AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY

Advance

The Journal of the ACS Issue Groups

BRENNAN CENTER FOR JUSTICE

A special issue featuring papers from *Building Freedom, Building Security*, a conference sponsored by ACS and the Brennan Center for Justice.

TABLE OF CONTENTS

Foreword
Lisa Brown and Michael Waldman

Commencing the Discussion on America's Challenge for the Next Five Years: Building Freedom, Building Security
Senator Gary Hart

National Intelligence and the Rule of Law
Deborah N. Pearlstein

The Twenty Year Test: Principles for an Enduring Counterterrorism Legal Architecture
Judge James E. Baker

A Global Response to Terrorism
Ian Shapiro

Restoration, Education, and Coordination: Three Principles to Guide U.S. Counterterrorism Efforts Over the Next Five Years
Louise Richardson

The New Domestic Surveillance Regime: Ineffective Counterterrorism That Threatens Civil Liberties and Constitutional Separation of Powers
Kate Martin

Prosecuting Suspected Terrorists: The Role of the Civilian Courts
Stephen J. Schulhofer

Building Checks and Balances for National Security Policy: The Role of Congress
Suzanne E. Spaulding

Engaging the Muslim World: How to Win the War of Ideas
Hady Amr and Peter W. Singer

Advance

The Journal of the ACS Issue Groups

TABLE OF CONTENTS

1 **Introduction**

5 **Foreword**
Lisa Brown and Michael Waldman

9 **Commencing the Discussion on America's Challenge for the Next Five Years: Building Freedom, Building Security**
Senator Gary Hart

11 **National Intelligence and the Rule of Law**
Deborah N. Pearlstein

21 **The Twenty Year Test: Principles for an Enduring Counterterrorism Legal Architecture**
Judge James E. Baker

37 **A Global Response to Terrorism**
Ian Shapiro

43 **Restoration, Education, and Coordination: Three Principles to Guide U.S. Counterterrorism Efforts Over the Next Five Years**
Louise Richardson

51 **The New Domestic Surveillance Regime: Ineffective Counterterrorism That Threatens Civil Liberties and Constitutional Separation of Powers**
Kate Martin

63 **Prosecuting Suspected Terrorists: The Role of the Civilian Courts**
Stephen J. Schulhofer

73 **Building Checks and Balances for National Security Policy: The Role of Congress**
Suzanne E. Spaulding

89 **Engaging the Muslim World: How to Win the War of Ideas**
Hady Amr and Peter W. Singer

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Advance

Advance, the Journal of the Issue Groups of the American Constitution Society for Law and Policy (ACS), is published twice yearly by ACS. Our mission is to ensure that our country's founding values of human dignity, individual rights and liberties, genuine equality and access to justice enjoy their rightful, central place in American law.

Each issue of *Advance* features a collection of articles that emanate from the work of ACS's Issue Groups. Most editions of *Advance* feature a selection of Issue Briefs written for ACS in the preceding several months, on topics spanning the breadth of the eight Issue Groups. But others, such as this one, consist of papers on one particular topic addressed at a conference or other event hosted by ACS. ACS Issue Briefs—those included in *Advance* as well as others available at www.acslaw.org—are intended to offer substantive analysis of a legal or policy issue in a form that is easily accessible to practitioners, policymakers and the general public. Some Issue Briefs tackle the high-profile issues of the day, while others take a longer view of the law, but all are intended to enliven and enrich debate in their respective areas. ACS encourages its members to make their voices heard, and we invite those interested in writing an Issue Brief to contact ACS.

We hope you find this issue's articles, which span a range of views on the topic of national security, engaging and edifying.

ACS Issue Groups

ACS Issue Groups are comprised of legal practitioners and scholars working together to articulate and publicize compelling progressive ideas. The Groups are led by distinguished co-chairs who are experts in their respective fields. They are open to all ACS members, and new members and new ideas are always welcome.

Access to Justice

The Access to Justice Group addresses barriers to access to our civil justice system, including, among other issues, efforts to strip courts of jurisdiction, raise procedural hurdles, remove classes of cases from federal court, insulate wrongdoers from suit, limit remedies and deprive legal aid services of resources. It focuses attention on ways to ensure that our justice system is truly available to all.

Co-Chairs: *Lucas Guttentag*, ACLU Immigrants' Rights Project
Marianne Lado, New York Lawyers for the Public Interest
Bill Lann Lee, Lewis, Feinberg, Lee, Renaker & Jackson, P.C.

Constitutional Interpretation and Change

Ideological conservatives have been quite successful in promoting neutral-sounding theories of constitutional interpretation, such as originalism and strict construction, and in criticizing judges with whom they disagree as judicial activists who make up law instead of interpreting it. The Constitutional Interpretation and Change Group works to debunk the neutrality of those theories and expose misleading criticisms. It also articulates effective and accessible methods of interpretation to give full meaning to the guarantees contained in the Constitution.

Co-Chairs: *Jack Balkin*, Yale Law School
Rebecca Brown, USC Gould School of Law
Andrew Pincus, Mayer Brown LLP

Criminal Justice

The administration of our criminal laws poses challenges to our nation's fundamental belief in liberty and equality. Racial inequality permeates the system from arrest through sentencing. The United States' imposition of the death penalty increasingly has set us apart from much of the world and has raised concerns about the execution of the innocent. Sentencing law and policy have led courts to impose lengthier sentences, resulting in the incarceration of an alarming percentage of our population. The recent invalidation of mandatory federal sentencing guidelines has left sentencing in flux. Failure to provide adequate resources for representation of accused individuals and investigation of their cases has weakened the criminal justice system. Restrictive rules governing collateral review of convictions have closed the courts to many. This Group explores these and other issues affecting criminal justice.

Co-Chairs: *David Cole*, Georgetown University Law Center
Gregory Craig, Williams & Connolly
Carol Steiker, Harvard Law School
Ronald Sullivan, Harvard Law School

Democracy and Voting

The Democracy and Voting Group focuses on developing a comprehensive vision of the right to vote and to participate in our political process. It identifies barriers to political participation that stem from race, redistricting, the partisan and incompetent administration of elections, registration difficulties, felon disenfranchisement and other problems that suppress access to voting and threaten the integrity of our electoral process.

Co-Chairs: *Julie Fernandes*, The Raben Group
Pamela Karlan, Stanford Law School
Nina Perales, MALDEF
Sam Hirsch, Jenner & Block

Equality and Liberty

The protection of individual rights lies at the core of a progressive approach to the law. The Equality and Liberty Group addresses means of combating inequality resulting from race, color, ethnicity, gender, sexual orientation, disability, age and other factors. It also explores ways of protecting reproductive freedom, privacy and end-of-life choices and of making work accessible and meaningful.

Co-Chairs: *Alan Jenkins*, The Opportunity Agenda
Nina Pillard, Georgetown University Law Center
Paul Wolfson, Wilmer, Cutler, Pickering, Hale & Dorr

Economic, Workplace, and Environmental Regulation

The work of the Economic, Workplace, and Environmental Regulation Group encompasses a broad range of issues in the areas of labor law, environmental protection, economic opportunity, and administrative law. Among the topics it examines are workplace democracy, climate change and the enforcement of environmental laws, the regulatory process, corporate governance, and wealth inequality.

Co-Chairs: *Stephen Berzon*, Altshuler Berzon LLP
Catherine Fisk, University of California, Irvine School of Law
Albert H. Meyerhoff, Coughlin, Stoia, Geller, Rudman & Robbins LLP

Religion Clauses

No issue was more central to our Nation's founding than freedom of religion and no part of the Constitution continues to capture the imaginations and passions of Americans more than the Religion Clauses of the First Amendment. The Religion Clauses Group provides a forum for discussion about the meaning and interpretation of the Establishment and Free Exercise Clauses and also investigates broader questions regarding religion in America—including the appropriate relationship between church and state in contemporary society and the role of religion and religious belief in American politics and public life.

Co-Chairs: *William P. Marshall*, University of North Carolina School of Law
Melissa Rogers, The Divinity School at Wake Forest University

Separation of Powers and Federalism

Recent years have witnessed an increase in executive power at the expense of the other branches of the federal government. This change has had a profound effect on our civil liberties, government transparency and the rule of law. The Separation of Powers and Federalism Group addresses the proper balance of power in our system of checks and balances, as well as other issues related to the power of the President. It also addresses the importance of preserving the independence of the judiciary. In addition, this Group focuses on the federalism jurisprudence of the Supreme Court, which has led it to strike down an unprecedented number of congressional enactments, threatening the ability of Congress to protect civil rights, the environment and workers. It also addresses positive visions of federalism that will promote the ability of government at all levels to pursue progressive policies.

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International Law and the Constitution Working Group

This Working Group focuses on the relationship between international law and the Constitution and the implications of this relationship for human rights. The Group examines issues such as the incorporation of international human rights law into domestic law and U.S. compliance with human rights obligations. It brings together scholars and practitioners in mutually supportive efforts to shape the debate over human rights law and policy in the U.S.

Co-Chairs: *Jamil Dakwar*, American Civil Liberties Union
Laura Dickinson, University of Connecticut Law School
Catherine Powell, Fordham Law School
Cindy Soohoo, Center for Reproductive Rights

Foreword

Lisa Brown* and Michael Waldman**

On September 11, 2001, the nation experienced an unprecedented act of terrorism and the threat of additional attacks has not abated since. In the words of the National Commission on Terrorist Attacks upon the United States ("the 9/11 Commission"), combating terrorism remains a "generational challenge." The 9/11 Commission pointed to the need for "national debate" both about "*what to do*—the shape and objectives of a strategy" and also about "*how to do it*—organizing [our] government in a different way." As we pass the seventh year after 9/11, the urgent need for this dialogue continues. Scholars and policymakers continue to grapple with how the domestic "war on terror" relates to other elements of national security and law enforcement policy. The United States needs a cogent and coherent domestic counterterrorism strategy that is consistent with American values and legal traditions.

National security policies implicate profound questions of national values, of national character—of the kind of nation *we want to be*. Revelations of prisoner abuse at Abu Ghraib, warrantless domestic surveillance by the National Security Agency, and secret CIA prisons have shocked and distressed many Americans. We are reminded of the advice of the 9/11 Commission to "offer an example of moral leadership in the world" and to resolve "to treat people humanely, abide by the rule of law, and be generous and caring to our neighbors."

This issue of *Advance: The Journal of the ACS Issue Groups*, co-published with the Brennan Center for Justice, stems from a conference held on September 7, 2007, at the New York University School of Law sponsored by the Brennan Center and the American Constitution Society. Governor Thomas Kean and Senator Gary Hart, two of the nation's most esteemed national security leaders, co-chaired the conference. As former Governor of New Jersey, Governor Kean co-chaired the 9/11 Commission. Senator Hart co-chaired the bipartisan U.S. Commission on National Security/21st Century, which presciently identified the terrorist threat prior to 9/11. These co-chairs brought an unparalleled combination of public service, experience and authority to the conference. This conference brought together leading scholars and practitioners in the field of national security law and policy, and asked them to address some simple questions: How can we safeguard our nation while still preserving the traditional American values of democracy and the rule of law? Can we achieve an effective national security policy that protects our civil rights and liberties? What are the challenges of intelligence gathering and counterterrorism policy? Their answers are reflected in the papers collected here, which provide a range of ideas for the next Administration and Congress to consider in evaluating our current national security policies and charting a course for the future.

In *National Intelligence and the Rule of Law,* Deborah N. Pearlstein examines the critical role that law plays in national security policy, particularly in the collection of intelligence. Professor Pearlstein contends that "law is not an obstacle that powerful

* Executive Director of the American Constitution Society for Law & Policy
** Executive Director of the Brennan Center for Justice

governments must overcome to meet their objectives—it is a vital tool that power must respect in order to wield successfully. From law's broad structural role in shaping decision-making and institutional culture to its immediate and instrumental function in constraining behavior and building international partnerships, law helps U.S. policy-makers avoid having to reinvent the wheel every time a terrorist attack occurs. The law exists, and should be designed, to serve America's long-term interests."

Judge James E. Baker asks, "[W]here should we be in twenty years, and how do we get there today?" in *The Twenty Year Test: Principles for an Enduring Counterterrorism Legal Architecture*. Judge Baker considers the principles that might inform a legal architecture designed to address the enduring threat of terrorism, including constitutionally inclusive processes for appraising and validating executive action. As he explains, "Practice advises that where there is broad authority, there is increased risk of overreaching and thus a corresponding risk to our constitutional values and process of government. Independent mechanisms of appraisal, by detached executive actors, or through review by different branches of government are the most effective way to appraise options and then evaluate their implementation."

In *A Global Response to Terrorism*, Professor Ian Shapiro argues that "in order to be effective, U.S. counterterrorism policy must be part of a coordinated, global response, involving building and sustaining international institutions and regional alliances to contain terrorist threats." Professor Shapiro contends that the Cold War policy of containment "continues to make sense as a basis for U.S. national security policy in the post-Cold War era. Islamic fundamentalism presents no more of a competitive threat to democratic capitalism than did communism."

In *Restoration, Education, and Coordination: Three Principles to Guide U.S. Counterterrorism Efforts Over the Next Five Years,* Dean Louise Richardson recommends that, in order to respond more effectively to terrorism, the United States must "make a concerted effort to restore our prestige in the world, demonstrate our commitment to multilateralism, and reframe the war against terrorism as a transnational campaign against isolated extremists." Dean Richardson emphasizes the importance of educating both the U.S. public about the risks of terrorism and the world at large about our policies. Looking to the experience of other countries that have confronted significant terrorist threats, she concludes that, "we should coordinate the actions of our intelligence and security forces, ensuring that their short-term successes are advancing our long-term goals."

In *The New Domestic Surveillance Regime: Ineffective Counterterrorism That Threatens Civil Liberties and Constitutional Separation of Powers,* Kate Martin explores the difficult issues raised by the government's growing domestic intelligence capabilities. Martin posits that "there has been no demonstration that such surveillance is likely to yield crucial information and no examination of whether the intelligence agencies are competent or knowledgeable enough to recognize what is crucial and to use such data to stop terrorists, assuming the data can even be found." She asks whether "the powers being amassed by the government [are] so great that oversight will not be sufficient, that traditional mechanisms should not be counted upon to protect the constitutional system in a time of crisis?"

In *Prosecuting Suspected Terrorists: The Role of the Civilian Courts*, Professor Stephen J. Schulhofer argues that the need for a special system of tribunals to handle terrorism cases, "has been wildly exaggerated. The federal courts are already well-equipped to protect classified information and to handle all the other supposed com-

plexities of terrorism trials." Professor Schulhofer identifies areas where Congress should act to clarify existing legislation, particularly the Classified Information Procedures Act, to address the special difficulties presented in terrorism prosecutions while preserving the role of the federal courts and the adversarial system.

Suzanne E. Spaulding discusses the importance of congressional oversight in *Building Checks and Balances for National Security Policy: The Role of Congress*. She offers specific proposals to increase the effectiveness of intelligence oversight. In Spaulding's view, "[w]ithout effective oversight, Congress is legislating in the dark. Unless Congress knows what happened in the area of surveillance after 9/11—what pressure those attacks and their aftermath put on the system and how the system responded—it cannot effectively adjust the legal framework both to provide the needed authority to the President and national security professionals to meet the challenges ahead and to ensure the necessary safeguards against abuse in the event of a future crisis."

Finally, Hady Amr and Peter W. Singer contend in *Engaging the Muslim World: How to Win the War of Ideas* that winning the "War on Terror" requires us to rebuild a foundation of trust between the United States and the Muslim world; "in other words, winning the 'war of ideas.'" Amr and Singer assert that, "More than merely a lost popularity contest, the deepening divide between the United States and Muslim nations and communities around the world poses a huge barrier to our success on a breadth of vital issues, from running down terrorist groups to expanding economic development and political freedom. Progress on these issues will steer individuals toward or against militant radicalism." They advocate a new approach to our public diplomacy and strategic communications and offer concrete suggestions for the next administration to improve U.S. relations with Muslim communities and to create a compelling alternative to radical extremism.

Our goal for the September 2007 conference and for this publication is to inspire lawyers, policymakers, advocates and students to look forward and consider how we can better build both domestic security and freedom in the years ahead. These papers reflect not only a variety of opinions on this subject, but also the many different aspects of the challenges we confront. Reading the papers together, it is clear that all three branches of government—the courts, Congress, and the executive branch—have critical roles to play in the conduct of counterterrorism domestically. We invite our readers to examine these important issues and enter into the ongoing public debate that will define who we are as a nation.

Commencing the Discussion on America's Challenge for the Next Five Years: Building Freedom, Building Security

Introductory Remarks by
Senator Gary Hart*

Thank you very much. I want to thank Michael Waldman and all those at the Brennan Center for their very kind invitation for me to join you here today. I am particularly pleased to be reunited with an old friend and colleague, Fritz Schwarz, one of the leading members of the New York bar and a great public servant. Fritz and I had the occasion to work together more than thirty years ago on issues that we are here to discuss, ironically, three decades later. It is also a great honor for me to share the platform with Governor Tom Kean, one of our era's great public servants. Tom Kean and I go back to an age when political parties used to get along with each other. A quaint notion I know for many of the younger people here, but in fact that age did exist and hopefully will return to the United States.

All of us who read American history in the founding era are struck by many things, not least of which is the Founders' reference to the need for vigilance. And once a great republic such as this is founded, one would think, especially after more than two centuries, that the need for vigilance would have long since expired. But, the longer I live and the more I begin to see patterns in American political life, the more I appreciate that admonition of the Founders not only to each other, but to future generations: To remain vigilant with regard to both the structure of government, which they created, and the principles for which it stood and, in theory at least, still stands.

And that vigilance it seems to me relates to a degree to an observation, or at least more than an observation, a theory of the late Arthur Schlesinger Jr.'s about cycles of American history. And Professor Schlesinger's theory, for those of you familiar with that book and that particular idea of his, had to do with 30 or 40-year cycles of reform and then what he called consolidation, or if you will, adoption of those reforms and inculcation or institution of those reforms into our system. Our system then becomes stagnant and occasionally corrupt and then that leads to another era of reform. Were he still with us, and were he participating in a forum such as this, I think it is quite likely that Professor Schlesinger would apply that same idea of reform and consolidation to the whole area of security and liberty because again after the passage of several decades of public service and observation, we are in one of those cycles. And the cycles

* Scholar in Residence at the University of Colorado and Distinguished Fellow at the New America Foundation. Senator Hart is chairman of the Council for a Livable World and is chairman of the American Security Project. He was co-chair of the U.S. Commission on National Security for the 21st Century, which performed the most comprehensive review of national security since 1947. Senator Hart represented the State of Colorado in the United States Senate from 1975 to 1987, where he served on the Armed Services Committee, Environment Committee, Budget Committee, and Intelligence Oversight Committee.

do repeat themselves, if not in predictable, 30-year patterns, but certainly in times of crisis. All of you, who know American history, know about the Alien and Sedition laws of the late 18th century and the first Adams' administration. We are all painfully familiar with President Lincoln's decision to suspend habeas corpus for some 90 days until it was approved by a reconvened Congress. We know the history of the Palmer raids in the 1920s. We know the McCarthy era and the Red Scares of the '50s and beyond. Fritz Schwarz and I and others know the era of Watergate and the abuses of power that occurred then and the reforms that were advocated by the Church Committee and in large part adopted, but not totally. And now, some twenty-five or thirty years later, we see a recycling of some of the same patterns of the abuse of power.

Some of us were discussing a few minutes ago whether or not the trajectory of American history is a more or less upward incline of progress. I wish I could say that it is, as I believed in my youth that every era brought on a more progressive country. I am beginning to think, although I am not sure, that it is more like Schlesinger's cycles of American history: we have crisis, the crisis tempts people to accumulate and consolidate power in the executive branch, and, in the name of security, to either take our liberties or encourage us to surrender them.

And this is what brings us here today. One of the ironies of politics is that, although not inevitably by any means, that it is often—too often—people who claim to be concerned about governmental power, who themselves are guilty of its consolidation and abuse. So I think whether liberal or conservative it is very important. And regardless of ideology for all of us to think very seriously always and particularly in times of national crisis—real or imagined—about the degree to which we are prepared to surrender our liberties to achieve our security.

A few of us met last night over dinner and discussed this issue and I reminded people of a couple of chapters in *The Brothers Karamazov*. "The Grand Inquisitor"' and the chapter proceeding it, in which this debate is carried on by "The Grand Inquisitor" about the degree to which people will sacrifice their freedom for bread and in Dostoevsky's notion bread can, I think, be transposed into security in early 21st century America. This is not to be too philosophical, but I think we are at a period in American history where we really do have to deal seriously with this decision on a daily basis. There is no single, simple answer, whether legislative or regulatory or partisan or whatever. It does require an informed electorate. It does require us who salute the flag of the Republic to take seriously the central theme of a republic and that is civic duty and citizen participation. I do believe, despite the cycles of abuse of power in times of crisis, that properly informed and properly engaged, the American people will reach the right conclusions.

Having said that, I must conclude by observing that it was less than a year ago that the Congress of the United States voted to give the incumbent president pretty much unilateral authority and arbitrary authority to suspend the writ of habeas corpus. Those of you who are lawyers, or those of you who have studied the law, know that there is no doctrine or ideal more central to the rule of law than the ideal of habeas corpus: that people cannot be in a democracy of rights, imprisoned without knowing why and without having access to the rule of law and the systems of law. But that is exactly in 2006 what the Congress of the United States has done. And the Great Writ is being abused even as we meet here today. So it does bring us back to that admonition of our founders to be vigilant. And if we are vigilant then we will correct the cycles of abuse when they occur.

National Intelligence and the Rule of Law

Deborah N. Pearlstein*

I. INTRODUCTION

For the past seven years, public discussion about national security policy has been plagued by a mistake in framing made in the immediate aftermath of the attacks of September 11, 2001. It was in those frightening times that both public leaders and legal scholars identified the key challenge of counterterrorism as how best to balance liberty and security. But as has since become apparent, the balance metaphor is, at best, inexact. As the 9/11 Commission Report itself made clear, the fundamental freedoms of our open society were not the primary or even secondary reason the terrorists succeeded on September 11. Societies decreasingly concerned with human rights, like Russia, have not necessarily been increasingly well protected from terrorism. And the most important actions Congress has taken to protect against catastrophic attacks—like legislation expanding U.S. involvement in international cooperative efforts to inventory, secure, and track the disposition of fissile materials—have involved no compromise of human rights.

The balance metaphor made thinking about post-9/11 security policy easy—fewer liberties equals better security—but it as often made it misguided. We began rounding up suspects before we knew what questions to ask, alienating the communities we needed most when we knew enough to be more targeted in our search. We subjected detainees to brutal treatment and torture, without reconciling ourselves to how such practices would compromise the hope of bringing the guilty to justice. We declared ourselves loosed of international legal obligations before coming to terms with how such decisions would compromise our international allies' willingness and ability to work with us in preventing terror. The result has been to damage our intelligence collection capacity, leave the full strategic power of our criminal justice system untapped, and weaken the scope of our international reach. As we think about designing national security policy going forward, we need to leave this most simplistic kind of balancing behind.

At the same time, a new security policy agenda is inadequate if it does no more than identify what has not worked and correct our most recent mistakes. The Military Commissions Act of 2006, the Foreign Intelligence Surveillance Act amendments of 2007, perennial post-9/11 proposals for a new legal regime of "preventive" detention—all are examples of rights reduction masking as affirmative approaches to national security. Such initiatives, which chip away at basic rights of due process, privacy, and judicial review, are simply efforts, however misguided, to correct the "balancing" mistakes of the current Administration. There are no doubt some important corrections we must make, including to resolve the situation of the detainees at Guantanamo Bay and to clarify at last that a single, humane standard of treatment governs all U.S.

* Visiting Scholar, Woodrow Wilson School of Public and International Affairs, Princeton University.

interrogation operations—no distinction between the Central Intelligence Agency ("CIA") and the Defense Department, no daylight between military and civilian. But the unique package of limited corrections necessary to resolve these existing problems should not be mistaken for an answer to the real policy challenges that remain about how best to protect the United States from terrorism. We must not let the hard case of fixing Guantanamo make bad law for all future approaches to intelligence collection.

Instead, we must return to the more basic questions that have not much occupied the legal debate: what specifically is the threat of terrorism; what is a realistic national goal to work toward in addressing it; what is our strategy for reaching that goal; and what tools are necessary to make that strategy a success? To be sure, these questions of threat assessment, objective setting, strategy and tactics are questions in the first instance not for lawyers, but for experts in psychology, history, technology, religion, organizational design and decision-making, policing, and national security. Wise policy will rely on their insights.

What lawyers can perhaps offer at this stage is some guidance about the role law can play in aiding this task of government—from security policy development to its deployment. The remainder of this essay aims to do that, with a particular focus on the role of law in aiding the collection of intelligence. It begins with a simple premise that has been, surprisingly, much challenged in recent years: there is no "intelligence collection" exception to the commitment of the U.S. government to operate under a system bound by the rule of law. To be clear, the expression "rule of law" does not refer, in particular, to a list of rules to be followed. It means a set of ideas: people will be governed by publicly known rules that are set in advance, that are applied equally in all cases, and that bind both private individuals and the agents of government.

Our society has long thought the rule of law a good idea for reasons that are centrally relevant to the intelligence collection mission. The law can create incentives and expectations that shape institutional cultures. It can construct decision-making structures that take advantage of comparative institutional competencies, and maximize the chance for good security outcomes. It can provide a vehicle for building and maintaining more reliable working relationships with international partners. Finally, and not least, it sets limits on behavior and ensures accountability. This list of virtues is, of course, only the way law functions ideally; the law itself must be clearly conceived and reliably enforced. But in considering the lessons of the past several years, it becomes apparent that *intelligence collection needs law* to fulfill these roles. Put differently, law must be considered an essential component of counterterrorism strategy going forward.

II. SHAPING INSTITUTIONAL CULTURE

Among the many insights of the 9/11 Commission Report was the extent to which the age-old culture of secrecy within the intelligence community compromised terrorism threat assessment and analysis. Information was hoarded rather than shared within the federal government; state and local officials and first responders felt cut off from federal information sources, and vice versa. While some small progress has been made, a recent Government Accountability Office ("GAO") report finds that much of the sharing that occurs today is in gross—access to mammoth databases, of uncertain accuracy or relevance, that accordingly are, at best, of questionable benefit to national security.[1]

[1] U.S. Gov't Accountability Office, GAO-08-35, Homeland security: Federal Efforts Are Helping to Alleviate Some Challenges Encountered by State and Local Information Fusion Centers 6-9 (2007).

Unnecessary secrecy has hamstrung our intelligence community with a host of ills. It of course undermines government's ability to "connect the dots" between facts that might alert officials to an impending attack. It also handicaps the important need for intelligence collection to adapt to changing environments over time. As organizational theorists have long emphasized, the ability of organizations to learn from mistakes (and successes) and to incorporate those lessons into ongoing operations is essential for organizational effectiveness. Compartmentalization of knowledge limits this critical ability to learn. Indeed, secrecy can all but exclude the possibility of independent judgment or meaningful review, creating an environment in which, as cognitive psychologists helped explain a quarter-century ago, "groupthink" can flourish. U.S. national security history is replete with mistakes made by homogenous groups, insulated from competing ideas or processes, moving forward without critically evaluating their own ideas of balancing tactical advantage against strategic goal.

Perhaps most troubling, secrecy can disable the ability of agreed-on laws to function, and create conditions that make it more likely for abuse of all kinds. As former UN Special Rapporteur on Torture Nigel Rodley has written in the context of detention, "the more hidden detention practices there are, the more likely that all legal and moral constraint on official behavior [will be] removed."[2] It is for this reason that a host of domestic and international human rights laws disfavor government secrecy. And why organizations like the International Committee of the Red Cross—while recognizing the importance of and upholding strict commitments to confidentiality—believe that even confidential engagement with government operations is better than no engagement at all. Even modestly intrusive structures of independent monitoring can help. Particularly in a conflict in which, it is often said, it is necessary to "win the hearts and minds" of those who would reject our system, it is in no one's interest to have laws on the books only to have them violated with impunity because of efforts to keep secret information demonstrating that violations have occurred.

Excessive secrecy is hardly the only disadvantageous cultural phenomenon that exists in the intelligence community, but it provides a particularly useful example of how law can help by shaping cultural norms. Consider just a few examples. As the 9/11 Commission pointed out in its report, the rule incentive structures on 9/11 imposed risks on intelligence community members for inappropriately sharing classified information.[3] But there was no penalty for failing to share information that should be transmitted. Nor was there any reward for responsiveness and communication. Rules that disfavor secrecy yet provide no advantage to critical information sharing only perpetuate the destructive cultural norm. The law can be redesigned to help work against it.

Much the same case may be made for the role of congressional oversight. The law currently requires congressional intelligence committees to exercise broad oversight of executive intelligence activities, but makes an exception for certain highly classified activities, allowing some to be briefed only to a "gang of eight"—the leadership of the House and Senate and of the intelligence committees, with no staff present or able later to learn about the content of the briefing from the members. As Suzanne Spaulding and others intimately familiar with the process on Capitol Hill have warned, such limitations on the process of information sharing and analysis make meaningful

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[2] Nigel S. Rodley, The Treatment of Prisoners Under International Law 244 (Oxford Univ. Press 2d ed. 1999).

[3] Nat'l Comm'n on Terrorist Attacks upon the U.S., The 9/11 Commission Report 416-18 (2004).

oversight virtually impossible.[4] Members are generally not capable of sorting through complex legal requirements on their own, and their ability to take any effective action against a troubling program is sharply constrained by the dearth of facts required to craft a response and persuade others to join in support. In short, the current "gang of eight" exception amounts to no effective oversight at all. The absence of even this kind of *ex post facto* independent review insulates poor policy-making and abuse, and badly hamstrings the learning capacity of the intelligence community over time. Revised legal structures may help cure the learning disability that results from such crabbed review.

