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CIVIL LIBERTIES AND NATIONAL SECURITY

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

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CIVIL LIBERTIES AND NATIONAL SECURITY

THURSDAY, DECEMBER 9, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:42 a.m., in room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. presiding.

Present: Representatives Conyers and Sensenbrenner.

Staff Present: Sam Sokol, Majority Counsel; and Paul Taylor, Minority Counsel.

Mr. CONYERS. Good morning. The Subcommittee will come to order. This is the Constitution, Civil Rights, and Civil Liberties Subcommittee chaired by Jerry Nadler and the Ranking Member is Jim Sensenbrenner.

I want to welcome our witnesses to what I consider an unusually important hearing in this Subcommittee. And I begin by welcoming this distinguished list of witnesses, Former Associate Deputy Attorney General Bruce Fein is with us this morning; Ms. Mary Ellen O'Connell from the University of Notre Dame Law School is on a plane that is delayed, she will be here shortly; Mr. Jeremy Scahill, investigative reporter; Mr. Michael W. Lewis, associate professor of law at Ohio Northern University, Petit College of Law; Jamil Jaffer of the Kellogg, Huber, Hansen law firm; the director of the American Civil Liberties Union Washington office, Laura Murphy; and the Honorable Thomas R. Pickering, the former Under Secretary of State and former United States ambassador to the United Nations. Without objection, of course, all of the witnesses statements will appear in the record.

And before I ask you to begin Ambassador Pickering, I and Mr. Sensenbrenner wanted to make a couple of comments with reference to the issue that brings us here today. The subject is a hearing on national security and civil liberties. Obviously the first question is, is there a tension between the two, or are there areas of compatibility? The power of what has begun to be termed the imperial presidency grows, and the ability of our democratic institutions, especially the Federal legislative branch, us, to constrain it, seems more uncertain.

And so to begin with, there seems to be agreement that in the 43rd presidency, there was left behind a grossly expanded national security state, and a tragic legacy of civil rights abuses. To wit: the

creation of off-the-books Black sites, the use of waterboarding and other tortures, an apparent violation of United States and international law. The cover-up of these crimes by the admitted destruction of videotapes of some of these brutal interrogations, a destruction that appears to have been not only intentional, but in violation of court orders.

The construction of a vast domestic surveillance apparatus in widespread warrantless wiretapping. The mass detentions at Guantanamo Bay prison, a scheme so ill-conceived that the Supreme Court and the lower Federal courts have overruled the previous Administration's judgment more than one dozen times. Extraordinary rendition of suspects to foreign governments for abusive interrogation.

The Guantanamo situation is further complicated by the fact that, last night, there was found out in the continuing resolution that there was a provision inserted by still no one knows who, that allowed—that prevented anyone on Guantanamo—the prosecutors would no longer determine whether they would prosecute under an Article 3 Federal court or whether there would be a military commission.

There was language in there that said there would be only military commissions. That never went to Judiciary Committee, and it nearly resulted in the whole bill collapsing, because myself and at least three or four other Members were prepared to vote against the whole resolution. We did not and the bill barely passed.

The extraordinary rendition of suspects to foreign governments for what is more likely to be expected abuse of interrogation. The ignoring of congressional enactments such as the McCain amendment, preventing abuse of detainees, through illegitimate signing statements. The repeated invocation of the state secrets privilege, with has gone on in recent years, including this Administration, to an incredible new height, to shut down complaints, investigations and lawsuits challenging executive branch action, such as illegal domestic surveillance, torture and rendition. The making of numerous unsubstantiated claims of executive privilege to create legal immunity from congressional subpoena, to avoid legislative oversight claims. When challenged in Federal court by the House Judiciary Committee, the House Judiciary Committee prevailed.

And then on top of all these, the USA PATRIOT Act passed by a compliant and overreactive Congress in the weeks following 9/11. Multiple Department of Justice reviews have found abuse of the PATRIOT Act provisions on National Security letters, which allows records to be seized on the thinnest legal showing of mere relevance, and require abusive gag orders. Other provisions of the PATRIOT Act such as the so-called library provision and the sneak and peek searches equally threaten, in my view, our liberty.

The 44th President started his term on a positive note when he said he would ban torture, the use of secret prisons or Black site, ordered the Guantanamo detention camp closed, revoked gravely flawed office of legal counsel memos on torture and other related subjects.

But the Administration has failed to adequately investigate, much less prosecute apparent national security crimes, including torture and waterboarding, and does not appear to have even in-

vestigated who approved or ordered these activities in the first place. This would include investigation of the 43rd President, who has written a book personally admitting and giving details of how and why he did what he did.

The present Administration has refused to prosecute the intentional destruction of the evidence of the crimes of what he did. That is known for anybody that has been around a few years, the cover-up, which is usually more prosecutable than the crime itself, evidence of these crimes, CIA videotapes of the interrogations themselves.

The formerly secret State Department cables recently released show that in addition to refusing to carry out its own investigation of torture, the Administration, this Administration, worked to squelch other countries investigating the same subject matter. And I have citations that will be brought in on all of these.

The Administration continues to rely on clearly overbroad interpretations of the state secrets privilege, to shut down lawsuits challenging executive branch activity that can be termed as misconduct, inappropriate or illegal.

Public reports describe the extensive use of drones not only in the battlefield but where villages and huge civilian populations can be destroyed, which amounts to an incredible extension of war in a new sense unlike any that we have experienced before.

I know everyone has read about the claim that this Administration and previous ones have claimed the power to target and assassinate anyone determined to be an enemy, including Americans. This President has implied that the Administration may resort to detaining individuals indefinitely without trial.

Fortunately, it hasn't gone beyond the thinking out loud about it, but to me and to other Members on this Committee, it is fundamentally at odds with the Constitution and the traditions of freedom and due process of law. And despite the effort of the President's task force, Guantanamo Bay detention camp remains open with 170 people still in limbo; detainees or prisoners, still in limbo. And while we in the Congress, and I am not trying to exclude us from receiving some of the criticism that I am directing to the other branch of government, it is an important and critical subject matter that brings us here today. I am very proud of the fact that the former Chairman of Judiciary Committee, Jim Sensenbrenner, is with us as the Ranking Member and I would recognize him at this time, thank you.

Mr. SENSENBRENNER. Well, thank you very much, Mr. Chairman. And listening to the opening statement of my esteemed friend, the gentleman from Michigan, I think he has turned the calendar back 2 years, because this sounds like the speech that he gave indicting the Bush administration 2 years ago and there just hasn't been any hope and change around here.

Mr. CONYERS. That is right.

Mr. SENSENBRENNER. Okay. Well, you were supposed to bring about the hope and change and you know we are still waiting for it. What I can say is that this Committee approved a reauthorization of the PATRIOT Act without any change. That is the PATRIOT Act that I wrote following 9/11 and the national security letters issue was not one of the expanded law enforcement func-

tions in the PATRIOT Act, but was a law that was originally enacted in 1986 sponsored by Senator Leahy and Representative Kastenmeier.

Now, just yesterday in the continuing resolution, which my good friend Mr. Conyers and our Subcommittee Chair, Mr. Nadler voted for, contained a provision that prevents the Administration from closing Guantanamo and relocating the detainees in the United States and prohibits the transfer of any detainee who is not a U.S. citizen and who is held in the Guantanamo detention center on or after June 24th, 2009. And that is despite the efforts of the Administration and the executive order the President signed earlier in his tenure in office.

So, you know, I don't see why we need to have this hearing today, because it is talking about things in the past, it is talking about things that my friend, Mr. Conyers and Mr. Nadler, voted to continue when they voted for the continuation resolution yesterday. So if he wishes to continue with this hearing, I think that is fine, he is the Chairman. But I want to wish him and everybody in the room a very blessed Christmas season and a productive new year, because next year when this Committee is under new management, we will be much more productive, much more relevant and we won't be looking at the calendar of last year or 2 years ago. Thank you.

Mr. CONYERS. Well, I thank you, at least for coming to the meeting to make your statement, Mr. Sensenbrenner.

Of course, a hearing can only be held on things that happened in the past. I have never heard of a hearing—well, around here I have heard of hearings on things that are going to happen in the future, but more than normally, they are in the past.

Mr. CONYERS. Ambassador Thomas Pickering is vice chairman of Hills and Company, an international consulting firm and serves as the member of the Constitution Projects Liberty and Security Committee.

He has had a distinguished career spanning over five decades as a United States diplomat serving as Under Secretary of State for political affairs, ambassador to the United Nations. Ambassador to Russia, ambassador to India, Israel, Nigeria, Jordan and El Salvador.

I must say, Ambassador, I read your submitted statement, which is now being printed in the record and was amazed at the depth and breadth and conviction that keeps you coming before us and working in government in your own way. We thank you and appreciate you being here and invite you to make your statement at this time.

TESTIMONY OF THE HONORABLE THOMAS R. PICKERING, FORMER UNDER SECRETARY OF STATE FOR POLITICAL AFFAIRS AND FORMER UNITED STATES AMBASSADOR TO THE UNITED NATIONS

Mr. PICKERING. Thank you, Mr. Chairman and Members, and thank you for your kind words. I am pleased to come before you as a diplomat with extensive service in the country with a single simple message. I don't believe that our national security and protection of our civil liberties are mutually exclusive. In fact, I believe

they are intimately tied together. The key task is to work together to find ways to assure both priorities are met in the interest of our people and of their government. What we do as a Nation in this area determines whether we have the support and backing of our friends around the world and the respect of all who look to us for leadership. Failure to follow our principals regarding civil liberty loses that respect. Even more, it sets an example for others that either we don't care or we have made expediency and compromises with our principles an overriding necessity. Once we do that, others will, of course, follow.

The limits on their actions will not be set by us or others, but by what they believe they can and need to do to meet their immediate needs with little or no respect for human rights. We will then be in a position where our own citizens from whatever walk of life will be fitted into their construct and held for an indefinite period, and be subject to trials that do not assure the high standards to which we aspire and left with little for our diplomats to use to assist our personnel, our people, our citizens under these conditions.

All of this reflects on our role as a state, which aspires to lead in the field of human rights, which is looked to by many to do so, and where we play a role that deeply impacts on our interests, including our security at home.

The trial of terrorism suspects is obviously of deep concern, the recent Ghailani terrorism prosecution in New York. Despite the disappointment of many that the convictions were not more sweeping is an example of the United States pursuing the right procedures in the correct court in trying terrorism suspects.

The Ghailani trial was only one out of over 400 terrorism-related trials that demonstrate that we can use Article III courts. I have already explained why I believe the use of our traditional criminal justice system has helped us to preserve and to protect our foreign policy interests.

The American justice system is the established standard, maybe even the gold standard around the world. An effort on the part of the United States to strengthen and preserve the use of alternative methods, specifically for terror-related crimes has appeared to the rest of the world to detract from, rather than strengthen our system of justice and by alternative methods, I am obviously here referring to military commissions.

Within our own judicial arrangements during the last review by the United States Supreme Court of military commissions, it appeared that they failed to meet constitutional standards. Recently, there have been increased calls for the use of indefinite or preventive detention, instead of trying suspected terrorist detainees at all. I believe that indefinite detention of individuals without charge under any guise short of prisoners of war, and traditional state-to-state military conflicts, either declared or undeclared, raises all of the problems of abuse of state power to the detriment of individual rights.

In my view, a system of indefinite detention without charge contravenes central principles of our own Constitution and national standards of a right to notice of charges and to trial. The detention issue presents a central conundrum of what to do when we believe all of the information at our disposal indicates that the detainee is

guilty, but we cannot put him or her through a Federal trial for one or more reasons. One such reason is that the information to be used at trial has been tainted by illegal and unacceptable methods of interrogation. One example is information found to be inadmissible, such as that in the Ghailani trial.

We have a treaty obligation not no engage in torture or cruel, inhuman or degrading treatment. These practices also contravene domestic legislation. Although we all now agree that torture must be prohibited, the value of information obtained through so-called enhanced interrogation techniques is widely debated in the intelligence world. The preponderance of evidence in my view is against the utility of such practices based on a reading of the materials which discuss it extensively.

In addition to the moral and legal issues, many studies have found that evidence obtained through coercion is inherently unreliable. That raises the question about what to do with defendants in this category. The options are stark and challenging. They can be tried on the admissible evidence as Ghailani was. They can be sent to jurisdictions which may have more evidence or different charges against which to try them outside our country. They can be, in the end, released.

That, in my view, of course, is a serious and difficult option, but it is not an option that obviously we can ignore. The danger here is that they will attempt once again to launch attacks on our country and its people. The danger has to be balanced against the fact that the high-level leadership of al-Qaeda, bin Laden and Zawahiri and others also remain at large. These are not easy choices, Mr. Chairman. But the shorter term tactical considerations need also to be balanced against the longer-term human rights and strategic issues for our country.

The second reason with respect to trial is that information was derived through intelligence collection where the tradition and the national interest are to protect the sources and methods of collection. The government has developed a practice of clearing and briefing judges and attorneys for a use of this protected evidence in courts under the Classified Information Procedures Act of 1980. There are, in that legislation, ways to protect sources and methods while making the principal elements of the evidence clear to those who need to know, including the defendant. This seems to be a respectable and responsible way to proceed.

Safeguarding privacy and avoiding unnecessarily secrecy. As you yourself have just told us, it is self-evident that the rule of law requires appropriate safeguards to protect individuals right to privacy. States traditionally for fiscal and security purposes at their borders have exercised the right to examine persons and goods entering their territory on an absolute basis with exceptions only for diplomatic and State immunity. It is obvious that that needs to be done for the purpose of protecting the country in carrying out its laws on trade and commerce, but such searches must also be conducted in a manner that minimizes intrusion into individual privacy.

In addition, we use the process of issuing visas to permit people to present themselves at our borders for admission into the coun-

try. We do so in a way that, among other things, reduces security risks.

We should, however, avoid a blanked selection of everyone from one or a number of countries for special treatment and review, wherever possible, including in their background. Instead, we should rely on actual intelligence and the application of standards of reasonable suspicion to determine which individuals actually pose threats. Ethnic, racial, national or other profiling have brought growing antagonism to the United States on the part of many, many innocent people who have been affected by these practices. This, in turn, has fostered resentment against the country which terrorists and others have used to recruit individuals to act against the United States.

Mr. Chairman, the sum total of this is that we must comport ourselves in the prosecution, and indeed, the detention, and the other aspects of our concern, rightful concern about terrorism in ways that continue to enhance our capacity to lead in the world, particularly in the areas of human rights and civil rights. We must treat individuals in accordance with our Constitution as we would expect to have our citizens treated around the world. And we should do so in ways that balance the security needs that we have with the rights to civil and the human rights in this country. That is the essence of my discussion here this morning and I thank you for the opportunity.

Mr. CONYERS. Ambassador Pickering, I want to congratulate you and hope that you continue to speak and read and write on the subject of your experience for a long time to come.

Mr. PICKERING. Thank you, Mr. Chairman.

Mr. CONYERS. Thank you very much for opening this discussion up.

[The prepared statement of Mr. Pickering follows:]

PREPARED STATEMENT OF THE HONORABLE THOMAS R. PICKERING

Testimony of Ambassador Thomas Pickering
Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties
of the House Committee on the Judiciary
December 9, 2010
(Revised Testimony)

Chairman Conyers and distinguished members of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, thank you for affording me the opportunity to testify before you today on the very important topics of civil liberties and national security.

I come before you at a time of uncertainty around the world; a time when fear and politics contest strongly with reason and the rule of law. I also come before you, I realize, at a time when changes in the Congress as a result of the recent election await this subcommittee. But, most importantly, I come before you as a former diplomat, with over 45 years of service to this country, with a single message—I do not believe that our national security and protection of our civil liberties are mutually exclusive. In fact, I believe that they are intimately tied together. The key task is to work together to find ways to assure both priorities in the interest of our people and their government.

Let me point out that I am not a lawyer and not qualified to address legal questions. I appear before you today to provide insights into how the decisions that will be faced by the next Congress and by this Subcommittee will have an impact on our foreign affairs and national security.

For nearly 50 years I have served this country in the military, in diplomacy overseas, and as a senior official at the Department of State. As a career foreign service officer who retired with the rank of Career Ambassador, I believe how we today handle our national security challenges and align these efforts with our own civil liberty interests is vital to America's future. To be clear, this effort is vital to our country's security, to its standing in the world, and to our collective commitment as a people, which honors, respects, and remains committed to our founding ideals in all that we do.

What we do as a nation in this area determines whether we have the support and backing of our friends around the world and the respect of all who look to us for leadership. Failure to follow our principles regarding civil liberties loses that respect. Even more it sets an example for others that either we don't care or that we have made expediency and compromises with our principles an overriding necessity. Once we do that, others will follow. The limits on their actions will not be set by us or others, but by what they believe they can and need to do to meet their immediate needs with little or no respect for human rights. We will then be in a position where our own citizens, from whatever walk of life, will be fitted into their construct and held for indefinite periods, subject to trials which do not assure the

high standards we aspire to and left with little for our diplomats to use to assist them in these conditions. All of this reflects on our role as a state which leads in the field of human rights, which is looked to by many to do so, and where the role we play deeply impacts on our own interests, including our security, at home and abroad.

Trial of Terrorism Suspects

I would first like to address the trial and detention of suspected terrorists and the implications for our national security and American foreign policy in our support for human rights and the rule of law. The rule of law and human rights are central tenets of American foreign policy. It is axiomatic that our ability to be effective in promoting human rights and the rule of law depends on our own performance. Countries around the world are tired of being told, "Do as I say, not as I do." To ensure that our standards are effective and that we are effective in promoting them, we have to have exemplary performance by the United States.

The recent Ghailani terrorism prosecution in New York, despite the disappointment of many that the conviction was not more sweeping, is an example of the United States pursuing the right procedures in the correct court in trying terrorism suspects. Admittedly, the verdict on a large number of counts demonstrates many of the difficulties of an Article III jury trial. But, the result was that the trial ended in a conviction on a significant charge. We will, of course, just have to wait and see what happens during the appeals process. I am not competent to discuss the details of the trial or rulings made by Judge Kaplan because, again, I am not a lawyer. What I can say, however, is that the Ghailani verdict demonstrates to the world that the American criminal justice system is capable of handling complex terrorism cases, while upholding our Constitution and the Rule of Law. The Ghailani trial has reinforced the legitimacy of our traditional criminal justice system. It has shown to the world that America can try terrorism suspects in a manner consistent with our Constitution, with our values, and with our treaty obligations.

The Ghailani trial is only one out of over 400 terrorism related trials that demonstrate that we can use Article III courts. I have already explained why I believe the use of our traditional criminal justice system has helped us to preserve and protect our foreign policy interests.

Additionally, the Geneva Conventions regulating warfare require, in cases of violation of the laws of war, the use of "a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." The wording makes clear that the use of an Article III court would fulfill this obligation. There has been a long and divisive debate over whether the Guantanamo military commissions meet these standards. I am not an expert on this issue, but it is clear that without exception, Article III courts meet the treaty requirement. It also seems clear to me that were the Guantanamo military commissions empowered in a

way to meet these same standards they would, in effect, become fully parallel to Article III courts.

The American justice system is the established standard, maybe even the gold standard, around the world. An effort on the part of the United States to strengthen and preserve the use of alternative methods specifically for terror related crimes has appeared to the rest of the world to detract from, rather than strengthen, our system of justice. Within our own judicial arrangements during the last review of the United States Supreme Court of military commissions, it appears they failed to meet constitutional standards. I understand the Military Commissions Act of 2009 has not yet been tested in that regard. The closer military commissions come to meeting Article III standards, which is what the world expects of us, then the less point there is, in my view, of employing military commissions. The issue here is that small differences, which do not go to making major changes in the rights and obligations of all parties under military commissions, have few if any benefits to those who would like to use military commissions as a device further to ensure convictions of terrorism suspects being held under the laws of war.

Detention of Terrorism Suspects

Recently, there have been increased calls for the use of indefinite or preventive detention, instead of trying suspected terrorist detainees at all. I believe that indefinite detention of individuals without charge under any guise short of prisoners of war in traditional state to state military conflict, either declared or undeclared, raises all of the problems of abuse of state power to the detriment of individual rights. In my view, a system of indefinite detention without charge contravenes the central principles of our own Constitution and national standards of a right to notice of the charges and to trial. The detention issue presents a central conundrum of what to do when we believe all of the information at our disposal indicates that the detainee is guilty, but we cannot put him or her through a federal trial for one or more reasons.

One such reason is that the information to be used at trial has been obtained by illegal or unacceptable methods. One example is the information found to be inadmissible in the Ghailani trial. We have a treaty obligation not to engage in torture or cruel, inhuman or degrading treatment. These practices also contravene domestic laws. Although all now agree that torture must be prohibited, the value of information obtained through so-called "enhanced interrogation techniques" is widely debated in the intelligence world. The preponderance of evidence, in my view, is against the utility of such practices based on a reading of the materials discussing it. In addition to the moral and legal issues, many studies have found that evidence obtained through coercion is inherently unreliable. That then raises the question of what to do with defendants in this category. The options are stark and challenging. They can be tried on the admissible evidence. They can be sent to jurisdictions which may have more evidence or different charges against which to try them. They can in the end be released. The danger there is they will once again

attempt to attack our country. That danger has to be balanced against the fact that the high level leadership of al Qa'eda – bin Laden and al Zawahiri and others - also remain at large. These are not easy choices. But the shorter term, tactical, considerations need also to be balanced against the longer term strategic issues.

The second reason is that the information was derived through intelligence collection where the tradition and the national interest are to protect the sources and methods of collection. The government has developed a practice of clearing and briefing judges and attorneys for use of this protected evidence in courts. Under the Classified Information Procedures Act (CIPA) of 1980 there are also ways to protect sources and methods while making the principal elements of the evidence clear to the defendant. This seems to be a respectable and responsible way to proceed.

Unfortunately, the issue of whether to try and/or indefinitely detain without charge the detainees in Guantanamo has become a highly politicized issue. However, I have joined a bipartisan group of nearly 140 prominent Americans who signed *Beyond Guantanamo: A Bipartisan Declaration*, a copy of which I would request be placed in the record. *Declaration* signatories, convened by the Constitution Project, include former U.S. federal judges, prosecutors, intelligence experts, former members of Congress, former diplomats, military leaders, and families of victims of terrorism. The *Declaration* supports the use of our traditional criminal justice system to try Guantanamo detainees, and opposes the use of indefinite detention without charge. We believe that "establishing a system of detention without charge would damage the ability of the United States to promote respect for human rights around the world, embolden human rights violators, and tarnish our Nation's reputation and credibility with its international allies." I believe it will have the same negative impact on our efforts to promote wider use of the Rule of Law. Further, a system of indefinite detention would raise a serious divergence on a major issue of principle with our international allies and other communities around the world. This would tend to discourage critical cooperation, especially in the fight against terror, by those allies and others whose assistance is important in our joint fight against terrorism.

Safeguarding Privacy and Avoiding Unnecessary Secrecy

It is self evident that the Rule of Law requires appropriate safeguards to protect individuals' right to privacy. States traditionally, for fiscal and security purposes at their borders, have exercised the right to examine persons and goods entering their territory on an absolute basis with exceptions only for diplomatic and state immunity. It is obvious that this needs to be done for the purpose of protecting the country and carrying out its laws on trade and commerce, but such searches must be conducted in a manner that minimizes the intrusion into individual privacy.

In addition, we use the issuance of visas that permit people to present themselves at our borders for admission into the country in a way that, *inter alia*,

reduces security risks. We should avoid a blanket selection of everyone from one or a number of countries for special treatment and review wherever possible their background. Instead, we should rely on actual intelligence and the application of standards of reasonable suspicion to determine which individuals pose threats. Ethnic, racial, and national profiling have brought growing antagonism to the United States on the part of the many innocent people who have been affected by these practices. This, in turn, has fostered resentment against our country, which terrorists and others have used to recruit individuals to act against the United States.

These are not, obviously, easy issues. But, over a period of time, incorporating protections for civil liberties can help us to restore our reputation as a welcoming nation, while we continue to deal with the international security problems posed by the terrorist threat to the United States. It is also clear that such an approach can only be effective if we continue to strengthen and refine our systems for gathering intelligence information and analyzing it appropriately. Similarly, we should focus our inquiries on actual threats - both current and potential - to help us more effectively and more selectively to conduct searches at our borders. This means that both increasing foreign trade and the number of visitors to the United States are kept more carefully in balance with assuring our security. Smarter visa issuances and smarter and better informed security inspections save time and effort and allow us to concentrate on areas where the threat is greatest and our security processes can be most effective.

The application of the state secrets doctrine is also an area of growing concern, particularly as it affects the rights of citizens and aliens to seek redress in court for actions of the government which negatively impact them or their interests. Blanket efforts to block all such claims seeking redress are both unfair and improper. Any doctrine that leaves the Executive Branch entirely immune, on its own say so, from all claims for redress against mistakes, errors, or bad or improperly applied policy seems overly broad and peremptory. We need to look carefully at how to assure the right to redress while fully protecting the government's responsibility to keep its legitimate secrets secure.

Perhaps there is a parallel here in the way we treat classified material in connection with criminal and civil actions in the judicial system under CIPA. The state secrets privilege should be restored to its proper role as an evidentiary privilege, safeguarding particular pieces of evidence against disclosure. The privilege should not be used as an immunity doctrine, completely blocking challenges to government actions. Judges should independently examine the evidence asserted to be secret to determine whether the privilege applies, and should assess whether there is sufficient non-privileged evidence for the case to proceed. This would help to assure the executive branch is not left to police itself. The judiciary would be playing its proper role in assuring that individual rights are carefully looked at in light of executive branch interests and requirements. It is

within the ambit of this approach that solutions to the question of the state secrets privilege and state protection of citizens' rights should be found.

Thank you, Mr. Chairman, for this opportunity to testify. I look forward to your questions.

ATTACHMENT

Beyond Guantanamo
A Bipartisan Declaration

Declaration Supporting Federal Court Prosecution of Terrorism Suspects and Opposing Indefinite Detention Without Charge

We, the undersigned, urge Congress and the President to support a policy for detention, treatment and trial of suspected terrorists that is consistent with U.S. treaty obligations and constitutional principles. As it moves to close Guantanamo and develop policies for handling terrorism suspects going forward, the government should rely upon our established, traditional system of justice. We are confident that the government can preserve national security without resorting to sweeping and radical departures from an American constitutional tradition that has served us effectively for over two centuries.

Civilian federal courts are the proper forum for terrorism cases

Over the last two decades, federal courts constituted under Article III of the U.S. Constitution have proven capable of trying a wide array of terrorism cases, without sacrificing either national security or fair trial standards.

Prosecutions for terrorism offenses can and should be handled by traditional federal courts, which operate under statutes and procedures that provide the tools necessary to try such complex cases. Moreover, the War Crimes Act explicitly gives federal courts jurisdiction to try certain war crimes.

Terrorism suspects should be criminally tried, not detained without charge

We believe it is unconstitutional to detain indefinitely terrorism suspects in the United States without charge, either for the purposes of interrogation and intelligence-gathering or solely on the basis of suspected dangerousness. There are limited times when preventive detention, subject to required procedural protections, is appropriate in the context of armed conflict. However, the continued detention without charge of the detainees remaining in Guantanamo is not appropriate and is contrary to American values.

Indefinite detention without charge is counterproductive and harms the U.S. reputation globally

Instituting a system of indefinite detention without charge in the United States for terrorism suspects would threaten the constitutional protections enshrined in our justice system and is simply bad policy. Such a system would undoubtedly result in protracted litigation, delaying justice in these cases. In addition, establishing a system of detention without charge would damage the ability of the United States to promote respect for human rights around the world, embolden human rights violators, and tarnish our Nation's reputation with international allies. Thus, by discouraging cooperation by international allies and communities around the world whose assistance is needed to defeat terrorism, a system of detention without charge would undermine U.S. counterterrorism and counterinsurgency efforts and thereby also increase the danger to American military and other U.S. personnel serving abroad.

The Constitution Project
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Beyond Guantanamo: A Bipartisan Declaration Signatories To Date

Stephen Abraham, Lieutenant Colonel (Ret.), U.S. Army Intelligence Corps (Reserves); Lawyer, Newport Beach, California

Morton Abramowitz, Senior Fellow, The Century Foundation; former President, Carnegie Endowment for International Peace; Ambassador to Turkey, 1989-1991, Thailand, 1978-1981 and to the Mutual and Balanced Force Reduction Negotiations in Vienna, 1983-1984; former Assistant Secretary of State for Intelligence and Research; former Deputy Assistant Secretary of Defense for Inter-American, East Asian, and Pacific affairs; former Special Assistant to the Secretary of Defense and to the Deputy Secretary of State; former political adviser to the Commander-in-Chief, Pacific

Azizah al-Hibri, Professor, The T.C. Williams School of Law, University of Richmond; President, Karamah: Muslim Women Lawyers for Human Rights

Dennis Archer, President, American Bar Association, 2003-2004; Mayor, Detroit, 1994-2001; Associate Justice, Michigan Supreme Court, 1986-1990

J. Brian Atwood, Dean, Humphrey Institute; former Administrator, U.S. Agency for International Development (USAID); head of transition team, State Department; former Under Secretary of State for Management; former Adjunct Lecturer at Harvard's JFK School; former Sol M. Linowitz Professor for International Affairs, Hamilton College; Director, Citizens International

Lourdes G. Baird, Judge, U.S. District Court for the Central District of California, 1992-2005, Los Angeles Superior Court, 1988-1990, Los Angeles Municipal Court, 1987-1988, and Municipal Court, East Los Angeles Judicial District, 1986-1987; U.S. Attorney, Central District of California, 1990-1992; Assistant U.S. Attorney, Central District of California, 1977-1983

Doug Bandow, former Special Assistant to President Ronald Reagan

William Banks, Professor, Director, the Institute for National Security and Counterterrorism; Laura J. & L. Douglas Meredith Professor of Law, Syracuse University College of Law

Harry G. Barnes, Jr., U.S. Ambassador to Romania, 1974-1977; to India, 1981-1985; to Chile, 1985-1988

*Affiliations are listed for identification purposes and do not imply the endorsement of the organizations with which the signatories are affiliated.

Bob Barr, Member of U.S. Congress (R-GA), 1995-2003; CEO, Liberty Strategies, LLC; the 21st Century Liberties Chair for Freedom and Privacy, the American Conservative Union, 2003-2008; Chairman, Patriots to Restore Checks and Balances; Practicing Attorney

Richard E. Benedick, President, National Council for Science and the Environment; Visiting Fellow, the Wissenschaftszentrum Berlin (Social Science Research Center), since 1995; former Diplomat to Iran, Pakistan, Paris, Bonn, and Athens; former Deputy Assistant Secretary of State for Environment, Health, and Natural Resources

David Birenbaum, Of Counsel, Fried, Frank, Harris, Shriver & Jacobson LLP; Senior Scholar, Woodrow Wilson International Center for Scholars; U.S. Ambassador to the United Nations for UN Management and Reform, 1994-1996

James S. Brady, U.S. Attorney, Western District of Michigan, 1977-1981

David M. Brahms, Brigadier General (Ret.), U.S. Marine Corps, 1963-1988, Legal Adviser, 1983-1988; Practicing attorney; Member, Board of Directors, Judge Advocates Association

Michael R. Bromwich, Inspector General, U.S. Department of Justice, 1994-1999; Associate Counsel, Office of Independent Counsel for Iran-Contra, 1987-1989; Assistant U.S. Attorney for the Southern District of New York, 1983-1987

Christopher Bryant, Professor of Law, University of Cincinnati; Assistant to the Senate Legal Counsel, 1997-1999

Edward N. Cahn, Chief Judge, U.S. District Court, Eastern District of Pennsylvania, 1993-1998

Barbara A. Caulfield, Judge, U.S. District Court, Northern District of California, 1991-1994

Steven Clemons, Director of American Strategy Program, New America Foundation; Publisher of *The Washington Note*; Co-Founder, Japan Policy Research Institute

John (Jack) Cloonan, President, Clayton Consultants, Inc.; Special Agent, Federal Bureau of Investigation, New York Field Office, 1976-2002

Phillip J. Cooper, Professor, Mark O. Hatfield School of Government, Portland State University

Edwin G. Corr, U.S. Ambassador to El Salvador, 1985-1988; to Bolivia, 1981-1985; to Peru, 1980-1981; Senior DAS, International Narcotics Matters Bureau, 1978-1980; Peace Corps Regional Director, Colombia, 1966-1968; U.S. Foreign Service Officer, 1961-1990,

*Affiliations are listed for identification purposes and do not imply the endorsement of the organizations with which the signatories are affiliated.

serving in seven countries and DOS; USMC Infantry Officer, 1957-1960; Professor and Administrator, University of Oklahoma, 1990-2007

Larry Edwin Craig, U.S. Senator (R-ID), 1991-2009, Chairman of the Senate Committee on Veterans' Affairs, 2005-2007; President, New West Strategies

James P. Cullen, Brigadier General (Ret.), U.S. Army Reserve Judge Advocate General's Corps; Chief Judge (IMA), U.S. Army Court of Criminal Appeals; practicing lawyer

Sandy D'Alemberte, President, American Bar Association, 1991-1992

John W. Dean, Nixon White House Counsel, 1970-1973

Robin DellaRocca, Member, September Eleventh Families for Peaceful Tomorrows; Special Assistant to the Director of the Strategic Communications Division, Department of Public Information, United Nations

Michael H. Dettmer, U.S. Attorney, Western District of Michigan, 1994-2001

W. Thomas Dillard, U.S. Attorney, Northern District of Florida, 1983-1987; U.S. Attorney, Eastern District of Tennessee, 1981; Assistant U.S. Attorney, Eastern District of Tennessee, 1967-1976 and 1978-1983; U.S. Magistrate, Eastern District of Tennessee, 1976-1978

Mickey Edwards, Member of U.S. Congress (R-OK), 1977-1993, Chairman of the House Republican Policy Committee, 1989-1993; Former National Chairman, American Conservative Union; Founder, Heritage Foundation; Lecturer at the Woodrow Wilson School of Public and International Affairs, Princeton University

Bruce J. Einhorn, Federal Immigration Judge, 1990-2007; Special Prosecutor and Chief of Litigation, U.S. Department of Justice Office of Special Investigations, 1979-1990; Professor of Law and Director of Asylum Clinic, Pepperdine University School of Law

Thomas B. Evans, Jr., Member of U.S. Congress (R-DE), 1977-1983; Co-Chairman, Republican National Committee, 1971-1973; Chairman, The Evans Group, Ltd.; Founder, Florida Coalition for Preservation

Bruce Fein, former Associate Deputy Attorney General and Assistant Director, Office of Legal Policy, U.S. Department of Justice; former General Counsel, Federal Communications Commission; former Research Director for the Joint Congressional Committee on Covert Arms Sales to Iran; former Executive Director, World Intelligence Review; Adjunct Scholar, American Enterprise Institute; Resident Scholar, Heritage Foundation; Lecturer, Brookings Institute; Adjunct Professor, George Washington

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University

Eugene R. Fidell, President, National Institute of Military Justice; Florence Rogatz Lecturer in Law, Yale Law School; Of Counsel, Feldesman Tucker Leifer Fidell LLP

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Sam Gardiner, Colonel (Ret.), U.S. Air Force

Michael German, Policy Counsel, American Civil Liberties Union; Adjunct Professor, National Defense University School for National Security Executive Education; Special Agent, Federal Bureau of Investigation, 1988-2004

John J. Gibbons, Chief Judge, 1987-1990 and Judge, 1969-1980, U.S. Court of Appeals for the Third Circuit; Director and Founder, John J. Gibbons Fellowship in Public Interest and Constitutional Law; Director, Business and Commercial Litigation, Gibbons PC law firm

Philip Giraldi, Francis Walsingham Fellow, American Conservative Defense Alliance; Former CIA counter-terrorism specialist and military intelligence officer

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Melvin A. Goodman, Senior Fellow, National Security Project, Center for International Policy

Michael S. Greco, President, American Bar Association, 2005-2006

Robert Grey, President, American Bar Association, 2004-2005

Lee F. Gunn, Vice Admiral (Ret.) U.S. Navy

Don Guter, Rear Admiral (Ret.) U.S. Navy, 1970-2002; Judge Advocate General, 2000-2002; President and Dean, South Texas College of Law

Talat Hamdani, Member, September Eleventh Families for Peaceful Tomorrows; civil liberties and human rights activist; mother of Mohammad Salman Hamdani, a NYPD

*Affiliations are listed for identification purposes and do not imply the endorsement of the organizations with which the signatories are affiliated.

