



# NATIONAL SECURITY LAW REPORT

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*Gregory S. McNeal*  
Editor

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## Guantanamo's Second Generation

By Peter Margulies

(Professor of Law, Roger Williams University School of Law)

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The second generation of Guantanamo issues will produce a growing gap between the legal positions taken by detainee advocates and long-term American interests. First generation legal issues often saw an alignment of these elements, as the advocates' commitment to a fair procedural regime enhanced America's international legitimacy, culminating in the Supreme Court's landmark decision in *Boumediene v. Bush*. However, divergence will increase as detainee cases move from systemic questions of judicial review to individual determinations of fact and remedy. The recent controversy about admission to the United States of the Uighurs, who are ethnic Turks seeking independence from China, illustrates the growing gap between detainees' positions and bipartisan conceptions of American sovereignty and security.

The Uighurs came to Guantanamo via a circuitous route. Courts have found that before the Taliban or Al Qaeda gained power in Afghanistan, the Uighurs established a military camp there to train rebels. After the United States intervened in Afghanistan in the wake of September 11, coalition forces took custody of the residents of the Uighur camp, and brought the residents to Guantanamo. The government now concedes that the Uighurs are not "enemy combatants," since they do not wish to engage in violence against the United States. However, returning the Uighurs to China would violate the government's obligations under the Convention Against Torture (CAT), and other countries are reluctant to accept them. Seeking their release from Guantanamo, the Uighurs sought resettlement within the United States. A federal district court granted this request, and the government appealed to the D.C. Circuit, which issued a stay pending resolution of the difficult issues raised.

The plight of the Uighurs is a quintessential second generation Guantanamo problem. The first phase concluded with the Supreme Court's landmark decision in *Boumediene*, holding that the summary procedures authorized by Congress in the Military Commissions Act were not an adequate substitute for habeas corpus. The second phase concerns the appropriate remedy for detainees. Second generation issues will involve difficult choices.

In second generation Guantanamo litigation, detainee advocates make three moves that will increasingly separate their client-based agenda from United States interests. First, detainee advocates conflate adequate procedures in general and the appropriateness of individual remedies. Second, detainee advocates continue to recount a misadventure narrative, which asserts that virtually all detainees at Guantanamo were students, journalists, or relief workers, caught in the wrong place at the wrong time. Third, detainee advocates make a supply-side argument, asserting that repressive policies initiated by the government merely create more terrorists.

None of these arguments recognize the complexities of second generation Guantanamo problems. The misadventure narrative is the most clearly problematic. Ben Wittes establishes in his excellent book, *Law and the Long War*, that reliable evidence ties a significant cohort of detainees to the Taliban or Al Qaeda, although it does not support the Bush administration's description of all of the detainees as "the worst of the worst." As is usual in life and law, the truth lies somewhere in between. For its part, the supply-side narrative is increasingly irrelevant. While the supply-side narrative resonated in first generation conflicts about systemic fairness, it has limited relevance in second generation disputes that turn on the facts of individual cases.

The Uighur advocates' conflation of systemic procedures and individual remedies presents the most serious mismatch with second generation Guantanamo issues. In pressing for the Uighurs' admission to the United States, their advocates have ignored an element that is central to both the supply-side narrative and to the foundations of American immigration law: reciprocity. Federal law prohibits travel abroad for purposes of planning violence. Other sovereign states have a legitimate interest in deterring their nationals from engaging in similar conduct. United States immigration law acknowledges this reciprocity, providing that aliens belonging to a group that has prepared or planned an armed attack for political purposes have engaged in terrorist activity and

are therefore inadmissible. By ordering the Uighurs' admission even after finding they had established a military camp in Afghanistan, the district court undermined the reciprocity principle. The district court's order therefore lacked the "circumspection" that the Supreme Court recently required in *Munaf v. Geren* regarding matters "inevitably entangled in the conduct of our international relations."

The case law suggests that foreign relations imperatives will shape the relief available in second generation detainee cases. In *Munaf*, the Court held that the reciprocity principle imposed limits on the relief available in an individual habeas proceeding. It accordingly declined to enjoin the transfer of an American citizen to Iraqi custody to permit the prosecution of the petitioner for alleged crimes committed in Iraq. The *Munaf* Court's view of habeas as requiring prudence in the selection of remedies dovetails with Justice Kennedy's outlook in *Boumediene*. While Kennedy's wise opinion noted that Congress cannot categorically bar courts from ordering the release of detainees, he also cautioned that release "need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted." The Court also ruled in *Zadvydas v. Davis* that national security interests trump the government's obligation to release a detained alien whom the government cannot remove to another country within six months. The reciprocity principle fits within the exception that the *Zadvydas* Court crafted to eradicate any "unprotected spot in the Nation's armor."

Closing gaps in armor is particularly appropriate here, because requiring admission of the Uighurs would impair the United States' ability to neutralize threats to its armed forces in future conflicts. The Uighurs, as the District Court concedes, engaged in training at military camps in Afghanistan with at least the tacit approval of the Taliban government. Coalition forces that deposed the Taliban could not have permitted the camp to continue to function. However, then and now, the CAT would have prohibited repatriation to China. The logic of the Uighurs' legal position would thus have required resettlement to the United States at the moment of detention in Afghanistan. This prospect would have forced coalition forces to permit the Uighurs to remain at liberty when those forces were unsure of the Uighurs' intentions and knew only that the Uighurs had manned an armed camp. While the logic of advocates' arguments would force this choice on United States forces in a theater of war, judicial approval of such arguments would not serve American interests.

Second generation Guantanamo problems will test courts and advocates alike. Detainee advocates will have to move beyond the platitudes of the misadventure and supply-side arguments and grapple with the sometimes messy facts of individual cases. The government will have to acknowledge the hyperbole of its prior positions, and pivot to aggressive diplomacy to secure third countries that will accept detainees like the Uighurs, while substantially upgrading conditions of confinement. The courts will have to referee these contests, preserving fair procedures while respecting the political branches' approach to the reciprocity principle that underlies America's national security and foreign relations.

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## **BARBARA OLSHANSKY RESPONDS**

By categorizing Guantanamo issues into the first generation issue of a "commitment to a fair procedural regime" and the second generation issue of determining individual remedies, Professor Margulies' essay neatly sidesteps the tough assessment that this country must make regarding the genesis of the "Guantanamo problem" and the legal and moral consequences that continue to flow from our Executive's stubborn attachment to its vision of a prison where no law applies. Unfortunately, there is simply no escaping the need for the nation's critical self-examination.

The problem the courts now face—as starkly revealed in the recent Court of Appeals argument in *Kiyemba v. Bush* (08-5424), regarding the fate of 17 Chinese Muslim (Uighur) detainees who cannot return to China—when confronted with the dilemma of what to do with detainees whom the Defense Department is willing to release to freedom (forgetting for now the military's convoluted nomenclature designed to avoid the fact that it mistakenly seized innocent people) is not one that can be divorced from the historical truth of our nation's very public and determined rejection of the rule of law.

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In early 2002, Americans saw photos of hooded and shackled men in bright orange jumpsuits kneeling, before a wire mesh fence, about to be placed in Camp X-Ray in Guantanamo. Some men had been picked up on or near the battlefields of Afghanistan; others were rendered to or picked up by U.S. forces from places far from any battlefield—Bosnia, Zambia, and The Gambia—torn from their families, careers, and communities. It was not long after Camp X-Ray first began holding U.S. “war on terror” detainees that the Administration announced that the protections of the laws of war—the Uniform Code of Military Justice and the Geneva Conventions—did not apply to the prisoners being held at Guantanamo. There can be no doubt that the Executive’s decision to disregard not only the Code and the Conventions but also the constitutional limitations on the use of executive power contributed to erasure of the boundaries of lawful and humane conduct.

Both present and former prisoners have made consistent allegations of systematic prisoner abuse at the hands of U.S. military personnel in Guantanamo, allegations which have now been corroborated by public, unclassified sources, including government documents. The Government has tried to dismiss prisoner accounts of mistreatment by claiming that they are hardened terrorists, trained to allege torture as part of their indoctrination by Al Qaeda, but these claims have been belied by the continually mounting evidence. Many in the military have voiced their strong opposition to the policy decisions that have resulted in prisoner abuse. In the words of Maj. Gen. Jack L. Rives, Deputy Judge Advocate General for the Air Force, “[T]he use of the more extreme interrogation techniques simply is not how the U.S. armed forces have operated in recent history. We have taken the legal and moral ‘high-road’ in the conduct of our military operations regardless of how others may operate.”

Mistreating persons we apprehended in the “war on terror” and denying them any avenue to seek their release from detention represents a radical departure from the standards that have guided U.S. military operations for decades. Such actions place U.S. service members and civilians detained by enemy forces at greater risk of mistreatment in future armed conflicts and sends a terrible message to the world that the Geneva Conventions are not binding law, but rather merely policies that can be changed according to each successive government’s whim. The idea that the fundamental human rights principles embodied in the Geneva Conventions can be cavalierly disregarded will have a profound impact on future armed conflicts and all people affected by them, including Americans.