A final example: Recent use of the so-called "state secrets privilege" has enabled the executive branch to escape all judicial scrutiny of major government counterterrorism initiatives posing a potentially (or actually) significant burden on individual rights. While the protection of legitimate government secrets is essential, the shield of secrecy should not be used to hide unlawful government activities, or to immunize government officials against accountability for the unlawful breach of human rights. From the National Security Agency's engagement in domestic warrantless surveillance, to the extraordinary rendition of suspects, to limits on the scope of whistleblower lawsuits—the common law state secrets privilege has been expanded through executive usage and judicial decision beyond what is legitimate or necessary for the protection of national security secrets, and at the expense of checks to ensure government conduct remains within the bounds of law. Congress should move to limit the privilege's scope, and to make clear that while procedural steps can and should be taken to protect legitimate interests in secrecy, the existence of secrets cannot justify the dismissal by courts altogether of claims for the violation of individual rights.

The culture of secrecy can only be partly solved by law. But law is an essential element of the cure. We should pursue as a matter of national security the kind of legal rules economists would call information-forcing defaults. The law should err on the side of forcing more information to more people, inside and outside the executive branch. Indeed, a government under the rule of law functions best when its actions and policies are known broadly and subject to public scrutiny. While there is no question that secrecy is sometimes required for the success of security operations, secrecy must not become the U.S. government's default position. Measures to protect secrets should be drawn as narrowly as possible to serve the interest of national security. The need for secrecy can never excuse the government from the accountability law requires.

III. STRUCTURING DECISION-MAKING

One of the most interesting insights to come out of government documents leaked in the wake of revelations of torture at Abu Ghraib was the extent to which elements of the professional military pushed back against civilian authorities demanding a "gloves off" approach to intelligence collection. Within the Pentagon, for example, the top Judge Advocate General's Corps officers in each of the services responded vigorously against proposals to authorize the use of dogs and "stress positions" to educe information from U.S.-held detainees on the grounds that such techniques were contrary to law and would undermine the U.S. mission; their opposition in that instance led quickly to the rescission of official authorization of some of these most violent techniques. At the same time, on the front lines, reservists and contract employees tasked with detention or intelligence functions lacked even the most basic instruction,

[4] Suzanne E. Spaulding, *Power Play*, WASH. POST, Dec. 25, 2005, at B01.

much less the kind of expert decision-making judgment that comes with career experience; these troops were among those implicated in some of the worst forms of abuse. The military was not the only agency struggling with inadequate expertise to meet and evaluate policy taskings. The CIA was placed at the forefront of operations to detain and interrogate suspected terrorists worldwide in the days following the September 11 attacks—despite both the absence of significant detention experience within the agency and a profound dearth of trained interrogators.

While classification rules may prevent us ever knowing in detail whether these interrogation programs produced any security benefits, there can be little question about their security burdens. Beyond the damage these policies have done to counterterrorism cooperation efforts with traditional U.S. allies, discussed more below, intelligence sources have pointed to the particular impact of such practices on intelligence collection. As one U.S. Army intelligence officer who served in Afghanistan put it in his subsequent book, *The Interrogators*: "The more a prisoner hates America, the harder he will be to break. The more a population hates America, the less likely its citizens will be to lead us to a suspect."[5] Today, extremist websites invoke the image of Abu Ghraib to generate support for terrorist action against the United States.

It is hardly news that professional expertise—the acquisition and maintenance of a set of technical knowledge, skills, norms, and ethics—can be a constructive force through which policy judgments may be filtered and improved. As Samuel Huntington theorized in the military context in his classic 1957 work, *The Soldier and the State*, "[a] strong, integrated highly professional officer corps… immune to politics and respected for its military character, would be a steadying balance wheel in the conduct of policy." Beyond the military, traditional administrative law has long recognized the virtues of agency expertise. As the Supreme Court put it in the 1944 case *Skidmore v. Swift*:

> We consider that the rulings, interpretations and opinions of the [Agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[6]

Courts respect these judgments not solely because agencies are empowered to make them, but because executive agencies house one of the U.S. government's primary sources of expertise and persuasive professional judgment about what should be done. Today, understanding how to design effective responses to the most potentially damaging terrorist threats—nuclear and biological terrorism in particular—requires highly technical knowledge of how such weapons might be acquired and what consequences a successful attack could have. In such a complex environment, a security policy approach based on nothing more than political instincts will not suffice to defuse the threat, and we should question whether it is invariably enough to persuade under law.

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[5] Chris Mackey & Greg Miller, The Interrogators: Task Force 500 and America's Secret War Against Al Qaeda 44–45 (Little, Brown & Co. 2004).

[6] 323 U.S. 134, 140 (1944).

In the security context, as elsewhere, much may be gained by legal rules designed to ensure that decision-making structures include—or perhaps more important, are not subverted to exclude—those with the most relevant professional knowledge about what approaches are likely to be effective. When courts are asked to review executive actions, deference may be greater when the political and professional arms of the executive branch are in agreement, far less when they are in discord. Likewise, in assessing the level of deference to which security-related judgments are entitled, courts should most respect authority exercised pursuant to a decision-making process likely to yield rational, fact-based decisions. Decision-making in a crisis may of necessity take a modified form. But the vast majority of day-to-day judgments to be made in a years-long struggle against terrorism—including decisions taken in any months-long build-up to war—may be effectively improved by setting structural legal expectations that make clear that process matters and expertise counts.

IV. STRENGTHENING INTERNATIONAL ALLIANCES

One can scarcely travel abroad without understanding the extent to which a host of U.S. intelligence collection operations since September 11 have put a strain on relations with the United States' closest allies. The strain shows in more than our allies' rhetoric. As a remarkable recent study by the Intelligence and Security Committee of the British Parliament found, widely reported U.S. practices of kidnapping and secretly imprisoning and torturing terrorist suspects led the British to withdraw from previously planned covert operations with the CIA because the United States failed to offer adequate assurances against inhumane treatment and rendition.[7] At the same time, the GAO reports that efforts by U.S. law enforcement agencies to help other nations identify, disrupt and prosecute terrorist crimes have been limited by a host of administrative factors—from staffing limitations to a lack of clear guidance, defined roles and responsibilities—compromising joint operations.[8] By failing to address these issues, we risk sending a message that such cooperative efforts are lower on America's list of priorities than even the current Administration believes they should be.

The importance of these relationships in efforts to combat terrorism is hard to overstate. Beyond the critical partnerships of U.S. and foreign law enforcement agencies, there is broad, bipartisan agreement that a central pillar of U.S. efforts to prevent a terrorist nuclear attack is to bolster international cooperative efforts to inventory, secure, deter, and track the disposition of fissile materials. The same may be said for efforts to prevent biological terrorism, for which international public health surveillance is our first and essential line of defense. Such efforts require the cooperation not only of our close allies, but also countries with which the United States has more complex relationships—Russia and Pakistan at the top of the list.

Despite the central role such international relations play in any U.S. counterterror-

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[7] *See* Raymond Bonner & Jane Perlez, *British Report Criticizes U.S. Treatment of Terror Suspects*, N.Y. TIMES, July 28, 2007 at A6 ("Britain pulled out of some planned covert operations with the Central Intelligence Agency, including a major one in 2005, when it was unable to obtain assurances that the actions would not result in rendition and inhumane treatment, the report said."). *See also* INTELLIGENCE AND SECURITY COMMITTEE, RENDITION, 2007, isc 160/2007, *available at* http://www.cabinetoffice.gov.uk/upload/assets/www.cabinetoffice.gov.uk/publications/intelligence/20070725_isc_final.pdf.ashx (providing the full report of the Committee).

[8] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-687, COMBATING TERRORISM: LAW ENFORCEMENT AGENCIES LACK DIRECTIVES TO ASSIST FOREIGN NATIONS TO IDENTIFY, DISRUPT, AND PROSECUTE TERRORISTS (2007).

ism strategy, recent years have seen the United States back away from a host of international agreements and legal regimes, from the Geneva Conventions to the Anti-Ballistic Missile Treaty. Even where the treaties the United States has abandoned have not directly governed our intelligence activities, there can be no doubt that our relationships with our treaty partners overall have been touched by our disengagement from such legal obligations of longstanding. Such regularized disengagement is a profound mistake.

Treaty law, like all U.S. law, binds the actions of our government because our government has given its consent to be bound. We gave that consent for a reason that was, of course, in part based on our calculation about our interests in the subject matter of the treaty at the time it was drafted and ratified. But our consent was also based on our broader desire to be part of an international legal system, a system that has shaped relations between nations (in greater or lesser measure) for centuries. It was to support this system that the Supreme Court interpreted treaties for much of our nation's history according to a canon of good faith or reciprocity—a rule of legal construction providing that if the plain terms of an international agreement were ambiguous, the treaty would be "construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them."[9] As Emer de Vattel, a key architect of modern international law, explained: "There would no longer be any security, no longer any commerce between mankind, if [nations] did not think themselves obliged to keep faith with each other, and to perform their promises."[10]

Whatever the reciprocity canon's status today as a matter of law, there is no escaping its relevance as a matter of policy. Our good faith in abiding by the legal promises set down in treaties is an inescapable measure by which the strength of our relations with other nations continue to be tested. It would be surprising indeed if one could betray a substantial promise in one context and not have it affect the character of our relations as a whole. Conversely, exercising good faith in this context can produce reciprocal benefits when the time comes to seek partnerships toward other objectives. Given the extraordinary importance of international partnerships as a pillar of any U.S. counterterrorism strategy going forward, the cost-benefit calculation between the use of any single intelligence collection tool and any associated breach of treaty obligations such collection may require, should tilt heavily in favor of a choice that strengthens key international bonds.

V. SETTING LIMITS ON BEHAVIOR

The past six years have been an object lesson in what goes wrong when existing legal constraints are disabled with no clear rules constraining behavior in intelligence collection set in their place. As Major General George Fay explained in his post-hoc investigation of the abuses at Abu Ghraib, "By October 2003, interrogation policy in Iraq had changed three times in less than thirty days and it became very confusing as to what techniques could be employed and at what level non-doctrinal approaches had to be approved." Beyond the few highly publicized incidents of torture at Abu Ghraib, a joint study by New York University, Human Rights First, and Human Rights Watch issued in April 2006 and based primarily on official government documents found more than 330 cases in which U.S. military and civilian personnel were credibly

[9] Factor v. Laubenheimer, 290 U.S. 276, 293-94 (1933).

[10] Chew Heong v. United States, 112 U.S. 536, 539 (1884) (citing 2 EMMERICH DE VATTEL, LE DROIT DE GENS, ch. 12, ¶ 163 (Edward D. Ingraham trans., AMS Press 1982) (1883)).

alleged to have abused or killed detainees.[11] The cases involved more than 600 U.S. personnel and over 460 detainees held at U.S. facilities throughout Afghanistan and Iraq and at Guantánamo Bay. Whatever techniques may or may not have been authorized by the Administration following its decision that the Geneva Convention rules on detainee treatment were not applicable to "enemy combatants," such widespread abuse was an outcome no one purported to seek.

The Army Field Manual on Intelligence Interrogation operative at the time of the September 11 attacks had anticipated the security consequences likely to accompany a coercive approach to custodial interrogation:

> Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear. Revelation of use of torture by U.S. personnel will bring discredit upon the U.S. and its armed forces while undermining domestic and international support for the war effort. It may also place U.S. and allied personnel in enemy hands at greater risk of abuse by their captors. Conversely, knowing the enemy has abused U.S. and allied [prisoners of war] does not justify using methods of interrogation specifically prohibited by [law].[12]

Indeed, as noted above, the effect of such practices on U.S. intelligence collection efforts was devastating. Yet while the most recent review of the subject by the U.S. Intelligence Science Board uncovered no study that had ever found that torture or coercion produces reliable information,[13] there remains a live debate about whether the CIA may be exempted from the very constraints that their line partners in the military must observe.

Getting the law right in this context—and ensuring its vigorous enforcement—is essential. One of the central purposes of criminal law is deterrence: bad acts should be met by the state with a predictable form of punishment so that the bad actor himself, and anyone else who might think to follow in his footsteps, will refrain from committing such acts anymore. But the idea that law proscribes certain conduct and imposes adverse consequences on violators is hardly limited to criminal acts. If a man breaches the terms of a contract, the law generally promises that the person's contracting partner will be able to recover money damages from the man in breach. This basic principle can be found across all bodies of law from tort to copyright to government regulation. Critically, in all of these contexts, one need not oneself engage in the practice addressed by the rules to be certain that predictable consequences will follow, and to conform one's behavior accordingly. Law works mostly through such

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[11] N.Y. Ctr. for Human Rights and Global Justice et al., By the Numbers: Findings of the Detainee Abuse and Accountability Project 2 (2006), http://www.humanrightsfirst.info/pdf/06425-etn-by-the-numbers.pdf.

[12] U.S. Dep't of the Army, Field Manual 34-52 Intelligence Interrogation (1992), http://www.fas.org/irp/doddir/army/fm34-52.pdf.

[13] Gary Hazlett, *Research on Detection of Deception: What We Know vs. What We Think We Know, in* Educing Information: Interrogation: Science and Art—Foundations for the Future (U.S. Intelligence Science Board, ed., 2006), at 45, 52.

indirect effects. In the normal course, one need never go near a court to have one's behavior effectively constrained by the law.

Beyond that, and whatever limits on behavior we set, the laws on detainee treatment during custodial interrogation will reflect profoundly on who we are as a people and what kind of world we want to live in when the acuteness of today's terrorist threat is behind us. As the 9/11 Commission explained: "[T]he United States has to help defeat an ideology, not just a group of people. . . America and its friends have a crucial advantage—we can offer these parents [of potential terrorist recruits] a vision that might give their children a better future. If we heed the views of thoughtful leaders in the Arab and Muslim world, a moderate consensus can be found." We cannot let short-term tactical choices compromise our overarching strategic goal. In this sense, we can no longer afford for there to be any doubt about how the United States will treat other human beings in our custody.

The laws governing the treatment of U.S.-held detainees—rules already established by the Constitution, treaties, and statutes of the United States, and reflected in the U.S. Army Field Manual on Intelligence Interrogation—should be standardized government-wide. U.S. efforts to educe information from detainees, whether held by our own military or intelligence agencies, or other agents acting at the United States' behest, should be guided by uniform rules and training programs, backed by the clear support of the law and the best evidence of what is effective. And violations of these rules should be met with swift and sure discipline proportionate to the offense. Whether to deter the kind of policy disaster we saw with Abu Ghraib, or to clarify for ourselves and the rest of the world the advantages of a free and democratic society, the law is the most important communications tool we have.

VI. CONCLUSION

If we are to avoid the errors of the past seven years in counterterrorism, we must return to the founding idea that law is not an obstacle that powerful governments must overcome to meet their objectives—it is a vital tool that power must respect in order to wield successfully. From law's broad structural role in shaping decision-making and institutional culture, to its immediate and instrumental function in constraining behavior and building international partnerships, law helps U.S. policy-makers avoid having to reinvent the wheel every time a terrorist attack occurs. The law exists, and should be designed, to serve America's long-term interests. It is time U.S. counterterrorism policy settles in for the long term.

The Twenty Year Test: Principles for an Enduring Counterterrorism Legal Architecture

James E. Baker*

The United States faces three enduring terrorism-related threats. First, there is the realistic prospect of additional attacks in the United States including attacks using weapons of mass destruction ("WMD"). Second, in responding to this threat, we may undermine the freedoms that enrich our lives, the tolerance that marks our society, and the democratic values that define our government. Third, if we are too focused on terrorism, we risk losing sight of this century's other certain threats as well as the capacity to respond to them, including the state proliferation of nuclear weapons, nation-state rivalry, pandemic disease, oil dependency, and environmental degradation.

The United States should respond to these threats using all available and appropriate security tools, on offense and in defense. Law is one of the essential security tools. Law provides substantive authority to act. Law can also provide and embed an effective process of preview and review to test proposals and validate actions, ensuring that they are both lawful *and* effective. Depending on how it is wielded, law can also serve as an independent policy value. However, the United States has been slow, or perhaps unwilling, to adopt a legal architecture that maximizes each of these legal benefits. Instead, the political branches have generally adopted an incremental approach, or relied on (*qua* deferred to) the President's authority as Commander in Chief to define the law.

This paper describes four principles that should inform the design of a lasting legal architecture to counterterrorism:

First, *the architecture should reflect an understanding of the strategic value of law* in substance, process, and policy.

Second, *the architecture should reflect the threats it is intended to address*, including the potential catastrophic nature of the physical threat, which distinguishes this form of terrorism from that of the past. That means the Executive should have broad and flexible authority to act. But, the law should also acknowledge that with greater authority comes increased risk of overreach and misuse. That favors a meaningful process of ongoing internal and external validation and appraisal.

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The views expressed in this Article are those of the author and do not necessarily reflect the views of the Court of Appeals for the Armed Forces, the National Security Council, or any other governmental entity.

Third, *with limited exception, the law should avoid absolutes—in the authority asserted; in the authority prohibited; or, in bureaucratic design*. Instead, we should favor statutes and directives that accent the role of meaningful process. Good process addresses concerns that national security is or will become myopic in vision or tactics. Thus, a good process does not define terrorism in military or law enforcement terms, but rather encourages policymakers to consider all options and adopt the best policy tool in context. Good process also provides for timely and meaningful legal input on the law and on legal policy.[1]

Finally, *the architecture should be lasting, which means among other things that it should be "constitutionally inclusive"* in design. A lasting and inclusive architecture will improve security—by maximizing the Executive's authority to act, sustaining support for tools and policies, and improving the opportunity and efficacy to appraise U.S. actions.

Part V of this paper discusses the application of these principles with reference to two controversial security instruments: detention and rendition. With these principles in mind, we must ask: where should we be in twenty years, and how do we get there today?

I. THE VALUE OF LAW

Law is not an abstraction; it is an essential tool that helps us provide for our physical security and uphold and advance our constitutional values in doing so. Whether the law in fact serves these two purposes depends both on its design as well as the moral courage and integrity of those who wield its authority; if wielded wisely and honestly, law can play three critical and related roles. The law can provide the substantive authority to act. Law may also provide a procedural framework in which to act wisely and in timely fashion, including the architecture to meaningfully appraise U.S. actions. Finally, the law can also serve as a positive security tool, conveying societal values to a broader audience, as well as guiding policymakers to better substantive results.

SUBSTANTIVE AUTHORITY: The law provides substantive authority for the Executive to act. This is an intuitive point; however, the security benefits of clear substantive authority embedded in law are not. When the authority to act is clear, and clearly demarcated in statute or executive directive, risk-taking increases in the field. This is especially true in intelligence practice. Consider the statement of former Central Intelligence Agency ("CIA") Assistant Deputy Director for Operations Robert Richer, "We were always conscious in the agency that we are judged not by the standards of today, but by the standards of tomorrow."[2] Uncertain authority can seed such caution; certain authority can mitigate it.

Substantive law also provides for policy continuity in an area where public and political perceptions of the threat may vary depending on the physical and temporal proximity of the last attack. An enduring threat requires a sustained response—in building alliances, in how we deploy finite resources, and in how we apply the law. Where policy is embedded in law, it is more likely to survive the vicissitudes of public

[1] The distinction is grossly summarized as the difference between "can" and "can't" on the one hand, and the pros and cons that inform the "should" or "shouldn't" in choosing between lawful options, on the other.

[2] Mark Mazzetti & Scott Shane, *Question Time for Nominee Linked to Interrogations*, N.Y. TIMES, June 19, 2007, at A17.

and political opinion. Many homeland security programs, for example, will only pay dividends over time and then only if the programs are sustained. A customs regime will hardly work if it is implemented at only 10 out of 351 ports of entry.

PROCESS: The law, in statute and executive directive, also helps to define national security process, which in turn defines procedural expectations and norms. Process addresses the twin pathologies of national security decision-making: secrecy and speed. Both are essential components of effective action; however, by design or default, speed and secrecy may also exclude critical viewpoints. Good process includes avenues to test ideas and assumptions, mitigate risks, voice dissent, and ensure that the long-term implications of policy options are considered along with the immediate security gains. Moreover, although some may find it counterintuitive, good process can improve speed through the use of tried and tested mechanisms, like the military chain of command.

Good process also helps to ensure that in addressing threats, we preserve and advance our constitutional values in doing so. That is because there is nothing automatic about the application of law to security policy. Process can create an expectation of legal review, as well as serve as the vehicle by which the lawyer gains access to policy deliberation. But the lawyer must then hold his or her place through the timely provision of meaningful advice. Where such process is embedded in statute or executive directive, it is harder to avoid (or evade), and less likely to succumb to speed, secrecy, or the pressure of the moment when policy actors tend to focus on the immediate problem, and not the process of decision.

SECURITY VALUE: Finally, law is itself a security policy value. To borrow from a related context: Law is about who we are. Law enables us to preserve and advance our constitutional values as we address security threats. These same legal values also enhance security.

This is true on a tactical level, as former CIA case officer Milt Bearden has illustrated with reference to Soviet operations in Afghanistan. When Bearden arrived as U.S. intelligence liaison to the tribal mujahadeen he was shown a picture of a Soviet pilot who, having successfully parachuted from his stricken aircraft, shot himself in the head rather than be taken alive and tortured. Bearden objected, noting that the Afghan treatment violated the law of war. More effectively, he also noted the impact such treatment had on reciprocal practice and pointed out that the practice discouraged intelligence collection. Dead pilots don't talk. A more humane and lawful practice followed. In course, some pilots chose defection or cooperation to suicide with resulting tactical intelligence benefit to the mujahadeen and strategic intelligence benefit to the United States.[3]

The point is also true on a macro level as illustrated by the Army's 2006 Counterinsurgency Manual, which describes in operational terms how the legal principles of discrimination, proportionality, and necessity improve military efficacy and result. Similarly, perceptions about the U.S. application of law, in our handling of detainees, fairly or unfairly, have undermined our capacity to collect intelligence through liaison, and damaged our ability to find, hold, and lead allies. They have also served as a source of propaganda and recruitment for our opponents.

[3] Milt Bearden, *When the C.I.A. Played by the Rules*, N.Y. TIMES, November 4, 2005, at A17.

In the domestic context, perceptions of constitutional exceptionalism or divisive legal arguments are less likely to garner and sustain support for policies that will only work over time and through successive administrations. They will also undermine support for the creation and exercise of broad national security authority of the sort necessary to address the threat of WMD terrorism.

II. A FRAMEWORK COMMENSURATE WITH THE THREAT

Disagreement over the shape of the law results in part from disagreement on the nature of the threats the law is intended to address. This is the product of honest differences of view inherent in intelligence analysis, including how one defines and calculates risk, probability, and cost. A nuclear attack (even an unsuccessful one), for example, is surely less probable than a conventional suicide attack, but its cost in terms of human life,[4] social impact, and economic destabilization is infinitely higher.

Different perspectives also derive from the use of "terrorism" as a political tool as well as a policy concept. Where politicians use "terrorism" or "liberty" as political banners, observers and particularly those with differing political outlooks, may discount the validity of concerns otherwise embedded in political hyperbole. As a result, the audience may discount the message.

Is a nuclear attack a realistic threat? The government thinks so. Consider the President's May 2007 Homeland Security Policy Directive, "National Continuity Policy," the bureaucratic term to describe the continuation of government after a catastrophic emergency or event. Agencies are directed to reconstitute within twelve hours in the event of a "no-warning" attack, an apparent euphemism for a terrorist nuclear attack, or perhaps a cyber attack.[5] The President has also directed that the government develop the nuclear forensics capacity to trace the signature of a nuclear device after detonation.[6]

Here is a dilemma. While we might reach an acceptable degree of risk-management, we can never assume that we have eliminated the risk. As long as this threat is realistic, it does not matter whether experts place the probability of such an attack as "more likely than not"[7] or at 10% per year;[8] we must defend against it.

WMD terrorism raises societal risks on both sides of the national security ledger that conventional terrorism does not. As a matter of physical security, a nuclear device could kill thousands, potentially many more, and reap untold economic devastation. As a liberty concern, a successful WMD attack could transform American society from one marked by tolerance and optimism to one marked by fear and isolation; government likely would be evaluated based on security indicators alone and not by its commitment to democratic due process and transparency.

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[4] Former Secretary of Defense William Perry has indicated that "for those within a two-mile wide circle around a Hiroshima-sized detonation or just downwind, little could be done." William J. Perry, Ashton B. Carter & Michael M. May, *After the Bomb*, THE N.Y. TIMES, June 12, 2007, at A23.

[5] NATIONAL CONTINUITY POLICY, NSPD 51/HSPD **20** (May 9, 2007), *available at* http://www.fas.org/irp/offdocs/nspd/nspd-51.htm (last visited May 25, 2007).

[6] David Sanger & Thom Shanker, *U.S. Debates Deterrence for Nuclear Terrorism*, N.Y. TIMES, May 8, 2007, at A1.

[7] Graham Allison, *Fast Action Needed to Avert Nuclear Terror Strike on U.S.*, BALTIMORE SUN, July 2, 2007, at 11A.

[8] See Richard Garwin, *Living with Nuclear Weapons: Sixty Years and Counting* (Apr. 30, 2005) (*transcript available at http://www.fas.org/rlg/050430-aps.pdf.*)

The potential of nuclear terrorism is as enduring as it is likely catastrophic. It takes only a few zealous actors to sustain this threat and only one to succeed. Moreover, Al Qaeda and other extremists have stated, and intelligence indicates, that they have sought nuclear weapons and continue to do so.[9] One does not need access to intelligence to know that if they obtain them, they will try to use them. Rational deterrence, it would appear, is less effective against a non-state, messianic opponent, intent on destruction and without concern for the survival of its "soldiers," nor a constructive agenda to preserve or a constituency to protect; Al Qaeda has no elite, fixed territory, or institution to protect and no positive political program to advance. Moreover, as Harvard's Graham Allison has explained, it does not ultimately take a rocket scientist to make a "nuke."[10] It takes fissionable material. The International Atomic Energy Agency and the Department of Homeland Security indicate that there is such a supply of fissionable material potentially available to the terrorists.[11] Therefore, while we might hope to reach an acceptable degree of risk management, we can never assume that we have eliminated the threat.

The dilemma is compounded because as 9/11 demonstrated, it does not take a WMD to have much the same effect. Consider that estimates place the lethal blast range of a tractor trailer loaded with 60,000 lbs of conventional explosives at 600 feet in diameter from the point of impact. Non-lethal collateral impact (as well as lethal depending on circumstance) would extend to 7,000 feet, and potentially further.[12] In the words of the Defense Department's senior Homeland Defense official, "Katrina by comparison to foreseeable terrorist attacks must be viewed as a catastrophic event at the low-end of the spectrum."[13]

A. BROAD AND FLEXIBLE INTELLIGENCE AUTHORITY

Intelligence is *the* essential ingredient in addressing the physical threat of terrorism. One might get lucky during a customs stop; but, as a general rule, one is not likely to find a sleeper cell embedded in New York or London or a nuclear device in a suitcase without information garnered through intelligence means. Nor can one protect everything; rather, intelligence and intelligence analysis inform judgments about risk management and concentric defense. Intelligence is also the predicate for determining which of the security tools is best used in context. As Secretary Gates has said, "over the long term, we cannot kill or capture our way to victory,"[14] we must effectively use all the security tools including the law.

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[9] *See, e.g.*, Nat'l Int. Council, *Prospects for Iraq's Stability: A Challenging Road Ahead* (Feb. 2, 2007) (Unclassified Key Judgments of the National Intelligence Estimate); FBI Director Robert Mueller, Speech to the Global Initiative Nuclear Terrorism Conference (June 11, 2007), *available at* http://www.fbi.gov/pressrel/speeches/mueller061107.htm (last visited June 14, 2006).

[10] *See*, Graham Allison, Nuclear Terrorism (2004). More recently, Allison wrote: "Based on current trends, a nuclear terrorist attack on the United States is more likely than not in the decade ahead." Graham Allison, *No Loose Nukes: Preventing a Terrorist Nuclear Attack on the U.S.*, EVENING BULLETIN (June 28, 2007).

[11] JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 10 (2007).

[12] Spencer Hsu & Sari Horwitz, *Impervious Shield Elusive Against Drive-By Terrorists*, WASH. POST, Aug. 8, 2004, at A1.

[13] Ass't Sec. of Defense for Homeland Defense Paul McHale, *quoted in* Geoff Fein, *Katrina Showed Need for Rapid Damage Assessment, Improved Communications*, 231 Defense Daily 16, July 27, 2006.

[14] Robert Gates, Speech to the U.S. Global Leadership Campaign (July 15, 2008), *available at* http://www.defenselink.mil/news/newsarticle.aspx?id=50518 (last visited July 23, 2008).

The nature of the threat and the role of intelligence in responding means the government will by necessity push the intelligence envelope out, in many cases to the limits of the law. CIA Director Hayden has explained:

> If you take nothing else from what I say, I hope it will be this: CIA operates only within the space given to us by the American people. That is how we want it to be, and that is how it should be. That space is defined by the policymakers we elect and the laws our representatives pass. But once the laws are passed and the boundaries set, *the American people expect CIA to use every inch we're given to protect our fellow citizens.*[15] (Emphasis added.)

The extremist opponent is ruthless; he has also shown creative capacity in the means of attack, resilience in recovery, and an ability to adopt countermeasures. Without broad and flexible substantive authority, the intelligence instrument may miss critical intelligence. However, in the absence of express law, actors may hesitate to push, and in adhering to the law may lack authority to do so. Presidents and intelligence actors may do so anyway, relying on assertions of executive authority alone. This may diminish risk taking and will certainly minimize the processes of internal and external appraisal, because such operations are necessarily conducted with secrecy.

B. A CORRESPONDING PROCESS OF INTERNAL AND EXTERNAL REVIEW

If the physical threat argues for a broad and flexible authority to act, exercise of that authority places added pressure on constitutional values. With increased authority, flexibility, and secrecy, comes increased risk of misuse. In liberty terms, three values may be tested: freedom, tolerance, and the democratic process of government. In security terms, we risk jeopardizing long-term support for the tools essential to addressing the physical threats ahead.

