



National Security Law Report

The Proliferation Security Initiative: A New Multilateralism?

By Matthew Foley

The Proliferation Security Initiative (PSI) is a US-led, multilateral effort to combat trafficking in weapons of mass destruction (WMD) and WMD delivery mechanisms. Since its launch in May 2003, the plan has experienced rapid success. This article reviews the formation, activities, and political and legal challenges faced by the PSI.

The *So San* Incident

Formation of the PSI was sparked by a 2002 incident that demonstrated the weaknesses of the existing laws and practices in interdicting shipment of WMD-related materials.

On December 10, 2002, Spanish and US troops boarded a North Korean vessel in the Arabian Sea 600 miles from Yemen. They had tracked the ship, the *So San* when it departed from North Korea. The ship was on a highly irregular course, and was flying without a flag when boarded. On board, the Americans and Spaniards found 15 Scud missiles concealed under sacks of cement. The US soon allowed the cargo to proceed to Yemen. While the boarding was legal under international law—a flagless vessel in international waters can be boarded under customary international law as reflected in the LOS Convention—North Korea and Yemen were under no legal obligation not to ship or receive the ship’s cargo, which did not include weapons of mass destruction. The Bush administration, deeply disappointed by this result, created the PSI in response.

PSI Principles

According to its Interdiction Principles, the PSI is intended to interdict shipments of “WMD, their delivery systems, and related materials.” The Interdiction Principles were outlined by the PSI’s original eleven countries, Australia, France,

Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the UK, and the US.

PSI is an “activity, not an organization,” according to senior Bush administration officials and some PSI materials. Rather than creating a new multilateral institution, or working through existing ones, members act “either alone or in concert with other states” to stop proliferation.

The PSI has conducted workshops and exercises and five plenary meetings in its year of existence. The members engage in information sharing, review, and strengthen national and international laws on proliferation. Individually, states indicate their intention to refrain from transporting materials to “states or non-state actors of proliferation of concern, and not to allow any persons subject to their jurisdiction to do so.” Regarding boarding ships, the PSI principles call for states to board and search its own flag vessels “[a]t their own initiative, or at the request and good cause shown by another state” and “to seriously consider” allowing other states to board and search its flag ships.

PSI Members

A State Department fact sheet states that “The PSI is not an organization that has ‘members,’ “but the PSI acknowledges a “core group” of participants. In the past year, Australia, Canada, Norway, Singapore, and Russia have joined the original core group members. Numerous countries have expressed a degree of support for the PSI. At the May-June 2004 First Anniversary Meeting in Krakow, Poland, representatives of 62 countries attended.

Russia joined the PSI in June. This was a major advance for the PSI because of Russia’s possession of nuclear material, its lengthy shorelines, and its influence over neighboring countries. Observers have cited Russia’s participation as of great importance. There may have been some political cost incurred by existing PSI members to gain Russia’s membership. The US initially intended UN Security Council Resolution 1540 on weapons proliferation, discussed below, to refer to specific states such as Iran and North Korea. The final version refers only to “non-state actors.” According to Russian news reports, references to specific states were deleted at Russia’s request.

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China, not a member, would be a valuable addition to PSI owing to its immense coast and less than perfect record on WMD proliferation.

The US and Liberia, which has the world's second largest ship registry, signed a boarding agreement on February 11, 2004. "The boarding agreement provides authority on a bilateral basis to board sea vessels suspected of carrying illicit shipments of weapons of mass destruction, their delivery systems, or related materials," according to the State Department. Liberia has not joined all aspects of PSI, but simply authorized the US to board suspicious ships sailing under the Liberian flag.

Panama, with the world's largest ship registry, joined the initiative in May. Under the agreement, the US and Panama can identify its own national ships, and consent to allow the other country's ships to board, search, and detain a ship. Panama and Liberia together account for 15 percent of the world's large cargo ships and 30 percent of commercial shipping weight.

A State Department fact sheet says that "[i]ndividual states determine how their current capabilities match with the PSI and its Statement of Interdiction Principles and they determine the extent to which they are able to cooperate in any given PSI action or operation that might arise."

Activities

PSI representatives meet on a regular basis. Member states conduct training exercises and interdictions, including nine joint interdiction exercises involving boarding planes and ships and ground exercises. In June 2003, Japan detained North Korean ships docked in two Japanese ports for safety inspections and Australia stopped a shipload of North Korean drugs in territorial waters. Each state acted alone, soon after the first PSI meeting.

Libya's December 2003 announcement that it had abandoned its WMD program, while part of a change in policy that began even before September 11, was apparently attributable in part to a yet-undisclosed PSI seizure of weapons materials. Both President Bush and Prime Minister Tony Blair cited the PSI in their statements about Libya. Some press reports indicated that PSI countries had boarded and searched a German ship, the *BBC China*, finding centrifuge components.

Practices

PSI actions are determined on a case-by-case basis rather than a detailed set of procedures. According to a recent US State Department fact sheet, "If a state believes it does not have the legal authorities to act in a specific action, it can decline to participate." The PSI definition of "states or non-state actors of concern" allows each state individually to determine appropriate targets of action. The PSI Statement of Interdiction Principles defines groups of concern as "those countries or entities that the PSI participants involved establish should be subject to interdiction activities because

they are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials."

PSI states can request assistance or take action with "good cause shown." "In responding to such a request, each state will need to decide for itself whether good cause has been shown," the State Department explains. Procedures for coordination with existing institutions on nonproliferation also remain in the development phase. A US State Department document says, "the United States believes that it will be useful to keep all relevant international bodies such as the UN informed of PSI developments."

International Law on the Oceans

Under the Law of the Sea (LOS) Convention, a coastal state's territorial sea extends no further than twelve miles from the baselines at a coastal state's territory. In this area, other states have the right to "innocent passage." In the exclusive economic zone, which extends 200 miles from shore, and beyond, all states have full freedom of navigation.

The longstanding customary international law allowing free passage on the high seas was codified in the 1958 Law of the Sea Convention, to which the US is a party, and the LOS Convention at Article 90. More than 150 states are parties to the LOS Convention. The US is not yet a party, but regards the normative provisions to the treaty as customary international law.

