



NATIONAL SECURITY LAW REPORT

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Looking Back to Go Forward: Remaking U.S. Detainee Policy

By **James M. Durant III** and **Frank Anechiarico**

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“By mid-1966 the U.S. government had begun to fear for the welfare of American pilots and other prisoners held in Hanoi. Captured in the midst of an undeclared war, these men were labeled war criminals... Anxious to make certain that they were covered by the Geneva Conventions and not tortured into making ‘confessions’ or brought to trial and executed, U.S. Ambassador-at-Large Averell Harriman asked [New Yorker correspondent Robert] Shaplen to contact the North Vietnamese.” - Thomas Bass (2009)

Introduction

The decision of the Obama Administration to use the federal courts to try Ali Saleh Kahah al-Marri, the last person labeled an enemy combatant to be held on the American mainland makes a discussion of detainee policy particularly relevant. Detained in December, 2001, Marri has been held for five of the last seven years in a Navy brig in Charleston, South Carolina. In this essay, a shorter version of a longer article, we first explain why and how detainee policy, as applied to those labeled enemy combatants, collapsed and failed by late 2008. Second, we argue that the most direct and effective way for the Obama Administration to reassert the rule of law and protect national security in the treatment of detainees is to generalize its decision in the *al-Marri* case by directing review and prosecution of detainee cases to U.S. Attorneys and adjudication of charges against them to the federal courts.

A Change in Policy

Two days after taking office, President Barack Obama, in Executive Order 13492, took the first steps toward rebuilding detainee policy. The order mandated immediate review of detainee status toward the goal of closing the detention facility at Guantanamo “promptly.” The Order reversed the standing position on detainee policy and rejected the value behind it:

No individual currently detained at Guantanamo shall be held in the custody or under the effective control of any officer, employee, or other agent of the United States Government or at any facility owned, operated, or controlled by a department or agency of the United States, except in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions. (Executive Order 13493, January 22, 2009)

Two other Executive Orders issued within a week of Executive Order 13492 required compliance with prohibitions against torture of detainees as detailed in the *Army Field Manual* and Common Article 3 (Executive Order 13491, January 27, 2009, “Ensuring Lawful Interrogations”) and established a Special Task Force on Detainee Disposition to “identify lawful options for the disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations.” (EO 13493).

By way of these Executive Orders, the Obama Administration calls for a new approach to detainee policy. The establishment of the Special Task Force indicates that the direction and policy content of the new approach has not been formalized, in spite of the decision on al-Marri’s trial. We direct our comments here to scholars, policy makers, and the many others interested in *why* a new, formalized approach is necessary (looking back) and *what* the new approach should be (going forward).

Looking Back

At his first news conference on February 9, 2009, President Obama addressed a question about Senator Patrick Leahy’s plan to use “a truth and reconciliation committee to investigate the misdeeds of the Bush administration.” Mr. Obama’s answered with an assertion and a qualification.

My view is . . . that nobody is above the law, and if there are clear instances of wrongdoing, that people should be prosecuted just like any ordinary citizen; but that generally speaking, I’m more interested in looking forward than I am in looking backward. (“Transcript, Obama Press Conference,” CBS.com February 9, 2009)

However, a change in detainee policy requires understanding the value conflict in detainee policy that led to the policy's collapse. Further, understanding the policy's collapse is necessary if the new policy is to be grounded in the rule of law, with full recognition of national security requirements. Studying policy implications is the way decision makers "use the past" to set a course toward broad goals like security and the rule of law.

Value Conflict and Policy Collapse

On January 14, 2009, the military commission convening authority, Susan J. Crawford, told the *Washington Post* that she would not refer for prosecution the case of Mohammed al-Qahtani (thought to be the 20th 9/11 hijacker) because Qahtani had been tortured. As Duke Law Professor Scott Silliman put it, "What do you do when you have an allegation from a senior official of the Bush administration that we committed a war crime?" The story of value conflict and policy failure cannot answer Silliman's question. The story of value conflict can, however, explain what prompted Silliman to ask the question.