Difficulty in finding an agreed and lasting intelligence framework, especially in the domestic context, is compounded because not everyone trusts the government to use the intelligence tools wisely or lawfully—with some cause. These tools are subject to witting and unwitting abuse and misuse,[16] even if used exactly as intended. Why? Because even if they are used effectively there will remain a circular error probable ("CEP"), to borrow a term from nuclear doctrine. This is the measure of the radius of a circle within which half of the weapons fired will fall in relation to the intended target or at the aim point. I use the term to suggest that not all legal weapons fall within the intended target circle. Indeed, it is a necessary cultural tendency of security specialists to push this circle out (as opposed to nuclear doctrine where the goal is to diminish the circle's size as an indicator of accuracy). When searching for a mole, for example, the counterintelligence specialist would rather investigate twenty honest

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[15] Gen. Michael Hayden, Remarks at the Council on Foreign Relations (as prepared for delivery) (Sept. 7, 2007), *available at* https://www.cia.gov/news-information/speeches-testimony/2007/general-haydens-remarks-at-the-council-on-foreign-relations.html (last visited Sept. 10, 2007).

[16] The electronic surveillance instrument, for example, has been misused before. *See e.g.*, S. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, 94TH CONG., FINAL REPORT (April 26, 1976) ("Church Committee Report"); COMM. ON CIA ACTIVITIES WITHIN THE U.S., FINAL REPORT (June 6, 1975) ("Rockefeller Commission Report"); DEP'T. OF JUST., A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS (Mar. 2007) *available at* http://www.usdoj.gov/oig/special/s0703b/final.pdf (raising more recent concerns about the misuse of National Security letters).

employees beyond the target circle than one spy short. Where we are searching for the potential nuclear terrorist, the CEP will increase. It should. The problem is that with expansion of the CEP, the risk of misuse, overuse, and potentially, abuse expands as well. In short, there are two structural risks—that security services will collect too little; and that they will collect too much. The remedy is effective processes of internal and external review.

Recall Director Hayden's words about using every inch of available legal space. Consider as well the innate sense of mission security officials and their lawyers already feel, without direction from above. The potential impact on the culture and the shape of daily legal practice is apparent; the necessity for introspective, retrospective, and objective appraisal of U.S. actions should be as well.

III. AVOID ABSOLUTES IN SUBSTANCE; FAVOR GOOD PROCESS

The law, by which I mean statutes as well as executive directives, can respond in three ways: (1) with express permits and prohibitions; (2) with required processes of decision; and/or (3) with mechanisms of internal and external appraisal. Proscriptions might be appropriate with respect to instruments or applications that inherently offend U.S. values, like torture. However, most intelligence tools are not inherently immoral or unlawful—like data mining, liaison, or electronic surveillance. Rather, the legality and morality of their use depends on context. Therefore, the better course is to craft laws and directives oriented toward meaningful processes of decision and appraisal that can weigh the legal and policy costs and benefits of action in context, rather than seek to regulate behavior with substantive and absolute permits and prohibitions.

Zero-sum solutions, which posit false substantive choices between security and liberty, risk not effectively providing for *either* our physical security or our constitutional values. In a nuclear context, for example, this paradigm may result in a diminution of an essential ability to locate the threat while at the same time minimizing or eliminating opportunities to determine if extant authorities are used wisely. Instead of trading-off, we must find ways to optimize both values. After all, liberty is one of the values the Constitution seeks to secure; and, physical security permits the exercise of liberty.

Good process is a start. The effective application of process before action is taken, and through effective appraisal after it is taken, helps to ensure that operating assumptions that may have been considered under constraints of speed and secrecy are validated. Where they are not validated, use of the tool should stop. Such processes not only ensure that the security tools are used in accordance with law, they also allocate finite resources to more palpable threats.

It is the duty of lawyers—and the law through use of process—to find where and when this has occurred and, in a timely manner, adjust the instruments of security on to the correct target area. This role is no less patriotic than that of ferreting out the opponent. Surely, it takes more moral courage to stop an unwarranted or unsubstantiated national security investigation than it does to start one, "just to play it safe." The risk of being wrong in the first instance is concrete and potentially measured in the loss of human life; the risk of being "wrong" in the second instance is specific to the target of surveillance, but otherwise diffuse and often unknown in terms of the societal risk to our collective constitutional values.

There are ways to regulate broad authority that go beyond trust and do not rely exclusively on the moral integrity of executive actors and their lawyers. The substantive framework itself can minimize the risk of unwarranted intrusion. In the case of

data mining, for example, the degree of intrusion will depend on the nature of the data searched, the pattern used to search, and the model used to analyze the data located. Pattern analysis might be designed to identify persons who have engaged in certain behaviors at a time-certain, e.g., men aged 20-40, who have traveled to Europe in the past month and have bank accounts in Boston. Computer modeling tools seek to relate data in meaningful manner, perhaps through the identification of predictive behavior, patterns of conduct that might suggest a degree of heightened risk, and associational data, which might identify links between seemingly unconnected persons. Telephone calling patterns might indicate that an unknown actor has telephoned an unknown phone number with the same frequency as a terrorist suspect. The computer algorithms can be set and applied so as to limit the data searched, and to alert if extraneous (or unauthorized) data is collected or retained.

In the end, however, procedural thresholds are more reliable than substantive thresholds in regulating the use of authorized tools. First, procedural standards usually entail review by persons beyond those immediately involved in the selection and use of the intelligence instrument in the first instance. Independent actors in or outside the executive branch can test and validate executive actions. Where surveillance has been conducted pursuant to the FISA, for example, it is the independent actors, the FISA judges, and internally the lawyers, who have the role of testing substantive propositions and asking the difficult questions of why, what, and for how long?

Second, most national security standards are malleable, especially when "vital national security" interests are at stake, like protecting the country from WMD attack. In the covert action context, for example, it is the process that generates careful review, not the necessity of the President finding that an action "supports identifiable foreign policy objectives," as the law requires.

Third, emphasis on process rather than substantive absolutes will also result in a more inclusive result, which for the reasons below, will be more sustainable and enhance security.

IV. A LASTING ARCHITECTURE

Because the threat of WMD terrorism is enduring, United States legal policy should embrace not only a threat-based paradigm, but a corresponding long-term outlook. An enduring legal framework is one that defines the exercise of presidential authority not in absolutes, or in terms of emergency or exigent circumstance alone, but in terms of optimums that will sustain commitment over decades. Such a long term framework permits opportunity to catch our constitutional breath, and find our equilibrium, and if need be start over again. And, it is a framework that embraces rather than eschews processes of executive, legislative, and judicial deliberation where deliberation is warranted and time permits.

Emphasis on the immediate over the long-term nature of the threat diminishes the value of process and law in the development of better national security policy because process and law take time to shape and refine. The National Security Council ("NSC") process, as a normative baseline, works well in part because it has evolved over time. As with the military chain of command, bureaucracies have conditioned themselves to the process. Not surprisingly, homeland security process is less well-developed. It is too early to tell, for example, whether the Homeland Security Council ("HSC") and related process will become a permanent part of security process or a passing experiment. The same can be said for the Department of Homeland Security as the headquarters element for many of the essential homeland security agencies. In times of

crisis and with matters of immediacy, the tendency is to stick with existing mechanisms or laws, or to adopt immediate *ad hoc* mechanisms, because the costs of defining new regimes outweigh the immediate benefits. In constitutional terms, that means reliance on the Commander in Chief's authority to define and refine new internal and external processes. But is that the preferred outcome?

A. THE CENTRAL ROLE OF THE PRESIDENT AS COMMANDER IN CHIEF

Make no mistake: The President, by constitutional design and statute, *is* the central and essential national security actor. The Constitution makes him so. As Commander in Chief, he is charged to "preserve, protect, and defend the Constitution."[17] The Constitution requires that he swear an oath to do so. He is also the Chief Executive who alone has the legal, bureaucratic, and moral capacity to coordinate and direct the intelligence instrument and unify national plans for homeland security and defense.

These are not statements of constitutional interpretation or executive assertion (although in breadth they may become so). This is constitutional law. It is statutory law as well. The Congress and not just the President have placed the President at the head of the security table, at the NSC and the HSC. In turn, the NSC and HSC systems serve as the President's principal processes for national security decision-making.[18] The National Security Act also makes the President the essential intelligence consumer and decision-maker. Thus, since 1947 the CIA has performed "such other functions and duties related to intelligence affecting national security as the President may direct."[19]

Further, in time of conflict, the President's role expands, not just because he is the Commander in Chief, but for the intangible reasons Alexander Hamilton identified when he wrote: "Safety from external danger is the most powerful director of national conduct … It is the nature of war to increase the Executive at the expense of the legislative authority."[20]

It is not surprising then that, as a matter of presidential choice, constitutional perspective, or perhaps by necessity, the President's constitutional authority, and in particular the Commander in Chief clause, has been central to the post 9/11 legal debate. But, as Justice Jackson observed, just what powers accompany that authority has "plagued presidential advisors who would not waive or narrow it by non assertion yet cannot say where it begins and ends."[21] It is worth pausing to recall that Justice Jackson was addressing the Commander in Chief clause in the context of a different president with different lawyers—who also did not wish to dilute or cede presidential authority in time of conflict.

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[17] To be sure, as a matter of law, persons appointed to certain positions in the federal government also swear to "support and defend" the Constitution. The presidential oath reflects the responsibility, which derives from the President's collective constitutional authorities as well as the National Security Act, which create the President's responsibility to prevent attack.

[18] Memorandum on Organization of the National Security Council System (NSPD-1) (Feb. 13, 2001); Memorandum on Organization of the National Security Council (PDD-2) (Jan 20, 1993).

[19] National Security Act of 1974 §103(d)(5), 50 U.S.C. §403-3(d)(5)(2006), *amended by* Intelligence Reform and Terrorism Prevention Act of 2004 §104A(d)(4), P.L. 108-458. Many of the other security tools are predicated on presidential decision as well, like IEEPA, and certain of the Foreign Assistance drawdown authorities.

[20] THE FEDERALIST NO. 8 (Alexander Hamilton).

[21] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641(1952)(Jackson, concurring).

They dare not do so. When it comes to the constitutional separation of powers, where one sits often influences how one stands on the law. But it is not just the law that looks differently depending on where one sits. It is also one's sense of responsibility—the roles are different. In *Youngstown*, Jackson cautioned that the Courts should be the last branch, rather than the first to give up our constitutional form of government. Presidents, however, are more likely to place security before liberty in defining their roles; or to place the thought in constitutional context, to emphasize their singular responsibility as Commander in Chief to defend the U.S.

Future presidents, who assume responsibility for protecting the nation from nuclear and other attack, will also focus on the immediate. As a result, they too will look to the Commander in Chief clause to find the flexibility, speed, and authority they feel they need. This point warrants emphasis. Presidents will act when they feel the country threatened from attack. Thus, as in international law, where presidents of both parties have expressed, at least in theory, a desire to use force in concert with U.S. allies, all presidents have reserved the right to use unilateral force when necessary.[22] The same imperatives are at play in constitutional context. The Executive will act, either pursuant to executive authority alone or pursuant to an inclusive and meaningful framework agreed to by the political branches.

B. THE CENTRAL ROLE OF THE PRESIDENT SHOULD NOT OBSCURE THE ADVANTAGES OF CONSTITUTIONAL INCLUSION

An enduring legal framework should address this practice realistically by seeking preferred functional outcomes. Absolute and exigent positions, legal and political, make it hard to do so. The focus on the Commander in Chief authority has also distracted from equally important elements of a long-term framework because of the Manichaean nature of the debate. Arguments about the Commander in Chief clause, couched in absolutes, drive advocates into their constitutional corners. Advocates of a broad reading of the Commander in Chief clause tend to disregard the President's parallel responsibilities to "take care that the laws be faithfully executed" including statutory law and the application of the framework of the Constitution itself, with its checks and balances between branches. They also tend to overlook longstanding legal traditions distinguishing between foreign and domestic applications of law. Advocates of limited presidential authority, on the other hand, tend to downplay the nature of the threat as well as the President's singular constitutional responsibility as Chief Executive and Commander in Chief to protect the country from attack.

In a long-term conflict the preferred paradigm is one that is constitutionally inclusive, in which the extraordinary circumstance remains the exception and not the norm—in practice as well as law. Such a framework recognizes the need for exigent action, and provides mechanisms to trigger appropriate appraisal when doing so. This is the formula adopted in the covert action context, where the law incorporates the seemingly incompatible constitutional positions of the political branches—in the case of the legislative branch, a right to prior notification, and in the case of the Executive, a right to withhold notification until after the fact.[23] The result preserves both constitutional positions by defining a norm of prior notification but recognizing the exception as well. Thus, in "extraordinary circumstances" the president may limit prior

[22] The "National Security Strategies" of President Clinton and President George W. Bush use almost identical language in making this point, which tracks as well with numerous public statements of presidents past and present.

[23] 50 U.S.C. §§413b(c)(1)-(3)(2006).

notification of covert actions to select members. And, in exceptions that go beyond even the extraordinary, the Act comprehends that the President might withhold notification altogether. But, the law requires him to inform the Congress that he did so and to justify the reasons for doing so. The exceptional argument is reserved for the exceptional moment. Ultimate constitutional arguments are deferred for when they are addressed to specific scenarios. This makes sense in a context where policy options may range from low threshold actions like press placements to covert acts of war.

The covert action statute is also process oriented. The law provides substantive authority, but is largely designed to encourage deliberation and accountability through the creation of procedural thresholds—foremost the requirement that the President personally "find" that the covert action in question is "necessary to support identifiable foreign policy objectives and is important to the national security of the United States."[24] This is not a high substantive threshold, but it is an important procedural threshold. Because the law also requires that findings specify certain implementation mechanisms, the president is accountable for both the policy and its implementation. Thus, through process, the law ensures that activities that historically have borne heightened policy and legal risks are vetted at the highest levels and in an accountable way.

Laws of constitutional inclusion, focused on process and review, have a number of concrete security advantages. Inclusive laws maximize the Executive's authority to act. An inclusive process is also more effective in validating options and thus achieving intended security results. Such laws are also more likely to be passed, enacted, and followed. Where the political branches have agreed on mechanisms to address differences of law or substance in context, the Executive will be less likely to fill the legal void with assertions of constitutional authority. This should result in greater sustained support over years for essential security instruments and policies. It should also increase, but not necessarily solidify, public confidence that U.S. security instruments are being used lawfully and effectively. This confidence should increase where the judicial branch also plays a role in validating facts and law.

Operational Authority: An inclusive paradigm maximizes the Executive's authority to act. This is a legal truism reflected in the *Youngstown* paradigm. The President acts at the zenith of his authority when he acts pursuant to congressional authorization as well as pursuant to his own constitutional authority. But this point is sometimes lost in the separation of powers scramble, especially where the Commander in Chief authority is used.

An exclusive and excessive reliance on unilateral executive authority may also, ironically, lead to a diminution of operational authority. Where the Congress or the courts perceive that the Executive has overreached, they may restrict the Executive in ways that place intended and unintended substantive limits on executive action. Larger debates over constitutional authority in one context may spill over into other contexts, resulting in hesitation to assert an argument or perhaps undue debate over its validity.

In the homeland security context, for example, an immediate and overwhelming federal response may be the essential policy ingredient to address an incipient, but potentially catastrophic event. But such an intervention might necessarily occur where the facts are inchoate, and thus in the face of state and local opposition. In reaction to the use of executive authority in one context, the Congress may pass legislation to

[24] 50 U.S.C. §413b(a)(2006).

curtail or limit the President's reliance on constitutional authority generally, or in a different context. Whether constitutional or not, congressional opposition may increase the political costs to a president in acting, making the president hesitant to act. Of course, the President can help to address this situation by reserving the exceptional legal argument for the truly exceptional factual circumstance.

Support and Commitment: This conflict is different in many ways from past U.S. conflicts, including the nature of the opponent, the scope and intermittent nature of threat at home, and the role of law. This conflict is also different because it is enduring, meaning that it will be fought through administrations and over decades. In other words, constitutional "command" will transition from one president to the next, rather than reside exclusively with a Lincoln, Wilson, or a Roosevelt. Enduring threats require enduring rather than *ad hoc* solutions that will stand the test of time and the transition between political parties.

A long-term solution that garners the support of only one party or one branch should be viewed with suspicion, not because it may not be the correct policy, but because it is less likely to be sustained over time. With finite resources, the United States can ill afford needless vacillations in policy and funding. Moreover, a policy that cannot win the sustained support of both political parties in the Congress is unlikely to persuade allies and intelligence partners of its credibility. If the U.S. policy is not credible, our allies and liaison partners may delay or demur in identifying terrorist actors overseas or transferring such actors to U.S. custody.

As a result, at home, as abroad, divisive legal arguments and stratagems should be eschewed where there are viable legal arguments that will gain broader support. Lawyers might favor that outcome because it tends to emphasize constitutional structure. Security specialists should favor that outcome because the threat is potentially catastrophic and enduring and we need to maximize both domestic and international support in combating the threat over years.[25]

V. PRINCIPLES APPLIED—DETAINEES AND RENDITION

Having described four essential principles that should inform a lasting legal architecture, it may be useful to consider how these principles might apply in context.

"Guantanamo" is a lightening rod, but it is just the most visible facet of a series of related intelligence, interrogation, adjudication, and detention issues. These issues include:

- How should the U.S. balance the need for intelligence to prevent future attack with legal values and principles that define who we are and, in the longer run, will deter recruitment to the extremists cause?
- What law applies, or should apply, to persons seized on and off the "battlefield" in a conflict against non-state actors engaged in terrorism?
- What role, if any, and in accordance with what procedural and substantive limitations should rendition, secret detention, and coercive interrogation play in such a conflict?

[25] The list of principles discussed in this article is not exhaustive. Global threats require global responses. A long-term architecture should therefore seek to better shape and then harness the positive value of international law to U.S. security practice. *See* J. Baker, *What's International Law Got to Do With It? Transnational Law and the Intelligence Mission*, 28 MICH. J. INT'L L. 639 (2007).

There are no easy answers to these questions because they find root in six sometime competing policies and values. That means that singular substantive answers in the form of permits or prohibitions are unavailing.

First, detainees can and have provided valuable intelligence.[26] An isolated prisoner, without benefit of counsel or friendly contact is more likely to succumb to interrogation. We know this from domestic law enforcement interrogation.[27]

Second, the United States has, will, and must detain persons who have as a goal wanton killing, including through mass casualty events.

Third, there have been and will be persons detained by the United States who are *not* in fact lawful or unlawful combatants. This may result from mistaken identity, a process of bounty, or from terrorists using non-combatants for concealment. It might also result from the absence of a clear demarcation line between those who passively associate with terrorist groups and those who actively participate.

Fourth, "Guantanamo" as a symbol of U.S. rendition and detention practice, has had significant negative impact on how the United States is perceived. Perception can fuel conflict and deter alliance and liaison.

Fifth, some detainees who have been released from U.S. detention have returned to the conflict and been captured a second time. Others, no doubt, are at large.

Sixth, there is some agreement on the law. This agreement embraces an understanding that detainees should be subject to a bifurcated process of adjudication, first of their status, and then, if appropriate, allegations of unlawful conduct. The debate seems focused on how to do this, not on whether it should be done.

In light of these factors, the central question is: Where should we be in twenty years, not twenty months, and how do we get there today? There are pros and cons incumbent with every option. There are only obvious answers if one believes that the threat is one dimensional—to our physical security alone, or to our legal values alone. Answering these questions requires us to be honest about the threat, its risks on one side, and its duration on the other, as well the intangible costs and benefits to U.S. policy caused by the legal choices we make. If we cannot persuade ourselves—across parties and between administrations—we surely cannot hope to persuade a wider audience.

We will more likely succeed in answering this question in sustained manner if we break it down into its constituent parts—capture, interrogation, status adjudication, conduct adjudication, detention, and release—rather than just "Guantanamo." Where mixed values are at stake and sometimes in tension as they are here, rigorous contextual process is also the best mechanism for adjudicating competing national security interests and values. Such contextual review is not facilitated by the resort to banners, like security and liberty or, for that matter, "Guantanamo." Closing Gitmo may be wise, but Guantanamo is a symptom not a solution. Detainees will still be taken, they must still be interrogated, and their status and conduct must still be adjudicated. Then, they must be detained somewhere. The less the United States takes the lead in these areas the more likely it will employ third-country locations or alternatives through the process of ordinary and extraordinary rendition.

Rendition is an important security tool.[28] It is a faster and more secure means to

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[26] *E.g.*, Mark Bowden, *The Ploy*, ATLANTIC MONTHLY, May 2007.

[27] Interrogation is inherently coercive; I am not engaged in a euphemism about coercive methodology, only making a point about physical isolation at the outset of detention.

[28] For a fuller discussion of the legal, moral, and policy issues surrounding "extraordinary rendition," *see* BAKER, *supra* note 11, at Ch. 7.

transfer suspects than extradition or deportation, including from a locale where they are not subject to lawful prosecution to one where they are. Rendition allows states that are either unwilling or unable to transfer subjects publicly to do so secretly. Rendition also raises the prospect of gathering intelligence and making further arrests before a subject's colleagues are aware of his capture. The prospect, accurate or otherwise, of third-party rendition may also induce subjects to cooperate.

Rendition is also subject to mistake and misuse. Advantages in secrecy and speed create risk. Persons rendered to third countries may be subjected to unlawful practices, including torture and extrajudicial punishment. Further, in the absence of the procedural safeguards applicable to extradition, subjects may be misidentified; or, where correctly identified, may be transferred based on information that is not subject to adjudication or independent validation through judicial and media oversight. Moreover, secrecy and speed can result in an internal process that minimizes the ordinary cross-checking that occurs when decisions are sent up the chain of command.

There is also little question that apparent mistakes or "notorious" cases become the lens through which the general audience evaluates the practice. As a result, rendition has taken on an importance in public perception disproportionate to its actual role in practice. To some, the United States commitment to the rule of law is judged by this practice, or better said, by real or perceived failures in practice.

Where the United States is perceived to act outside the law or its legal values, security may also be damaged and not just in intangible ways. Officials may be banned or placed at greater risk when operating overseas. Foreign governments may hesitate to act, share, or transfer at the critical moment when an attack might be averted. U.S. flight clearance may be denied.

For all these reasons, rendition practice warrants careful regulation, but regulation and not blind proscription. It is a necessary tool whose risks, costs, and benefits are best assessed in context. A good process for authorizing renditions is one that:

- Includes role-playing by persons not directly associated with the proposed activity, including persons whose sole responsibility is to the law and to the foreign policy implications of the conduct in question.
- Is secret and fast, but also meaningfully considers the predicate for rendition; the range of alternatives for displacing the subject and the U.S. experience with each alternative; the opportunities available to garner intelligence from the subject, based in part on projections of knowledge; the relative merits of public prosecution in the United States or a third state; and the actual and potential positive and negative repercussions of each rendition operation.
- Takes substance into account. Process is also substance where it dictates which views are considered or excluded, which options are tabled, and which risks are addressed. With respect to rendition, if one wants to "get to yes," then one should limit the decisional process to national security specialists. If one wants to "get to no," then one might give a veto to those officials responsible for human rights. Within an agency, the same results might be obtained by selecting the persons who attend a decisional meeting. That is not to say intelligence personnel do not value human rights, or human rights advocates do not value physical security. But if an official is charged with providing for security, chances are that as a matter of culture, practice, and interpretation, that official will lean in the direction of his or her perceived role.

With responsibility comes accountability, and with accountability comes care. A good process establishes a chain of responsibility for confirming identity, vetting operational details and, where applicable obtaining and verifying meaningful assurances from third countries. Here, the law might encourage rigorous process by requiring written authorization at the highest level of government feasible under operational circumstances, prior to third-country transfers. A process of periodic, rather than operational, external validation can also test whether practices that should remain extraordinary in practice, do indeed remain extraordinary rather than normative in practice as well as in name. Finally, a good process will double back, and once beyond the moment of necessity, consider whether the results were morally and legally sound and the security benefit validated.

VI. CONCLUSION

Law is not an abstraction, but an instrument intended to address real threats and sustain our constitutional values while doing so, to provide for the common defense of our physical security, our liberty, and our way of governance.

The terrorism threat is potentially catastrophic and in response we should adopt a legal architecture that is broad and flexible in authority. Use of the authorities in practice may be controversial but the necessity of having these tools in the counterterrorism quiver should not be, at least not if the threat is nuclear in dimension. Our legal architecture should also respond to security culture and practice, including the practice of presidents in executing their responsibility to protect the United States from attack. Presidents will act in response to threats. The question is: in accord with what framework?

Practice advises that where there is broad authority, there is increased risk of overreaching and thus a corresponding risk to our constitutional values and process of government. Independent mechanisms of appraisal, by detached executive actors, or through review by different branches of government are the most effective way to appraise options and then evaluate their implementation. Proactive appraisal results in better decisions. Independent actors ask tougher questions and are more probing in testing results. They also safeguard against bureaucratic propensities toward group think, factual complacency, secrecy, and default tendencies of security bureaucracies to allow the mission and not the law to define the exercise of power. Moreover, such appraisals make it easier to defend decisions internally and externally in the face of unanticipated, unintended, or simply unpleasant outcomes.

Finally, our legal architecture should maximize the use of law as a positive security value and virtue. In few other conflicts have the reaction of other states—and, as importantly, their citizenry—played such an important role in the conduct of the conflict. The United States is dependent on intelligence gathered at the ground level through law enforcement and intelligence liaison. The United States also depends on immediate access to foreign territory, or alternatively, credible local assistance. Our opponents rely on the cycle of action-reaction to U.S. policy, including legal policy, as a recruiting mechanism. If law defines who we are, it also distinguishes us from our opponents and defines how we are seen by others in a global contest with extremist terrorism.

A *Global* Response to Terrorism

Ian Shapiro*

The reflections offered below concern the geo-strategic context within which the United States ("U.S.") should think about national security in the coming decades. My central contention is that, in order to be effective, U.S. counterterrorism policy must be part of a coordinated, global response, involving building and sustaining international institutions and regional alliances to contain terrorist threats. Strong international relationships are essential both for practical reasons and for reclaiming the United States' legitimacy on the world stage.

A major problem confronting the U.S. in Iraq is the perception based on past U.S.-led missions, namely the Vietnam War, that we lack the will to stay the course. If enough people believe that it is only a matter of time before U.S. troops pack up and leave, even if the job remains unfinished, there is a knock-on effect, influencing current U.S. efforts. Consequently, insurgents have every incentive to wait us out abroad, while at home, the scores of American fatalities and severely wounded each month seem all the more tragically pointless.

Some argue that if the U.S. can stabilize the situation, it will then become possible to leave. They point to "the surge" in this regard. The decline in fatalities since late 2007 might partly be due to the surge, but, to the extent that it is, this increases Iraqi reliance on U.S. forces. This difficulty was most starkly apparent in early April of 2008, when over a thousand Iraqi forces refused to fight or abandoned their posts in an assault on Shiite militias in Basra, forcing the British and Americans to take up the slack.[1] The Bush Administration's policy that "as the Iraqis stand up we will stand down"[2] exhibits the logic of a parent telling a teenager that he will stop getting an allowance once he starts earning an income. It is a recipe for fostering dependence rather than weaning.

This difficulty is compounded by our need to depend on allies, whose own politics might make them just as fickle as we are. British Prime Minister Gordon Brown, for example, is widely known to be cooler than Tony Blair to his country's involvement in Iraq. Even as Downing Street was denying that Brown's July 2007 visit to Camp David involved unveiling plans for a British withdrawal, *The Times* of London reported that one of Brown's aides was sounding out Washington "on the possibility of an early British military withdrawal" from Basra, which has since taken place.[3] If your adversary believes you are going to fold, why wouldn't they up the ante?

A possible response to this worry is to scotch the perception of inevitable defeat. No doubt this is what prompted Undersecretary of Defense Eric Edelman's criticism

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[1] Stephen Farrell & James Glanz, *More Than 1,000 in Iraq's Forces Quit Basra Fight*, N.Y TIMES, April 4, 2008, at A1.

[2] John D. Banusiewicz, *'As the Iraqis stand up, we will stand down' Bush Tells Nation*, AMERICAN FORCES PRESS SERVICE, June 28, 2005, http://www.defenselink.mil/news/newsarticle.aspx?id=16277.

[3] Sarah Baxter & David Cracknell, *U.S. fears that Brown wants Iraq pull-out,* TIMES (London), July 29, 2007, at 1.

of Senator Clinton last year. Responding to her request for a Pentagon plan for U.S. departure, Edelman wrote that "premature and public discussion of the withdrawal of U.S. forces from Iraq reinforces enemy propaganda that the United States will abandon its allies in Iraq, much as we are perceived to have done in Vietnam, Lebanon, and Somalia."[4] Suggesting that a senator who raises questions about the Administration's Iraq policy is somehow unpatriotic or giving aid and comfort to the enemy smacks of McCarthyism. Edelman's letter to Clinton was, consequently, a political gift: Clinton could both take the moral high ground and further distance herself from her earlier support for the war. Edelman's response also reflected his slim grasp of the problem's roots. Our leaders' commitments to Iraq will eventually flag *not* because the other side perceives we are planning a withdrawal, but rather because we did not go to war in Iraq to protect *vital* U.S. interests.

