Jose Padilla's trial last week--conviction on charges of conspiring to commit violence abroad and providing material assistance to a terrorist organization--gives only the coldest of comfort to anyone concerned about how our legal system deals with the threat he and his co-conspirators represent. He will be sentenced--likely to a long if not a life-long term of imprisonment. He will appeal. By the time his appeals run out he will have engaged the attention of three federal district courts, three courts of appeal and on at least one occasion the Supreme Court of the United States.

It may be claimed that Padilla's odyssey is a triumph for due process and the rule of law in wartime. Instead, when it is examined closely, this case shows why current institutions and statutes are not well suited to even the limited task of supplementing what became, after Sept. 11, 2001, principally a military effort to combat Islamic terrorism.

Padilla's current journey through the legal system began on May 8, 2002, when a federal district court in New York issued, and FBI agents in Chicago executed, a warrant to arrest him when he landed at O'Hare Airport after a trip that started in Pakistan. His prior history included a murder charge in Chicago before his 18th birthday, and a firearms possession offense in Florida shortly after his release on the murder charge.



Padilla, alias Muhajir

Padilla then journeyed to Egypt, where, as a convert to Islam, he took the name Abdullah al Muhajir, and traveled to Saudi Arabia, Afghanistan and Pakistan. He eventually came to the attention of Abu Zubaydeh, a lieutenant of Osama bin Laden. The information underlying the warrant issued for Padilla indicated that he had returned to America to explore the possibility of locating radioactive material that could be dispersed with a conventional explosive--a device known as a dirty bomb.

However, Padilla was not detained on a criminal charge. Rather, he was arrested on a material witness warrant, issued under a statute (more than a century old) that authorizes the arrest of someone who has information likely to be of interest to a grand jury investigating a crime, but whose presence to testify cannot be assured. A federal grand jury in New York was then investigating the activities of al Qaeda.

The statute was used frequently after 9/11, when the government tried to investigate numerous leads and people to determine whether follow-on attacks were planned--but found itself without a statute that authorized investigative detention on reasonable suspicion, of the sort available to authorities in Britain and France, among other countries. And so, the U.S. government subpoenaed and arrested on a material witness warrant those like Padilla who seemed likely to have information.

Next the government took one of several courses: it released the person whose detention appeared on a second look to have been a mistake; or obtained the information he was thought to have, and his cooperation, and released him; or placed him before a grand jury with a grant of immunity under a compulsion to testify truthfully and, if he testified falsely, charge him with perjury; or developed independent evidence of criminality sufficiently reliable and admissible to warrant charging him.

Each individual so arrested was brought immediately before a federal judge where he was assigned counsel, had a bail hearing, and was permitted to challenge the basis for his detention, just as a criminal defendant would be.

The material witness statute has its perils. Because the law does not authorize investigative detention, the government had only a limited time in which to let Padilla testify, prosecute him or let him go. As that limited time drew to a close, the government changed course. It withdrew the grand jury subpoena that had triggered his designation as a material witness, designated Padilla instead as an unlawful combatant, and transferred him to military custody.

The reason? Perhaps it was because the initial claim, that Padilla was involved in a dirty bomb plot, could not be proved with evidence admissible in an ordinary criminal trial. Perhaps it was because to try him in open court potentially would compromise sources and methods of intelligence gathering. Or perhaps it was because Padilla's apparent contact with higher-ups in al Qaeda made him more valuable as a potential intelligence source than as a defendant.

The government's quandary here was real. The evidence that brought Padilla to the government's attention may have been compelling, but inadmissible. Hearsay is the most obvious reason why that could be so; or the source may have been such that to disclose it in a criminal trial could harm the government's overall effort.

In fact, terrorism prosecutions in this country have unintentionally provided terrorists with a rich source of intelligence. For example, in the course of prosecuting Omar Abdel Rahman (the so-called "blind sheik") and others for their role in the 1993 World Trade Center bombing and other crimes, the government was compelled--as it is in all cases that charge conspiracy--to turn over a list of unindicted co-conspirators to the defendants.

That list included the name of Osama bin Laden. As was learned later, within 10 days a copy of that list reached bin Laden in Khartoum, letting him know that his connection to that case had been discovered.

Again, during the trial of Ramzi Yousef, the mastermind of the 1993 World Trade Center bombing, an apparently innocuous bit of testimony in a public courtroom about delivery of a cell phone battery was enough to tip off terrorists still at large that one of their communication links had been compromised. That link, which in fact had been monitored by the government and had provided enormously valuable intelligence, was immediately shut down, and further information lost.

The unlawful combatant designation affixed to Padilla certainly was not unprecedented. In June 1942, German saboteurs landed from submarines off the coasts of Florida and Long Island and were eventually apprehended. Because they were not acting as ordinary soldiers fighting in uniform and

carrying arms openly, they were in violation of the laws of war and not entitled to Geneva Conventions protections.