Cadet and NYS Certified Paramedic who died in the line of duty in WTC II on September 11, 2001; Salman is mentioned in the Patriot Act for his heroism as a Muslim American

William C. Harrop, Foreign Service Officer, 1954-1993; former Ambassador to Guinea, Kenya, Seychelles, Zaire and Israel; former Inspector General, U.S. Department of State and the Foreign Service

William vanden Heuvel, Ambassador, United Nations, 1979-1981 and United Nations European Office, 1977-1979

Robert Hirshon, President, American Bar Association, 2001-2002

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David R. Irvine, Brigadier General (Ret.) U.S. Army; Former Deputy Commander, 96th Regional Readiness Command; former faculty member, Sixth U.S. Army Intelligence School where he taught interrogation for 18 years; former Legislator (R), Utah House of Representatives for four terms

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Nicholas de B. Katzenbach, Under Secretary of State, 1966-1969; U.S. Attorney General, 1965-1966; Deputy Attorney General, 1962-1965

David A. Kay, Former Head of the Iraq Survey Group; former Special Advisor on the Search for Iraqi Weapons of Mass Destruction to the Director of Central Intelligence

David Keene, Chairman, American Conservative Union; Member, Board of Directors, National Rifle Association

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David Lawrence, Jr., President, Early Childhood Initiative Foundation; former Publisher, *Miami Herald* and *Detroit Free Press*

John Leinung, Member, September Eleventh Families for Peaceful Tomorrows; step-father of Paul J. Battaglia, who died in WTC Tower 1, 100th floor

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in the Practice of Diplomacy, Georgetown University; Former U.S. Permanent Representative to the United Nations

James E. McPherson, Rear Admiral (Ret.), Judge Advocate General of the U.S. Navy, 20042006

Harry C. McPherson, Jr., White House Counsel, 1965-1969

Nancy Meyer, Project Director, September Eleventh Families for Peaceful Tomorrows; sister-in law to Lauren Catuzzi Grandcolas, who was a United Flight 93 victim

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Alberto Mora, Former General Counsel, Department of the Navy

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William Nash, Major General (Ret.), U.S. Army

James F. Neal, Special Assistant to Attorney General Robert Kennedy, 1961-1964; U.S. Attorney, Middle District of Tennessee 1964-1966; Chief Trial Counsel, Watergate Special Prosecution Force 1973-1975; Chief Counsel, Senate Select Committee to Study Undercover Operations of the Department of Justice, 1982

William H. Neukom, President, American Bar Association, 2008-2009

Grover Norquist, President, Americans for Tax Reform

Donna Marsh O'Connor, Member, September Eleventh Families for Peaceful Tomorrows; Professor, Syracuse University; mother of Vanessa Lang Langer, who died on 9/11 at the WTC Tower II

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Pete Peterson, U.S. Member of Congress (D-FL), 1991-1997; Ambassador to Hanoi, 1997-2001

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Redding Pitt, U.S. Attorney, Middle Alabama, 1993-2000

George W. Proctor, U.S. Attorney, Eastern Arkansas, 1979-1987

Anthony Quainton, Ambassador to Kuwait, 1984-1987; Distinguished Diplomat in Residence, American University

Frank C. Razzano, Assistant U.S. Attorney, 1975-1978; Assistant Chief Trial Attorney, Securities and Exchange Commission, 1978-1982; Adjunct Professor, University of Maryland Law School; Defense counsel for a Guantanamo detainee

Charles B. Renfrew, Deputy Attorney General, U.S. Department of Justice, 1980-1981; U.S. District Judge, Northern District of California, 1972-1980; former President, American College of Trial Lawyers; former Vice Chairman, Antitrust Section, and form member, Standing Committee on the Federal Judiciary, American Bar Association; Chairman, Special Committee to Study the Problem of Discovery, Federal Judicial Center

James H. Reynolds, U.S. Attorney, Northern District of Iowa, 1976-1982; U.S. Attorney, South Dakota by Special Appointment of U.S. Attorney General, 1978-1979; Section Director, U.S. Attorney General's Advocacy School, 1979

Jose de Jesus Rivera, U.S. Attorney, Arizona, 1998-2001

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Richard A. Rossman, Chief of Staff, Criminal Division, U.S. Department of Justice, 1998-1999; U.S. Attorney, Eastern District of Michigan, 1980-1981; Chief Assistant U.S. Attorney, Eastern District of Michigan, 1977-1980; Chief Deputy Federal Defender, Eastern District of Michigan, 1972-1975

William D. Ruckelshaus, Administrator, Environmental Protection Agency, 1970-1973; acting Director, Federal Bureau of Investigation, 1973; Deputy Attorney General, U.S. Department of Justice, 1973; Strategic Director, Madrona Venture Group; Chairman, the Puget Sound Partnership

Murray G. Sagsveen, Brigadier General (Ret.) U.S. Army; Staff Judge Advocate for the State Area Command, Special Assistant to the National Guard Bureau Judge Advocate, Army National Guard Special Assistant to the Judge Advocate General of the Army; General Counsel, American Academy of Neurology

Wright Salisbury, Member, September Eleventh Families for Peaceful Tomorrows; founder of the Alliance for Jewish-Christian-Muslim Understanding; father-in-law of Ted Hennessy, Jr., who died on 9/11 on American Airlines Flight 11

Stephen A. Saltzburg, Attorney General's ex-officio Representative, U.S. Sentencing Commission, 1989-1990; Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, 1988-1989

Donald E. Santarelli, Administrator, Law Enforcement Assistance Administration, Department of Justice, 1973-1974; Associate Deputy Attorney General, 1969-1972; Special Counsel, Senate Judiciary Committee on Constitutional Rights, 1968-1969; Minority Counsel, U.S. House of Representatives Committee on the Judiciary, 1967-1968; Assistant U.S. Attorney, District of Columbia, 1966-1967

H. Lee Sarokin, Judge, U.S. Court of Appeals for the Third Circuit, 1994-1996; Judge, U.S. District Court, District of New Jersey, 1979-1994

Daniel S. Seikaly, Chief of the Criminal Division, U.S. Attorney's Office, District of Columbia, 2001-2004; Associate Inspector General for Investigations, Central Intelligence Agency, 1998-2001; Associate Deputy Attorney General, U.S. Department of Justice, 1996-1998

William S. Sessions, Director of the FBI, 1987-1993; Chief Judge, 1980-1987, and Judge, 1974-1987, U.S. District Court for the Western District of Texas; U.S. Attorney, Western District of Texas, 1971-1974

*Affiliations are listed for identification purposes and do not imply the endorsement of the organizations with which the signatories are affiliated.

Jerome Shestack, Senior Counsel, Wolf, Block, Schorr and Solis-Cohen, LLP; President, American Bar Association, 1997-1998

Earl J. Silbert, Partner, DLA Piper; U.S. Attorney, District of Columbia, 1974-1979; Former Watergate Prosecutor

Richard Sobel, Visiting Scholar, Buffett Center for International and Comparative Studies, Northwestern University; founding Director of the Cyber Privacy Project

Neal Sonnett, Chair, American Bar Association Task Force on Treatment of Enemy Combatants and Task Force on Domestic Surveillance in the Fight Against Terrorism

Nancy Soderberg, former Deputy Assistant to the President for National Security Affairs; Ambassador and Alternate Representative to the United Nations

Theodore C. Sorensen, White House Counsel, 1961-1963

Thomas P. Sullivan, U.S. Attorney, Northern District of Illinois, 1977-1981; Former Co-Chair of the Illinois Governor's Commission on Capital Punishment, 2000-2008

John F. Tate, President, Campaign for Liberty

Charles Tiefer, General Counsel (Acting) 1993-1994, Solicitor and Deputy General Counsel, 1984-1995, U.S. House of Representatives

Joshua Treem, Assistant U.S. Attorney, District of Maryland, 1973-1978

James B. Tucker, U.S. Attorney, Southern Mississippi, 2001

Dane vonBreichenruchardt, President, U.S. Bill of Rights Foundation

Colby Vokey, Lieutenant Colonel (Ret.) U.S. Marine Corps, 1987-2008; Lead Counsel for Guantanamo detainee Omar Khadr at Military Commissions, 2005-2007; Attorney, Fitzpatrick Hagood Smith & Uhl, LLP

Patricia M. Wald, Chief Judge, 1986-1991, and Judge, 1979-1999, U.S. Court of Appeals for the D.C. Circuit

Edward G. Warin, U.S. Attorney, District of Nebraska, 1977-1981

Alexander F. Watson, Assistant Secretary of State for Western Hemisphere Affairs, 19931996; U.S. Deputy Permanent Representative to the United Nations, 1989-1993; Ambassador to Peru, 1986-1989; Deputy Chief of Mission, Brazil, 1984-1986, Colombia,

*Affiliations are listed for identification purposes and do not imply the endorsement of the organizations with which the signatories are affiliated.

1981-1984, and Bolivia, 1979-1981

Dan K. Webb, U.S. Attorney, Northern District of Illinois, 1981-1985

H. Thomas Wells, Jr., President, American Bar Association, 2009-2010

Adele Welty, Member, September Eleventh Families for Peaceful Tomorrows; mother of firefighter Timothy Welty, who was lost in the line of duty at the World Trade Center; opposed to capital punishment and testified for the defense in the Moussaoui trial

James J. West, U.S. Attorney, Middle District of Pennsylvania, 1985-1993; First Assistant U.S. Attorney, Middle District of Pennsylvania, 1982-1985; Deputy Attorney General, Deputy Director of the Office of Criminal Law Enforcement, Pennsylvania DOJ,1979-1982; Asistant U.S. Attorney, Western District of Pennsylvania, Chief of the Appellate Section, 1974-1979

Daniel E. Wherry, U.S. Attorney, District of Nebraska, 1975-1978

John W. Whitehead, President, The Rutherford Institute

Lawrence Wilkerson, Colonel (Ret.) U.S. Army; Visiting Pamela C. Harriman Professor of Government at the College of William and Mary; Professorial Lecturer in the University Honors Program at the George Washington University; former Chief of Staff to Secretary of State Colin Powell, 2002-2005

Roger Wilkins, Clarence J. Robinson Professor Emeritus of History and American Culture, George Mason University; Director of U.S. Community Relations Service, Johnson administration, 1964-1966

William D. Wilmoth, U.S. Attorney, Northern District of West Virginia, 1993-1999

Stephen N. Xenakis, Brigadier General (Ret.) U.S. Army, Commanding General of the Southeast Army Regional Medical Command; author on medical ethics, military medicine, and treatment of detainees

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Mr. CONYERS. I turn now to the director of the American Civil Liberties Union, Laura Murphy. Her family is very well known. Her father created, was it the Pittsburgh Courier?

Ms. MURPHY. My great grandfather created the Afro-American newspapers.

Mr. CONYERS. What were they called?

Ms. MURPHY. The Afro-American newspapers.

Mr. CONYERS. And they were nationwide?

Ms. MURPHY. They were in five cities, Richmond, Philadelphia, Newark, Baltimore, Washington, D.C., Richmond.

Mr. CONYERS. Well, I used to deliver something that had Murphy on it.

Ms. MURPHY. It was the Afro.

Mr. CONYERS. Yes. And her brother is a distinguished civil rights lawyer now in New York. She herself has 30 years of policymaking and political expertise at both the national, State and local levels. In previous professional positions, Ms. Murphy has served as chief of staff to the California assembly speaker, a cabinet member for the mayor of the District of Columbia, an account executive for a public affairs organization, and a legislative assistant for two Members of the House of Representatives.

She represents the Washington branch of an organization that is very distinguished and is well-known to the House Judiciary Committee because they come before us so regularly. The one comment I have about her paper, because it was in small print and it had to be enlarged for my reading, is that it is the longest and one of the best papers.

Normally, when we get large quantities of speech preparation, we say, uh-oh, but this was not the case in your case. I want to commend you for the thorough review of the subject matter before us and the work of ACLU in this regard. And we welcome you this morning before our Committee.

TESTIMONY OF LAURA W. MURPHY, DIRECTOR, AMERICAN CIVIL LIBERTIES UNION

Ms. MURPHY. Thank you, Mr. Chairman. And it has been my honor since I first became a lobbyist for the ACLU in 1979 to have known you and worked with you over all of these years. And we so appreciate your stewardship of this Committee. Thank you for being here today.

I appreciate the opportunity to testify on behalf of the ACLU on this important subject. There is no question that the 9/11 attacks were a serious blow to our Nation. And the risk of significant future attacks is a frightening prospect and something our government must work to prevent. But we must work intelligently to prevent attacks, and we must do so with the integrity that we as Americans owe to our constitutional heritage, ourselves, and to future generations.

In particular, history teaches us that the executive branch of the U.S. Government regardless of the party in power always seizes opportunities to expand its own power, and the American people need Congress to serve as a healthy check on that tendency. We need to make sure that the steps we take to protect ourselves are smart ones. And we need to keep faith with our Nation's highest ideals as outlined in the bill of rights, which are the source of the real strength of our Nation.

In recent years in the wake of 9/11, unfortunately we have not done this. The examples are many, and as you say, my staff has prepared excellent testimony illustrating many of these examples: Illegal warrantless wiretapping; the targeted killings of Americans without trial far from any battlefield; unjustifiably intrusive airline

security measures; military commission; state secrets; indefinite detention; out-of-control watchlists; the PATRIOT Act.

Never before has the executive branch had such sweeping powers. This is a radical departure for our country. Despite the summer clamoring to give even more broad powers to the executive branch. Let me briefly mention three that the Congress is likely to confront: Authorization for the use of military force. One absolutely crucial issue is indefinite detention and the authorization for use of military force. Twice introduced by the incoming full Committee Chairman, Lamar Smith and Senator Lindsey Graham their legislation would declare that the U.S. is in a worldwide war without end. It is just two simple sentences in their proposal, but it would drastically expand the power of executive even further and forever alter the course of U.S. history.

We wonder how many Members of Congress realize the monumental effect that the proposed new declaration of war would have. It has no time limits or geographic boundaries; it authorizes indefinite imprisonment without charge or trial, including against Americans in America. Is this the heritage our generations wants to pass along to future Americans?

A second issue that Congress will be confronting is the Obama administration's reported plans to change the very architecture of the Internet to make eavesdropping easier. As reported, this radical proposal would require all on line services, even those which operate by putting individuals in direct contact with each other using encryption to restructure the way their services work in order to make it easier for the government to eavesdrop upon demand. This step would interfere with technological innovation, create significant new cybersecurity vulnerabilities, reduce privacy and chill expression on the Internet, impose great dangers of abuse.

The third upcoming issue I wanted to mention, which will be before this Committee very shortly, is the reauthorization of the PATRIOT Act. There are a couple of sections up for reauthorization before February 28th, including section 215, the so-called library provisions, which gives the government sweeping new powers to seize records or goods from anyone, even people who aren't suspected of doing anything wrong, who are somehow just relevant to an investigation. Roving John Doe wire taps.

The Fourth Amendment Requires warrants to state with particularity the things to be search or seized. But this sweeping authority permits the government to get an order without naming either the place or the person to be tapped. Either one or the other should be required.

Protecting the Constitution is not a partisan issue. The executive branch, whether under control of Democrats or Republicans, tends to push for expanded powers of monitoring and control over the American people. It is up to the legislative branch to push back.

In closing, Mr. Conyers, I am sorry that Mr. Sensenbrenner wasn't able to stay longer, but I would ask that the Committee allow to be put in the record a report recently issued by the ACLU called the New Normal, talking about how many of the expanded executive branch powers have been carried over by the Obama administration.

Mr. CONYERS. Without objection, we will do that.
Ms. MURPHY. Thank you.
[The prepared statement of Ms. Murphy follows:]

PREPARED STATEMENT OF LAURA W. MURPHY

American Civil Liberties Union

Testimony Regarding Civil Liberties and National Security:

Stopping the Flow of Power to the Executive Branch

Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties,
Committee on the Judiciary
United States House of Representatives

Submitted by Laura W. Murphy

Director, Washington Legislative Office

December 9, 2010

Stopping the Flow of Power to the Executive Branch

INTRODUCTION

Chairman Nadler, Ranking Member Sensenbrenner, Full Committee Chairman Conyers, Full Committee Ranking Member Smith, and Members of the Subcommittee: the American Civil Liberties Union ("ACLU"), representing its nearly 600,000 members, respectfully submits this testimony on Civil Liberties and National Security.

The ACLU celebrated its 90th anniversary this year. The Obama Administration is nearing the end of its second year, and we are on the brink of a new Congress. It is an appropriate time to take stock of where we are, and the decisions that lie ahead of us in the 112th Congress.

It can be a disheartening time to reflect. It feels as though scissors have cut out whole portions of our liberties in the name of fighting the war on terrorism. The conversation about national security often falls prey to overheated rhetoric that obscures rather than elucidates a bipartisan examination of the facts. We have trained ourselves to jump and react and legislate every time there is a terrorism-related incident or trial. That behavior often undermines rather than reinforces faith in our institutions. But the good news is that it is not too late to restore our faith in the institutions of the courts, the Congress and the executive branch and the important checks and balances they provide to safeguard our liberty.

Congress is a co-equal branch of the federal government. It has an important role that should be used but not abused in holding the executive branch to account for its extraordinary powers – powers that have vastly expanded since the horrific attacks of 9-11.

History teaches us that executive branch of the US government – regardless of the party in power – always seizes opportunities to expand its own power, and the American people need Congress to serve as a healthy check on that tendency.

CHALLENGES TO OUR SECURITY
There is no question that the 9/11 attacks were a serious blow to our nation. We continue to experience periodic attempts by terrorists to harm innocent people. The risk of future significant attacks is a frightening prospect and something our government must work to prevent.

We must work *intelligently* to prevent attacks, however, and we must do so with the integrity that we as Americans owe to ourselves and future generations.

Intelligence means making sure the steps we take are smart ones – that we marshal our limited security resources, and devote them to those measures that will do the most good without imposing disproportionate costs, in treasure or in our liberties. *Integrity* means keeping faith with our nation's highest ideals as outlined in the Bill of Rights, which have made us what we are – at our best, a beacon of liberty for the world – and which are the real source of our strength as a nation.

What we should not do is let our policies be driven by fear. Fear can push us to act without either intelligence or integrity. We are a strong nation, and our strength comes from our values and the rule of law. Violating those values and the rule of law rarely gives us much protection in the short term, and in the long term weakens the foundations of our strength.

Security risks are not exactly something that started on 9/11. There is a long, diverse history of terrorist activity in the United States, from anarchists to Puerto Rican nationalists to the Weather Underground to the Ku Klux Klan to Timothy McVeigh. More broadly, Americans have lived through civil war, economic collapse, an attempt to conquer the world by a mad, genocidal dictator, a surprise military attack on U.S. territory, world war on two fronts, and, for 50 years, the threat of nuclear Armageddon. Through all these threats, we mostly stayed true to our values and preserved our freedom.

And when we didn't, it didn't make us safer and we always came to regret it. Whether it was the Alien and Sedition Acts, the suspension of Habeas Corpus during the Civil War, the Palmer Raids and the World War I Red Scares, the internment of Japanese-Americans, or domestic spying under the COINTELPRO program during the Vietnam War – we got a bad deal. We gave up freedom without getting improvements in our safety. In each case, that was eventually recognized, and the policy was discredited.

RESPONSES TO THOSE CHALLENGES
In the wake of 9/11, we have repeated that pattern. Unfortunately, there are many examples to cite. Let me discuss a few of them.

Warrantless surveillance
President Bush dealt a body blow both to long-respected traditions of privacy and to the rule of law with his program of illegal warrantless wiretapping.

Information about the precise nature of this spying is difficult to obtain, but our spy agencies have departed radically from their supposedly exclusive focus on overseas spying, and have turned their eyes and ears inward upon the American people.

In December 2006 the *New York Times* first reported that the NSA was tapping into telephone calls of Americans in violation of existing laws and the Constitution. Furthermore, the agency gained direct access to the telecommunications infrastructure through some of America's largest companies. Using that access, the agency appeared to be using broad data-mining techniques to evaluate the communications of millions of people within the United States.

In May 2006, Americans learned that at least some of the major telecommunications companies granted the NSA direct, wholesale access to their customers' calling records – once again, outside the law – and that the NSA was compiling a giant database of those records. According to the *New York Times*, the NSA was working with "the leading companies" in the telecommunications industry to collect communications patterns, and accessing "switches that act as gateways" at "some of the main arteries for moving voice and some Internet traffic into and out of the United States."[1] These apparently included telephone gateways as well as key nodes through which a large portion of Internet traffic passes. Access to these network hubs provides access to a direct feed of all the communications that pass through them, and the ability to sift through those communications as it sees fit.

Congress worsened the situation in 2008 by passing the Foreign Intelligence Surveillance Act Amendments Act (FAA), which permits the government to get annual court orders that can capture all communications coming into or going of the United States – even if an American citizen is on one end, and even if that person is not suspected of doing something wrong. The amount of private American communications that can be collected under this law is staggering, and this un-American and unconstitutional spying continues under President Obama. The ACLU has challenged the constitutionality of this law and our case is pending before the Second Circuit.

Secret warrantless eavesdropping on American citizens – is this the heritage our generation wants to pass along to future Americans?

Targeted killings

Of all of the national security policies introduced by the Obama administration, none raises human rights concerns as grave as those raised by the so-called "targeted killing" program. According to news reports, President Obama has authorized a program that contemplates the killing of suspected terrorists – including U.S. citizens – located far away from zones of actual armed conflict. If accurately described, this program violates international law and, at least insofar as it affects U.S. citizens, it is also unconstitutional.

The entire world is not a war zone. Outside of armed conflict, lethal force may be used only as a last resort, and only to prevent imminent attacks that are likely to cause death or serious physical injury. According to news reports, the program the administration has authorized is based on "kill lists" to which names are added, sometimes for months at a time, after a secret internal process. Such a program of long-premeditated and bureaucratized killing is plainly not limited to targeting genuinely imminent threats. Any such program is far more sweeping than the law

[1] Eric Lichtblau and James Risen, "Spy Agency Mined Vast Data Trove, Officials Report," *New York Times*, December 24, 2005; www.nytimes.com/2005/12/24/politics/24spy.html

allows and raises grave constitutional and human rights concerns. As applied to U.S. citizens, it is a grave violation of the constitutional guarantee of due process.

The program also risks the deaths of innocent people. Over the last eight years, the government has repeatedly detained men as "terrorists," only to discover later that the evidence was weak, wrong, or non-existent. Of the many hundreds of individuals previously detained at Guantánamo, the vast majority have been released or are awaiting release. Furthermore, the government has failed to prove the lawfulness of imprisoning individual Guantánamo detainees in some three-quarters of the cases that have been reviewed by the federal courts thus far, even though the government had years to gather and analyze evidence for those cases and had itself determined that those prisoners were detainable. This experience should lead the administration – and all Americans – to reject out of hand a program that would invest the CIA or the U.S. military with the unchecked authority to impose an extrajudicial death sentence on U.S. citizens and others found far from any actual battlefield. The ACLU has launched a constitutional challenge to this policy, which is pending before a district court in D.C.

The right to unilaterally kill anyone, including American citizens, far from any battlefield – is this the heritage our generation wants to pass along to future Americans?

Airline Security

The spread of unjustifiably intrusive airline security measures continues, such as virtual strip search body scanners and extremely personal pat-downs conducted without even the tiniest basis for suspicion.

Thanks to a new Transportation Security Administration (TSA) policy, many passengers are being forced to undergo an extremely intrusive and humiliating "pat down" search that is unlike anything most Americans have experienced before.

In the few weeks since the policy came into effect, the ACLU has received hundreds of complaints from travelers who have been subject to these invasive and suspicionless searches. These complaints came from men, women and children who reported feeling humiliated and traumatized by the searches they received, and, who, in some cases, compared the psychological impact to a sexual assault. Travelers with specific medical conditions, such as a breast cancer survivor with a breast prosthesis and a bladder cancer survivor with a urostomy bag, have reported being humiliated by less-than-sensitive agents.[2]

Meanwhile, the government is also engaging in the widespread deployment of body scanners – a move that makes no sense as a tradeoff between safety and our liberty. This technology involves a striking and direct invasion of privacy, by producing graphic images of passengers' bodies. It is a virtual strip search that reveals not only our private body parts, but also intimate medical details like colostomy bags. Such a degree of examination amounts to a significant assault on

[2] "TSA Pat-Down Leaves Mich. Man Covered in Urine," CBS News, Nov. 22, 2010; at http://www.cbsnews.com/stories/2010/11/22/national/main7078699.shtml; "TSA Makes Cancer Victim Remove prosthetic Breast," CBS News, Nov. 19, 2010; at http://www.cbsnews.com/stories/2010/11/19/national/main7070415.shtml.

the essential dignity of passengers. Some people do not mind being viewed naked, but many do and the issue is their right to have their integrity honored.

Some try to portray the situation as if we will be 100% safe with these scanners, and doomed without them. Of course, there is no such thing as 100% security, and many plots have been thwarted in recent years without the scanners. The question is, exactly how much of an uptick in security will we receive in exchange for the privacy and dignity we give up? Based on what experts are saying, the answer is: not much. The U.S. Government Accountability Office has reported that the body scanners may well have missed the explosives that "underwear bomber" Umar Farouk Abdulmutallab carried in his pants.[3] Some experts have said explosives can be hidden by being molded against the human body, or in folds of skin,[4] and government testing in the UK found that the technology comes up short in detecting plastic, chemicals and liquids.[5] At London's Heathrow airport, a four-year test of the scanners resulted in a decision to discontinue their use.

The ineffectiveness of body scanners in preventing attacks simply confirms the absence of justification for the level of intrusion involved. Ultimately if we are to protect ourselves with intelligence and integrity, our limited security dollars should be invested where they will do the most good and have the best chance of thwarting attacks. That means investing our scarce dollars in the development of competent intelligence and law enforcement agencies that will stop terrorists before they show up at the airport. The TSA should also invest in developing other detection systems that are less invasive, less costly and less damaging to privacy. For example, "trace portal detection" particle detectors hold the promise of detecting explosives while posing little challenge to flyers' privacy.

The government must indeed work zealously to make us as safe as possible and to take every reasonable step to make sure security breaches do not happen. But they need to act wisely, not by trading away our privacy for ineffective policies.

Security guards who can violate personal privacy and dignity in the most appalling ways in airports, and who knows where else tomorrow – is this the heritage our generation wants to pass along to future Americans?

Military Commissions

The embrace of military commission trials at Guantánamo by the Bush Administration and the Obama Administration (albeit with some procedural improvements) has been a major disappointment to those committed to due process and the rule of law. The effort to create an entirely new court system for Guantánamo detainees is a failure and needs to be halted. President Obama did encourage an effort to redraft the legislation creating the commissions and signed that bill into law. To be sure, the reformed Military Commissions Act contains

[3] "DHS and TSA Have Researched, Developed, and Begun Deploying Passenger Checkpoint Screening Technologies, but Continue to Face Challenges," Government Accountability Office, October 2009, at http://www.gao.gov/new.items/d10128.pdf.

[4] Thomas Frank, "X-ray tests both security, privacy," *USA Today*, Dec. 27, 2006, at http://www.usatoday.com/news/nation/2006-12-26-backscatter_x.htm.

[5] Jane Merrick, "Are planned airport scanners just a scam?" the Independent (UK), Jan. 3, 2010, at http://www.independent.co.uk/news/uk/home-news/are-planned-airport-scanners-just-a-scam-1856175.html.

improvements, but there remains a very real danger that defendants might be convicted on the basis of hearsay evidence obtained under coercion from those who will not be available for cross-examination.

More fundamentally, the existence of a second-class system of justice with a poor track record and no international legitimacy undermines the entire enterprise of prosecuting terrorism suspects. So long as the federal government can choose between two systems of justice, one of which (the federal criminal courts) is fair and legitimate, while the other (the military commissions) tips the scales in favor of the prosecution, both systems will be tainted in the eyes of the public and the international community. The perception will persist that the government will use the federal courts only in cases in which conviction seems virtually assured, while reserving the military commissions for cases with weaker evidence or where there are credible allegations that the defendants were abused in U.S. custody.

The error in continuing with a flawed military commission system is perhaps most starkly illustrated by the first prosecution to go forward at Guantánamo under President Obama's watch.

The defendant, accused child soldier Omar Khadr, is a Canadian citizen who was only 15 years old when he was captured after a firefight in Afghanistan. Khadr is alleged to have thrown a grenade that killed a U.S. soldier. If the allegations are true—and they have been cast into serious doubt by subsequent revelations—then Khadr was a child soldier brought to the battlefield by adults. In any event, Khadr was subjected to cruel and humiliating interrogations during his eight years at Guantánamo. These interrogations began almost immediately after his capture, while Khadr was in serious pain, being treated for life-threatening wounds in a military field hospital. The very first hearing at the revamped military commissions concerned whether Khadr's statements to interrogators could be used against him, despite this torture and abuse. It was marred by the same chaotic lack of regular process that characterized other hearings in the military commissions. Proceeding with this prosecution or any other in so flawed a system would be not only unjust but unnecessary: the federal criminal courts are both fairer and more effective. It is long past time to end the failed experiment of military commission trials at Guantánamo.

A parallel court system lacking in core legal protections that have long been part of our tradition – is this the heritage our generation wants to pass along to future Americans?

Detention

Over a hundred prisoners remain locked up in the Guantanamo prison, almost two years after President Obama promised to close the facility. In court, the administration has fought the release of detainees against whom the government has scant evidence of wrongdoing. Worse, the administration has embraced the theory underlying the entire Guantanamo detention regime: that the Executive Branch can detail militarily – without charge or trial – terrorism suspects captured far from a conventional battlefield.[6]

To its credit, the administration has now publicly stated that it will not support any new legislation expanding detention authority. Nevertheless, it has continued to assert, in habeas

[6] President Barack Obama, Remarks on National Security at the National Archives (May 21, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ .

corpus proceedings involving Guantánamo and Bagram detainees, a dangerously overbroad authority to detain civilian terrorism suspects militarily. And its task force has identified 48 Guantánamo detainees who will be held indefinitely without charge or trial.

Perhaps the most troubling iteration of this sweeping theory of detention authority occurred in legal proceedings in which the Obama administration defended the detention without judicial review of detainees in the Bagram prison in Afghanistan. While the Obama administration has improved the military screening procedures in place at Bagram, those procedures still fall far short of basic due process standards. In response to *habeas corpus* petitions filed by prisoners who had been captured *outside* of Afghanistan and transferred by the Bush administration to military detention at Bagram Air Base, the government argued that the courts lacked jurisdiction even to hear the prisoners' challenges, let alone decide their merits, because the prisoners were being detained in a war zone. This was disingenuous bootstrapping: the prisoners had been captured outside the war zone and transferred into it. The government thereafter relied on their presence in the war zone as a basis for avoiding any judicial scrutiny.

The Court of Appeals for the D.C. Circuit sided with the administration, effectively giving the government carte blanche to operate the prison at Bagram without any judicial oversight. Armed with this decision, Obama administration officials have reportedly begun debating whether to use the Bagram prison as a place to send individuals captured anywhere in the world for imprisonment and interrogation without charge or trial.[7]

Finally, the Obama administration has advocated for the transfer of some Guantánamo prisoners to a prison in Thomson, Illinois, where they would be detained by the military without charge or trial. If a precedent is established that terrorism suspects can be held without trial within the United States, this administration and future administrations will be tempted to bypass routinely the constitutional restraints of the criminal justice system in favor of indefinite military detention. This is a danger that far exceeds the disappointment of seeing the Guantánamo prison stay open past the one-year deadline. To be sure, Guantánamo should be closed, but not at the cost of enshrining the principle of indefinite detention in a global war without end.

A government that can imprison people forever without trial – is this the heritage our generation wants to pass along to future Americans?

State Secrets

The state secrets privilege, when properly invoked, permits the government to block the release of any information in a lawsuit that, if disclosed, would cause harm to national security. However, the Bush administration began using the privilege to dismiss entire lawsuits at the onset – and the Obama Administration has supported and continued that abuse of power.

The government has invoked the privilege to evade accountability for torture, to silence national security whistleblowers, and even to dismiss a lawsuit alleging racial discrimination. Most recently the government has invoked the privilege to block a challenge to the government's authority to use lethal force against a U.S. citizen without due process. This once-rare tool is

[7] Julian E. Barnes, *U.S. Hopes to Share Prison with Afghanistan*, L.A. Times, June 9, 2010.

being used not to protect the nation from harm, but to cover up the government's illegal actions and prevent further embarrassment.

In the ACLU's landmark case challenging the Bush administration's warrantless wiretapping program, a federal court rejected the government's claim that the lawsuit could not proceed because of state secrets. In her August 17, 2006 ruling in *ACLU v. NSA*, Judge Anna Diggs Taylor recognized that the government had publicly acknowledged that President Bush authorized the National Security Agency to wiretap Americans without warrants, and thus it could not claim that discussing the program in court would harm national security.

Although the state secrets privilege has existed in some form since the early 19th century, its modern use, and the rules governing its invocation, derive from the landmark Supreme Court case *United States v. Reynolds,* 345 U.S. 1 (1953). In *Reynolds,* the widows of three civilians who died in the crash of a military plane in Georgia filed a wrongful death action against the government. In response to their request for the accident report, the government insisted that the report could not be disclosed because it contained information about secret military equipment that was being tested aboard the aircraft during the fatal flight. When the accident report was finally declassified in 2004, it contained no details whatsoever about secret equipment. The government's true motivation in asserting the state secrets privilege was to cover up its own negligence.

While the Supreme Court upheld the use of the privilege in *Reynolds*, it did not dismiss the lawsuit. Instead the Court recognized the potential for abuse of the privilege, and placed restrictions on its use to ensure the power would not be "lightly invoked."

There has been no apparent difference between the policies of the Bush and Obama administrations on state secrets, even though the current administration has promised a more rigorous administrative process in deciding when to advance a state secrets argument. In a lawsuit brought by five survivors of the CIA's rendition program, Mohamed v. Jeppesen Dataplan, Inc., the Bush administration argued that the case could not be litigated without the disclosure of state secrets, and that it should therefore be dismissed at the outset. A district court agreed. To the surprise of many, the Obama administration defended that district court decision in the Court of Appeals for the Ninth Circuit, arguing that the district court was correct to deny the plaintiffs any opportunity to present their case in court. Even after a three-judge panel of the Ninth Circuit court sided with the ACLU and vacated the lower court decision, the Obama administration persisted in its argument that the case should not be litigated at all. It asked the full Ninth Circuit to reconsider the decision of the three-judge panel, and the court did so. And by a 6-5 vote, the court affirmed the government's overbroad and premature claim of secrecy. The ACLU is seeking Supreme Court review.

Unless the courts reject the government's overbroad claims of privilege, the government will have every incentive to continue invoking "state secrets" as a shield against embarrassing disclosures.

A government that can evade responsibility in court for all manner of injustices by simply crying "secrecy" – is this the heritage our generation wants to pass along to future Americans?

Watch lists

The national security establishment's record in creating and managing watch lists of suspected terrorists has been a disaster that too often implicates the rights of innocent persons while allowing true threats to proceed unabated. This regrettable outcome is partly a result of mismanagement and partly due to the deceptive difficulty of creating identity-based systems for providing security. These failures have been documented in a long string of government reports, which are consistent in their identification of persistent design flaws and ongoing, unacceptably high error rates.[8]

In May 2009 the Department of Justice Inspector General found that many subjects of closed FBI investigations were not taken off the list in a timely manner, and tens of thousands of names were placed on the list without appropriate basis.[9] A 2009 report by the Inspector General of DHS detailed extensive problems with the redress process for people improperly identified on watch lists.[10]

Further, because of outmoded information technology systems, the method for clearing the names of people who pose no threat to national security from watch lists is plagued by delays, and DHS can't even monitor how many cases it resolves. Yet in the wake of Umar Farouk Abdulmutallab's failed Christmas Day bombing, National Counter-Terrorism Center Deputy Director Russell Travers told Congress that the watch list architecture "is fundamentally sound," and suggested that the lists would soon be getting bigger: "The entire federal government is leaning very far forward on putting people on lists."[11]

Rather than reform the watch lists, the Obama administration has expanded their use and resisted the introduction of minimal due-process safeguards to prevent abuse and protect civil liberties. The Obama administration has added thousands of names to the No Fly List, sweeping up many innocent individuals. As a result, U.S. citizens and lawful permanent residents have been

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[8] *See for example*, GAO Report to Congressional Requesters, GAO-03-322 *Terrorist Watch Lists Should Be Consolidated to Promote Better Integration and Sharing* (April 2003); Department of Homeland Security, Office of Inspector General, OIG-04-31 *DHS Challenges in Consolidating Terrorist Watch List Information* (August 2004); Department of Justice, Office of the Inspector General, Audit Report 05-27 *Review of the Terrorist Screening Center (Redacted for Public Release)* (June 2005); Department of Justice, Office of the Inspector General, Audit Report 05-34, *Review of the Terrorist Screening Center's Efforts to Support the Secure Flight Program (Redacted for Public Release)* (August 2005); Department of Justice, Office of the Inspector General, Audit Report 07-41, *Follow-Up Audit of the Terrorist Screening Center (Redacted for Public Release)* (September 2007); Department of Justice, Office of the Inspector General, Audit Report 08-16, Audit of the U.S. Department of Justice Terrorist Watchlist Nomination Processes (March 2008); Department of Justice, Office of the Inspector General, Audit Report 09-25, *The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices* (May 2009); Department of Homeland Security, Office of Inspector General, OIG-00-103, *Effectiveness of the Department of Homeland Security Traveler Redress Inquiry Program*, (September 2009).

[9] Department of Justice, Office of the Inspector General, *The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices* (May 2009), Audit Report 09-25.

[10] Department of Homeland Security, Office of Inspector General, Effectiveness of the Department of Homeland Security Traveler Redress Inquiry Program OIG-00-103 (September 2009).

[11] *See The Lessons and Implications of the Christmas Day Attack: Watchlisting and Pre-Screening, Hearing of the S. Comm. On Homeland Security and Governmental Affairs,* 111th Cong. (2010)(Statement of Russell Travers, Deputy Director National Counterterrorism Center); *and* Mike McIntire, *Ensnared by Error on Growing U.S. Watchlist*, New York Times, Apr. 6, 2010, at: http://www.nytimes.com/2010/04/07/us/07watch.html.

stranded abroad, unable to return to the United States. Others are unable to visit family on the opposite end of the country or abroad. Individuals on the list are not told why they are on the list and thus have no meaningful opportunity to object or to rebut the government's allegations. The result is an unconstitutional scheme under which an individual's right to travel and, in some cases, a citizen's ability to just return to the United States, is under the complete control of entirely unaccountable bureaucrats relying on secret evidence and using secret standards. The ACLU has filed a lawsuit challenging this lack of due process.

A kafkaesque system in which the government can secretly tag its own citizens as "risks" without appeal or relief – is this the heritage our generation wants to pass along to future Americans?

Expanded FBI investigative powers

Revisions to the Attorney General Guidelines in 2002 and 2008 expanded the FBI's investigative authorities. The 2002 revisions lowered the threshold for initiating investigations, authorized FBI agents to attend public meetings or events without documenting such activities, and expanded the length and scope of preliminary investigations opened upon mere allegations. The 2008 revisions removed the requirement of factual predication altogether for a type of investigation called an assessment, in which agents can conduct physical surveillance, gather information using ruses, recruit and task informants and use grand jury subpoenas to obtain telephone records of Americans not even suspected of wrongdoing. These expanded powers would allow the FBI to conduct meritless investigations of peaceful political activism and religious practices, and now there is ample evidence this has occurred.

For example, when the Attorney General Guidelines were first changed in 2002, FBI Director Robert Mueller dismissed concerns in Congress that the FBI would use these expanded powers to infiltrate mosques. But a December 5, 2010 *Washington Post* article revealed a broad effort to spy on the Muslim community in southern California by using an FBI informant to infiltrate area mosques.[12] Similar cases where the FBI used dubious informants as *agents provocateurs* in Muslim communities have occurred in Miami, Florida; Lodi, California; and Albany and Newburgh, New York, sowing distrust within the Muslim community across the country. In 2009 Director Mueller defended these tactics, saying the FBI would not "take [its] foot off the pedal of addressing counterterrorism," despite the negative impact on the larger Muslim-American community.