Six decades ago George Kennan, Director of Policy Planning in the Truman Administration, pointed out that going to war when a vital American interest is not threatened is problematic because our adversaries *will have* vital interests at stake. Opponents will, therefore, have every incentive to wait us out, confident that the dynamic that Edelman wanted to avoid will eventually kick in. This is precisely why Kennan opposed America's involvement in Vietnam, which unfolded as he predicted, and why, in 2002 at the age of 98, he also spoke out against the planned Iraq invasion.[5]

President Bush's attempts to deploy the Vietnam analogy have, predictably, backfired.[6] The revisionist historians, to whom the President appealed, claim—as General Westmoreland and others did at the time of the Vietnam War—that the war was winnable, and that greater suffering would have been averted had we stayed in Vietnam. Although these claims are controversial and have been widely challenged, the salient point to note here is that they could be granted without laying a glove on Kennan's argument, which does not depend on claims about whether the U.S. might, in principle, be able to prevail at some point in a given conflict. Rather, Kennan's theory depends on the claim that the window of opportunity, which depends critically on public support, is likely to close before we prevail. In other words, if the U.S. goes to war when its vital interests are not at stake, it will not be able to stay the course because the general public—both domestically and internationally—will not stand for it.

Kennan was the architect of the doctrine of containment, developed at the start of the Cold War in response to the Soviet threat. He believed the Soviet system was not viable in the long run and that its international over-extension would lead eventually to its implosion. So long as the USSR did not attack us, Kennan argued that we should rely on economic sticks-and-carrots competition, intelligence and diplomacy, and the vitality of capitalist democracies to hem in the threat the communist movement posed. History proved Kennan right.

Containment continues to make sense as a basis for U.S. national security policy in the post-Cold War era. Islamic fundamentalism presents no more of a competitive threat to democratic capitalism than did communism. The costs of "regime change" across the Middle East today are no more sustainable than the "rollback" Kennan opposed in Eastern Europe in the 1950s. Kennan's argument continues to be relevant:

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[4] *Pentagon Aide Says Clinton Helps Enemy,* N.Y Times, July 20, 2007, at A18.

[5] Ehsan Ahrari, *George F. Kennan: The Passing of a Giant*, March 20, 2005, http://www.ehsanahrari.com/articles.php?id=199.

[6] Massimo Calabresi, *Bush's Risky Vietnam Gambit*, Time, August 23, 2007, available at http://www.time.com/time/nation/article/0,8599,1655516,00.html.

Rather than lump our adversaries together and give them common cause, we should take advantage of their differences. This is the opposite of the Bush administration's "Axis of Evil" approach.

In the post-Cold War world, however, containment faces new challenges. Terrorist groups move around and they often operate out of rogue nations and failed states. For these reasons, global terrorism must be confronted on a global basis. This might even involve the need for military action, as was required to expel Iraq from Kuwait in 1991.

But, the first President Bush (George H.W. Bush) understood something that is lost on his son: Sustainable military action against post-Cold War threats requires more than just unilateral action buttressed by opportunistic "coalitions of the willing." Rather, it must be authorized by international institutions and supported by large coalitions in which there is strong representation from countries in the local region.

In the post-Cold War world, facing down the expansion of tyranny might require a military response to belligerence even when this does not involve strict U.S. self-defense, but rather the vital interests of allies or coalition partners. For this purpose alone, the U.S. should be willing to support international containment. Saddam Hussein's 1991 invasion of Kuwait is a case in point. Hussein's campaign was an unprovoked exercise of aggression that clearly called for a response by democracies committed to resisting the spread of domination in the region. International action with strong regional participation is consequently needed partly for pragmatic reasons; it provides the U.S. and its allies the necessary authority to retaliate legitimately even when they are not acting in a matter of self-defense.

Moreover, countries in the region, where military action is unfolding, are likely to have vital interests at stake and are potential spoilers. Their participation in an international coalition helps scotch the perception that far-off powers are acting because of imperial motives. Participation of Arab countries in the Middle East during the U.S. effort to oust Iraq from Kuwait was important for all of these reasons. The lack of comparable cooperation during the U.S. invasion of Iraq in 2003 has compounded our difficulties there significantly.

Pursuing containment on a global basis typically requires cooperation from other nations. This was certainly true for the containment of Iraq after 1991. And in the current military effort in Iraq, it is sometimes argued that the singularly U.S. containment regime against Saddam Hussein's Iraq was failing by 2002—as indicated by the fact that he agreed to allow United Nations ("UN") weapons inspectors to return *only once* American troops were massing on the Iraqi border. If we grant this argument, it reveals the limits of unilateral action. As a containment regime, the U.S. troop buildup in 2003 was unsustainable. Everyone knew that we could not keep troops amassed on the Iraqi border throughout the summer of 2003, thus presenting the Bush Administration with the conundrum that the U.S. would either have to invade or to withdraw (in which case Hussein could have expelled the weapons inspectors again).

If, instead, President George W. Bush had put together the kind of coalition his father had assembled in 1991, troops from different nations could have rotated in and out, keeping up pressure on Saddam Hussein. To this, it might be objected that too few powers would have agreed to participate in this effort, making it unsustainable. Perhaps so, but limited participation suggests, in turn, that the U.S. could not prove or was exaggerating the threat Iraq posed. Indeed, if major powers would not participate and Iraq's neighbors did not feel sufficiently threatened to get involved, this should have been a warning that the WMD threat in Iraq might just be a paper tiger.

Regional participation is needed to make containment sustainable. If the U.S. insists upon going it alone all over the globe, our bluff will be called time and again for the reason Kennan gave: The American people will not support it down the stretch and opponents will know it. The Iraq Study Group understood this when it insisted that we begin working with Syria and Iran to contain the terrorist threats that many agree will continue to emanate from Iraq for a long time to come.[7] More generally, as the retired U.S. Army Colonel Joseph Núñez has argued, we need NATO-like organizations on every continent to contain terrorist groups and sectarian conflicts in failed states.[8]

This is not to say we should trust the Syrians or be sanguine about Iran's nuclear ambitions. But containment means talking to our enemies; just as a strategic opening to China was helpful in containing the USSR, so too will a strategic opening to Iran be helpful in containing the terrorism that will otherwise emanate from Iraq. Iran would face major problems with its own Kurdish population if Iraq broke up, not to mention a major refugee crisis. Iran also shares an interest with the U.S. in not seeing the Taliban return to power in Afghanistan. These are among the reasons that the Mullahs in Iran have been signaling a desire to work with Washington. This is, of course, not to deny that Iran will also need to be contained, just as China had to be contained during the Cold War after President Nixon went to Beijing. We often share some common interests with our adversaries, making it feasible and sometimes necessary to work with them.

Regional participation is important also for normative reasons. Nations bordering on an expansionist power will have major, possibly vital, interests at stake. This gives them a strong claim to a say and to a role in the defensive response. To this, it might be objected that, if the regional actors are not democracies, why should democratic nations respect the appeal of these governments concerning their affected interests? Why should we care about Kuwait's interests, let alone those of Syria or Iran?

But the failure of others to respect the principle of affected interest is not a good reason for democratic nations to flout it. Moreover, the leaders of democracies have an interest in encouraging non-democracies to adopt democratic norms and to play by democratic rules when they operate internationally—whether in institutions like the UN or in more informal consultations and coalitions between nations. The more non-democratic governments accept the democratic norm's legitimacy in one context, the more they legitimate it in others—making it harder to resist domestic demands for democratic reform.

The authorization of international institutions matters for reasons both practical and normative. On the practical front, it is often UN officials from development and other agencies on the ground who have access to pertinent information. This is especially the case as far as weak and failed states are concerned; it is often these people who know the details of different warlords' capacities and agendas, where the weak points in borders are, and other relevant street-level information. Moreover, international authorization of containment coalitions enhances their stability. It is harder for a country to withdraw from participation after committing its resources through an international legal process, such as a UN security council resolution, than when it is merely a coalition "of the willing"—of which a new and different administration might take a different view. Gordon Brown's replacement of Tony Blair and the prompt withdrawal of British troops from Iraq is a case in point.

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[7] The Iraq Study Group, The Iraq Study Group Report (U.S. Institute of Peace 2006), available at http://www.usip.org/isg/iraq_study_group_report/report/1206/iraq_study_group_report.pdf.

[8] Joseph Núñez, Op-Ed., *One NATO Is Not Enough*, N.Y Times, January 27, 2007, at A17.

But the most important reasons for international authorization are normative. If major powers act either unilaterally or via coalitions of the willing when they are not themselves under threat of imminent attack, they lack principled authority for their actions. As a result, they are likely to be seen as imperialistic, opportunistic, or both. The 1991 Gulf War and the 2001 action against Afghanistan garnered worldwide support partly because they were authorized by the UN Security Council. This stands in stark contrast the 2003 Iraq war, which continues widely to be seen as a rogue American action against a country that posed no regional or global threat. Rather than undermine the UN at every turn, as the Bush administration has done, the major democratic powers should strengthen the UN, and then work through it to face down domination. There is no alternative if we are to have an effective *global* strategy against international terror in general, and against terrorist threats emanating from Iraq specifically.

Restoration, Education, and Coordination: Three Principles to Guide U.S. Counterterrorism Efforts Over the Next Five Years

Louise Richardson*

I. INTRODUCTION

As we approach the seventh anniversary of the attacks of 9/11, the evidence of the failure of United States counterterrorism policy accumulates daily. True, we have not been attacked at home since then, though whether this is due to actions our government has taken or because our adversaries have lacked the capacity to attack us, we simply do not know. We do not, in fact, know whether the estimated $58 billion a year the United States ("U.S.") is spending on Homeland Security is making our homeland more secure. We do know, or rather, there is compelling evidence that the foreign policy our government has followed in the name of counterterrorism has served to swell the ranks of our adversaries and thereby undermine our nation's security.

In considering the counterterrorism experience of other democracies, one general observation stands out: governments improve the efficacy of their policies over time. The British, Indian, Italian and Peruvian governments, for example, each learned from the early mistakes they made against the Irish Republican Army ("IRA"), Sikh terrorists, the Red Brigades and the Shining Path respectively, and each significantly improved the effectiveness of its counterterrorism policies. The very mixed record of U.S. early counterterrorism policies suggests that there might be an openness to new approaches here too. The record is mixed because, like other democratic governments before us, we have been unable to translate military strength into victory against terrorism. We have waged two wars at a cost of over four thousand American lives, and tens of thousands of non-American lives, yet we have not captured the perpetrators of the 9/11 attack. We have damaged our reputation and undermined our influence overseas while winning recruits for our adversaries. Public confidence in the ability of our government to improve its practices, however, was severely shaken by the thoroughly mishandled response to hurricane Katrina, which occurred only a few years after the U.S. invested billions in homeland security measures and disaster response preparedness. That natural disaster exposed rampant incompetence, confusion, lack of coordination, planning and follow-through, raising serious questions about our ability to handle the repercussions of another terrorist attack.

For the purposes of this paper, I was asked to identify three challenges to counterterrorism over the next five years and to suggest ways that they might be addressed.

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This is a tall order—not to identify the challenges, but to confine the list to three. The three broad challenges I choose to focus on are restoration, education and coordination:

1. to restore American prestige in the world;
2. to educate ourselves both on the nature and the extent of the risk we face and on the impact of our policies on the ground overseas; and to educate the rest of the world on the nature of American society and values; and
3. to coordinate the actions of the various arms of our government so that they are enhancing rather than undermining one another, and, in so doing, exploit our strengths, including our technological superiority, our wealth, and our individual freedoms.

II. THE CHALLENGE OF RESTORATION

President Bush has been quite right in asserting the inextricable link between our foreign and domestic policies when it comes to countering terrorism. He was quite wrong, however, to assert that Iraq was the central front in the war on terror. Unfortunately, by claiming that it was, he made it so.

The U.S. reaction—I would go so far as to call it an overreaction—to the attacks of 9/11 and our response, in particular our war in Iraq, have undermined the prestige of the United States and our legitimacy as a principled power in the world. Our claims to fight for freedom ring hollow in the face of Guantanamo, Abu Ghraib and documented U.S. atrocities in Iraq. Our inability to achieve our declared objectives in Iraq, because we arrogantly assumed that our strength and the purity of our motives were adequate and self-evident, has made us appear weak abroad. Our allies have been appalled by American hubris, excesses, and incompetence; our rivals have delighted in our well-publicized difficulties, while our adversaries have seen their suspicions of our malevolence confirmed. This portends a larger security concern: given the transnational nature of the adversaries we face, we are dependent on the cooperation of other countries to share intelligence, to disrupt the movements of terrorists and their financing, and to help us track down those conspiring against us. The United States will not be able to secure the cooperation we require unless we can restore our reputation abroad.

Reputations are easier to damage than to repair. In order to repair ours, we will need first to convince the rest of the world that the U.S. has learned from the past seven years and is about to embark on a different direction. Practically speaking, this will require a change of administration in Washington. But it will also require more than that. It will require a real and public change in direction and a highly articulated rationale for that change in order to persuade the rest of the world that there is a different United States than the one that has shown its face to the world in the past seven years. It will require re-framing the conflict. We should abandon the language of a "War on Terror," which is a war we cannot hope to win, and reframe the conflict as a focused and limited campaign against individuals and organizations who are willing to use terrorist methods against us. This is a campaign in which we can prevail.

The second and more difficult task required in order to restore American prestige will be to manage our exit from Iraq in such a way as to minimize the damage to our interests. Our exit from Iraq is inevitable; the only questions that remain concern the timing and the circumstances under which we will leave. There can be little doubt that

when we do leave, our adversaries will claim to have defeated us and driven us out. There can also be no doubt that our war in Iraq has produced a new generation of fighters anxious to use terrorist methods against us and trained to do so. Their success against the Soviet Union in Afghanistan inspired Bin Laden and his followers to believe that they could then take on the United States. Veterans of the Soviet-Afghanistan conflict swelled the ranks and radicalized the memberships of terrorist groups throughout the Middle East. It will be difficult to prevent similar developments in the wake of our withdrawal from Iraq. Our reputation will also be tied to the conditions that prevail in Iraq when we leave. Rather than wishfully thinking that peace or democracy, not to mention "victory," are around the corner, we need pragmatically to accept that our involvement in Iraq was a mistake and we must engage in a concerted effort at extrication and damage limitation. As long as our troops are on the ground in Iraq, we will not be able to persuade moderate Muslims, a group crucial to the success of our counterterrorist policies in the region and around the world, that we believe in the principles we espouse.

III. THE CHALLENGE OF EDUCATION

A resilient public is a key weapon in the counter-terrorism arsenal, but we have made no effort over the past six years to develop one. On the contrary, public fears have been fanned by partisan politicians and revenue-driven media. There is no doubt that the mass murder of almost three thousand people on U.S. soil was a deeply shocking event but I, for one, very much doubt that the scale of the atrocity warranted our response.

Americans were more fearful after 9/11 than they were when tens of thousands of Soviet nuclear weapons were trained on our cities during the Cold War. Six times as many people are killed by drunk drivers every year than were killed on 9/11 and yet we do not live in fear of drunk drivers. Terrorism is a weapon of the weak—the whole point is that the psychological impact is greater than the actual physical act. The public needs to understand this. Rather than encouraging fear for political or financial advantage, our leaders should endeavor to educate the public to the psychological nature of terrorism and the actual risk to individuals. In addition to losing our sense of security on 9/11, we also lost our sense of perspective as evidenced, for example, in the completely unwarranted conclusion that it had become unsafe to fly. Indeed, among the uncounted casualties of 9/11 are the extra 1,200 fatalities on the road occasioned by the diversion from air to road transport after 9/11. Perhaps fearful themselves, or concerned at being proven wrong by another attack, our leaders made no effort to help the American public put the attacks of 9/11 in perspective, thereby enhancing the impact of the attack.

Many Americans responded to the attacks by asking: Why? Why us? Why do they hate us? This is a very important question, but rather than engage in a reasoned analysis, our leaders responded in effect: because we are good and they are bad. If we want to have an effective counterterrorism policy over the next five years, we must engage seriously with this question. The United States needs to understand what it means to be the most powerful country in the history of the planet and how that affects perceptions around the world. We must not only educate our children in the languages and cultures of other societies, but also educate our citizens as to what it means to be on the receiving end of U.S. policies in countries where our good intentions are not self-evident.

We also need to educate our policy makers about the nature of our adversaries. We cannot hope to develop an effective counterterrorism policy unless we understand the nature of our adversary. Why do they wish to attack us? What drives them? What to they hope to achieve? Who are they? How do they manage to recruit followers? What capacity do they have to harm us? Seven years after the attacks, there is remarkably little information and even less consensus on these points. Rather, whether out of fear, conviction, or a desire to justify political and military action, we have defined our enemy as a nebulous, but all-powerful menace such as Islamo-fascism. We have played directly into the hands of our adversaries by declaring war on them and, in so doing, elevating their stature to a height of which they could only have dreamt.

Once we have a clearer understanding of their objectives, then we can fashion policies to deny them. If, indeed, they are driven by a desire to exact vengeance against us, to attain glory for themselves and to provoke us into over-reacting to them, then the policies we have followed for the past seven years are precisely the wrong ones.

For our policies to be effective, we must also educate the rest of the world so that they have a better understanding of the United States. Our wealth, military strength and the pervasiveness of our culture are enough to ensure widespread resentment against us. They are not enough to ensure widespread support for the murder of our civilians. Moreover, our wealth, strength, and culture could—and should—be turned into assets to make our case overseas and to undermine support for our adversaries. The United States has an enormously attractive and successful ideology to spread, but we should be altogether more self-conscious about how we spread it. The rationale that the U.S. public believes for U.S. government actions should be made publicly known in the countries we seek to influence. Most Americans believed, for example, that our sanctions against Iraq were evidence of our humanitarian restraint, designed to prevent the suffering of the Iraqi public while pressuring the Iraqi dictator. Many people in the region believed it was a callous attempt to starve Iraqis. Americans believed we invaded Iraq to defend ourselves against attack, bring down a brutal dictator, and bring democracy to a long-suffering people. Most people in the region believe we invaded Iraq to secure its oil supplies and establish a military base in the region.

We should be aware of these conflicting interpretations of our policies and engage in debate on them. A concerted effort at public diplomacy will not be successful as long as there are hugely unpopular U.S. policies in evidence and as long as we have little or no understanding of the cultures we are trying to influence. Over the next five years, we should make a sophisticated and well-financed effort to use our wealth and our media skills to make our case where it needs to be made—to the moderates in the Middle East. We cannot hope to change the minds of those who are prepared to use violence against us, but the focus of our policies should be the communities in which they operate, from which they draw their recruits and amongst whom they hide.

IV. THE CHALLENGE OF COORDINATION

Specific institutional arrangements are less important than having clearly articulated goals and shared principles to guide action. No amount of organizational restructuring, however sensibly designed or intelligently implemented, will actually be able to counter terrorism effectively or provide security for our homeland unless it is accompanied by a change in our foreign policy, which is daily generating more recruits for the groups who would like to attack us. That said, a large number of bureaucratic initiatives have been undertaken in the past five years. The most dramatic of these

have been the creation of the mammoth Department of Homeland Security and the Transportation Security Administration.

While there is consensus on the centrality of good intelligence to effective counterterrorism, there is little consensus on the effectiveness of these initiatives. Judge Richard Posner, for example, blames the 9/11 Commission Report and what he terms the hasty legislative reorganization to which it led for throwing off course efforts to repair the weaknesses in intelligence that were exposed by 9/11.[1] He suggests that the Intelligence Reform Act and the creation of the Department of Homeland Security may have actually retarded rather than advanced the reform of intelligence. Others, like Michael O'Hanlon and Jeremy Shapiro at Brookings, argue on the contrary that intelligence sharing has improved through increased integration of databases and greater collaboration between the FBI and the intelligence community, improvements that were enhanced by the 2004 act.[2] All argue the benefits of creating an American domestic intelligence agency along the lines of the British Security service, MI5, and the Canadian Security Intelligence Service. Of course, those who argue for the creation of an American MI5 as an antidote to bureaucratic rivalries must never have examined the history of relations between MI5 and MI6 or the bureaucratic rivalries between the various British security agencies engaged in the fight against the IRA in Northern Ireland.

A consideration of the counterterrorism experience of other democracies quickly reveals both the central importance and considerable difficulty of coordinating the actions of various security forces. This was true of countries such as Japan, Italy, France and Spain in which the military were not involved in counterterrorism, as well as countries such as India, Peru, Turkey and Britain, in which both the military and the police were involved. A serious effort to coordinate the various security and law-enforcement organizations involved in counterterrorism was a precursor to every successful counterterrorist campaign. Israel, the country with the most experience in confronting a serious terrorist threat, has developed a special coordinating apparatus, the Counterterrorism Coordination Office within the National Security Council. One of the hallmarks of failed counterterrorism policies has been the failure to coordinate security forces. In Chechnya, for example, federal and regional security units and the army have appeared to be operating on their own which has contributed to the terrible losses in the province. In Columbia too, a weak state was unable to coordinate its forces with the result that freewheeling paramilitary groups, often with tenuous relations to the government, waged their own brutal counterterrorism campaigns. In light of the lessons derived from the experiences of other countries, the position of Director of National Intelligence appears to have been poorly conceived: the crucial role of coordinating the intelligence agencies is diluted when one is simultaneously expected to manage intelligence missions and undermined by the lack of budgetary authority.

An effective counterterrorist policy requires a strong intelligence capability and coordinated security forces. There are real differences in Washington on precisely how this capability is to be developed and how these forces should be coordinated. It may not much matter though: the experience of other governments suggests that there is no one right way to organize one's government for counterterrorism. Different governments have organized themselves differently and successfully, although in every

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[1] Richard a. Posner, Countering Terrorism: Blurred Focus, Halting Steps (Rowman & Littlefield 2007).

[2] Michael d'Arcy, Michael O'Hanlon, Peter Orszag, Jeremy Shapiro & James Steinberg, Protecting the Homeland 2006/2007 (Brookings Institution Press 2006).

instance it has taken them time to do so. What matters domestically is that the priorities are clearly understood, by both policy makers and the public; that responsibilities are clearly assigned and understood; and that effective co-ordination and oversight mechanisms are put in place. What matters with respect to foreign policy is that these government organizations are not undermined by the irresponsible conduct of foreign policy, making their goals impossible to realize. The effective coordination of counterterrorism policy both within and between government bureaucracies was a prelude to every successful counterterrorism campaign carried out by a democratic government.

There are two other lessons that can be derived most broadly from the experiences of other governments. First, that there is no silver bullet in the fight against terrorism, no quick fix; the best counterterrorism policies are likely to be those designed to counter the particular terrorist group one faces. Second, the governments that were most successful in combating terrorism often (not always) turned out to be those that adopted a well-integrated mix of both coercive and conciliatory measures. By coercive measures, I am referring to reliance on the intelligence and security forces. By conciliatory measures I am referring to social reform, political engagement with grievances, and mobilization of moderates.

As well as learning from the experience of other governments, we could learn from our adversaries. They have proven quite adept at using key attributes of our society against us. Given the stark asymmetry of power between us they have, in Ju Jitsu fashion, used our strengths—a free press, competitive media and complex economy—against us. We need to understand them at least as well as they understand us. The source of our adversaries' strength appears to be two fold: they have an ideology that many people find attractive and they have extraordinary organizational flexibility. They have managed to survive a massive military assault, the destruction of their central command and control structure and the death or capture of many of their leaders. They have transformed themselves into a loose, but deadly network of individuals and groups who share a common inspiration. We too have an attractive ideology—and one likely to have far broader appeal—but we cannot match them in organizational flexibility. One of the great frustrations of the past seven years (a frustration shared by most other governments that have relied on military force to defeat terrorism) was our inability to translate our strength into victory.

The transformation of Al Qaeda, however, has only been possible because of their increasingly sophisticated exploitation of the very attributes of the globalization they are so quick to criticize. The transformation of Al Qaeda from hierarchical organization to decentralized network is only made possible by the existence of the Internet. Al Qaeda and their supporters rely on the Internet to communicate with one another across borders, to plan attacks, to raise funds, to make propaganda, to recruit, educate and train their followers. They could not manage without it. With our technological skill, we should be able to devise means to undermine their trust in the security of the Internet. Any effort to do so will raise significant civil liberty concerns, but this is an area in which we should be working assiduously and launching a public debate about the appropriate balance between privacy and security. There are a number of principles that could guide our action in this area, among them: effectiveness must be demonstrated before new procedures are adopted; privacy and other concerns should be incorporated at every stage of the development of the policy; and oversight mechanisms must be put in place to evaluate effectiveness and compliance with stated

principles. Despite the difficulties in finding an appropriate balance, this is an area in which we should be able to use our strengths to our advantage.

A related issue is the monitoring of computers. Our efforts to capture terrorists have led us to launch missiles from predator drones against innocent villagers, have led us into the unworthy world of renditions, secret prisons and abuse of prisoners that has done so much to undermine our moral authority in the world. When we have captured computers, however, we have gained extraordinarily detailed intelligence; the information is far more reliable than that extracted from a prisoner under duress, and we have not had to mistreat anyone to attain the information. Again, there are real areas of concern here, but these are areas on which we need to focus in the next five years.

We have, over the past seven years, spent staggering sums of money in an effort to improve our security. We have no idea how successful we have been. Nor do we know how effective the expenditure of similar or smaller sums on very different policies might have been; policies designed, for example, to prevent radicalization of prison populations, reduce gang violence, and integrate immigrants. These types of longer term policies tend not to be considered. Instead there is widespread consensus that much remains to be done: border and port security is inadequate; state and local governments have not been well integrated into federal efforts at attack prevention or consequence management; there are exposed chemical plants; vulnerable transport systems and ill-secured radiological materials, and much more. The simple truth is that we can never make our society invulnerable to another terrorist attack. We should instead focus our attention on the less likely, but far more damaging possibility of a catastrophic attack by terrorists—an attack using weapons of mass destruction. Our best hope in preventing such a catastrophic attack is good intelligence and the best source of that intelligence is likely to be sympathizers overseas and the loyal Muslim population of this country.

V. CONCLUSION

Over the next five years we should acknowledge the failures of the past seven years. We should publicly repudiate the departures from American principles evident in our counterterrorism policy. We should abandon the language of the "war on terror." Instead, we should make a concerted effort to restore our prestige in the world, demonstrate our commitment to multilateralism, and reframe the war against terrorism as a transnational campaign against isolated extremists. We should try to persuade the American people that we can be most effective against terrorism when we abide by our principles, keep the threat in perspective, and play to our strengths. We should educate our children in the languages and cultures of others. We should educate our public about how to evaluate risk and how terrorists try to manipulate us. We should educate ourselves about the nature of our adversary and we should educate the rest of the world about America's virtues. Finally, we should coordinate the actions of our intelligence and security forces, ensuring that their short-term successes are advancing our long-term goals. This means that we should exploit our technological strength to reduce our adversaries' reliance on new technologies. We should also articulate a set of goals for our policies, principles to guide us in pursuing them, and means to evaluate the success of our actions in achieving them. I have no great confidence that we will do this, but if we did, in five years, we would find ourselves enjoying both more liberty and more security than we do today.

The New Domestic Surveillance Regime: Ineffective Counterterrorism That Threatens Civil Liberties and Constitutional Separation of Powers

Kate Martin*

Secret intelligence failed to provide reliable information and knowledge for the weighty decision of when and against whom to go to war. Nevertheless, it is being touted as the be-all and end-all for targeting Americans at home for surveillance, imprisonment and black-listing. Is there any basis for hoping that it will prove more effective at protecting the national security at home, including civil liberties, than it proved to be when deciding to invade Iraq?

I. INTRODUCTION

On August 16, 2007, the *Washington Post* ran a story about the Defense Department agreeing that the Department of Homeland Security could use military spy satellites for aerial surveillance of the interior of the United States ("U.S."). The same day the paper ran a separate story, quoting a Rand Corporation terrorism expert asserting that there was no evidence of "a significant cohort of terrorist operatives" in the U.S.[1] These two stories illustrate a troubling development: the reach of the intelligence activities now being directed against Americans far exceeds the small number of terrorists who have been charged or are even suspected of being here. Since then, for example the National Security Agency ("NSA") has just been granted vast new surveillance powers over Americans' international communications.

If there are at most a handful of terrorist cells in the U.S., one must ask why has the Administration decided to use its expensive satellite capabilities and other scarce intelligence resources in this way?

The answer can be found by comparing the record of massive expansion of secret domestic intelligence authorities and the explosion of technological surveillance capabilities since 9/11 with the history of arrest and imprisonment of hundreds of individuals in the U.S. since then as part of the Administration's "War on Terror." Those imprisoned include both citizens and non-citizens, almost all Muslim; some have been convicted of minor crimes, fewer of terrorism-related crimes, but many more were never even charged with any crime.

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[1] Joby Warrick, *Domestic Use of Spy Satellites to Widen*, WASHINGTON POST, Aug. 16, 2007. Dan Eggen, *Terror Threat Grows Quietly, Report Warns*, WASHINGTON POST, Aug. 16, 2007.

The expansion of secret surveillance authorities used domestically is integral to the Administration's declaration that the U.S. is at war and that intelligence is the most important weapon for winning this war. The connections between such surveillance and the arrests and detentions of individuals identified primarily on the basis of their religious beliefs have not been adequately examined. The question posed most often today is what kind of oversight and safeguards can we build to prevent abuses of these new surveillance powers? But the question is usually asked in too narrow a context—without looking at the record of domestic detentions—and with little appreciation for the historical record of the abuses of secret domestic intelligence authorities by all governments, both democratic and totalitarian.

Before 9/11, there was a wide recognition of and effort to mitigate the substantial risks posed to democracy and human rights by secret domestic intelligence activities. As a civil liberties lawyer working on government surveillance and other national security issues for 13 years before 9/11, I frequently reassured activists that the government was not spying on them, unless they worked for pro-Palestinian causes, in which case the Federal Bureau of Investigation ("FBI") had a Foreign Intelligence Surveillance Act ("FISA") warrant. There was also healthy skepticism about the effectiveness of such activities in preventing terrorist acts. That broad perspective has largely disappeared, however, and been replaced by much narrower analyses of the potential risks and benefits of particular surveillance techniques.

Today we must ask whether the U.S. is in danger of becoming a place where the government's knowledge gives it too much power over individual lives and, if so, how can that be prevented. I hope I am wrong, but I can no longer find any reason to give this Administration or the intelligence agencies and their leaders the benefit of the doubt in worrying about such threats to our democracy.