So now the seeds of our immoral policies sown over the last seven years have begun to bear some very bitter fruit. We must now face the fact that our federal courts cannot—and will not—accept evidence tainted by torture even when it is proffered by the Government. This means that we may have sabotaged our own efforts to prosecute individuals who may have violated the laws of war or perhaps even engaged in terrorist acts, but that is the price we must pay to reclaim our true moral heritage and redeem ourselves in the world’s eyes. And in this we simply have no choice: we are either the nation we have all believed we are—the one founded upon and dedicated to justice, fairness, and equality—or we are the nation the world has begun to fear and hate—the renegade state operating outside of the rule of law indifferent to men’s dignity and detached from our own humanity.

What is the answer to the problem of Guantanamo? It is not complicated and it will not cause the undoing of our military, though it may be difficult. We must create an interagency task force to review detainee files and determine who should be charged and tried and who should be released. This task force will be forced to deal with the issue of the detainees whom the Government claims are “too dangerous to be released” but cannot be tried, and it will have to decide between trial and release. There is no other option after holding these men unlawfully for so many years and under such inhumane conditions. The detainees who will not be tried and can be safely returned home should be repatriated as quickly as possible. And for those who cannot go home, like the Uighurs, we must find them a home. It is true that there is a reciprocity principle at play here, but it is not the one Professor Margulies suggests. There should be no doubt that we will have to accept some of these men into our own country before any other nation will agree to help resettle any of our former detainees. It is time to call ourselves to account and remind our leaders and the world that the nation we have always believed we were has not vanished for good.

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## Why Are We Trying to Solve the “Problem of Guantanamo?”

By Barbara Olshansky

*(Leah Kaplan Visiting Professor of Human Rights, Stanford Law School)*

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In focusing mostly on the problems of whether or how to close the “war on terror” detention operation at the U.S. Naval Base in Guantanamo Bay, Cuba, we risk missing a critical, and likely historical, opportunity to address the deep structural issues threatening our country’s system of checks and balances and the moral and political crises spilling out of the fissures in the constitutional foundation of the Republic.

The Bush Administration’s silent adoption of Richard Cheney’s 20-year old concept of a “unitary executive” who has the power to reject judicial and congressional oversight merely by donning the mantle of national security, has unfortunately led us precisely to the political address shunned by the framers of the Constitution—a place where the executive can wield all of the nation’s forces in ways that undermine the most fundamental rules of domestic and international law without the slightest concern about ever being held to account.

What does this structural imbalance look like to us—the *People*—on the ground? We have seen almost the entire picture even if we try to avoid speaking about it. The hallmarks of a lopsided government in which no two branches can operate as co-equal safeguards against another’s arrogation of power are by now as familiar as they are deeply concerning. We can all bear witness to:

- (a) excessive secrecy regarding the policies and activities of the executive branch;
- (b) the concentration of legislative, judicial, and executive power in the executive branch;
- (c) the authorization of a policy of unlawful seizure and detention of immigrants and foreign visitors to the U.S. by means of a nationwide dragnet carried out under the pretext of non-criminal immigration violations;
- (d) the rejection and undermining of the Geneva Conventions as a system of constraints on State actions during international and internal armed conflicts;
- (e) the use of the executive’s “war powers” to seize people from countries all over the world and hold them indefinitely, without charge or trial, for purposes of interrogation and preventive detention;
- (f) the creation of a satellite system of detention facilities designed to hold “war on terror” detainees out of the purview of the judiciary and Congress and to operate as black holes in which no laws apply;
- (g) the fabrication of a category of “war on terror” possible offenders (“enemy combatants”) that does not exist in international law and has been reinterpreted continually by the executive so as to be able to apply the “status” to individuals encountered in a broad range of varying circumstances; and
- (h) the top-down permission for military, intelligence, and law enforcement personnel to use torture and other abusive measures as part of our interrogation and detention practices.

Why recite this litany of moral and political failures now? Because we have finally seen the indisputable evidence revealing each piece of the picture, because we have had enough of the disgrace and dishonor these policies and practices have brought to our doorstep, because what we have witnessed is not what we (or the Framers) ever meant America to be, and because we have the chance, right now, to return to our core values, to reclaim our place in the world community of nations, and to ensure that future generations need not look back with shame upon this chapter in our history.

How does all of this relate to discussions about the closure of Guantanamo? While we know that the world views Guantanamo—like Abu Ghraib—as a symbol of the excesses committed during the executive’s prosecution of the “war on terror”, we know also that it is only one of many detention facilities selected to hide the executive’s unlawful and horrific treatment of people from the rest of the world and from us, the *People*. And we know that many thousands of people remain imprisoned in these facilities without charge or access to a fair tribunal, that many of these prisoners have been badly mistreated, and that the world is watching.

So what do we do now? There are many things that we need to do, and we need to start now. First, we need to lift the dark cloak that has enveloped the actions of executive branch officers. The use of excessive secrecy—through the assertion of “Executive privilege,” the issuance of secret executive orders, the blocking of Congressional investigations or the circulation of internal policy memoranda—impedes the public’s ability to find out about government’s activities and correspondingly reduces the accountability of government officials. Without information, the public cannot make an informed assessment of whether the government is acting within constitutional constraints or in conformity with our country’s democratic ideals. Furthermore, secrecy not only suppresses the core First Amendment values of creating an informed polity, it shifts power to the executive branch to release information selectively in order to promote a particular political agenda, and squelches the public’s ability to participate in the act of governing itself. The Constitution invests in Congress the authority to investigate, review, and monitor federal agencies’ policies and activities. During this administration, however, Congress has rarely invoked these powers. And when it has, it has been met with unrepentant stonewalling. When the ranking members of eight House committees wrote to President Bush in 2004 to advise him of their intention to investigate the prison abuses at Abu Ghraib and other “war on terror” detention facilities and to request documents needed to begin their investigation, they received no response whatsoever.

Second, we must push our representatives to unravel legislative and executive policies that undermine international humanitarian and human rights treaties. The executive must repudiate the incorrect and dangerous analysis that deprived every person fighting in Afghanistan of his Geneva Convention protections during our war with the Taliban regime and now deprives all those fighting against U.S. and coalition forces now—after the end of the international armed conflict—with the human rights treaties’ protection that apply under the present circumstances. The executive must also reaffirm our commitment to compliance with extradition treaties, publicly reject and dismantle the CIA’s extraordinary rendition program, and disavow the use of diplomatic assurances to justify rendition or circumvent the prohibition against returning people to places where they would be at risk of torture, other ill-treatment or detention without charge or trial. Congress must be pushed to repeal, among others, those provisions of the Military Commissions Act of 2006 that deprive everyone held by the executive the privilege of the writ of habeas corpus and the right to challenge the conditions of their detention, including torture. It must also amend the War Crimes Act to remove the recently added language creating a gigantic shield of immunity protecting from criminal prosecution officials who have committed grave breaches of the Geneva Conventions and war crimes, and adopt a humane detention law that: ensures that interrogations are carried out in accordance with applicable international standards; ends the practices of incommunicado and secret detention; ensures that all detainees are brought before a judicial authority within 48 hours of entry into custody; requires the holding of detainees only in officially recognized places of detention with access to family, legal counsel, and the courts; ensures that the officials responsible for disappearances are brought to justice and that victims and their families receive rehabilitation services, restitution, and compensation; and ensures that all detainee identifying information is promptly supplied to the ICRC and family members.

Third, we must demand that both the legislative and the executive branches collaborate in an effort that end for all time the system that tolerates torture, abuse, and indefinite detention without due process that has been put into place over many years. The new law must require a prompt, thorough, and independent investigation into all allegations of torture or abuse of individuals in U.S. custody regardless of where in the world the misconduct occurred. The law should create an independent oversight body to investigate complaints of torture and abuse and monitor the conditions and treatment in all U.S. jails, prisons, and detention centers. And finally, there must be an effective legal scheme and enforcement agency in place to hold all individuals, including government officials, members of the armed forces, intelligence personnel, police, prison guards, medical personnel, and private government contractors who authorized, condoned, or committed torture or cruel, inhuman or degrading treatment.

You see, we didn’t just put nearly 800 men in Guantanamo during the last seven years, we shredded the system of international protections—many of which our country fought hard to put into place—and domestic protections that were intended to ensure that the abuses of World War II and those occurring during more recent conflicts (with regard to the most recent additions to body of humanitarian and human rights treaties) do not happen again. In the not too distant past, our country stood for our belief that we must all stay on the road of progress

until every state fulfills its commitment to honor human dignity. We can bring ourselves back to those fundamental beliefs. The Justices of the Supreme Court have been helping us find the way through the decisions in *Rasul*, *Hamdi*, *Hamdan*, and *Boumedienne*. But we won't get there by limiting the scope of our vision and dealing solely with concerns about closing Guantanamo.

## **PETER MARGULIES RESPONDS**

Barbara Olshansky's piece pinpoints a central second generation Guantanamo issue – the disposition of detainees held in other sites around the world. Bringing this question to the surface, Olshansky provides a powerful critique of the Bush administration's overreaching. However, Olshansky does not fully address the challenges entailed in both the disposition of detainees and the shaping of American policy regarding future terrorist threats.