When a policy collapses, the values of neither side prevail and the purpose of the conflict becomes secondary to the political standing of the parties. The eventual cessation of communication between those holding opposing values leaves core policy differences in place, as public attention drifts away from the main issues. The "winner" in a policy collapse has not used persuasion through democratic discourse, but has closed debate by asserting political control. This control will hold in the short term. In the longer-term, though, a collapsed policy leaves a legal void. (Bozeman, Barry *Public Value Failure: When Efficiency Markets May Not Do*, *Public Administration Review*, 62 (2), April, pp.145-161.)

Factors Related to Detainee Policy: 2002-2008

The first most prominent factor related to detainee policy is the discretion exercised by the National Command Authority (NCA: the Commander in Chief and other constitutionally recognized defense authorities in the U.S.). Two examples will illustrate the discretion available to the NCA in selecting policy values. First, during Operation Allied Force, the U.S. led NATO incursion and bombing campaign in support of Kosovo in 1999, three soldiers from the 1st Infantry Division of the U.S. Army were captured by Yugoslav (Serbian) forces. The United States declared that the three soldiers were not combatants entitled to prisoner of war protection granted under the Geneva Conventions and therefore demanded their immediate release to U.S. custody. The choice was made not to follow the values expressed in Common Article III that prisoners of war may be held until the cessation of conflict. The second incident occurred two weeks later when the Kosovo Liberation Army detained a Yugoslav Army lieutenant. The Pentagon immediately declared that this officer was a prisoner of war and was entitled to the protections under the Geneva Conventions relative to enemy prisoners of war, enabling NATO to keep the lieutenant in custody until the end of the conflict.

The value conflict over the status and treatment of detainees held by the U.S. at Guantanamo Bay, Cuba involves NCA decisions made at the time the first captives from the conflict in Afghanistan arrived in Cuba, in late 2001 and early 2002. At that time, John C. Yoo, Robert J. Delahunty and other U.S. Justice Department attorneys drafted a number of official memoranda which provided the legal basis for circumventing or ignoring the Geneva Conventions with regard to the status of those detained at Guantanamo Bay. The conclusion of the Justice Department lawyers was that the Geneva Conventions were inapplicable to detainees from the Afghanistan theater. The memoranda argued that since Afghanistan was a failed state, persons captured during Operation Enduring Freedom in Afghanistan could not be legally recognized under the Geneva Conventions. Thus, persons captured in Afghanistan during Enduring Freedom were actors without a state, i.e., terrorists. The status of those captured in Afghanistan was most clearly articulated by President George W. Bush in his 2002 State of the Union address where he stated, "Terrorists who once occupied Afghanistan now occupy cells at Guantanamo Bay" which in his mind symbolized that the war on terror justified the detentions.

While the NCA adopted the Justice Department's argument and the President's value choice as the basis of official policy, Secretary of State Colin L. Powell relied on an opposing value in a statement just three days before the President's speech. Powell argued that declaring Geneva Convention Articles III and IV inapplicable would reverse "U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the laws of war for our troops... it would [also] undermine public support among critical allies."

The language of Common Article III indicates that whatever the final detainee status determination may be, basic,

specified standards of humane treatment apply. This provision was neglected by the NCA with regard to persons held at Guantanamo Bay on the advice of the Justice Department and the White House Office of Legal Counsel. Starkly, this decision of the NCA trumped Secretary Powell's concerns regarding "protections of the laws of war for our troops."

It should be noted that in July 2006, four years after opening detention camps in Cuba, the Defense Department stated that Guantanamo detainees would be treated in accordance with Common Article III. However, the reasoning in a July 7th memorandum by Acting Deputy Defense Secretary Gordon England on this point avoided a change in policy:

It is my understanding that, aside from the military commission procedures [*Hamdan v. Rumsfeld*, 2006], existing DoD [Department of Defense] orders, policies, directives, executive orders, and doctrine comply with the standards of Common Article 3 and, therefore, actions by DoD personnel that comply with such issuances would comply with the standards of Common Article 3.