To be clear, I do not dispute the threat of additional violent attacks inside the U.S. or that the government should use appropriate surveillance and investigative techniques to attempt to identify and locate individuals planning such attacks before they happen. However, it would be both ineffective and dangerous to create a domestic intelligence agency with virtually unrestrained power to conduct national security surveillance inside the U.S. Instead, we need a strong agency with law enforcement responsibilities, including prevention, which is trained to carry out targeted investigations within constitutional rules, to prevent international terrorist plots. Whether such responsibility should remain with the FBI or a new agency established under the control of the Department of Justice is another question. I note with some relief that, to date, suggestions to establish a domestic intelligence agency have been rejected.

But there is increasing evidence that an enormous domestic intelligence capability is, in fact, being built piece-by-piece, much of it housed in the Department of Defense, including the NSA. The satellite surveillance, though vast, is only a small piece of that. In order to evaluate the benefits and risks of this expansion of domestic intelligence, it is necessary to start with some of the general characteristics of secret intelligence.

II. THE RISKS OF SECRET DOMESTIC SURVEILLANCE

What differentiates "intelligence" from any other human endeavor to attain information and knowledge is that it is conducted by the state in secret. This paper addresses only secret intelligence activities carried out inside the U.S. and directed against U.S. citizens and residents. Such activities, unlike intelligence directed overseas, impact directly on the compact between the government and the governed. Indeed, secrecy poses difficulties for intelligence agencies themselves. Long-time CIA veteran

and Director William Colby explained, in connection with ensuring the agency's survival in the mid-1970s in the face of intense public outrage over past abuses:

> The Agency's survival, I believed could only come from understanding, not hostility, built on knowledge, not faith….
>
> The CIA no longer could operate within the traditions of the past. The CIA must build, not assume, public support, and it can do this only by informing the public of the nature of its activities and accepting the public's control over them. It must convince the people that it is not some nefarious "invisible government" engaged in heinous crimes and oblivious to American democratic values, but a legitimate, controlled, and immensely valuable weapon in the arsenal of our democracy, serving to protect the nation and promote its welfare….
>
> The only way we can have such a public [supportive of the intelligence community] is by making the CIA an integral part of our democratic process, subject to our system of checks and balances among the Executive and the Congress and the Judiciary, responsive to the Constitution and in the end controlled by the informed populace it serves.[2]

While this vision was not fully implemented by past administrations, there is no evidence that the current Administration understands that this point applies to the intelligence community in spades when it turns its activities on Americans.

Secret intelligence-gathering and the corresponding lack of transparency also greatly increase the probability of error. Moreover, because intelligence is by its nature secret, it is difficult to design mechanisms and systems that provide any real and effective oversight or accountability. Yet, the secret intelligence agencies are perhaps the agencies most in need of oversight and accountability both because of the risks they pose to democratic decision-making and because the government gains enormous power over individuals through knowledge about those individuals. As Senator Sam Ervin, chief author of the Privacy Act, wrote in 1974:

> [D]espite our reverence for the constitutional principles of limited Government and freedom of the individual, Government is in danger of tilting the scales against those concepts by means of its information gathering tactics and its technical capacity to store and distribute information. When this quite natural tendency of Government to acquire and keep and share information about citizens is enhanced by computer technology and when it is subjected to the unrestrained motives of countless political administrators, the resulting threat to individual privacy makes it necessary for Congress to reaffirm the principle of limited, responsive Government on behalf of freedom.
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> …

[2] WILLIAM H. COLBY, HONOURABLE MEN 21(1978).

> Each time we give up a bit of information about ourselves to the Government, we give up some of our freedom. For the more the Government or any institution knows about us, the more power it has over us. When the Government knows all of our secrets, we stand naked before official power. Stripped of our privacy, we lose our rights and privileges. The Bill of Rights then becomes just so many words. [3]

Since 9/11, however, it is widely claimed that secret surveillance and intelligence against Americans is essential to our national security. Providing for our national security is certainly an essential function of our federal government, but this approach raises serious questions. Is the U.S. building a surveillance regime likely to be effective at stopping terrorist attacks? Or, is it constructing a surveillance regime likely to become an ungovernable tool in the hands of an executive for use against its own citizens, serving the purposes of those in power rather than the national interest as constitutionally and democratically determined?

We need to know much more in order to have any confidence about the answers to these questions. We must understand the underlying rationale for the surveillance, the ways in which it may be used, and just what such surveillance entails.

III. "*WE'RE AT WAR*." THE JUSTIFICATION FOR DOMESTIC INTELLIGENCE

This claim and its corollary—that intelligence is the most important weapon in this war—are the key rationales for the current surveillance regime. Understanding this is critical to assessing the risks and benefits of the regime in terms of constitutional requirements and effective counterterrorism.

This claim underlies the assertion by the Administration that the President has Article II Commander in Chief powers, authorizing him to override statutory prohibitions—in secret—without informing the Congress or the American people.[4] Such powers are said to encompass surveillance of the enemy—wherever found and however identified. The Administration reads the Fourth Amendment to require only that surveillance inside the U.S. against U.S. citizens and residents be "reasonable" and it claims that the executive branch is the sole judge of reasonableness.

While courts have on occasion approved warrantless surveillance, there is a key difference between the surveillance approved in those cases and the secret surveillance being conducted for intelligence purposes. In each of those cases, the target of the search or seizure knew that his belongings had been searched or that his communications were overheard and, therefore, could challenge the reasonableness of the search with a judge as the final arbiter. The essence of the "wartime" surveillance being conducted by the Bush Administration in the U.S. against U.S. citizens and residents is

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[3] Senator Ervin, Speech introducing S. 3418 (June 11, 1974), *reprinted in* COMMITTEE ON GOVERNMENT OPERATIONS, UNITED STATES SENATE AND THE COMMITTEE ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES, LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974 S.3418, at 157 (Public Law 93-579)(Sept. 1976) (hereinafter SOURCE BOOK ON PRIVACY).

[4] These Article II claims are outlined in a variety of sources. *See e.g.* Memorandum from Off. Legal Counsel to Att'y Gen. Alberto Gonzales (Aug. 1, 2002); Dep't of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006) (White paper on FISA surveillance); Letter from Bryan Cunningham to Arlen Specter & Patrick Leahy (Feb. 3, 2006); JOHN YOO, WAR BY OTHER MEANS, AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 2006.

that it remains a secret and may never be revealed to those who have been spied on. Further, its reasonableness is never reviewed by a court in an adversarial proceeding. Indeed, when individuals have attempted to challenge such surveillance, the government has strongly argued against judicial review.[5]

Other Administration supporters argue for secret warrantless surveillance not by claiming extraordinary Article II powers for the President, but instead by reading the protections of the Bill of Rights to incorporate a balancing test. They claim that individual rights must be balanced against national security concerns and that the risk of terrorist attacks outweighs the protections and checks and balances traditionally understood to be guaranteed by the Constitution.[6]

These claims have led to adoption of a military model of surveillance, even when directed inside the U.S against U.S. citizens. As explained by John Yoo, author of the Justice Department's legal opinions approving the use of warrantless surveillance against Americans in violation of FISA: "Individualized suspicion [as required by the Fourth Amendment] does not make sense when the purpose of intelligence is to take action, such as killing or capturing members of the enemy, to prevent future harm to the nation from a foreign threat."[7] The same arguments are also advanced to defend a military model of detention without charge or trial for individuals seized in the United States as "enemy combatants." The more benign formulation of this claim is that because it is difficult to find Al Qaeda in this country, the threat is so great, and there is no real harm to privacy interests from the kind of surveillance at issue, secret warrantless surveillance of Americans is therefore justified and constitutional.

Both formulations rest on an unexamined and unsupportable hope that surveillance will actually work, while ignoring its real harms. Before examining both of those flawed premises, let us look more closely at the purpose of such surveillance, what it includes, and how is it carried out.

IV. DOMESTIC "WARTIME" SURVEILLANCE AND DETENTION

There is much we still do not know about the connections between the Patriot Act amendments to FISA, the warrantless NSA surveillance program revealed in December 2005, and the Administration's claim of authority to imprison Americans and others seized in the U.S. as "enemy combatants" without charges, trial, or even any access to counsel or any court for months on end. It is clear that the Bush Administration viewed both detention and secret surveillance as weapons to be employed against the "enemy" both here and abroad. In the months following 9/11, more than 1,000 individuals were arrested in secret, physically assaulted in custody, and held illegally for months on end, simply because they were (or were believed to be) Arabs or Muslims. Then-Attorney General Ashcroft repeatedly spoke about "sleeper cells" in the U.S. Ashcroft ordered prosecutors to comb through years of pre-9/11 FISA surveillance to determine what criminal charges could be brought on the basis of the old surveillance tapes and some prosecutions of Arabs, Muslims and Palestinians resulted. And the President claimed the extraordinary and unprecedented authority to command the military to seize U.S. citizens and legal residents in the United States, imprison them

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[5] Providing for a FISA court order to initiate such surveillance does not address this issue, as such orders are issued in *ex parte* proceedings.

[6] See e.g. RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006).

[7] Yoo, *supra* note 4, at 112.

incommunicado for years, without access to a lawyer or any judicial review on the claim that they were "enemy combatants."

There is no doubt that the secret surveillance both under FISA and by the NSA in violation of FISA was part of this system whereby the government would gather information in secret, and use it to seize and imprison Americans as enemy combatants. It seems evident that many in the Administration contemplated from the beginning that the government would use warrantless surveillance outside the law to "disable" or "take out" individuals in the U.S. suspected of terrorist associations. When the legal opinions justifying the warrantless wiretapping program are finally disclosed, we will know whether they expressly discuss this objective. The system of secret intelligence gathering to find Al Qaeda "sleeper cells" is not designed to "disable" suspected terrorists found in the United States by bringing criminal charges resulting in imprisonment or immigration charges resulting in detention followed by deportation. To the contrary, it was expressly designed to enable the government to detain individuals without any due process as "enemy combatants." It was also designed in order to allow the seizure of non-citizens and render them outside any legal process to countries where they could be held outside the law and interrogated with no protection against being tortured. Thus, there is a deep and important connection between the use of secret surveillance with no outside checks and the system of detaining individuals outside the legal protections (such as they are) of the criminal and immigration systems.

In both cases, the Administration dismisses any care for constitutional norms because they calculate that such norms must give way in the face of current threats. Their defense of secret surveillance rests less on the claim that the surveillance will not be used against individuals and more on the assurance that it will only be used against guilty individuals with no need for the innocent to worry. But the determination of the guilt or innocence of those accused is shrouded in secrecy and is no longer tied to any due process.

Is this description exaggerated? Has this actually happened? There is no doubt that the legal analysis proffered by the Administration for its claim of authority to detain "enemy combatants" and to engage in extraordinary rendition of individuals outside the legal process to countries of its choosing rests on the same assumptions and adopts the same reasoning as the legal analysis proffered in support of secret warrantless surveillance in the U.S., even when prohibited by statute. While at this time there are only two known instances of individuals seized in the U.S. and held without charges as enemy combatants and one extraordinary rendition from the U.S., there are many instances of individuals kidnapped around the world and held in secret without any process. It is not known what role secret, warrantless surveillance played in these cases, because the government has refused to say. But it appears that Ashcroft was most likely referring to warrantless NSA wiretaps when he first outlined the government's allegations against the U.S. citizen Jose Padilla, who was seized in the U.S. and detained as an enemy combatant for more than three years.[8]

The claim that the Administration has the authority to conduct warrantless secret surveillance because the U.S. is at war has other important consequences as well: the Defense Department has become heavily involved in domestic surveillance activities and the government has violated the due process rights of individual criminal

[8] Jose Padilla eventually obtained a lawyer and filed a habeas corpus petition challenging his detention as an enemy combatant. While that petition was before the courts, the government suddenly transferred him from military detention and brought criminal charges against him. He was tried in 2007 and convicted.

defendants, who have been denied access to information about government surveillance of them.

As far as I have been able to determine, in all the criminal cases where the defendants have sought to discover whether they were listened to by the NSA, the government has refused to say and has won on the grounds that the information should be kept secret, notwithstanding the protective procedures available under the Classified Information Procedures Act. One might wonder what is secret, once the subject of the surveillance is in prison? But more importantly, allowing the government to withhold such information from a defendant violates his or her Fourth Amendment and basic due process rights. Prior to the NSA warrantless surveillance program, it was the established understanding that when the government indicted an individual, it was required to disclose whether he had been wiretapped and to make available to him the transcripts of such wiretaps as a matter of fundamental due process. Such an after-the-fact check traditionally provided the only adversarial judicial review of whether secret surveillance was, in fact, lawful.

Less attention has been paid to the civil liberties issues raised by criminal prosecutions of Muslim-Americans (including a number of Imams) than has been paid to the enemy combatant detentions. But there are serious issues about whether illegal surveillance is being used to target individuals on the basis of their constitutionally-protected religious activities. Questions have been raised about sting operations used to entrap individuals who may have been targeted based on warrantless surveillance.[9] Individuals have also been charged, not with attempted terrorist attacks, but with much more inchoate offenses, for example under material support laws. This comes dangerously close, in the words of Professor Peter S. Margulies, to "allow[ing] someone to be found guilty for something that is one step away from a thought crime."[10]

V. THE GOVERNMENT IS ENGAGED IN A MULTI-BILLION DOLLAR EFFORT TO BUILD A MASSIVE WEB OF DOMESTIC INTELLIGENCE CAPABILITIES

While there has been extensive public debate and some limited congressional oversight on the warrantless NSA spying, some provisions of the Patriot Act, and some aspects of data-mining, there has been little public information about or congressional understanding of the overall effects of the massive increases in surveillance capabilities. There likewise has been little debate about or oversight of the extensive rewriting of legal restrictions to weaken the checks on employing these surveillance capabilities against U.S. citizens and residents.

There has been a massive shift from surveillance and intelligence-gathering based on a factual predicate—such as specific information or a lead about a suspicious person or event—to surveillance and intelligence-gathering intended to obtain vast troves of data on millions of people. The NSA has been given authority to acquire and analyze the international calls and e-mails of Americans in the U.S., an intelligence activity that was formerly conducted by the FBI. The latter traditionally investigated based on some factual predicate; the NSA "vacuums" information in the hope that it may be useful in the future. Turning the NSA's supercomputing capabilities inward on Americans, when they were previously directed outward towards foreigners overseas,

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[9] Adam Liptak, *Spying Program May Be Tested by Terror Case*, NEW YORK TIMES Aug. 26, 2007.

[10] Adam Liptak, *Padilla Case Offers New Model of Terrorism Trial*, NEW YORK TIMES Aug. 18, 2007.

is an enormous change. In addition, the intelligence agencies not only collect, but also retain billions of items of data on Americans on the theory that they may be useful in the future, including data gathered by commercial entities as well as that collected by the government directly.

Here are some other key aspects of these developments:

- Data-mining—the use of enormous computing capabilities to aggregate enormous amounts of data and analyze and search the data using a limitless number of search algorithms.
- Much greater involvement by the Defense Department, both through its intelligence agencies and the Northern Command, in domestic intelligence, including the analysis of data collected by other agencies and other efforts like the use of military satellites over the U.S. to collect data directly.
- Massive initiatives to make myriad government databases available to thousands of government officials, including state and local police, CIA officials, and White House personnel. Notably these mass information-sharing efforts lack any attempt to train personnel on what is important and relevant information. It would seem that those who collect the information and know something about its source would generally be in the best position to assess its importance, but little attention is paid to that issue. Nor is there any real effort to assure that those who need specific information actually receive it, rather than simply warehousing the information in massive data-bases accessible to thousands of individuals.
- The elimination of legal rules intended to provide safeguards against abuse, *e.g.* the Patriot Act amendment permitting wholesale sharing of criminal wiretap intercepts of Americans with intelligence and White House personnel with no judicial oversight or audit mechanism.
- An attempt to eliminate meaningful judicial review of surveillance, either by claiming that no judicial determination of individualized probable cause is required to initiate surveillance or that there should be no after-the-fact judicial review of such.
- The creation of secret "watchlists" containing names of thousands of Americans, without any defined or legitimate purpose for such lists, much less criteria for inclusion or protections against abuse.
- Discriminatory data collection based on perceived religious affiliation or ethnicity, such as the request by the Department of Homeland Security for census data on neighborhoods with high concentrations of Arab-American residents and the program to collect data from Middle Eastern residents in the U.S. concerning their contacts and associates in the U.S.
- Fifteen thousand "confidential human sources" a.k.a. "informants" employed by the FBI, including an unknown, but apparently quite substantial, number working on counterterrorism (to find the handful of terrorists) and directed to infiltrate mosques or civic organizations.
- Changes in agency rules to allow intelligence agents to freely attend and record information about religious services or public political meetings.

In sum, as one proponent of increased surveillance describes it, the government is on its way "to assembling all the recorded information concerning an individual in a single digital file that can easily be retrieved and searched. It should soon be possible—maybe it is already possible—to create a comprehensive electronic dossier for the vast majority of American adults… [and that] digitized dossier would be continuously updated."[11] It is not clear whether this is being done on the assumption that it is useful to employ limited resources in this way, even though most people are innocent, or with a more sinister understanding that (as purportedly observed by Stalin's KGB chief) "show me the man and I'll show you the crime."

The Administration claims that building such surveillance capabilities is crucial for effective counterterrorism and holds few risks for civil liberties. But the claim that it has been or will be effective is backed only by hypotheticals. To date, there has been no demonstration that such surveillance is likely to yield crucial information and no examination of whether the intelligence agencies are competent or knowledgeable enough to recognize what is crucial and to use such data to stop terrorists, assuming the data can even be found.

The public record supplies little reason for confidence that the intelligence agencies will use their increased surveillance capabilities wisely. The intelligence community knew before 9/11 of the threat that Al Qaeda posed to the U.S. and that Al Qaeda associates were in the U.S. It did not recognize the significance of the information it had nor did it know what steps to take. That failure was followed by the failures of intelligence used to make the case for war in Iraq. The pre-9/11 record can be read as failures of analysis: the agencies had too much information and not enough understanding of its significance. They are now engaged in gathering oceans of information on innocent people with no explanation about how they will now differentiate the significant from the unimportant.

While there have been many legal and bureaucratic changes made since 9/11 and politicians have claimed that such changes have prevented more attacks in the U.S. since then, there has been no objective study or analysis to evaluate those claims. One of the key questions that needs to be asked is whether any useful information that may have been obtained, for example through warrantless NSA surveillance, could have been obtained lawfully, through less intrusive means, *e.g.* with a warrant.

Nor has there been any comprehensive examination of what uses have been made of the information collected through these massive efforts. To the contrary, the Administration has repeatedly rebuffed any efforts to discover even limited aspects of its activities. There has been no examination of what uses the government has made of such information to watch list Americans, to target individuals for further investigation or prosecution, or to prosecute them. Such examination, for example, would need to go beyond the political claims made by the Administration concerning the importance of its terrorism prosecutions since 9/11. At least some of those have targeted individuals who seem highly unlikely to possess the ability or intention to carry out mass murder. Other prosecutions were brought on the basis of wiretapping authorities that existed before 9/11. For example, the prosecutions of the defendants in Lackawanna were based on FISA wiretaps carried out years before 9/11.

Moreover, there is no country in the world where domestic intelligence collected in secret has not been misused by the government in power, usually against its political opponents for its own political gains. In response to this charge, the Administration

[11] POSNER, *supra* note 6 at 135.

argues that the risks to civil liberties are diminished because much of the massive amounts of data is initially "read," collected, analyzed and sorted by machine, rather than by a person. They argue that civil liberties will be protected by built-in technological protections against the loss or theft of the data and against rogue government agents "misusing" such information. Both arguments ignore the real civil liberties risks—the authorized use of such data stored in and retrieved by computers—against individuals on the orders of government officials, now or for the indefinite future, in violation of basic constitutional rights. The risks include: targeting and discriminating against individuals on the basis of their religion or ethnicity; using information against political opponents or unfairly to deny individuals jobs; using information obtained in violation of the Fourth Amendment against them; or detaining individuals arbitrarily, without charge, and with no due process. We have already seen the Joint Terrorism Task Forces, including agents from the FBI, CIA and Defense Department, collect information on the Quakers and other religious groups with absolutely no connection to terrorism, merely because they opposed the U.S. war in Iraq.

VI. RECOMMENDATIONS

First, and perhaps most importantly, the war model should be rejected as a legal framework for surveillance directed against individuals in the United States. Second, both Congressional and public scrutiny are needed to determine whether individuals are being targeted on the basis of their First Amendment-protected religious activities. Third, wiretapping and physical searches of individuals in the U.S. should remain secret for only a limited period of time; thereafter the individuals whose belongings have been searched or communications seized must be notified by the government, with limited exceptions upon a specific finding of necessity by a court.

More broadly, many have urged adoption of adequate safeguards and oversight to prevent abuses. While superficially appealing, such a recommendation does not address a fundamental question: Are the powers being amassed by the government so great that oversight will not be sufficient, that traditional mechanisms should not be counted upon to protect the constitutional system in a time of crisis? This question cannot be answered without much more information about what is currently being done.

Congress needs to conduct a comprehensive in depth examination of the whole of domestic intelligence activities, to see how the different activities in different agencies fit together, to examine how the information is being used and how it may be used in the future. Such examination should be conducted not just by the Intelligence committees, but also by the Judiciary and perhaps Homeland Security committees operating jointly. As much information as possible should be made public and there should be a comprehensive and detailed public report issued by the committees.

The inquiry should start with an open question about the design or efficacy of oversight and accountability mechanisms. The inquiry should ask first whether some powers should ever be granted to the government; whether the law or institutional safeguards can ever be adequate to protect constitutional government and individual liberties against the kind of power a government will amass when it harnesses all potential technological surveillance capabilities.

The words of Senator Church from 30 years ago are even more relevant today. "I don't want to see this country ever go across the bridge," Senator Church said. "I know the capacity that is there to make tyranny total in America, and we must see to it that [the National Security Agency] and all agencies that possess this technology operate within the law and under proper supervision, so that we never cross over that abyss. That is the abyss from which there is no return."[12]

[12] *Meet the Press*, (NBC television broadcast Aug. 17, 1975); *quoted in* James Bamford, *Big Brother is Listening*, THE ATLANTIC MONTHLY, April 1, 2006.

Prosecuting Suspected Terrorists: The Role of the Civilian Courts

Stephen J. Schulhofer*

Although the George W. Bush Administration has successfully prosecuted dozens of terrorism cases in the federal courts since the 9/11 attacks,[1] Administration officials and other observers continue to argue that we need a special forum or specialized procedures for at least some sorts of terrorism cases. The principal concern has been that the rights available in federal court—especially the defendant's rights to confront the evidence against him, to obtain evidence in his favor, and to be tried in a public proceeding—could jeopardize classified information that must be kept secret. On the other hand, any process that compromises these rights can unfairly hamper a defendant's ability to defend himself and can open the door to the abuse of executive power.

One attempt to solve this problem has taken the form of an entirely new system of tribunals—the military commissions designed to try terrorism suspects under rules of procedure and evidence crafted specifically with terrorism prosecutions in mind. That approach, ostensibly intended to streamline the trial process and avoid the supposed complexities of federal criminal procedure, has thus far had the opposite effect. While terrorism prosecutions in the federal courts have proceeded with no more complication and delay than attend any complex criminal case, the military commissions have been mired in litigation and have yet to result in a single trial.[2] At the same time, the military commission system, though it has yet to yield any discernable benefits for the United States, has hampered cooperation with European allies and exacted heavy reputational costs that damage our effectiveness in many ways. If the military commission system itself is unnecessary, moreover, those costs are entirely needless.

The need for a special system of tribunals has been wildly exaggerated. The federal courts are already well-equipped to protect classified information and to handle all the other supposed complexities of terrorism trials. Quite simply, terrorism suspects

* Robert B. McKay Professor of Law, New York University. This article draws heavily on the Brennan Center Report: SERRIN TURNER & STEPHEN J. SCHULHOFER, THE SECRECY PROBLEM IN TERRORISM TRIALS (2005). Many of the ideas and proposals put forward here are developed in greater detail in that Report.

[1] For compilations of post-9/11 terrorism prosecutions, *see* CTR. ON LAW & SEC.: NYU SCHOOL OF LAW. TERRORIST TRIALS: A REPORT CARD (2005), available at http://216.239.59.104/search?q=cache:FH3YbvXMEyQJ:www.lawandsecurity.org/publications/terroristtrialreportcard.pdf+%22Terrorist+Trials:+A+Report+Card%22&hl=en&ct=clnk&cd=1&gl=us.

[2] In Hamdan v. Rumsfeld, 548 U.S. 557 (2006), the Supreme Court held that the military commission system, as established by the President's executive order, conflicted with existing statute and treaty law, and that the entire system as it then stood was therefore void. Congress responded by passing the Military Commissions Act of 2006, 10 U.S.C.A. §948a et seq. (Supp. 2008), authorizing yet another new system that will again be challenged in the federal courts. In the only military commissions case concluded to date, David Hicks pleaded guilty to a single count of providing material support to terrorism, under an arrangement that allowed him to return home to serve his nine-month sentence in his native Australia. *See* Michael Melia, *Australian Gitmo Detainee Gets 9 Months*, WASH. POST, Mar. 31, 2007; Josh White, *Australian's Guilty Plea is First at Guantanamo*, WASH. POST, Mar. 27, 2007, at A1. [*Editor's Note*: Since the drafting of this article, the military commission trial of Salim Hamdan has occurred.]

can and should be indicted and tried for their alleged crimes in the ordinary civilian court system. That approach will avoid further damage to America's reputation for respecting human rights, and it will enhance our ability to win the whole-hearted cooperation of our allies in the global counterterrorism effort, including our ability to extradite terror suspects held in allied nations abroad. That approach will ensure an essential check on government power through independent judicial oversight of the momentous executive decision to deprive an individual of his liberty.

Not least important, and somewhat paradoxically, that approach will also permit much more expeditious and efficient prosecution, conviction and punishment than a newly created system of military tribunals will ever be able to achieve. Supporters of the new military tribunals are mostly well-intentioned patriots who are genuinely disturbed by the prospect of jeopardizing classified information in conventional trials. But in many instances they also seem to be influenced by instinctive mistrust of judicial oversight, by unwarranted confidence in the probity and competence of an unchecked executive, and by a failure to focus on a pragmatic assessment of the most practical means available to get the job done. Detainees who have indeed perpetrated or attempted to launch acts of brutal violence against defenseless civilians should be convincingly convicted and promptly, severely punished; yet the military tribunal system has allowed these individuals to paint themselves as victims. Reliance on proven procedures of unquestioned legitimacy would eliminate that distraction and quickly return the focus of attention, as it should be, to the actual culpability of the alleged perpetrators.

What, then, would be the impact on the government's exceedingly important interest in protecting sources and methods of sensitive intelligence? Although the conflict between affording a traditional adversarial trial and protecting classified information is often portrayed as irreconcilable, federal courts have decades of experience dealing with precisely this dilemma. And the courts have repeatedly shown that the tensions between secrecy and accountability can be minimized or avoided altogether. Most prominently, the Classified Information Procedures Act ("CIPA") allows courts to filter out any classified information that is not strictly necessary to the resolution of the disputed issues in the case.[3]

The CIPA statute has proven highly effective. Between 1966 and 1975, only two espionage prosecutions were brought in federal court.[4] Since CIPA's enactment, however, there have been dozens of espionage prosecutions—62 during the 1980s alone.[5] The Senate Select Committee on Intelligence concluded shortly before 9/11 that CIPA "has proven to be a very successful mechanism for enabling prosecutions that involve national security information to proceed in a manner that is both fair to the defendant and protective of the sensitive national security intelligence information."[6]

CIPA has also worked well in terrorism prosecutions. In most of the major terrorism cases brought in the 1990s, CIPA was not much needed because few secrecy issues arose. Yet, these cases included prosecutions against those responsible for the 1993 World Trade Center bombing, the prosecution of Ramzi Yousef for the foiled 1994 attempt to blow up twelve airliners over the Pacific, and the prosecution of Ahmed

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[3] Classified Information Procedures Act, 18 U.S.C. app. § 3, (2008).

[4] *See* GRIFFIN B. BELL & RONALD J. OSTROW, TAKING CARE OF THE LAW 106 (1982).

[5] *See* KATHERINE L. HERBIG & MARTIN F. WISKOFF, DEF. PERSONNEL SEC. RESEARCH CTR., ESPIONAGE AGAINST THE UNITED STATES BY AMERICAN CITIZENS 1947-2001 11 (2002), *available at* http://www.fas.org/sgp/library/spies.pdf (hereinafter "Espionage Report").

[6] S.Rep. No.107-5, at 34 (2001), *available at* http://www.fas.org/irp/congress/2001_rpt/srep107-51.html.

Rassam for the December 1999 Millennium Plot to detonate a bomb at Los Angeles International Airport. The government uncovered damning physical evidence against the defendants in all of these cases and did not need to rely on evidence involving classified sources or methods.

One case in which CIPA was put to the test before 9/11 was the embassy bombings prosecution, brought in the wake of the simultaneous August 1998 attacks carried out on the U.S. embassies in Kenya and Tanzania. The indictment charged the defendants with a wide-ranging conspiracy to attack American citizens, including the embassy bombings and numerous other terrorist acts. The broad scope of the alleged conspiracy implicated a vast amount of discoverable material, much of it classified. Yet CIPA (along with related protective measures) prevented any improper disclosure of such information.