Policymakers meeting this challenge must distinguish between the danger posed by a detainee and the legality of tactics used in the detainee's interrogation. After a careful review of government records, reporters for the New York Times recently echoed Ben Wittes' observation that many Guantanamo detainees appear to have troubling track records of violence. The government's use of inappropriate tactics to gain some of its information should not automatically trigger the release of these detainees. Release is a problematic option, particularly for detainees from Yemen, whose government has allowed even *convicted* terrorists to escape. For these detainees, the government should focus on building realistic cases with evidence obtained through acceptable means.

Even if a new administration shuts down Guantanamo, the ongoing need to incapacitate suspected terrorists will increase reliance on other locations, such as Afghanistan's Bagram Air Base, and other methods, including rendition. The United States should reject extraordinary rendition performed solely for interrogation purposes. However, countries contending with their own nationals who have joined the ranks of international terrorist groups will still seek United States assistance in the ordinary rendition of terrorism suspects to face criminal charges. While Olshansky urges that the United States reject such pleas for help and rely solely on extradition proceedings, the Clinton administration found that rendition was a key component of a proactive counterterrorism policy. Since prosecutions in destination countries may involve abuse of prisoners, the United States must also press regimes abroad to reform their legal systems.

Looking back requires as much care as looking forward. While Olshansky argues for sweeping civil and criminal liability for Bush administration officials, such measures could chill future officials confronting crises. A bipartisan truth commission focused on transparency, not blame, would better serve American interests. As in all responses to the Bush administration's excesses, the politics of pay-back should bow to the imperative of problem-solving.

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740 15th St., NW

Washington, D.C. 20005-1009

(202) 662-1035 -- FAX: (202) 662-1032

***E-mail:*** [hcmcmahon@staff.abanet.org](mailto:hcmcmahon@staff.abanet.org)

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## **Run for the Border: Laptop Searches and the Fourth Amendment**

**By Nathan A. Sales**

*(Assistant Professor of Law, George Mason University School of Law. Professor Sales previously served at the U.S. Department of Homeland Security and the U.S. Department of Justice.)*

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Should customs officers be able to search your laptop computer at the border the same way they inspect your suitcase? People like Stefan Irving certainly hope not.

On May 27, 1998, Irving flew from Mexico to Dallas-Fort Worth International Airport. Formerly the pediatrician for a New York school district, his license to practice medicine was stripped after a 1983 conviction for sexually abusing seven-year old boy. Irving served his time and was released. Now he was returning home from vacation in Acapulco. Customs officers at Dallas searched his luggage and found children's books and drawings. They also discovered two computer disks. When they examined the disks, they found numerous images of child pornography.

It turns out Irving was in Mexico to visit – these are the words of the court that convicted him – “a guest house that served as a place where men from the United States could have sexual relations with Mexican boys.” Irving “preferred prepubescent boys, under the age of 11.”

Stefan Irving is now back in prison, in part because customs officers were able to search his digital media. He's not the only pedophile to be snared by these kinds of inspections. As of this writing, federal courts have decided twelve cases involving laptop searches at the border, and every single one has involved child pornography.

Examining laptops can also help customs detect potential terrorists who may be trying to cross our borders. A 2006 laptop search at Minneapolis-St. Paul airport revealed video clips of improvised explosive devices – weapons of choice for terrorists in Afghanistan and Iraq – being used to kill soldiers and destroy vehicles, as well as a video on martyrdom. Officers also discovered that the traveler was carrying a manual on how to make IEDs.

We justifiably applaud the incapacitation of terrorists and child predators, but laptop searches can do real harm to ordinary travelers' privacy interests. When told that the government claims the power to rummage through computers, BlackBerrys, and flash drives at the border, many people react with shock, even revulsion. A laptop search seems terribly invasive. The most intimate details of one's life – emails to friends and colleagues, family photographs, financial records, and so on – are paraded in front of the officer at the customs checkpoint. The average traveler may be willing to hand over his suitcase for inspection, but his laptop seems a bridge too far.

While these concerns are legitimate, my sense is that suspicionless laptop searches are generally permissible under the Fourth Amendment. The Supreme Court's border-search doctrine holds that “non-routine” searches (e.g., invasive searches of the body) are off-limits unless officers have a reasonable suspicion of wrongdoing. By contrast, “routine” searches (e.g., searches of property) need not be based on any suspicion whatsoever. Routine searches are constitutional simply by virtue of the fact that they occur at the border.

How does the border-search doctrine apply to laptops? The Supreme Court has never addressed the question, but the consensus among lower courts is that laptop searches count as routine. Officers therefore don't need reasonable suspicion before conducting them. Of those twelve federal-court decisions, eight hold or imply that customs may search laptops at the border with no particularized suspicion at all. Three courts dodged the question. The officers in those cases had reasonable suspicion to search the laptops and the courts therefore found it unnecessary to decide whether suspicionless searches were permissible. Other than a single California district court that was reversed on appeal, no court has held that border officials must have reasonable suspicion before they search a laptop. No court has held that probable cause is needed to conduct a laptop search at the

border. And no court has held that customs must obtain a warrant before examining a laptop.

These rulings are probably right, for a simple reason: technological neutrality. The privacy protections we enjoy at the border shouldn't depend on whether we store our data in digital format or on paper. Customs can inspect mail, address books, and photo albums that are brought into the country with no suspicion at all. Why should the rule change when we keep our correspondence, contacts, and pictures on a laptop? The mere fact of computerization shouldn't make a difference.

In fact, laptop searches have the potential to be *less*, not more, intrusive than traditional border searches of luggage and cargo. The conventional wisdom is that inspections of laptop computers are an especially intrusive kind of search. Yet when border officials inspect a laptop by using keyword searches, automated and impersonal computer processes are responsible for identifying the specific data points that might warrant further investigation. That means human beings don't need to rifle through the laptop's hard drive manually.

Laptop searches thus can be thought of as a digital equivalent of a dog sniff. With dog sniffs, customs needn't open each incoming suitcase to manually inspect it for illegal drugs. Instead, specially trained dogs screen the baggage unopened. Officers then take a closer look at any suitcases as to which the dogs have alerted, signaling the possible presence of narcotics. Because dog sniffs eliminate the need for officers to manually inspect contents that may turn out to be innocuous, they are said to represent less of an affront to travelers' privacy interests than traditional border inspections. The same can be true of laptop searches. Just as dog sniffs help customs detect narcotics without rifling through the entire contents of a suitcase, keyword searches of laptops likewise enable border officials to hunt for tell-tale signs of terrorism and child predation without meandering through massive volumes of sensitive personal data.

While the Fourth Amendment imposes few restrictions on laptop searches, policymakers would do well to adopt some additional safeguards. In particular, the government should formalize the standards it uses to pick travelers for laptop searches. These standards would help provide assurances to people who are asked to undergo laptop inspections that they were selected due to legitimate law-enforcement or intelligence considerations, and not for impermissible reasons like race or religion. Policymakers also adopt guidelines on the amount of time it takes to complete a laptop search. Lengthier searches increase the likelihood that officers who are hunting for contraband will, whether deliberately or by accident, start browsing through entirely innocent computer files. Next, the government should establish rules for retaining information from laptops. If a search uncovers no evidence of crime, customs would be hard pressed to justify keeping any data. Finally, the government should apply special protections to sensitive data like trade secrets and privileged correspondence. Supplemental standards like these would equip the government with the tools it needs, while helping to prevent the privacy interests of law-abiding travelers from becoming collateral damage in the war on terrorism.

[Readers interested in this topic may wish to download a longer version of this essay, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1279683](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1279683)]

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## **MARCIA HOFMANN RESPONDS**

While Professor Sales and I share a great deal of common ground, our main point of disagreement is whether searches of laptops at the border should be considered routine and therefore per se constitutional merely because they occur at the border.

Professor Sales argues that the border search doctrine should be applied in a technology-neutral way so that Fourth Amendment privacy protections are consistent regardless of whether information is stored digitally or in paper format. As I explain in my essay, there is no real-world equivalent to the information collectively stored on a laptop—its sheer volume, sensitivity, duplicability, and central role in day-to-day life make it exceptional. This information has no physical counterpart, so we shouldn't automatically impose the same rules we've developed for physical searches.

The Fourth Amendment protects the right of individuals “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” Recognizing that these basic values do not exist in a vacuum, the Supreme Court has adjusted the scope of the guarantee when emerging technologies make new types of intrusion possible. While the Court once held that the Fourth Amendment didn’t protect telephone conversations, *United States v. Olmstead*, 277 U.S. 438, 466 (1928), the Court has long since abandoned this view, and now says the Fourth Amendment protects such communications even in a public telephone booth. *Katz v. United States*, 389 U.S. 347, 353 (1967). As the Court explained, “[t]o read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.” *Id.* at 352. The Court should similarly recognize the vital role that computers play in our lives today and adjust the border search doctrine accordingly.