UN Security Council Resolution 1540 on nonproliferation was proposed by the US and unanimously adopted in April,

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Book Review

Combating Terrorism: Strategies of Ten Countries

Edited By Yonah Alexander

Reviewed by Patricio Asfura-Heim

In "Combating Terrorism," Yonah Alexander has assembled a robust collection of essays outlining ten nations' responses to terrorist threats. The result is a comprehensive guide to the dos and don'ts of counterterrorism policy based on the experiences of the United States, Argentina, Peru, Colombia, Spain, the United Kingdom, Israel, Turkey, India, and Japan. The contributors are renowned experts in the field, and each provides unique insight into the struggle against terrorism. Each essay, while reflecting the given country's idiosyncrasies, considers the following common factors that influence the success or failure of counterterrorism policy: the political environment, the counterterrorism organizational structure, intelligence, law enforcement, diplomacy, economics, and military responses. Although "Combating Terrorism" was finished prior to the attacks on 9/11, it provides an up-to-date analysis of the threats we face today as well as fascinating chapter-by-chapter postscripts that reconcile pre- and post-9/11 thinking.

According to the authors, a successful counterterrorism strategy requires several elements. First and foremost is a government's ability to recognize a threat and to act appropriately. Alberto Bolivar writes in his chapter on Peru that the Sendero Luminoso (Shining Path) was able to achieve early success when the government failed to recognize the danger that terrorists posed and then later overreacted, assisting the terrorists by isolating the population. Similarly, Roger Fontaine's essay on the Argentine "dirty war" illustrates the consequences of an inept government whose initial failure to act leads to a crackdown in which thousands of innocent people die. Colombia, arguably the country most affected by terrorism, has traditionally maintained that the *violencia*, as they obliquely call it, is an organized crime problem.

In addition to properly recognizing a threat, successful counterterrorism policy requires a positive political environment. In Peru, counterterrorism policy failed until the government won the support of its population by protecting villagers and leaving a small footprint in the day-to-day lives of its people. Japan, the only country in the world to have suffered a chemical weapon terrorist attack, has had much difficulty overcoming an overwhelmingly pacifist political environment. It has placed terrorist attacks in the same category as natural disasters. As a result, the Japanese response to terrorism has been inflexible and backward-looking.

A revision of criminal procedure laws in Turkey and the United States has allowed those nations to better combat terrorism. Increased defense of human rights by Turkish authorities has led to better international cooperation. And in the US, lowering the legal wall to information sharing between intelligence and law enforcement authorities has

removed significant restrictions on tracking down terrorists. A recent example of this lowered legal wall appears in section 215 of the USA PATRIOT Act which has allowed federal investigators to arrest terrorism suspects living in the US using evidence gathered by foreign intelligence operations.

In contrast to Colombia, Israel's comprehensive strategic concept of counterterrorism has been successful. The legal policies of the UK have virtually eliminated terrorism there and have maintained public support. However, there has been a trade-off in the UK between national security and civil liberties.

Ved Marwarh's India essay focuses on the importance of training the military to combat terrorism. Twice, Sikh Bhindranwale terrorists stormed and fortified the Sikh Golden Temple in full public view, taking many hostages on both occasions. The move was a direct confrontation of the central government aimed at the formation of a separate Sikh state. The first time, the unprepared Indian military attempted to flush out the terrorists, and more than four thousand innocent people were killed. By the time of the second occupation, the military had been trained in counterterrorism actions, and no civilians were killed when they took action. Today, Operation Black Thunder, as it was called, is considered one of the most successful counterterror operations anywhere in the world.

Highlighted among all the essays is the need for good intelligence and international cooperation. While the US, UK and Israel consider intelligence the foundation of good counterterrorism policy, countries such as Japan have shown little interest in developing even the most basic counterterror intelligence capability. And in Peru, actionable intelligence as a result of public cooperation virtually ended the terrorism of the Shining Path guerillas.

Many of the essays tackle the issue of negotiation. While countries such as Colombia, Japan, and Spain have all attempted to limit violence through negotiating with terrorists, history has proven that negotiation only gives terrorists time to regroup, while inspiring new terrorist organizations to form or encouraging them to act. Likewise, political resolutions, even backed by the UN, can only work when terrorist organizations renounce violence, as the Israeli-Palestinian conflict has shown.

This book is an ambitious and comprehensive series of case studies that presents objective analysis about which government actions have worked and which ones have failed. Both instructive and challenging, it provides a timely reference to both students and professionals of counterterrorism policy.

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Book Review

Piercing the Veil of Secrecy

By Janine Brookner

Reviewed By Blayne Miley

In *Piercing the Veil of Secrecy: Litigation Against U.S. Intelligence*, Janine Brookner presents a “how-to” guide for suing the CIA and other intelligence agencies for employment abuses such as sexual harassment or retaliation. Potential plaintiffs face a series of unique obstacles. Some are readily apparent, such as the CIA’s control over classified information, while others are unexpected, such as the sweeping exemptions of the CIA from various employment laws. Any employment suit brought by a CIA employee faces an uphill battle. Brookner, a former CIA employee who succeeded in her employment claim against the Agency, presents a David versus Goliath theme that paints her as the Erin Brockovich of intelligence community litigants.

Throughout the years, Congress has passed legislation designed to protect employees from mistreatment at the hands of their employers, especially if that employer is the federal government. Examples include the Civil Service Reform Act, Whistleblower Act, Administrative Procedure Act, and the Federal Tort Claims Act. This legislation was passed because of specific abuses taking place in the workplace that did not have adequate remedies. In passing these laws, Congress totally or partially exempted the CIA and other intelligence agencies from coverage. The exemption was due to Congress’ overriding concerns about national security, not because the abuses did not occur in intelligence agencies. Employees for these agencies remain without many remedies for workplace abuses. This creates an obvious problem. Just because everyone at the CIA has a security clearance doesn’t mean there won’t be sexual harassment, favoritism, and a variety of other employment abuses. Congress saw there were compelling interests at stake that justified not extending the employment protections to the CIA. However, the lack of exploration into the legislative history of these laws in *Piercing the Veil* leaves one assuming.