A little more than one year later, on July 10, 2007, President George W. Bush issued Executive Order 13440, which reflected the values in the 2002 Justice Department memoranda:

On February 7, 2002, I determined for the United States that members of al Qaeda, the Taliban and associated forces are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war. I hereby reaffirm that determination...

Limits of National Command Discretion

What does it mean to say that the NCA is responsible for treating detainees humanely? The law in this area distinguishes between broad, humanitarian protections and narrower human rights protections:

Humanitarian Law refers to those conventions from the law of war that protect the victims of war (primarily the Geneva Conventions). Human Rights Law refers to a small core of basic individual rights embraced by the international community during the past forty years as reflected in various declarations, treaties, and other international provisions beginning with the UN Charter and Universal Declaration of Human Rights (Puls, Keith E. ed. (2005) *Law of War Handbook* (Charlottesville, VA.: The Judge Advocate General's Center and School))

Another limit on NCA discretion is Article I, Section 8 of the U.S. Constitution which gives Congress the power to punish "offenses against the law of nations." J. Andrew Kent argues that the Congress might well delegate a good deal of this interpretation to the NCA, but that it can and should play a role in applying the law of nations and customary international law to military operations and to the treatment of detainees. If Congress can punish offenses against the law of nations, it can interpret such law.

In fact, the tradition of judicial review of executive actions has set limits on NCA detainee policy. In its decision on the process available to detainees in *Rasul v. Rumsfeld*, issued in June 2004, the United States Supreme Court ruled that detainees at Guantanamo Bay, Cuba must be afforded an opportunity to be heard before a court. *Rasul* provided a legal basis for U.S. Federal Judges to decide upon writs of *habeas corpus* filed by the detainees. Reacting to the *Rasul* decision, Congress passed the Military Commissions Act of 2006 which provided that:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

In a test of the 2006 Act, the Supreme Court held unconstitutional the 2006 Act's prohibition of detainee habeas corpus applications. In *Boumediene v. Bush* (553 U.S. 466, 2008) Justice Anthony Kennedy wrote a detailed analysis of the history and application of the habeas corpus guarantee. He concluded, following *Rasul*, that the writ did apply to detainees at Guantanamo and that suspending the writ was a particular power of Congress that could not be implied from the 2006 Act. Neither was the creation of the on-site Combat Status Review Tribunal process at Guantanamo an adequate substitute for *habeas corpus* review by an Article III court:

We hold that petitioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided

that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

The Boumediene decision showed the value conflict in high relief. In a further illustration of the conflict, two high ranking military lawyers provided differing assessments of detainee policy in Guantanamo. Brigadier General Thomas Hemingway (USAF, Ret.), former legal adviser to the military commissions convening authority, rated the process afforded detainees after *Rasul* as “sufficient” General Hemingway further noted that the policy may have been less controversial had the administration worked more closely with Congress from the outset. Colonel Will Gunn, (USAF, Ret.), found that during the time he served as Chief Defense Counsel (2003-2005) at Guantanamo “the lack of access to information...meant that there were no discernible standards of accountability for those conducting interrogations, those responsible for the care and condition of detainees, or for military and civilian officials setting policy.”

In September, 2008, two prosecutors assigned to the military commissions, Air Force Colonel Morris Davis and Army Reserve Lieutenant Colonel Darrel Vandeveld, resigned. According to reports in the *Los Angeles Times*, Lieutenant Colonel Vandeveld filed a four page declaration with the court charging that, as he put it, “potentially exculpatory evidence has not been provided to the defense.” When Colonel Davis left his position as chief prosecutor for the commissions he “went public with claims that he had been pressured by politically appointed senior Defense officials to pursue cases deemed ‘sexy’ in the run-up to the 2008 elections.”