Discovery, rather than trial, is where most classified information problems arise in a terrorism prosecution. CIPA requires the judge to make difficult determinations about precisely what information should be disclosed to the defense and what information should be withheld. Deciding what information is "helpful" or "essential" to the defense may be impossible without standing in defense counsel's shoes. Moreover, where large amounts of potentially discoverable classified materials are involved, the problem is compounded; requiring a judge to sift through all the materials to determine what bits of information must pass through to the defense may be extremely laborious. In light of these practical difficulties, courts applying CIPA in the terrorism context have sought to facilitate the production of classified discovery materials, by ordering their disclosure only to members of the defense team who have obtained the requisite security clearance. In effect, these protective orders allow cleared counsel to review classified discovery materials, while blocking the defendant or members of his entourage from seeing the materials and possibly passing sensitive information on to confederates. Such a protective order was successfully used in the embassy bombings case, for example; a substantial quantity of classified information was provided to cleared counsel during discovery on a "counsel's eyes-only" basis.[7]

CIPA does not specifically authorize the cleared-counsel process and "counsel's eyes-only" protective orders. Nonetheless, courts have inherent power to structure the discovery process,[8] and they have used it to restrict the defendant's access to classified discovery materials in terrorism cases, in effect supplementing CIPA.

As a pragmatic matter, the "counsel's eyes-only" solution collapses if the defendant is his own lawyer. This wrinkle arose in *Moussaoui*, in which the defendant sought to represent himself. The trial court originally found Moussaoui competent to do so but warned that, even if he chose to act as his own counsel, he might not be able to review classified evidence in the case.[9] When Moussaoui later moved for access to classified discovery materials, the judge denied the request. Moussaoui's interests, she ruled, could be adequately protected by disclosing classified materials instead to "standby" defense counsel, appointed by the court to provide a second voice representing Moussaoui's interests.[10] It is an open question whether such an arrangement

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[7] *See* United States v. Bin Laden, 2001 WL 66393 (S.D.N.Y.2001) (upholding constitutionality of protective order).

[8] *See* FED. R. CRIM. P. 16(d)(1) ("At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief").

[9] *See* Philip Shenon, *Judge Lets Man Accused in Sept. 11 Plot Defend Himself*, N.Y. TIMES, June 14, 2002, at A27.

[10] *See* United States v. Moussaoui, 2002 WL 1987964, at *1 (E.D. Va. 2002).

can be squared with Supreme Court case law holding that a trial judge cannot force counsel upon a defendant found competent to represent himself.[11]

It would be useful for Congress to refine and formalize the cleared-counsel model. In past terrorism cases, security clearances for defense counsel and related personnel have been issued *ad hoc* in each case. But background investigations required for clearance can take months to complete and, therefore, can delay a case considerably. A permanent, institutional mechanism would provide better assurance that cleared defense personnel are always available quickly for terrorism cases. While such pre-cleared counsel should not supplant the defendant's choice of counsel, they could at least provide a supplement, perhaps serving as standby counsel designated to review classified discovery materials where defendant's chosen counsel lacks the requisite clearance. Equally important is developing a corps of cleared paralegals, translators, and other personnel whose assistance defense counsel or judges may need.

Congressional attention should also be directed toward defining appropriate limits on the cleared-counsel discovery model. There are dangers inherent in blocking a counsel from consulting with his client when reviewing sensitive discovery materials. In the ordinary criminal case, a defendant is entitled to review all materials produced by the government during discovery and to consult with counsel about them. Excluding the defendant from this process when classified discovery materials are involved may force defense counsel to operate in the dark. Although to date, defense counsel have been able to analyze most discovery materials without the client's assistance, some situations could require the defendant's input. For example, if the government produces intercepts of communications involving events in which the defendant took part, the defendant may be better situated than counsel to decipher the communications and determine how they might fit into his defense. Without the ability to ask his client about the intercepts—*e.g.*, who the parties to the conversation are, or whether the government's translation of the intercepts is accurate—defense counsel may be deprived of the ammunition essential to mount an effective adversarial challenge.

Courts recognize the validity of these concerns. Thus, where courts have ordered classified discovery materials to be disclosed to cleared defense counsel only, they have still left the door open for counsel to demonstrate a need to consult with the defendant about specific materials. In essence, courts have created a rebuttable presumption that classified discovery materials may be adequately reviewed by defense counsel alone. To prove otherwise, counsel bears the burden of showing that the defendant's personal input is necessary in order to evaluate a particular item of information adequately.[12] Congress would do well to examine this standard carefully. Particularly in circumstances in which discovery materials relate to events about which the defendant has personal knowledge, it seems unrealistic and unfair to expect counsel to bear that burden at a point when he has not been allowed to ascertain what his client could tell him.

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[11] *See* Faretta v. California, 422 U.S. 806, 833-36 (1975).

[12] *See Bin Laden*, 2001 WL at *4; United States v. Rezaq, 156 F.R.D. 514, 524. Courts in terrorism cases have also excluded the defendant from being personally present in any CIPA proceedings (i.e., proceedings regarding whether and in what form classified information may be obtained in discovery or used at trial). While such exclusion has been challenged by defense counsel, again on the grounds that the defendant's personal input is necessary to evaluate the relevance of classified information to the case, courts have held that CIPA proceedings concern matters of law rather than fact and can be adequately argued by defense counsel, without the defendant's personal presence. *See, e.g., id.* at *6-*7; United States v. Klimavicius-Viloria, 144 F.3d 1249, 1261-62 (9th Cir. 1998).

In terrorism cases to date, neither the prosecution nor the defense has used classified information directly as evidence at trial. Classified information has been declassified by intelligence officials prior to trial and subsequently used as evidence, and classified information has also been replaced with unclassified substitutions under CIPA. Nonetheless, it is foreseeable that in some future case, it may be imperative to maintain the confidentiality of sensitive information, such as the identity of a witness.

Restricting the public's access to such information is one way to address these concerns. CIPA itself does not authorize a court to facilitate the use of classified information by excluding the public from trial. Nevertheless, courts have inherent authority to restrict public access in order to accommodate a compelling governmental interest, so long as the restrictions are no broader than necessary.[13] The justifications for such closures apply with considerable force in the CIPA context, where forcing a Central Intelligence Agency ("CIA") agent or intelligence source to testify in public could jeopardize not only the witness's safety, but also national security. For example, courts have applied the "silent witness rule," under which classified documents may be entered into evidence without exposing their contents to the public. Under this approach, the witness is given a copy of the classified document, along with the court, the parties, and the jury. The witness answers questions about the document by pointing the jury to the relevant portions of it, without discussing the contents of the document openly; the document itself is filed under seal. In this way the classified information contained in the document is not made public, but it still may be entered into evidence and considered by the jury.[14] How far courts can go in limiting public access to trial proceedings during the presentation of classified evidence is a somewhat open question.

This is another area that could benefit from legislation. Congress should clarify when and how trial proceedings may be closed in order to protect classified information. Legislation should confirm that courts have the power to exclude the press and the general public during the introduction of classified information and should provide guidance as to how to apply this power. Beyond giving guidance to the courts, clarifying legislation would help the government predict when courts would accept restrictions on public access. Greater certainty would enable the government to determine whether the national security risks of prosecuting a particular terrorism case will be adequately contained and will help persuade foreign intelligence officials to testify, by assuring them that their testimony will not be publicly disclosed.

Legislative guidance could clarify three points:

1. *When is closure permissible?* If evidence is properly classified, then by definition its public dissemination would harm national security, and there would be a compelling interest to support closure. The catch, of course, lies in determining whether the evidence is properly classified. When courts in past cases have restricted public access, in order to protect classified evidence, they have insisted on independently assessing the claimed harm to national security. Otherwise, the government could abuse its classification power to thwart public scrutiny. Yet customary practices for conducting such assessments are ill-defined and obscure. Clarifying legislation should require an appropriately

[13] *See* Brown v. Artuz, 283 F.3d 492, 501-02 (2nd Cir. 2002) (finding that safety of undercover police officer "surely constitutes an overriding interest" justifying closure); Bowden v. Keane, 237 F.3d 125, 130 (2nd Cir. 2001) (same); Bell v. Jarvis, 236 F.3d 149, 167-68 (4th Cir. 2000) (finding it "settled that the state's interest in protecting minor rape victims is a compelling one," sufficient to justify well-tailored closure).

[14] *See* United States v. Zettl, 835 F.2d 1059, 1063 (4th Cir. 1987).

high-ranking official to certify the national security interest and then detail precisely what showing the government must make in such circumstances in order to satisfy the court's independent judgment that the national security certification is appropriate.[15]

2. *Procedures.* Clarifying legislation should also specify the kind of hearing appropriate for making the national security determination. It would rarely, if ever, be permissible for the showing to be made *ex parte*. At a minimum, cleared defense counsel should have the opportunity to contest the government's national security claims.
3. *Compensatory public disclosure.* Closure legislation should also spell out ways to make available to the public as much as possible of the content of the information presented in closed session. For example, witnesses could testify behind a screen so that the content of their testimony is disclosed while revealing their identity only to the trial participants, or unclassified summaries of their testimony could be released at some point shortly after the day's testimony has concluded.

There remains, though, the problem of ensuring that classified evidence presented in a closed trial session does not leak out. As to the potential for leaks by prosecutors, defense counsel, and court staff, security clearance provides a satisfactory solution. With respect to the jury, however, the answers are less clear.

Although jurors could conceivably be subjected to background investigations and security clearance procedures, until now those precautions apparently have never been taken, and they would be extremely problematic.[16] This is another issue that might benefit from congressional consideration.

There are other ways, however, to mitigate the risk of jury leaks. In espionage trials, simply warning jurors of the threat of criminal prosecution has proven sufficient to prevent improper leaks. The use of anonymous juries—already a well-established practice in cases where jury safety or privacy is an issue—could further mitigate the risk of jury leaks, by reducing the danger that jurors will be approached by the press about evidence presented in closed session. In contrast to other countries that have encountered difficulty in trying terrorism cases by jury, our government does not face

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[15] Courts have considerable experience making such determinations. Under Exemption One of the Freedom of Information Act, agencies are permitted to refuse disclosure of matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) *are in fact properly classified* pursuant to such Executive order." 5 U.S.C. §552(b)(1) (2008). For recent cases in which judges have reviewed national security materials in camera in order to determine whether they were properly classified, *see, e.g.,* Am. Civil Liberties Union v. Fed. Bureau of Investigation, 429 F. Supp. 2d 179 (D.D.C. 2006) (rejecting Exemption One claim and ordering disclosure of part of one classified document). *See also* N.Y. Times Co. v. Dep't of Def., 499 F. Supp. 2d 501 (S.D.N.Y. 2007) (reviewing material *in camera* but finding that material in question had been properly classified); Associated Press v. Dep't of Def., 498 F. Supp. 2d 707 (S.D.N.Y. 2007) (same); Wheeler v. Dep't of Justice, 403 F. Supp. 2d 1 (D.C.C. 2005) (same); Fla. Immigration Advocacy Ctr. v. Nat'l Sec. Agency, 380 F. Supp. 2d 1332 (S.D. Fla. 2005) (same).

[16] The rules established by the Chief Justice, detailing security protocols for federal courts to follow in cases involving classified information, caution: "Nothing contained in these procedures shall be construed to require an investigation or security clearance of the members of the jury or interfere with the functions of a jury, including access to classified information introduced as evidence in the trial of a case." *See* 18 U.S.C. app. 3, Security Procedures Established Pursuant to Pub. L. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information, § 6.

any systemic problem of jury disloyalty. Jury trials did, for example, pose an impediment to successful prosecution during Britain's long struggle against terrorists in Northern Ireland, leading the government eventually to suspend the right to jury trial. Those problems resulted from pervasive local support for the IRA terrorists and the practical impossibility of selecting a jury that would not contain a significant number of IRA sympathizers.[17] There is no such problem, of course, in prosecuting suspected al Qaeda members in the United States today.

Like the general public, the defendant has a right to be present at trial, but the defendant's right is considerably stronger. The defendant's right to know all the evidence against him cuts to the core of a fair and effective adversarial proceeding. As a result, in the absence of unruly behavior, the defendant has an unqualified right to be present throughout the presentation of evidence at trial.[18] While "counsel's eyes-only" protective orders limit the defendant's full participation in *pre-trial discovery*, in no case have the courts excluded a defendant from *trial* during the introduction of classified evidence, nor have they otherwise restricted the defendant's right to know any evidence seen by the jury. Such measures apparently have never even been considered, much less implemented. No matter how exceptional the circumstances, it seems doubtful that constitutionally acceptable procedures could be devised for presenting classified evidence at a criminal trial without fully disclosing it to the defendant.[19]

But in any event, experience to date has indicated no need to depart from this bedrock norm, given the availability of measures to prevent the defendant from passing classified evidence to the outside world in the rare cases where such evidence must be introduced.

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The need to protect sensitive information in terrorism trials poses a genuinely difficult problem. But creating any system of special courts to deal with this problem is dangerously short-sighted. Any system that provides special insulation for national security secrets must, by its very nature, weaken independent oversight of the executive. Any such system must by its very nature set aside procedural safeguards that have a well-established pedigree and a widely accepted legitimacy. And any system that produces these results must inevitably prove counter-productive and unsustainable over the long term.

Three imperatives must be respected:

1. the need to resolve complex factual questions accurately;
2. the need to resolve questions of individual responsibility through a process that will be widely accepted as fair; and
3. the need to minimize official carelessness, malfeasance, and other abuses which not only harm individuals, but also render the counterterrorism effort itself less effective.

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[17] *See, e.g.,* John D. Jackson, Katie Quinn & Tom O'Malley, *The Jury System in Contemporary Ireland: In The Shadow of a Troubled Past*, 62 LAW & CONTEMP. PROBS. 203, 221 (1999).

[18] The defendant has the right to be present at trial at any point where his exclusion would "interfere[] with his opportunity for effective cross-examination," Kentucky v. Stincer, 482 U.S. 730, 740 (1987), or where his presence otherwise "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge," Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934).

[19] *See* Coy v. Iowa, 487 U.S. 1012 (1988).

These imperatives can be satisfied, without resorting to a new system of courts, simply by relying on the judicial system and the carefully developed body of precedent that we already have. The ordinary federal court system makes available many tools to protect classified information without compromising the defendant's right to a fair trial:

- courts can craft unclassified substitutes for sensitive evidence;
- courts can use protective orders when classified evidence must be disclosed during the discovery process or at trial, so that classified discovery material is available only to cleared counsel, and they can order closure of trial proceedings so that evidence disclosed to the defendant and the jury at trial does not become available to the wider public;
- the government can declassify information of only modest sensitivity in instances where the benefits of using it in court outweigh any marginal risks to the national security;
- the prosecution can craft alternate charges that can be proved without reliance on classified evidence; and
- the prosecution can seek to postpone the start of trial, within the limits permitted by the Speedy Trial Act, in order to insure that the defendant will remain in custody (under strictly time-limited, pre-trial detention) while unclassified evidence is developed and classified evidence becomes less sensitive, so that it can more easily be declassified.

Although these approaches may not suffice to eliminate every conceivable secrecy problem, they progressively narrow the difficulties, so that, at worst, only a narrow set of concerns is likely to remain, even in the most problematic cases. And if existing tools turn out to be imperfect in the context of a particular, unusually complex prosecution, case-by-case adjudication and multiple layers of review can permit courts to flesh out ways of dealing with unusual problems in ways that sustain accountability and respect our constitutional values.

Prior to CIPA's enactment in 1980, it was widely believed that espionage cases could not be prosecuted in federal court without putting classified information at risk. Congress could have attempted to address that problem by establishing special courts in which evidence could be concealed from the defendant and from the public. After all, we were in a "cold war" with the Soviet Union throughout this period, not to mention long-running periods of active military operations and intensive combat with heavy casualties in Korean and Vietnam. But Congress recognized the even-greater importance of maintaining the separation of powers and preserving the role of the federal courts as the linch-pin of the checks and balances essential to our system of government. Through CIPA, therefore, Congress chose to craft a narrower solution that remained within the structures of existing institutions, and that solution, fine-tuned by the courts over the years, has proved both workable and fair.

There is no reason to believe that a similar approach, based on modest, narrowly crafted procedures, cannot appropriately address the special difficulties presented in cases involving global terrorism. If the available tools are refined along the lines sug-

gested above, courts will be well-equipped to resolve novel secrecy problems, protecting classified information where necessary, while preserving transparency and accountability through an effective adversary system.

Workable solutions, of course, will not always be perfect or cost-free. But there are and *should be* limits on how far the courts and Congress can go in accommodating executive branch preferences for secrecy. To the extent that a rare terrorism case may some day arise in which courts cannot find a way to accommodate secrecy concerns and still try the suspect fairly, the problem would not lie with our judicial system. The problem—if it can be called a problem—would lie in our commitment to fairness, recognizing that we must have reliable findings of guilt, reached in an effective adversary process, before we deprive individuals of their life or liberty. As the Israeli Supreme Court aptly observed:

> Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they [add to] its strength.[20]

[20] HCJ 5100/94 Pub. Comm. Against Torture in Israel v. State of Israel [1999] IsrSC 53(4) 817, 39.

Building Checks and Balances for National Security Policy: The Role of Congress

Suzanne E. Spaulding*

Congress is generally viewed as having two key roles in our system of government: conducting oversight and enacting legislation. It also has a third important role: informing and leading public discussion and debate. Each of these roles is interdependent and all are important to preserving checks and balances. Unfortunately, all three of these roles have suffered in the current national security climate.

There are many factors contributing to the failure of Congress in recent years to exercise a robust and effective check on the executive branch in the area of national security. Certainly the incentive for challenging executive assertions of power was reduced when Congress and the White House were controlled by the same party. Moreover, national security is traditionally an area in which both Congress and the courts tend to be more deferential to the President, particularly during wartime. Perhaps most significant, then, is the effect of the attacks of 9/11 and the constant reminders that we are engaged in a "Global War on Terrorism" ("GWOT"). This climate of fear puts tremendous pressure on Congress to be "tough" on national security; describing the threat as a "war" implies that Congress can only be tough on national security by deferring to the President as Commander in Chief.

The current Administration argues that with regard to this GWOT, the President's authority cannot be constrained by Congress. His lawyers maintain that the President is free to ignore laws that he decides infringe upon his Article II power, particularly his power as Commander in Chief during wartime. This constitutional argument, most clearly articulated in the now infamous August 2002 Department of Justice memo on torture,[1] has never been repudiated and has been repeated often since then.

The August 2002 memo asserts that, "Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield. Accordingly, we would construe [the U.S. law prohibiting torture] to avoid this constitutional difficulty, and conclude that it does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority." Similar arguments were made in the Justice Department memo written after the National Security Agency ("NSA") warrantless surveillance program was revealed.

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[1] Memorandum from Deputy Assistant Attorney General John Yoo to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.

The potential scope of this Commander-in-Chief authority to do whatever the President believes necessary to protect the nation is breathtaking, particularly in the context of the Global War on Terrorism ("GWOT"). The GWOT extends, by definition, worldwide. The battlefield is wherever the terrorists are, or—for purposes of "preparing the battlefield"—wherever they might be in the future, including inside the United States (U.S.). And, of course, the "enemy" against which this unchecked authority can be exercised includes not just foreign terrorist suspects, but U.S. citizens as well.

Until very recently, the Administration used signing statements to signal its determination to ignore the laws that Congress passed if the President decided they were inconsistent with his authority. This growing practice has generated significant criticism. Thus, when Congress hurriedly passed a bill in 2007 to expand the Foreign Intelligence Surveillance Act ("FISA") just before leaving town for the August recess, the President's signing statement contained no such qualification. Nevertheless, officials have made it clear that the President still maintains the prerogative to ignore this law if he decides it impermissibly interferes with his authority. The only thing that has changed, apparently, is that the President's lawyers no longer feel the need to express this in the signing statement.

So much for Congress's legislative authority acting as a check on executive authority.

Congressional oversight has not fared much better. In the debate over the bill to expand FISA, it was clear that most Members of Congress still had not been briefed on the details of the surveillance activities undertaken since 9/11. For example, most Members did not seem to know exactly what surveillance issues prompted the threatened resignation of the Acting Attorney General and the Director of the FBI.[2] It took many months, and the threat of subpoenas, before the intelligence and judiciary oversight committees received the documents they had requested on the legal underpinnings for the program. The clearest indication that Congress was legislating before the members fully understood the facts was that the new FISA law included a section requiring the Inspectors General ("IGs") of the relevant intelligence agencies and the Department of Justice IG to collaborate on an inquiry designed to uncover these facts over the course of the following year. Sen. Arlen Specter (R-PA) complained on the floor that Congress was "buying a pig in a poke."[3]

Without effective oversight, Congress is legislating in the dark. Unless Congress knows what happened in the area of surveillance after 9/11—what pressure those attacks and their aftermath put on the system and how the system responded—it cannot effectively adjust the legal framework both to provide the needed authority to the President and national security professionals to meet the challenges ahead and to ensure the necessary safeguards against abuse in the event of a future crisis.

Yet, despite not having the information it has requested regarding surveillance activities since 9/11, Congress moved ahead and enacted legislation to expand FISA significantly and to grant immunity to communication carriers that may have assisted with the warrantless surveillance. Their ability to insist that the expansion of authority be appropriately limited and safeguarded was significantly hampered by their concern that the U.S. public would view them as "soft" on national security. This reflects a failure to exercise effectively the third function of Congress: to inform and lead public discussion and debate.

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[2] Jack Goldsmith, The Terror Presidency (2007).

[3] 154 Cong. Rec. S6454, 6462 (daily ed. July 9, 2008) (statement of Sen. Specter).

Ultimately, Congress derives its power from the people. Our elected officials at both ends of Pennsylvania Avenue are, by design, political creatures sensitive to public opinion. But they also have the ability and responsibility to inform that opinion. The President has the "bully pulpit" and can more easily shape public opinion. It is more difficult for 535 Members of Congress to have their individual voices heard in a coherent and compelling way. Nevertheless, Congress needs to work harder at reshaping the discussion about how best to address the long term threat of terrorism. It needs to clearly explain the ways in which policies that mock the rule of law and undermine our carefully constructed system of checks and balances make it more likely, rather than less likely, that we will be attacked again.

The public needs to better understand the nature of the long-term threat from international terrorism; one that both military and civilian experts agree is not going to be defeated militarily. Just as important as eliminating the terrorists' leadership is reducing their ability to recruit new young people to join their cause and to generate and maintain support within communities around the world. This is a struggle for hearts and minds; a competition among competing narratives. The jihadist narrative is undeniably compelling to many young Muslim men. The narrative of democracy and the rule of law can be equally compelling, but its credibility is dramatically undermined if the greatest democracy is not clearly committed to live that narrative and not just mouth the words.

We have to demonstrate that we believe what our founders believed: that this system of checks and balances and respect for civil liberties is not a luxury of peace and tranquility, but it was created in a time of great peril as the best hope for keeping this nation strong and resilient. It was a system developed not by fuzzy-headed idealists, but by individuals who had just fought a war and who knew that they faced an uncertain and dangerous time.

The wisdom of this system and the importance of remaining true to it even in times of peril can perhaps best be understood with regard to fears of home-grown terrorism. The best hope for detecting and preventing this threat lies not in intrusive intelligence methods, which are better suited to monitoring a known target than in finding out who might be a target. Instead, our best hope lies in working with communities, particularly Muslim-American communities. Yet, many of our policies and practices since 9/11 that compromise civil liberties or seem to reflect a lack of respect for the rule of law risk alienating those very communities.

Congress must continue to try to convey this message. Nonetheless, the ultimate obligation to ensure checks and balances in the area of national security is on us. We have a responsibility to become informed and to contribute to an informed public discussion and debate. As Justice Potter Stewart wrote in the Pentagon Papers case, "In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government."[4]

I. CONGRESSIONAL OVERSIGHT OF INTELLIGENCE

Maintaining this kind of informed public discussion and debate is particularly difficult with regard to intelligence activities. Yet, in no area are congressional checks and balances more important.

[4] New York Times Co. v. United States, 403 U.S. 713, 728 (1971).

A. PURPOSE OF CONGRESSIONAL INTELLIGENCE OVERSIGHT

The House and Senate intelligence oversight committees were established in the 1970s in the wake of special congressional committees investigating a series of scandals involving the intelligence community ("IC"). In addition to finding problems within the IC, these committees determined that a more formal structure was needed to ensure more consistent and rigorous oversight by the Congress.

The resolution establishing the Senate Select Committee on Intelligence ("SSCI"), S.Res. 400, 94th Cong. (1976), provides that the committee is "to oversee and make continuing studies of the intelligence activities and programs of the United States Government," report to the full Senate, and propose appropriate legislation.[5] In carrying out this purpose, the committee is to "make every effort to assure that the appropriate agencies and departments of the United States provide informed and timely intelligence necessary for the executive and legislative branches to make sound decisions affecting the security and vital interests of the Nation." In addition, the committee is to provide "vigilant legislative oversight over the intelligence activities of the United States to assure that such activities are in conformity with the Constitution and laws of the United States."

Simply put, the goal is to ensure that the IC is providing the best intelligence possible in a manner consistent with the Constitution and U.S. laws. In order to ensure effective intelligence, the oversight committees must authorize appropriate resources, allocate them among the various programs and activities, monitor the expenditure of those resources, and evaluate the effectiveness and appropriateness of the activities undertaken with those funds. When this oversight identifies a need for additional legislative authority and safeguards, the process should be as transparent as possible, consistent with the need to protect sources and methods.

B. ENHANCING PUBLIC AND IC TRUST IN THE COMMITTEES

Congressional oversight of intelligence plays a key role in trying to reconcile the imperatives of intelligence and the requirements of democracy. The admonition in the Senate committee's charters to assure "conformity with the Constitution" can be read not just as ensuring activities do not violate the Bill of Rights, but also in the broader sense of trying to address the potential tension between the secrecy required for clandestine intelligence activities and the participatory nature of the democratic republic described in that founding document. Since the normal mechanisms for relying upon an informed public are constrained in this context, the oversight committees bear a unique burden to act as intermediaries between the intelligence community and the public. The public and, often, the members of Congress who do not sit on the oversight committees, are uniquely dependent upon the intelligence committees to monitor and evaluate the activities of the IC. In the same way, the intelligence community is constrained in its ability to convince the American public that it can be trusted and deserves their support. In order to mediate this relationship, the oversight committees must earn the trust of both the public and the IC.

Because the public cannot be told about much of what the intelligence community does, they are most likely to hear about the scandals and failures that make it into the media reports. Successes are rarely publicized. The public is unable to make its own assessment of the value of intelligence or the degree to which intelligence personnel

[5] The House does not have a corresponding resolution establishing the House Permanent Select Committee on Intelligence. Instead, House Rule X sets forth its jurisdiction and procedures.

are acting appropriately. The committees must be their eyes and ears, and the public must trust that they are doing their jobs effectively.

The committees are also dependent to a large extent upon the IC to provide the information that they need to conduct effective oversight. Over the years, the committees have worked to develop a relationship of trust in which the IC understands that the committees will act responsibly, safeguarding sensitive information and avoiding the kind of partisanship that appears to put politics ahead of security. Similarly, the committees must be able to trust that the IC is not trying to "hide the ball," forcing the members to play "20 Questions" in the hope of getting the information they need. This mutual trust has been tested at times, but must continue to be a high priority for the committees and the IC.

C. GREATER TRANSPARENCY

To the extent that any of the reforms discussed here improve the effectiveness of congressional oversight, they should help to enhance the credibility of the committees in the eyes of both the public and the IC. However, the impact of such reforms will be limited if the public is not aware of it. To improve public trust in congressional oversight, there must be greater transparency in the work of the committees.

For example, while the budget numbers authorized by the committees are classified, the legislative portion of the annual authorization bill is entirely unclassified. In fact, as the President emphasized in his signing statement for the Intelligence Authorization bill for fiscal year ("FY") 2005, there can be no such thing as secret laws in our democracy.[6] Yet, for years the oversight committees have marked up the public portion of the bill in secret session. When combined with stringent rules in the House that prohibit staff from discussing committee business with other committees, or Members not on the committee, this practice prevents even members of Congress, as well as the public, from knowing what is in the public part of the bill until it is filed. This has sometimes created the impression that the committees are trying to sneak provisions past the public and non-committee members. Moreover, the result is often, inevitably, either little or no public or congressional debate, or debate that is based more on emotion than on facts. This does not build confidence in our intelligence laws or in Congress's role.

Legislative mark ups should take place in open session. If there are sensitive issues that must be discussed regarding the public bill, the committees can reserve that discussion for executive session. The presumption should be in favor of a public mark up, however. At a minimum, the bill should be introduced or otherwise made public prior to committee mark up so that outsiders, including Members not on the committee, can review it and comment in a thoughtful and informed way.

Additional open hearings would also provide the public with greater insight into the way in which the Congress is overseeing the IC. The annual Worldwide Threat briefing by the Director of Central Intelligence is usually held in open session without compromising national security. The House Permanent Select Committee on Intelligence ("HPSCI") has held a number of other open hearings in recent years without jeopardizing sources and methods.

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[6] GEORGE W. BUSH, STATEMENT ON SIGNING THE INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2005 (2004), *available at* http://www.whitehouse.gov/news/releases/2004/12/20041223-6.html.

D. DETERRING UNAUTHORIZED DISCLOSURES

Greater transparency in the unclassified aspects of the committees' oversight must be accompanied by a corresponding commitment to protect sensitive information from unauthorized disclosure. There is a general consensus that most leaks come from the executive branch rather than Congress, if only because of the vastly greater number of executive branch officials with access to classified information. Though the consequences of any disclosure are severe, however, the cost of disclosures that appear to emanate from Congress is particularly high in terms of degrading the trust that is so essential to making oversight work.

Some years ago, the executive branch undertook an effort to assess current laws regarding leaks and concluded that better enforcement was the answer, rather than new laws. Similarly, the House and the Senate each have rules to protect sensitive information and a process for investigating and penalizing those who violate those rules. In both chambers, members have been kicked off the oversight committees for violating those rules. Unfortunately, it is also the case that some instances of unauthorized disclosure have either been ignored or treated lightly.