Brookner begins with brief anecdotal references to past claims brought against the CIA. These are used to highlight the issues raised as she reviews the legal playing field for CIA employees bringing employment suits. The anecdotes include her own victorious lawsuit. Brookner avoids trumpeting her own triumph above the successes and downfalls of similarly situated litigants. She doesn’t explicitly indicate which of the thirteen accounts is her own, but the book does reveal which story is hers despite the required plaintiff-pseudonym (hopefully that’s not a breach of her privacy agreement).

The main element of the book is a statute-by-statute approach offering guidance on actions to bring and pitfalls to avoid in suing an intelligence agency. Brookner’s catalogue of statutory alternatives includes some creative alternatives, such as RICO. The progressions through the statutes include a walk-through of the text of the statutes reminiscent of a nutshell on employment law. After the textual walkthrough, Brookner covers the distinctive obstacles of such a suit when brought against the CIA. These vary based on the statute and depend on whether the CIA is partially or totally exempt from the legislation. The walk-thrus also indicate how the CIA has responded to such claims in the past, by referencing the anecdotes in the introduction.

Brookner also covers the unique resources the CIA possesses to defeat claims brought against it, including major self-dealing in terms of security clearances and classifications. Although some of the tactics are questionable, others are the same ones used by any defense firm worth its salt. Delaying and stalling in civil litigation is a common tactic, and plaintiffs should expect it anytime they litigate against a defendant with significant resources. The CIA just happens to have a few extra cards up its sleeve to impede litigation against it. For example, through its control of security clearances, the CIA can limit who represents its employees, how many attorneys and staff are allowed to work on the employee’s claim, and even where that work must take place. The CIA may also drastically restrict discovery through its determination of which documents are classified. While these measures may be imminently frustrating for CIA employees suing for employment abuses, they don’t violate the Sixth Amendment as suggested by Brookner. Even with the restrictions, the legal resources available to CIA employees usually vastly outstrip those available to indigent defendants in the criminal justice system.

After surveying the current playing field, Brookner has some suggestions for change. One is simply to give intelligence employees more of the remedies enjoyed by the general public. Congress rejected this when it specifically exempted the CIA and other agencies in passing the legislation. Another approach would be to provide intelligence employees bringing employment actions with benefits that are not given to the general public. This would make up for the benefits the general public has that are withheld from intelligence employees. Given that Congress felt national security could exempt the CIA from certain employment legislation, national security concerns are also likely to impede any efforts to level the playing field through other

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Piercing the Veil of Secrecy

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legislative remedies. Cleaning up the potential for abuse regarding the CIA's control of the security clearance and classification process in litigation seems to be needed. However, our security clearance and classification systems are compartmentalized. The book leaves unexplored whether an outside body could perform adequate oversight on how many people need clearance and which CIA documents need to be classified. Brookner doesn't necessarily dispute the need for certain procedural safeguards in litigation involving the CIA. Instead, she highlights the potential for abuse of those safeguards when they are solely in the hands of the CIA itself.

Brookner also has some possible judicial remedies, and some seem to make good sense. Others however pull too far for the little guys, especially taking *res ipsa loquitur* to a place it was never meant to go. *Res ipsa loquitur* applies in situations where there is a clear injury, but the plaintiff faces nearly impossible obstacles in determining who or what within a specific set of possibilities caused the injury. This was the situation in the shooting accident in *Summers v. Tice*,

which is discussed by Brookner, where two hunters fired simultaneously but only one struck the plaintiff. In the circumstances covered by Brookner, whether any injury occurred is still at issue—and in fact is often the key question in the litigation. Shifting the burden of proof in this situation would be an improper application of *res ipsa loquitur*.

Piercing the Veil of Secrecy is a good warning sign for all current and potential intelligence employees, helping them understand the tradeoffs of the career path. While some sacrifices are readily apparent, most of the ones addressed by Brookner would normally go unnoticed until a problem occurred. Brookner's work would also be a helpful guide to attorneys looking for new avenues to explore in litigation against the intelligence community, although the statutory progression will probably be elementary to experienced employment litigators. Attorneys looking to expand into the area of employment litigation against the intelligence community would find the book useful, but are unlikely to do so. Despite the underdog litigant role, there's no massive punitive damage award at the end for this Erin Brockovich; the CIA is exempt from punitive damages.

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2004. Under the Resolution, states are forbidden to "provid[e] any form of support to non-State actors" seeking to acquire WMD or related materials, and required to develop laws and practices that prohibit acquisitions of such items by non-state actors. The Resolution also "calls upon" all states to cooperate to prevent illegal proliferation "in accordance with their national legal authorities and legislation and consistent with international law." There were concerns among some observers, even some Security Council members, that the changes affected in international law were more suited for a treaty than a resolution. "There is a strong impression that by arrogating to itself wider powers of legislation, the Council departs from its Charter-based mandate, which is essentially the maintenance of international peace and security," read an op-ed in India's *The Hindu* newspaper.

John Bolton, Under Secretary for Arms Control and International Security, the lead figure in US diplomacy behind the PSI, has expressed reservations about pushing for a Security Council resolution or a treaty to resolve legal gaps, at times expressing a preference to change customary international law by changing state practice. Bolton has been skeptical of international agreements—he has argued that treaties and the UN Charter are "simply political obligations" in their international operation. But he has achieved some hard-fought diplomatic successes during the Bush administration, particularly on PSI and in negotiating agreements for other countries to turn US service members

over to the US should the International Criminal Court try to assert jurisdiction over them.

Criticisms of PSI

The provisions of Resolution 1540 do not alter the fact that there is no law preventing countries that are not parties to the Nuclear Nonproliferation Treaty such as North Korea from shipping nuclear-related material to each other. Even today, if the *So San* flew no flag, "there is no provision under international law prohibiting" the shipment and sales of WMD-related materials.