I agree with Professor Sales that border agents could potentially use technology to perform laptop searches in a less intrusive manner than physical searches of luggage and cargo. However, if the Fourth Amendment allows the government to search a laptop at the border for no reason whatsoever, nothing in the law requires or gives the government any incentive to take measures voluntarily to protect travelers’ privacy.

Furthermore, while I think technology could potentially make the search of a laptop comparable to a dog sniff, keyword searches are not the way to do it. Dog sniffs aren’t considered Fourth Amendment searches because they detect only the existence or nonexistence of contraband, and not information about lawful activity. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005). It would be very difficult to design or run a keyword search that wouldn’t detect lawful activity, though. For example, I’ve performed a keyword search for “jihad” on the laptop I’m using to write this rebuttal. The search returns more than thirty hits including news articles, government reports, white papers, legal briefs, draft and final work product, and email (legitimate and spam). None of these materials are contraband, but a keyword search would expose them all to government scrutiny.

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## **Laptop Searches and the Fourth Amendment**

**By Marcia Hofmann**

*(Staff Attorney, Electronic Frontier Foundation)*

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Your laptop is small enough to slip into your briefcase, but holds an exhaustive record of your day-to-day existence. It probably contains years of personal and professional correspondence and an address book full of information about colleagues, friends, and family. It likely holds a detailed accounting of your Internet browsing history, as well as writings and reading material reflecting your interests and beliefs. It might also store your tax filings, financial records, medical information, vacation photos, attorney-client privileged information, and trade secrets. In past eras people would have kept most or all of this information in their homes, where it would enjoy the strongest Fourth Amendment protection. According to the courts, however, the government may search the data on your laptop computer for no reason whatsoever when you cross the border.

The Supreme Court may soon determine what level of suspicion, if any, customs officials must have to search laptops at the border. *United States v. Arnold*, 533 F.3d 1003 (9th Cir. 2008), *petition for cert. filed* (Oct. 7, 2008) (No. 08-6708). Because such searches are uniquely capable of intruding upon fundamental rights, the Court should require the government to have some level of suspicion to search electronic devices at the border and to copy and retain information on those devices.

The Fourth Amendment protects people against unreasonable government searches and seizures. While the Fourth Amendment applies at the nation’s borders and demands that searches be reasonable there, the Supreme Court has held that the government may conduct “routine” searches of individuals and their personal effects at the borders with no suspicion whatsoever. *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). On the other hand, the government must have reasonable suspicion to conduct highly invasive border searches. *Id.* at 541 (requiring reasonable suspicion that a traveler is smuggling contraband in her alimentary canal before detaining her at the border).

The Court has declined to decide what level of suspicion is necessary for the government to conduct other types of border searches that substantially intrude upon an individual's dignity and privacy interests. *Montoya de Hernandez*, 473 U.S. at 541 n.4 (expressing no view on how much suspicion is necessary for "nonroutine border searches such as strip, body cavity, or involuntary x-ray searches"). The Court has also left open the possibility that some searches of property at the border might demand some level of suspicion. *United States v. Flores-Montano*, 541 U.S. 149, 155-156 (2004).

In *Arnold*, the Ninth Circuit determined that a laptop, as a piece of property, "simply does not implicate the same dignity and privacy concerns as intrusive searches of the person." 533 F.3d at 1008 (citing *Flores-Montano*, 541 U.S. at 152) (internal quotation marks omitted). In the modern era, however, a search of your laptop can be far more invasive than a physical search. There can be little dispute that individuals have a significant privacy interest in the information on their computers that reflect "their beliefs, their thoughts, their emotions and their sensations," which are precisely the interests that Justice Brandeis sought to protect when he famously described "the right to be let alone." *United States v. Olmstead*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Indeed, even Senator Sam Brownback, generally a proponent of suspicionless searches at the border, admitted during a congressional hearing in June that he wouldn't want a border agent rummaging through his BlackBerry.

Laptops may carry not only sensitive private information, but also material that raises profound First Amendment concerns. Laptops contain vast amounts of expressive material because they are used to think, learn, communicate, and associate with others. Suspicionless border searches give the government free rein to rifle arbitrarily through a person's thoughts, feelings, and communicative activities, potentially revealing confidential information like journalists' notes and sources. Such searches may also chill speech; as the Supreme Court has noted, fear of unauthorized government surveillance may deter dissent and discussion of government activity. *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 314 (1972).

In addition to storing material highly likely to impact fundamental liberty interests, laptops have unique attributes that heighten the potential for intrusive searches. One of these defining features is a computer's vast storage capacity, for which there is no real-world equivalent. The 2008 MacBook Pro hard drive, for example, has as much as 320 GB of storage capacity, which can hold more data than three floors of an academic research library. It is physically impossible for a traveler to carry the same volume of paper files across the border. Indeed, if a traveler crossed the border with a pickup truck filled with paper, the information he carried could be stored electronically in a single gigabyte. *Id.*

Furthermore, laptops contain digital information that may be quickly copied and saved, which blurs the distinction between a search and a seizure. The Department of Homeland Security's Bureau of Customs and Border Protection (CBP) says that it is entitled to "detain documents and electronic devices, or copies thereof, for a reasonable period of time to perform a thorough border search." U.S. Customs and Border Protection, Policy Regarding Border Search of Information (July 16, 2008). When the government copies a traveler's device or data to perform a border search, however, the action should be considered a seizure because it "meaningfully interfere[s]" with a traveler's "possessory interest" in the data. *Arizona v. Hicks*, 480 U.S. 321, 324 (1987); see also Paul Ohm, *The Olmsteadian Seizure Clause: The Fourth Amendment and the Seizure of Intangible Property*, 2008 STANFORD TECH. L. REV. 2, 67.

Finally, advances in search technology make comprehensive review of private information increasingly practicable and commonplace. Microsoft has already developed a small plug-in forensic tool that enables law enforcement to quickly extract evidence on-site from a computer. See Press Release, Microsoft, *Microsoft Calls on Global Public-Private Partnerships to Help in the Fight Against Cybercrime* (Apr. 28, 2008). Just three years ago, the Fourth Circuit dismissed this sort of possibility as "far-fetched" when it upheld suspicionless searches of laptops at the border. *United States v. Ickes*, 393 F.3d 501, 506-07 (4th Cir. 2005). Nevertheless, as Customs officials improve their technical ability to search computers quickly, widespread suspicionless searches of computers at the borders will become easier and more efficient. Any comprehensive review of private data, even one motivated only by a desire to locate known contraband, may still run afoul of the Fourth Amendment; one district court recently held that a hash value analysis that

indexes and compares files on a computer to known child pornography files subjects every file on a computer to government review and constitutes a Fourth Amendment search. *United States v. Crist*, No. 07-211, 2008 WL 4682806, 2008 U.S. Dist. LEXIS 84980, at \*27 (M.D. Pa. Oct. 22, 2008).

In the absence of judicial action to protect laptops from suspicionless border searches, Congress is considering several pieces of legislation that would protect travelers' digital information at the border. As a constitutional matter, however, the Supreme Court should recognize the unique nature of the computer as a window into an individual's life and mind, and require the government to have reasonable suspicion before searching and seizing digital information from any international traveler.

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## NATHAN SALES RESPONDS

I think there's a fair amount of common ground here. Marcia and I agree that laptop searches can be quite intrusive. (Though, as I argued, laptop inspections also have the potential to be less invasive than searches in the analog world, if customs officers limit themselves to basic keyword queries.) We also agree that border searches of expressive materials present thorny problems that may well justify heightened levels of suspicion. (Though the concerns are not limited to laptops. They apply to all expressive materials, whether stored in digital format or on paper.)

But this won't be much of a debate if we keep agreeing with one another. One area where we part company is our understandings of what the law currently provides. As I read the cases, the Supreme Court has drawn a bright line rule: Invasive border searches of the body might require reasonable suspicion, but searches of property do not. And as a type of property, laptops fall on the other side of the line. I don't think *Flores-Montano* hinted that "some searches of property at the border might demand some level of suspicion." What the Court said is that a search might be deemed unreasonable if it's conducted in a "particularly offensive manner" – e.g., if the property is destroyed in the process. But nowhere did *Flores-Montano* suggest that particular types of property are, as a class, entitled to heightened protections.

We also disagree about what the law ought to provide. The fundamental question is whether laptops are sufficiently different from other types of property that they should be exempt from the ordinary rules for routine border searches.

I don't think the *quality* of the data kept on a computer justifies a special carve-out. It's true that laptops can hold "an exhaustive record of your day-to-day existence." But the same can be said of other things you carry across the border – e.g., your calendar, Rolodex, photo album, and so on. Border officials are allowed to inspect these items without any particularized suspicion, and travelers shouldn't enjoy greater privacy protections if they

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store the very same data in digital form.

Nor do I think the *quantity* of data makes a difference. It's not quite right to suggest that "a computer's vast storage capacity" has "no real-world equivalent." Cargo ships contain even greater amounts of material, yet these massive vessels historically have been searched under the same suspicionless standard that governs all other routine border inspections. Size doesn't matter.