A September 2010 review by the Department of Justice Inspector General, initiated after ACLU Freedom of Information Act requests revealed FBI spying operations against a number of domestic advocacy organizations, concluded the FBI initiated these inappropriate investigations with "factually weak" and "speculative" justifications. The IG determined most of these investigations did not violate the 2002 guidelines because the FBI only required the "possibility" of a federal crime to open a preliminary inquiry. Still, the FBI often failed to document the reasons for opening these investigations as required, and classified non-violent acts of civil disobedience as terrorism. In some cases the IG found the FBI opened full investigations and extended their duration without sufficient basis. As a result, the political activists who were the

[12] Jerry Markon, *Tension grows between Calif. Muslims, FBI after informant infiltrates mosque*, Washington Post, Dec. 5, 2010, at: http://www.washingtonpost.com/wp-dyn/content/article/2010/12/04/AR2010120403710.html.

subjects of these investigations were placed on terrorist watch lists, and sometimes remained on them even after the cases were closed.

Unfortunately the IG investigation only covered FBI activities through 2006, and was limited to cases the ACLU had already exposed. The fact that the Attorney General Guidelines were further weakened in 2008 makes it likely that similarly abusive and ineffective investigations targeting non-violent political and religious activity are occurring today. Because the FBI has shown an unwillingness to police itself, Congress must step in and narrow the FBI's investigative authorities in order to focus its efforts on real threats.

A society in which federal law enforcement can roam about at will on the thinnest of pretexts, spying, gathering information and hiring informers against politically disfavored groups – is this the heritage our generation wants to pass along to future Americans?

UPCOMING ISSUES

In these areas and many others, Congress has ceded dangerously broad powers to the executive branch. Despite these sweeping grants of authority, some are saying that still more powers are needed. Whatever you might think of airline security or eavesdropping policies or other controversies, there is no question that the government today has more than enough powers to conduct anti-terrorism operations.

Let me discuss three other new or continuing issues that we are likely to face in the coming two years.

A new declaration of a worldwide war without end

One issue that Congress may confront in its next session is indefinite detention and the Authorization for the Use of Military Force (AUMF). This issue eclipses all others – and could become the single biggest ceding of unchecked authority to the Executive Branch, in modern American history. As incredible as it may sound even to people intimately familiar with the legislative branch, some key lawmakers want the next Congress to pass a new declaration of worldwide war without end. A sleeper provision buried deep inside habeas legislation first drafted in 2008 by former Attorney General Michael Mukasey's staff, and twice introduced by the incoming House Judiciary Committee Chairman Lamar Smith and Senator Lindsey Graham, would greatly expand the authority given to the executive branch by the post-9/11 Authorization for Use of Military Force. It is two simple sentences that declare that the United States is in an armed conflict with the Taliban, al Qaeda, and associated forces and can detain persons caught in those conflicts, but the course of U.S. history would be forever altered.

Very few members of Congress, and perhaps not even the sponsors themselves, realize the monumental effect that the proposed new declaration of war would have. The current Authorization for Use of Military Force passed in 2001 is focused on the 9/11 attacks and did not declare the United States to be in an armed conflict, but it was used by the Executive Branch as authority to go to war in Afghanistan and Pakistan, torture and abuse detainees, eavesdrop and

spy on American citizens without warrants, and imprison people without charge or trial far from any battlefield. The proposed new declaration of war goes much further and:

- has no geographic boundaries, which means the president could take America to war in any country in the world – including America itself – where a suspected terrorist resides;
- has no limitation on the president using the new war powers within our own country or against American citizens;
- authorizes indefinite imprisonment without charge or trial, without any exceptions for American citizens or persons captured on American soil;
- authorizes the president to use the new war powers, even when there is no harm to the United States and no threat to America's national security. Unlike the current Authorization for Use of Military Force that ties the authority to the 9/11 attacks, the new proposal authorizes war against all terrorism suspects everywhere, thereby turning the United States into the world's most powerful unrestrained cop;
- has no end, which could set America on a course for decades of war;
- has no statutory limitation on whether or how it can be invoked domestically or abroad to supersede laws protecting the civil liberties or human rights of others.

At a time when Department of Justice officials have testified that the government does not need new detention authority, the president and Secretary of Defense have stated their commitment to withdrawing from Iraq and Afghanistan, and the American people want to reclaim our due process rights and focus on peacetime needs, the proposed new declaration of war would set the United States on a very different and far more dangerous course. The issues raised by the proposed new declaration of war are too fundamental to who we are – and who we will become – as a nation to let this issue become partisan. The enormous harm that this proposal would cause to America's values, national security, and economic security should concern members from both sides of the aisle. We urge you to avoid setting the country off on this new course.

Rewiring the Internet for Eavesdropping

A second issue that Congress will confront is the Obama Administration's proposal to change the very architecture of the Internet in order to make eavesdropping easier. The details of this proposal have not yet been formalized, but they have been floated in the press.

According to the *New York Times*, the administration is expected to submit legislation to Congress early next year that would require all online services – even those which operate by putting individuals in direct contact with each other – to make it possible for the government to eavesdrop upon demand. This would require companies to completely restructure the way their services work. The proposed measure would mandate that all online communications services allow the government to collect private communications and decode encrypted messages that Americans send over texting platforms, BlackBerries, social networking sites and other "peer to peer" communications software.

The administration has argued that it is simply hoping to emulate the Communications Assistance to Law Enforcement Act (CALEA), which mandated that telephone companies rework their networks to be wiretap-ready. The reported proposal, however, differs from CALEA in that it would require reconfiguring the Internet to provide easier access to online communications.

This is particularly problematic because many of the privacy protections that governed the government's wiretapping powers when CALEA passed in 1994 no longer exist or have been significantly weakened. For example, Congress has granted the executive branch virtually unchecked power to conduct dragnet collection of Americans' international e-mails and telephone calls without a warrant or suspicion of any kind under the FISA Amendments Act of 2008.[13]

This proposal would interfere with technological innovation, create significant new cybersecurity vulnerabilities, reduce privacy and chill expression on the Internet, and pose dangers of government and third-party abuse. Under the guise of a mere technical fix, the executive branch seeks significant new power to reconfigure the Internet and conduct easy dragnet collection of Americans' most private communications.

Patriot Act reauthorization

The third upcoming Congressional issue is reauthorization of the Patriot Act. The Patriot Act made it easier for the government to spy on innocent people, often with no court review. There are three sections up for reauthorization before February 28.

- Section 215, the so-called "library provision," which gives the government sweeping new powers to seize any tangible thing – library records, tax records, the hard drive of a computer, a DNA sample – that the government deems merely "relevant" to an investigation. That means this power can be wielded against people who are not suspected terrorists or spies – and even people who aren't suspected of doing anything wrong (but are somehow just "relevant.") That's a stunningly broad standard completely out of proportion to the power this authority conveys.
- The "lone wolf" provision. It used to be that secret warrantless FISA surveillance could be used only against people who were members of terrorist groups or spies for foreign countries. The secret FISA powers were created outside criminal wiretap statutes because they were supposed to be used against international conspiracies to harm the United States. The "lone wolf" provision dispensed with that limit, allowing FISA spying to be conducted against anyone suspected of being involved in international terrorism. In 2009, the FBI admitted that this supposedly crucial provision had never actually been used.
- Roving John Doe wiretaps. The Fourth Amendment requires warrants to state "with particularity" the things to be searched or seized. That prevents the government from executing general warrants that leave all discretion in the hands of the executive branch. With the advent of cell phones and other technology, a person may have more than one device for communication – so it makes sense to permit the government to "rove" with an

[13] Interview by Eric Schmidt with Senator Barack Obama at Google (Nov. 14, 2007), http://www.youtube.com/watch?v=m4yVlPqcZwo.

individual, and tap him as he moves from home phone to cell phone to lap top computer, as long as that individual is identified. However, the roving John Doe authority permits the government to get an order without naming either the place or the person to be tapped. This provision should be amended to reflect long standing criminal law: either the person or the place must be identified in the warrant application and order. That will prevent the government from both roaming from device to device AND from person to person at the same time.

None of these three provisions deserve reauthorization. Perhaps more importantly, though, is the dire need to pull back some of the other Patriot Act authorities that independent authorities have shown to be subject to executive branch abuse. Chief among them is the National Security Letter (NSL) authority – similar to the Section 215 authority, but requiring no judicial review. Multiple reports of the DOJ Inspector General have found an explosion in the use of NSL's. In addition, this tool has been regularly abused – with this extrajudicial process being substituted for a court process when courts fails to go along with investigators' requests. Also, courts have already declared aspects of the authority to be unconstitutional – holding, for example, that the automatic gag provisions are far too broad. Congress must take the time to pull back the extraordinary authorities it has given the executive branch to invade the private records of Americans under the Patriot Act.

FISA Amendments Act renewal

Finally, NSA spying will also be up for review in the 112th Congress. The FISA Amendments Act, which as discussed above gave a Congressional stamp of approval to the previously illegal warrantless eavesdropping, expires on December 31, 2012.

Documents obtained last week by the ACLU through a Freedom of Information Act request show that programs conducted under the FAA have repeatedly violated its own targeting and minimization procedures meant to protect Americans' information. The documents confirm that there have been abuses of the FAA power – although because of heavy redactions, it is difficult to tell exactly what those specific abuses are and how systemic they may be. The documents make clear, however, that violations continued to occur on a regular basis even through March 2010. Every internal, semi-annual assessment conducted by the Attorney General and the Director of National Intelligence from when the FAA was enacted through March 2010 found incidents of violations of the FAA's targeting and minimization procedures.

It is incredible that, despite the sweeping new powers this law granted the executive branch, and the sensitivity of this law with regard to our longstanding traditions of privacy, no public oversight of this program has yet taken place. The new Congress should conduct such oversight and significantly reign in the warrantless surveillance it permits.

CONCLUSION

With as much power as we have ceded to the government, the prospect of ceding even more should be questioned by all, whether Democrat or Republican, conservative or liberal. Protecting the constitution is not a partisan issue. The executive branch, whether under control

of Democrats or Republicans, tends to push for expanded powers of monitoring and control over the American people. It is up to the legislative branch – whichever party is in control – as well as the judicial branch to be vigilant in protecting the time-honored, longstanding legal principles and traditions that have always formed the basis of life in the Anglo-American tradition of freedom and democracy.

At the very least, when the executive branch claims that it needs new powers, the people's representatives in Congress must ask sharp questions about:

- exactly why those new powers are needed
- what they will be used for
- why those goals cannot be accomplished using existing authorities
- and whether the needs are proportional to the cost the new powers will impose on our freedom, and the freedom of future generations.

We need to keep the history of past American security scares and civil liberties violations in mind, and the fact that those abuses have never made us more secure and are always seen by posterity as a source of shame and failure.

As Americans we have inherited a treasure of liberty, but all too often recently we have been trading it away at bargain-basement prices – getting little or nothing in exchange, except for temporary illusions of security, and depriving future generations of the inheritance of liberty that they deserve for us to pass along intact.

Mr. CONYERS. Thank you very, very much.

I am now pleased to welcome Jamil Jaffer, Esquire of the Kellogg firm. He has previously served as associate counsel to the President from 2008 to 2009, as a counsel to assistant Attorney General at the Department of Justice, the National Security Division, and as counsel to the Department's Office of Legal Policy from 2005 to

2006. We have your statement, Attorney Jaffer, and we welcome you to the hearing this morning, you may proceed.

TESTIMONY OF JAMIL N. JAFFER, KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL LAW FIRM

Mr. JAFFER. Thank you, Mr. Chairman. I would like to thank the Chairman and the Ranking Member for inviting me here to testify today.

I would like to spend my opening statement discussing the difficult questions that arise with respect to what to do about the detainees in Guantanamo Bay, the remaining 170 detainees.

There are basically four options: We can try these detainees in Federal courts, we can try them in military commissions, we can create a new national security court and try them there, or we can detain them with no trial, no process other than the evaluation of status, and detain them until the duration of conflict is over.

Now, the current approach of this Administration and the prior Administration, largely not changed, is a combination of the first two approaches, try them in Federal court or try them in military commissions. There is a fundamental problem with this approach though. First, I would note that under the law, these individuals detained at Guantanamo Bay have no constitutional rights except what the Supreme Court has given them. And those constitutional rights are fairly limited. They are limited to a review in Federal court of their status as enemy combatants. These are folks captured on the battlefield, captured abroad and held abroad in Cuba.

Now they have no right to a trial in Federal court. They have no rights that come with the right to a trial in Federal court: the right to a jury, the right to the exclusionary rule and other similar rights.

The criminal justice system that we have in this country is designed to exonerate the innocent and convict the guilty. And in doing so, we build in a strong presumption in favor of innocence. In essence, we stack the decks against conviction. This makes a lot of sense. This is as it should be in the criminal context. Because based on our view—long held in this country—that it is better if many of the guilty get off in order to save one innocent from being convicted.

So we confront then a policy question, not a legal question, but a policy question whether this same approach should be applied to enemy combatants captured abroad on the battlefield of war. And if we do so, we must consider the very real consequences. That is, if we fail to convict these detainees in Federal court, the typical analysis would suggest release. But in an era when we are engaged on a global war on terrorism and we have recently learned that the individuals released from Gitmo, the ones that have been cleared for release, and have been sent abroad, return to the fight at a rate of 25 percent, one must wonder whether it makes a lot sense to take the remaining 170 detainees, try them in Federal court, and run the risk that we will be presented with the Hobson's choice of releasing them because they haven't been convicted, or continuing to detain them after they have been held not guilty by a jury.

If we take the latter approach, which the current Attorney General said may very well happen and could very well happen with

Khalid Sheikh Mohammed if he is tried in a Federal court, and you have to wonder what is this project of trying folks in Federal court really about? If it is about showing justice being done and justice being done in the American way, well then, how can we possibly justify continuing to detain these folks after they have been found not guilty by a Federal jury? And yet, we can't help but do that, because these are the highest value detainees. This Administration has gone through a review process determining that these 170, other than the ones who have been scheduled for release and some can't be released because of the challenges of countries we would release them to, are a serious problem.

Now, in addition to these issues with respect to the release of individuals who aren't convicted, it is simply the case that many of the evidentiary rules in the Federal courts don't make a lot of sense when the evidence and the witness come from abroad and on the battlefield. Moreover, there are security issues for the people who live near the courthouse, think New York City, the judges and the court staff, and civilian jurors who will be sitting in on these trials. Moreover, there are issues of classified information, and having worked with the talented prosecutors in the Department of Justice's National Security Division, I can tell you that while the Classified Information Procedures Act is extremely helpful, it is certainly not a panacea.

I would like to close briefly by returning to the basic options available to the government moving forward. Again, we can try these detainees in the Federal courts, we can try them in military commissions, we can create a new national security court with different rules and different approaches, and perhaps then have justice seem to be done or you can detain them, no trial and no process, save for status reviews. In my view, it is critical that this Committee is considering that we balance national security and civil liberties and yet we be seen to do justice.

The Federal court project, as we have just discussed, is fraught with a number of difficulties. The military commissions, while better, also face significant public perception issues because of the nature of the military criminal justice system and the fact of having the very individuals who capture these folks try them in court. Many have argued the creation of a national security court staffed by sitting Federal judges, nominated by the President, confirmed by the Senate, and prosecutions brought by the talented, outstanding prosecutors in the Department of Justice, and rules that make more sense than the current criminal Federal court system for the trial of national security detainees is a reasonable approach.

My view, expressed in other settings, is that the latter approach has many of the benefits of trials in Federal court without the downside, and it also lacks many of the downsides that come from the public perception associated with military commissions.

Now this is not an easy project. The creation of a new court will be a substantial challenge. It would take a lot of work, but it is something to consider. And with that, I appreciate the Committee's time, and would be happy to answer any questions the Committee might have.

Mr. CONYERS. Thank you very much, Attorney Jaffer.

[The prepared statement of Mr. Jaffer follows:]

PREPARED STATEMENT OF JAMIL N. JAFFER

Written Testimony of Jamil N. Jaffer[1]
before the
United States House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

on

Civil Liberties and National Security

December 9, 2010

Good morning, Chairman Conyers, Chairman Nadler, Ranking Member Sensenbrenner, and Members of the Subcommittee. Thank you for the opportunity to testify today regarding civil liberties and national security. I want to note, at the outset of my testimony, that the views I present today are my own and do not represent the views of my law firm nor the views of any client of the firm.

The topic of today's hearing—civil liberties and national security—bears a great deal of importance, particularly in a time of war. The question how the federal government should balance its protection of civil liberties of Americans with national security needs in a time of war is amongst the most difficult issues the government confronts. Since this war was brought to our shores on the morning of September 11, 2001, Congress has taken a leadership role in ensuring that, as the Executive Branch prosecutes the War on Terror on battlefields across the globe, the civil liberties of

[1] Jamil N. Jaffer is an attorney at a Washington, D.C. trial litigation firm. Mr. Jaffer previously served in the White House as an Associate Counsel to the President (2008-2009), handling State Department, Defense Department, and Intelligence Community matters. Mr. Jaffer previously served in the United States Department of Justice's National Security Division as Counsel to the Assistant Attorney General (2007-2008) and Senior Counsel for National Security Law & Policy (2007) with a focus on counterterrorism and intelligence matters, and in the Department of Justice's Office of Legal Policy as Counsel (2005-2006). Mr. Jaffer served as a law clerk to Judge Edith H. Jones of the United States Court of Appeals for the Fifth Circuit (2003-2004) and Judge Neil M. Gorsuch of the United States Court of Appeals for the Tenth Circuit (2006-2007). Mr. Jaffer is a graduate of the University of Chicago Law School (J.D., *with honors*, 2003), the United States Naval War College (M.A., *with distinction*, 2006), and the University of California, Los Angeles (B.A., *cum laude*, Phi Beta Kappa, 1998).

Americans, as guaranteed by the United States Constitution, are respected and protected at all times. It is, in my view, a true testament to the greatness of this nation, that members of Congress have remained vigilant defenders of both the nation's security and the constitutional rights of Americans during this time of great import.

The topic of today's hearing is broad and potentially covers a wide range of issues relating to the prosecution of the War on Terror. It is my understanding, however, that today's hearing is likely to focus on how the government can best protect national security and the civil liberties of Americans while it considers the ongoing detention and potential trial of foreign detainees currently held at Guantanamo Bay, Cuba. As such, my written testimony briefly addresses—at a broad level of generality—some of the issues that Congress may wish to consider in evaluating how to move forward on the detention and potential trial of such individuals.

The current Administration, the previous Administration, and each successive Congress that has served since that fateful (and terrible) day that al Qaeda terrorists attacked our country, killing thousands of Americans, have all grappled mightily with finding a reasonable approach to the difficult matter of what to do with individuals detained by the United States military in the War on Terror. While these issues may perhaps be more vexing when they involve American citizens or nationals, or individuals captured or detained within the United States, my testimony today is limited to the situation of the foreign nationals captured abroad and currently detained in Cuba.

With respect to these individuals, it is important to note that no court has ever held that they possess the full panoply of constitutional rights enjoyed by Americans in the United States. For example, no court has held—and in my view, there can be no real

argument—that foreign enemy fighters, captured abroad on the battlefields of Afghanistan and elsewhere, have a *right* to a criminal trial in the federal courts or, truth be told, to *any* of the particular rights or remedies that come along with such trials, such as the right to a trial by jury, the right to confront witnesses, and the judicially-created exclusionary rule, which bars the introduction of certain evidence obtained in violation of law. While the Supreme Court has, in recent years, extended certain rights to Guantanamo Bay detainees with respect to the review of their status as enemy combatants, *see, e.g., Boumediene v. Bush*, 553 U.S. 723 (2008), these cases cannot accurately be read as suggesting that these detainees have a right to be tried in criminal court or to have many of the benefits to which Americans are otherwise entitled. Indeed, a plurality of the Supreme Court has held that the Executive Branch has the right to detain—for the duration of the conflict—individuals captured on the battlefield of the War on Terror. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (plurality op.); *see also Boumediene*, 553 U.S. at 733 (noting that five Justices in *Hamdi*—the O'Connor plurality plus Justice Thomas in dissent—"recognized that detention of individuals who fought against the United States in Afghanistan 'for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.'") (quoting *Hamdi*, 542 U.S. at 518). Of course, if the Executive Branch can detain properly-designated enemy combatants for the duration of the conflict, there can be little argument that these individuals then have the *right* to a criminal trial with all of the protections and remedies that come along with a trial. Thus, the question before the committee is fundamentally one of policy, not law.

And if we do give such individuals—foreign fighters captured on the battlefield abroad—the right to a federal trial as matter of policy, we run the risk of creating larger problems. For example, trying Guantanamo Bay detainees in federal court raises serious questions about what to do if the government fails to convict a given detainee. The American criminal justice system, it almost goes without saying, is designed to separate out the innocent from the guilty, and convict and incarcerate the latter, and exonerate and free the former. As such, in the typical scenario, if a suspected criminal is arrested and tried in federal court, and the government fails to convict him, the firm expectation is that the individual will be released forthwith. But in the context of an ongoing war, if a Guantanamo Bay detainee is placed in the criminal justice system for trial, the question of what might happen if the government fails to obtain a conviction becomes more difficult. Can the government simply transfer the individual back to military custody and continue to detain him indefinitely for the remaining duration of the conflict? Must the individual be released? And more troublingly, must the individual be released into the United States?

And this concern isn't simply hypothetical. Recent events serve to highlight the importance of considering these questions. In testimony before Congress in late 2009, at time when the current Administration had resolved itself to try key al Qaeda operative Khalid Sheikh Mohammed ("KSM") in federal court in New York, Attorney General Eric Holder expressed confidence that KSM would be convicted and opined that failure to convict KSM was "not an option." Putting aside the issues this might raise for a criminal justice system whose rubric, at its core, includes a presumption of innocence, and whose essential function is separating the innocent from the guilty, it is clear that the

Administration's then-current decision to try KSM in federal court put a bright spotlight on the potential for an acquittal. When pressed on the question of what might happen if KSM was not convicted, the Attorney General indicated that the government had options available to it, including continuing to detain KSM as needed. And while this position may indeed be correct, it raises further questions about the very purpose of trying these detainees in federal court and the potential impact on our criminal justice system of conducting trials under such circumstances.

For example, given that we are currently detaining KSM for the duration of the hostilities, the benefits of trying him in federal court are unclear at best. One might think that a federal conviction would provide increased legitimacy to our ongoing detention of KSM. One might also think that a federal conviction might allow us to incarcerate KSM beyond the duration of the hostilities or permit the imposition of the death penalty. And one might even think that a federal conviction could showcase America as a land of laws and true justice, while providing the families of al Qaeda's victims an opportunity to express their righteous anger and grief. The fundamental problem with this approach is that it only takes one major failure to convict a key al Qaeda operative and his continued detention by the Executive Branch, to undermine most, if not all, of these benefits. This is because, at that point, even if the continuing detention is held to be lawful (which it very well might), the entire project to earn legitimacy for the detention of enemy combatants, to provide legitimate justification for the imposition of penalties, and to provide a forum for the expression of forthright anger and grief through the criminal justice system is, essentially, at sea. And moreover, such a decision would inevitably harm the criminal justice system itself by undermining one of the key principles the

system is based upon, namely the incarceration of the duly convicted; and the release of the duly exonerated. Given the recent outcome of the New York trial of another key al Qaeda operative (and former Guantanamo Bay detainee), Ahmed Khalfan Ghailani, where the defendant was acquitted of 284 of the 285 counts brought against him, the question what might happen when the next Guantanamo Bay detainee is transferred to the civilian system for trial is even more forcefully presented; indeed, it becomes much harder to just assume that the government will be able to easily obtain a conviction.

Indeed, the Ghailani case also highlights the procedural difficulties with using the criminal justice system to try Guantanamo Bay detainees. The rules of criminal procedure applicable to such trials, and other statutory and constitutional requirements, can make the prosecution of individuals captured on a battlefield—particularly if they are interrogated to obtain critical, time-sensitive intelligence—much more difficult. So, for example, in the Ghailani case, the government stipulated for the purposes of the case that certain information leading to the identification of a witness against Ghailani had been obtained through coercive methods. As might be expected in a typical criminal setting, the judge excluded the key evidence from the witness, including barring his testimony. Many have pointed to this ruling—and the resulting dearth of direct evidence on certain counts—as one of the key reasons why the government failed to convict Ghailani on a number of charges. Others laid the blame for the Ghailani verdict elsewhere, and have further noted that the same evidence may have likewise been excluded in other proceedings, *e.g.*, under the current military commission rules. But whether the contentions regarding the Ghailani verdict are accurate or not, and whether the evidence may also have been excluded in another type of proceeding because of a policy judgment

about the applicable rules, is not really the point; the key point here is that when federal courts apply their strict rules—required by law and designed to protect innocent Americans from being wrongfully deprived of their liberty under the Constitution—critically important evidence *may* end up staying out and the guilty *may* end up being exonerated. While we might be willing to accept this outcome in the criminal context in order to preserve our presumptions and rules designed to protect the innocent,[2] it is far from clear why the same presumptions and rules should be applied to foreign fighters, captured on the battlefield, and held outside the United States during a time of war. Moreover, as Jack Goldsmith and Ben Wittes pointed out almost exactly two years ago, the decision to make federal courts the key venue for detainee prosecution (and the concomitant imposition of strict presumptions and rules on such cases) can actually create an incentive for the government to try fewer detainees and to instead simply hold them in long-term detention.[3] Similarly, there is a possibility (perhaps somewhat more remote) that the government will be less willing to take risks in the interrogation process while seeking to obtain intelligence information from new detainees, in an effort to preserve the government's ability to effectively prosecute the individual down the road. And the problems don't just stop with interrogation and intelligence gathering; the reality is that many evidentiary rules, including, for example, keeping a chain of custody for evidence to be introduced at trial or the hearsay rule, simply make little sense when the key evidence or witness comes from the battlefield in Kandahar or similar locales.

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[2] *See In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[A] fundamental value determination of our society [is] that it is far worse to convict an innocent man than to let a guilty man go free[.]"); *see also* T. Starkie, LAW OF EVIDENCE 756 (1824) ("The maxim of law is that it is better that ninety-nine . . . offenders should escape than that one innocent man should be condemned.").

[3] *See* Jack Goldsmith and Ben Wittes, *A Blueprint for the Closure of Guantanamo Bay*, Slate.com (Dec. 8, 2008), available online at <http://www.slate.com/id/2206229/> (visited Dec. 6, 2010).

Even beyond the impact of the decision to try the Guantanamo Bay detainees in federal court on the principles underlying the justice system and the ability of prosecutors to obtain valid convictions, there are also very real operational impacts of such a decision on the participants in the trial and the system itself, as well as the general public. The debate over the KSM trial previously planned for New York City highlighted many of these issues, including the physical security of the civilians living in the area, the judges and staff working these cases, and the jurors selected for trial. And beyond all of this, there remains the issue whether the highly classified information often necessary to convict these detainees can be adequately protected in open, public trials, even under the existing Classified Information Procedures Act.

Finally, it is important to note that there are many options available in lieu of holding criminal trials. Some have advocated for simply detaining the fighters at Guantanamo Bay without trial for the duration of the conflict; *i.e.*, no commissions, no trials, just detention. Others have argued for the exclusive (or at least increased) use of military commissions. And still others have called for the creation of a national security court, employing regular federal judges and federal prosecutors, but specially designed to address many of the issues raised above. While none of these alternate approaches has yet taken hold, the current approach of trying some cases in the federal courts and some in the commissions, when combined with the seeming inability of the government to land a solid detainee conviction in the federal courts (including in the Ghailani case), seems unwise and reflects a process that has become perhaps irretrievably broken.

Thank you very much for the opportunity to present my views today.

Mr. CONYERS. I now turn to Michael Lewis, welcome. An associate professor of law at Ohio Northern University. Before that, he was a Naval aviator in the United States Navy, and he is a cum laude Harvard Law School graduate, which we do not hold against anybody in the Judiciary Committee. But we do welcome you, we have your statement and we would like to hear from you at this time, sir.

TESTIMONY OF MICHAEL W. LEWIS, ASSOCIATE PROFESSOR OF LAW, OHIO NORTHERN UNIVERSITY, PETTIT COLLEGE OF LAW

Mr. LEWIS. Thank you, Mr. Chairman. I would also like to thank Ranking Member Sensenbrenner for inviting me to testify here today.

In reading the other submissions, I noted that there was also an extensive discussion of scope of the laws of armed conflict and the boundaries of the battlefield, and I actually filed a supplemental submission on that issue that I would like to be entered into the record.

Mr. CONYERS. We will be happy to take it into the record.

[The information referred to follows:]

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Civil Liberties

Subcommittee Hearing:
"Civil Liberties and National Security"

Supplemental Submission of
Michael W. Lewis
Professor of Law
Ohio Northern University Pettit College of Law

Honorable Chairman and Members:

Introduction

This supplemental submission is being offered in response to the written testimony of Prof. Mary Ellen O'Connell on the issue of the scope of armed conflict. Having reviewed her testimony before this subcommittee and that of the other witnesses that testified on the issue of the use of drones before the Subcommittee on National Security and Foreign Affairs of the House Committee on Oversight and Government Reform on March 23 and April 28 as well as the speech given by Harold Koh, the State Department's Legal Adviser on Mar. 25, 2010, I believe that it is important that the committee be fully informed on the current state of the law of armed conflict and the generally accepted understanding of its scope.

The Current Laws of War are Sufficient to Address the Drone Question

As a number of witnesses have already stated, there is nothing inherently illegal about using drones to target specific individuals. Nor is there anything legally unique about the use of unmanned drones as a weapons delivery platform that requires the creation of new or different laws to govern their use. As with any other attack launched against enemy forces during an armed conflict, the use of drones is governed by International Humanitarian Law (IHL). Compliance with current IHL that governs aerial bombardment and requires that all attacks demonstrate military necessity and comply with the principle of proportionality is sufficient to ensure the legality of drone strikes. In circumstances where a strike by a helicopter or an F-16 would be legal, the use of a drone would be equally legitimate. However, this legal parity does not answer two other fundamental questions. Who may be targeted? Where may they be targeted?

Who May be Targeted?

In order to understand the rules governing the targeting of individuals, it is necessary to understand the various categories that IHL assigns to individuals. To best understand how they relate to one another it is useful to start from the beginning.

All people are civilians and are not subjected to targeting unless they take affirmative steps to either become combatants or to otherwise lose their civilian immunity. It is important to recognize that a civilian does not become a combatant by merely picking up a weapon. In order to become a combatant an individual must be a member of the "armed forces of a Party to a conflict."[1] This definition is found in Article 43 of Additional Protocol I to the Geneva Conventions. It goes on to define the term "armed forces" as:

> The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.[2]

The status of combatant is important because combatants "have the right to participate directly in hostilities".[3] This "combatants' privilege" allows privileged individuals to participate in an armed conflict without violating domestic laws prohibiting the destruction of property, assault, murder, etc. The combatant's conduct is therefore regulated by IHL rather than domestic law.

Combatant status is something of a double-edged sword, however. While it bestows the combatant privilege on the individual, it also subjects that individual to attack at any time by other parties to the conflict. A combatant may be lawfully targeted whether or not they pose a current threat to their opponents, whether or not they are armed, or even awake. The only occasion on which IHL prohibits attacking a combatant is when that combatant has surrendered or been rendered *hors de combat*.[4] Prof. Geoff Corn has argued compellingly that this ability to target based upon status, rather than on the threat posed by an individual, is the defining feature of an armed conflict.

After examining the definition of combatant, it becomes apparent that combatant status is based upon group conduct, not individual conduct. Members of al Qaeda are not combatants because as a group they are not "subject to an internal disciplinary system which [enforces] compliance with the rules of international law applicable in armed conflict." It does not matter whether an individual al Qaeda member may have behaved properly he can never obtain the combatants' privilege because the group he belongs to does not meet IHL's requirements. Prof. Glazier's testimony that al Qaeda and the

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[1] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, (API) Art. 43(2). Although the United States has not ratified Protocol I, it recognizes much of Protocol I as descriptive of customary international law.
[2] Art. 43(1).
[3] Art. 43(2).
[4] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Art. 12 and Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Art. 13.

Taliban could possess "the basic right to engage in combat against us" is mistaken. These groups have clearly and unequivocally forfeited any "right" to be treated as combatants by choosing to employ means and methods of warfare that violate the laws of armed conflict, such as deliberately targeting civilians.

If al Qaeda members are not combatants, then what are they? They must be civilians, and civilians as a general rule are immune from targeting.[5] However, civilians lose this immunity "for such time as they take a direct part in hostilities."[6] The question of what constitutes direct participation in hostilities (DPH) has been much debated. While DOD has yet to offer its definition of DPH, the International Committee of the Red Cross (ICRC) recently completed a six-year study on the matter and has offered interpretive guidance that, while not binding on the United States, provides a useful starting point. The ICRC guidance states that "members of organized armed groups [which do not qualify as combatants] belonging to a party to the conflict lose protection against direct attack for the duration of their membership (i.e., for as long as they assume a continuous combat function)."[7]

The concept of a "continuous combat function" within DPH is a reaction to the "farmer by day, fighter by night" tactic that a number of organized armed terrorist groups have employed to retain their civilian immunity from attack for as long as possible. Because such individuals (be they fighters, bomb makers, planners or leaders) perform a continuous combat function, they may be directly targeted for as long as they remain members of the group. The only way for such individuals to reacquire their civilian immunity is to disavow membership in the group.

So the answer to "Who may be targeted?" is any member of al Qaeda or the Taliban, or any other individuals that have directly participated in hostilities against the United States. This would certainly include individuals that directly or indirectly (e.g. planting IED's) attacked Coalition forces as well as any leadership[8] within these organizations. Significantly, the targeting of these individuals does not involve their elevation to combatant status as Prof. O'Connell implied in her testimony. These individuals are civilians who have forfeited their civilian immunity by directly participating in hostilities. They are not, and cannot become, combatants until they join an organized armed group that complies with the laws of armed conflict, but they nevertheless remain legitimate targets until they clearly disassociate themselves from al Qaeda or the Taliban.

Where May Attacks Take Place?

Some witnesses have testified to this Subcommittee that the law of armed conflict only applies to our ongoing conflict with al Qaeda in certain defined geographic areas. Prof.

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[5] API Art. 51(2).
[6] API Art. 51(3).
[7] http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/direct-participation-ihl-faq-020609
[8] If these groups established a political arm (similar to Sinn Fein in Northern Ireland) whose members solely participated in the political process, those leaders could not be targeted, however these groups have shown little inclination to engage in the political process.

O'Connell states that the geographic limit of the armed conflict is within the borders of Afghanistan while others include the border areas of Pakistan, and Iraq. They take the position that any operations against al Qaeda outside of this defined geography are solely the province of law enforcement which requires that the target be warned before lethal force is employed. Because drones cannot meet this requirement they conclude that drone strikes outside of this geographical area should be prohibited. The geographical boundaries proposed are based upon the infrequency of armed assaults that take place outside of Afghanistan, Iraq and the border region of Pakistan. Because IHL does not specifically address the geographic scope of armed conflicts, to assess these proposed requirements it is necessary to step back and consider the law of armed conflict as a whole and the realities of warfare as they apply to this conflict.

One of the principal goals of IHL is to protect the civilian population from harm during an armed conflict. To further this goal IHL prohibits direct attacks on civilians and requires that parties to the conflict distinguish themselves from the civilian population. As a result, it would seem anomalous for IHL to be read in such a way as to reward a party that regularly targets civilians, and yet that is what is being proposed. As discussed above, a civilian member of al Qaeda who is performing a continuous combat function may be legitimately targeted with lethal force without any warning. But the proposed geographic limitations on IHL's application offer this individual a renewed immunity from attack. Rather than disavowing an organization that targets civilians, IHL's preferred result, the proposed geographic restrictions allow the individual to obtain the same immunity by crossing an international border and evading law enforcement while remaining active in an organization that targets civilians. When law enforcement's logistical limitations are considered, along with the host state's ambivalence for actively pursuing al Qaeda within its borders, it becomes clear that the proposed geographical limitations on IHL are tantamount to the creation of a safe haven for al Qaeda.

More importantly these proposed limitations would hand the initiative in this conflict over to al Qaeda. Militarily the ability to establish and maintain the initiative during a conflict is one of the most important strategic and operational advantages that a party can possess. To the extent that one side's forces are able to decide when, where and how a conflict is conducted, the likelihood of a favorable outcome is greatly increased. If IHL is interpreted to allow al Qaeda's leadership to marshal its forces in Yemen, Somalia or the Sudan, or any number of other places that are effectively beyond the reach of law enforcement and to then strike at its next target of choice, whether it be New York, Madrid, London, Bali, Mumbai, Washington, DC or Detroit, then IHL is being read to hand the initiative in the conflict to al Qaeda. IHL should not be read to reward a party that consistently violates IHL's core principles and it has never been read this way in the past.

Armed conflict and the laws governing armed conflict extend to the locations in which the participants to an armed conflict can be found. International law has never understood geopolitical boundaries to limit the ability to act against one's military adversary except in the clearly defined situation of neutrality. Examples of widely accepted use of force across such boundaries include the U.S. pursuit of the Viet Cong

and North Vietnamese Army into Cambodia and Laos, the Colombian attack on FARC positions in Ecuador and Israel's incursions into Lebanon during its conflict with Hezbollah. It is this last example that perhaps best illustrates the point.

Just as the United States is involved in an armed conflict with a non-state actor, al Qaeda, Israel found itself in a similar position in 2006 with regards to Hezbollah. There was no armed conflict occurring within Lebanon at the time, and yet Israel's use of the tools of armed conflict in southern Lebanon was not criticized as an impermissible expansion of the laws of armed conflict. Rather the international legal debate at that time focused on whether Israel complied with the laws of armed conflict during conflict with Hezbollah and the criticisms leveled against Israel were that its actions failed the proportionality and military necessity tests of the laws of armed conflict and that Israel used prohibited weapons.[9] The international legal community accepted that Israel had the right to use the tools of armed conflict against Hezbollah in a nation (Lebanon) in which an armed conflict was not previously occurring. Yet today we are told by Professor O'Connell that the United States is violating international law if it targets a non-state actor on the territory of a third state with that state's permission. Nothing has occurred between 2006 and today that would suggest customary international law on that topic has changed.