Some observers have advocated a UN Security Council resolution banning such proliferation and authorizing states to stop and search any ship suspected of carrying weapons of mass destruction. Others have argued that PSI is a partial response to the problem of WMD proliferation. Mohamed Elbaradei, Director General of the International Atomic Energy Agency, said that interdiction of shipments is a "late stage" of WMD programs, and that other areas such as "control of highly enriched uranium and plutonium" are also important.

Conclusion

The PSI presents a challenge to international lawyers interested in efforts to combat the spread of weapons of mass destruction and delivery materials. PSI's precise fit within the framework of international law and organizations remains unclear. Still, the PSI has been a diplomatic and operational success in its first year, with many countries signing on and some shipments intercepted.

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Counsel to the President Alberto R. Gonzales Discusses Administration Procedures on Unlawful Combatants

EDITORS' NOTE: Judge Gonzales delivered his remarks prior to the Supreme Court's announcement of its decisions in a series of cases challenging the administration's actions in the war on terrorism. In Rasul v. Bush, the Court held 6-3 that foreign nationals captured abroad and held at Guantanamo Bay can challenge the legality of their detention. In Hamdi v. Rumsfeld, a plurality held that executive detention of a United States citizen apprehended on the field of battle as an "enemy combatant" was authorized by Congress, but that due process requires that a citizen be permitted access to a lawyer and to judicial evaluation of the factual basis of the executive's action. The Court did not rule on the merits in Rumsfeld v. Padilla, which challenged the president's authority to indefinitely detain as an enemy combatant a US citizen captured on US soil. Judge Gonzales' remarks, edited slightly for space, are below. See the Committee website (www.abanet.org/natsecurity) for the complete speech. A brief summary of the question-and-answer period is included.

In 1862, President Abraham Lincoln composed a letter to Eliza P. Gurney in which the President considered how God could allow the horrors of the Civil War to occur. In his correspondence, our 16th President wrote:

We must believe He permits it [this war] for some purpose of his own, mysterious and unknown to us; and though with our limited understanding we may not be able to comprehend it, yet we cannot but believe, that he who made the world still governs it.

Lincoln's faith would not permit him to doubt that the specter of American sons killing American sons was providential. Many Americans surely had similar thoughts about God's plan as we watched American Airlines Flight 11, and then United Airlines Flight 175, slam into the Twin Towers of the World Trade Center on the morning of September 11th. On that day, America was subjected to a brutal and treacherous attack by an enemy that had declared war on our society.

Whether consciously or not, we all realized on September 11th that some things would never be the same. We all realized that the country now faced an unprecedented threat that, in ways yet to be known, would alter the way we live our lives and would alter the way the government goes about protecting American lives. Over time, some of the ways September 11th has changed our lives have become routine – such as the longer security screenings we all now build into plans when we are going to the airport. In part because these changes have become routine, and particularly because there have been, thankfully, no subsequent attacks on American soil, some may be tempted to become complacent,

and may no longer be concerned about future acts of terrorism.

But we should make no mistake about it: despite our successes in capturing many al Qaeda leaders, in destroying their base of operations in Afghanistan, and in preventing domestic attacks, the threat posed by al Qaeda is still very real. Al Qaeda is a fluid, adaptable, and resourceful enemy that continues actively to plan attacks both against American interests and our allies abroad and against targets within the United States. As you all know from the period of the heightened threat level that we all experienced around the holidays, we continue to get specific intelligence about planned al Qaeda attacks. We know from their previous practices that members of al Qaeda are very patient, willing to spend years to plan, train for, and then execute an attack. It would be foolish for anyone now to declare that, given two-plus years free from attacks within the U.S., the domestic phase of the conflict with al Qaeda is somehow "over." I can assure you that no one in the Government is complacent about the threat posed by al Qaeda.

In response to this ongoing threat, President Bush, like other Presidents during times of war, has taken strong, sometimes difficult, action to protect American lives and preserve the long-term survival of this country.

A few people – probably some in this audience – are uncomfortable with the balance struck by this Administration between protecting our country and preserving our freedoms. They are uneasy with the idea of applying the law of war to the enemy combatants waging war against this country, including enemy combatants who are American citizens. Citing the necessity of protecting our reputation in the international community, our critics insist that these combatants should receive the benefit of the rules and procedures of our criminal justice system, those tried and true methods that we use to deal with criminals such as car thieves and drug dealers. They demand that our judges – even though untrained in executing war plans – have a substantive role in the war decisions of the Commander-in-Chief.

In spite of the massive and horrific loss of life on September 11th, the skeptics assert it is obvious that America is not at war, much less engaged in warfare on American soil. In their view, it is obvious that every American citizen – even a citizen who, as a member of a terrorist group, wages war against our sons and daughters – is entitled to be dealt with solely according to the rules and presumptions of the criminal justice system, including the right to counsel, the right to

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ABA Resolution Sponsored by SCOLANS Passes

At the ABA Midyear Meeting, the Standing Committee sponsored a resolution on universal jurisdiction of war crimes. The resolution passed by a wide margin. The Standing Committee attained the co-sponsorship of the Section of Individual Rights and Responsibilities, the Section of International Law and Practice, the Center for Human Rights, the Criminal Justice Section, the Bar Association of Metropolitan St. Louis, the Standing Committee on Armed Forces Law, the Government and Public Sector Lawyers Division, and the Judge Advocates Division.

The Committee decided to act when Belgian activists claimed the right to force a war crimes investigation of Gen. Tommy Franks and others in Belgian courts. The Belgian law on which they relied was grounded in universal jurisdiction. The law had encouraged numerous politically motivated lawsuits against US officials for the bombing of Serbia and actions during the first Gulf War.

The Committee-sponsored resolution sought to impose some discipline on excessive and unnecessary invocations of universal jurisdiction. It recognized that universal criminal jurisdiction is an "important tool in the worldwide effort to strengthen the rule of law," while stressing that "since the United States has adequate procedures to investigate and prosecute" crimes, other nations should refrain from prosecuting US citizens or nationals on the basis of universal jurisdiction.