Legal Values and Detainee Policy

The key effort by the Bush Administration to control and regularize detainee policy was Executive Order 13440 of November 13, 2001, establishing military commissions to try those held by U.S. forces and labeled

“unlawful enemy combatants. The status of the commissions and the status of detainees themselves was a matter of debate as soon as the Executive Order was published. Constitutional litigation over each aspect of detainee policy began immediately and continued to within months of the end of the second Bush Administration. At the same time, legal scholars within and outside the Administration argued that the President could act unilaterally to establish and implement detainee policy.”

In the seven years following President Bush’s executive order creating military commissions, only two cases have been completely processed by the commissions, *U.S. v. David Hicks* (2004, 2007) and *Hamdan v. Rumsfeld* (2006). Hicks, an Australian national, was released before trial pursuant to a plea agreement. Salim Hamdan, garnered notoriety when the challenge launched by his lawyers resulted in the U.S. Supreme Court decision noted above. Hamdan was eventually found guilty of providing material support to Al Qaeda, but was cleared of conspiracy charges. His trial resulted in a five-and-a-half year sentence by a military jury with five years of credit for time already served.

Convening authority, Susan J. Crawford’s declaration that Guantanamo detainee Qahtani had been tortured opened an official policy debate that had been closed since January, 2003. At that time, questions raised in the Pentagon about detainee abuse by chief Navy lawyer Alberto Mora were dismissed. Mora’s misgivings about detainee treatment may have been vindicated by the *Rasul* decision, but key rulings by the U.S. Supreme Court came late in the process. Detainees had already suffered maltreatment and many had been held for years without charge or review. In the short-run, the exercise of political power was a “victory” for the NCA. In the longer term, the instrumental justification of detainee treatment put forward by the NCA failed and detainee policy collapsed. We are left with a situation in which an ostensibly very dangerous detainee like Qahtani will not be tried. Others are in the same situation, (by early 2009, approximately 250 detainees are reported to be held at the Guantanamo camps.) The fact that after seven years, there is no formal policy for dealing with the remaining detainees at Guantanamo is a clear indication that no value in the policy debate yet prevails.

Values Guiding Interpretation of Common Article III

In a widely circulated 2002 paper, Curtis Bradley and Jack Goldsmith of Harvard Law School cite historical and cultural support for the constitutionality of military commissions as adequate judicial process for detainees. The authors assert that “President Bush has independent power as Commander in Chief to establish military commissions

to try war crimes violations.” Justice Department lawyers John Yoo and Robert Delahunty referred directly to Common Articles II and III of the Geneva Conventions to reject the application of formal judicial authority to “conflicts involving non-state actors” (Memorandum of January 9, 2002) thus clearing the way for the President to direct the trial and treatment of detainees without international impedance.

We point out that Article III explicitly requires that those “placed ‘hors de combat’” [out of combat] by sickness, wounds, detention, or other cause, “shall in all circumstances be treated humanely.” And to leave no doubt about what humane treatment means, the Article requires that

“the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons [which includes those in “detention”]: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture. . . (c) outrages upon personal dignity, in particular humiliating and degrading treatment (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. . .” (Geneva Conventions, 1949: III.1.4.)

These general, humanitarian provisions of Common Article III are by-passed by Bradley and Goldsmith and by the Yoo-Delahunty Memorandum. After considering the historical setting of traditional armed conflict that they argue was most familiar to the framers of Article III, Yoo and Delahunty conclude that “it seems to us overwhelmingly likely that an armed conflict between a Nation State and a transnational terrorist organization could not have been within the contemplation of the drafters of Common Article 3.”