Indeed, at the direction of President Roosevelt they were not only not held as prisoners of war but were tried before a military court in Washington, D.C., convicted, and--except for two who had cooperated--executed, notwithstanding the contention by one of them that he was an American citizen, as is Padilla, and thus entitled to constitutional protections. The Supreme Court dismissed that contention as irrelevant.

In any event, Padilla was transferred to a brig in South Carolina, and the Supreme Court eventually held that he had the right to file a habeas corpus petition. His case wound its way back up the appellate chain, and after the government secured a favorable ruling from the Fourth Circuit, it changed course again.

Now, Padilla was transferred back to the civilian justice system. Although he reportedly confessed to the dirty bomb plot while in military custody, that statement--made without benefit of legal counsel--could not be used. He was instead indicted on other charges in the Florida case that took three months to try and ended with last week's convictions.

The history of Padilla's case helps illustrate in miniature the inadequacy of the current approach to terrorism prosecutions.

First, consider the overall record. Despite the growing threat from al Qaeda and its affiliates--beginning with the 1993 World Trade Center bombing and continuing through later plots including inter alia the conspiracy to blow up airliners over the Pacific in 1994, the attack on the American barracks at Khobar Towers in 1996, the bombing of U.S. embassies in Kenya and Tanzania in 1998, the bombing of the Cole in Aden in 2000, and the attack on Sept. 11, 2001--criminal prosecutions have yielded about three dozen convictions, and even those have strained the financial and security resources of the federal courts near to the limit.

Second, consider that such prosecutions risk disclosure to our enemies of methods and sources of intelligence that can then be neutralized. Disclosure not only puts our secrets at risk, but also discourages allies abroad from sharing information with us lest it wind up in hostile hands.

And third, consider the distortions that arise from applying to national security cases generally the rules that apply to ordinary criminal cases.

On one end of the spectrum, the rules that apply to routine criminals who pursue finite goals are skewed, and properly so, to assure that only the highest level of proof will result in a conviction. But those rules do not protect a society that must gather information about, and at least incapacitate, people who have cosmic goals that they are intent on achieving by cataclysmic means.

Khalid Sheikh Mohammed, the mastermind of the 9/11 attacks, is said to have told his American captors that he wanted a lawyer and would see them in court. If the Supreme Court rules--in a case it has agreed to hear relating to Guantanamo detainees--that foreigners in U.S. custody enjoy the protection of our Constitution regardless of the place or circumstances of their apprehension, this bold joke could become a reality.

The director of an organization purporting to protect constitutional rights has announced that his goal is to unleash a flood of lawyers on Guantanamo so as to paralyze interrogation of detainees. Perhaps it bears mention that one unintended outcome of a Supreme Court ruling exercising jurisdiction over Guantanamo detainees may be that, in the future, capture of terrorism suspects

will be forgone in favor of killing them. Or they may be put in the custody of other countries like Egypt or Pakistan that are famously not squeamish in their approach to interrogation--a practice, known as rendition, followed during the Clinton administration.

At the other end of the spectrum, if conventional legal rules are adapted to deal with a terrorist threat, whether by relaxed standards for conviction, searches, the admissibility of evidence or otherwise, those adaptations will infect and change the standards in ordinary cases with ordinary defendants in ordinary courts of law.

What is to be done? The Military Commissions Act of 2006 and the Detainee Treatment Act of 2005 appear to address principally the detainees at Guantanamo. In any event, the Supreme Court's recently announced determination to review cases involving the Guantanamo detainees may end up making commissions, which the administration delayed in convening, no longer possible.

There have been several proposals for a new adjudicatory framework, notably by Andrew C. McCarthy and Alykhan Velshi of the Center for Law & Counterterrorism, and by former Deputy Attorney General George J. Terwilliger. Messrs. McCarthy and Velshi have urged the creation of a separate national security court staffed by independent, life-tenured judges to deal with the full gamut of national security issues, from intelligence gathering to prosecution. Mr. Terwilliger's more limited proposals address principally the need to incapacitate dangerous people, by using legal standards akin to those developed to handle civil commitment of the mentally ill.

These proposals deserve careful scrutiny by the public, and particularly by the U.S. Congress. It is Congress that authorized the use of armed force after Sept. 11--and it is Congress that has the constitutional authority to establish additional inferior courts as the need may be, or even to modify the Supreme Court's appellate jurisdiction.

Perhaps the world's greatest deliberative body (the Senate) and the people's house (the House of Representatives) could, while we still have the leisure, turn their considerable talents to deliberating how to fix a strained and mismatched legal system, before another cataclysm calls forth from the people demands for hastier and harsher results.

Mr. Mukasey was the district judge who signed the material witness warrant authorizing Jose Padilla's arrest in 2002, and who handled the case while it remained in the Southern District of New York. He was also the trial judge in United States v. Abdel Rahman et al. Retired from the bench, he is now a partner at Patterson Belknap Webb & Tyler in New York.