Those opposed to the position that IHL governs the conflict with al Qaeda regardless of geography, and therefore allows strikes like the one conducted in Yemen in 2002, have voiced three main concerns. The first concern is that the United States may be violating the sovereignty of other nations by conducting drone strikes on their territory. It is true that such attacks may only be conducted with the permission of the state on whose territory the attack takes place and questions have been raised about whether Pakistan, Yemen and other states have consented to this use of force. This is a legitimate concern that must be satisfactorily answered while accounting for the obvious sensitivity associated with granting such permission. The fact that Harold Koh, the State Department's Legal Advisor, specifically mentioned the "sovereignty of the other states involved"[10] in his discussion of drone strikes is evidence that the Administration takes this requirement seriously.

The second concern is that such a geographically unbounded conflict could lead to drone strikes in Paris or London, or to setting the precedent for other nations to employ lethal force in the United States against its enemies that have taken refuge here. These concerns are overstated. The existence of the permission requirement mentioned above means that any strikes conducted in London or Paris could only take place with the approval of the British or French governments. Further, any such strike would have to meet the requirements of military necessity and proportionality and it is difficult to imagine how these requirements could be satisfactorily met in such a congested urban setting.

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[9] *See e.g.* Human Rights Watch, "Lebanon/Israel: Hezbollah Rockets Targeted Civilians in 2006 War" http://www.hrw.org/en/news/2007/08/28/lebanonisrael-hezbollah-rockets-targeted-civilians-2006-war; *see also* "Human Rights Group Accuses Israel of War Crimes", N.Y. Times, Aug. 24, 2006 accessed at http://www.nytimes.com/2006/08/24/world/middleeast/24lebanon.html.

[10] Harold Hongju Koh, *The Obama Administration and International Law*, Annual Meeting of the American Society of International Law, Washington, D.C., March 25, 2010, www.state.gov.

Lastly, there is a legitimate concern that mistakes could be made. An individual could be inappropriately placed on the list and killed without being given any opportunity to challenge his placement on the list. Again, Mr. Koh's assurances that the procedures for identifying lawful targets "are extremely robust"[11] are in some measure reassuring, particularly given his stature in the international legal community. However, some oversight of these procedures is clearly warranted. While *ex ante* review must obviously be balanced against secrecy and national security concerns, *ex post* review can be more thorough. When the Israeli Supreme Court approved the use of targeted killings, one of its requirements was for transparency after the fact coupled with an independent investigation of the precision of the identification and the circumstances of the attack.[12] A similar *ex post* transparency would be appropriate here to ensure that "extremely robust" means something.

Conclusion

Drones are legitimate weapons platforms whose use is effectively governed by current IHL applicable to aerial bombardment. Like other forms of aircraft they may be used to target enemy forces, whether specifically identifiable individuals or armed formations.

IHL permits the targeting of both combatants and civilians that are directly participating in hostilities. Because of the means and methods of warfare that they employ, al Qaeda and Taliban forces are not combatants and are not entitled to the combatants' privilege. They are instead civilians that have forfeited their immunity because of their participation in hostilities. Members of al Qaeda and the Taliban that perform continuous combat functions may be targeted at any time, subject to the standard requirements of distinction and proportionality.

Placing blanket geographical restrictions on the use of drone strikes turns IHL on its head by allowing individuals an alternative means for reacquiring effective immunity from attack without disavowing al Qaeda and its methods of warfare. It further bolsters al Qaeda by providing them with a safe haven that allows them to regain the initiative in their conflict with the United States. The geographical limitations on drone strikes imposed by sovereignty requirements, along with the ubiquitous requirements of distinction and proportionality are sufficient to prevent these strikes from violating international law. However, some form of *ex post* transparency and oversight is necessary to review the identification criteria and strike circumstances to ensure that they remain "extremely robust".

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[11] *Id.*
[12] *The Public Committee against Torture in Israel v. Israel*, HCJ 769/02, Supreme Court of Israel (2006).

Mr. LEWIS. As my written testimony focuses on the choice between Article III courts and military commissions for trying terrorists and al-Qaeda members, there is no question that Article III courts are capable of trying terrorist and al-Qaeda members. We

have seen that with Richard Reid, the shoe bomber, Zacarias Moussaoui as well as Timothy McVeigh. I believe that there is a subset of terrorists or al-Qaeda defendants whose proper place is before military commissions rather than Article III courts. That subset would be the group of defendants who are apprehended overseas by members of the United States military. And the reason for that is that the Federal Rules of Evidence that determine what evidence gets before criminal juries in Federal court is based upon the police apprehension assumption, basically, the idea that law enforcement individuals who are trained in the preservation and collection of evidence in chain of custody and Mirandizing defendants and interrogating them appropriately under Miranda; in drafting very detailed police reports that will stand up to cross examination by skilled defense counsel; and, perhaps most importantly, to be available weeks, months or even years after the event to return to testify about the specifics of the arrest, again, subject to the cross examination of skilled defense counsel.

These assumptions underlie the Federal Rules of Evidence, and none of these assumptions are valid for that subset of defendants who are apprehended overseas by members of the U.S. military. Because the members of the U.S. military combat troops are not trained, nor should they be trained in the collection and preservation of evidence or in the Mirandizing of defendants, or in the writing of police reports. And they are very likely to not be available weeks, months or years later to come back and testify about the specifics of the arrest, which gives a great deal of hearsay problems to any evidence that was collected at the time.

As a result of this, I think there are two major concerns that I have. The first is, obviously, there is a great deal of evidence that is likely to be excluded from any trial because of the fact that these people are not trained in the preservation of such evidence, and we saw some of that in the Ghailani trial, and that was even where you had law enforcement agents that had gone over to Kenya and Tanzania to do much of the investigation.

But the other problem, and this is one that is less discussed and I think equally as important, is that if you decide to tell the military that all al-Qaeda members, all terrorists will be tried before Article III courts, you are going to make the military become better police officers, and that is not something we want to do.

In my submissions, if you look at page 4, 5 and 6, there are a couple of different forms that I have copied for the Committee to look at. On page 4, you have a standard what is called capture tag that was used in Afghanistan, and that is a very short piece of information that is required by the Geneva Conventions anytime you capture someone. It can be filled out in a minute and a half by anyone, whether they understand the Federal Rules of Evidence or not.

Pages 5 and 6 contain a form that has been used by the coalition forces in Iraq and looks far more like a traditional police report. It requires a great deal of detailed information be secured by the combat forces that are doing the apprehension, and it also requires some understanding of chain of custody, evidence collection, et cetera. And the reason why this is a problem is because our combat soldiers only have a limited amount of time to maintain their

skills. And as someone who, at least for a brief period of time, myself, achieved a high degree of combat proficiency, I can tell you that that combat proficiency is very perishable. And to the extent you take away training time from combat proficiency in order to learn how to properly withstand cross examinations, fill out police reports, and keep evidence, you are likely to degrade the combat effectiveness of the troops that are being asked to do that.

So I would ask that we do not make that requirement of our men and women overseas that are in combat. Thank you for the time.

[The prepared statement of Mr. Lewis follows:]

PREPARED STATEMENT OF MICHAEL W. LEWIS

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Civil Liberties

Subcommittee Hearing:
"Civil Liberties and National Security"

Submission of
Michael W. Lewis
Professor of Law
Ohio Northern University Pettit College of Law

Honorable Chairman and Members:

Introduction

My name is Michael Lewis and I am a professor of law at Ohio Northern University's Pettit College of Law where I teach International Law and the Law of Armed Conflict. I spent over 7 years in the U.S. Navy as a Naval Flight Officer flying F-14's. I flew missions over the Persian Gulf and Iraq as part of Operations Desert Shield/Desert Storm and I graduated from Topgun in 1992. After my military service I attended Harvard Law School and graduated *cum laude* in 1998. Subsequently I have lectured on a variety of aspects of the war on terror, at dozens of institutions including Harvard, NYU, Stanford, Columbia and the University of Chicago. I have published several articles and co-authored a book on the war on terror, national security and the laws of war.

Article III courts are generally capable of effectively trying terrorists and should be the first choice for most cases in which terrorists are caught by domestic law enforcement

Federal courts can effectively try terrorism cases and al Qaeda defendants. The highly visible trials of Timothy McVeigh, Richard Reid (the shoe bomber) and Zacarias Moussaoui have demonstrated that such trials can be conducted without jeopardizing classified information and can lead to convictions. More importantly, a large number of less well known cases involving conspiracies, foiled plots and material support charges have moved through the system with reasonably high conviction rates.[1] These statistics support the claim that the federal courts can effectively handle terrorism cases. However they do not, as some have suggested, prove that military commissions do not have a role to play in the prosecution of some al Qaeda suspects.

[1] *See* Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data in Light of the "Soft-Sentence" and "Data-Reliability" Critiques*, 11 Lewis & Clark L. Rev. 852 (2007).

Because the use of military commissions has been tainted by the perception of illegitimacy,[2] federal courts should continue to conduct the vast majority of terrorism trials in which terrorists are caught by domestic law enforcement, as they have done ever since 9/11. But for both legal and policy reasons there are certain readily-definable situations in which terrorist/al Qaeda defendants should be tried by military commissions.

There is a subset of terrorist/al Qaeda defendants that should be tried by military commissions

While the federal courts are generally capable of effectively trying terrorism cases and al Qaeda defendants, there is a subset of defendants for whom the federal courts are not the best option. These are the defendants that have been apprehended abroad by members of the U.S. military. For this group, trial by military commissions is preferable for both legal and policy reasons.

The evidentiary rules applied by the federal courts were written to govern the apprehension of criminal suspects by police in domestic situations. Chain-of-custody requirements for physical evidence, hearsay exclusions and the rules governing the admissibility of confessions are all designed with the paradigmatic police apprehension in mind. Police officers that are trained in the preservation of evidence arrest a suspect complete a detailed report at the time of the arrest and then appear at trial weeks or even months after the incident to testify about the particulars of the arrest. This process assumes that the arresting officer has a familiarity with the evidentiary requirements and routinely punishes any failure to meet these requirements by excluding the evidence from consideration at trial.

These basic assumptions about the nature and training of the apprehending officer, which are perfectly justified in the domestic law enforcement context, should not apply to soldiers in combat or near-combat situations half way around the world. Soldiers are not trained (nor should they be) in evidence collection procedures, or how to write a police report that will stand up to cross-examination or how to testify effectively when being subjected to cross-examination. These are skill sets that any police officer will tell you take a degree of training and experience to learn. Our combat soldiers should not be asked to expend valuable training time[3] acquiring such law enforcement skills, and as will be detailed below, there is some evidence that they already been asked to do just that.

Unlike the federal courts, the military commissions were specifically designed to deal with the realities of apprehension in a combat or near-combat environment. One illustration of the different approach taken by these two bodies is their treatment of a defendant's statements. Federal courts will exclude any statement made by the defendant

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[2] For a point-by-point comparison of the procedures utilized in federal courts and military commissions *see* Jennifer K. Elsea, Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court, Congressional Research Service, Nov. 19, 2009.

[3] As someone who attained a high degree of combat proficiency in the past, I can assure this committee that such proficiency is highly perishable and can only be maintained with a great deal of focused training. Training time spent on evidence preservation requirements and report writing will result in a lower level of combat proficiency for those soldiers required to undergo such training.

that was not preceded by a *Miranda* warning and was not voluntarily given.[4] While the question of whether the *Miranda* requirement applies in the context of foreign military apprehension is still unresolved, the fact that *Miranda* warnings have been read to detainees in Afghanistan in anticipation of trial in Article III courts[5] indicates an executive branch concern that such a requirement may exist. Even if the federal courts were to decide that the specific *Miranda* warning requirement did not apply, the voluntariness test established by 18 U.S.C. § 3501 tracks the *Miranda* requirements so closely that it is unlikely that any non-Mirandized confession would be admissible. In contrast, the military commissions take a far more relaxed view of what statements should be admissible.

> No statement of the accused is admissible at trial unless the military judge finds that the statement is reliable and sufficiently probative; and that the statement was made "incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement" and the interests of justice would best be served by admission of the statement into evidence; or that the statement was voluntarily given, taking into consideration all relevant circumstances, including military and intelligence operations during hostilities; the accused's age, education level, military training; and the change in place or identity of interrogator between that statement and any prior questioning of the accused.[6]

There are two reasons why this more relaxed, and arguably realistic, approach to evidentiary rules in the context of a combat apprehension are preferable to those employed by the federal courts. The first is quite simply prosecutorial effectiveness. While opponents of military commissions point to statistics indicating that hundreds of terrorism cases have been successfully tried in federal courts, few (if any) of those cases involved defendants apprehended by the U.S. military overseas. Therefore any claim that the current conviction rates for terrorism prosecutions are predictive of how effectively federal courts (and the federal rules of evidence) will deal with future cases involving combat apprehensions is speculative at best.

The second reason why military commissions are preferable to federal courts in the context of combat or near combat apprehensions is the effect that applying the federal rules would have on military operations and training. Below are two forms that U.S. forces have used after capturing suspected enemy fighters in Afghanistan and Iraq. Figure 1 is a capture tag that was used in Afghanistan. It contains the information that the Geneva Conventions require a detaining state to gather on any individual detained

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[4] *See* 18 U.S.C. § 3501 and *Miranda v. Arizona*, 384 U.S. 436 (1966).
[5] *See* RESOLUTION OF INQUIRY REQUESTING THAT THE PRESIDENT AND DIRECTING THAT THE ATTORNEY GENERAL TRANSMIT TO THE HOUSE OF REPRESENTATIVES ALL INFORMATION IN THEIR POSSESSION RELATING TO SPECIFIC COMMUNICATIONS REGARDING DETAINEES AND FOREIGN PERSONS SUSPECTED OF TERRORISM, Report 111-189, p. 3 fn. 6.
[6] 10 U.S.C. § 948r.

during an armed conflict.[7] It is relatively simple and straightforward and could be filled out in a minute or two.

1. Date and time of Capture		2. Serial No.		ENEMY PRISONER OF WAR (EPW) CAPTURE TAG (PART A) For Use of this form, see AR 190-8, the proponent agency is DCSOPS
3. Name		4. Date of Birth		
5. Rank	6. Service No.			Attach this part of tag to EPW (Do not remove from EPW.) 1. Search – For weapons, military documents, or special equipment. 2. Silence – Prohibit talking among EPWs for ease of control 3. Segregate – By rank, sex, and nationality 4. Safeguard – To prevent harm or escape. 5. Speed – Evacuate from the combat zone. 6. Tag – Prisoners and documents or special equipment.
7. Unit of EPW		8. Capturing Unit		
9. Location of Capture *(Grid coordinates)*				
10.Circumstances of Capture	11. Physical Condition of EPW	12. Weapons, Equipment, Documents		DA FORM 5976, JAN 91

Figure 1

In contrast Figures 2 and 3 are the Coalition Provisional Authority Forces Apprehension Forms that were used in Iraq several years ago. These forms look very similar to a police report, would take a great deal of time to fill out at the point of capture and would require a fair amount of training if they were to be filled out in a way that was designed to minimize their vulnerability to a cross-examination by a skilled defense attorney. These forms were utilized to help facilitate the domestic Iraqi prosecution of the detained individuals.

One of the effects of declaring that all al Qaeda detainees will be tried in Article III courts is likely to be that our soldiers will spend a great deal more time learning how to be better police officers. A job for which they are not currently suited and one for which we should not want them to become suited because it will come at a price in combat proficiency.

[7] *See* Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Art. 70. It is actually modeled after the card found in Annex IV B of the Third Geneva Convention.

COALITION PROVISIONAL AUTHORITY FORCES APPREHENSION FORM

YELLOW FIELDS MUST BE FILLED IN, IF APPLICABLE, UPON APPREHENSION

☐ **Offense against Civilian(s) [check one] If "Other" then describe:**_____

☐ Arson (I.P.C. 342)
☐ Solicitation of Fornication/Prostitution (I.P.C. 399)
☐ Rape/Indecent/Sexual Assaults/Acts (I.P.C. 393-98, 402)
☐ Murder (I.P.C. 405)
☐ Aggravated Assault/Assault With Intent To Kill (I.P.C. 410)
☐ Maiming (I.P.C. 412)
☐ Simple Assault (I.P.C. 415)
☐ Kidnapping (I.P.C. 421)
☐ Burglary or Housebreaking (I.P.C. 428)
☐ Extortion/Communicating Threats (I.P.C. 430)
☐ Theft (I.P.C. 439)
☐ Destruction of Property (I.P.C. 477)
☐ Obstructing a Public Highway/Place (I.P.C. 487)
☐ Discharging Firearm/ Explosive in City/Town/Village (I.P.C. 495)
☐ Riot or Breach of Peace (I.P.C. 499/3))
☐ Other

☐ **Offense against Coalition Forces [check one] If "Other" then describe:**_____

☐ Violation of Curfew
☐ Illegal Possession of Weapon
☐ Assault/Attack on Coalition Forces
☐ Theft of Coalition Force Property
☐ Trespass on Military Installation or Facility
☐ Photographing/Surveiling Military Installation or Facility
☐ Obstructing Performance of Military Mission
☐ Other

Apprehending Unit:	Location Grid:
Date of Incident: (D/M/Y) / / to / /	Time of Incident: hrs to hrs
Date of Report: (D/M/Y) / /	Time of Report: hrs

Detainee #_____	Key Connected Person: ☐ Victim ☐ Witness
Last Name:	Last Name:
First Name: Given Name:	First Name: Given Name:
Hair Color: Scars/Tattoos/Deformities:	Hair Color: Scars/Tattoos/Deformities:
Eye-Color: Weight: lb Height: in	Eye-Color: Weight: lb Height: in
Address:	Address:
Place of Birth:	Place of Birth:
Ethn/Tribe/Sect: Sex: ☐ M ☐ F Phone#: DOB D/M/Y: ☐ Mobile ☐ Regular	Ethn/Tribe/Sect: Sex: ☐ M ☐ F Phone#: DOB D/M/Y: ☐ Mobile ☐ Regular
☐ Passport ☐ Dr. license ☐ Other (specify) Document #:	☐ Passport ☐ Dr. license ☐ Other (specify) Document #:

Total Number of Persons Involved _____ (list names/identifying info on reverse under "Additional Helpful Information")

☐ Vehicle Information Vehicle Number _____ of _____ Vehicle(s)

Make:	Color:	License No.:	Owner:
Model:	Type:	Plate No.:	Number of People in Vehicle:
Year:	Names of People in Vehicle:		
Contraband/Weapons in Vehicle:			

☐ Property/Contraband ☐ Weapon Photo Taken of Suspect with Weapon/Contraband: Yes/ No

Type:		Model:	Color/Caliber:
Serial No.:	Quantity:	Make:	Receipt Provided to Owner: Yes/ No
Other Details:		Where Found:	Owner:

Name of Assisting Interpreter: Email, Phone, or Contact Info:

Detaining Soldier's Name (Print): Last, First MI	Supervising Officer's Name (Print): Last, First MI
Signature:	Signature:
Email: Unit Phone: Date: / /	Email: Unit Phone: Date: / /

Figure 2

COALITION PROVISIONAL AUTHORITY FORCES APPREHENSION FORM

Why was this person detained? _____

Who witnessed this person being detained or the reason for detention? Give names, contact numbers, addresses. _____

How was this person traveling (car, bus, on foot)? _____

Who was with this person? _____

What weapons was this person carrying? _____

What contraband was this person carrying? _____

What other weapons were seized? _____

What other information did you get from this person? _____

Additional Helpful Information: _____

Figure 3

Conclusion

Federal courts remain the best option for prosecuting most terrorism cases in which terrorists are caught by domestic law enforcement, but military commissions still have a role to play in dealing with combat or near combat apprehensions.

Thank you to the Subcommittee, chairman and members for inviting me to testify. I would willingly entertain any follow up questions or additional viewpoints on these issues.

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Mr. CONYERS. Thank you very much, Professor Lewis. We turn now to a Puffin Foundation writing fellow at the Nation Institute, a non profit media center. Mr. Jeremy Scahill, he is investigative journalist, an author and a correspondent on both radio and television programs. We welcome you here this morning, your statement will be included in the record, welcome.

TESTIMONY OF JEREMY SCAHILL, INVESTIGATIVE REPORTER AND CORRESPONDENT FOR DEMOCRACY NOW!

Mr. SCAHILL. Thank you very much, Mr. Chairman. I am the national security correspondent for the Nation Magazine and proud of our editor, Katrina vanden Heuvel.

I would like to thank the Chairman in this Committee. I wish that Ranking Member Sensenbrenner was here, I am from his State of Wisconsin. I would have liked to engage with him on some of these issues.

As we sit here today in Washington across the world, the United States is engaged in multiple wars, some like those in Afghanistan and Iraq are well-known, but there is another war, a covert shadow war, being waged in darkness by U.S. special operations forces and the CIA across the globe. This war is largely void of any effective or meaningful congressional oversight, and takes place in countries like Yemen, Somalia and Pakistan, nations with which the U.S. is not officially at war.

The actions and consequences of this shadow war are seldom discussed in public, or investigated by the Congress. And yet they have a direct impact on the debates and legislation on national security and civil liberties here at home.

Far from discussing the distant past, as Mr. Sensenbrenner indicated, I intend to talk about current U.S. policy and how the Obama administration has continued some of the most outrageous policies and dangerous policies of the Bush administration.

The current U.S. strategy in the shadow war can be summed up as follows, we are trying to kill our way to peace, and the killing fields are growing in number. Congress has a responsibility to soberly and seriously address crucial questions. What impact are these clandestine operations having on U.S. national security? Are they making us more safe or less safe? When U.S. forces kill innocent civilians in so-called counterterrorism operations, are we inspiring a new generation of insurgents to rise against our country. And what is the oversight role of U.S. Congress in the shadow wars that expand the Bush and Obama administration. The most visible among these shadow wars, Mr. Chairman, is in Pakistan where the U.S. regularly bombs that country using weaponized drones. At the same time, U.S. special operations forces are engaged in covert offensive actions in Pakistan, including hunting down so-called high value targets and conducting raids with Pakistani forces in north and south Waziristan. These actions are carried out in secret and have been publicly denied by senior Pentagon and State Department officials who stated that there are no U.S. troops in Pakistan, or that the only role of U.S. troops there is to train Pakistani forces. Such statements made recently by Ambassador Richard Holbrooke and Pentagon spokesperson Geoff Morrell, their statements are demonstrably false.

U.S. Officials have consistently misled the American public and the Pakistani people on the extent of U.S. military operations in Pakistan. If Congress is kept in the dark about these operations, Mr. Chairman, how can it expect to honestly and effectively debate U.S. on Pakistan?

One of the most off-the-radar wars the U.S. is currently waging is in the Horn of Africa and the Gulf of Aden, where U.S. Forces

are increasingly attacking forces from al-Qaeda and the Arabian Peninsula. As with the presence of U.S. Forces in Pakistan, publicly the Obama administration insists that its role in Yemen is limited to training and equipping the country's military forces.

This is false. On multiple occasions, the United States has launched cruise missiles carrying cluster bombs at villages in Yemen, killing scores of people, among them, women and children. Two such attacks took place last December. One of them was reportedly aimed at targeting a U.S. citizen, Anwar al-Awlaki to execute him without trial. Special operation sources have told me that elite U.S. Special ops have also engaged in lethal ground operations directly in Yemen. As in the case of U.S. drone strikes in Pakistan, the Yemeni authorities are colluding with American officials to cover up and mask the extent of U.S. involvement.

In a meeting with General David Petraeus in early January 2010, Yemen's president reportedly told the General, "We will continue to saying the bombs are ours, not yours." U.S. special ops forces have launched at least six attacks in Somalia in recent years, including multiple helicopter assaults and Tomahawk missile attacks.

The most recent operation we know of in Somalia was a helicopter attack in September 2009 under the current President's command.

These ongoing shadow wars, Mr. Chairman, confirm an open secret that few in Congress are willing to discuss publicly, particularly Democrats. When it comes to U.S. counterterrorism policy, there has been almost no substantive change from the Bush to the Obama administration. In fact, my sources within the CIA and the special operations community tell me that if there is any change, it is that President Obama is hitting harder, hitting in more countries than President Bush. The Obama administration is expanding covert actions of the military in the number of countries where U.S. special forces are operating. The Administration has taken the Bush era doctrine that the world is a battlefield, a favorite of the neocons, and run with it and widen its scope.

Under the Bush administration, special forces were in 60 countries around the world; under President Obama, they are in 75. As a special operations veteran told me, President Obama has, "Let U.S. special operations forces off the leash."

As I just returned from Afghanistan, Mr. Chairman, I would like to share with this Committee part of my investigation into deadly U.S. Night raids in that country where innocent civilians were killed. These operations carried out by the same special ops team that operate in Yemen, Pakistan and Somalia are part of what is effectively a shadow war within the more publicly visible war in Afghanistan.

In one incident in February of this year, U.S. special operations forces raided a civilian compound in the Gardez district of Paktia Province. They killed two pregnant women, a teenage girl and two men. U.S. forces tried to cover up their responsibility for the killings and blame the Taliban and said the women were executed in an honor killing. That was a blatant lie, Mr. Chairman, and eventually the U.S. was forced to admit its responsibility. These in-

nocent Afghans were killed by soldiers from the joint special operations command.

I went to visit with that family in their home in Gardez. They were pro American and anti Taliban before this raid. In fact, the night U.S. Forces stormed their compound, they thought it was a Taliban attack. The two men who were killed were actively working with U.S. forces. One of them was a top police commander trained by the United States. The other was a local prosecutor in the Karzai government. One man who saw his pregnant wife gunned down by U.S. Forces was hooded, and handcuffed, and taken prisoner for days by American forces. When he was released, he told me he wanted to become a suicide bomber and blow himself up among the Americans. To date, the only remedy that the United States has offered this family were two sheep for them to sacrifice.

A similar story happened when I visited Nangarhar Province, U.S. forces raided the Kashkaki family's compound in May of 2010, killing 8 civilians. Local police officials told me the family had no connection to the Taliban. That family is left asking why they should support the U.S. presence in their country after watching their loved ones shot dead before their eyes by a military that claims to be there to liberate them and free their country. These raids and the civilian death they cause are hardly isolated incidents.

In closing, Mr. Chairman, I told both of these families targeted in those raids that I described that I would bring their cases before the U.S. Congress and ask that they be investigated and that those responsible be held accountable. On behalf of those families I humbly ask this Committee to consider this request. Thank you, Mr. Chairman.

[The prepared statement of Mr. Scahill follows:]

PREPARED STATEMENT OF JEREMY SCAHILL

Prepared Testimony of Jeremy Scahill
Before the House Judiciary Committee, December 9, 2010

My name is Jeremy Scahill. I am the National Security correspondent for The Nation magazine. I recently returned from a two-week unembedded reporting trip to Afghanistan. I would like to thank the Chairman and the Committee for inviting me to participate in this important hearing. As we sit here today in Washington, across the globe the United States is engaged in multiple wars. Some, like those in Afghanistan and Iraq, are well known to the US public and to the Congress.

They are covered in the media and are subject to Congressional review. Despite the perception that we know what is happening in Afghanistan, what is rarely discussed in any depth in Congress or the media is the vast number of innocent Afghan civilians that are being killed on a regular basis in US night raids and the heavy bombing that has been reinstated by General David Petraeus. I saw the impact of these civilian deaths first-hand and I can say that in some cases our own actions are helping to increase the strength and expand the size of the Taliban and the broader insurgency in Afghanistan.

As the war rages on in Afghanistan and--despite spin to the contrary--in Iraq as well, US Special Operations Forces and the Central Intelligence Agency are engaged in parallel, covert, shadow wars that are waged in near total darkness and largely away from effective or meaningful Congressional oversight or journalistic scrutiny. The actions and consequences of these wars is seldom discussed in public or investigated by the Congress.

The current US strategy can be summed up as follows: We are trying to kill our way to peace. And the killing fields are growing in number.

Among the sober question that must be addressed by the Congress: What impact are these clandestine operations having on US national security? Are they making us more safe or less? When US forces kill innocent civilians in "counterterrorism" operations, are we

inspiring a new generation of insurgents to rise against our country? And, what is the oversight role of the US Congress in the shadow wars that have spanned the Bush and Obama Administrations?

The most visible among these shadow wars is in Pakistan where the United States regularly bombs the country using weaponized drones. As we now know from diplomatic cables made public by Wikileaks, Pakistan's Prime Minister told a senior US official in Islamabad, "I don't care if [the US bombs Pakistan] as long as they get the right people. We'll protest in the National Assembly and then ignore it."

At the same time, US Special Operations Forces are engaged in covert, offensive actions in Pakistan, including hunting down so-called high value targets, doing reconnaissance for drone strikes and conducting raids with Pakistani forces in north and south Waziristan. These raids are carried out in secret and denied by Pentagon spokespeople in public. Leaked US diplomatic cables have now confirmed that the sustained denials by US officials for more than a year are false. According to an October 9, 2009 cable classified by Anne Patterson, then the US ambassador to Pakistan, offensive operations have been conducted by US Special Operations Forces and coordinated with the US Office of the Defense Representative in Pakistan. A US Special Operations source told me that the US forces described in the cable as "SOC(FWD)-PAK" were "forward operating troops" from the Joint Special Operations Command (JSOC), the most elite force within the US military made up of Navy SEALs, Delta Force and Army Rangers. This despite senior Pentagon and State Department officials, including by Ambassador Richard Holbrooke and Pentagon spokesman Geoff Morrell, publicly claiming there are no US troops in Pakistan or that the only role of US troops is to train the Pakistani military. Those statements are demonstrably false.

In the fall of 2008, the US Special Operations Command asked top US diplomats in Pakistan and Afghanistan for detailed information on refugee camps along the Afghanistan Pakistan border and a list of humanitarian aid organizations working in those camps. On October 6, Ambassador Patterson, sent a cable marked "Confidential" to

senior US defense and intelligence officials saying that some of the requests, which came in the form of emails, "suggested that agencies intend to use the data for targeting purposes." Other requests, according to the cable, "indicate it would be used for "NO STRIKE" purposes." The cable, which was issued jointly by the US embassies in Kabul and Islamabad, declared: "We are concerned about providing information gained from humanitarian organizations to military personnel, especially for reasons that remain unclear. Particularly worrisome, this does not seem to us a very efficient way to gather accurate information." What this cable says in plain terms is that at least one person within the US Special Operations Command actually asked US diplomats in Kabul and/or Islamabad point-blank for information on refugee camps to be used in a targeted killing or capture operation.

What is clear is that US officials have consistently misled the American and Pakistani people on the extent of US military operations inside Pakistan. The reality is that US soldiers are fighting and dying in Pakistan despite the absence of a declaration of war. It is imperative that Congress investigates this shadow war to examine its legality, but also its impact on Pakistan's stability and US national security. If Congress is kept in the dark about these operations, how can it expect to effectively and honestly debate US policy in Pakistan?

One of the most off-the-radar wars the US is currently waging is in the areas around the Horn of Africa and the Gulf of Aden, where US forces are increasingly militarily engaging forces from Al Qaeda in the Arabian Peninsula (AQAP). While the stated US position is that the US military role in this region is limited to training and weapons support, we now know that on multiple occasions the US has launched cruise missiles carrying cluster bombs at villages in Yemen, killing scores of people. According to the Yemeni parliament, women and children have been among those killed by American bombs. One of these strikes was reportedly aimed at killing a US citizen, Anwar al Awlaki, who has been placed on a targeted assassination list by the CIA and the Joint Special Operations Command. Special Operations sources have told me that elite forces from the US Joint Special Operations Command have also engaged in unilateral direct

actions--lethal operations--inside Yemen. As in the case of US drone strikes in Pakistan, the Yemeni authorities are colluding with American officials to mask the level of US involvement.

We now know that on September 6, 2009, President Obama's Deputy National Security Advisor, John Brennan, met with Yemen's president, Ali Abdullah Saleh, to discuss the rising influence of Al Qaeda in the Arabian Peninsula (AQAP). According to one cable, "President Saleh pledged unfettered access to Yemen's national territory for U.S. counterterrorism operations… Saleh insisted that Yemen's national territory is available for unilateral [counterterrorism] operations by the U.S." As with the presence of US forces in Pakistan, publicly, the Obama administration insists that its role in Yemen is limited to training and equipping the country's military forces. In secret, however, US Special Operations Forces have been conducting offensive operations in Yemen, including airstrikes, and conspiring with Yemen's president and other leaders to cover-up the US role.

On December 17, 2009, an alleged al-Qaeda training camp in Abyan, Yemen was hit by a cruise missile killing 41 people. According to an investigation by the Yemeni parliament, 14 women and 21 children were among the dead, along with 14 alleged al-Qaeda fighters. A week later another airstrike hit a separate village in Yemen.

Amnesty International released photographs from one of the strikes revealing remnants of US cluster munitions and the Tomahawk cruise missiles used to deliver them. At the time, the Pentagon refused to comment, directing all inquiries to Yemen's government, which released a statement on December 24 taking credit for both airstrikes, saying in a press release, "Yemeni fighter jets launched an aerial assault" and "carried out simultaneous raids killing and detaining militants."

US diplomatic cables now reveal that both strikes were conducted by the US military. In a meeting with General Petraeus in early January 2010 President Saleh reportedly told Petraeus: "We'll continue saying the bombs are ours, not yours." Yemen's Deputy Prime

Minister Alimi then boasted that he had just "lied" by telling the Yemeni Parliament "that the bombs… were American-made but deployed by" Yemen. In that meeting, Petraeus and Saleh also discussed the US using "aircraft-deployed precision-guided bombs" with Saleh saying his government would continue to publicly take responsibility for US military attacks. It is clear that we have only seen the beginning of the shadow US war in Yemen and Congress must demand accountability and examine the full extent of the lethal actions currently underway in Yemen.

US forces have also struck multiple times in Somalia and have used the Ethiopian Army as a proxy force to cover the role of US Special Operations troops in a shadow war against al Shabaab and other militant groups. In the years leading up to the December 2006 Ethiopian invasion of Somalia, the Pentagon trained Ethiopian forces—including the notorious Agazi special forces unit. The US role continued well into the Ethiopian offensive. A series of at least six US Special Operation incursions into Somalia followed the invasion, beginning with two AC-130 attacks in southern Somalia in early 2007 and another attack from a US warship in mid-2007. In the spring of 2008, five Tomahawk cruise missiles were fired from an unidentified US naval vessel at a target in southern Somalia, followed by a second strike in central Somalia that killed alleged al Qaeda commander Aden Hashi Ayro. The most recent operation we know of occurred under President Obama's command in September 2009, when at least two US helicopters—reported to have been AH-6 Little Bird attack helicopters—tracked and killed an alleged senior al-Qaeda leader in the al Shabaab-controlled southern region. A diplomatic cable released by Wikileaks reveals that a foreign official praised the US for the Somalia operation, saying "The Somalia job was fantastic." But the reality is that the invasion of Somalia was a disaster and actually increased support for Islamic radical movements.

These ongoing shadow wars confirm an open secret that few in Congress are willing to discuss publicly--particularly Democrats: When it comes to US counterterrorism policy, there has been almost no substantive change from the Bush to the Obama administration. In fact, my sources within the CIA and the Special Operations community tell me that if there is any change it is that President Obama is hitting harder and in more countries that

President Bush. The Obama administration is expanding covert actions of the military and the number of countries where US Special Forces are operating. The administration has taken the Bush era doctrine that the "world is a battlefield" and run with it and widened its scope. Under the Bush administration, US Special Forces were operating in 60 countries. Under President Obama, they are now in 75 nations.

The Obama administration's expansion of Special Forces activities globally stems from a classified order dating back to the Bush administration. Originally signed in early 2004 by then-Secretary of Defense Donald Rumsfeld, it is known as the "AQN ExOrd," or Al Qaeda Network Execute Order. The AQN ExOrd was intended to cut through bureaucratic and legal processes, allowing US Special Forces to move into "denied" areas or countries beyond the official battle zones of Iraq and Afghanistan.

As a Special Operations veteran told me, "The ExOrd spells out that we reserve the right to unilaterally act against al Qaeda and its affiliates anywhere in the world that they operate." The current mindset in the White House, he told me, is that "the Pentagon is already empowered to do these things, so let the Joint Special Operations Command off the leash. And that's what this White House has done." He added: "JSOC has been more empowered more under this administration than any other in recent history. No question." "The Obama administration took the [Bush-era] order and went above and beyond," he said. "The world is the battlefield, we've returned to that."

While some of the Special Forces missions are centered around training of militaries in allied nations, that line is often blurred. In some cases, "training" is used as a cover for unilateral, direct action. As a former special ops guy told me: "It's often done under the auspices of training so that they can go anywhere. It's brilliant. It is essentially what we did in the 60s. Remember the 'training mission' in Vietnam? That's how it morphs."

As I just returned from Afghanistan, I would like to share with this committee part of my investigation into deadly US night raids in Afghanistan where innocent civilians were killed. These operations, carried out by the same Special Ops teams that operate in

Yemen, Pakistan and Somalia, are part of what is effectively a shadow war within the more publicly visible war in Afghanistan. In one incident in February of this year, US Special Operations Forces raided a civilian compound in the Gardez District of Paktia province. They killed two pregnant women, a teenage girl and two men. US forces tried to cover up their responsibility for the killings and blamed the Taliban and said the women were killed in an honor killing. That was a blatant lie and eventually the US was forced to take responsibility, admitting the raid was conducted by operators from the Joint Special Operations Command.

I went to visit with that family in their home. They were pro-American and anti-Taliban before this raid. In fact, the night US forces stormed their compound, they thought it was a Taliban attack. The two men who were killed were actively working with US forces. One of them was a top police commander trained by the US, the other was a local prosecutor in the Karzai government. One man, who saw his pregnant wife gunned down by US forces, was hooded and handcuffed and taken prisoner for days by American forces. When he was released, he told me, he wanted to become a suicide bomber and blow himself up among Americans. The same was true of a similar raid on the Kashkaki family in Nangarhar province in May 2010 where eight civilians were gunned down by US forces. Local police officials told me the family had no connection to the Taliban. That family is left asking why they should support the US presence in their country after watching their loved ones shot dead before their eyes by a military that claims to be there to liberate them and free their country. The perception I heard expressed widely in Afghanistan was that the US is killing with impunity and strengthening the Taliban in the process.