I began with our agreements so I may as well end with them. Like Marcia, I'm troubled by the prospect that officers could retain permanent copies of the data they extract in the course of a laptop search. Laptop inspections can blur the line between search and seizure. That's why policymakers should adopt some additional safeguards, like requiring customs to delete the information if investigation reveals no evidence of wrongdoing, and strictly enforcing policies that limit access to the data and punishing those who retrieve it without permission.

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## **International Travel and the Constitution**

**By Jeffrey D. Kahn**

*(Assistant Professor of Law, Southern Methodist University, Dedman School of Law)*

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Imagine yourself waiting in Hong Kong International Airport for the final leg of a long journey home to the United States. You are traveling with your family. Everyone is tired. When you reach the front of a long line at the ticket counter, you are stunned to hear the attendant say: "I'm sorry, but you cannot board this airplane. Your name appears on a United States terrorism watchlist."

Obviously someone, somewhere, has made a mistake. You ask to speak to a supervisor, but she is equally unable to assist you. You present your United States passport, the ticket stubs from your previous flight, even your driver's license. "There is nothing we can do. But we cannot board anyone without pre-clearance, and your name wasn't cleared. Try contacting the embassy." She hands you a slip of paper with a telephone number and a website address on it. As you slip out of line, you feel the nervous stares of other travelers.

A slow sense of dread creeps over you. This is not going to be resolved with a simple phone call. What is this "watchlist"? Who put your name on it? How can it be removed? Can an American citizen really be kept from returning home to the United States? Waiting on hold, your thoughts turn to more immediate concerns. You are thousands of miles from home. Can you stay here? What if your visa expires? When can you travel again? Do you need a lawyer?

This story is not fictional. It is drawn from the experience of an American family (all U.S. citizens) split in half by a "No Fly List" that prevented a father and son from returning home to California. The family members were separated for five months as their attorney fought to reunite them. *See*, Randal C. Archibold, *Wait Ends for Father and Son Exiled by F.B.I. Terror Inquiry*, N.Y. Times, Oct. 2, 2006, at A10.

In an age of globalization, international travel presents a clash of values. Citizens of the United States enjoy a freedom of movement at home and abroad envied the world over. But now more than ever before the mass movement of people can disguise grave dangers to our society. And as the state perceives greater danger, travel abroad finds itself increasingly restricted. Freedom of movement, like so many freedoms, is not absolute. How should it be reconciled with the national security concerns of the state? Which value should give way when the state perceives an individual's itinerary to threaten its foreign policy interests?

Surprisingly, given the importance of free movement to our democratic society, courts have generally found relatively weak protection in the Constitution for this essential liberty. The citizen's right to travel outside the country has always been weighed against (and almost always outweighed by) its predicted effects on America's foreign policy or security interests. As transportation technology shrank America's geographic isola-

tion and the country grew into a world power, the passport (in its present form, essentially an invention of the 20th century) was transformed into a tool to monitor and restrict the foreign travel of its citizens. The Supreme Court upheld such use because a passport holder should not “exploit the sponsorship of his travels by the United States.” *Haig v. Agee*, 453 U.S. 280, 309 (1981). The Court of Appeals for the District of Columbia Circuit put the point more bluntly: “The Secretary [of State] may preclude potential matches from the international tinderbox.” *Briehl v. Dulles*, 248 F.2d 561, 572 (D.C. Cir. 1957), *rev’d on other grounds sub nom. Kent v. Dulles*, 357 U.S. 116 (1958).

At the height of the Cold War, communists were feared just as terrorists are feared today: they were international, ideologically driven enemies, sometimes hidden in plain sight, intent on destroying the American way of life. Americans whose loyalties were questioned or whose political views were disfavored were denied passports and kept at home. Others were allowed to travel, but their itineraries were carefully restricted and monitored, as if the citizen were a prisoner on parole from America for good behavior.

The digital revolution, and with it the creation of micro-technologies, vast databases, and lightning-fast computer networks, made it easier than ever before to track, assess, and control the itineraries of millions of people. Now all travelers require the federal government’s express prior permission to board any aircraft or maritime vessel that will enter or leave the United States. 72 Fed. Reg. 48,320 (Aug. 23, 2007). If a would-be traveler should find that her name appears on one of the many counterterrorism watchlists maintained by the federal government, her travel will come to an abrupt halt wherever she may be, inside or outside of the United States.

In many ways, this highly classified system is worse than the more public and individualized system of passport controls that it replaced. It is a faceless, multi-agency system that shifts to the traveler the burden of justifying her travel. Notwithstanding a Terrorist Screening Center at the FBI with the mission to consolidate terrorism screening, many offices and agencies may access and add to the relevant databases. Error abounds, but is difficult to trace, as the Justice Department’s Inspector General concluded in a 2007 audit. No-Fly lists are (necessarily) designated “sensitive security information” and therefore all aspects of their composition are exempt from notice and comment rulemaking. 49 U.S.C. § 114(1)(2)(A); *Ibrahim v. Dep’t of Homeland Security*, 538 F.3d 1250, 1256 (2008).

I think that the tension between the citizen’s right to travel and the state’s interest in successful foreign policies should be reconciled by contesting the under-examined premise that puts them into conflict in the first place. The premise is that the state has a right to restrict any citizen’s travel when that travel might frustrate the state’s foreign policy objectives. Why should that premise be correct? With few clear exceptions, weighing the citizen’s travel interest against foreign policy interests lacks constitutional legitimacy because it equates the citizen of a democratic republic with the subject of a monarchy or an undemocratic dictatorship. Unlike those civic creatures, the American citizen has no obligation to advance the state’s interests through his actions. The state cannot treat its citizens as if they were “potential matches” that might set alight its foreign policy. So long as the citizen’s actions are not treasonous, immediately dangerous, or contrary to some contractual obligation freely made to the state, a citizen’s travel (like a citizen’s speech) should be free from the state’s interference. Suspected future dangerousness is not good enough.

Unenumerated fundamental rights typically have been found in the guarantee of substantive due process (and the right to enter and exit the country might well be considered “implicit in the concept of ordered liberty”). But I argue that there is an alternative source for this right: the meaning of citizenship established by the text of the Constitution. Whatever “privileges or immunities” the legislature might grant on the basis of citizenship, there is a certain core meaning to the status of citizen that the Citizenship Clause can be read to protect. I argue that foreign travel should be considered a citizen’s fundamental right, protected by the strictest judicial scrutiny. Of course, few rights are truly absolute. *Some* national security reasons *should* occasionally result in curtailment of a citizen’s right to enter and leave the country. But these cases are rare birds that such a high standard of review would appropriately pass.

Of course, too much weight on protecting citizens *qua* citizens would erode the liberty that was promised to “persons” by the Fifth and Fourteenth Amendments. In a world of sovereign nation-states, however, the right to leave and return to one’s country of citizenship, like the right to vote or hold public office, is a right peculiar only to those persons who are citizens. In a democratic republic (as opposed to a monarchy or theocracy or dictatorship), the right of citizens to depart and return cannot be abridged on the grounds that such travel is not in the interest of the state. A democratic republic can rarely be said to have such an interest vis-à-vis its citizens. Grounding the would-be traveler for perceived future dangerousness (at its most extreme, a form of preventive detention) is the essence of a no-fly list. In our democratic republic, this simply is not among the available options.

## Special Section

### Workshop Report: “The Intersection of Immigration and National Security” Compiled and Edited By John Allen Williams, PhD (Loyola University Chicago) and Richard E. Friedman (National Strategy Forum)

#### Overview and Executive Summary

On April 28 and 29, 2008, some two dozen participants of widely varying backgrounds and perspectives gathered at the Cantigny Conference Center of the McCormick Foundation to address the issue, “The Intersection of Immigration and National Security.” The workshop was organized by the American Bar Association Standing Committee on Law and National Security and the National Strategy Forum, with the support of the McCormick Foundation.

The purpose of the workshop was to see what agreement there may be on the national security aspect of immigration and on appropriate policies going forward. While there was not a complete consensus on any issue, there were varying degrees of agreement on several points:

- The paramount objective is to prevent the entry into the United States of persons posing a security threat while facilitating the entry of legal visitors and immigrants who present no risk.
- Borders are important, even if porous, and are an essential principle of sovereignty; accordingly, the imposition of targeted border controls is justified.
- Immigration has national security implications, but immigration also involves other important national interests; therefore, not every immigration policy and procedure should be analyzed from a national security perspective.
- Robust immigration enforcement is one of a number of critical building blocks in national security policy. Immigration must be viewed through multiple lenses – national security as well as the national interests of our economy, our social networks, and our foreign policy.
- Immigration presents opportunities as well as challenges for national security.
- The sheer volume of cross-border movement of persons and goods presents significant policy and management challenges.
- National security-related immigration policy involves principles of management, not risk elimination; choices must be made based upon values, probabilities, potential degrees of harm, and the national interest.
- Some existing immigration laws and policies are overly broad, leading to an inefficient use of resources, the possible disaffection of some persons in affected communities and a potential compromise of American values.
- It is not desirable to have some 12.5 million to 15 million illegal immigrants living in the United States, primarily because the true identities and intentions of many of these individuals are difficult to ascertain.
- Citizens and non-citizens alike should be treated with a fundamental level of fairness and with the due process afforded to them by law.