The Washington Post
October 22, 2004 Friday

Released Detainees Rejoining The Fight
John Mintz, Washington Post Staff Writer

At least 10 detainees released from the Guantanamo Bay prison after U.S. officials concluded they posed little threat have been recaptured or killed fighting U.S. or coalition forces in Pakistan and Afghanistan, according to Pentagon officials.

One of the repatriated prisoners is still at large after taking leadership of a militant faction in Pakistan and aligning himself with al Qaeda, Pakistani officials said. In telephone calls to Pakistani reporters, he has bragged that he tricked his U.S. interrogators into believing he was someone else.

Another returned captive is an Afghan teenager who had spent two years at a special compound for young detainees at the military prison in Cuba, where he learned English, played sports and watched videos, informed sources said. U.S. officials believed they had persuaded him to abandon his life with the Taliban, but recently the young man, now 18, was recaptured with other Taliban fighters near Kandahar, Afghanistan, according to the sources, who asked for anonymity because they were discussing sensitive military information.

The cases demonstrate the difficulty Washington faces in deciding when alleged al Qaeda and Taliban detainees should be freed, amid pressure from foreign governments and human rights groups that have denounced U.S. officials for detaining the Guantanamo Bay captives for years without due-process rights, military officials said.

"Reports that former detainees have rejoined al Qaeda and the Taliban are evidence that these individuals are fanatical and particularly deceptive," said a Pentagon spokesman, Navy Lt. Cmdr. Flex Plexico. "From the beginning, we have recognized that there are inherent risks in determining when an individual detainee no longer had to be held at Guantanamo Bay."

The latest case emerged two weeks ago when two Chinese engineers working on a dam project in Pakistan's lawless Waziristan region were kidnapped. The commander of a tribal militant group, Abdullah Mehsud, 29, told reporters by satellite phone that his followers were responsible for the abductions.

Mehsud said he spent two years at Guantanamo Bay after being captured in 2002 in Afghanistan fighting alongside the Taliban. At the time he was carrying a false Afghan identity card, and while in custody he maintained the fiction that he was an innocent Afghan tribesman, he said. U.S. officials never realized he was a Pakistani with deep ties to militants in both countries, he added.

"I managed to keep my Pakistani identity hidden all these years," he told Gulf News in a recent interview. Since his return to Pakistan in March, Pakistani newspapers have written lengthy accounts of Mehsud's hair and looks, and the powerful appeal to militants of his fiery denunciations of the United States. "We would fight America and its allies," he said in one interview, "until the very end."

Last week Pakistani commandos freed one of the abducted Chinese engineers in a raid on a mud-walled compound in which five militants and the other hostage were killed.

The 10 or more returning militants are but a fraction of the 202 Guantanamo Bay detainees who have been returned to their homelands. Of that group, 146 were freed outright, and 56 were transferred to the custody of their home governments. Many of those men have since been freed.

Mark Jacobson, a former special assistant for detainee policy in the Defense Department who now teaches at Ohio State University, estimated that as many as 25 former detainees have taken up arms again. "You can't trust them when they say they're not terrorists," he said.

A U.S. defense official who helps oversee the prisoners added: "We could have said we'll accept no risks and refused to release anyone. But we've regarded that option as not humane, and not practical, and one that makes the U.S. government appear unreasonable."

Another former Guantanamo Bay prisoner was killed in southern Afghanistan last month after a shootout with Afghan forces. Maulvi Ghafar was a senior Taliban commander when he was captured in late 2001. No information has emerged about what he told interrogators in Guantanamo Bay, but in several cases U.S. officials have released detainees they knew to have served with the Taliban if they swore off violence in written agreements.

Returned to Afghanistan in February, Ghafar resumed his post as a top Taliban commander, and his forces ambushed and killed a U.N. engineer and three Afghan soldiers, Afghan officials said, according to news accounts.

A third released Taliban commander died in an ambush this summer. Mullah Shahzada, who apparently convinced U.S. officials that he had sworn off violence, rejoined the Taliban as soon as he was freed in mid-2003, sources with knowledge of his situation said.

The Afghan teenager who was recaptured recently had been kidnapped and possibly abused by the Taliban before he was apprehended the first time in 2001. After almost three years living with other young detainees in a seaside house at Guantanamo Bay, he was returned in January of this year to his country, where he was to be monitored by Afghan officials and private contractors. But the program failed and he fell back in with the Taliban, one source said.

"Someone dropped the ball in Afghanistan," the source said.

One former detainee who has not yet been able to take up arms is Slimane Hadj Abderrahmane, a Dane who also signed a promise to renounce violence. But in recent months he has told Danish media that he considers the written oath "toilet paper," stated his plans to join the war in Chechnya and said Denmark's prime minister is a valid target for terrorists.

Human rights activists said the cases of unrepentant militants do not undercut their assertions that the United States is violating the rights of Guantanamo Bay inmates.

"This doesn't alter the injustice, or support the administration's argument that setting aside their rights is justified," said Alistair Hodgett, a spokesman for Amnesty International.