In the summer of 2003, Suzanne Spaulding introduced an early version of this resolution at the national ABA meeting. The House of Delegates voted to table the resolution. This February, Stewart Baker spoke on behalf of the resolution as passed. By winning ABA support for a useful implementation of universal jurisdiction, the Committee was able to help advance the cause of the rule of law and help protect American citizens, including servicemen and women, from the possibility of politicized prosecutions.

Save the date... November 18–19, 2004.

Fourteenth Annual Review Conference

The popular Annual Review of the Field of National Security Law, cosponsored by the Standing Committee on Law and National Security, the Center for National Security Law at the University of Virginia School of Law and the Center on Law, Ethics and National Security at Duke University School of Law will be held on November 18 and 19, 2004 at the Crystal City Marriott Hotel, 1999 Jefferson Davis Highway in Arlington, VA. Special panel topics will include the survey of developments in national security law by the Executive and

Legislative Branches as well as two days of discussion with senior analysts and government officials on timely national security law topics. Watch your mail and the Committee's website (www.abanet.org/natsecurity) for conference updates and registration information. Please make your hotel reservation NOW. The Marriott has set aside a block of rooms at the ABA rate of \$150 single/double but they will only hold them until October 27. Telephone the Marriott directly at 1-800-228-9290 to make your reservation.

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remain silent, and the general right to judicial supervision of their detention. It is obvious, they say, that foreign fighters, captured overseas and detained by our military outside the United States, have a right to challenge, in our civilian courts, the scope and terms of their detention.

Respectfully, these propositions are not at all obvious as a matter of law; to the contrary, they lack any valid foundation in domestic or international law. The Administration's detractors fundamentally misunderstand the nature of the threat this country is facing. America confronts a lethal but unfamiliar enemy, sometimes hidden here in our neighborhoods, waiting to hurt innocent people. Our enemies are not constrained by civilian authority or by any government. Nor are they inhibited by ordinary human concerns for their own safety or lives. Some are fanatics who believe their greatest power can lie precisely in their disregard for human life and their willingness to resort to indiscriminate violence, as we witness nearly every day in bombings and shootings around the world. They do not love liberty, they do not respect law, they do not cherish life.

Certain propositions are, in my view, clear. First, the brutal attacks of September 11th – which killed nearly three thousand people from more than ninety countries – were not only crimes, but acts of war. Since at least that day, the United States has been at war with al Qaeda. While al Qaeda may not be the traditional armed force of a single nation state, al Qaeda is clearly a foreign enemy force. It has central direction, training, and financing and has members in dozens of countries around the world who are committed to taking up arms against us. It has political goals in mind. Al Qaeda has attacked not only one of our largest cities, killing thousands of civilians, but also has attacked our embassies, our warships, and our government buildings. While different in some respects from traditional conflicts with nation states, our conflict with al Qaeda is clearly a war.

As a practical matter, this state of war is not in dispute – not by the United Nations Security Council, which passed a resolution in response to the September 11th attacks recognizing the right of states to act in self-defense; not by members of NATO, or the Rio or ANZUS treaties, all of which unanimously invoked their treaty clauses regarding collective defense from armed attack; and not by the United States Congress, which acted to support the President's use of all necessary and appropriate military force against al Qaeda.

Second, the President is determined to win this war and has directed that all instruments of national power be directed at this new type of enemy. Because the threat is not only against our military abroad, but also against civilians here, the Department of Justice and the Department of Homeland Security share responsibility with the Department of Defense for the successful prosecution of this war. To suggest that an al Qaeda member must be tried in a civilian court because he happens to be an American citizen – or to suggest that hundreds of individuals captured in battle in Afghanistan should be extradited, given lawyers, and tried in civilian

courts – is to apply the wrong legal paradigm. The law applicable in this context is the law of war – those conventions and customs that govern armed conflicts.

Under these rules, captured enemy combatants, whether soldiers or saboteurs, may be detained for the duration of hostilities. They need not be “guilty” of anything; they are detained simply by virtue of their status as enemy combatants in war. This detention is not an act of punishment but one of security and military necessity. It serves the important purpose of preventing enemy combatants from continuing their attacks. Thus, the terminology that many in the press use to describe the situation of these combatants is routinely filled with misplaced concepts. To state repeatedly that detainees are being “held without charge” mistakenly assumes that charges are somehow necessary or appropriate. But nothing in the law of war has ever required a country to charge enemy combatants with crimes, provide them access to counsel, or allow them to challenge their detention in court – and states in prior wars have generally not done so. It is understandable, perhaps, that some people, especially lawyers, should want to afford the many due process protections that we have grown accustomed to in our criminal justice system to the individuals captured in our conflict with al Qaeda. It has been many years, fortunately, since the United States has been in a conflict that spans the globe, where enemy combatants have been captured attempting to attack our homeland. But the fact that we have not had occasion to apply the well-established laws of war does not mean that they should be discarded. The United States must use every tool and weapon – including the advantages presented by the laws of war – to win the war against al Qaeda.

Within this framework, today I would like to discuss what some may consider the most controversial of the President's actions, namely the detention of American citizens as enemy combatants, wherever those persons may have been seized, and more specifically the determination that a person – particularly an American citizen – captured in the United States is an enemy combatant. As you know, we have detained two American citizens as enemy combatants.

The first, Yaser Hamdi, is a Saudi national who was a part of a Taliban military unit that surrendered to Northern Alliance forces in a battle near Konduz, Afghanistan in late 2001. He was armed with an AK-47 assault rifle when he surrendered. He has admitted that he went to Afghanistan to train with and fight for the Taliban. Following his capture, a U.S. military screening team confirmed that Hamdi indeed met the criteria for enemy combatants over whom the U.S. forces were taking control. Afterwards, military authorities learned of records indicating that Hamdi, although a Saudi national, had been born in Louisiana. He was transferred to a naval brig in the United States where he remains detained.