- U.S. immigration policies and procedures need to be better resourced and managed, although increased fee revenues have become available to meet operational expenses.
- A comprehensive review of the national security dimension of immigration should be undertaken, considering legal and enforcement issues.
- Immigration policies and practices need to be better explained to domestic and foreign audiences.
- Immigration policies and practices require management review and enhanced coordination among U.S. government agencies.

### **The Challenge of the Borders**

The United States faces significant border security challenges. The U.S. has one of the longest land borders in the world and faces a determined, skilled, ruthless, and adaptive enemy bent on confronting us since well before the attacks of September 11, 2001. Within the U.S.'s large foreign national population there is a segment of relatively anonymous people without lawfully issued identification documents. This population relies on false, stolen, or multiple identities to work and to survive in the U.S. The volume of cross-border traffic, both human and cargo, requires consideration of how the vulnerabilities of the U.S. immigration system, including border control, could be exploited by adversaries and what should be done about it.

In a typical day more than a million entrants are processed at United States places of entry – 60 percent of whom are non-citizens. In addition, during an average day some 69,000 truck, rail, and seaborne containers and 333,000 private vehicles cross the border, 3,300 arrests are made for various suspected violations, and border agents seize 5,400 pounds of narcotics, \$77,000 in undeclared currency, and \$330,000 in fraudulent commercial merchandise.

The challenge to the United States border control is immense. Although some border crossing choke points are near population centers, much of the U.S. border area is effectively unregulated and porous. For example, the State of Maine has a long border with Canada and a long seacoast, and people go back and forth across that border every day. There are about 38,000 logging roads alone that cross the border.

Estimates of the number of persons present in the United States illegally range from 12.5 to 15 million and growing – equal to the population of Belgium or Ohio. While the vast majority are in the U.S. primarily as economic migrants or to join family members already here, the fact that they are officially unaccounted for is troublesome. The U.S. cannot know who is here for more threatening reasons. Identifying terrorists and potential terrorists among largely unknown immigrant communities is like finding an invisible needle in a haystack.

Border security is important for practical reasons as well as being a fundamental attribute of sovereignty. Making it more difficult for prospective terrorists to cross borders, however porous they may be, complicates their planning and may thwart the achievement of their objectives. Effective policies enhance the likelihood that terrorists and other dangerous people can be identified. The ability to identify a malfasant leads directly to the ability to deny visas, entry, or legal resident status in the United States. Proper security identity verification does not prevent the entry of immigrants who are coming for lawful purposes. Ideally, the United States would push the border screening process outward, detecting and interdicting or otherwise addressing immigrants with dangerous intentions at foreign sites prior to their arrival at the border. In this context interdiction is the primary objective which trumps potential conflict with immigration laws.

### **The Threat**

Defining the actual threat posed by terrorists to the U.S. is critical for the development of rational public policy regarding immigration. The people and critical infrastructure of the United States are vulnerable and susceptible to terrorist attack in ways not previously imagined. At issue are the scope and nature of the

threat and what policies are best crafted to prevent potential security threats through a multi-layered protective system: while they are still abroad, when they try to cross the border, or once they are here. Not all immigration enforcement targets “national security threats,” of course, and the term risks trivialization from overuse. For example, in this context a natural disaster should not be classified as a national security threat, even though major protective resources are required to preserve order and provide services in the aftermath of such events. There is a need to define the nature of the threat carefully in order to devise sensible immigration laws, regulations, and practices.

Rational immigration enforcement will cover day to day enforcement as well as target policies aimed specifically at terrorist or criminal enterprises. Illegal entry into the United States or overstaying a visa is only part of the equation. Preventing the entry of persons who intend to harm the United States is a significant challenge. The September 11 hijackers all entered the country by fraud, omitting the facts that might have alerted authorities to their terrorist intentions and background and concealing their identities. Dangerous persons can enter the country legally on student, business, work or other visas by deceiving government officials and then stay longer than permitted. Refugee law may also pose complex security challenges. During the 1980 Mariel boatlift, Fidel Castro released about 125,000 Cubans, mostly political dissenters welcome in the United States. But also included were thousands of inmates from Cuban prisons and mental institutions, some of whom were quite dangerous. Some of these refugees may also have been connected with Cuban intelligence services.

There is also a threat of corruption within the immigration and border management system itself. For example, a State Department officer at the U.S. Embassy in Guyana was arrested in 2000 on charges of amassing more than \$1.3 million in cash and gold in a conspiracy to sell U.S. visas to foreigners. Also in that year, a high-ranking US immigration official was arrested by the FBI in an elaborate sting operation for passing what he thought was classified information about a Cuban intelligence agent’s intention to defect from Cuba to the United States. In 2005 there was another visa bribery scheme in the embassy in Mexico City. Persons who entered with those illegally granted visas were very difficult to track down. There have been dozens of arrests on corruption grounds against port of entry and border patrol officials.

The porous status of the U.S. border means that along with the economic migrants who cross our borders for jobs, there are others from countries with a significant terrorist presence who may take advantage of established smuggling routes to enter the U.S. illegally across the southern border. It has been reported that there have been attempts to breach the southern border by individuals who are on our list of terrorist groups. Some are economic migrants and some are genuine refugees, such as Chaldean Christians who get to Mexico, cross the border, and seek asylum at a U.S. port of entry. Many others could be crossing the border for illegal purposes. Basic immigration enforcement that shuts down general criminal smuggling routes can address some of these issues.

The 12.5 to 15 million undocumented people mentioned above could include a number of potential security threats. Even known criminals can be very difficult to find. Terrorists also recruit “clean operatives” who do not have criminal or status problems. Either way, immigrants fearing deportation have a reduced incentive to turn in persons that may pose a danger, particularly if they believe that assisting law enforcement might lead to their deportation or the deportation of a family member. Some point out that immigrants, even illegal aliens, may actually have greater incentive to cooperate with law enforcement officers because immigration law offers an array of special protections and benefits to informants, witnesses, and victims of crime regardless of their status.

A developing threat is that of vicious, highly armed gangs, such as the MS-13 (“Mara Salvatrucha”) gang that originated in Los Angeles and was strengthened when early leaders were deported back to Central America (especially El Salvador). The gang expanded its operations and recruited new members there. The FBI estimates that there are between 6,000 and 10,000 MS-13 members in the United States, operating in 42 states. Although gang activities are mainly criminal, an escalating level of violence could eventually pose a

substantial threat in particular communities. (For more information on this topic see Robert Killebrew, "A New Threat: The Crossover of Urban Gang Warfare and Terrorism" published by the National Strategy Forum, vol. 17, no. 4 (Fall 2008), available online at <http://www.nationalstrategy.com/NationalStrategyForumReview/>)

### **Risk Management**

Immigration is essential to the well being of our country. Trade requires persons and cargo to cross the borders at staggering volumes. Given the magnitude of the traffic and myriad vulnerabilities, it is not possible to achieve complete protection of all soft targets in the U.S. and abroad all of the time. Therefore, management of our immigration system is essentially an issue of risk management, not risk elimination. Choices must be made based upon values, probabilities, and degree of potential harm to our country. How many resources should be made available? What risks to civil liberties are acceptable? The U.S. is an open society, which is its defining character, a cause of its success, and a source of vulnerability. Draconian measures could be taken to reduce risk, but at what cost to the fundamental values of the nation? Furthermore, such measures could entail unacceptable interference with civil liberties with no real promise of the complete elimination of risk.

Therefore, public policy decisions in this area boil down to one question: What degree of risk are government officials and the public willing to accept? If complete protection is not possible, what level of protection is acceptable? In this context a 99 % success rate means that 1 out of 100 terrorist attacks will succeed. Public officials are aware that blame will be apportioned. This results in an immigration culture so risk averse that it becomes gridlocked. To avoid a no-risk approach/gridlock, the government would need to recognize and communicate to immigration officials an acceptance of these risks. Signaling to officials that they will not be penalized if they perform competently but a terrorist nonetheless infiltrates the United States is a rational approach. However, this approach may pose serious political or career problems to its advocates.

### **Counterintelligence and Intelligence**

Counterintelligence and intelligence data is gathered from a broad information base, which includes information concerning both legal and illegal immigrants. One of the best ways of developing information about who actually poses a threat is through immigrant communities, but cooperation will be reduced if entire communities are regarded as suspect and treated accordingly. Relationships of trust must be developed with communities that have had negative experiences with law enforcement before or after their immigration to the U.S. Local police are properly concerned with preserving good relations with immigrant communities. If the community is offended by government enforcement which is perceived to be unfair, the result may well be to reduce community support. However, this so-called "chilling effect" has been avoided successfully in many jurisdictions across the country. Many law enforcement agencies have navigated these community policing issues successfully, without sacrificing immigration, national security, or other federal law enforcement objectives – primarily through diversity in staffing, public education, community outreach, and solicitation of meaningful community input. Community-based intelligence gathering can be a valuable addition to a centralized data base, so local police are concerned with preserving good relations. In addition, the U.S. Department of Defense and other agencies need native speaking officers and translators. Many are already employed by U.S. intelligence services, some of whom are brought into the country for that purpose. An intensive security vetting process that excludes potential translators based on their ties to people who might pose a security risk greatly complicates the challenge of hiring sufficient numbers of competent translators for counterintelligence and counterterrorism work.