Thus, the formal basis of U.S. detainee policy was not a textual analysis of Common Article III, but instead the Yoo-Delahunty interpretation based on an assessment of the “contemplation of the drafters of Article 3.” This memo stands opposite the interpretation of Geneva Articles III and IV by then Secretary Colin Powell and the questions raised by Alberto Mora. This opposition sets the stage for value failure. The torture declaration by Judge Crawford and the 2007 Red Cross report on torture of U.S. detainees turn any conflict over the constitutionality of military commissions into a sideshow. The release by the Obama Administration in mid-April, 2009, of material detailing official approval of detainee abuse and torture makes the lawyers’ debate in retrospect constitutionally, ethically and morally troubling.

Summary and Conclusion

We return to practical matters in order to discern a way to reestablish values of justice and national security as the basis of a policy on detention—a policy that, if we are to have one at all, must be rebuilt. (Note that the day after taking office, President Obama suspended any further action by military commissions.) The value dilemma with which we began calls into question exactly who is responsible for articulating and explaining: first, a concept of justice for those detained in Guantanamo Bay and second, the value of national security for the American people. The immediate response has been that the Commander in Chief has such responsibility and authority. However, this response only begins to reveal the interrelated judicial and bureaucratic layers that prevented values from emerging. The lack of guiding legal values is illustrated by the highly controversial definition of torture developed by Administration lawyers up to 2009.

Both justice and security values ought to be clear to those holding captives taken in military operations. And those values ought to be clearly communicated to the public. The Bush Administration relied on processes (incarceration without charge or with limited review) that could not be defended by reliance on conventional values of justice. The Administration put in place the aforementioned Combatant Status Review Tribunals (CSRTs) as process to manage detainees. The CSRTs were not adversarial nor were they based on formal rules of evidence. However, as noted in the Boumediene decision, they were presented by the Government, arguably relying on *Hamdi*, as “due process.” Thus, instead of following established law and practice, the Administration relied on instrumental justification for its detention and judicial processing policy and on interpretations of international and U.S. law that were developed in confidential memoranda. Justice John-Paul Stevens takes up this point in his opinion for the Court in *Hamdan v. Rumsfeld* “[I]n undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”

The first step in moving past the value dilemma is to reject the notion that the National Command Authority encompasses anyone or any agency other than the President. If executive power is diffuse, it cannot be checked or held accountable. The responsibility for decisions made by the Commander in Chief (National Command Authority is a pale substitute for this explicitly Constitutional title) is entirely the President's.

If the President is once again recognized as the repository of executive authority in time of armed conflict, it is possible to bring forward the role, not only of the Judiciary, but also of the Congress as a check and balance. Returning to J. Andrew Kent's interpretation of Congressional power to "punish . . . offenses against the law of nations" (U.S. Const. Art. I Sec. 8) we disagree with Chesney and Goldsmith that American criminal law is somehow inadequate to the challenge of trying and punishing non-state offenders captured in extra-territorial conflict.

There is no doubt that the Guantanamo detainees may be tried as criminal actors charged with committing felonies under the jurisdiction of U.S. courts with competent jurisdiction. Consequently, they may be punished with sentences specified in a legislative process that is unable to avoid or neglect basic policy values. The technique of keeping captives beyond the reach of U.S. law by moving them to prisons outside of the U.S., often called "extraordinary rendition," should be ended by an act of Congress that extends U.S. jurisdiction to those taken and held by U.S. forces, unless they are declared "prisoners of war" under the Geneva Conventions. This extension of jurisdiction would only extend to territory over which no duly constituted local judicial authority has functioning jurisdiction.

Such a statute would clarify and enforce the value of justice in all types of armed conflict including those such as Operation Enduring Freedom. It would also include specifications of process and sanction distinct from other parts of the federal criminal code, just as the Racketeer Influenced Corrupt Organizations Act of 1970 is distinct in its definition of criminality and sanction (18 USC 1963). The exception for declared "prisoners of war"—a declaration made in the First Gulf War—clarifies and enforces security values by indicating the conflict has the characteristics of a "conventional war" with identifiable enemies and a foreseeable endpoint. If detainees are not identified as POWs, justice and security will include the federal criminal process, as specified in public laws.