Congressional leadership should make clear that unauthorized disclosures of classified information will be referred to the ethics committees. Members and staff of the oversight committees should be held to a particularly high standard, but no member or staffer on the Hill should be able to disclose classified information with impunity.

Respect for this process, however, will be diminished if it is seen as being used for partisan political purposes, with tit-for-tat accusations of leaks or investigations that appear to be aimed at intimidation or retaliation.

E. REDUCING PARTISAN POLITICS IN THE COMMITTEES

The political process is inherent in our democratic republic and ideological differences will often break down along party lines, but it is generally understood that politics should never be allowed to threaten national security. Ensuring an effective and appropriate intelligence capability is vital to our national security. Thus, it is particularly important that partisan politics not interfere with effective oversight or the effectiveness of our intelligence efforts. Moreover, consistent with the discussion above regarding the importance of public trust in the process, even the perception that partisanship is interfering with national security is damaging.

There is a general sense that Congress as a whole has become more partisan and the intelligence committees, while generally operating in a more bipartisan manner than most other committees, have not been immune from that trend. Reversing this trend within the committees is a formidable challenge, but one that Congress must undertake.

The most important factor in enhancing bipartisanship within the committees is the commitment of the committee leadership. If these leaders are determined to be partisan, there is little that structure or processes can do to prevent it. Thus, it is essential that the House and Senate leaders choose the membership of these committees wisely, particularly ensuring that they select as chairs and vice chairs/ranking members individuals who bring a commitment to, and record of, bipartisanship.

Having established the critical role of choosing the right leadership, there are other ways to reduce the tendency toward partisanship. For example, the Senate included in S.Res. 400 a number of provisions aimed at enhancing bipartisanship on the SSCI. The most significant may be the decision to designate the ranking member as the Vice Chairman of the committee. This means that, unlike in any other committee, if the

Chair is not present, the Vice Chair presides rather than the next ranking majority member. Aside from the practical implications, this sends a clear signal that both parties share in the responsibility for careful and effective oversight. This is further reinforced by the requirement, endorsed by the 9/11 Commission, that the majority maintain no more than a one member advantage in membership. The Senate rules also provide that the majority and minority will have equal access to information held by the committee. While not sufficient in themselves, these provisions have increased the imperative for the majority on the SSCI to work with the minority more closely than might be the case on other committees. The HPSCI should consider incorporating these aspects of S.Res. 400.

The committees must maintain a focus on the intelligence process and strive to avoid becoming entangled in policy debates. The nuts and bolts of intelligence are far less susceptible to partisan politics than are the policies that intelligence informs. Separating these two realms is increasingly difficult, given the role of intelligence as a key factor informing assessments of the success or failure of national security policies. Nevertheless, the committees should try, as much as possible, to focus on the effectiveness of our intelligence efforts and leave the policy implications of the resulting intelligence assessments to policy committees.

Another issue often considered in this context is whether the committee staff should be unified, with all staffers working for the entire committee, or split along party lines. As with the other structural recommendations, neither staff structure is likely to overcome the tone set by the committee leadership. If the leaders are committed to working on a bipartisan basis, a unified staff can support that commitment, enhance mutual trust, and provide greater efficiency. However, when partisan pressures infiltrate the committee, a unified staff cannot prevent partisanship and can become dysfunctional. Moreover, a unified staff can significantly undermine the ability of the minority to serve the function of bringing potentially alternative viewpoints that we value in our two-party system. Conversely, if the leadership is committed to bipartisanship, a split staff is not likely to undermine that commitment.

Ultimately, the structure of the staff is not likely to be a significant factor in increasing or reducing the partisanship of the committees. As noted above, however, in some circumstances a unified staff may undermine effective oversight by silencing the minority viewpoints. Thus, a split staff may be preferable overall. Steps should be taken to reinforce a close, cooperative working relationship among the entire staff. For example, regular joint staff meetings, particularly among the senior staff, could be encouraged or even required. Access to information or IC personnel should be open to both sides of the aisle equally. Perhaps most importantly, the staff should consist of national security professionals who are focused on the objectives and priorities of the committee.

F. "GANG OF EIGHT" BRIEFINGS

Title V of the National Security Act of 1947 codified what had earlier been articulated in the congressional charters for the intelligence oversight committees, that the IC must keep the committees "fully and currently informed" of all intelligence activities. The only situation in which the law provides for reporting only to the committee and chamber leadership—the "Gang of Eight"—is with respect to certain findings for covert actions "[i]f the President determines that it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United

States."[7] Even then, the law requires that the President inform the full committee "in a timely fashion."[8]

Long-time observers in Congress have indicated that there seem to be an increasing number of these "Gang of Eight" briefings. While these briefings have the advantage of severely limiting the number of people with access to very sensitive information, they seriously undermine the effectiveness of Congressional oversight. Members cannot bring staff or share with staff any of the information they receive. They typically do not take any notes and there is no paper record of the briefing other than whatever the executive branch might prepare—and that is not provided to Congress. Members will not always have the institutional memory or familiarity with details to recognize potential problems or areas for further inquiry. They cannot rely upon their staff for any follow up, either to clarify issues or to check on the status of the activities about which they were briefed. The leadership cannot take advantage of the expertise or alternative viewpoints of other members of the committee. Moreover, when full committee hearings are held on issues related to those that are briefed only to the leadership, there is the potential that the other members of the committee will get a misleading picture because significant facts are left out. And when the committee leadership leaves the committee, there is no record or institutional memory of the briefings unless they have subsequently been briefed to the full committee.[9]

Explicit criteria should be established for "Gang of Eight" briefings. Consistent with the law, they should be limited only to the most sensitive covert actions where operational activity is about to be undertaken and lives are at risk. Once the operation has been undertaken, or the highest risk period has passed, the full membership should be briefed. In addition, the committee staff directors for the majority and minority should be included in the briefing. One option might be to brief only the "Gang of Four" (committee leadership) and the four committee staff directors, leaving to the committee leadership the decision of when to brief the House and Senate leaders. Another option might be to include subcommittee chairs in the briefings. Finally, there should be a paper record of the briefing in the possession of the committees.

In addition to establishing these procedures in consultation with the executive branch, the congressional leadership should develop its own procedures to enhance their ability to serve as an appropriate check on the executive branch in this area. For example, Members of Congress who are briefed should routinely meet after the briefing to discuss what they heard and their reactions to it.

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[7] 50 U.S.C. § 413(b) (2006).

[8] Any discussion of the reporting requirements contained in Title V of the National Security Act of 1947 should be caveated with a reference to the potential dispute between the executive and legislative branches regarding the scope of the President's constitutional authority to ignore these requirements. In signing statements and comments on various bills over the years, the White House has consistently indicated that they will interpret these provisions consistent with the President's authority to withhold information from Congress pursuant to his constitutional responsibilities as the Chief Executive and Commander in Chief. Given the wide scope of the GWOT, and the broad interpretation of the commander in chief powers as articulated in recent Justice and Defense Department documents, this could have a significant impact on Congressional oversight.

[9] For further background on the development of "Gang of Eight" briefings, see discussion in L. Britt Snider, Congressional Oversight of Intelligence: Some Reflections on the Last 25 Years (The Center on Law, Ethics & National Security 2003), available at http://www.law.duke.edu/lens/downloads/snider.pdf.

II. OVERSIGHT REFORM EFFORTS

The *Final Report of the National Commission on Terrorist Attacks Upon the United States* (the "9/11 Commission Report") concluded that congressional oversight of intelligence is "dysfunctional."[10] Specifically, the Commission found that the intelligence committees "lack the power, influence, and sustained capability" necessary to meet the future challenges of America's intelligence agencies. The Report made two major recommendations for restructuring the intelligence committees: (1) creating a bicameral committee, modeled on the Joint Committee on Atomic Energy; or (2) combining the authorizing and appropriating authorities into a single committee in each chamber. Neither of these options was adopted by either the House or the Senate.

In addition, the Report listed some key attributes they recommended for the restructured committee(s). Some of these suggestions were already reflected in the rules governing one or both of the committees (S.Res. 400 for the SSCI and Rule X for the HPSCI). Others were included in a resolution adopted by the Senate in October 2004, S.Res. 445[11], and in H.Res. 35 adopted by the House in 2007.

The Commission's suggestions included:

- A subcommittee specifically dedicated to oversight, "freed from the consuming responsibility of working on the budget."[12]
    - S.Res. 445, adopted by the Senate on October 9, 2004, includes this provision, but no subcommittee has been established. The House has established a subcommittee on oversight.
- Subpoena authority.
    - S.Res. 400 provides this authority already. HPSCI has authority derived from the rules applicable to all House committees.[13]
- Majority advantage in representation not exceeding the minority's representation by more than one member.
    - This is already provided for in S.Res. 400. The House rule allows for a two-member majority advantage.
- Cross-over members from key committees (Armed Services, Foreign Relations/International Relations, Judiciary, and Defense Appropriations)
    - S.Res. 400 already requires two crossovers from each of the key committees, one from each party. The House rules call for one cross-over from each committee.
    - S.Res. 445 added a provision making the Chair and Ranking Member of the Armed Services Committee *ex officio* members of the SSCI.

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[10] THE 9/11 COMM'N, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 420 (2004), *available at* http://www.gpoaccess.gov/911/pdf/fullreport.pdf.

[11] The Senate resolution was the product of a working group of 22 Members, chaired by Senators Mitch McConnell (R-KY) and Harry Reid (D-Nev), established by the Senate leadership to consider ways of improving oversight of intelligence and homeland security. S.Res. 445 included a number of changes to the original resolution, S.Res. 400, which had established the SSCI and governed its structure and process since 1976. S. Res. 445, 108th Cong. (2004) (enacted).

[12] THE 9/11 COMM'N, *supra* note 10, at 421.

[13] H.R. Doc. No. Rule XI(m)(1)(B).

- No term limits
  - S.Res. 445 eliminated term limits for SSCI. HPSCI retains term limits of not more than four Congresses in a period of six consecutive Congresses. HPSCI Chair and Ranking Member are exempt from the term limits.
- Fewer members on the committee
  - S.Res. 445 actually added two additional *ex officio* members (see above).
- Finally, the Report comments that the staff of the committee should be nonpartisan and work for the entire committee and not for individual members.
  - The Senate has traditionally had a nonpartisan, or "unified," staff. The HPSCI has a split staff, but the committee rules are written as if there were a single staff governed by the Chair.
  - S.Res. 445 formalizes the split funding for personnel, 60% for the majority and 40% for the minority. Funding is also split on the HPSCI, 2/3-1/3.
  - Contrary to the 9/11 Commission recommendation, S.Res. 445 returned to the practice of having staff on the SSCI who work for individual members as their designees. This practice had been stopped in 1995.

In addition to the changes mentioned above, S.Res. 445 requires quarterly reports to the full Senate; strengthens the role of the Senate leaders, particularly with regard to the appointment of the Chair and Vice Chair of the SSCI; gives SSCI jurisdiction for reporting on all civilian nominees within the IC; and reduces the time for referrals to or from other committees from 30 days to 10 days.

S.Res. 445 also calls for the creation of an Appropriations Subcommittee on Intelligence. This change would require eliminating an existing subcommittee to maintain the current total of 13 subcommittees on Appropriations. This provision has not yet been implemented. The House resolution created a Select Intelligence Oversight Panel on the Appropriations Committee, although it is merely advisory.

III. EVALUATING ADDITIONAL OPTIONS FOR REFORM

There are many other options for improving congressional oversight of intelligence. The following discussion examines the major advantages and disadvantages of some of these proposals.

A. PROPOSALS OF THE 9/11 COMMISSION

1. Joint Committee

The creation of a joint House/Senate committee for intelligence oversight, as recommended by the 9/11 Commission, was proposed as early as 1948. Proponents of this recommendation cite the successes of the Joint Committee on Atomic Energy ("JCAE"). It is not clear, however, that the factors that contributed to the strength of that committee would apply today or in the future to a joint intelligence committee.[14] For example, the Supreme Court has since ruled that congressional vetoes are unconstitutional, there are more committees and members today with an interest and asserted expertise in issues related to intelligence, and the JCAE never had to deal with

[14] *See* CHRISTOPHER M. DAVID, CONG. RESEARCH SERV., 9/11 COMMISSION RECOMMENDATIONS: JOINT COMMITTEE ON ATOMIC ENERGY — A MODEL FOR CONGRESSIONAL OVERSIGHT? (2004), *available at* http://www.fas.org/irp/crs/RL32538.pdf.

split control of Congress—something a joint intelligence committee might someday encounter. Moreover, even the JCAE lost its power over time as circumstances changed.

A joint committee might improve the coordination of oversight, reduce the burden on the IC and the duplication of effort within the Congress, and potentially reduce the number of staffers with access to sensitive information. But it may also reduce the effectiveness of oversight, given the difficulty in managing House and Senate member schedules, the potential diffusion of accountability and unclear chain of command, and fewer sources of competing ideas. At any rate, there does not seem to be a political consensus in favor of this approach.

Alternatives may include encouraging or even requiring bicameral hearings/briefings on topics of general interest, such as the Worldwide Threat hearing or budget briefings. The Joint Inquiry into the attacks of 9/11 may also serve as a model for future bicameral investigations into high-profile issues. Additionally, the burden on IC witnesses could be reduced by holding more joint hearings with other relevant committees within each chamber.

2. *Combine Authorizing and Appropriating Functions*

The 9/11 Commission recommendation to combine authorizing and appropriating functions in the oversight committees has the greatest promise for increasing the influence of the oversight committees and aligning the expertise gained through oversight with the decisions about allocation of resources. The IC has gotten particularly adept at going around the authorizing committees to the committees that actually control the funding. Yet, the appropriation committees do not even have dedicated intelligence subcommittees and certainly do not have the staff to conduct the kind of comprehensive oversight that in necessary to make informed funding decisions. Congress recognized this problem and enacted Section 504 of the National Security Act of 1947 to prohibit expenditures of funds unless the funds were also specifically authorized.[15] However, this has been undermined for years because the appropriations bills now have boilerplate language stating that, "notwithstanding Section 504," the funds appropriated are deemed to be authorized.

Combining authorizing and appropriating in one committee would address these problems and strengthen oversight. Nonetheless, this proposal was apparently rejected by both the House and Senate. The appropriations committee chairs were unwilling to give up that jurisdiction, worried about the precedent for other issues, and argued that more eyes and ears, as well as viewpoints, were beneficial. Others were also concerned that such a committee would be too powerful relative to other committees.

B. RECOMMENDATIONS OF THE WEAPONS OF MASS DESTRUCTION COMMISSION[16]

1. *Intelligence Appropriations Subcommittee*

Intelligence subcommittees on Appropriations could help to align more closely the appropriations and authorization authorities and processes. Currently, the intelli-

[15] 50 U.S.C. § 414 (2006).

[16] The following proposals were developed by the author of this paper for the Commission on the Intelligence of the United States Regarding Weapons of Mass Destruction and were included in its Report. COMM'N ON THE INTELLIGENCE OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT (2005), available at http://www.wmd.gov/report/report.html.

gence appropriations are included in the Defense appropriations bill and, thus, handled by the Defense Appropriations Subcommittee. This was designed primarily so that funding levels for classified programs and activities could be hidden in the large Department of Defense ("DOD") budget. Traditionally, however, there is only a very small staff looking at the intelligence budget, precisely because it is such a small percentage of the overall DOD appropriation and not the principal focus of the Defense Appropriations Subcommittee. As noted earlier, the Senate has voted to establish a new appropriations subcommittee specifically on intelligence but it has never actually been stood up. In addition, the House has established an Intelligence panel, which has no legislative authority but makes recommendations to the Defense subcommittee and the full Appropriations committee. While the pros and cons of this will be discussed below, it could provide an easier mechanism for coordination.

For example, the chair and vice chair/ranking member of the intelligence committees could also serve as the chair and ranking member of the intelligence authorization subcommittee, increasing coordination between committees. Potential problems with this approach include concern that the time spent running the appropriations subcommittee will detract from the other responsibilities of oversight; reduced flexibility for the leadership and the caucus in allocating committee leadership posts; and, again, the potential loss of diverse viewpoints. Alternatively, the chairs and ranking members of the authorizing committee could serve as *members* of the appropriations subcommittee, and visa versa. The most modest proposal would be to simply add the intelligence appropriations subcommittee to the list of committees required to have cross-over members on the intelligence committees.

Making intelligence the sole focus of a subcommittee, rather than a relatively minor focus of the Defense Appropriations subcommittee, as it now stands, should result in more careful consideration of the intelligence appropriation.

2. Removing or Adjusting Term Limits

The 9/11 Commission recommended eliminating term limits for membership on the intelligence oversight committees. S.Res. 445 implements that recommendation for the Senate. The HPSCI currently has eight year term limits for all but the chair and ranking member.

Term limits on each committee were initially put in place for several reasons. There was a concern that overseers with long tenures would become co-opted by the entities they were to oversee. In addition, rotation through the committees provided more members with some understanding of intelligence issues and the workings of the committee, something that is otherwise hard to come by given the imperative for secrecy.

Over time, however, there has been a growing concern that term limits may weaken the committees. Because so much of the workings of intelligence are classified, most members come onto the committees knowing very little about the complex issues involved. There is a sense that, just as members finally acquire the expertise needed to independently evaluate and challenge the IC, they are rotated off the committee. Moreover, temporary membership may undermine a member's commitment to the committee relative to other committees on which their tenure is likely to be much longer.

A compromise between these pros and cons might be to lengthen the terms or to eliminate term limits for *some* of the committee slots rather than for all of the slots. It has always been understood that the leadership could waive the term limits. However, this is rarely done. One option is to make the authority to waive the term limits ex-

plicit in the rules. Further, the rules could state either a preference or a requirement that a specified number of slots should have either longer or no term limits. In all likelihood, there would be a self-selection process in which members who are most committed to the work of the committee would ask to be kept on.

3. Reducing the Reliance Upon Supplemental Funding

In the normal course of events, the President sends his budget each year to Congress and it goes through a formal process that includes consideration by authorizing committees and appropriations committees. However, occasionally—and increasingly since 9/11—the President sends up a supplemental request for more funding before the end of the fiscal year. Because supplemental budget requests do not go through the authorizing committees, the dramatic rise in supplemental funding for intelligence has undermined the oversight committees, as well as undermined the intelligence activities themselves. The Administration likes supplementals primarily because they can do an end-run around the authorizing committee and it does not appear in the bottom line of the President's budget, making the budget look smaller.

The problem of supplemental funding has been particularly severe since the attacks of September 11, 2001. There were good reasons that the dramatic increase in intelligence funding following those attacks was accomplished through supplemental requests. However, by 2004, it had reached a point where less than 1/3 of the key counterterrorism intelligence needs were included in the President's budget request. The rest was sought later in the form of supplemental budget requests. For FY 2005, for example, the President's budget only included 20% of the funds that the CIA's Counterterrorism Center had determined it would need for the year. This has a devastating effect on the ability of the IC to plan operations and build programs. But it also has a significant impact on the relevance of the authorizing committees, since they have a formal role only in the initial budget request, not in supplemental requests.

Congress can address this problem by: (1) pressing the Administration to dramatically reduce the use of supplemental budget requests; (2) having the oversight committees authorize the full year funding even without the benefit of the President's specific allocation requests; or, (3) requiring that supplemental requests be authorized as well as appropriated. The most preferable approach, from the standpoint of the IC as well as the oversight committees, would be for the President's budget to reflect the IC's needs for the entire year, rather than just the first quarter as was done for FY 2005 counterterrorism operations.

The issue of supplemental funding for the IC became the subject of a largely party-line vote in the House during consideration of the FY 2005 intelligence authorization bill. Still, there is a bipartisan consensus that funding by supplemental requests has gotten out of control and is detrimental.

4. Adjust Budget Jurisdiction

Currently, the House and Senate oversight committees have different jurisdiction over the various components of the intelligence budget. Both committees have jurisdiction over the National Intelligence Program, previously called the National Foreign Intelligence Program. The HPSCI also shares with the Armed Services Committee jurisdiction over the Military Intelligence Program ("MIP") budget, which covers DOD-specific intelligence programs and activities. SSCI has no jurisdiction over the MIP, although it provides advice to the Armed Services Committee on both budgets. This complicates conference on the intelligence authorization bill and reduces the number

of intelligence oversight voices participating in the Armed Services Committee conference on the MIP.

In addition, the trend toward independent intelligence capabilities within DOD, particularly in the context of Special Operations Command, raises serious questions with regard to potential gaps in congressional oversight. For example, the law requires that Congress be kept "fully and currently" informed of intelligence activities, but "traditional military activities" are exempt from key reporting requirements. To the extent that DOD intelligence activities undertaken around the world as part of the GWOT are considered to fall within this exemption, they are not subject to those oversight provisions. Presumably they receive some scrutiny by the Armed Services committees but those committees do not bring the same depth of intelligence expertise to bear on that oversight.

Broadening the SSCI's budget jurisdiction expressly to include intelligence programs located within DOD could enhance efforts reflected in the intelligence reform law, as well as efforts long underway at DOD, to better integrate intelligence efforts from the tactical programs through to the national programs and visa-versa.

5. *Mission-based Budget Displays*

Another impediment to congressional evaluation of the effectiveness of budget allocations and expenditures is the way the budget is presented. Because the line items track specific technologies or programs rather than mission areas, it is nearly impossible for Congress—or the executive branch—to determine how much money is being spent on priority targets such as terrorism or proliferation. This is a problem with which the IC and Congress have wrestled for years with very little progress.

Another consequence of the way the budget is presented to, and handled by, the committees is that it generates the same kind of stovepiping along agency lines within the committee staff that has been so problematic in the IC. Thus, when it comes to the budget the staff is likely to be assigned along agency lines rather than mission areas because that is how the budget is presented. The intelligence reform efforts aimed at breaking down those stovepipes in the IC so as to bring greater unity of effort against priority targets should be matched in the oversight committees.

Congress should strongly support efforts by the Director of National Intelligence to use his or her enhanced budget authority to require greater transparency into budget expenditures, with a concomitant requirement to track those expenditures by mission to the greatest extent feasible. This would provide the data necessary to allow the budget to be presented to Congress by mission as well as by traditional programs and activities, which would enhance the ability of oversight committees to conduct cross-cutting evaluations of intelligence efforts against specific targets such as terrorism and proliferation.

6. *Subcommittee on Oversight*

As noted above, the Senate has adopted a resolution calling for the establishment of a SSCI subcommittee on oversight, but currently the SSCI has no subcommittees. The House has established a subcommittee on oversight. Telling the oversight committees to create a subcommittee on oversight may seem odd, but the 9/11 Commission recommended such a subcommittee because it would be "specifically dedicated to oversight, freed from the consuming responsibility of working on the budget."[17]

[17] THE 9/11 COMM'N, *supra* note 10, at 421.

Because authorizing the budget is such a time-consuming task, programs and activities that do not have significant budget implications often do not receive adequate scrutiny unless and until there is a public scandal. Thus, the oversight agenda is often driven by big budget items and the scandals of the day, rather than a careful consideration of oversight priorities. Moreover, the distraction of responding to media reports undermines the kind of persistent, long-term oversight that is necessary to adequately evaluate ongoing intelligence activities.

A subcommittee on oversight could be valuable if its jurisdiction were defined as "ongoing oversight," as opposed to the big investigations prompted by media stories or the review of the budget. This subcommittee should set an agenda at the start of the year or session of Congress, based on enduring oversight priorities, and stick to that agenda.

For example, the oversight subcommittee could conduct "deep dives" on key issues such as nuclear programs in North Korea and Iran. Ordinarily, the committees do not probe too deeply into the intelligence underlying analytic assessments. There is an implicit understanding that Congress will not inquire as to specifics regarding sources, for example. In the aftermath of the intelligence shortcomings on Iraq's weapons programs, however, there is a sense that more careful scrutiny may be warranted. Rather than having the entire committee get into sensitive details related to underlying intelligence, the oversight subcommittee could conduct these kinds of inquiries. Alternatively, the subcommittee could do a deep dive to evaluate the effectiveness of the "red team" process. Once assured of the effectiveness of these internal efforts to challenge intelligence analyses, the subcommittee might feel less compelled to second-guess analysis—a task for which almost no members and few staff are really qualified.

7. Interaction with Policymakers

Oversight committees could better evaluate the effectiveness of intelligence by having greater interaction with the consumers of the IC's products, executive branch policy makers. The committees rarely hear from officials at the State or Homeland Security departments, for example. More regular interaction could help the committees determine how well the IC is meeting policymaker needs and could also provide another potential barometer of the accuracy of the IC's analysis. If policymakers evaluate a situation in a way that is significantly different from the IC's analysis, it may not be a sign that the IC is wrong, but it may warrant closer scrutiny. At the same time, the committees must use this approach with caution. Policy-maker assessments must be taken with a grain of salt and filtered for bias based on preferred policy outcomes.

8. Effective Use of Other Oversight Mechanisms

The committees could also expand their reach by making more effective use of existing oversight mechanisms such as the IGs, the General Accounting Office ("GAO"), and the Congressional Budget Office. Historically, the CIA has not permitted the GAO to examine any of its activities, claiming justification in certain statutory and congressional provisions. Congress should consider fixing this.

Over-reliance on the executive branch oversight mechanisms, such as the IGs, is clearly not advisable and the committees should generally do their own independent investigations into important issues. However, instances that involve intensive fact-

finding could start with an IG investigation and Congress could use the results of that effort to guide its own probe.[18]

IV. CONCLUSION

Congress must find ways to improve its oversight of intelligence. This is essential both to enhance public confidence and to ensure that we have the very best intelligence capabilities to meet today's deadly challenges. Robust oversight reflects the values inherent in our system of checks and balances: it not only prevents the accumulation of power in one branch of government, but improves decision making, thereby increasing our national security. Similarly, congressional oversight must ensure and reflect compliance with the rule of law. Demonstrating a commitment to our core democratic values becomes another national security imperative as we wage a battle with terrorists for hearts and minds. Those who care about our nation's national security should be among the most vocal proponents of effective congressional oversight.

[18] SNIDER, *supra* note 9.

Engaging the Muslim World: How to Win the War of Ideas

Hady Amr[*] and Peter W. Singer[**]

A critical pillar of success in the war on terrorism is restoring the world's trust in the word of the United States—in other words, winning the "war of ideas." Fortifying this pillar, particularly in the Muslim world, should be a top priority of our federal government. To win the "war of ideas" against those advocating violence directed at the United States ("U.S.") and its citizens, we must act quickly to rebuild the shattered foundations of understanding between our nation and predominantly Muslim states and communities. Central to winning the "war of ideas" globally are: preserving our civil liberties at home in an age of terror; living up to those values on the global battlefield, be it in Guantánamo Bay or in Abu Ghraib; and, in particular, being viewed as treating our own Muslim population here in the U.S. respectfully.

For our efforts in the "war of ideas" to be effective, the U.S. government must move beyond understanding the problem as simply a global popularity contest. The very success of our foreign policy depends on how the United States can engage with, and help shape the views and attitudes held by, foreign populations. Both how and with whom our government speaks create the environment in which our policies flourish—leading to greater security—or fail. Furthermore, central to the struggle in the global "war of ideas" is how the United States addresses constitutional liberties at home.

I. THE COLD WAR MODEL

Analysts on both sides of the political aisle often describe the current terrorism-related challenge to the United States as a long-term conflict, akin to the Cold War between the United States and the Soviet Union. That conflict, like the current one,

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was waged both in the realm of ideas and in the realm of national security.[1] Whereas national security measures during the Cold War era mirrored those of traditional warfare, including the use of intelligence and military tools, the "war of ideas" provided an extensive framework, employing public diplomacy—U.S. government-sponsored, strategically targeted communication and cultural exchange programs—to stamp out communist ideology and ignite the spread of our constitutional values and democratic ideals. This U.S.-based initiative "carried out a sophisticated program of overt and covert activities designed to shape public opinion behind the Iron Curtain, within European intellectual and cultural circles, and across the developing world."[2]

Our efforts to defeat the Soviet Union in the war of ideas during the Cold War were largely aided by our domestic efforts to confront directly the problem of racism at home. As Professor Mary Dudziak writes:

> The focus of American foreign policy at this point was to promote democracy and to "contain" communism. However, the international focus on U.S. racial problems meant that the image of American democracy was tarnished. The apparent contradictions between American political ideology and practice led to particular foreign policy difficulties with countries in Asia, Africa, and Latin America. U.S. government officials realized that their ability to sell democracy to the Third World was seriously hampered by continuing racial injustice at home. Accordingly, efforts to promote civil rights within the United States were consistent with, and important to, the more central U.S. mission of fighting world communism.[3]

By the time we passed through the 1960s Civil Rights Movement and emerged on the other side with increased civil rights, we were a beacon of hope, freedom, and justice to the world, particularly for Eastern Europe, stuck on the other side of the Iron Curtain. This subsequent transformation in our domestic policy at home greatly contributed to our foreign policy successes overseas defeating communism.[4] Applying this successful Cold War "war of ideas" model to the present national security challenge in the Middle East could effectively drive out extremist ideology that may give rise to terrorist behavior while strengthening the United States' stature in the international community.

II. APPLYING THE COLD WAR MODEL AND GETTING IT RIGHT

The current National Security Strategy of the United States, issued by President Bush in March 2006, recognizes that winning the "war of ideas" is crucial to the long-term success in the War on Terrorism. Unfortunately, we are now struggling against credibility and image problems similar to those of the former Soviet Union, so memorably characterized by President Reagan as "The Evil Empire."

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[1] Eliot A. Cohen, *World War IV: Lets call this conflict what it is*, WALL ST. J., Nov. 20, 2001; James Woolsey, *At War for Freedom*, THE GUARDIAN, July 20, 2003.

[2] WILLIAM ROSENAU, MCGRAW-HILL HOMELAND SECURITY HANDBOOK 1137 (2005), *available at* www.rand.org/pubs/reprints/2006/RAND_RP1218.pdf.

[3] Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62-63 (1988).