Significant security and counterintelligence concerns are new for the cultures of most U.S. Government departments. This is true even of Departments of State, Treasury, Commerce, and Homeland Security, all of which encounter substantial security and counterintelligence risks. Adapting these cultures and kinds of organizations will take a long time. Department of Homeland Security headquarters and field offices who do border screening need improved training and dedicated resources to spot operations being run at them, not just

by foreign intelligence services but by drug or human trafficking organizations, potential terrorists, and other criminals.

Given that terrorists and potential terrorists represent a very small percentage of legal or illegal immigrants in the U.S., how does one identify them without violating the rule of law or discouraging travel to the United States by welcome visitors? Does the use of anti-terrorism methodologies interfere with the orderly implementation of immigration laws and regulations or resource allocation? Does the terrorism dimension of immigration enforcement collide with concerns for the rule of law and civil liberties? Or should “national security,” properly understood, embrace these concepts? It is clear that immigration records and intelligence gathering constitute important tools in identifying, exploiting, and apprehending terrorists. As a result, they need to be digitized and made more widely available.

### **Legal and Civil Liberties Issues**

In addition to enforcing immigration law fairly and transparently, the U.S. must adhere to the rule of law and constitutional principles regarding immigration and national security. The criteria include respect for civil liberties, particularly regarding immigration policies and their implementation. The degree to which the present status of management and enforcement of national security-related immigration conforms to U.S. rule of law standards is controversial, especially the differential treatment of citizens and non-citizens (which is not done in the U.K.).

Persons who have provided “material support” for listed terrorist organizations are excluded by law from entering the United States. For organizations below the top tier, Congress granted the administration wide discretion in interpreting the meaning of “material support.” Congress and the Administration have chosen to define material support broadly – to include, for example, paying a ransom to secure the return of a kidnapped family member. Such a broad interpretation did not seem fair or necessary to many participants. American society works because it is open. The concept of the open society in the U.S. imposes limitations and obligations on border control and affects civil liberties issues. The risks and challenges discussed in this workshop are byproducts of what is good about the United States. All risks cannot be eliminated without paying an unacceptable price. Actions taken to reduce these risks must be consistent with respect for civil liberties. For example, there was little support for linking immigration decisions to an ideological litmus test short of an outright espousal of violence or an ideology directly incompatible with liberal democracy.

Another civil liberties issue relates to personal privacy. The government collects information about individuals in various agencies for various purposes, but the private sector has already moved ahead of the government in information collection. Americans provide personal information readily in return for the convenience of automatic toll collection, online transactions, and discounts at grocery and drug stores. Americans have abandoned a certain degree of privacy for convenience. Emerging issues include how the government should maintain and use the information it collects and the degree to which the government should have access to private sector information (and under what circumstances). The issue of privacy and secrecy was examined in a 2004 McCormick Foundation conference titled “Counterterrorism Technology and Privacy.” (Available at <http://www.nationalstrategy.com/Programs/OtherPublicationsandEvents/>) Communication is important in any matter touching on civil liberties. The public must understand as much as possible about the threats, the difficulty of countering them, and the measures needed to protect the United States. Government must provide as much education as possible.

### **Legislation**

Current immigration legislation may be a substantial part of the problem because it is overly broad, complex, and imprecise, making it difficult to implement. A significant part of the immigration processing management problem is attributable to the perceived defects and complexity in the law. There is a high volume

of paperwork associated with the processing of visa applications, Security Advisory opinions, the processing of green cards, and admissions at the port of entry. All of these have management problems, but they are from different causes and require different solutions. For example, the large backlog in the processing of naturalization applications and green cards is due as much to high demand as to defects in the law. Overly long delay in processing immigration-related paperwork is frustrating to applicants and undermines confidence in the system.

The current broad definition of terrorism mandated by Congress requires considerable expenditure of time although much of the terrorism screening is done by databases which attempt to sort out possible terrorists. Much of this is wasted time because of the imprecision of the definition, taking away resources from other immigration issues. But what is the alternative? What if Osama Bin Laden applies for a visa? We need a mechanism to refuse him, because on paper he would appear to be well-qualified. We have to accept some degree of imprecision in these laws, at least until a way is developed to screen for terrorists using DNA or a blood test. The problem is not the imprecision in definition but the inherent difficulty of identifying a threat. If the law were made more precise, it could result in more refusals, because it would be easier for consular officers to say no to more people. There has to be some allowance for the exercise of discretion, while preserving the ability to refuse the obvious terrorists. That is why supervisory review of visa decisions is imperative. Congress crafted a broad anti-terrorism law with the understanding that the Department of Homeland Security (DHS) would have wide latitude to write the necessary regulations. One legislative objective could be to give DHS authority to grant waivers and make exemptions when the policy leads to unwanted results when literally interpreted. For example, Nobel Prize winner Nelson Mandela was flagged on U.S. terrorist watch lists and needed special permission to enter the U.S., because South Africa's governing African National Congress was once designated a terrorist group.

Some participants believe that the immigration laws are very inefficient tools with which to deal with terrorist issues. However, other participants believe that the policy of deporting illegal alien men ages 18 to 45 from countries of interest is beneficial. This immigration law was used successfully in counterterrorism after September 11 and this policy should be continued. Conceptually, terrorist considerations should be separated from immigration laws. In particular, detention and deportation actions must meet constitutional standards of due process. There was agreement in the group that immigration law should not be viewed principally through the prism of counterterrorism.

### **Management**

Management issues in this field are numerous and complex, aggravated by the large number of people who cross the borders (some 500 million annually), including an estimated 6 million persons each year who seek legal benefits. Given that, how does one identify those who should be excluded, whether suspected terrorists or not?

Risk Management is an important issue. Both the U.S. Departments of State and Homeland Security have been tasked to screen all immigrants and visitors in order to identify a very small percentage of potentially dangerous immigrants and visitors. The laborious immigration process and screening program coupled with time delay has exacerbated existing anti-Americanism abroad and has resulted in the counterproductive exclusion of highly skilled persons. However, limits on the admission of immigrants, even the highly skilled, may be politically popular and justifiable for a number of reasons, including national security. Others point out that current screening procedures may not be tight enough to permit the identification of terrorists, criminals and other unqualified individuals. Programs such as the Visa Waiver Program, the religious worker program, and the student and exchange visitor programs present glaring security vulnerabilities, and the problems are exacerbated by insufficient immigration law enforcement in the interior. The program can be enhanced substantially by making the processing more efficient and timely, but national security interests must remain paramount. One serious concern is that blame likely will be placed on the enforcement agencies perceived as failing to do their job when a terrorism event inevitably occurs. Some believe a "zero defects" mentality emerges, resulting

in insufficiently discriminating caution. This is a factor in tourism and in the recruitment of foreign students and skilled workers. In spite of potential delays and other challenges, it is noted that enrollment of foreign students in U.S. universities and schools has not diminished any more after the process was tightened than in Canada, where the process has not been tightened.

One important management issue is that of agency discretion: at what level should exceptions be permitted and for what purposes? This issue was discussed above in the context of defining “material support” for groups designated as terrorist organizations. Delegation of discretion to the lowest enforcement level is sometimes done to achieve efficiency, but lower level officials are understandably risk-averse given a “zero risk” mentality among the public and political leaders. In addition, too much delegation could result in a loss of control.

Fraud and divided loyalty pose other potential problems. As discussed above, there have been a number of attempts to bribe U.S. officials abroad for favorable consideration of visa applications, and some of these have been successful. Other possibilities include a bribed U.S. contractor who supports visa applications for dangerous individuals, and bribed crossing guards or luggage inspectors, a well known method of drug cartels. Does the government also confront an issue of divided loyalty if a DHS employee is a dual citizen? Also, consider the loyalty of U.S. employees of foreign corporations and multinational U.S.-based corporations.

Problems of bureaucratic inefficiency, inadequate staffing, high volume of applications, insufficient resources, and unrealistic expectations have complicated handling a surge in visa applications. After September 11, 2001, Congress and the State Department tightened visa application procedures, without the immediate benefit of additional personnel resources or new management approaches to deal with the increased workload in the face of an increasing demand for immigrant and non-immigrant visas. There is also a question whether the Department of State and the Department of Homeland Security manage their resources efficiently. There is a need for better liaison between DHS and DOS regarding the status of individuals. A surge in citizenship applications last year, for example, has led to long application processing delays, even for non-problematic applications.

There are also more complex public diplomacy and political consequences to be analyzed. Although strict controls may be politically popular domestically, many countries are adopting similar or even more stringent policies, and many international travelers express understanding and support of the need for more scrutiny, visa and border inspection practices are often noted unfavorably abroad and in domestic communities, and could be a national security problem to the extent that they affect the U.S. image abroad negatively or reduce the willingness of domestic communities to cooperate with governmental officials. However, a much greater national security problem would occur if the system was penetrated by terrorists resulting in a large number of American deaths or injury. At that point, most Americans would not be overly concerned about U.S. image abroad or “domestic communities” that may appear resistant to security cooperation.