The Obama Administration's decision to prosecute Ali Saleh Kahah al-Marri in federal court is not a new idea. Jane Mayer reports on a recent interview with former U.S. Attorney for the Southern District of New York, David Kelley regarding bringing Marri to justice.

[Kelley] thought that Marri could be convicted in a matter of a few months, and sentenced to years in prison. Kelley, who is now a partner at Cahill Gordon, in Manhattan, was disappointed when, on the basis of a one-page executive order, Marri was suddenly sent to the brig. "My view is, we haven't really exhausted the potential for using the criminal-justice system," he said. (Jane Mayer, 2009: newyorker.com)

The *al-Marri* case has come full circle and taken over five years to do so.

Once the Legislative branch resumes its role in the definition and punishment of offenses "against the law of nations" the Judiciary will be relieved from taking on the difficult and politically freighted issues of the validity of *casus belli* and of the President's role as Commander in Chief. Instead, the federal courts may consider, under ample precedent, the validity of process and sanction as specified in the U.S. Code. Security concerns can be dealt with, as Colonel Will Gunn suggests, according to the Confidential Information Procedure and Statistical Efficiency Act of 2001, as they are now.

Arguments have been made in favor of creating hybrid federal courts or for the use of courts-martial to review status and try detainees such as those held at Guantanamo. (Guiora, Amos N. "Improving Detainee Policy: Handling Terrorism Detainees Within the American Justice System," Testimony Prepared for the U.S. Senate Judiciary Committee, June 4, 2008) It may be that additional resources or special "parts" of the federal courts will be necessary. Nevertheless, the legitimacy and strength of precedent in the currently constituted federal judiciary make it the clearest choice for the reestablishment of the values of security and justice and for the reconstruction of a ruined policy.

This article does not reflect the views of the Air Force, the United States Department of Defense, or the United States Government. A more complete discussion of this topic is presented by the authors at: <http://www.hamilton.edu/academics/government/fanechiarico.html>

Tying Our Hands in Combating International Money Laundering: The United States Should Loosen the Restraints, But Do So Carefully

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Most military specialists are in agreement that the principal threat to the country's national security is not conflict with other nation-states. Rather, terrorist and international organized crime organizations (TOs and IOCOs, respectively) probably represent the principal threats to U.S. (With regard to the latter, see the IOC Strategy at the U.S. Department of Justice website).

Both TOs and IOCOs rely on the ability to move "value" to operate effectively. This frequently occurs outside the international financial system. While individual operations by terrorist (often home-ground "cells") and organization crime groups may be financed with relatively small amounts of money, the infrastructures to sustain TOs and IOCOs usually require large amounts of money and frequently involve money laundering.

Nevertheless, the U.S.'s ability to establish a highly effective system for fighting money laundering is hindered by numerous factors. Whereas business and crime operates transnationally, law and regulatory enforcement remains primarily national in scope, thus complicating efforts to deal with crimes having a nexus in more than one country. Within the U.S., it is difficult enough to get federal agencies to cooperate and share information with one another or with state and local governments.

Now, imagine the difficulty, law enforcement organizations have to operate effectively with foreign counterparts, where differences in laws, culture and politics are significant obstacles. This problem is offset to some extent by InterPol, the Financial Action Task Force (FATF), and the Egmont Group (the members of which are international financial intelligence units). Often the personal relationships that develop as a result of these organizations' programs can prove more valuable than the programs themselves.

Within the U.S., many obstacles to dealing with money laundering were eliminated in the aftermath of the 9/11 terrorist attacks on the World Trade Center and the Pentagon as Congress immediately enacted The USA Patriot Act. Title III of the Patriot Act – International Money Law Abatement and Anti-Terrorist Financing Act of 2001 made significant amendments to existing U.S. legislation in the money laundering area previously established by the Bank Secrecy Act of 1970.