Former senior State Department official in Afghanistan, Matthew Hoh, recently told me that the night raids are "a really risky, really violent operation," saying that when Special Operations Forces conduct them, "We might get that one guy we're looking for or we might kill a bunch of innocent people and now make ten more Taliban out of them." I told both of the families targeted in the raids I described that I would bring their cases before the US Congress and ask that they be investigated and that those responsible be

held accountable for these extrajudicial killings. On behalf of those families, I humbly ask this committee to consider this request.

In closing, the stated focus of this hearing is US national security policy and civil liberties. I believe strongly that the wars in Iraq and Afghanistan have a direct impact on what happens here in the United States. The same is true for the covert, shadow wars from Pakistan to Somalia to Yemen and beyond. These wars help to shape our domestic policies as well as world opinion about our nation. It is essential for journalists and this Congress to fulfill their oversight functions and to shed light on actions--as unsavory or as difficult as they might be at times--so that US policy moving forward can truly be based on what is best for the people of this nation as well as the populations of the nations where the US is waging wars, whether declared or undeclared. I thank this body for the opportunity to testify today. I ask that my full, prepared remarks be entered into the official record. I am prepared to answer any questions you may have.

Mr. CONYERS. I would like to get the details on both of them. And would you also, when you submit, would you identify the 75 nations that you say we have gone up from 60 to 75.

Mr. SCAHILL. Mr. Chairman, that information remains classified. I have been able to gather about a dozen of them from Special Operation sources, but I will submit to you the information that I have thus far and documentation to support the 75 statistic.*

Mr. CONYERS. Thank you very much.

I now am very pleased to introduce as our next witness Bruce Fein. For years he served as Assistant Director of the Office of Legal Policy, legal adviser to the Assistant Attorney General for Antitrust, and the Associate Deputy Attorney General of the United States.

Mr. Fein has also served as the general counsel of the Federal Communications Commission, followed by an appointment as research director for the Joint Congressional Committee on Covert Armed Sales to Iran. And I hesitate to add this, but he also is a graduate from Harvard Law School with honors.

We welcome you, Bruce Fein, to this hearing.

TESTIMONY OF BRUCE FEIN, FORMER ASSOCIATE DEPUTY ATTORNEY GENERAL

Mr. FEIN. Thank you, Mr. Chairman.

The law reflects the moral deposit of the time. And I think the issue that you have raised at this hearing, civil liberties and national security, represents a revolution for the worse in the American political culture and psychology.

The United States was born with the idea that the individual was the center of the universe and due process was to be praised and venerated above all else. And the reason wasn't to win foreign allies and international support, although that was something that would not be unwelcome, but it was because of who we are as a people, who we are as a people. Do we care about freedom more than absolute safety? Do we care about due process more than domination for the sake of domination?

And I think I would like to illustrate the degradation in our political culture to a way that we resemble more China and Russia than we do the United States in 1776 or 1787 by some comparisons.

I think the first is are we at war? It is the characteristic of all empires to inflate danger from a reasonable level into thousands or millions of times above that level in order to justify an extra increment of safety. And if you examine today the enemy-to-soldier ratio of the United States and Afghanistan and Pakistan—and our CIA and our counterterrorism experts estimate we have 50 to 100 al-Qaeda in Afghanistan at present, maybe 300 in Pakistan—if you take that current enemy-to-soldier ratio and apply it to what our Armed Forces would have looked like in World War II fighting Japan and Germany, we would have fielded a military of 3½ billion soldiers. Including conscripting every single American, we would have to multiply the population by 126. And our enemies in World War II were not those who were in caves and had primitive access to technology or weapons; these were people in Germany

*The material referred to was not received by the Subcommittee at the time of the printing of this hearing.

and Japan building V-1, V-2 rockets, Zero airplanes, kamikaze pilots, et cetera. And yet we did not suspend due process of law.

In my judgment, one of the greatest errors that we have made in addressing this whole issue is to conclude that 9/11 did cross the threshold of danger that put us at war. And that is very critical, Mr. Chairman, because war is very unique because it makes what is customary murder legal. That doesn't mean it should never happen, but that is a very grave step to take. What is customarily murder becomes legal.

And that is where we are today with, I think, the authorization to use military force and really without much debate or discourse at all, saying al-Qaeda represents that level of danger that justifies moving from a criminal justice system to where we treat these people as international thugs and dangers to being warriors subject to the rules of war.

But that is just one example.

Another example, if we look at where we were at the outset and where we are today, you remember the Boston Massacre, and we had someone named John Adams, and he was a lawyer. He defended some of the British soldiers who were accused of massacring protesting Americans at the time, and he was placed under much criticism. He was actually defending the rule of law, and he won acquittal from those British soldiers. He later became a President of the United States. He was the first Vice President as well.

Today this culture treats those who would defend those accused of crimes. If you call them a terrorist crime, would you get elected President? No. You would get on the banned list. No one should hire you. You should be treated as a pariah if you are defending the rule of law. Indeed, we have lowered to the situation where we have had a former Solicitor General of the United States say that someone who defends an organization allegedly listed as a—false, wrong as a foreign terrorist organization, to provide legal assistance is a material assistance prohibited under a material assistance law. Now, that sounds like a lawyer practicing in Russia or in China, not the United States of America.

Now, let me give you the odyssey of Khalid El-Masri to show again how far we have come in degrading the rule of law.

Khalid El-Masri was a German citizen of Lebanese ancestry, and after 9/11, he was picked up—kidnapped, if you will—from Macedonia, taken to Afghanistan, imprisoned there. He was tortured. He was abused. He was dumped back in Albania. All of this never being accused of any crime whatsoever.

In Germany, there are 13 arrest warrants that were initially issued in order to try to bring to justice CIA operatives. The United States of America urged and exhorted the Germans to stop, don't go this far; you will upset the international opinion toward us. The rule of law should be crucified on a national security cross. And those arrest warrants were then never executed.

Mr. El-Masri then comes to the United States, and he brings a lawsuit claiming that the Constitution has been violated, and he is suing CIA Director then George Tenet and others for constitutional violations of his rights. And what is he confronted with? State secrets privilege. You can't prosecute your case, the U.S. Court of Appeals for the Fourth Circuit said, because you will have to disclose

who the culprits were who tortured and beat you, and that will disclose intelligence sources and methods. Therefore, you are out of court. And that kind of Catch-22, again, it smacks of Soviet or Chinese justice. This is the United States of America, and this is what happened to Mr. Khalid El-Masri. Just one example.

If we were to read in the newspapers that Vladimir

Putin could put on a list, you know, Russians who he thought—Mr. Berezovsky or others who are outside—a list to be assassinated because he thought they were endangering political stability in Russia, we would think, what a monstrosity. This shows how bad and lawless Russia is. They really haven't changed since Gorbachev left.

And yet here we have today a President of the United States claiming identical authority, unilaterally authorized to identify an American citizen abroad, no judicial review, no congressional oversight. You are on an assassination list because I am declaring that you are an imminent threat to the United States. He is not on a battlefield. He is not engaged in active hostilities against the United States. There is no due process whatsoever. And indeed, just 2 days ago, a U.S. district court here held, well, there is no way that the judiciary can review this particular power. Only Congress can do it. Only Congress can do it.

I want to take you back, Mr. Chairman, to the days when I think you and I were here some 30 or 40 years ago concerning President Nixon's impeachment and to examine how again far we have fallen since those times.

You remember those three articles of impeachment that were voted by the House Judiciary Committee? They were strong. And Barbara Jordan was there. One of one, he, President Nixon, had failed to faithfully execute the laws. There were law violations that he knew about, and he was not faithfully executing laws. Indeed with the tapes we heard he was encouraging obstruction of justice, et cetera. And he was impeached for that.

And as you pointed out in your opening statement, we have a President now who sees out there waterboarding, torture. He knows the people who are complicit because they have confessed.

Now, there is no exception in Article II of the Constitution to decline to faithfully execute the laws because it would be politically difficult. No exceptions. Indeed, if there is some awkwardness, there is a remedy, if you will. It is called the pardon power. President Ford, as you well know and remember, Chairman Conyers, decided he would pardon Richard Nixon because he thought the country would be too convulsed with a trial. But he took accountability. A pardon requires the recipient to acknowledge guilt or wrongdoing, and it does not then wound the rule of law.

To just shut your eyes to violations of law of the most heinous sort is a flagrant violation of that duty to faithfully execute the law, and yet nothing happens.

Let us go to another area. Another article of impeachment against Richard Nixon was obstruction of justice. Remember the 18-minute gap and all of the things that disappeared? Obstruction of justice.

As you point out, we have open acknowledgment that those interrogation videotapes were destroyed. And what happens? Nothing.

Nothing. Where is the oversight? That is an unflagging obligation to enforce the laws. And I go back. If you don't think it will be politically healthy, you have to pardon them. And pardoning requires the recipient to say, "I did wrong."

The third article of impeachment was flouting a congressional subpoena, an impeachable offense. Today it happens every day. You know, Mr. Chairman, you had to go to court. Ultimately you won at the district level, and it became moot because Congress expired, et cetera. Had to fight the case again.

This Administration, previous Administration, ignores subpoenas all the time. I don't want to answer. It doesn't even have to be classified information, sensitive information. We don't want to tell you. It is why you know more about the United States from reading WikiLeaks than you get in classified briefings from this executive branch and previous ones. It is not a partisan issue; it transcends politics.

And then we had Mr. Sensenbrenner talk with, I think, rather a breezy air about these national security letters. These are letters that the FBI and others can issue unilaterally, no judicial review. If you say that some investigation has any relation to terrorism, which can be anything under the sun—and today, when we are at least semientrapping 18- and 19-year-olds that we read in the newspapers to plan bomb plots or whatever, you know, a terrorism investigation can cover the waterfront, and even with that breadth, their own inspector general in the Justice Department said it was violated thousands of times where there is not proper certification given.

These kinds of infringements in our day, Mr. Chairman, it was called the Houston Plan, and the Houston Plan was rejected even by J. Edgar Hoover. J. Edgar Hoover says this is not acceptable in the United States. He then becomes a civil libertarian like John Ashcroft in the hospital where at least he wouldn't do some of the things in flouting the Foreign Intelligence Surveillance Act that the Bush administration wanted.

And perhaps to me most shocking, although the incidents are so numerous you get numb to them, was a statement made by a Member of Congress, and I won't identify him, after the verdict up in New York on one of the alleged—those complicit in the bombings in Tanzania and Kenyan Embassies where the gist of his statement was, we can't have trials if you are going to have not guilty verdicts. We only do trials if you know you are going to bring in guilty and punish them.

This is like a world of Joe Stalin. You only have show trials. Due process isn't there to try to ferret out what is truthful and what is not, who is innocent and who is not guilty. The fact that a statement like that could be made from someone whose oath of office is to uphold and defend the Constitution of the United States—and it goes unremarked—is truly shocking. Truly shocking.

The last example I want to give—and I was involved in some sense as amicus curiae—concerns our treatment of Uighurs. Now, it may sound very exotic. Uighurs are an ethnic minority in Northeast China. They are Muslims. And there was about two dozen of them detained at Guantanamo Bay. Two dozen were detained at Guantanamo Bay, allegedly enemy combatants, although they de-

spise Communist China, never threatened Americans ever, but they are said to be enemy combatants because they trained on the same field that Osama bin Laden once put a foot on or his car drove over.

They were there for almost 8 years. Finally, the Supreme Court gave them habeas corpus in the Boumediene case. And they come to the district court here, and the Justice Department finally says—this is Obama—we really don't have any evidence that they are enemy combatants at all. We have no evidence that really they have been detained illegally for 7 years. The judge says, well, I guess they should come to the United States.

Indeed their leader, semileader, is a woman called Rebiya Kadeer, who has received the Nobel Peace Prize nomination three times. Her offices are catty-corner from the White House's. Well, I will take care of them. There are only 17. I will give you my bond that they won't become public charges. And the Obama administration says, no, they are illegal aliens. They don't have green cards. They can't come to the United States. They have to go back and rot in Guantanamo even though they are being held illegally. And that argument prevailed in the executive branch.

The case went up on appeal. Meanwhile, the United States of America then shocked the world offering bribes, would you please take these Uighurs off our hands? We don't want them here. We are frightened. The Chinese might not buy our bonds. So we will then sell their liberty to somebody else, Vanuatu or the Bahamas or Bermuda or something like that.

That is what the United States has come to. It has come to resemble the King George III monarchy, the tyrannies that we were fighting about. And this is not something that is a trade-off between civil liberties and national security.

The greatest national security of any nation is the loyalty of its people, its devotion to the country because it respects the rule of law. The British may have thought that they were getting security when they quartered soldiers in American colonists' homes, when they issued writs of assistance, when they impressed U.S. seamen, American seamen, into their own Navy, and they ended up with a revolution, and they lost everything. That is what the French thought, too, on the eve of the French Revolution. The escalation of the oppression of freedom ends up endangering the state rather than making it more secure.

And on that score, as when stated as by my previous witness, we also, by acting in a lawless way abroad, are creating more enemies than we are killing. We are making ourselves less safe. We have the illusion with the body count that, oh, yes, now I don't feel quite as fearful that tomorrow there will be a caliphate in Washington, D.C.

But ultimately, Mr. Chairman, this will change only if our political culture and our leadership changes to say we prefer freedom to absolute safety. Now is the time to understand our goal is not an empire. Restore the individual and freedoms as the center of our constitutional universe, and other things are subordinate to that overriding goal.

Thank you, Mr. Chairman.

Mr. CONYERS. Thank you, sir.

[The prepared statement of Mr. Fein follows:]

PREPARED STATEMENT OF BRUCE FEIN

STATEMENT OF BRUCE FEIN*

BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES

RE: CIVIL LIBERTIES AND NATIONAL SECURITY

DECEMBER 9, 2010

*Associate Deputy Attorney General under President Reagan and author of *American Empire Before The Fall.*

Mr. Chairman and Members of the Subcommittee:

The current state of civil liberties and national security endangers the United States. In the American Empire, the former are routinely crippled or lacerated in the false name of the latter. Citizen trust in government plunges. Dangers are magnified manifold to wound constitutionally venerated freedoms. International terrorist suspects who have never attempted to kill an American are treated as existential threats to U.S sovereignty—equivalent to the Nazi Wehrmacht or Luftwaffe, the Soviet Red Army, or Emperor Hirohito's Navy. Habeas corpus is suspended. Military commissions denuded of due process are substituted for independent civilian courts. Time-honored privacy rights are trampled. Torture or fist cousin enhanced interrogation techniques are endorsed. The worst civil liberties crimes are dared by few, willed by more, and tolerated by virtually all.

The nation needs a new birth of freedom dedicated to the proposition that the life of a vassal or serf—even in absolute safety—is not worth living.

At present, procedural safeguards against injustice are jettisoned for the counter-constitutional dogma, "Better that many innocents suffer than that one culprit eludes punishment." A craving for a risk-free and comfortable existence fuels the nation's war on individual freedom. But acceptance of risk is the lifeblood of a free society. Every human sports DNA capable of anti-social behavior—even the saintly. The United States is headed for the same ruination as Athens for the same reasons. Edward Gibbon observed, "In the end, more than they wanted freedom,

they wanted security. They wanted a comfortable life, and they lost it all—security, comfort, and freedom. When ... the freedom they wished for was freedom from responsibility, then Athens ceased to be free."

Contrary to prevailing and longstanding orthodoxies, civil liberties and national security are more aligned than opposed. Scrupulous respect for freedom works hand-in-glove with national security by engendering unbegrudging loyalty among citizens eager to risk that last full measure of devotion to foil opponents and to maintain government of the people, by the people, and for the people. Patriotic soldiers are superior to mercenaries. Hessians were defeated in the Revolutionary War after Washington crossed the Delaware on Christmas and otherwise. A military that fights for love of country as opposed to fear or money will invariably triumph. And love of country comes by the government's securing unalienable rights to life, liberty, and the pursuit of happiness. In sum, civil liberties and national security are bookends.

Crushing civil liberties may occasion enhanced safety in the immediacy. But it sets the stage for calamity. The British believed that Writs of Assistance, denial of jury trial, quartering soldiers, and impressing American seaman to fight against American colonists would make them safer. But the abuses ignited the American Revolution, and the beginning of the end of the British Empire.

Prevailing legal doctrines and practices in the United States bear the earmarks of tyranny deplored by the Founding Fathers. Even an inexhaustive enumeration is alarming.

The President is empowered to target American citizens for assassination abroad who have not engaged in hostilities against the United States on his say-so alone.

Citizens and non-citizens may be detained indefinitely without accusation or trial at Bagram prison in Afghanistan on the President's say-so alone.

Predator drones are used to kill civilians off the battlefield in Afghanistan, Pakistan, and Yemen.

Military commissions are established for the trial of alleged war crimes that may be equally prosecuted in civilian courts, for example, material assistance to a foreign terrorist organization. Military commissions combine judge, jury, and prosecutor in a single branch—the very definition of tyranny according to the Founding Fathers.

State secrets are invoked by the President to prevent victims of constitutional wrongdoing, including torture or kidnapping, from judicial redress for their injuries.

Telephone calls and emails are indiscriminately intercepted by the government without probable cause to believe the target is connected to international terrorism.

Lawyers who defend alleged international terrorist organizations are vulnerable to prosecution under the material assistance law.

The Patriot Act authorizes the FBI to obtain business, bank, or other records by unilateral issuance of national security letters.

Extraordinary rendition is employed to dispatch detainees to countries notorious for torture.

Individuals or organizations are designated as "terrorists" and quarantined from human intercourse based on secret evidence.

Government crimes--including torture, illegal surveillance, obstruction of justice, and war crimes-- go unprosecuted.

The United States was founded on the idea that the individual was the center of the nation's universe; and, that freedom was the rule and government restraints grudging exceptions. The right to be left alone was cherished above all others. The national purpose was not to build an Empire by projecting military force throughout the planet, but to revere due process and the blessings of liberty at home.

These ennobling ideas have been abandoned for the juvenile thrill of domination for the sake of domination.

Where are the leaders to awaken America to its philosophical peril? Who has the courage to preach, "Better free than safe," "As we would not be tyrannized, so we shall not be tyrants," and, "due process is a higher life form than vigilante justice?"

If not us, who? If not now, when?

Mr. CONYERS. You six witnesses have provided us with some of the most important discussion that the Judiciary Committee has held in the 111th session. I am grateful to you.

I am going to ask you now, starting with Ambassador Pickering, where do you think we ought to—or how might members of the legislative branch and citizens begin to weigh in on a discussion such as the one that has been held here this morning that many people are going to look much further into and become more aware of some of these tensions between constitutional liberties and security?

Mr. PICKERING. Mr. Chairman, that is an important and significant challenge. All of us, I think, have great respect for the Committee and great respect for your work and role. I hesitated to provide prescriptory ideas, but let me begin with a few.

I think you have several powers that are very important here. One, the simplest and the easiest, but perhaps one of the most effective, is the simple power of reporting, reporting to your fellow Members of Congress, reporting to the public, reporting in that way to the executive branch about the areas that you are concerned about.

I particularly expressed my concern about the issue of the use of Article III courts and the concern I had that military commissions and other substitutes, if they were not equal to Article III courts in their protection of the rights of the individual, would be failing to meet the constitutional norms.

I am concerned about detention without trial on an indefinite basis. Some of us have suggested some ways to proceed.

I am concerned about the protection of privacy while at the same time, obviously, administering effectively the law and security and the adequate control of trade and commerce.

I am concerned about the exercise of state immunity as a blanket way to evade the use of the judicial process to find redress for issues and problems that come up that are otherwise open to citizens of this country.

The second question that you will have to face and the second important power you have as individual Members is to institute legislation where you feel legislative remedies may be required to deal with the problem. I don't have in mind specific remedial legislation, others may have, but it is an important activity.

The third is obviously what you are doing here today, bringing people together who have an interest in this problem. We don't all have unanimity of views, obviously, but we have serious concerns about what we see as the derogation of constitutional rights and privileges and the creation of sets of activities which could well lead to serious abuses now and in the future of the human rights of our citizens and indeed all others who enjoy rights under our Constitution.

And those kinds of activities, I think, coming together can provide both a powerful voice and institutionally a powerful set of arrangements to correct what we believe have been abuses and tendencies to continue and expand abuses of these particular actions on the part of the executive branch.

Mr. CONYERS. Thank you very much.

I would like to ask my two witnesses, Professor Lewis and Attorney Jaffer, in a hearing like this, do you see any recommendations, or do any suggestions come to your mind about ways that we might be able to improve the delivery of justice and fairness in this country both in our courts and in relationship between the three branches of government here and with the countries and the peoples of the world? Have you been thinking about that at all?

Mr. JAFFER. Thank you, Chairman Conyers. It is a very important question, and, as with Ambassador Pickering, I was always cautious to suggest prescriptive ideas.

Congressman, I do think that with respect to the question of how to deal with Guantanamo Bay detainees that the system is broke. We are trying folks in Federal court, and yet we are saying if they are not convicted, we are going to continue to detain them. Well, that may actually make a lot of sense because these are folks who have engaged in war against the United States. They have gone through a review process, and this Administration, and the prior Administration, have determined that these individuals are of the highest value and should continue to be detained. So it makes sense that if they are not convicted, that we are going to need to keep them off the battlefield, particularly when folks are returning at high rates.

But then you have to ask yourself, well, perhaps we should be looking at a different judicial system that doesn't ensure convictions—that is not what folks are looking for—but that sets the balance differently than we do in the criminal justice system where instead of the default presumption being innocence and complete—you know, we let 99 guilty men off in order to ensure that 1 innocent man is not convicted—perhaps it makes sense to try a different set of rules.

Certainly we don't want to abandon the presumption of innocence. That is not what I am suggesting. What I am suggesting, however, is a set of rules that makes sense in the context of war; a set of judges who have been through the Federal system, who were confirmed by the Senate, nominated by the President; prosecutors, career prosecutors, in the Department of Justice; cleared defense counsel who have high-level security clearances; a system that makes sense and yet can be seen to do justice without the problems raised by our current criminal justice system around the challenges, security issues, outside information issues, and all of those challenges that we have talked about earlier today.

Mr. CONYERS. Attorney Jaffer—before you begin, Professor Lewis—let me ask you, isn't there a possibility that among those 70, there may be some that even you and I could agree ought to be released, and that there are not appropriate charges to bring against them?

Mr. JAFFER. Well, Chairman Conyers, certainly there is the possibility that among the remaining 170, that there are folks who deserve to be released.

I would note that the current Administration, when it first came in, appointed a terrific team of lawyers from the National Security Division, many folks that I worked with, headed by Matt Olsen, currently the general counsel at the National Security Agency, a gentleman who I worked with and who I have a tremendous amount of respect for, who actually did the very review that you are talking about. And so I would be hard pressed to question that review.

Certainly Congress should take a close look at the results of that review, but given that they spent a lot of time looking at the classified information, working with analysts from CIA, DIA, the National Security Agency, working with the operators, and actually recommended a number of folks to be released and a number of folks to be detained, continued detention, and some for prosecution, I think it makes a lot of sense—the process has been gone through.

The question now becomes what happens with those detainees who we have determined are either too high-value to be released and/or we simply don't have the kind of evidence that would work in a Federal court; what do you do with those things? The basic options are currently military commissions or just detention without any sort of trial. A national security court might be an option that presents some of the benefits of Federal court without the whole perception issue associated with the military commissions.

Mr. CONYERS. What are the problems that you envision could happen in a Federal court that create a little bit of apprehension in your mind about them being the appropriate court of jurisdiction? I mean, they are nothing—I mean, that is the same court with the same set of rules that Americans are called upon to visit, and that we create the laws for, and that we select the judges for every—almost every day in the year.

Mr. JAFFER. Absolutely. And the only thing I mean to suggest is that it is policy question. These folks don't have the same constitutional rights that folks in this country have. And the question becomes, as a matter of policy, do we want to put these detainees in Federal court and give them the same rights and benefits that Americans have, including this very strong bias against conviction, very strong bias against putting—sacrificing 99 guilty, letting them on the street——

Mr. CONYERS. Well, we are not playing the numbers game.

Here is what I am suggesting; that going through a Title III court, we would have to prove their guilt. What is wrong with that?

Mr. JAFFER. There is nothing wrong with that, and I actually think that it makes a lot of sense to have to prove the guilt of folks that we want to detain particularly beyond the duration of hostilities. Certainly there are folks at Guantanamo Bay who we don't ever want to have to see released including after the current set of hostilities, the immediate set of hostilities ends, because they have killed Americans and deserve perhaps a life sentence, perhaps even the death penalty.

Mr. CONYERS. Who has determined that?

Mr. JAFFER. So, for example, an individual like Khalid Sheikh Mohammed, who has been accused of crimes, right, that would suggest a life sentence or the death penalty, Khalid Sheikh Mohammed we would want to, if we believe that, in fact, he is guilty of those crimes which he has been accused of, to be detained, incarcerated beyond the scope of any hostilities ongoing. And so the question becomes you have got to find a way to do that, and the Federal courts are one option, certainly. And it is an option that applies to American citizens, applies to folks inside the United States. And it is not a crazy option; it is a very reasonable option.

The problem is there are huge challenges with the use of the Federal courts, both to the safety of the folks in New York, to the jurors who might be called, the judges, the classified information that might be used to convict Mr. Mohammed.

Mr. CONYERS. What is the problem? I mean, sure, all of that would happen, but what dangers does that present to you in terms of determining guilt or innocence?

Mr. JAFFER. Well, imagine a world in which the evidence obtained that we have against Mr. Mohammed was obtained in ways that wouldn't——

Mr. CONYERS. Were illegal.

Mr. JAFFER. Well, no. Put aside enhanced interrogation for the sake of argument. Take the example of information obtained in Afghanistan, bad chain of custody, obtained on the battlefield of war. That evidence you would want brought before you.

Mr. CONYERS. Would you want evidence that was gained by torture to be usable against terrorists?

Mr. JAFFER. I think that we have to look at the evidence that was obtained.

Mr. CONYERS. You wouldn't want that, would you?

Mr. JAFFER. I don't think we should be torturing people. I would never support the use of torture against——

Mr. CONYERS. And you wouldn't want people whose evidence was secured through torture to be found guilty on the basis of that evidence. Or water torture, for example, you don't support that.

Mr. JAFFER. Chairman Conyers, certainly I don't think that—if we are torturing folks, we should not be doing it. And, you know, there are a lot of concerns about the enhanced interrogation techniques that were used in the CIA program. Nobody can doubt that. A lot of people talk a lot about waterboarding. There were other techniques that have now been publicly released by the current Administration.

Mr. CONYERS. They are probably just as bad.

Mr. JAFFER. Walling, sleep deprivation.

Mr. CONYERS. But what would you do with evidence gained through those techniques in a court?

Mr. JAFFER. If those techniques constitute torture under the law of the United States, and that is a legal question, one that no court has yet determined, and one that different folks disagree about——

Mr. CONYERS. On the contrary. It has been determined—waterboarding has been determined pretty definitively as not being appropriate, and for all that we can determine, it is ordered to have been stopped, and we don't have any reports that it is still going on. Do you know of any?

Mr. JAFFER. No, Mr. Chairman. In fact, both Administrations have indicated clearly that there were only three individuals subject to waterboarding, and they disclosed the names of those individuals, including the number of applications of waterboarding. So it was a very—that particular technique obviously being on the farthest edge of the enhanced interrogation techniques that were used in the CIA program, the sort of the least invasive being perhaps the facial slap, right, all the way to the waterboarding. And there were a number of techniques in between as now has been declassified by the Administration.

The real concern here, though, is, you know, when we are looking at these techniques, people of reasonable minds put aside the really extreme techniques and take other techniques that may be used, whether it is the ones that are approved in the Army Field Manual or others. There are people of reasonable minds who will disagree about whether those techniques should be used in a free society

like America. There is no doubt that that disagreement is a valid, reasonable disagreement to have.

The question then becomes what happens when a technique you don't want, whether it is an extreme technique—and put aside, again, the most extreme technique—but enhanced——

Mr. CONYERS. In other words, you might see your way to endorse modestly enhanced techniques. Could that satisfy your sense of fairness?

Mr. JAFFER. Mr. Chairman, I think that is a decision well above my pay grade. And it is——

Mr. CONYERS. No. It is a decision that each of us can individually possess that might—yours might be different from someone else's, but it doesn't make it any less important to you.

Mr. JAFFER. Well, Mr. Chairman, I think what I would say is, you know, the CIA program yielded its most highly valuable intelligence gained on the war on terror, period, bar none. There is no question that the information gained from that program, whether you agree or disagree with the techniques used, but the fact that they were detained, held as high-value detainees and were questioned in a particular set of circumstances, led to the further capture of some of the highest-value detainees that we have in our custody and the biggest efforts against the al-Qaeda network. And so, you know, I am not sure that I know which techniques are good——

Mr. CONYERS. Why is it that judges seem to be prone to not allow admissible evidence from witnesses who have been subject to enhanced interrogation? Are they soft-headed or sentimental, or what is the problem here?

Mr. JAFFER. Not at all. We have a long history in this country of excluding evidence obtained from coercion because, A) we don't think coercion is right, and, B) we don't think necessarily that the information that came from coercion is reliable.

Mr. CONYERS. And neither do you.

Mr. JAFFER. And I think that there are serious questions there. There are serious questions about whether information obtained from coercion is reliable. And there are serious questions about whether these are techniques that we want to use in America, in a free country.

Mr. CONYERS. Could you understand how a person subject to these kind of techniques would say anything that anybody wanted them to say?

Mr. JAFFER. Absolutely. Absolutely. There is no doubt that the history of the use of coercive techniques has suggested that there are serious issues with the information obtained from such coercion.

That being said, there is also no question that the folks who went through the CIA program yielded tremendously valuable, accurate intelligence, actionable intelligence that we acted upon and protected this Nation; that there are now—as part of the release of the CIA memos, other documents were released at the request of the previous Administration, that evidence, that information obtained from individuals in U.S. Custody as part of the CIA and other detainee programs, allowed us to protect this Nation from actual, ongoing, day-to-day plots.

Mr. CONYERS. Let me summarize here because I want to recognize Laura Murphy. Then I am coming back to Professor Lewis.

Would you be willing to submit at your earliest convenience a list of cases in which there was known enhanced interrogation or torture used in which the witness elicited valuable and correct information?

That is for you, Attorney Jaffer.

Mr. JAFFER. I am not aware—you know, the information that has been declassified by the current Administration is very limited, especially with respect to the information obtained from——

Mr. CONYERS. Well, I don't want classified information. Although I am cleared for it, maybe several hundred million Americans may not be.

Mr. JAFFER. And I am no longer cleared for it either, Mr. Chairman.

Mr. CONYERS. So let us take that off. Let us take that off.

We are talking about trials or evidentiary proceedings or investigations in which enhanced torture, enhanced interrogation or torture, revealed valuable and important and accurate information.

Mr. JAFFER. Well, Mr. Chairman, I would just say even if you look at the Agency's program alone, as we know, Abu Zubayda, who was subjected to extreme enhanced interrogation techniques, including the waterboard, ultimately gave us information that led us to Khalid Sheikh Mohammed. That much has been declassified and is in the public record.

So I can't speak to whether, you know, in the entire history of the criminal justice system we have found folks who have been——

Mr. CONYERS. Neither can I. That is why I am asking you.

Mr. JAFFER. But I share the concern, Mr. Chairman.

Mr. CONYERS. Okay. Then we agree that it would be pretty difficult to do.

Mr. JAFFER. Absolutely, Mr. Chairman. We agree on that.

Let me be clear. I do not support the use of coerced testimony, nor do I support the use of techniques that constitute torture or anything even approaching that, Mr. Chairman.

What I do want to note, though, however, is that this program that the CIA engaged in where they held high-value detainees abroad and sat down with them and went through these issues yielded tremendously valuable intelligence and protected Americans from ongoing plots. There can be no doubt about that; the public record on that is clear. It is not as fulsome as one might hope. One might hope for even more information that would allow us to really judge the program, right? And perhaps this Administration will declassify additional information, if appropriate.

But I guess my concern is that when you look at this classified information, to declassify, you must step very, very cautiously. And I would submit that even some of the declassifications taking place to date have been perhaps unnecessary. So it may be necessary to say, look, here are the techniques that were used in the program, but to give a detailed description of how many degrees you incline someone's head, what amounts of water you might use, I mean, this is just a recipe for how to torture Americans or how to use enhanced interrogation techniques against Americans and more ag-

gressively, right, if you believe that such technique constitute torture, right?

So if you are a person who believes that waterboard is torture, and I think most people tend to feel that it is the most extreme of the enhanced interrogation techniques, whether you use the term "torture" or whatever to describe it, right, why would you then give everybody in the world, including our enemies, a detailed recipe of how to carry that out? It seems—what is the national security benefit of that?

Mr. CONYERS. Ambassador Pickering, you seem disturbed, and I would like to recognize you before I go on.

Mr. PICKERING. I have been following with interest the line of questioning, Mr. Chairman. I have two concerns. One, the Federal court does not answer the question, at least in terms of how it has been explained—it is a new Federal court idea—of what to do about detainees who are not convicted. So we know that that is a problem.

Secondly, I personally have no objection to finding useful ways to bring together the judicial system with the protection of classified information, and we have a statute that does that. If Mr. Jaffer feels that is inadequate, then maybe there is an opportunity here to propose something for your delectation that would, in fact, improve that particular process. We have no objection to that. At least I have no objection to that.

I have a serious concern that if, with all the euphemisms that have been used, the new Federal court is designed to prejudice the trial in a way to assure convictions by denying rights that are otherwise available to Americans and others under our judicial system, then I have an objection. Why not just use the Article III courts? If it is an attempt to get halfway between the old military commission struck down by the Supreme Court and the Article III courts, then we are, in a sense, moving in the right direction, but not sufficiently, in my view. So those remain important.

The whole question of torture and its role I addressed in a few brief words. I am not the expert on this issue. I have read a lot about it. I am convinced it is a highly unreliable and reprehensible technique, and that it shouldn't be used; that it has muddied the process of bringing people who, with every other piece of evidence, are undoubtedly convictable in court, and it, as a result, has destroyed the capacity to deal with that set of issues.

I would think it would require an act of the most careful, painstaking, and infinitely detailed kind of research, with total access to every interchange with the gentlemen concerned who have been subject to these techniques to begin to make head or tails out of whether a particular technique, a particular line of questioning produced a particular result.

I know from what I have read that experienced interrogators find the use of these kinds of techniques in the main as destroying their capacity to effect the kind of relationship with the person being interrogated that produces the kind of useful information that is very valuable.

But I think your question is entirely germane, it is an extremely useful one, but I think it points down the road of the frustration of trying to find the answer to this question: Under any cir-

cumstances that we can conceive of, has this particular set of techniques produced the reliable sort of information that is the kind of silver bullet that Mr. Jaffer would like to have us believe is, in fact, the product of this, but where everything else is in an inscrutable and unopenable black box.

Mr. CONYERS. Attorney Bruce Fein.

Mr. FEIN. I would like to make three observations about Mr. Jaffer's remarks, which I find a little frightening.

First, I think it is specious to say because torture, waterboarding was used, and some information by that individual who was interrogated was useful, therefore only the torture was the way to bring it about, because, as I think Ambassador Pickering pointed out, there are those skilled interrogators who said, well, many of these individuals were giving useful information before the waterboarding occurred, and there is no reason why they couldn't have gotten the information otherwise.

But putting that aside, there really is no limit I see, principle, to stopping at waterboarding. How about the rack and screw? How about threatening the family of the individual and say, we are going to kill your son or your daughter? If everything is subordinate to trying to get reliable information, then we have lost our badge of being civilized people. Anything goes.

And then the last thing that is also very troublesome is we do not have a culture whereby you can have a deterrent effect on these heinous techniques, because even though you could use the information against the alleged terrorist, you prosecuted the individual who was violating our own laws in the process, because we have a situation where they act with impunity, and Mr. Jaffer didn't say, well, we should be prosecuting those who used waterboarding or things that violated our laws that this Congress enacted. It was just like they washed out of the picture. But if you want to have any deterrence right now, the only way you get it is by excluding that evidence at a criminal trial.

Mr. CONYERS. The ever-patient Laura Murphy.

Ms. MURPHY. You see me wiggling over here.

Mr. Chairman, I don't even know where to begin with some of these ideas.

Our Article III courts are in great shape. They have worked for over 150 years. We have the Classified Information Procedures Act that is working.

We need to prosecute terrorists in Article III court. We elevate them as war heroes when we try to use military commissions that are deeply flawed, that allow hearsay evidence that has not been tested through the Supreme Court process.

Military commissions have tried five people. The Justice Department has prosecuted over 400 people in Article III courts.

We need accountability for terrorism. We know that terrorism—I am sorry—for torture. We know that torture is illegal. We need to make sure that Mr. Durham fully investigates people all the way up the food chain in the former Administration who authorized this.

That the President, the former President, can walk around with impunity and say that he gladly authorized waterboarding is just

an insult and an offense to our values and to the treaty obligations that we hold dear in our American law and jurisprudence.

But the other thing, I wanted to go back to your first question about what should you do. I think that if you recall those days right after 9/11, we worked very closely together, Mr. Chairman. And the Congress was put under so much pressure not to hold hearings, and you and Mr. Sensenbrenner figured out how to hold hearings nonetheless.

We need hearings on the PATRIOT Act, and we need to start as soon as possible. There are many abuses of the PATRIOT Act that are still unresolved. There are a number of inspector general reports that specifically go to the use of national security letters where the FBI has egregiously violated the statute. There is section 215 that needs to be fixed. There is the "lone wolf" provision, which the Justice Department says it rarely, if ever, uses.

So I think we need to start the 112th Congress with a strong defense of Article III courts. We need to get ready for the PATRIOT Act reauthorization as soon as possible, and even though you don't—you will not control the hearings, Mr. Conyers, I think it is very important that we host conversations.

And there were bipartisan discussions about the PATRIOT Act, patriots defending the Bill of Rights. There are organizations and institutions that want to work in a bipartisan fashion to look at the PATRIOT Act, reopen it, and make sure that Congress has serious consideration.