The second, Jose Padilla, also an American citizen, was among those who sought to bring terror to our soil. Padilla has served time in the U.S. for murder and for a handgun charge. In 1998, following his release from prison, he moved

to Egypt, where he took the name Abdullah Al Muhajir. In 2001 and 2002, Al Muhajir, or Padilla, met with al Qaeda officials and senior operatives, and proposed to conduct terrorist operations within the United States – including a plan to detonate a dirty bomb – as well as the detonation of explosive devices in hotel rooms and gas stations. Padilla received training from al Qaeda operatives, and was directed by al Qaeda members to return to the United States to explore and advance plans for further attacks against the United States. Multiple intelligence sources separately confirmed Padilla's involvement in planning terrorist attacks by al Qaeda against United States citizens and interests. Like Hamdi, Padilla has been detained in a naval brig in the United States.

The President's legal authority to detain American citizens as enemy combatants is, in my view, clear. The practice of capturing and detaining those engaged in hostilities is as old as war itself, and is ingrained in this Nation's military history. The detention of enemy combatants serves two vital objectives in the global war on terror: preventing killers from rejoining the enemy and continuing to fight, and enabling the collection of intelligence about the enemy. The Supreme Court's 1942 decision in *Ex parte Quirin* acknowledged that the President's war powers include the authority to capture and detain enemy combatants at least for the duration of a conflict, an authority that was well-settled by the time of that decision. More to the point with respect to Hamdi and Padilla, the Supreme Court has made clear that this power extends to enemy combatants who are United States citizens. As the Court observed in *Quirin*, in which one of the detained Nazi saboteurs was a United States citizen: "citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful."

The course of action that we have taken with respect to Mr. Hamdi and Mr. Padilla – and the arguments that we have made in defending those actions in the courts – draw upon these well-established precedents. The Executive's determination that an individual is an enemy combatant is a quintessentially military judgment – indeed, deciding who is the enemy is in many senses the fundamental, threshold decision that the Commander-in-Chief makes, the decision from which all other military decisions flow. Accordingly, the traditional deference owed by courts to military judgments is at its broadest with respect to the President's determination that an individual is an enemy combatant. While courts may review (by habeas corpus) the Executive's determination that an American citizen (whether captured abroad or on U.S. soil) is an enemy combatant, that review must be deferential. Specifically, in view of the great deference owed to the President's enemy combatant determinations and the serious separation-of-powers concerns that would attend any searching judicial inquiry into the factual underpinnings of the President's judgment, a factual review of the President's determination can extend no further than ensuring that it has evidentiary support. That framework focuses exclusively on the factual support presented by the Executive and entails

confirming the existence of some evidence supporting its determination that the individual is an enemy combatant.

The Government's record in the courts on the scope of the President's authority, as you probably know, has been mixed. The Fourth Circuit in *Hamdi* agreed that the President may detain enemy combatants, including American citizens, and further agreed that judicial review should be highly deferential. The Court reasoned that the designation of Hamdi as an enemy combatant bears the closest imaginable connection to the President's constitutional responsibility during the actual conduct of hostilities, and that while judicial review does not disappear during wartime, the review of battlefield capture in overseas conflicts is a highly deferential one.

I would like to turn to something that has not been made a matter of public record. Until today, the Government has been reticent about discussing in any detail the decision-making steps that may result in an American citizen being designated as an enemy combatant or how an American detainee held in the United States may be provided access to counsel.

As a result, while we have set forth our legal authorities clearly in legal briefs, in the debate over the fairness and prudence of the Government's actions in the war on terror, the voice of the Government has remained essentially unheard. Our silence has been largely for reasons of national security. The deliberations that underpin any decision that a person already within the United States is, in reality, an enemy combatant, invariably include extraordinarily sensitive intelligence information that we are loathe to reveal for fear that it may jeopardize the future capture of enemy combatants and future prevention of terrorist attacks. We realize that our relative silence on this issue has come at a cost. Many people have characterized – *mis*-characterized, in our view – our actions in the war on terrorism as inconsistent with the rule of law. Indeed, because of our silence, many critics have assumed the worst. They have assumed that there is little or no analysis – legal or otherwise – behind the decision to detain a particular person as enemy combatant. To them, the decision making process is a black box that raises the specter of arbitrary action.

While some of these criticisms are understandable, they are wrong. With two years of experience, we now believe that our concerns for national security can be accommodated with a greater public disclosure of the steps we have taken behind the public actions you already know about. And so today, we will begin to take a more active role in the debate about the fairness of our acts of detention of U.S. citizen enemy combatants. This discussion builds on Secretary Rumsfeld's speech eleven days ago in Miami, where he revealed the review mechanisms that had long been in place with respect to detentions of non-U.S. citizen enemy combatants being held at Guantanamo Bay, Cuba. Today I am going to explain the decision-making that led to our enemy combatant determinations with respect to U.S. citizens.

Yaser Hamdi, in my view, presents a relatively easy case. Hamdi was seized in a combat zone in Afghanistan. He was armed with an AK-47 when his Taliban unit surrendered to Northern Alliance forces. The Northern Alliance subsequently made him available for an interview by U.S. military personnel. A U.S. military screening team confirmed that Hamdi met the criteria for enemy combatants over whom the United States was taking control, and Hamdi was transferred to U.S. control. In such a situation in a foreign zone of combat, that determination was quite properly made by military personnel on the ground. These facts and other details relating to the circumstances of Hamdi's case were memorialized in a declaration, the so-called Mobbs declaration, which was made available for review by the courts in connection with Hamdi's habeas petition.

As for enemy combatants who are American citizens and are captured here in the U.S., as a matter of prudence and policy the decision-making steps we have employed have been far more elaborate. They have included a thoughtful, deliberate and thorough analysis of the relevant facts and law at many levels of the Executive branch. In the one case in which the President has exercised his authority as Commander-in-Chief to detain a U.S. citizen in the United States as an enemy combatant, we have employed a thorough – indeed, painstaking – mechanism to ensure multiple layers of scrutiny before even proposing any action to the President.