[4] P.W. Singer, *American goodwill, in shackles*, SALON.COM, June 26, 2007, *available at* http://www.salon.com/opinion/feature/2007/06/26/war_of_ideas/.

During the past few years, U.S. standing across the world in general and in the Muslim world in particular has sustained a deep and rapid deterioration. According to the Pew Global Attitudes Survey, 80% of the citizens of predominantly Muslim countries hold solidly negative views of the United States. Negative ratings are even higher in the key moderate countries of Jordan, Morocco, and Turkey.[5] Yet, inexplicably, out of an already small federal budget of about $1.5 billion for core public diplomacy, only about 9.5% ($140 million) is devoted to the Near East and South Asia—core areas of the Muslim world.[6] Meanwhile, 16% ($240 million) was spent on the U.S.- mouthpiece television and radio stations Al Hurra and Radio Sawa, which have a limited following and limited impact.[7]

Importantly, the anger is not directed at our cultural values; rather, U.S. policy is identified as the main cause of the negative sentiments, ranging from the conduct of the war in Iraq to the abandonment of civil liberties in U.S. detention centers at Guantánamo Bay and Abu Ghraib.[8] In an August 2007 *Washington Post* article, Brookings Senior Fellow Philip Gordon highlighted how critical it is for U.S. conduct to be aligned with U.S. communications strategy in order to marginalize and root out violent extremism, writing, "Bush may speak as though he believes we're in a battle of ideas, but he wages the "war on terror" as if it were a traditional conflict, in which military force matters more than moral authority and allied support."[9] As then-Senator John F. Kennedy once recommended, we need to "practice what we preach."[10]

By any measure, U.S. efforts at communicating with Muslim-majority nations since 9/11 have not been successful. The efforts have relied on informational programming that has lacked energy, focus, and an overarching, integrated strategy. Our efforts have also lacked nuance in dealing with diverse and sensitive issues and have failed to reach out to the key "swing" audiences.

In today's digitally interconnected world, however, our behavior within the U.S. is even more closely monitored by people around the globe. Many of those in the Muslim world—who are unsure whether to love us for our ideals of equality and freedom, or loath us for our practices at Guantánamo Bay and Abu Ghraib—have increasing access to the Internet and satellite television. They are watching carefully. And in years to come, they could either move to becoming supporters of those who resist U.S. policy in the form of terrorism or supporters of those who embrace the United States in free trade and political cooperation.

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[5] Shibley Telhami, 2008 Annual Arab Public Opinion Poll: Survey of the Anwar Sadat Chair for Peace and Development at the University of Maryland (2008), *available at* http://sadat.umd.edu/surveys/2008%20Arab%20Public%20Opinion%20Survey.ppt; Pew Global Attitudes Project, America's Image Slips, But Allies Share U.S. Concerns Over Iran, Hamas (2006), *available at* http://pewglobal.org/reports/display.php?ReportID=252.

[6] U.S. Gov't Accountability Office, GAO-06-535, U.S. Public Diplomacy: State Department Efforts to Engage Muslim Audiences Lack Certain Communication Elements and Face Significant Challenges 10 (2006), *available at* http://www.gao.gov/new.items/d06535.pdf.

[7] *Id*. at 7.

[8] Pew Global Attitudes Project, American Character Gets Mixed Reviews: U.S. Image Up Slightly, But Still Negative (2005), *available at* http://pewglobal.org/reports/pdf/247.pdf.

[9] Philip H. Gordon, *Take Some Cues From the Cold War, Mr. President*, Wash. Post, Aug. 19, 2007, at B03, *available at* http://www.brookings.edu/opinions/2007/0819forceandlegitimacy_gordon.aspx.

[10] *See* Senator John F. Kennedy and Vice President Richard M. Nixon Second Joint Radio-Television Broadcast (1961), *available at* http://www.jfklibrary.org/Historical+Resources/Archives/Reference+'Desk/Speeches/JFK/JFK+Pre-Pres/1960/Senator+John+F.+Kennedy+and+Vice+President+Richard+M.+Nixon+Second+Joint+Radio-Television+Broadcast.htm.

Indeed, we find ourselves in a crucial period, when enduring attitudes are being formed. Getting our communications right is critical to overall national security now and will continue to be critical in decades to come. Much of the threat we face comes from terrorists around the globe, often acting in a decentralized, self-inspired fashion. However, our security concerns extend beyond terrorism and suggest a long-term need for a grand strategy to prevent or wage a wider conflict in the future. The United States—and the world—may be standing on the brink of a "Clash of Civilizations," as Samuel Huntington once warned.[11] The widely held view among Muslims that the U.S. war on terrorism is a "war on Islam" illustrates the vast gulf in understanding and perceptions.

The prevailing view in the Muslim world of a "war on Islam" impedes our success not only in mounting a viable grand strategy in our overall foreign policy, but also in confronting localized terrorist threats. The global war on terrorism, after all, is not a traditional military conflict made up of set-piece battles; it is a series of relatively small conflicts and insurgencies in places like Iraq, Afghanistan, Pakistan, Egypt—and even in some neighborhoods, in places such as Britain. In each case, the United States must sway a population from hostility to support in order to oust terror cells and shut down recruiting pipelines. The U.S. Marine Corps *Small Wars* manual, which details tactics and strategies for operations combining military force and diplomatic pressure, and on which the "Global War on Terror" is based, famously notes that such "wars are battles of ideas and battles for the perceptions and attitudes of target populations."[12]

More than merely a lost popularity contest, the deepening divide between the United States and Muslim nations and communities around the world poses a huge barrier to our success on a breadth of vital issues, from running down terrorist groups to expanding economic development and political freedom. Progress on these issues will steer individuals toward or against militant radicalism.

III. CREATING THE STRATEGY

For the last six years, the United States has all but conceded the field in the war of ideas to the extremists, whether they be Taliban members in Afghanistan, al-Qaeda forces in Pakistan or instigators of sectarian violence in Iraq. To win this war, the next president must clearly recognize the importance of America's voice and good standing as elements of its power and influence in the world. Indeed, Joseph Nye acknowledges the importance of wielding soft power, writing that "soft power…comes from being a shining 'city upon a hill'…. Our leaders must make sure that they exercise our hard power in a manner that does not undercut our soft power."[13] As a matter of the highest national security importance, the next president should undertake a major, integrative initiative in public diplomacy and strategic communications to reach Muslim states and communities from the United Kingdom to Indonesia, including Muslim minority communities in Europe and India.

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[11] Samuel Huntington, The Clash of Civilizations and the Remaking of World Order (1998).

[12] U.S. Marine Corps Combat Dev. Command, Small Wars/ 21st Century 79 (2005).

[13] Joseph Nye, Jr., The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone 141 (2002).

Winning the war of ideas and creating better relations with the Muslim world require more than tired tactics, immobility, and budgetary pocket change (the current $50-million cost is less than 1/10,000th of our Iraq-related expenditures).[14] The next president should designate this effort as a matter of the highest national security importance. The campaign as a whole should be self-critical, regularly evaluating its own performance and ready and willing to change in response to evaluation results.

There are six broad principles that should guide our strategy to improve U.S. security through winning the war of ideas and broadening and deepening relationships between U.S. citizens and institutions and their counterparts abroad. These overarching principles include:

> *Confronting who we are*. Harkening back to the civil rights era and the Cold War, unless we take a zero-tolerance stand against anti-Muslim statements and bias both in government and among our political elite, we risk being cast as undertaking a "war on Islam" instead of a "war on terror." America must clearly confront its civil liberty concerns at home—and in our military campaigns—if we are to be able to inspire the Muslim world to support our vision of "liberty and justice for all" in the world.
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> *Engaging in dialogue*. Instead of just producing propaganda, communication efforts should be audience-centered and designed to build dialogue, assure mutual respect, forge partnerships, and place a premium on joint participation and planning. The structure of the National Model United Nations event sponsored by the National Collegiate Conference Association could be used as an example. This annual conference in New York brings together thousands of students from over 30 countries to discuss global concerns. Such forums, where the United States is viewed as an evenhanded partner, are the only way to restore and secure damaged credibility. This dialogue should be two-way—emphasizing "listening" and "learning" as much as "talking."
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> *Reaching out*. Rather than merely "preaching to the choir," the United States should engage a varied set of regional players and constituencies, including Islamists and other social conservatives who may sometimes be controversial, but who carry the greatest influence within the target populations. Beyond traditional vehicles for discussion, which target government counterparts and standard news media, U.S. communications strategy should engage leaders in a variety of forums, including universities, the arts, business and professional associations, labor groups, and non-governmental organizations. This worked well in the Cold War,

[14] The Pentagon reports the cost of the Iraq War has already reached about $600 billion and the Congressional Budget Office estimates that it is likely to end up costing $1–2 trillion, depending on troop levels and the amount of time the U.S. maintains its presence in Iraq. *See* David M. Herszenhorn, *Estimates of Iraq War Were Not Close to Ballpark*, N.Y. TIMES, Mar. 19, 2008, *available at* http://www.nytimes.com/2008/03/19/washington/19cost.html.

when the U.S. government sponsored the Congress for Cultural Freedom, an international association of artists and thinkers opposed to totalitarianism.[15]

Integrating. Diverse U.S. agencies should develop a coordinated goal-oriented, two-way communications approach to maximize effectiveness and resources and to speak with a single, credible voice. For example, the United States Agency for International Development should coordinate its activities more closely with the Office for the Undersecretary for Public Diplomacy and Public Affairs to better communicate the depth of involvement of U.S. development assistance across the Muslim world.[16]

Responding nimbly and quickly. Strategies and programs should be flexible and responsive to changing events, findings, and trends. For example, three years after 9/11, only 27% of U.S. public diplomacy resources were deployed in the 1.4 billion person Muslim world, which makes up 20-22% of the global population.[17] Just as the U.S. focused the majority of such programs on the Soviet Bloc during the Cold War, so too should it focus the majority of today's resources on the current ideological battleground in the Muslim world. The U.S. should also use new technologies and tactics to reflect these changes, such as increasingly embracing the use of Internet platforms like blogs and Facebook.

Investing. The financial investment in public diplomacy should reflect the very high strategic priority of the war of ideas in ensuring U.S. security. The United States can start by increasing funding for Near East and South Asia programs. We have seen this work in post-World War II when the U.S. invested millions of dollars in creating American centers in Germany. The United States needs to do the same thing in Iraq, and across the Arab world.[18]

IV. CENTRAL VISION OF PUBLIC DIPLOMACY PROGRAMS

The success of any program begins with a central vision. The Administration should order a reexamination of public diplomacy and strategic communications goals and programs at the senior levels of the National Security Council and at affected departments and agencies, especially the State Department. This effort should include seeking and integrating input from legislative bodies, universities, think tanks, and friends in the Muslim world. Good advice should be welcomed, not cast aside. In

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[15] Rosenau, *supra* note 2, at 1137.

[16] HADY AMR, THE NEED TO COMMUNICATE: HOW TO IMPROVE U.S. PUBLIC DIPLOMACY WITH THE ISLAMIC WORLD 36 (2004), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2004/ 01islamicworld_amr/amr 2004 0101. pdf.

[17] *The President's FY 2006 International Affairs Budget: Hearing Before the S. Subcomm. On State, Foreign Operations and Related Programs*, 109th Cong. (2005) (statement of Condoleezza Rice, Secretary of State of the United States).

[18] Hady Amr, *American Public Diplomacy: Some Lessons From Germany*, THE DAILY STAR, July 15, 2005, available at http://www.spinwatch.org/content/view/1475/9/.

the past, policymakers have ignored reports on the issue from groups as varied as the congressionally mandated Advisory Group on Public Diplomacy, the Council on Foreign Relations, and the Center for the Study of the Presidency. In order to ensure both high-level support and durability, the main findings and recommended core strategies should be embodied in a National Security Presidential Directive, presenting an agenda for building positive relations with Muslim countries and communities, using public diplomacy and strategic communications.[19]

Once the strategic goals are established, policymakers can develop a more systematic approach to ascertain how far short the United States falls from its target, and what exactly is required to attain it. This analytical and planning process will also identify tangible courses of action in the most important issue areas, *e.g.* alleviating the intensity of anti-Americanism in key countries and increasing levels of cooperation on anti-terrorist activity. The objective is to create not only a methodological approach to evaluating our successes and failures, but also a guide to steer the right course in the future.

As important as the substance of the strategy is in rebuilding the shattered foundations of trust, it is time to get the structural components of those messages in shape. Many Muslims say they find the style and tone of communications used by senior U.S. officials arrogant, patronizing, and needlessly confrontational. Simply returning the *art* of diplomacy to our *public* diplomacy could have an immediate impact. It is important to demonstrate respect: The empathic and measured tone that Secretary of State Condoleezza Rice used after the alleged Koran desecration incident in 2005 was all too rare and should serve as a model of appropriate diplomacy. Senior leaders need to avoid cultural insensitivity, boasting, and finger-wagging. Similarly, U.S. leaders should avoid displaying an openly hostile attitude toward the major Arab media outlets such as Al Jazeera and Al Arabiya, as they have done in the past.[20] Al Jazeera still commands the largest portion of the Arabic news market. In a poll taken in 2008, 53% of respondents identified it as their first choice for news. Al-Arabyia also continues to make gains with Arab audiences.[21] Like it or not, these channels are the means of conveying our message to the broader community, and attacking them only undermines our efforts.

V. SPECIFIC WAYS TO WIN THE "WAR OF IDEAS"

In applying the six broad principles that should guide our public diplomacy strategy presented above, our Administration can make significant progress towards winning the "war of ideas" and improving U.S. relations with the Muslim world through many interrelated initiatives. The following is a list of ten immediate suggestions that can be easily implemented so as to win the "war of ideas." There are, of course, many more suggestions for improving and fortifying the "war of ideas."

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[19] Jim Hoagland, *How to Respond*, WASH. POST, Sept. 18, 2001, at B07. The focus here is on public diplomacy and strategic communications involving the Muslim world. However, it can serve as a model for more broad efforts at restoring America's leadership and credibility on a global basis.

[20] For example, former Secretary of Defense Donald Rumsfeld called the network "vicious, inaccurate and inexcusable." See Sarah Baxter, *Rumsfeld's Al-Jazeera outburst*, TIMES ONLINE, Nov. 27, 2005, *available at* http://www.timesonline.co.uk/tol/news/world/article597096.ece.

[21] Telhami, *supra* note 5, at 3.

1. STAND TALL AGAINST CURTAILMENT OF CIVIL LIBERTIES AND ANTI-MUSLIM BIGOTRY

In an age of globalized technology and communication, the world is watching to see if we live up to our ideals of civil liberties and constitutional values, and is waiting to see if we stamp out anti-Muslim bigotry at home. A series of anti-Muslim statements made by various policymakers and close Administration supporters have undercut President Bush's post 9/11 message that Islam was not to blame for the attacks.[22] Even though media in the Middle East give extensive coverage to these sorts of statements, the Administration has usually failed to condemn them or separate itself from the speakers. Bigotry in our midst is not just distasteful; in the age of globalization, it directly undermines our security. We live in an era where the world constantly watches to see whether we actually live up to our ideals. At a time when many in the world expect the worst of us, such positions only support the enemy's propaganda and recruiting efforts. Efforts on this front alone will determine if we have the moral authority to build multi-government coalitions and can inspire other countries to follow suit.

2. CREATE A U.S. VOICE CORPS

Several recent reports have revealed the persisting deficit in the foreign language skills needed to communicate to the citizens of Muslim-majority countries, especially in Arabic.[23] Indeed, perhaps one of the most shocking findings in the Advisory Commission on Public Diplomacy's 2005 report was that only 54 Department of State employees have tested for high ("Level 4") Arabic or above and only 279 for all levels.[24] Even in June 2007, the Office of the Spokesman at the State Department reported only ten of the Foreign Service officers (including the ambassador) working at Embassy Baghdad as having "general professional fluency" in Arabic.[25] Presidential support is needed for the rapid recruitment and training of at least 100 fully fluent Arabic speakers—five highly trained individuals in each Arab country—with public diplomacy skills. Respected corps members could also become the top experts or "go-to" people on Arabic-language talk shows and news analyses. Further, it is equally important to train speakers in other languages spoken by more than 500 million Muslims in strategically important countries like Indonesia, Iran, Malaysia, Pakistan, and Turkey.

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[22] For example, Lt. General William Boykin set off a firestorm of attention in 2003, when, comparing his faith with a Muslim's, he said, "I knew that my God was bigger than his. I knew that my God was a real God and his was an idol." Boykin was then promoted to Deputy Undersecretary of Defense for Intelligence, a position that he held from June 2003 until August 2007. *See US is 'battling Satan' says general*, BBC NEWS, Oct. 17, 2003, *available at* http://news.bbc.co.uk/1/hi/world/americas/3199212.stm.

Similarly, Christian Coalition founder and Bush administration associate Pat Robertson's called Islam a "violent religion." See Sonja Barisic, *Pat Robertson describes Islam as violent religion that wants to dominate, destroy*, THE ASSOCIATED PRESS, Feb. 22, 2002, *available at* https://www.synapsenow.com/synapse/news/fullstory_public.cfm ?articleid=6316&website=israelfacts.org. Likewise, Franklin Graham called Islam a "very evil and wicked religion." *See Franklin Graham conducts services at Pentagon*, CNN.COM, Apr. 18, 2003, *available at*: http://www.cnn.com/2003/ALLPOLITICS/04/18/graham.pentagon/.

[23] U.S. PUBLIC DIPLOMACY: STATE DEPARTMENT EFFORTS TO ENGAGE MUSLIM AUDIENCES LACK CERTAIN COMMUNICATION ELEMENTS AND FACE SIGNIFICANT CHALLENGES, *supra* note 6, at 37.

[24] ADVISORY GROUP ON PUBLIC DIPLOMACY IN THE ARAB AND MUSLIM WORLD, CHANGING MINDS WINNING PEACE: A NEW STRATEGIC DIRECTION FOR THE U.S. PUBLIC DIPLOMACY IN THE ARAB AND MUSLIM WORLD 28 (2003).

[25] *See* Press Release, U.S. Dep't of State, Arabic Speakers- Embassy Baghdad (Taken Question) (June 19, 2007), *available at* http://www.state.gov/r/pa/prs/ps/2007/jun/86792.htm.

3. ESTABLISH AMERICAN CENTERS ACROSS THE REGION

Young people are the most critical audience in a war of ideas that may last for generations. This is all the more important since many of the countries involved have a higher than normal percentage of their population under the age of 25. The frustration that Muslim youth feel with the *status quo* could be harnessed into a demand for progressive reforms. U.S. foreign policy must be deeply engaged not only in developing a real sociopolitical alternative to offer this next generation but also in articulating this alternative through strategic communications. The centers should provide not just a window into U.S. life, but also enable open and critical dialogue on issues of local and international concern, such as U.S. policy in the Middle East, thereby demonstrating the value of free discourse so essential to democracy. Otherwise, pent-up rage will continue to focus on us. There is a historical model to emulate in reaching foreign youth, and citizens of all ages. After World War II, the United States launched dozens of "America Houses" across Germany as focal points to build democracy and form a bond with the German people. Located in city and town centers, "America Houses" also served as community hubs. After 40 years under U.S. stewardship, many of these centers evolved into German-American institutes under private German control.[26] The British Council serves as another example. The Council seeks to build bridges among the United Kingdom and other countries through initiatives in the arts and sciences.

4. IMPLEMENT A U.S. KNOWLEDGE LIBRARY INITIATIVE

The Advisory Commission on Public Diplomacy also pointed out the dearth of Arabic translations of major works of literature and political theory coming out of the United States. While certain U.S. embassies do undertake translations of books into Arabic, the scale of these efforts is miniscule compared with the potential market. The lack of translated material means that many Arabs are cut off from the history of the United States, political ideas, literature, and science. An expeditiously run project to translate a variety of books and journals would soon make such works widely and inexpensively available.

5. PRIVATIZE AL HURRA AND RADIO SAWA

One of the few major U.S. public diplomacy initiatives in the last five years was the launch of U.S. government-sponsored satellite TV and radio stations, Al Hurra and Radio Sawa, which broadcast in Arabic and are intended to supplement, or even supplant, indigenous media in the region. Despite the massive launch costs, which ate up most of the public diplomacy budget, neither station has found its footing, nor has any credible study has found them to be influential among the populace. Former ambassador to Yemen William A. Rugh explained as much in his testimony given before the Senate Foreign Relations Committee on Radio Sawa and Al Hurra television, noting that the first impression of Radia Sawa has "disappointed many viewers."[27] An article in the Spring 2004 *National Interest* also concludes that Radio Sawa wielded little

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[26] Amr, *supra* note 18.

[27] For Ambassador Rugh's full statement see, *Comments on Radio Sawa and al Hurra Television, Hearing Before the Subcomm. on Intl. Relations and Terrorism of the S. Comm. on Foreign Relations*, 108th Cong. (2004) (statement of William A. Rugh, Ambassador), *available at* www.senate.gov/~foreign/testimony/2004/RughTestimony040429.pdf.

influence in the "street."[28] Clearly, their problem is not the lack of funding but rather their overt association with the U.S. government, which effectively de-legitimizes these media outlets in the eyes of the Arab population. Al Hurra and Radio Sawa actually undermine broader reform efforts, as the United States is in no position to challenge Arab government control of media while running its own government-funded media there. The U.S. should have a voice in the region, but this voice will more likely be listened to and believed, if people understand that it is being transmitted through a non-government and unbiased source.[29] More collaboration is needed with the private sector, which, as the Defense Science Board has noted, can often be a more credible messenger than the U.S. government. Privatization of Al Hurra and Radio Sawa is a good place to start.

6. LAUNCH "C-SPANS" FOR THE MUSLIM WORLD

Sources of unfiltered information are sorely lacking throughout the Muslim world, even though there is a palpable appetite for them. For example, during the Abu Ghraib crisis, the public in the Middle East watched live coverage of U.S. congressional hearings on Arabic news channels with great interest. Scenes of U.S. policymakers and military leaders directly answering the probing questions of legislators and reporters presented a powerful illustration of democracy in action as well as a sharp contrast to the authoritarian practices predominant in the viewers' home regions. Through collaboration with local organizations, unfiltered Arabic channels showing the democratic processes of our federal government will eliminate the credibility gap that has undermined Radio Sawa and Al Hurra. Similar opportunities exist for public affairs channels targeting speakers of other Muslim languages in Iran, Pakistan, India, Indonesia, Turkey, and elsewhere.

7. BOLSTER CULTURAL EXCHANGE PROGRAMS AND IMPROVE THE VISA PROCESS

As in the Cold War, when U.S. outreach programs created allies around the world, we should enlarge educational and cultural exchange programs, increase exchanges of youth and young professionals, and support investments in development, technology, and science initiatives in the Muslim world. The media can multiply the effects of these exchanges through television, print, and the Internet. Not only should exchange initiatives like the Fulbright and Humphrey programs be dramatically expanded in Muslim-majority countries, but virtual youth exchanges, harnessing Internet and video-conferencing, should also be initiated. Current visa procedures impose onerous requirements and delays that humiliate, rather than welcome, Arabs and Muslims from abroad; in turn, the cumbersome procedures subvert efforts to reach out to our natural ambassadors—namely, visitors and students who can then attest to the depth and reality of our goodwill.[30] Special attention should also be given to integrating official visitor

[28] Derk Kinnane, *Winning Over the Muslim Mind*, NATIONAL INTEREST, Spring 2004, available at http://findarticles.com/p/articles/mi_m2751/is_75/ai_n6077656.

[29] Stephen Cook, *Hearts, Minds and Hearings*, N.Y. TIMES, July 6, 2004, *available at* http://www.cfr.org/publication/7168/hearts_minds_and_hearings.html.

[30] John N. Paden & Peter W. Singer, *America Slams the Door (on its Foot): Washington's Destructive New Visa Policies*, FOREIGN AFFAIRS, June 2003, *available at* http://www.foreignaffairs.org/20030501facomment11216/john-n-paden-peter-w-singer/america-slams-the-door-on-its-foot-washington-s-destructive-new-visa-policies.html.

programs across agencies. All too frequently, high-profile visa delays, and, in particular, the erroneous detention of officially invited leaders and representatives from the Muslim world, have proved embarrassing and detrimental to our country's image.[31]

8. HARNESS THE DIVERSITY IN THE UNITED STATES BY ENGAGING ARAB-AMERICANS AND AMERICAN MUSLIMS

At a time when the U.S. government lacks both credibility abroad and fluent speakers to represent our views, the distance between our government and *domestic* Arab and Muslim communities is stunningly wide. The State Department's office for public diplomacy, for example, did not include a single American-Muslim on its staff until 2006 when the Office for Public Diplomacy and Public Affairs appointed its first four American Muslim "civilian ambassadors" to travel to Southeast Asia, the Middle East and the South Pacific.[32] The Departments of Defense, Homeland Security, Justice, and State should examine how they can better tap into the programming and recruiting strengths of these communities and move beyond symbolic respect for Muslim rituals, such as convening annual Iftar dinners during Ramadan, to substantial initiatives. To offer one example, just as political donors and corporate executives often join official travel delegations, Arab-Americans and American Muslims could also help brief and even accompany officials when they visit the broader Middle East.

9. INVOLVE THE WHOLE FEDERAL BUREAUCRACY IN PUBLIC DIPLOMACY

Leaders in the executive branch should conduct regular interviews with the foreign press and engage in genuine dialogue, even with media outlets that hold negative views of our government. In other words, public diplomacy must go beyond "preaching to the converted." For example, visits by senior U.S. officials to the region should include meetings not merely with government officials, but also with local students, civil society leaders, reformers, and even conservative religious or social leaders. They should follow the Cold War model of a wide engagement strategy to expand and deepen relationships with U.S. allies and counterparts in what were then considered "battleground states" in the developing world.

10. EXERT PRESIDENTIAL LEADERSHIP IN PUBLIC DIPLOMACY

The role of presidential leadership is critical and cannot be emphasized enough. The U.S. president is a world leader. His style and manner of public diplomacy are crucial to winning the "war of ideas." Much of our recent decline in credibility and standing in the Muslim world has focused on the actions of the current Administration, with President Bush cited by name in various regional public polls, as well as

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[31] For example, Ejaz Haider, the editor of one of Pakistan's most moderate newspapers, was arrested in Washington, DC, in 2003 by Immigration and Naturalization Service agents on visa charges, even though he was in the United States at the direct invitation of the State Department to build goodwill. Those sympathetic to the United States could only charitably conclude that one American hand did not know what the other was doing. Unsurprisingly, those less favorably inclined took a darker view, and made sure to publicize their conspiracy theories in regional media.

[32] For more on this, *see* Heather Maher, *Islam: Muslim Americans to Improve U.S. Image Abroad*, RADIO FREE EUROPE/ RADIO LIBERTY, June 16, 2006, *available at*: http://www.rferl.org/featuresarticle/2006/06/b47f318d-dcef-4b59-ac09-9a9d33a70805.html.

conversations with key leaders.[33] Fair or not, this focus on President Bush does present a limited window for his successor. The next president will have a unique opportunity to personally "reboot" the relationship between the United States and Muslim populations worldwide.

Indeed, according to the Pentagon's Defense Science Board, "only White House leadership … can bring about the sweeping [communications] reforms that are required," and "nothing shapes U.S. policies and global perceptions ... more than the president's statements."[34] To demonstrate the importance of a strong relationship, the next president should consider including stops in Muslim states in his first international trip. There, the president could deliver a major policy address, outlining goals and revealing a vision of future relations between the United States and the Muslim world, and could meet with forward-looking leaders, civil society reformers, and youth. Given the importance of the "war of ideas" to the battle against terrorism and the risks of a greater, long-term rift between the United States and the Islamic world, efforts should be made to bring the president into personal contact with reformers and civil society leaders. These efforts include hosting delegations at the White House to demonstrate respect and bolster both parties' standing, as well as to increase mutual understanding. In addition, the President should schedule time for regular interviews with news media outlets from the Muslim world.

Furthermore, the President should use the bully pulpit to condemn hate speech. Shortly after 9/11, President Bush took the compelling personal step of visiting the Islamic Center of Washington, the capital's leading mosque, to show Americans U.S. citizens and the world that the administration understood that Islam was not to blame for the attacks. Unfortunately, the clarity of this message was quickly lost, as was discussed above. The next president must not repeat this failure of leadership, as it weakens our moral standing.

VI. CONCLUSION

In no area could the Bush Administration's foreign policy be described as meek, except in public diplomacy and strategic communications—its efforts to win the war of ideas. The Administration's combination of an aggressive foreign policy and a feeble effort to maintain our voice and credibility in the world leaves the next president with a historic challenge. The next president will inherit a series of complex and difficult decisions about engaging with Muslim states and communities, along with only a short window of opportunity to "reboot" the relationship. After all, these decisions are at the heart of the war on terrorism.

Simply put, there is a glaring need for the United States to undertake a proactive strategy aimed at restoring long-term security through the presentation of our principles as part of U.S. foreign policy. The tools of public diplomacy and strategic communications are the most valuable weapons in America's arsenal. It is not too late to wield them.

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[33] For example, see June 27, 2007 Pew Research Center Poll taken in Turkey, Egypt, Jordan, Kuwait, Lebanon, Morocco, Palestinian Territories, Israel asking respondents how much confidence they had in certain leaders to do the right thing regarding world affairs. With the exception of those interviewed in Israel, over 40% of respondents answered that they had "no confidence at all" in President Bush. PEW GLOBAL ATTITUDES PROJECT, RISING ENVIRONMENTAL CONCERN IN 47-NATION SURVEY: GLOBAL UNEASE WITH MAJOR WORLD POWERS 61-62 (2007).

[34] U.S. DEP'T OF DEFENSE, OFFICE OF THE UNDER-SEC'Y OF DEF. FOR ACQUISITION, TECH. AND LOGISTICS. REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON STRATEGIC COMMUNICATION 3 (2004), *available at* http://www.acq.osd.mil/dsb/reports/2004-09-Strategic_Communication.pdf.

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