And the last thing that I will say is this whole issue around the authorization for the use of military force makes the issues that you have just been discussing go on steroids. We will be confronted with so many new challenges if this Congress abrogates its responsibility and just quickly expands a declaration of war.

The Constitution gave the United States the Congress to declare war for a reason. And so if there is any expansion of our war efforts away from the original authorization of the use of military force, Congress should have very, very detailed hearings about that.

And you will be under particular pressure, Mr. Conyers, because Chairman Buck McKeon has said—incoming Chairman Buck McKeon has said that he wants to persist in the Armed Services Committee. Incoming Chairman Lamar Smith has said that he wants to look at this. Senator Lindsey Graham has said that he is going to push for this. So you will be confronted in very short order at the very beginning of the next Congress with several issues.

So accountability for torture, taking the reauthorization of the PATRIOT Act seriously, making sure that there is no expansion of the authorization for the use of military force are just three issues.

And you have a remarkable track record of bringing groups together from all sides of the aisle, and even if you don't have hearings, you should have meetings. You should invite us in to meet with you and to brief Members on your side of the aisle if at all possible.

Mr. CONYERS. But we can have forums which are not official meetings.

Ms. MURPHY. Absolutely. Public forums. And that is what we did when we had the PATRIOT Act. Remember the leadership of the

House refused to give you the permission to hold those hearings, but you held them anyway, and they were highly——

Mr. CONYERS. I think they were down in the basement somewhere.

Ms. MURPHY. They were. They were in the basement of the Rayburn Building.

But that is what we are going to have to go back to.

Thank you, Mr. Chairman.

Mr. CONYERS. I now turn to Professor Michael Lewis, who has been very patient.

Ms. MURPHY. I thank you, Mr. Chairman.

I wanted to mention one thing Mr. Fein had said about the information obtained from Abu Zubayda using waterboarding. He said that there is no evidence that supports that the use of that technique was the result, but the fact of the matter is that Zubayda had resisted all the other techniques. He had been in the hands of trained interrogators for long periods of time without having given up the information that eventually led to the capture of Khalid Sheikh Mohammed. It was only after he was waterboarded that that occurred.

Now, having said all of that, there is no question that enhanced interrogation techniques and information obtained from them should have—has no place in criminal courts or criminal trials. However, that doesn't mean that it has not affected intelligence gathering. Those are two separate issues and two separate ways or reasons for using the techniques.

So you may have a need to gather intelligence in a short period of time that might include the use of enhanced interrogation techniques; however, those cannot possibly be used to convict the people afterwards.

And you had asked about where we should go in terms of process for these individuals. And the fact of the matter is the Congress of the United States has gone through three iterations to try to make the Military Commissions Act better and better and better, and in each iteration it has come closer and closer to being, I think, the full protections required to give, I think, fair and legitimate trials. I think the greatest——

Mr. CONYERS. But, of course, people conducting the trials can be sergeants on the battlefield or anybody, whatever group of people get called together.

I am still extremely skeptical that military commissions and the way that they are brought together could ever even come close to the safeguards in a regular court.

Mr. LEWIS. There is no doubt that they are not going to be the same as the safeguards in the regular court, and part of the reason for that is the evidentiary problems that I discussed previously. The evidentiary problems where soldiers are the ones gathering the information just are not going to meet Article III court standards, and therefore you are not going to have the evidence necessary in the Article III court to convict people that otherwise probably would be.

Mr. CONYERS. And that is why I thought that I heard you suggesting that you were in somewhat favor of Article III courts yourself.

Mr. LEWIS. I am in favor of Article III courts where the defendants are apprehended by law enforcement, even overseas. I don't have any problem with the idea of Ghailani being tried in Article III courts; however, I think you would have a very different case with trying to try Khalid Sheikh Mohammed or Abu Zubayda or others like that in Article III courts because the evidentiary basis is fundamentally flawed based upon who it is that brought them in.

The other question that you asked earlier that I think will also segue to Mr. Scahill at some level is the question of our relation with foreign nations and how we can best work with them in terms of the way we are prosecuting the war on terror. There are a lot of anecdotal discussions, such as the one that Mr. Scahill presented today, where al-Qaeda members or al-Qaeda supporters being enhanced by some of the actions that our Special Forces people take and some of the tragic mistakes that they have made on occasion. And there is no question that anecdotally that that is true.

But I think it is important to look at much broader studies, and there are some metastudies that have been done, particularly in the border regions of Pakistan, that indicate that overall the effect of the U.S. military's actions there is a net positive rather than a net negative.

And I would strongly commend the study done by Professor Echeverri-Gent down at the University of Virginia because he did a very detailed analysis of public opinion in Afghanistan based upon open-source information over there. And while, yes, an individual might be turned against us because of a poorly planned or poorly executed attack, broadly al-Qaeda is not popular in that region. And the two choices to oust al-Qaeda are either the United States or the Pakistani military. And the fact of the matter is the Pakistani military tends to use artillery, tends to use artillery very indiscriminately, and has caused tremendous amounts of civilian havoc when they have attempted to—rather ineffectively in the opinion of the people in Pakistan—attempted to fight al-Qaeda. And they see the United States drone strikes and the United States Special Forces operations as being far more effective in countering al-Qaeda. They are not saying they are perfect, but they are the better of the choices, according to the people on the ground in Pakistan.

As I said, I would commend that study to you for that review.

Mr. CONYERS. Thank you. We will examine that study.

I will recognize now Jeremy Scahill.

Mr. SCAHILL. Just to respond to what Professor Lewis just said. I think that one thing that we have learned over the past 10 years is that these polls that are done in Pakistan and Afghanistan are just wildly inaccurate. It was abundantly clear to me not just anecdotally, but also from talking to U.S. forces as well, that the strength of the Taliban is growing within Afghanistan and also within Pakistan. And let us remember, we are not fighting al-Qaeda in Afghanistan.

According to the outgoing National Security Adviser, General Jim Jones, there are less than 100 al-Qaeda operatives in Afghanistan with no effective ability to strike the United States.

I also talked to senior Taliban officials from the Mullah Omar government, who expressed a concern that when the United States is killing the leadership of the Taliban, that they are killing the only people that would be capable of negotiating a nonviolent solution to the conflict there, and in some cases the individual commanders who are killed are replaced by commanders who are far more radical. And, in fact, some of Mullah Omar's envoys—Mullah Omar being the head of the Taliban in Afghanistan—some of his envoys have actually been butchered by new Taliban commanders because they feel that Mullah Omar isn't radical enough.

So I think we have to be very careful when we take any poll and hold it up and suggest that it is evidence that we are sort of winning hearts and minds, because I think it is clear to many within our Armed Forces that that is just not the case.

To respond to something that Mr. Jaffer said, I think that I would echo Professor Fein's comments as well, that if we do not hold past committers of torture accountable, we have no mechanism by which to dissuade future acts of torture. The most effective way to stop torture is to hold torturers accountable.

I think it is outrageous that we didn't have congressional intervention of any strength in the case of the destruction of the CIA torture tapes. I think that there should have been subpoenas issued to Jose Rodriguez and other CIA officials to ask them about their role, to ask them if there were only three tapes, or if more had been destroyed.

I think Congress should have used its subpoena power to go after those who were committing torture and also the officials who ordered it and authorized it. I think that is one of the great shames of the era of the Democratic control of both Houses of Congress is that there was not enough done to ensure that if the President wasn't going to hold the torturers accountable, that the Congress would.

I would also recommend that people read Matthew Alexander's book, How to Break a Terrorist. He was an interrogator in Iraq, and he was instrumental to gathering intelligence using nontorture techniques that led to the capture of Abu Musab al-Zarqawi, and I would recommend that the Committee review his work as well.

In closing, I want to say that I think that the Congress needs to not just limit its investigation of these torture techniques to the CIA. Torture was also committed at Camp Nama in Iraq, which was run by the Joint Special Operations Command. And I think that the failure to use the subpoena power is failing the American people. We have to have accountability, or it is going to continue under Democratic and Republican administrations.

Mr. CONYERS. Yes, Attorney Jaffer.

Mr. JAFFER. Mr. Chairman, I appreciate the opportunity.

Let me be clear. Torture is wrong under any and all circumstances, and there is no question that people who engage in torture should and must be prosecuted to the fullest extent of the law. Let there be no lack of clarity on that question. I think that everybody on this panel can agree on that question.

With respect to the CIA program, you have to remember that, first of all, there are a very narrow number of detainees that were held in this program. This was not a program sort of run sort of,

you know, behind closed doors with no monitoring at all. This was a program where the CIA said, look, we have got these folks we are capturing. We need to figure out what to do with them. They are high value. We believe they have immediate intelligence value. What should we do?

So they came up with a series of plans. They went to the policy structure of the White House and the Department of Justice and they said, what should we do as a policy matter and as a legal matter? And the Department of Justice came back with a set of legal opinions.

Now, those legal opinions, I think the fact of the matter is there were deep flaws in many of the legal opinions associated with that time period. Now, the time constraints were huge. People were working very quickly. Whatever excuses you might make, there is no question that there were challenges to the legal opinions, and they were properly withdrawn by the Justice Department later on down the road, and other ones were—continued to be withdrawn. And a better, more careful legal analysis was done down the road.

That being said, the CIA came to the Administration and said—they came to the White House and said, what should we do as a policy matter, and what can we do within the law? And then they were given legal guidance, and they were given policy guidance. They were told, here is what the law says you can do. And they were told as a matter of policy, the policy of the United States is to engage in these certain techniques. Certain techniques, as the President has now said in his book, were taken off the table. Certain techniques were left on the table. And then the CIA went forward and executed what the Justice Department told them was lawful and what the policy part of the government said is what we wanted to do.

Now, how can we prosecute line CIA officers? How can we justify prosecuting line CIA officers who did what they were told the law permitted them to do and the government's policy was to do? And that seems to me to be just as much of a crisis as all of the problems with military commissions and other levels of process or holding people without trial.

How can you possibly take a government employee, any government employee sitting in this room, and say, here is what the law lets you do, and here is what I, as your boss, the Commander in Chief, and the head of the executive branch want you to do, and then say, oh, but down the road we are going to prosecute you for doing just what we told you to do? That seems to me to be just as much of a crime.

Mr. CONYERS. We have been joined by Professor Mary Ellen O'Connell, professor of law at the University of Notre Dame. She is a designated professor of law at Moritz College of Law at Ohio State University.

We know why she was detained, and we would like, even at this late date, to invite her to discuss her statement with us and any conversations among the panel that you may have heard coming in the room.

Welcome, Professor O'Connell.

TESTIMONY OF MARY ELLEN O'CONNELL, ROBERT AND MARION SHORT CHAIR IN LAW AND RESEARCH PROFESSOR OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW, UNIVERSITY OF NOTRE DAME LAW SCHOOL

Ms. O'CONNELL. Thank you very much, Mr. Chairman.

In fact, my statement does touch on the comments that were just being made. So with your permission, I have a very succinct 5-minute statement. And I do begin with apologies from Delta. They are very sorry about my delay.

Mr. Chairman, ladies and gentlemen, let me also express my deep appreciation for the invitation to speak before you today. In my very brief time I will focus on the issue of perhaps greatest concern to many of us today, and that is targeted killing of persons away from any battlefield.

Through the use of drones and other means, the United States is carrying out killings that fundamentally violate the human right to life. The justification we have been given for these killings is fundamentally the same justification we were given for the use of torture. It consists of an erroneous definition of "combatant" accompanied by a plea of necessity along the lines you just heard. But as with the arguments in favor of torture, the arguments for targeted killing do not meet the test of legality, morality, or effectiveness.

Let me address each of these tests very, very briefly. First, international law absolutely prohibits the intentional targeting of persons for killing outside of the hostility situations of armed conflict. International law does not relax this prohibition, except in the clear situation of actual armed conflict hostilities. In such hostilities, the regular armed forces of the sovereign state may intentionally kill members of the opposing armed forces and any civilians who are directly participating in armed conflict.

International law defines armed conflict as situations of organized armed groups engaged in intense armed fighting. Today, the United States is engaged in such fighting in only one place, and that is Afghanistan. Ask any soldier where U.S. combat operations are occurring today, and they will tell you, Afghanistan. It is only there that the United States may lawfully carry out targeted killing.

Second, not only is this the law, it is the right ethical position. All human beings are endowed with dignity which we protect through human rights, including the human right to life. Through the centuries, humanity has constantly striven to enhance respect for life. We have prohibited war through the U.N. Charter, and we have condemned terrorism because of its violence against human life. America's targeted killing program is a serious retrograde step in the moral advancement of humanity. It demonstrates grave disregard for the right to life. But ladies and gentlemen, if law and morality are not enough, we can also add that empirical data clearly shows that military force is ineffective to end terrorist groups.

In 2008, the Rand Corporation released a study that concluded: All terrorist groups will eventually end, but how do they end? Answers to this question have enormous implication for counterterrorism efforts. The evidence since 1968 indicates that most groups have ended because 1, they joined the political proc-

ess; or two, local police and intelligence agencies arrested or killed key members. Military force has rarely been the primary reason for the end of terrorist groups. This has significant implications for dealing with al-Qaeda and suggests fundamentally rethinking post September 11th U.S. Counterterrorism strategy."

We are told with respect to targeted killing as we were with regard to torture that post 9/11 circumstances require extraordinary measures. However, some of our leading ethicists responded forcefully to the arguments in favor of torture by saying that the absolute ban on torture in existence at the time that legal memos were prepared by the White House and DOJ, a moral imperative required that absolute ban regardless of the consequences. And we could say the same for targeted killing.

But as in the case of torture, it turns out that doing the moral thing, doing the legal thing is doing the effective thing against terrorism. Targeted killing is unreliable—against terrorism.

Torture is an unreliable means of interrogation that trained interrogators, including my husband, have rejected out of hand. Similarly, some of the best counterterrorism experts reject the use of military force in efforts against terrorism. Terrorists seek to undermine lawful institutions to sow chaos and discord and to foment hatred and violence. Upholding our lawful institution, holding to our legal and moral principles in the face of such challenges is not only the right thing to do, it is a form of success against terrorism that can lead to the end of terrorist groups.

Apparently, President Obama himself is aware that targeted killing by drones will not achieve greater national security in the face of terrorist threats. Bob Woodward writes in his new book, Obama's Wars, "despite the CIA's love affair with unmanned aerial vehicles such as Predators, Obama understood with increasing clarity that the United States would not get a lasting durable effect with drone attacks." If we care about the rule of law, fundamental morality and national security, we will call on President Obama to end targeted killing. Thank you.

[The prepared statement of Ms. O'Connell follows:]

PREPARED STATEMENT OF MARY ELLEN O'CONNELL

Testimony of Mary Ellen O'Connell

before the Subcommittee on the Constitution, Civil Rights and Civil Liberties

Committee on the Judiciary

United State House of Representatives

December 9, 2010

The Rights v. Security Myth[1]

My primary purpose today is to try to dispel the myth of a human rights-national security tradeoff. Rights and security are intimately interrelated. Doing the right thing in terms of human rights is also the right thing in terms of American national security. Our nation is not facing tough tradeoffs. It is facing tough myths that need dispelling.

One particularly stubborn part of the trade-off myth is that the President may exercise extraordinary wartime privileges to kill and detain with respect to persons anywhere in the world. In fact, since the end of combat operations in Iraq, the United States has been involved in combat operations in only one country: Afghanistan. The Afghan conflict is a counter-insurgency war being fought by the government of Afghanistan with the assistance of outside troops, including Americans. The United States began its current involvement in Afghanistan in October 2001 in a war of self-defense as permitted by the United Nations Charter in response to the 9/11 attacks. That war ended in June 2002 when Afghan leaders replaced the ousted Taliban government and replaced it with a government friendly to the United States.

The only place where it is lawful today for the United States to intentionally target and kill persons is in Afghanistan. The only persons who may plausibly be held without trial until the end of hostilities are detainees in Afghanistan. With respect to individuals outside Afghanistan of concern to the United States, the U.S. must treat them as criminal suspects, just as it is treating Julian Assange and just as it is treating a number of persons within our own borders.

To do otherwise, weakens American security by fueling anger and hatred in response to our law violations. We also fuel anger by extending rights to people in the U.S. and in Europe that we do not extend in poorer regions. Law violations and disparate treatment weakens America's ability to lead in strengthening the rule of law in the world. Fundamentally, it will be respect for law and rejection of violence that will give Americans the greatest security.

Despite these truths, the United States is still operating under the flawed legal analysis that was developed after 9/11 by government lawyers trying to justify torture. Those arguments have been widely and roundly condemned as highly flawed. Yet, the same basic legal reasoning

[1] This testimony draws on an article scheduled for publication in December 2010, *The Choice of Law Against Terrorism*, JOURNAL OF NATIONAL SECURITY LAW (vol. 4:2) available at http://www.jnslp.com/read/vol4no2.asp.

underpins American's current use of targeted killing and to justify the detention without trial of many persons.

The United States is carrying out targeted killing with drones, helicopter gunships, cruise missiles fired from Navy vessels, bomber aircraft, and other means to kill individuals without warning in Pakistan, Somalia, and Yemen. The targets of these attacks are suspected members of al Qaeda, various Taliban groups, and other militant organizations. It was only on 9/11 that the U.S. began to treat such persons as anything but common criminals. The same lawyers who wrote the torture memo, who devised the detention policy, who tried to make Guantanamo Bay a legal black hole, developed specious legal arguments for the proposition that persons outside of armed conflict hostilities could be combatants and killed as if in a war.

Before September 11, 2001, the United States applied its criminal law to terrorism suspects.[2] President Ronald Reagan explained that terrorists have and should have the status of criminals, not combatants. He said that to "grant combatant status to irregular forces even if they do not satisfy the traditional requirements … would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves."[3]

In 2001, U.S. Ambassador to Israel, Martin Indyk, stated on Israeli television in connection with Israeli targeted killing of suspected terrorists: "The United States government is very clearly on the record as against targeted assassinations. They are extrajudicial killings, and we do not support that."[4] The U.S. position with respect to terrorists has been to treat them as criminals they are. After attacks by al Qaeda on American targets in 1993, 1998, and 2000, the U.S. used the criminal law and law enforcement measures to investigate, extradite, and try persons linked to the attacks.[5]

Our allies who dealt for years with determined problems of terrorism have taken the same approach. The British, Germans, Italians, Indians, and others have all faced terrorist challenges

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[2] *See* Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror*, 43 COLUM. J. TRANSNAT'L. L. 435 (2005).

[3] Ronald Reagan, *Letter of Transmittal*, The White House (January 29, 1987), *reprinted in* 81 AM. J. INT'L L. 910, 911 (1987). *But see* Hans Peter Gasser, *An Appeal for Ratification by the United States*, 81 AM. J. INT'L L. 912 (1987) (response).

[4] Joel Greenberg, *Israel Affirms Policy of Assassinating Militants,* N.Y. TIMES, July 5, 2001, at A5.

[5] After attacks on the U.S. embassies in Kenya and Tanzania in 1998, the U.S. used law enforcement techniques but also bombed sites in Sudan and Afghanistan. These bombings were controversial. *See, e.g.*, Jules Lobel and George Loewenstein, *Emote Control: The Substitution of Symbol for Substance in Foreign Policy and International Law*, 80 CHI.-KENT L. REV. 1045, 1071 (2005).

that they dealt with using law enforcement methods.[6] When becoming a party to the 1977 Additional Protocols to the 1949 Geneva Conventions,[7] the British appended the following understanding to their acceptance: "It is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation."[8] France made a similar statement on becoming a party to the Protocol.[9]

In the days following the September 11 attacks, however, the United States asserted a different choice of law to deal with the perpetrators. President Bush declared a "war" on terrorists that "will not end until every terrorist group of global reach has been found, stopped and defeated."[10] In the months that followed, we saw the administration invoke the core privileges available to lawful belligerents during an armed conflict, including an expanded right to kill, a right to detain without trial, and a right to search and seize cargo of foreign-flagged vessels.[11]

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[6] For a detailed account of the British struggle against the IRA and other counter-terrorism efforts, see LOUISE RICHARDSON, WHAT TERRORISTS WANT: UNDERSTANDING THE ENEMY, CONTAINING THE THREAT (2006).

[7] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

[8] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Reservation/Declaration (2 July 2002), *available at* http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument.

[9] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Reservation/Declaration (11 April 2001), *available at* (in French) http://www.icrc.org/ihl.nsf/NORM/D8041036B40EBC44C1256A34004897B2?OpenDocument.

[10] *See* George W. Bush, President's Address to the Nation on the Terrorist Attacks, 37 Weekly Comp. Pres. Doc. 1301 (Sept. 11, 2001); President's Address to a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11, 37 Weekly Comp. Pres. Doc. 1347, 1348 (Sept. 20, 2001); Training Camps and Taliban Military Installations in Afghanistan, 37 Weekly Comp. Pres. Doc. 1432 (Oct. 7, 2001); President's Address Before a Joint Session of the Congress on the State of the Union, 39 Weekly Comp. Pres. Doc. 109 (Jan. 28, 2003), *all available at* www.gpoaccess.gov/wcomp/index.html (Bush said the US was in a "war on terror' that would last 'until every terrorist group of global reach has been found, stopped and defeated".).

[11] Mary Ellen O'Connell, *Ad Hoc War*, *in* KRISENSICHERUNG UND HUMANITÄRER SCHUTZ—CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION 405 (Horst Fischer et al, eds., 2004).

It took some time before it was apparent that these privileges were being invoked outside of the armed conflict in Afghanistan that began on October 7, 2001. The first public evidence came on November 13, 2001, when President Bush issued an Executive Order titled "Detention, Treatment, & Trial of Certain Non-Citizens in the War Against Terrorism" which stated that terrorist suspects would be tried before military tribunals and would be subjected to military detention, irrespective of where the person was captured.[12] Detention would be based on a person's associations not his actions or the factual situation in which he found himself. This was a novel assertion of when armed conflict privileges could be claimed. The Executive Order made no reference to armed conflict duties nor did it take any stand on whether other states should also have the same right to treat terrorist suspects as enemy combatants.

By January 2002, the prison at Guantánamo Bay was opened. Within a few years, the public learned that some detainees had been brought there from Malawi, Bosnia, Algeria and other places where no active hostilities were occurring.[13] The first known killing under the "global war" declaration occurred on November 3, 2002. The CIA, based in Djibouti, fired a Hellfire missile from a Predator drone at a car in Yemen, killing the six men inside. Yemen recognized no armed conflict on its territory at the time of the strike, nor was the United States at war with Yemen. The CIA carried out the operation because the Air Force questioned its legality. National Security Adviser Condoleezza Rice, however, argued in an interview on Fox News that the killings were lawful by saying, "We're in a new kind of war, and we've made very clear that it is important that this new kind of war be fought on different battlefields." [14] Also in 2002, a Department of Defense official said al Qaeda suspects could be killed without warning wherever they are found. Charles Allen said the U.S. could target "al-Qaeda and other international terrorists around the world, and those who support such terrorists."[15] In 2006, a Department of

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For a prescient article respecting the problems of trying to fit crime into the armed conflict legal paradigm, see Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1 (2002).

[12] Executive Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001).

[13] The United States Department of Defense maintains a web page with extensive documentation relevant to Guantánamo Bay. *See Detainee Related Documents*, DEPARTMENT OF DEFENSE, http://www.dod.gov/pubs/foi/detainees/ (last updated May 24, 2010). *See also* ANDY WORTHINGTON, THE GUANTÁNAMO FILES, THE STORIES OF THE 774 DETAINEES IN AMERICA'S ILLEGAL PRISON (2007).

[14] *Fox News Sunday with Tony Snow* (Fox News Network television broadcast Nov. 10, 2002) (Lexis News library, Allnws file).

[15] Anthony Dworkin, *Law and the Campaign against Terrorism: The View from the Pentagon*, CRIMES OF WAR PROJECT (Dec. 16, 2002), http://www.crimesofwar.org/print/onnews/pentagon-print.html.

Justice official said in Congressional testimony that the President could order targeted killings inside the United States on the basis of the new kind of war—the global war on terror.[16]

State Department Legal Adviser, Dean Harold Koh, has made it clear that the U.S. no longer uses the term "global war on terror." Rather, drone strikes, detention without trial and military commissions in the case of persons not involved in the hostilities in Afghanistan are now being based on the view that "as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law."[17] The Legal Adviser emphasized that in his view this is a different legal paradigm than the "global war on terrorism."[18]

In either case, whether "a global war on terror" or an "armed conflict against al Qaeda and the Taliban," these are new positions for the U.S., apparently taken up in order to claim expanded wartime rights with respect to targeted killing, detention, and judicial procedure. Once an armed conflict is triggered, certain peacetime human rights protections no longer apply or no longer apply in the same way. Under customary international law it is evident that in the emergency situation of armed conflict hostilities, governments may detain opposition fighters and even use lethal force if reasonably necessary.[19] States parties to certain human rights treaties must formally derogate from those treaties to be able to lawfully detain without trial or use lethal force at the more flexible level applicable in armed conflict. Most human rights continue during armed conflict as in peace, but the content of rights, such as the right to life may differ depending on the situation in which it is invoked. According to the International Court of Justice in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, "whether a particular loss of life… is to be considered an arbitrary deprivation of life contrary to Article 6 of

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[16] Katerina Ossenova, *DOJ Official: President may have Power to Order Terror Suspects Killed in US*, JURIST (Feb. 5, 2006), http://jurist.law.pitt.edu/paperchase/2006/02/doj-official-president-may-have-power.php.

[17] Harold Hongju Koh, *The Obama Administration and International Law*, Annual Meeting ASIL, U.S. DEPARTMENT OF STATE (Mar. 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm. At time of writing, July 2010, the hostilities in Iraq had so subsided that U.S. military were following peacetime rules of engagement. *See infra* note 101.

[18] *See* Ari Shapiro, *U.S. Drone Strikes Are Justified, Legal Adviser Says*, NPR (Mar. 26, 2010), www.npr.org/templates/story/story.php?storyId=125206000.

[19] These customary international law rights are not found restated as affirmative rights but may be deduced from the customary international law duties governing targeting and detention. *See generally* 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts and Louise Doswald-Beck eds., 2005).

the [International Covenant on Civil and Political Rights], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."[20]

Other human rights conventions similarly couch the right to life in relative terms, depending on the circumstances. Thus, they reflect that in armed conflict hostilities lives may lawfully be taken in circumstances that would be unlawful outside such situations.[21] Governments reacting to violence in circumstances less than armed conflict may only lawfully use lethal force in situations of absolute necessity.

Within an armed conflict, lawful combatants are not restricted to killing only to save a human life immediately. Opposing combatants and civilians taking a direct part in hostilities may be killed in a zone of armed conflict hostilities unless they surrender or an alternative is available and dictated by the principle of humanity. In the International Committee of the Red Cross Customary Law Study, the right to target combatants but not civilians is the first rule:

> Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.[22]

This rule is supported by a number of legal authorities, including, perhaps most importantly, Additional Protocol I of 1977 to the 1949 Geneva Conventions:

> Article 43(2) Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
>
> Article 51(3) Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

In short, lawful combatants need to know two things with respect to the combatant's privilege to kill: They must know they are targeting combatants or persons taking direct part in hostilities, and they must know they are killing in a situation of armed conflict.

The Obama administration argues that Congress's Authorization for the Use of Military Force (AUMF) passed after the 9/11 attacks gives the President authority to attack suspected terrorist anywhere in the world. The AUMF, however, restricts the President to measures that are "necessary" and "appropriate." Because targeted killing and detention without are generally

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[20] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8) [hereinafter Nuclear Weapons].

[21] *See* NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW xiii (2008).

[22] I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 42, at 3.

unlawful anywhere outside of Afghanistan, they are hardly "appropriate."

Professor Anderson correctly concludes: "[A] strategic centerpiece of U.S. counterterrorism policy rests upon legal grounds regarded as deeply illegal…by large and influential parts of the international community."[23]

Not only is targeted killing and detention without trial generally unlawful in the terrorism context, these battlefield practices do not succeed in ending terrorism:

In 2008, the Rand Corporation released a study that concluded:

> All terrorist groups eventually end. But how do they end? Answers to this question have enormous implications for counterterrorism efforts. The evidence since 1968 indicates that most groups have ended because (1) they joined the political process or (2) local police and intelligence agencies arrested or killed key members. Military force has rarely been the primary reason for the end of terrorist groups, and few groups within this time frame achieved victory. This has significant implications for dealing with [al Qaeda] and suggests fundamentally rethinking post-September 11 U.S. counterterrorism strategy. [24]

We are told with respect to detention without trial and targeted killing – as we were with regard to torture – that post-9/11 circumstances require extraordinary measures. Some of our leading ethicists countered those claims for torture by arguing that the absolute ban on torture must be respected as a moral imperative, regardless of the consequences.[25] We could say the same about targeted killing, indefinite detention, and military commissions. But, as in the case of torture, it turns out that doing the moral thing is also the effective thing. Torture is an unreliable means of interrogation that trained interrogators reject,[26] and, some of the best counter-terrorism experts similarly reject the use of military force in efforts against terrorism. Terrorists seek to undermine lawful institutions, to sow chaos and discord, and to foment hatred and violence. Upholding our lawful institutions, holding to our legal and moral principles in the face of such challenges, is not only the right thing to do – it is a form of success against terrorism that can lead to the end of terrorist groups.

Apparently, President Obama is aware that targeted killing by drones will not achieve greater national security in the face of terrorist threats. Bob Woodward writes in his new book, *Obama's Wars*:

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[23] Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* 16 (May 11, 2009), http://ssrn.com/abstract=1415070.

24. *See* SETH G. JONES & MARTIN C. LIBICKI, HOW TERRORIST GROUPS END: LESSONS FOR COUNTERING AL QA'IDA XIII (2008), *available at* http://www.rand.org/pubs/monographs/2008/RAND_MG741-1.pdf.

25. *See, e.g.*, Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005).

26. Peter Bauer, Statement on Interrogation Practices, Statement in lieu of Appearance Before the International Commission of Jurists (August 29, 2006), *available at* http://ejp.icj.org/IMG/Bauer_statement.pdf. *See also* Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L. J. 1231 (2005).

"Despite the CIA's love affair with unmanned aerial vehicles such as Predators, Obama understood with increasing clarity that the United States would not get a lasting, durable effect with drone attacks."[27]

[27] BOB WOODWARD, OBAMA'S WARS, 284 (2010).

Mr. CONYERS. Professor Lewis, you are the beginning of everyone having the last word.

Mr. LEWIS. I just actually wanted to comment on the assertion that international law has clearly determined that the boundaries of the battlefield are based on geopolitical lines. That has never been how that has been understood in the past. In order to make international law, you have to either have a clear treaty statement

indicating what international law says, and there is no clear treaty that indicates what the boundaries of the battlefield are or where the law of armed conflict applies or does not apply.

And so what you are left with is customary international law. In order to make customary international law, you must show not only an agreement of jurists and commentators about its content, which I don't believe exists, but even more importantly, you have to show some form of state practice that supports the recognition that there is a legal obligation to perform in that way.

And I can think of no example at all of state practice in which a state has said I will not strike an enemy because they have crossed a geopolitical line. And I can think of many examples in which the exact opposite is true. One that was brought before the Government Oversight Committee earlier this year by Professor Glazier, who is generally an opponent of the Bush administration policies and these sorts of actions in general, was the fact that the United States pursued the Vietcong and the North Vietnamese army across the border into Laos and Cambodia, and yet that was not a violation of international law. Those forces were attempting to escape by finding sanctuary across a line. And more importantly, where you have non state actors doing the same thing, the FARC attempting to find sanctuary in Colombia—not in Colombia, sorry, from Colombia in Ecuador, and Colombia crossed the border and struck into FARC camps there. That was not deemed to be a violation of international law. And perhaps the best example is the Hezbollah war in Lebanon.

According to Professor O'Connell's test, there was no armed conflict in Lebanon at the beginning of that war. There were sporadic rocket attacks, sporadic cross-border raids by Hezbollah, but that was it. And the Israeli response was to use the tools of armed conflict and invade Lebanon to go after Hezbollah. And the conflict between Hezbollah and Israel was understood by everyone to be governed by the laws of armed conflict, not to be an improper use of force. Where Israel was criticized, and it was heavily, was because they had allegedly violated the laws of armed conflict, they hadn't been proportional, they hadn't used military necessity, they had used banned cluster munitions, et cetera.

But the whole conversation throughout the whole international legal community was: Have they complied with the laws of war? The laws the war clearly applied to that conflict. And yet Professor O'Connell now is saying if the Taliban can cross into Pakistan, they are safe. If they can get to Yemen, they are safe. They cannot be struck there. We have to use law enforcement and that is the only method of attempting to capture them.

And if there is either an incapable government in Yemen or Somalia, or an unfriendly government that is unwilling to effect that capture, then they have found a sanctuary. And the claim that international law grants terrorists of all people a sanctuary in the war on terror, I don't believe is international law.

Mr. CONYERS. Professor O'Connell, what say you?

Ms. O'CONNELL. Thank you, Mr. Chairman. I really do appreciate that. I have just heard such a mixture of unusual and confusing comments about the law of armed conflict. I will just say very briefly a few things. First the definition of armed conflict is

well-known, and it has a territorial aspect. I just lead a 5-year study, produced a report of 42 pages for the International Law Association, the chief scholarly organization of international lawyers throughout the world.

My committee included the 18 most highly qualified experts on the law of armed conflict from 15 different countries, every region of the world. Our study concluded that, in fact, armed conflict takes place within a particular zone. And in internal armed conflict of the kind that is occurring in Afghanistan right now, a counterinsurgency armed conflict, is taking place within Afghanistan. It is the U.S.'s official position to respect the border between Pakistan and Afghanistan. And the U.S. well knows our lawyers well know that there is no right of hot pursuit on land to follow those individuals who may be crossing from Pakistan into Afghanistan to join the fight.

What is America's option? It is, of course, first and foremost to work with our ally, Afghanistan. We are in Afghanistan at the request of that government. And if they wish for us to work with the Pakistani authorities about preventing cross-border provocation, that is our obligation under international law.

If Afghanistan feels that it is being attacked by Pakistan, then it has the right, under U.N. charter, Article 51, to respond in self-defense. Afghanistan has said that it has not been a victim of an armed attack from Pakistan. Pakistan is well aware and is taking steps to pursue militant and violent action on its border. The International Court of Justice has told us that it is the obligation of Afghanistan and the U.S., when dealing with provocations that are less than the kind of armed attack that would give rise to Afghanistan's right of self-defense against Pakistan, that Pakistan's obligation is on its side of the border.

The U.S. can offer to help, but we cannot pretend that there is no sovereign boundary there and take the law into our own hands. These are very clear precedents. Professor Lewis should know all about them, I am very sorry that he has presented to you a different story today.

Mr. CONYERS. Professor Lewis, I will allow you a brief comment and then I will turn to Attorney Jaffer.

Mr. LEWIS. The only thing I say is there has to be some evidence of state practice to back up the idea to say I will not strike an enemy because they have crossed the geopolitical line and I am not aware of any state practice. Colombia didn't do it with the FARC; Israel didn't do it with Hezbollah; and we didn't do it with the Vietcong and the North Vietnamese army; Turkey doesn't do it with the PKK. I don't believe there is a state practice that says we agree that geopolitical lines are the end when the enemy is seeking sanctuary.

Ms. O'CONNELL. In addition to our report, I would like to also refer Professor Lewis to the Congo versus Uganda case in 2005 in the International Court of Justice, there is plenty of authority in that decision by the International Court of Justice, and that is where he needs to look for answers to his questions.

Mr. CONYERS. Would you submit that additionally to the Committee?

Ms. O'CONNELL. I would be very happy to. I brought a copy of my latest article that also has all the correct citations and responds to many of the other specific points that Professor Lewis made.

[The information referred to follows:]

The Choice of Law Against Terrorism

Mary Ellen O'Connell*

On December 25, 2009, a 23-year-old Nigerian, Umar Farouk Abdulmuttalab, took Northwest Airlines Flight 253 from Amsterdam to Detroit, Michigan. Shortly before landing, he allegedly attempted to set off an explosive device. Abdulmuttalab was immediately arrested by police and within a few days was charged by U.S. federal prosecutors with six terrorism-related criminal counts.[1] By early January 2010, Senators Joseph Lieberman and Susan Collins, among others, were calling for Abdulmuttalab to be charged as an enemy combatant under the law of armed conflict rather than as a criminal suspect.[2] Those critical of the criminal charges generally expressed the view that as a combatant, Abdulmuttalab could be interrogated without the protections provided to a criminal suspect during questioning, especially the right to have a lawyer present.[3] Attorney General Eric Holder said that he had considered charging Abdulmuttalab under the law of armed conflict but decided to follow past precedent and policy and charge him under anti-terrorism laws.[4]

A similar debate was already underway regarding Khalid Sheik Mohammed, the alleged mastermind of the 9/11 attacks. Khalid Sheik Mohammed was originally captured in Pakistan, far from any on-going hostilities. He was subsequently held in secret CIA prisons, where he was waterboarded 183 times, then transferred to the prison at the U.S. Naval base at Guantánamo Bay.[5] Attorney General Eric Holder announced that Khalid Sheik Mohammed would be tried in a civilian court on criminal charges of terrorism, but politicians of both major U.S. political parties called on the President to reverse the decision and try him and several

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1. Sebastian Rotella, *U.S. Had Planned To Interview Would-Be Bomber on Landing*, SEATTLE TIMES, Jan. 6, 2010, *available at* http://seattletimes.nwsource.com/html/nationworld/2010725368_airline07.html.

2. *See, e.g.*, Joseph Lieberman, *Lieberman, Collins Urge Administration To Move Abdulmuttalab into Military Custody*, JOE LIEBERMAN, UNITED STATES SENATOR FOR CONNECTICUT (Jan. 25, 2010), http://lieberman.senate.gov/index.cfm/news-events/news/2010/1/lieberman-collins-urge-administration-to-move-abdulmutallab-into-military-custody.

3. *Id.*

4. *Holder Defends Handling of Abdulmutallab*, CBS NEWS (Feb. 3, 2010), http://www.cbsnews.com/stories/2010/02/03/politics/main 6170460.shtml. The article links to a letter sent by Attorney General Eric Holder to Republican Congressional leaders.