What follows is a general description of the mechanism that was employed before the President exercised this presidential power. I should caution, however, that there is no rigid process for making such determinations – and certainly no particular mechanism required by law. Rather, these are the steps that we have taken in our discretion to ensure a thoroughly vetted and reasoned exercise of presidential power.

In any case where it appears that a U.S. citizen captured within the United States may be an al Qaeda operative and thus may qualify as an enemy combatant, information on the individual is developed and numerous options are considered by the various relevant agencies (the Department of Defense, CIA and DOJ), including the potential for a criminal prosecution, detention as a material witness, and detention as an enemy combatant. Options often are narrowed by the type of information available, and the best course of action in a given case may be influenced by numerous factors including the assessment of the individual's threat potential and value as a possible intelligence source. This explains why persons captured in the U.S. may be processed differently depending on the totality of the circumstances the particular case presents.

For example, we could have abundant information indicating that the individual has committed a crime – such as material support for terrorism – but the information may come solely from an extremely sensitive and valuable intelligence source. To use that information in a criminal prosecution would mean compromising that intelligence source and potentially putting more American lives at risk. Those are the sort of

considerations that have to be weighed in deciding how we proceed against a particular individual in any given case.

When it appears that criminal prosecution and detention as a material witness are, on balance, less-than-ideal options as long-term solutions to the situation, we may initiate some type of informal process to present to the appropriate decision makers the question whether an individual might qualify for designation as an enemy combatant. But even this work is not actually commenced unless the Office of Legal Counsel at the Department of Justice has tentatively advised, based on oral briefings, that the individual meets the legal standard for enemy combatant status. That standard was articulated by the Supreme Court in *Quirin*, where the Court made clear that, at a minimum, "citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance, and direction enter this country bent on hostile acts are enemy belligerents within the meaning of . . . the law of war," and thus may be detained. The important factor, therefore, is that the person has become a member or associated himself with hostile enemy forces, thereby attaining the status of enemy combatant.

It is worth noting, I think, that on more than one occasion OLC has advised that the facts relating to a certain individual did not support an enemy combatant determination, or were so close to the line as to present a very doubtful case. In those cases the United States did not proceed further in the process of determining whether to designate the persons as enemy combatants, but rather pursued different, legally available options for addressing the threat. In a very real sense, the Executive branch in these cases declined to take a particular action against suspected terrorists because it concluded that the action was not clearly legally supportable.

Once initial assessments indicate that an enemy combatant designation may be the best legally available way to deal with a particular U.S. citizen, we have proceeded to take the following steps to assist the President in making a final decision.

First, the Director of Central Intelligence makes a written assessment of all available CIA intelligence information concerning the individual and transmits a recommendation and request to DoD recommending that the person be taken into custody as an enemy combatant. The Secretary of Defense then makes his own independent evaluation, based upon the information provided by the CIA and other intelligence information developed within DoD. That evaluation is embodied in a written assessment concerning enemy combatant status.

The Secretary's assessment is provided to the Attorney General with a request for the Attorney General's opinion concerning: (1) whether the assessment comports with applicable law; (2) whether the individual may lawfully be taken into custody by the Department of Defense; and (3) whether the Attorney General recommends as a matter of policy that that course be pursued. This ensures that DOJ

can formally provide input on the law-enforcement equities related to the individual. DoD's request to the Attorney General includes the intelligence information from both the CIA and DoD.

In addition to the materials forwarded by DoD, the Attorney General relies on two documents in responding to DoD's request: the first is a memorandum from the Criminal Division setting out all the information available to it from the FBI and other sources concerning the individual; and the second is a formal legal opinion from OLC analyzing whether the individual meets the legal standard to be held as an enemy combatant – the *Quirin* standard I just discussed.

Following his review, the Attorney General forwards a letter with his legal advice and recommendations back to DoD, along with the Criminal Division fact memo and the OLC opinion. The Secretary of Defense then transmits a package of information to the President, recommending that the President designate the individual as an enemy combatant. The package of information recommending the enemy combatant designation includes six items: (i) the written assessment and recommendation of the CIA; (ii) the recommendation and preliminary assessment by the Secretary of Defense; (iii) the DoD intelligence information; (iv) the Attorney General's letter to DoD, including his legal opinion and recommendation; (v) the Criminal Division's fact memo; and (vi) the OLC opinion.

Lawyers at the White House review the DoD package and recommendation, and the Counsel to the President forwards it to the President along with his written recommendation to the President.

Finally, the President reviews the DoD package and is briefed by his Counsel. If the President concludes that the person is an enemy combatant, the President signs an order to that effect directing the Secretary of Defense to take him into his control. In the case of Padilla, the President concluded that Padilla "is, and at the time he entered the United States in May 2002 was, an enemy combatant." The President also determined that he "possesses intelligence, including intelligence about personnel and activities of al Qaeda that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda."

As you can see executive branch decision making is not haphazard, but elaborate and careful. And although these specific steps are not required by law, we have followed them in our discretion, in order to make sure that – in this context as in all others – the President's Commander-in-Chief authority is exercised in a reasoned and deliberate manner.

In part because of the reluctance that I spoke about earlier to articulate our position and procedures, there appears to be some confusion about whether the Government is willing to permit American enemy combatants access to our courts to challenge their detention. The reality, of course, is that they do have such access: the detentions of Hamdi and Padilla have been challenged in the courts and indeed are

slated for review by the Supreme Court this Spring. And, of course, from the outset, those challenges on Hamdi's and Padilla's behalf have been pursued by qualified counsel.

But can there be meaningful access to our courts and a meaningful right to file a habeas challenge without direct access to counsel? To the average American, this may appear to be a legitimate question. But those who question the government's position on access to counsel operate under a fundamental misunderstanding of the legal nature of the detention of virtually all of these terrorists.

It is the position of this Administration that, in the case of citizens who take up arms against America, any interest those individuals might have in obtaining the assistance of counsel for the purpose of preparing a habeas petition must give way to the national security needs of this country to gather intelligence from captured enemy combatants. Although the right to counsel is a fundamental part of our criminal justice system, it is undeniably foreign to the law of war. Imagine the burden on our ability to wage war if those trying to kill our soldiers and civilians were given the opportunity to "lawyer up" when they are captured. Respectfully, those who urge the extension of the right to counsel to these combatants, for the purpose of filing a habeas petition, confuse the context of war with that of the criminal justice system.