Bureaucratic culture change may be needed in order to enhance government management of terrorism. In any event, there is a need to define the problems carefully, consider what organizational structure is best suited to address them, and move ahead with any necessary re-engineering or reorganization.

## **Conclusions**

The final session of the workshop attempted to identify areas of common opinion among the participants. Varying levels of support was expressed for the following propositions, with all falling into a zone of agreement, but not necessarily consensus:

1) Border control is an attribute of sovereignty and the screening of immigrants at the border is a legitimate national security objective.

- 2) Immigration enforcement and implementation have national security consequences, but individual illegal immigrants in the U.S. do not necessarily constitute a national security threat.
- 3) Immigration is linked to national security in several ways. These include screening persons who seek entry into the U.S. at the border, identifying potentially dangerous immigrants already in the country, and sharing information from the immigration data base for counter-terrorism and counter-intelligence purposes.
- 4) Immigration is not solely a U.S. domestic issue. For example, the perception of the U.S. abroad is affected negatively by the exclusion of people who seek entry into the country and when excessive time is required for processing visitor and immigration applications.
- 5) There are an estimated 12.5 to 15 million persons without legal status in both rural and urban areas in the United States. Terrorists may seek protective cover in immigrant communities, which is why it is essential that these communities be utilized to identify potential threats. Immigrants can also promote security by providing needed services, such as translation, to government agencies and be recruited into national service in other ways, including military service.
- 6) The removal and detention of illegal residents suspected of being national security threats is inefficient and imposes an intrusive layer of processing on an already burdened immigration system. Are there alternate non-immigration-related laws that could be used effectively to reach the same objective?
- 7) The use of immigration laws for national security purposes creates the risk of selective enforcement against certain foreign born communities in the U.S., for example, Muslims and Arabs. This presents questions of principle and of practicality. Identifying one ethnic group or religious confession for strict enforcement could create resentment and reduce cooperation within the community with law enforcement officials. Research on this issue would be useful, since there is no objective information regarding the effect of selective immigration enforcement on a community's willingness to cooperate with government officials. Positive or negative judgments in this regard tend to be subjective and intuitive.
- 8) Attracting foreign highly skilled persons, students, entrepreneurs, and investors would have a positive effect on the U.S. economy and affect national security at least indirectly, especially in certain sectors. Some believe that high immigration barriers impede the flow of these desirable immigrants, but others point out that there is broad public and intellectual support for reasonable limits on immigration. The current system represents a compromise between those who favor family immigration and those who would give priority to skills-based immigration.
- 9) Unnecessary immigration compliance burdens placed upon non-risk travelers interferes with globalization, diminishes the United States, and undermines U.S. economic standing.
- 10) The US holds itself out as exemplifying adherence to the rule of law. Due process must be observed; but it must be recognized that due process can be fulfilled in a variety of administrative ways without requiring judicial review or access to the U.S. court system.
- 11) Treating foreign nationals differently than U.S. citizens, whether or not based on perceived national security interests, was believed by some to be contrary to law. U.S. law treats foreign nationals differently from U.S. citizens on many issues. What is the appropriate procedure for assessing, questioning, detaining, and deporting suspected terrorists?
- 12) Inefficient immigration management is perceived to be a continuing problem. Adding a layer of national security objectives to immigration processing and enforcement exacerbates the underlying management problem.

13) Immigration laws and regulations require periodic review and evaluation to ensure that enforcement practice is appropriate for the intended objective.

14) There is a need to re-allocate resources to strike an appropriate balance between immigration enforcement and enhanced processing and related services. There is some debate on which priorities should receive more money and resources than others.

15) For national security purposes a layered defense is needed. Screening done at foreign venues by foreign officials addresses one aspect of this problem. However, this delegation of responsibility may create an undesirable risk factor because of the potential for fraud and a diminished control.

16) A risk analysis is needed. What is the trade-off of focusing on potential terrorists and other undesirable persons on an exception basis and decreasing processing attention for the balance of no-risk persons, as is now being done through the new Global Entry program?

17) The issue of comprehensive immigration reform was largely outside the scope of discussion. However, some participants believe that it is likely that such reform would benefit national security-related immigration issues, depending on the specific reforms that are enacted. Other participants noted that comprehensive reform was not discussed and the national security/immigration benefits, if any, are wholly speculative.

As a final observation, there was general agreement that a more thorough analysis of national security-immigration issues should be undertaken, leading to a comprehensive review of the national security dimension of immigration. Convening working groups which would focus on various sections of this report is suggested as a point of departure.

### PARTICIPANTS

Nickolas Abramo  
Oakley Strategic Services, LLC

Randel K. Johnson  
US Chamber of Commerce

Jessica M. Vaughan  
Center for Immigration Studies (CIS)

Leonard C. Boyle  
Terrorism Screening Center

Donald Kerwin  
Catholic Legal Immigration  
Network, Inc. (CLINIC)

John Allen Williams, PhD  
Loyola University Chicago

James Jay Carafano  
The Heritage Foundation

Lawrence M. Lebowitz  
Cohen & Grigsby, P.C.

### OBSERVERS

David Cole  
Georgetown University Law Center

Judy Rabinovitz  
American Civil Liberties Union

Joel F. Brenner  
Office of the Director of National  
Intelligence

John Fonte  
Hudson Institute

Harvey Rishikof  
National War College

David L. Grange  
McCormick Foundation

Richard E. Friedman  
National Strategy Forum

Nicholas Rostow  
The State University of New York

Andrea Jett  
McCormick Foundation

Susan Ginsburg  
Migration Policy Institute (MPI)

Suzanne E. Spaulding  
Bingham McCutchen LLP

Lillian Murphy  
National Strategy Forum

Albert C. Harvey  
ABA Standing Committee on Law  
and National Security

Alfred A. Spitzer  
Law Offices of Alfred A. Spitzer,

Jonathan R. Scharfen  
US Dept. of Homeland Security

Aziz Huq  
New York University School of Law

Margaret Deborah Stock  
US Military Academy

John M. Sirek  
McCormick Foundation

## In Case You Missed It ...

*Staying current in the field of national security law is never easy. Every week there are significant new opinions, statutes, indictments, reports, articles, and any number of other developments. In an effort to assist practitioners and scholars in keeping up to date with these events – and in particular to provide ready access to primary sources in electronic format – Professor Robert Chesney of Wake Forest University School of Law maintains a listserv for professionals and academics working in this area. Those interested in subscribing to the listserv may do so by contacting Professor Chesney at [robert.chesney@wfu.edu](mailto:robert.chesney@wfu.edu).*

**“In Case You Missed It...,”** featuring selected posts from Professor Chesney’s listserv, is a recurring feature of The National Security Law Report.

*In re Guantanamo Bay Detainee Litigation (D.D.C. Dec. 16, 2008)*

Judge Hogan has granted, in part, the government’s motion to revise the case management order that he previously issued in connection with the bulk of the habeas petitions concerning GTMO detainees (113 petitions on behalf of 200 of the approximately 250 remaining detainees).

Part of the order is included below with brief comments in brackets from Professor Chesney.

Section I.D.1 is amended to state:

1. The government shall disclose to the petitioner all reasonably available evidence in its possession that tends materially to undermine the information presented to support the government’s justification for detaining the petitioner. See *Boumediene*, 128 S. Ct. at 2270 (holding that habeas court “must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the [CSRT] proceeding”).

In this context, the term “reasonably available evidence” means evidence contained in any information reviewed by attorneys preparing factual returns for all detainees; it is not limited to evidence discovered by the attorneys preparing the factual return for the petitioner. The term also includes any other evidence the government discovers while litigating habeas corpus petitions filed by detainees at Guantanamo Bay. [THIS IS MUCH NARROWER THAN THE ORIGINAL DISCLOSURE OBLIGATION THE JUDGE IMPOSED, WHICH APPEARED TO RUN TO MOST IF NOT ALL INFORMATION IN THE GOVERNMENT’S POSSESSION, NOT JUST THE INFORMATION ACCESSED BY THE ATTORNEYS INVOLVED IN RESPONDING TO THE PETITIONS]

Section I.E.1 is amended to state:

1. If requested by the petitioner, the government shall disclose to the petitioner (1) any documents and objects in the government’s possession that the government relies on to justify detention; (2) all statements, in whatever form, made or adopted by the petitioner that the government relies on to justify detention; and (3) information about the circumstances in which such statements of the petitioner were made or adopted.

[THIS IS NARROWER IN THAT THE EARLIER ORDER WAS NOT LIMITED TO MATERIAL THE GOVERNMENT RELIED ON]

Section I.F is amended to state:

F. Classified Information. If any information to be disclosed under Sections I.D or I.E of this Order is classified, the government shall, unless granted an exception by the Merits Judge, provide the petitioner’s counsel with the classified information, provided the petitioner’s counsel is cleared to access such information. If the government objects to providing the petitioner’s counsel with the classified information, the government shall move for an exception to disclosure. [THIS IS MORE RESTRICTIVE THAN THE EARLIER ORDER]