5. *See* Jane Mayer, *The Trial: Eric Holder and the Battle over Khalid Sheikh Mohammed*, NEW YORKER (Feb. 15, 2010), http://www.newyorker.com/reporting/2010/02/15/100215fa_fact_mayer.

others before the military commissions put together after 9/11.[6] In the midst of the controversy over Khalid Sheik Mohammed's trial, Senator Lindsey Graham offered to support closing the prison at Guantánamo Bay in exchange for domestic legal authority to detain some terrorism suspects without trial and to try others before military commissions, as is permitted with respect to enemy combatants.[7]

On May 1, 2010, Faisal Shahzad attempted to blow up a vehicle in Times Square, New York. Within days, police apprehended him on an airplane about to leave the United States. Soon thereafter a number of U.S. officials, including Senator John McCain, called for Shahzad to be treated not as a terrorist criminal suspect but rather as an enemy combatant.[8]

While these debates continue, the Obama administration also claims a right, asserted by the Bush administration, to kill suspected terrorists wherever found as if they were combatants. The Bush administration first took action based on this claim in November 2002 when the CIA launched Hellfire missiles from an unmanned aerial vehicle, or drone, at a car on a road in a remote part of Yemen, killing all six passengers.[9] By early 2010, U.S. Hellfire missiles launched from drones were attacking suspected terrorists in Pakistan about twice a week.[10] This was a significant increase in attacks compared with the final year of the Bush administration. The United States has continued to launch drone attacks in Yemen and is also using drones in Somalia.[11] In March 2010, at a meeting of the American Society of International Law, in response to a question by the author, the Legal Adviser to the State Department, Dean Harold Koh, sought to justify these killings on a different basis than the Bush administration's "global war on terror." Koh said, rather, that the United States "is in an armed conflict with [al Qaeda], as well as the Taliban and associated forces. . . ."[12]

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6. *Id.*

7. Charlie Savage, *Closing Guantánamo as a Priority*, N.Y. TIMES, June 25, 2010, at A13.

8. *See* Andrew Cohen, *Times Square Bomb Suspect Faisal Shahzad and the Miranda Warning*, POLITICS DAILY (May 6, 2010), http://www.politicsdaily.com/2010/05/06/times-square-bomb-suspect-faisal-shahzad-and-the-miranda-warning/print/.

9. Doyle McManus, *A U.S. License To Kill*, L.A. TIMES, Jan. 11, 2003, at A1.

10. The United States government does not release official data on the drone program. This article draws on a variety of media sources, such as the New America Foundation's drone database, which tracks strikes in Pakistan. *See The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2003-2010*, NEW AMERICA FOUNDATION, http://counterterrorism.newamerica.net/drones. Care must be taken with this and most sources as international legal terms of art such as "civilian" and "combatant" are used imprecisely. For details on U.S. drone use, see Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, *in* SHOOTING TO KILL, THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt ed., forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144.

11. O'Connell, *Unlawful Killing*, *supra* note 10.

12. Harold Hongju Koh, *The Obama Administration and International Law*, U.S.

In April 2010, *The New York Times* reported that the Obama administration had authorized "the targeted killing of an American citizen" linked to al Qaeda living in Yemen.[13]

Under international law, in an armed conflict enemy fighters may be targeted and killed in situations not permitted in peace. Certain persons may also be detained without trial or tried before military commissions. Many important human rights protections may be relaxed or derogated from in the exigencies of armed conflict. This shift from the law that prevails during peace occurs only when armed conflict begins. It is, therefore, critical to understand what constitutes "armed conflict" in international law to make an appropriate choice of law between the law that prevails in peace and the law that may be applied during an armed conflict. This choice between bodies of international legal rules is, in turn, governed by international law. It is not a matter of policy or discretion.

Under international law the existence of an armed conflict is determined on the basis of certain objective criteria. Prior to the adoption of the U.N. Charter in 1945 a state could declare a legal state of war even without the firing of a single shot.[14] That is no longer the case. Today, we assess facts on the ground to determine whether there is a legal state of armed conflict. There must be organized armed fighting of some intensity for armed conflict to exist.[15] This is not an entirely objective standard, however. The level of intensity is open to subjective assessment and situations of violence may wax and wane, leading to gray areas in which situations are not clearly armed conflict. The restrictive rules on the right to resort to military force, and the important requirement of respecting human rights, demand that in such cases law-abiding states act in conformity with the law prevailing in peace.[16] This does not mean that states are left defenseless against terrorism. Peacetime criminal law and law enforcement methods permit the use of lethal force and provide punishment of terrorism. Moreover, as will be discussed below, law enforcement methods are far

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DEPARTMENT OF STATE (Mar. 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm. At the time of writing, July 2010, the hostilities in Iraq had subsided to a level where the U.S. military was following peacetime rules of engagement. *See infra* note 104.

13. Scott Shane, *U.S. Approves Targeted Killing of Radical Muslim Cleric Tied to Domestic Terror Suspects*, N.Y. TIMES, Apr. 7, 2010, at A10. *See also* ACLU, *CCR and ACLU Receive License from OFAC To Pursue Challenge to Targeted Killing* (Aug. 4, 2010), http://www.aclu.org/national-security/ccr-and-aclu-receive-license-ofac-pursue-challenge-targeted-killing.

14. *See* INTERNATIONAL LAW ASSOCIATION, FINAL REPORT OF THE USE OF FORCE COMMITTEE THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 8 (August 2010), *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/1022 [hereinafter INTERNATIONAL LAW ASSOCIATION, FINAL REPORT].

15. *Id.*

16. *See* KENNETH ANDERSON, TARGETED KILLING IN U.S. COUNTERTERRORISM STRATEGY AND LAW, 16 (Working Paper of the Series on Counterterrorism and American Statutory Law, 2009), *available at* http://ssrn.com/abstract=1415070.

more successful in ending terrorists groups than military force.[17] It must be emphasized, however, that most of the examples reviewed above are not unclear cases. Most occurred far from any armed conflict where peacetime law applied. Under peacetime law, a person suspected of terrorism has the right to a fair and speedy trial before a regular court. Law enforcement authorities may use lethal force but only when absolutely necessary, a standard that the current generation of drones can rarely meet.[18]

The assessment of facts to determine if peacetime law or the law of armed conflict is the correct choice involves the same analysis used in resolving other choice of law questions. Lawyers and judges constantly make choice of law decisions.[19] Choice of law is part of the consideration of every legal matter. In most cases the choice is probably obvious and requires no particular effort. A good many issues do require careful consideration, however, and for those we have choice of law rules, which steer us toward the proper law for any particular matter, whether local, national, regional, or international law. If the matter involves an international boundary, international choice of law rules will guide the choice. Take a typical issue that arises frequently – the choice of law governing a contract between a seller in Indiana and a buyer in Provence, France. No one would expect the President of France or the President of the United States to declare, as a matter of discretion, what law governs this contract. The answer lies in international law, which, in this case, sends us to neither the contract law of Indiana nor the contract law of France, but to the U.N. Convention on Contracts for the International Sale of Goods, to which both France and the United States are parties.[20] International law regulates the choice of law, and in this case it is the Convention that governs – a treaty under international law.

In the terrorism-related cases discussed above, international law also determines the choice of law. In these cases, choice of international law sends us, generally, to the domestic criminal law of the United States, Pakistan, Yemen, and other states. It does not send us to the law of armed conflict.

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17. *See* SETH G. JONES & MARTIN C. LIBICKI, HOW TERRORIST GROUPS END: LESSONS FOR COUNTERING AL QA'IDA (2008), *available at* http://www.rand.org/pubs/monographs/2008/RAND_MG741-1.pdf.

18. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 78-81 (2009), *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/ htmlall/p0990/$File/ICRC0020990.pdf [hereinafter INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETATIVE GUIDANCE].

19. Concerning the choice of law, also known as conflicts of law, see DICEY, MORRIS & COLLINS ON THE CONFLICTS OF LAW (Lawrence Collins et al. eds., 14th ed. 2006 & Supp. 2009).

20. United Nations Convention on Contracts for the International Sale of Goods, *opened for signature,* Apr. 11, 1980, 1489 U.N.T.S. 3 (entered into force Jan. 1, 1988).

I. THE CHOICE OF CRIMINAL LAW V. THE LAW OF ARMED CONFLICT

Before September 11, 2001, the United States applied its criminal law to terrorism suspects.[21] President Ronald Reagan explained that terrorists have and should have the status of criminals, not combatants. He said that to "grant combatant status to irregular forces even if they do not satisfy the traditional requirements . . . would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves."[22]

In 1988, Israel sent a commando team to Tunis to kill the number two in command of the Palestinian Liberation Organization (PLO), Khalil Wazir, also known as Abu Jihad. The PLO was responsible for terror attacks in Israel. Yet, the U.N. Security Council condemned Israel, in Resolution 611, for carrying out an "assassination." The United States refused to veto Resolution 611. U.S. Ambassador Herbert Okun "referred to Tunisia as a friend of the United States and said 'the perpetration of political assassination on Tunisian soil stands in stark contrast to Tunisia's longstanding tradition of non-violence.'"[23] In 2001, the U.S. Ambassador to Israel, Martin Indyk, stated on Israeli television the U.S. position regarding Israeli targeted killing of suspected terrorists: "The United States government is very clearly on the record as against targeted assassinations. They are extrajudicial killings, and we do not support that."[24] The U.S. position with respect to terrorists generally has been to treat them as criminals.[25] After attacks by al Qaeda on American targets in 1993, 1998, and 2000, the United States used the criminal law and law enforcement measures to investigate, extradite, and try persons linked to the attacks.[26]

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21. *See* Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror*, 43 COLUM. J. TRANSNAT'L L. 435 (2005).

22. Ronald Reagan, *Letter of Transmittal*, The White House (Jan. 29, 1987), *reprinted in Agora: The U.S. Decision Not To Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 81 AM. J. INT'L L. 910, 911 (1987). *But see* Hans Peter Gasser, *An Appeal for Ratification by the United States*, 81 AM. J. INT'L L. 912 (1987) (response).

23. Candice Hughes, *Security Council Condemns Wazir Slaying, U.S. Abstains*, ASSOC. PRESS, Apr. 25, 1988, *available at* 1988 WL 3779956.

24. Joel Greenberg, *Israel Affirms Policy of Assassinating Militants*, N.Y. TIMES, July 5, 2001, at A5.

25. The United States made an exception to this position when it discovered that Libyan agents bombed a Berlin disco that American service personnel often visited. The U.S. view was that such attacks and indications of future attacks led to a right to use force in self-defense under Article 51 of the U.N. Charter. For the facts, see Christopher Greenwood, *International Law and the United States' Air Operation Against Libya*, 89 W. VA. L. REV. 933 (1987). Such a claim has always been controversial because of the low-level nature of the terrorist attack. It is unclear after the decision in *Nicaragua v. United States*, 1986 I.C.J. 14 (1986) [hereinafter Nicaragua] whether bombing or other significant military response is lawful against more minor attacks, even state-sponsored attacks. The ICJ indicated in Nicaragua that countermeasures are the appropriate response. *Id.* at 195, 230.

26. After attacks on the U.S. embassies in Kenya and Tanzania in 1998, the United

Allies that dealt for years with determined problems of terrorism have taken the same approach. The British, Germans, Italians, Indians, and others have all dealt with terrorist challenges using law enforcement methods.[27] When it became a party to the 1977 Additional Protocols to the 1949 Geneva Conventions,[28] the British appended the following to their acceptance: "It is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation."[29] France made a similar statement on becoming a party to the Protocol.[30]

In the days following the September 11 attacks, however, the United States asserted a different choice of law to deal with the attacks' perpetrators. President Bush declared a "war against terrorism" that would not end until every terrorist group had been found, stopped, and defeated.[31] In the months that followed, we saw the Administration invoke the core privileges available to lawful belligerents during an armed conflict, including an expanded right to kill, a right to detain without trial, and a right to search and seize cargo of foreign-flagged vessels.[32]

States used law enforcement techniques but also bombed sites in Sudan and Afghanistan. These bombings, like the Berlin disco bombing discussed in *supra* note 25, were controversial. *See, e.g.*, Jules Lobel and George Loewenstein, *Emote Control: The Substitution of Symbol for Substance in Foreign Policy and International Law*, 80 CHI.-KENT L. REV. 1045, 1071 (2005).

27. For a detailed account of the British struggle against the IRA and other counter-terrorism efforts, see LOUISE RICHARDSON, WHAT TERRORISTS WANT: UNDERSTANDING THE ENEMY, CONTAINING THE THREAT (2006).

28. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

29. *See* AP I, Reservation/Declaration (July 2, 2002), *available at* http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument. The entire text of the treaty is available at http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079.

30. *See* AP I, Reservation/Declaration (Apr. 11, 2001), *available at* (in French) http://www.icrc.org/ihl.nsf/NORM/D8041036B40EBC44C1256A34004897B2?OpenDocument.

31. *See* George W. Bush, President's Address to the Nation on the Terrorist Attacks, 37 Weekly Comp. Pres. Doc. 1301 (Sept. 11, 2001); President's Address to a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11, 37 Weekly Comp. Pres. Doc. 1347, 1348 (Sept. 20, 2001); Training Camps and Taliban Military Installations in Afghanistan, 37 Weekly Comp. Pres. Doc. 1432 (Oct. 7, 2001); President's Address Before a Joint Session of the Congress on the State of the Union, 39 Weekly Comp. Pres. Doc. 109 (Jan. 28, 2003), *all available at* www.gpoaccess.gov/wcomp/index.html (providing Bush statements to the effect that the United States was engaged in a "war against terrorism" that would last until every terrorist group of global reach had been found, stopped, and defeated).

32. Mary Ellen O'Connell, *Ad Hoc War*, *in* KRISENSICHERUNG UND HUMANITÄRER

It took some time before it was apparent that these privileges were being invoked outside of the armed conflict in Afghanistan that began on October 7, 2001. The first public evidence of expanded detention came on November 13, 2001, when President Bush issued a Military Order titled "Detention, Treatment, & Trial of Certain Non-Citizens in the War Against Terrorism." The Order stated that terrorist suspects would be tried before military tribunals and would be subjected to military detention, irrespective of where the suspects were captured.[33] Detention would be based on a person's associations, not on his actions or the factual situation in which he found himself. This was a novel assertion as to when armed conflict privileges could be claimed. The Military Order made no reference to armed conflict duties, nor did it take any stand on whether other states should also have the same right to treat terrorist suspects as enemy combatants. By January 2002, the prison at Guantánamo Bay was opened. Within a few years, the public learned that detainees had been brought there from Malawi, Bosnia, Algeria, and other places where no active hostilities were occurring.[34]

The first known killing under the "global war" declaration occurred in the November 3, 2002,[35] incident in Yemen described above. Yemen recognized no armed conflict on its territory at the time, nor was the United States at war with Yemen. The CIA carried out the operation after the Air Force questioned its legality.[36] National Security Advisor Condoleezza Rice, however, argued that the killings were lawful by saying, "We're in a new kind of war, and we've made very clear that it is important that this new kind of war be fought on different battlefields."[37] Also in 2002, a Department of Defense official said that al Qaeda suspects could be killed without warning wherever they were found. DoD Assistant Secretary Charles E. Allen said that the United States could target "[al Qaeda] and other international terrorists around the world, and those who support such

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SCHUTZ – CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION 405 (Horst Fischer et al. eds., 2004). For a prescient article respecting the problems of trying to fit crime into the armed conflict legal paradigm, see Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1 (2002).

33. Military Order of Nov. 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

34. The U.S. Department of Defense maintains a web page with extensive documentation relevant to the Guantánamo Bay prison. *See Detainee Related Documents*, DEPARTMENT OF DEFENSE, http://www.dod.gov/pubs/foi/detainees/. *See also* ANDY WORTHINGTON, THE GUANTÁNAMO FILES: THE STORIES OF THE 774 DETAINEES IN AMERICA'S ILLEGAL PRISON (2007).

35. McManus, *supra* note 9.

36. *Id.*

37. *Fox News Sunday with Tony Snow* (Fox News Network television broadcast Nov. 10, 2002) (Lexis News library).

terrorists."[38] In 2006, Steven G. Bradbury, acting head of DOJ's Office of Legal Counsel, said in Congressional testimony that the President could order targeted killings inside the United States on the basis of the new kind of war – the global war on terror.[39]

As previously noted, State Department Legal Adviser Dean Harold Koh has made it clear that the United States no longer uses the term global war against terrorism.[40] Rather, drone strikes, detention without trial, and military commissions in the case of persons not involved in the hostilities in Afghanistan are now justified on the view that "as a matter of international law, the United States is in an armed conflict with [al Qaeda], as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law."[41] Koh emphasized that in his view this is a different legal paradigm than the global war against terrorism.[42] He further believes "U.S. targeting practices . . . comply with all applicable law, including the laws of war."[43]

Whether in a global war against terrorism or an armed conflict against al Qaeda, the Taliban, and associated forces, these are new positions for the United States, apparently taken up in order to claim expanded wartime rights with respect to targeted killing, detention, and judicial procedure. Once an armed conflict is triggered, certain peacetime human rights protections no longer apply, or no longer apply in the same way. Under customary international law, governments may detain opposition fighters, and even use lethal force if reasonably necessary, in the emergency situation of armed hostilities.[44] State parties to certain human rights treaties must formally derogate from those treaties to be able to lawfully detain without trial or use lethal force at the more flexible level applicable in armed conflict. Most human rights applicable in peacetime continue during

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38. Anthony Dworkin, *Law and the Campaign against Terrorism: The View from the Pentagon*, CRIMES OF WAR PROJECT (Dec. 16, 2002), http://www.crimesofwar.org/print/onnews/pentagon-print.html.

39. Katerina Ossenova, *DOJ Official: President May Have Power To Order Terror Suspects Killed in US*, JURIST (Feb. 5, 2006), http://jurist.law.pitt.edu/paperchase/2006/02/doj-official-president-may-have-power.php.

40. Dean Koh made clear that new terminology was being used in an answer to a question from the author at the American Society of International Law Annual Meeting on March 26, 2010. It is not clear, however, that the new terms refer to a substantive change. The exchange was recorded and broadcast on NPR. *See* Ari Shapiro, *U.S. Drone Strikes Are Justified, Legal Adviser Says*, National Public Radio (Mar. 26, 2010).

41. Koh, *The Obama Administration and International Law*, *supra* note 12.

42. *See* Shapiro, *supra* note 40.

43. Koh, *The Obama Administration and International Law*, *supra* note 12.

44. *See generally* I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts and Louise Doswald-Beck eds., 2005). These customary international law rights are not found restated as affirmative rights but may be deduced from the customary international law duties governing targeting and detention.

armed conflict, but the content of rights, such as the right to life, may differ depending on the situation in which it is invoked. According to the International Court of Justice (ICJ) in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, "whether a particular loss of life . . . is to be considered an arbitrary deprivation of life contrary to Article 6 of the [International Covenant on Civil and Political Rights], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."[45]

Other human rights conventions similarly couch the right to life in relative terms, depending on the circumstances. Thus, they reflect that in armed conflict hostilities lives may be taken lawfully in circumstances that would be unlawful outside armed conflict hostilities.[46] Governments reacting to violence in circumstances less than armed conflict may only lawfully use lethal force in situations of absolute necessity. Again, the choice of law is fundamental to these questions. The Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders (1990) formulated a principle shared by most states:

> Law enforcement officials shall not use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.[47]

Within an armed conflict, lawful combatants are not restricted to killing only to save a human life immediately. Opposing combatants and civilians

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45. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶25 (July 8) [hereinafter Nuclear Weapons]. *See also* Armed Activities on the Territory of the Congo (Congo v. Uganda), Judgment, 2005 I.C.J. 168 (Dec. 19) [hereinafter Congo]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter The Wall Case]. *See also* Constantine Antonopoulos, *The Relationship Between International Humanitarian Law and Human Rights*, 63 REV. HELLENIQUE DE DROIT INT'L (forthcoming 2010); Françoise Hampson, *The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*, 90 INT'L REV. RED CROSS 549 (2008); and William Schabas, Lex Specialis? *Belt and Suspenders? The Parallel Operation of Human Rights and the Law of Armed Conflict, and the Conundrum of* Jus Ad Bellum, 40 ISR. L. REV. 592 (2007).

46. *See* NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW xiii (2008).

47. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, ¶9 (1990), *available at* http://www2.ohchr.org/english/law/pdf/firearms.pdf.

taking a direct part in hostilities may be killed in a zone of armed conflict hostilities unless they surrender or an alternative is available and dictated by the principles of humanity. In the International Committee of the Red Cross Customary Law Study, the right to target combatants but not civilians is the first rule:

> Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.[48]

This rule is supported by a number of legal authorities, including, perhaps most importantly, Additional Protocol I of 1977 to the 1949 Geneva Conventions:

> Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
>
> Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.[49]

In short, lawful combatants need to know two things with respect to the privilege to kill: they must know they are targeting combatants or persons taking direct part in hostilities, and they must know that they are killing in a situation of armed conflict.

The rules governing detention also differ depending on whether one is in an armed conflict or not. In an armed conflict, combatants who fall into the hands of a party to the conflict may be detained without trial until the end of hostilities.[50] "The purpose of captivity is to exclude enemy soldiers from further military operations. Since soldiers are permitted to participate in lawful military operations, prisoners of war shall only be considered as captives detained for reasons of security, not as criminals."[51] Detainees may, however, be tried for law violations committed prior to capture in proceedings consistent with minimum due process.[52] Arguably, the detaining power has a duty to try persons for grave breaches of

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48. I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 44, at 3.

49. AP I, *supra* note 28, arts. 43(2), 51(3). *See also* AP II, *supra* note 28, art. 13(3).

50. Geneva Convention Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Prisoner's Convention]; *cf.* AP I, *supra* note 28, art. 75(3).

51. Horst Fischer, *Protection of Prisoners of War*, *in* The HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 321, 326 (Dieter Fleck ed., 1995).

52. Prisoner's Convention, *supra* note 50, arts. 84, 105; AP I, *supra* note 28, art. 75.

humanitarian law.[53] In international armed conflicts, detainees who have not violated humanitarian law may not be tried for the deaths or destruction they cause when in compliance with the law of armed conflict. In the absence of an armed conflict, international human rights law prohibits detaining people for months or years without trial.[54] If authorities wish to detain someone because he or she is a criminal suspect, the person may be detained only pursuant to a fair, public, and prompt trial.[55] Suspects may not be detained indefinitely.

In January 2002, the United States brought 110 persons for detention to the U.S. Naval Base at Guantánamo Bay. By mid-June, 2003, the 1000-person prison held 680 individuals from 42 countries including some as young as 13 years old.[56] It would eventually hold almost 800. While most detainees were taken from the fighting in Afghanistan, others were taken from countries where there was no fighting. When the author asked Administration officials in October 2002 if the detainees captured in Afghanistan would be released when the hostilities in Afghanistan ended, she was told that Guantánamo detainees would not be released until every terrorist in the world was killed or captured, or when every member of al Qaeda was killed or captured.[57]

The Bush administration planned to place some detainees on trial. It created special military commissions for the purpose. The United States has used military commissions in the past – on battlefields in the eighteenth and nineteenth centuries and in a few controversial instances during and right after World War II.[58] Today, the U.S. military uses courts martial to try persons, in particular members of the American military, for war crimes and other violations of the Uniform Code of Military Justice. The highest profile trials of U.S. troops to date since 9/11 have been those for the men and women accused of abusing prisoners at Abu Ghraib Prison in Iraq.[59] For the most part, however, persons accused of war crimes are tried in civilian criminal courts. The International Criminal Tribunal for the former Yugoslavia and national courts all over Europe have held civilian trials of

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53. Prisoner's Convention, *supra* note 50, art. 129.

54. International Covenant on Civil and Political Rights, art. 9, Dec. 16, 1966, 999 U.N.T.S. 171.

55. *Id.*, art. 14(3)(c).

56. Ted Conover, *In the Land of Guantánamo*, N.Y. TIMES MAG., June 29, 2003, at 44.

57. These remarks were made during a conference where comments were not for attribution. But compare them with President Bush's public statements to the effect that the war on terror would end only when every terrorist group of global reach had been found, stopped, and defeated. *See, e.g.*, Presidential Address to a Joint Session of Congress, *supra* note 31.

58. See the discussion of the use of military commissions in all six opinions in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

59. *See, e.g.*, Kate Zernike, *Ringleader in Iraqi Prisoner Abuse Is Sentenced to 10 Years*, N.Y. TIMES, Jan. 16, 2005, at A1.

persons accused of war crimes committed during the conflicts connected with the break-up of Yugoslavia.[60] Their laws support the use of civilian trials, not military commissions, for persons accused of crimes in war and peace.[61] The reasons for their laws include the fact that members of military commissions are under temporary military orders and not, therefore, as independent as civilian judges with lifetime appointments. Also, military commissions are extraordinary and not the "regular" courts called for in human rights law.

The third wartime privilege invoked by the Bush administration after 9/11 was search and seizure of foreign-flagged vessels on the high seas. American allies soon persuaded the United States, however, to get the consent of the ship's master or the flag state before searching even suspect vessels. The global war against terrorism would not be pursued on the high seas.[62]

Thus, while the *lex specialis* that applies in armed conflict – the law of armed conflict – does permit some greater privileges as regards the right to kill, detain, and try persons, and to seize cargo, trial procedures are not significantly looser than in civilian trials, and all wartime rights must be exercised while respecting important protections for the accused. Outside of armed conflict hostilities, peacetime criminal law applies to violent criminal acts, including terrorism. The United States had supported and complied with this principle until the President declared war after 9/11. The next section discusses why neither President Bush's declaration of a war on terror nor President Obama's position that the United States is in an armed conflict with al Qaeda, the Taliban, and associated forces is sufficient to shift from peacetime to wartime rules.

II. ARMED CONFLICT V. TERRORISM

Plainly, the correct choice of law in the aftermath of the 9/11 attacks rests on a proper characterization of armed conflict situations. The definition of armed conflict found in customary international law is based

60. *See, e.g.*, Director of Public Prosecutions v. T, Eastern High Court (3rd Div. Nov. 22, 1994) (Denmark) excerpted in MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE 636 (2d ed. 2009) (discussing Denmark's prosecution of a Croatian citizen for prisoner abuse in Bosnia in violation of the Geneva Conventions).

61. *See, e.g.*, Ward Ferdinandusse, *The Prosecution of Grave Breaches in National Courts*, 7 J. INT'L CRIM. JUST. 723 (2009); Harold Hongju Koh, *Against Military Tribunals*, 49(4) DISSENT 58 (2002).

62. Mary Ellen O'Connell, *Ad Hoc War*, *supra* note 32, at 418-421. U.S. Ambassador John Bolton apparently changed his position from 2002 to 2003 when he argued that post-9/11 the United States and its allies could stop and search shipping on the high seas without consent of the ship's master or flag state pursuant to the Proliferation Security Initiative. *See id.* Thereafter, the United States signed cooperation agreements with major flag states, including Panama and Honduras.

on objective evidence of fighting, not mere declarations. The legal significance of declarations in international law faded away with the adoption of the U.N. Charter in 1945. "War" as a technical, legal term fell out of use. It was replaced by a broader term, "armed conflict." The Charter in Article 2(4) prohibits all uses of force – war and lesser actions – except in self-defense in response to an armed attack or as mandated by the Security Council. Following the adoption of the Charter, treaties relevant to war, such as the Geneva Conventions of 1949, substituted the term "armed conflict" for "war." "War" ministries became "defense" ministries. States engaging in armed conflict rarely declared war. What mattered after 1945 was actual fighting, not nineteenth century formalities that recognized a legal state of war in the absence of any use of military force. We still use the term "war" to refer to any serious armed conflict. But indicative of the fact that "war" is no longer the significant legal term it once was, the United States fought a war on poverty and a war on drugs.

According to a study by the International Law Association's Committee on the Use of Force, international law defines armed conflict as always having at least two minimum characteristics: 1) the presence of organized armed groups that are 2) engaged in intense inter-group fighting.[63] The fighting or hostilities of an armed conflict occurs within limited zones, referred to as combat zones, theaters of operation, or similar terms. It is only in such zones that killing enemy combatants or those taking a direct part in hostilities is permissible.[64]

Because armed conflict requires a certain intensity of fighting, the isolated terrorist attack, regardless of how serious the consequences, is not an armed conflict.[65] Terrorism is generally a crime, although in some

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63. INTERNATIONAL LAW ASSOCIATION, FINAL REPORT, *supra* note 14.

64. The combat zone is a critical concept to the lawful waging of armed conflict. Today, the right to resort to armed force (*jus ad bellum*) is triggered by an armed attack or Security Council authorization in response to a threat to the peace, breach of the peace, or act of aggression. The lawful response to those provocations must be calibrated to be necessary and proportionate in the circumstances. This means that the old claim that a state may attack the opponent's forces anywhere they are found is no longer supportable. A parallel principle is found in the *jus in bello*. Combatants may not kill the enemy wherever they find him, but only when reasonably necessary. This means that a combatant may kill another person fighting against him in a combat zone, but someone away from the combat, who may be captured, may not be killed. For a more extensive discussion of these points and the law supporting them, see Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845 (2009); Christopher Greenwood, *Scope of Application of Humanitarian Law*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 45, 61-62 (Dieter Fleck ed., 2d ed. 2008); JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES (2004).

65. A significant armed attack may trigger the right to resort to armed force but an armed attack is not an armed conflict unless it is launched by an organized armed group and is responded to with the use of significant military force by another organized armed group. Thus the 9/11 attacks were found to be significant enough to trigger a right to respond under Article 51 of the U.N. Charter (see Security Council Resolution 1368) but an armed conflict

circumstances it may be carried out so continuously as to be the equivalent of an armed conflict. Terrorism is widely defined as the use of politically motivated violence against the civilian population to intimidate or cause fear.[66] The Supreme Court of Israel found in 2006 that Israel was engaged in a "continuous state of armed conflict" with various "terrorist organizations" due to the "unceasing, continuous, and murderous barrage of attacks."[67] The Court described a situation that meets the definition of organized armed groups engaged in intense fighting – with attacks and responses direct and constant enough to constitute armed conflict. The single, isolated act of terrorism, however, is consistently treated by states as crime, not armed conflict. Members of al Qaeda or other terrorist groups are active in Canada, France, Germany, Indonesia, Morocco, Saudi Arabia, Spain, the United Kingdom, Yemen, Kenya, Uganda, and elsewhere. Still, these countries do not consider themselves in an armed conflict with al Qaeda. As Judge Christopher Greenwood of the ICJ has concluded:

> In the language of international law there is no basis for speaking of a war on [al Qaeda] or any other terrorist group, for such a group cannot be a belligerent, it is merely a band of criminals, and to treat it as anything else risks distorting the law while giving that group a status which to some implies a degree of legitimacy.[68]

One Supreme Court decision seems to be commonly misread as supporting the possibility of a worldwide "armed conflict against al Qaeda" or other terrorist organizations even in the absence of continuous attacks. In *Hamdan v. Rumsfeld*, the Supreme Court found the Bush administration's special military commissions for trials at Guantánamo Bay to be unconstitutional. The Court ruled that the President lacked the right to create military commissions and had to comply with a federal statute governing the matter. The federal statute in question permitted the creation of military commissions that complied with the laws of war. For purposes of testing the compliance of the Guantánamo commissions with the law of war, the Court accepted the Bush administration's assertion that the United States is in a "non-international armed conflict with [al Qaeda]." The Court

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did not follow until the United States and United Kingdom responded with significant military force in Afghanistan. Afghanistan was determined by the U.S. and U.K. to have been responsible for the 9/11 attacks, thus giving rise to the right to use force against it. For a detailed discussion of state practice and International Court of Justice decisions relevant to this law, see Mary Ellen O'Connell, *Preserving the Peace: The Continuing Ban on War Between States,* 38 CAL. W. INT'L L.J. 41 (2007) and Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 889-904 (2002).

66. *See generally* JONES & LIBICKI, *supra* note 17.

67. HCJ 769/02, The Public Committee Against Torture in Israel v. Israel [2006] (2) IsrLR 459, ¶16 (Dec. 14, 2006). *See also* The Wall Case, *supra* note 45.

68. Christopher Greenwood, *War, Terrorism and International Law*, 56 CURR. LEG. PROBS. 505, 529 (2004).

found that Common Article 3 of the 1949 Geneva Conventions covers even that purported conflict. It further found that the Guantánamo commissions did not comply with Common Article 3. The Supreme Court had only to find one plausible example of a violation of the laws of war to strike down the commissions. It did not find that the United States actually *is* in a worldwide armed conflict with al Qaeda. It could not make such a finding, as there is no such conflict.[69]

Despite what the Supreme Court actually said, following the *Hamdan* decision we began to see references to a non-international armed conflict against al Qaeda and associates not connected with any sovereign state.[70] Dean Koh made such a reference when he described the United States as being engaged in an "armed conflict with [al Qaeda], the Taliban and associated forces."[71] He said that the United States had an "inherent right of self-defense" and said that "whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses."[72] To the author, these statements indicate the same basic argument to justify killings and detention far from battlefields used by the Bush administration.[73] The Obama administration has clearly changed the name of the conflict, dropping the reference to the global war against terrorism, but it has not, to date, provided a different legal rationale for why it is lawful to kill or detain persons who had no role in the Afghanistan hostilities or any other hostilities.

The Bush administration never developed a persuasive argument as to why the United States could use force on the basis of self-defense far from the location of those legally responsible for the 9/11 attacks. In October 2001, the United States and United Kingdom took the position that the Taliban government of Afghanistan was responsible for al Qaeda so that under the law governing resort to armed force (the *jus ad bellum*), the United States and United Kingdom had the right to use force against that sovereign state. The United States never argued that other states might also be responsible for the 9/11 attacks and thus has no right under the *jus ad bellum* to use force against other states, besides Afghanistan. Dean Koh has added nothing to the Bush administration arguments on this point.

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69. *Hamdan v. Rumsfeld*, *supra* note 58, at 628-631.

70. *See, e.g.*, Marco Sassòli, *Remarks at the Panel, Same or Different? Bush and Obama Administration Approaches to Fighting Terrorists*, Proc. of the Annual Meeting of the American Society of International Law (ASIL) (Mar. 26, 2010) (forthcoming]; *but see* Diane Amann, *Remarks*, *id.*

71. Koh, *The Obama Administration and International Law*, *supra* note 12.

72. *Id.*

73. At the 2010 ASIL Annual Meeting, the author requested the definition of armed conflict that Dean Koh was using to justify killing far from actual hostilities. Koh provided none.

Moreover, the war of self-defense in Afghanistan ended in 2002 when Hamid Karzai became Afghanistan's leader following a *loya jurga* of prominent Afghans who elected him.[74] Today, the United States and other foreign militaries are in Afghanistan at the invitation of President Karzai to suppress an insurrection. Thus, attacking or detaining members of al Qaeda or associates as a matter of the law of armed conflict must be connected with the suppression of an Afghan insurrection.

References by Bush and Obama administration officials to the right of self-defense offer no justification for using force or exercising wartime privileges beyond Afghanistan. Before Dean Koh's speech, Kenneth Anderson suggested that the Obama administration might have been basing its targeted killing and detention policies on anticipatory self-defense to prevent another 9/11. If targeted killing under this argument were lawful, logically mere detention would be too. This argument differs from the global armed conflict argument in that it does not conceive of a worldwide conflict but, rather, a right to attack individuals or small groups who might be planning future attacks. Koh's guidelines mentioned above would seem to be equally applicable under this conception. The basis for attacking would also be the "inherent right of self-defense," and "the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses" would be relevant.[75]

Anderson has pointed out that certain U.S. officials have long held that the United States has a right to target individuals in anticipatory self-defense: "The United States has long assumed, [as] then-Legal Adviser to the State Department Abraham Sofaer stated in 1989, that the 'inherent right of self defense potentially applies against any illegal use of force, and that it extends to any group or State that can properly be regarded as responsible for such activities.'"[76] Anderson also accepts, however, that much of the international community rejects this argument.[77]

International rejection is not based simply on policy or preference. The argument has virtually no support in international law. The right to use force in self-defense applies to inter-state uses of force. The law of self-defense was designed to allow a state to take necessary action against another state responsible for attacking the defending state, as in the case of the United States and United Kingdom attacking Afghanistan in response to

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74. *See President Hamid Karzai*, THE EMBASSY OF AFGHANISTAN, WASHINGTON D.C., http://www.embassyofafghanistan.org/president.html.

75. Koh, *The Obama Administration and International Law*, *supra* note 12.

76. ANDERSON, *supra* note 16. For an updated version of the Sofaer position in the context of targeted killing, see Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y (forthcoming 2010), *available at* http://ssrn.com/abstract=1520717.

77. ANDERSON, *supra* note 16, at 16.

9/11.[78] The law of self-defense is not designed for responding to the violent criminal actions of individuals or small groups.

The most important treaty on the use of force in self-defense is the U.N. Charter. Article 51 of the Charter permits the use of force in self-defense if an armed attack occurs, and permits collective self-defense if the state that has been attacked requests it. The Security Council may also authorize force in self-defense. In addition to the Charter, the ICJ and other international tribunals have clarified the general principles and the rules of state responsibility applicable to lawful uses of force. From many ICJ decisions, including, the 1949 *Corfu Channel* case,[79] the 1986 *Nicaragua* case,[80] the 1996 *Nuclear Weapons* case,[81] the 2003 *Oil Platforms* case,[82] the 2004 *Wall* case,[83] the 2005 *Congo* case,[84] and the 2007 *Bosnia v. Serbia* case,[85] it is clear that force in self-defense may only be carried out on the territory of a state responsible for a significant armed attack ordered by the state or by a state-controlled group that carried it out.

The *Congo* case is perhaps most on point regarding U.S. actions against al Qaeda. It concerned Uganda's use of force on the territory of Congo after years of cross-border incursions by armed groups from Congo into Uganda. The ICJ found that Congo was not legally responsible for the armed groups – it did not control them. Even Congo's failure to take action against the armed groups did not give rise to any right by Uganda to cross into Congo to attack.[86]

Where a state is responsible for attacks, the ICJ said in *Nicaragua*[87] and *Oil Platforms*[88] that low-level attacks or border incidents do not give rise to the right to use force in self-defense on the territory of the responsible state.

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78. *See* INTERNATIONAL LAW ASSOCIATION, FINAL REPORT, *supra* note 14 and accompanying text

79. Corfu Channel (U.K. v. Albania), Judgment, 1949 I.C.J. 4 (July 9).

80. *Nicaragua*, *supra* note 25.