When we are at war, debriefing of enemy combatants is a vital source of intelligence. But the stream of intelligence would quickly dry up if the enemy combatant were allowed contact with outsiders during the course of an ongoing debriefing. The result would be the failure to uncover information that could prevent attacks on our military and on American citizens. This is an intolerable cost, and we do not believe it is one required by the Constitution. For these reasons, we have urged that interrogations of captured enemy combatants should be allowed to proceed, as they historically have, uninterrupted by access to counsel.

We have also recognized, however, that in every case we need not maintain the most restrictive conditions on detention that the law of war permits. Constraints imposed on a particular U.S. citizen held as an enemy combatant should be and are constantly re-evaluated as a matter of policy to make sure that the terms and conditions of confinement are necessary to meet the needs of national security.

The Department of Defense employs a deliberate and thorough procedure, as a matter of policy, when making this decision about access to counsel. The stated policy of the Department – which it detailed publicly last December – is to permit any enemy combatant who is a United States citizen and who is being detained by DoD in the United States access to counsel: (1) after DoD has determined that such access will not compromise the national security of the United States; and (2) after DoD has completed intelligence collection from that enemy combatant or after DoD has determined that such access will not interfere with intelligence collection from that enemy combatant.

The policy is initiated when DoD officials in charge of interrogations make an initial determination that intelligence collection is completed or that access to counsel would not interfere with intelligence collection. This determination is made after coordination with the Department of Justice, including the FBI, and the CIA. DoD officials prepare a memo for the Deputy Secretary of Defense seeking authorization for access to counsel. That draft is coordinated within DoD and with officials at the White House, DOJ, and CIA.

Once this coordination is complete, and a consensus reached, the memo is forwarded to the Deputy Secretary of Defense for his consideration. The Deputy Secretary then makes a final decision whether the two prongs of the DoD access to counsel policy are satisfied.

As you can see, the decision to provide counsel is made after careful consideration of national security implications. These decisions are guided by thorough legal analysis at various levels of our government. That is precisely the course we have followed both with Yaser Hamdi and Jose Padilla. When officials at DoD determined that intelligence collection from Hamdi was complete, they announced last December that he would be allowed access to a lawyer, subject to appropriate security restrictions. Hamdi has now met with his lawyer. Earlier this month DoD officials concluded that national security would not be harmed by permitting Padilla to have access to counsel, and he too will be given access to a lawyer. As these decisions show, we have an interest in restricting access to counsel to the extent necessary to advance an important intelligence-gathering interest. When that interest no longer exists, we have no further need to restrict access to counsel and will allow U.S. citizens that access to assist in their challenge to their detention in the courts by means of habeas corpus. We believe strongly that access to counsel needs to occur at an appropriate time. What we will not do is put American lives at risk and jeopardize intelligence-gathering by recognizing a non-existent right for enemy combatants to consult with lawyers.

I am pleased to have had the opportunity this morning to provide you with some more details about the decisionmaking process that we have followed in dealing with enemy combatants who are U.S. citizens. The way in which this Administration has made its decisions, in my judgment, vividly illustrates the President's commitment to wage war on terror aggressively and relentlessly while fully respecting the bounds of the law.

Recent press accounts and editorials have suggested that the Bush Administration – fearing losses in the courts – has revised its approach to dealing with terrorists. As I hope my remarks this morning have made clear, that is not the case. The extensive procedures and safeguards that I have described today are ones that we have followed from the outset in determining whether certain individuals qualify as enemy combatants. All along, the Administration's actions have been uniformly grounded in historical practice and legal precedent and have been based on careful and continuous consideration of the facts and circumstances of

each case. What is new is our willingness to share more information about our procedures, as Secretary Rumsfeld did two weeks ago in Miami and as I am doing today. Our flexibility in this regard has been constrained by the demands of national security. At this point in time, however, we have decided that there are ways that we can share some of this information, and that doing so – as I have today – is both consistent with the demands of national security and in furtherance of our interest in showing the American people that their government is one that respects the law even as it fights aggressively an enemy dedicated to our destruction.

Because ours is a free society, the actions taken by the Administration have been (and will continue to be) challenged in the courts. These are important issues, and courts exist to resolve such disputes. Our independent judiciary will help determine how longstanding practice applies to the first conflict of the 21st Century. It is possible that the courts may disagree with a particular decision or policy; indeed, the Second Circuit has already done so in *Padilla* (although the Supreme Court will now be reviewing that case and providing the final word on the issues presented). I am confident in the legality of the measures the Administration has employed in seeking to defend Americans from our enemies in the war on terror – but in our system the courts will have their say. What cannot be denied, however, is that in protecting the American people from our terrorist enemies, the Administration has carefully examined the Constitution and laws of the United States, as applied in historically analogous situations.

In closing, when I walk into the Oval Office to brief the President, I am always reminded of the awesome responsibility that the President has – and the corresponding duty on all of us who serve him. But the burden of protecting this country and of securing the rights embodied in our Constitution is not ours alone.

Yes, those of us in government have a direct hand in executing power under our Constitution. But American citizens – including members of the bar – also play an important role in protecting and defending the Constitution's precious precepts. The vigilance and work of American citizens in this endeavor arguably is no less patriotic than the actions of our soldiers on the battlefield – both are in defense of our freedoms . . . and both should be respected.

An audience member inquired as to the rationale for prohibiting prisoners access to counsel during interrogations. Judge Gonzales responded that, "I'm not an expert. I can only go by what I've been told by our interrogators in the various agencies. That is they have a specific plan with respect to interrogations. Those plans are carefully structured and any kind of interruptions and any kind of outside influence does make a difference." In response to a question about how many American citizens had been detained as unlawful combatants, Gonzales said that the administration would disclose every such detention, even though in his view there was no legal obligation to do so.