81. *Nuclear Weapons, supra* note 45.

82. Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶¶61-64 (Nov. 6).

83. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Separate Opinion of Judge Higgins, 2004 I.C.J. 207 (July 9), ¶¶33-34.

84. Congo, *supra* note 45, ¶¶146, 301. *But see* Paust, *supra* note 76 (objecting to the application of the *Congo* case to U.S. uses of force in Pakistan). He does not spell out why beyond citing *obiter dictum* in the decision saying it does not reach "large-scale attacks" by irregulars. Paust, *supra* note 76, at 15-16 n.33. However, the cross-border incursions from Pakistan into Afghanistan are comparable to the incursions the ICJ was considering in *Congo*. Nor have the armed activities emanating from Yemen and Somalia where the U.S. has also used drones been "large-scale."

85. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment, ¶391 (Feb. 26, 2007), *available at* http://www.icj-cij.org/docket/files/91/13685.pdf.

86. Congo, *supra* note 45, ¶¶146, 301.

87. Nicaragua, *supra* note 25, ¶¶195, 230.

88. Oil Platforms, *supra* note 82, ¶64.

The Ethiopia-Eritrea Arbitral Tribunal said much the same in the *Jus Ad Bellum* award.[89]

Additionally, in the *Nicaragua* case and the *Nuclear Weapons* case, the ICJ held that even where a state is responsible for a significant attack, there is no right to use force in self-defense if the use of force is not necessary to accomplish the purpose of defense and/or the purpose cannot be accomplished without a disproportionate cost in civilian lives and property. Necessity and proportionality are not expressly mentioned in the Charter, but according to the ICJ "there is a 'specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.' This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed."[90]

Under these treaties, as well as customary international law rules and general principles, the United States has virtually no support for its claim to a right to detain or target persons not fighting in Afghanistan. The U.N. Special Rapporteur on extrajudicial, summary, or arbitrary executions found that the 2002 strike in Yemen that killed six persons alleged to be associated with al Qaeda was an unlawful, extrajudicial killing.[91] This is the correct finding in the view of most states that simply do not accept targeted killing as justifiable under Article 51 in particular or international law in general:

> To put the matter simply, the international law community does not accept targeted killings even against al Qaeda, even in a struggle directly devolving from September 11, even when that struggle is backed by U.N. Security Council resolutions authorizing force, even in the presence of a near-declaration of war by Congress . . . and even given the widespread agreement that the U.S. was both within its inherent rights and authorized to undertake military action against the perpetrators of the attacks . . .
>
> [A] strategic centerpiece of U.S. counterterrorism policy rests upon legal grounds regarded as deeply illegal . . . by large and influential parts of the international community.[92]

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89. Jus Ad Bellum (Eth. v. Eri.), Ethiopia Claims 1-8, Partial Award, ¶¶9-12 (Eri. Eth. Claims Comm'n 2005), http://www.pca-cpa.org/upload/files/FINAL%20ET%20JAB.pdf.

90. Nuclear Weapons, *supra* note 45, ¶41. *See also* Nicaragua, *supra* note 25, ¶176; Oil Platforms, *supra* note 82, ¶76.

91. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, *Report of the Special Rapporteur, Asma Jahangir, Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, U.N. Doc. E/CN.4/2003/3, ¶¶37-39 (Jan. 13, 2003) [hereinafter *Report on Extrajudicial, Summary, or Arbitrary Executions*].

92. ANDERSON, *supra* note 16, at 16.

Another interpretation of Dean Koh's remarks is that he may have been referring to the U.S. right to resort to self-defense in Afghanistan, and, related to that right, the right to kill or detain al Qaeda or Taliban members who may be participating remotely by cell phone or computer, or who may be preparing to join the fight. Dean Koh mentioned a case from World War II in which the United States set out to kill a named individual far from actual hostilities, targeting the plane carrying Japanese General Yamamoto, reputedly a planner of the Pearl Harbor attack.[93]

There are several problems with this interpretation. First, Dean Koh did not refer to remote participation. Moreover, many persons killed and detained have had no connection with Afghanistan. Finally, the Yamamoto case was not uncontroversial at the time,[94] and today it would be in conflict with the basic treaties that form the law on the use of force, namely the 1945 U.N. Charter and the 1949 Geneva Conventions. These treaties provide little or no right to use military force against individuals far from battlefields. Moreover, if there was a right to target or detain such persons, CIA specialists participating in the drone program but located in the United States could equally be subject to targeted killing as unlawful combatants and equally subjected to indefinite detention.[95] For that matter, regular members of the U.S. armed forces could be subject to the same treatment. In fact, it is the U.S. view that no hostilities are occurring on U.S. territory and, thus, there is no right to use military force on U.S. territory. Other, less forceful measures must be taken against persons who might be undertaking unlawful activities abroad from a base in the United States.

Two different analyses can be employed to reach the conclusion that the U.S. may not kill without warning far from a battlefield. One is that adopted by the International Committee of the Red Cross (ICRC). In 2009, the ICRC produced interpretative guidance on the concept of direct participation in hostilities. The Guidance provides that all persons in a combat role, in a continuous combat function or directly participating in hostilities are lawfully targetable, but that it would violate the law of armed conflict to actually kill a person under the battlefield standard of necessity when conditions are actually peacetime ones, where law enforcement standards prevail.[96] The ICRC's Guidance includes a new category of persons who are lawfully targetable (and presumably detainable). In

93. Koh, *The Obama Administration and International Law*, *supra* note 12.

94. Diane Amann relates that at least one of the participants in that attack, U.S. Supreme Court Justice John Paul Stevens, today has doubts as to whether it was lawful. *See* Diane Marie Amann, *John Paul Stevens, Human Rights Judge*, 74 FORDHAM L. REV. 1569, 1582-1583 (2006).

95. *See* Gary Solis, *CIA Drone Attacks Produce America's Own Unlawful Combatants*, WASH. POST, Mar. 12, 2010, at A17 (assessing the legality of CIA and private contractor participation in targeted killings).

96. INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE, *supra* note 18. The Guidance does not discuss the right to detain.

addition to the traditional categories – members of the armed forces of a state party to the conflict and civilians directly participating in hostilities for as long as they participate – the ICRC now recognizes the category of persons involved in an organized armed group who are in a "continuous combat function."[97] This new category provides that civilians who are members of organized armed groups need not be directly participating in hostilities at the time of targeting. The category brings such civilians closer to the category of combatants of the regular armed forces of a state. The Interpretative Guidance indicates that if a member of al Qaeda or a member of the U.S. armed forces participates in the fighting in Afghanistan, even remotely, he is a lawful target. The ICRC further indicates, however, that there would be no right to kill such a person far from actual hostilities under battlefield rules because he is not on a battlefield. He could be detained or killed by law enforcement authorities under local criminal law standards. To do otherwise would be to violate his human rights.

The other avenue to the same result is to say that peacetime conditions are peace, and no one may be targeted in peace as if in armed conflict hostilities. Under either assessment, it is difficult to make the case that persons may be killed or detained under the law of armed conflict as opposed to the criminal law of the place where they are physically located. The ICRC position is consistent with this war/peace distinction. Both analyses hold that far from armed conflict hostilities, states may not claim the combatant privilege to kill or detain without trial.[98] The second, incorporating the war/peace distinction, however, is more consistent with state practice on the definition of armed conflict.[99] Moreover, it is in keeping with the growing understanding that human rights law applies at all times and that governments' arguments for narrowing the scope of application of human rights law, or the grounds for derogating from it, are declining.[100]

For much of the period that the United States has used drones for targeted killing in Pakistan, Yemen, and Somalia, the killings occurred either in the absence of hostilities or when the United States was not participating in hostilities. In other words, the United States has targeted and killed persons under the combatant's privilege to kill where it did not possess that privilege. When the CIA carried out a drone strike in Yemen in November 2002, the U.N. Special Rapporteur concluded that the strike

97. *Id.* at 32-35.

98. *See also Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum, Study on Targeted Killings,* U.N. Doc. A/HRC/14/24/Add.6, at 3, 54, 85-86 (May 28, 2010) [hereinafter *Study on Targeted Killings*].

99. *See supra* note 64 and accompanying text.

100. *See supra* note 45, and accompanying text.

constituted "a clear case of extrajudicial killing."[101] The United States has carried out similar attacks in Yemen during the Obama administration.

The situation in Pakistan is particularly complicated. Initially, the Pakistan government decided to tolerate a level of autonomy in the provinces along its border with Afghanistan that obviated any need to fight militant groups. By the spring of 2009, Pakistan's armed forces began engaging various Taliban militants when one group tried to take over Buner Province. Pakistani forces repulsed the group in fighting that plainly amounted to armed conflict, but Pakistan did not request U.S. assistance, let alone authorize the use of drones to end the challenge to its authority in Buner. Pakistan has continued to fight in a number of provinces. In some of this fighting it has apparently requested or permitted U.S. drone attacks.[102] Many other drone attacks, however, have been carried out in areas where the Pakistani government had been attempting, through a variety of methods, to prevent armed conflict.[103]

Dean Koh has improved the U.S. position by clarifying that the United States is at war with persons and not with an abstract concept – terrorism. But the change seems to be more form than substance. Following the November 2001 Military Order on detention, the Bush administration actually focused its detention, trial, and targeting on al Qaeda or the Taliban. The weakness in the Bush administration position was not in what it called its campaign but rather that it focused on individuals' associations rather than the exigencies of fighting.

The Obama administration's approach to date shares this weakness. In international law, invoking the exceptional rights to kill and detain without trial is permissible only in the exceptional situations of actual hostilities. Only in Afghanistan today is the United States engaged in an armed conflict where combatants may lawfully kill on the basis of reasonable, as opposed to absolute, necessity. At time of writing, U.S. Marines in Marja Province in Afghanistan are facing ambushes daily and improvised explosive devices weekly. They are fighting to control the Province and end the violent contest against the government in Kabul and the local authorities loyal to

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101. *Report on Extrajudicial, Summary, or Arbitrary Executions*, *supra* note 91, ¶¶37-39. *But see* Michael J. Dennis, *Human Rights in 2002: The Annual Sessions of the UN Commission on Human Rights and the Economics and Social Council*, 97 AM. J. INT'L L. 364, 367, n.17 (2003) ("The United States' response to the ... Yemen allegations has been that its actions were appropriate under the international law of armed conflict and that the Commission and its special procedures have no mandate to address the matter.").

102. *See* Jane Mayer, *The Predator War: What are the Risks of the C.I.A.'s Covert Drone Program?*, NEW YORKER, Oct. 26, 2009, *available at* http://www. newyorker.com/ reporting/2009/10/26/091026fa_fact_mayer.

103. *See, e.g.*, David Cortright, *"Winning" in Afghanistan: How To Splinter the Taliban and Support Afghans*, SOJOURNERS MAGAZINE, Mar. 2009, *available at* http://www. sojo.net/index.cfm?action=magazine.article&issue=soj0903&article=winning-in-afghanistan.

that government. In Iraq, by contrast, fighting had so declined by late 2009 that the U.S. troops began following law enforcement-type rules of engagement.[104] How can it be that the United States may use lethal force under battlefield rules in Yemen but not in Iraq? Absent armed conflict hostilities, the standard of absolute necessity governs uses of lethal force.[105]

The same choice of law should be made with respect to all persons detained outside of armed conflict hostilities and suspected of terrorist activities. Detention and trial should occur under peacetime law and procedures. This is the proper law in peace; it is even more imperative to make the proper choice of law in the case of targeting. If there is no right to detain terrorism suspects as enemy combatants, there is certainly no right to target them as such.

In only two cases – those of José Padilla and Ali Saleh Kahlah al-Marri – did the United States attempt to act as though the "global war" extended to U.S. territory. In both cases, the United States retreated from its "global war" arguments and proceeded under domestic criminal law. These cases and the 300 mentioned by Holder form a substantial body of precedent in line with the proper choice of law principles. To abandon both principles and precedent going forward would bring into question the legality of any U.S. proceedings against terrorism suspects.

The Padilla and al-Marri cases should make it difficult for any judge to take seriously the claim that someone who has never been in combat is an enemy combatant. President Bush had designated both men "enemy combatants" even though they were both first arrested in the United States on criminal charges and held in civilian jails. In early 2006, the Department of Justice requested that Padilla be moved back to the criminal system, shortly before the Supreme Court was to take up his case and his argument that he was not an enemy combatant. Padilla was convicted of terrorism-related charges and sentenced to seventeen years in prison.[106] In December 2008, the Supreme Court agreed to determine whether al-Marri was or was not an enemy combatant. The Obama administration prepared to defend President Bush's designation of him as a combatant, but then, shortly before the argument, moved al Marri to the criminal system. He pleaded guilty to the criminal charges against him and received a fifteen-year sentence.[107]

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104. U.S. rules of engagement are not public documents. The statement here regarding Iraq ROEs was informally confirmed to the author by several knowledgeable persons. The change followed President Obama's speech at Camp Lejuene on February 27, 2009 when he said that by August 31, 2010, the U.S. combat mission in Iraq would end. *In Announcing Withdrawal Plan, Obama Marks Beginning of Iraq War's End*, N.Y. TIMES, Feb. 27, 2009, at A06.

105. MELZER, *supra* note 46, at 397-398.

106. Peter Whoriskey & Dan Eggen, *Judge Sentences Padilla to 17 Years, Cites His Detention*, WASH. POST, Jan. 23, 2008, at A3.

107. John Schwartz, *Plea Agreement Reached with Agent for Al Qaeda*, N.Y. TIMES,

In explaining his decision to try Abdulmuttalab in civilian courts under domestic criminal law statutes, Attorney General Holder wrote:

> Under a policy directive issued by President Bush in 2003, for example, "the Attorney General has lead responsibility for criminal investigations of terrorist acts or terrorist threats by individuals or groups inside the United States, or directed at United States citizens or institutions abroad, where such acts are within the Federal criminal jurisdiction of the United States, as well as for related intelligence collection activities within the United States." (Homeland Security Presidential Directive 5 (HSPD-5, February 28, 2003). . . .
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> In keeping with this policy, the Bush Administration used the criminal justice system to convict more than 300 individuals on terrorism-related charges. For example, Richard Reid, a British citizen, was arrested in December 2001 for attempting to ignite a shoe bomb while on a flight from Paris to Miami carrying 184 passengers and 14 crewmembers. . . .[108]

The United States has asserted a right to kill or detain in places far from hostilities only in a few states with weak governments such as Yemen, Bosnia, Malawi, and Pakistan. This fact is further evidence against the U.S. claim that it is acting consistently with international law. If the United States really could target and detain persons simply because they are members of al Qaeda, it should be able to do so in Germany, the United Kingdom, Canada, Australia, and in the United States itself. The right to shift from the law of peace to the law of armed conflict does not turn on the strength of the government or the wealth of a state, but rather on whether the state in question is responsible for a significant armed attack on the United States or the state's legitimate government has requested U.S. assistance in fighting an insurgency on its territory.

III. THE PROPER AND EFFECTIVE LAW AGAINST TERRORISM

Terrorism is not new, nor has the United States demonstrated in argument or action that new rules are needed to deal with it. So much in current U.S. policy supports the rules that were in place on 9/11: The United States wants terrorism to be considered a heinous crime that all nations should join in suppressing through cooperative efforts. The United States wants peacetime human rights standards to be extended to its own

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Apr. 30, 2009, at A16.

108. Eric Holder, Letter to Senator Mitch McConnell, (Feb. 3, 2010), *available at* http://www.cbsnews.com/htdocs/pdf/AG_Letter_2-3-10.pdf?tag=contentMain;contentBody.

citizens – civilian and military alike – everywhere in the world, except in actual zones of armed conflict, such as Afghanistan. Indeed, as argued above there is little evidence that the Bush administration previously considered, or the Obama administration now considers, the whole world in reality to be a scene of armed conflict, whether against terrorism or al Qaeda and its associates.

The question remains whether the current law, as described here, should be changed. Should we accept that any significant use of violence by a terrorist organization qualifies that group as combatants under the law of armed conflict? Should we develop new law for today's terrorism challenge?

The success of the British against the Irish Republican Army (and more recently against the perpetrators of the July 2005 London subway bombings); the success of the Spanish against al Qaeda after the March 2004 Madrid train bombing, as well as the U.S. success after the 2000 attack on the *Cole* and the 1993 World Trade Center bombing, all support the conclusion that the best way to deal with terrorism is through the criminal law and police methods. By contrast, the use of military force has been counter-productive. Military force is a blunt instrument. Inevitably, unintended victims result from almost any military action. Drone attacks in Pakistan have caused large numbers of deaths, and are generally seen as fueling terrorism, not abating it. In Congressional testimony in March 2009, counter-terrorism experts David Kilcullen and Andrew Exum said that drones in Pakistan are fueling angry and growing militancy even far from the scene of the attacks.[109] Another expert told *The New York Times*, "The more the drone campaign works, the more it fails – as increased attacks only make the Pakistanis angrier at the collateral damage and sustained violation of their sovereignty."[110]

Guantánamo Bay and military commissions also make people angry. They are symbols of the gulf between the stated commitment of the United States to the rule of law and its actual conduct. The U.S. decision to treat all of the world as a zone of armed conflict (where drones may be used at will and persons may be secretly detained and brought to Guantánamo Bay or, today, Bagram prison in Afghanistan) cannot lead the way toward promoting the rule of law. It is counter-productive to promoting respect for

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109. Mary Ellen O'Connor, *Flying Blind: US Combat Drones Operate Outside International Law*, AM. MAG. Mar. 15, 2010, *available at* http:// www.americamagazine.org/content/article.cfm?article_id=12179. *See also* David Kilcullen & Andrew McDonald Exum, Op-Ed, *Death From Above, Outrage Down Below*, N.Y. TIMES, May 17, 2009, at A13; David Kilcullen, Testimony Before the House Armed Services Committee Hearing on HR 1886, The Pakistan Enduring Assistance and Cooperation Enhancement (PEACE) Act 2009 (Apr. 23, 2009), *available at* http://armedservices.house.gov/pdfs/FC042309/Kilcullen_Testimony042309.pdf.

110. Scott Shane & Eric Schmitt, *C.I.A. Deaths Prompt Surge in Drone War*, N.Y. TIMES, Jan. 23, 2010, at A1.

life, and it is counter-productive to promoting societies that respect the rule of law and reject violence.

Anti-American sentiment continues to grow. During Secretary of State Clinton's visit to Pakistan in late October 2009, a woman at a town hall meeting "characterized U.S. drone missile strikes on suspected terrorist targets in northwestern Pakistan as de facto acts of terrorism."[111]

In 2008, the Rand Corporation released a study that concluded:

> All terrorist groups eventually end. But how do they end? Answers to this question have enormous implications for counterterrorism efforts. The evidence since 1968 indicates that most groups have ended because (1) they joined the political process or (2) local police and intelligence agencies arrested or killed key members. Military force has rarely been the primary reason for the end of terrorist groups, and few groups within this time frame achieved victory. This has significant implications for dealing with [al Qaeda] and suggests fundamentally rethinking post-September 11 U.S. counterterrorism strategy.[112]

We are told with respect to detention without trial, military commissions, and targeted killing – as we were with regard to torture – that post-9/11 circumstances require extraordinary measures. Some of our leading ethicists countered those claims for torture by arguing that the absolute ban on torture must be respected as a moral imperative, regardless of the consequences.[113] We could say the same about targeted killing, indefinite detention, and military commissions. But, as in the case of torture, it turns out that doing the moral thing is also the effective thing. Torture is an unreliable means of interrogation that trained interrogators reject,[114] and, some of the best counter-terrorism experts similarly reject the use of military force in efforts against terrorism. Terrorists seek to undermine lawful institutions, to sow chaos and discord, and to foment hatred and violence. Upholding our lawful institutions, holding to our legal and moral principles in the face of such challenges, is not only the right thing to do – it is in itself a form of success against terrorism that can also lead to the end of terrorist groups.

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111. Alex Rodriguez, *Clinton Gets an Earful Against U.S. in Pakistan*, L.A. TIMES, Nov. 1, 2009, at A32.

112. JONES & LIBICKI, *supra* note 17, at xiii.

113. *See, e.g.*, Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005).

114. Peter Bauer, Statement on Interrogation Practices, Statement in lieu of Appearance Before the International Commission of Jurists (Aug. 29, 2006), *available at* http://ejp.icj.org/IMG/Bauer_statement.pdf. *See also* Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L. J. 1231 (2005).

CONCLUSION

On 9/11, the United States made a radical change in its choice of law in defending against terrorism. After a century of pursuing terrorists using criminal law and police methods, the United States invoked the law of armed conflict and military means. This article has presented evidence that the change was not – and is not – supported by international law. In November 2008, this author and colleagues David Graham and Phillipe Sands drew up a set of principles to guide the Obama administration toward reforms of post-9/11 U.S. laws and policies. Our aim was to improve U.S. compliance with the world's law against terrorism. The first principle we stated urged cessation of reliance on war as the legal and policy basis for confronting terrorists:

> The phrase "Global War on Terrorism" should no longer be used in the sense of an on-going "war" or "armed conflict" being waged against "terrorism." Nor should it serve as either the legal or security policy basis for the range of counter- and anti-terrorism measures taken by the Administration in addressing the very real and present challenges faced by the United States and other nations in addressing terrorism.[115]

Peacetime criminal law, not the law of armed conflict, is the right choice against sporadic acts of terrorist violence. The example of the United States adhering closely to its legal obligations in this vital area can only help create greater respect for the rule of law worldwide.

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115. Washburn Consensus Post-9/11 Principles are reproduced in Mary Ellen O'Connell, *The Way Forward: Post 9/11 Principles*, JURIST, Nov. 25, 2008, *available at* http://jurist.law.pitt.edu/forumy/2008/11/way-forward-post-911-principles.php.

Mr. CONYERS. Attorney Jaffer.

Mr. JAFFER. Mr. Chairman, thank you for the opportunity to appear before you today. You know, I think a lot of issues that have been raised here are very important. I would like to associate myself with Professor Lewis's remarks with respect to the use of—that topic we discussed earlier, obtained from coercive methods, whether they are called enhanced interrogation techniques or torture, or whatever you want to call them. That type of evidence is inadmissible in court, in criminal court, it should not be admitted. And that is absolutely, without a doubt, one of the core principles of the American justice system.

In fact, the Department of Justice in the Ghailani trial stipulated for the purposes of that case, that the information obtained with respect to the witness against Mr. Ghailani had been obtained through coercive methods. Therefore it was not expected to be introduced.

Mr. CONYERS. But of course, we don't have that safeguard in military commissions, do we?

Mr. JAFFER. As I understand it, Mr. Chairman, I think that the current Military Commissions Act of 2009, the one passed by Congress, does not permit the use of information obtained from coercive techniques in the military commissions either.

Mr. CONYERS. No, it doesn't, but the practice, I mean, you are an a battlefield. How many people that are drafted into a military commission knows about the law that we just passed cautioning them to be careful about torture or enhanced interrogation techniques?

Mr. JAFFER. That is an important question, Mr. Chairman. As you know, just like in the Federal courts, in the military commissions there are judges who make the legal determinations. And so one would presume that in the military commissions context——

Mr. CONYERS. Yes, they are judges, but they are appointed judges. They are not really judges. They are not even lawyers.

Mr. JAFFER. I believe, and I could be mistaken, but I believe that the judges for the military commission are JAG's, are military lawyers. I could be mistaken.

Mr. CONYERS. Well, let us clear it up. Are they, or aren't they? They are JAG lawyers?

Mr. LEWIS. Yes. The judge must not only be a JAG lawyer, the judge must also have gone through judicial training in addition to being a JAG lawyer. That is the judge. The members could be otherwise.

Mr. FEIN. Your Honor, if I could just interject here. In the Federalist Papers the Founding Fathers described the very definition of tyranny: combining within the same branch law enforcement, and law adjudication and lawmaking. And that is what a military commissions is. In the executive branch they play judge, jury, prosecutor, and define what a war crime is.

Now putting aside whether they have legal training, they know that they report to the Commander in Chief. And the whole reason why we have an independent judiciary with life tenures is because—and is the crown jewel of the Constitution—because that is how you get an unfettered, impartial mind. He is not worried about whether his superiors are going to want one thing or another. But

it was the Founding Fathers who described military commissions as the very definition of tyranny.

Mr. CONYERS. Does anybody on the panel take any exception or want to qualify what Professor Fein—Attorney Fein has said?

Laura Murphy.

Ms. MURPHY. I think one of the things that we need to be clear about is that even though you may—we believe that you have to be a JAG lawyer to be a judge, you don't have to have to have ever tried an international terrorism or other complex criminal case. And so, you know, I don't think that—as much talent as there is in military commissions, it doesn't compare to the talent that a Federal district court judge has or that the U.S. attorneys have in prosecuting complex criminal conspiracy cases, which is essentially what terrorism trials are.

And so, you know, there were some improvements made in the Military Commissions Act of 2009, but we don't think that the training for the lawyers or the judges is adequate to deliver justice.

Mr. CONYERS. Attorney Jaffer seems to nod his approval.

Mr. JAFFER. Well, I think that I agree to the extent that I believe that Federal district court judges have a tremendous amount of experience in trying complex criminal cases, including in some instances international terrorism cases. Our Federal prosecutors at the Department of Justice are phenomenal folks. These are career prosecutors in AUSA offices across the country and at main Justice. These are the people who would be ideal to prosecute these terrorists and to be tried before these judges.

My view is simply that—and I share actually Attorney Fein's concerns about the appearance of the folks who capture the individuals also trying them and acting as judges.

Now let me also be clear that these military judges, these military lawyers are among the best lawyers that America has to offer. They sit up and serve our country. They get immediate trial experience. JAG lawyers, their first day on the job is going to trial, as I understand it. And so these are not lawyers with little experience who are not capable. These are terrific Americans, who have chosen to serve their country. They have decided to go to law school, become lawyers, admitted to the bar. They have engaged in numerous trials.

So the fact that they haven't necessarily tried complex criminal cases, I agree Federal courts are better. There is no doubt. And in an ideal world, I think the Federal courts are the best option as the ones that make us appear to do justice and there——

Mr. CONYERS. Professor Lewis seems to agree with you on that point.

Mr. JAFFER. They simply don't work in the context of national security detainees. There is an option out there that you could appear to do justice and use Federal sitting judges, and AUSAs, and cleared defense counsel with experience in these cases. That is important, too, for the protection of the individual being tried.

Mr. LEWIS. I do agree that Article III courts are a better option. As I mentioned in my opening, though, I think that there are a certain subset of cases in which the evidentiary hurdles that it presents and the people who are gathering the information from overseas are just not a good fit.

Mr. CONYERS. Jeremy Scahill.

Mr. SCAHILL. You know, it is pretty clear that when it comes to the issue of torture and accountability for it that the United States Government holds itself to one standard and the rest of the world to a different standard.

I also wanted to add that when it became clear that the Obama administration had authorized the assassination of United States citizen Anwar al-Awlaki by either the Central Intelligence Agency or the Joint Special Operations Command, Representative Dennis Kucinich put forward a very simple piece of legislation that said the United States shouldn't assassinate its own citizens without due process. I think five Members of Congress cosigned or cosponsored that legislation.

That is a shocking commentary on the state of affairs in the Capitol today that only six American politicians, legislators would sign on to such a simple piece of legislation that said we shouldn't assassinate our own citizens without due process.

What I think what we are seeing unfold around the world today is a situation where in Afghanistan we are propping up drug dealers, war criminals and mass murderers in the name of democracy. We are bombing countries that we are not at war with, Yemen, Somalia, Pakistan. We are creating a new generation of insurgents that want and have every justification or reason to rise up against the United States because they actually have grievances now because members of their families have been killed.

I feel very sad when I think about the future of our democracy, because I think that what we are doing right now is sending a message to the rest of the world that in many ways our foreign policy represents that of the very rogue states that we denounce on a regular basis. And I don't say that lightly. I say it with a great sense of sobriety because I think it is shocking, and when you go to these war zones and you meet with the victims that live on the other end of the barrel of the gun that is our foreign policy, and they ask journalists, well, what can you do for us? The only thing we can do is come back to this body and ask that you do something about it, or try to give them access it to the lawyers.

One the ironies of the dark years of the Bush administration was that trial lawyers emerged as some the strongest freedom fighters we had in this society. But for the Center for Constitutional Rights and the ACLU, I think we would be in a much darker situation right now.

So I am very disturbed by a lot of what I have heard today and a lot of what is going on in the world. And I think a lot of it, when it comes down to Congress, boils down, as I said earlier, to the failure to use subpoena power. I think that is one of the actions that Congress can take that is a way of actually effecting some kind of responsibility or accountability when the other branches of government fail. And yet we have seen almost none of it with the Democrats in power in this Congress, and I hope that if the Democrats do regain the Congress, control of the House, that the subpoena power is used on these life-and-death issues.

Mr. CONYERS. But can these hearings begin the commencement of a potentially more optimistic view on your part in the coming Congress?

Mr. SCAHILL. Well, I think the empty chair next to you is an indication of where things are headed, Mr. Chairman. And I think we are going to see the targeting of the great enemy to our society ACORN, and, you know, maybe Van Jones will be subpoenaed, you know, these great threats to U.S. National security. But I think we have to hold our own people accountable, and I wish this Committee had used its subpoena power more, quite frankly, and the oversight committee as well.

Yes, it is a sign of optimism, to directly answer your question, that you so kindly agreed or initiated this hearing, but I think that the work has just begun, and hopefully if you are Chair again, we will see some subpoenas flying out of this office.

Mr. CONYERS. Professor O'Connell.

Ms. O'CONNELL. I am more optimistic than Mr. Scahill. I recall the great tradition of the Republican Party in terms of fidelity to international law. It was Abraham Lincoln, a Republican, who asked to have the first set of Code of Armed Conflict for the Law of Land Warfare to be written, and those rules are the fundamental rules that should be guiding how the United States conducts itself today.

One of our greatest Secretaries of State, Elihu Root, founded the American Society of International Law with its object of promoting understanding and international relations under the rule of international law.

I think if Republicans respect their tradition, the tradition of this country, where our Founding Fathers were well versed in international law, understood what it took to be a good citizen in the world, respecting international borders, respecting the authorities of international courts and tribunals, respecting what the well-versed, well-trained, proficient authorities, professors, publicists in international law had to say; I think if we see that—and I will do my level best from my position at Notre Dame to remind our Republican colleagues, our Republican elected Representatives that this is their tradition, that is the tradition of this country. And we can continue to add the counter example, which Mr. Scahill and I absolutely share.

We tried these expansive lawless approaches, these extraordinary arguments that were not based in authority or good faith analysis of the law, and where are we today? We have so little to show. We have not regained our standing in the world. There is only one way to do that, and that is return to fidelity of the rule of law for which this country was founded. I think if we proceed in goodwill and those of us in a position to speak out and write out and continue to teach students, I have hope that this country will not further stray from our path and from who we are as Americans.

Mr. CONYERS. I appreciate that.

Ms. O'CONNELL. If I could just add one brief comment. I am married to a combat veteran, who was a United States Army interrogator, and I think that his sacrifice and that of all of our serving men and women is to be respected. And he fought for the rule of law. He fought in the Gulf War, which he knew was on behalf of enforcing the United Nation's Charter. He fought under orders and respect for the Constitution. But that is what we owe all of our

serving men and women, respect for law, and we should not continue on this path that disregards that.

Mr. CONYERS. Thank you so very much.

Mr. Scahill, are you aware if the Chairman of this Committee was on H.R. 6010, prohibiting the extraterritorial killing of United States citizens?

Mr. SCAHILL. Yes.

Mr. CONYERS. Yes, you were aware?

Mr. SCAHILL. Yes.

Mr. CONYERS. So that you know that I am a cosponsor.

Mr. SCAHILL. Yes.

Mr. CONYERS. All right.

Mr. SCAHILL. Oh, yeah, no, and I commend you for that. Yes, of course.

Mr. CONYERS. Had you mentioned that before now?

Mr. SCAHILL. Oh, well, it is your Committee, Mr. Chairman.

Mr. CONYERS. I should know that I am on the bill.

Mr. SCAHILL. I think you were one of the half dozen brave Members of Congress that had the audacity to stand up against our government assassinating our own citizens without due process.

Mr. CONYERS. Well, I don't think it takes that much audacity.

Mr. SCAHILL. I don't think it does. What I think is audacious is that only six of you, I believe I am correct, actually cosponsored that legislation. I congratulate you for it.

Mr. CONYERS. Attorney Fein.

Mr. FEIN. To add to that, I would compliment you as also being a supporter of a bill that I drafted with Walter Jones to have the audacious prohibition on a President intentionally and knowingly lying to Congress to obtain authorization for war, sort of a revolutionary principle. And that, again, had a handful of cosponsors.

But just a couple of final closing points. One, due process is not simply a slogan. On Guantanamo Bay, after the Supreme Court declared that habeas corpus was available to the detainees, the vast majority that had hearings have been concluded not to be enemy combatants, and this is even though the Administration is able to rely on secret evidence to prove enemy combatant status. And these are people that, as words of former Secretary of Defense Rumsfeld said, were the worst of the worst.

So due process matters. They don't get it right all of the time.

With regard to the idea of battlefield, what is and is not, what to me is rather alarming is that when you declare or find yourself at war with a tactic as opposed to a country, there are no boundaries; that if you say you are at war with international terrorism, the boundary is all of the planet. It can go interplanetary, intergalactic, wherever the tactic could be conceivably be used. That is what makes so dangerous the idea that we have the legal architecture of war in fighting international terrorism, because it means you can use military force anywhere you think someone is a terrorist, including in this very Committee room.

Lastly at least with regard to waterboarding, if it really works so well, I am puzzled as to why those on this panel and maybe others who supported it aren't championing that it be reinstituted. I don't know anyone saying, we need Congress to pass a law saying the Administration shall use waterboarding because it is so effec-

tive at gathering useful information of thwarting terrorist attacks. I think the fact that it was abandoned once it came under the sunshine exemplifies that it was hardly the necessary tool to prevent future terrorist attacks.

Thank you, Mr. Chairman.

Mr. CONYERS. Thank you.

I would like to say on behalf of the Committee that there is nobody here on this Committee that sanctions waterboarding, among the witnesses in this discussion. I think that is accurate.

Ambassador Pickering, you started us off, and I would ask you to make any closing comments that you would like to make before we adjourn.

Mr. PICKERING. Two or three points, Mr. Chairman. Before I begin, there is a tendency in this town and sometimes up here on the Hill that while everything has been said, not everybody has said it yet. I will try to resile from that.

I want to thank you for having the hearings. I think they brought out a number of very interesting points. It has been interesting that while the debate has had something of a partisan flavor from time to time, there are enough home truths that I think one can draw from this and your very vital and interesting cross examination of us all that there is a way ahead.

My own sense is that there is an entire compatibility between national security and honoring and observing human and civil rights. This is where I began. My sense is that that still remains the deep underlying theme of this particular hearing. And even though we have had differences in degree about how the various pieces of this could come together, I think we have no difference across the group here in any way in principle.

Thank you, Mr. Chairman.

Mr. CONYERS. Thank you very much. This hearing stands adjourned.

[Whereupon, at 12:11 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Congressman Henry C. "Hank" Johnson, Jr.

Statement for the Hearing on Civil Liberties and National Security

December 9, 2010

Thank you, Mr. Chairman, for holding this important hearing which will give us the opportunity to explore the relationship between civil liberties and national security.

The September 11, 2001 attacks on the World Trade Center and the Pentagon were a powerful demonstration of the horrors of terrorism and offered proof of the urgent need to defend our country against these dangers.

Since September 11, 2001, our government has sought to enhance security, which necessitates action on balancing national security and civil liberties.

As a Member of this Committee and the Armed Services Committee, I am committed to doing whatever I can to ensure the safety of our nation.

At the same time, our nation must also remain a steadfast defender of civil rights.

By not holding ourselves to the high standards we hold others to, we run the risk of invalidating the most sacred of our democratic values.
While we may live in a dangerous world, America must remain a place of laws.

It is important that we keep this principle in mind as some of the previous Bush Administration's policies that allowed for warrantless wiretapping, water-boarding and other enhanced interrogation techniques of detainees are unsettling and deeply disturbing.

I take issues of personal privacy and protecting our civil liberties very seriously.

The threat of terrorism is real, and law enforcement must have the right tools to protect Americans, but we must also ensure that our efforts in counterterrorism efforts have a solid Constitutional footing.

I also sit on the Transportation & Infrastructure Committee and I have the world's busiest airport, Hartsfield-Jackson Atlanta International Airport, right outside of my district. Therefore, airline security is very important to me.

Earlier this year, I sent a letter to the Government Accountability Office requesting a report.

In that request, I asked for a detailed explanation of the procedures that Transportation Security Administration's employees use to secure the baggage claim/conveyor belt area; identifies the strengths and weaknesses of TSA's system for securing the baggage claim/conveyor belt area; and recommends what can be done to address the identified weaknesses of TSA's system for securing the baggage claim/conveyor belt area to prevent national security threats.

I have also introduced the Airport Security Act of 2010.

This bill would expand the TSA's authority to non-federally regulated areas of an airport, such as the lobby or baggage claim area, and make it illegal to carry a loaded gun into those areas.

Allowing loaded guns into airports could endanger airport workers, passengers, and people waiting to pick them up or to see them off.
I introduced this bill to make our airports safer and secure for the millions of American that fly every year.

While security is of the upmost importance to me, it is equally important that our laws are in line with the Constitution, and we enact proper checks and balances.

Earlier this session, I cosponsored the Chairman Conyers' bill, H.R. 104, which would establish a national commission on war powers and civil liberties.

This independent bipartisan commission would investigate detention, enhanced interrogation techniques, and warrantless electronic surveillance.

I am proud to be an original cosponsor of the most recent version of the Chairman's legislation, H.R. 6501.

The original bill only examined Bush era actions while the latest version will cover all executive branch actions since September 11th.

It is worth noting that a central challenge for a democracy like the United States of America is to maintain national security while enhancing individual freedoms.

Defense of civil liberties and constitutional procedures in the face of claims of national security is a never-ending task that requires constant vigilance and public awareness.

We cannot allow our fears about terrorism to lead to lawlessness or a lack of integrity.

Again, I thank the Chairman for holding this hearing today and look forward to hearing from our witnesses.

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