Also not to be ignored are multinational and foreign efforts to strengthen their anti-money laundering systems. For example, approximately 15 offenses are considered crimes pursuant to international law by treaty or custom, with acts of terrorism among the 15 crimes. The U.N. members have adopted numerous instruments against aspects of terrorism including: (i) 1997 International Convention for the Suppression of Terrorist Bombings, (ii) the 1999 International Convention for the Suppression of the Financing of Terrorism and (iii) the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.

Now that the dust has settled from the initial implementation of the Patriot Act, it is now clear what needs to be done to further close the gaps in national money laundering policy. Paradoxically, just as the way forward is clear, so too are the complications evident that such a path will engender. Though even more expansive claims at international jurisdiction will be necessary to improve regulation of transnational money laundering, unfortunately this same mechanism will inherently deter foreign governments from cooperating. Consequently, it would be wise counsel for U.S. legislators to proceed with expanding money laundering regulation, but for them to tread carefully and follow the path of consensus as they do so.

The international aspects of U.S. anti-money laundering regulation primarily deal with instances where U.S. legal entities and individuals are engaged in transactions with foreign persons that have been designated to be "of concern." Under certain circumstances, the Patriot Act grants U.S. government officials extraterritorial au-

thority to respond to actions occurring abroad. As Raymond Baker, author of “Capitalism’s Achilles Heel” (Wiley 2005) points out, 15 of the 66 crimes if committed abroad could serve as a predicate act under U.S. anti-money law legislation. For example, the Patriot Act’s § 315 amended 18 U.S.C. § 1956 (Laundering of monetary instruments) so that the bribery of a foreign public official or the misappropriation, theft or embezzlement of public funds by or for the benefit of a foreign public official was deemed to be a “specified unlawful activity” giving rise to criminal liability irrespective of whether committed in the U.S. or abroad. Furthermore, the Patriot Act’s §§ 320 and 323 established new rules concerning the proceeds of foreign crimes and the enforcement of foreign judgments. Nonetheless, despite the above amendments, there remain significant limitations on the extraterritorial jurisdiction of U.S. money laundering law. 18 U.S.C. 1956(f) requires conduct be carried out by a U.S. citizen or that a substantial part of the conduct in question occurred in this country.

As a result of this and other provisions of the anti-money laundering statute there are numerous instances where if a crime is committed in the U.S. it can serve as a predicate offense for money laundering, but if the very same crime is committed abroad it cannot be regarded as a predicate offense. Consequently, American financial and other regulated institutions can accept illicit funds generated abroad for deposit or other purposes, although if such funds were generated in the U.S. they would be prohibited from doing so.

On two occasions, Senator Charles Grassley (R-Iowa) has attempted to introduce legislation to solve this problem and treat all illicit funds in the same manner, irrespective of where they were generated. S. 473 – known as the “Combating Money Laundering and Terrorist Financing Act of 2007” (introduced on February 1, 2007) as well a predecessor bill S. 2403 (introduced on March 13, 2006). S. 473 never made it to the Senate floor for a vote.

When introducing S. 473, Senator Grassley identified the “loopholes” in the existing rules he sought to close:

First, my bill deals with the problem of “specified unlawful activities” or “SUAs.” SUAs are predicate offenses required for current money laundering statutes to apply, and there are currently over 200 of them. As criminals continue to change methods of laundering money, the list of SUAs will continue to grow. This legislation will prevent criminals from turning to other means not designated as an SUA, and will consolidate the ever growing list of SUAs by including all federal and state offenses punishable by imprisonment for more than one year. Also, criminals will no longer be able to hide behind borders, as this legislation would subject violations in foreign countries that have an effect on the U.S. to the same penalties as if they had occurred in the United States.

On April 1, 2008, the Senate Finance Committee held a hearing dedicated to terrorist financing. The principal witness was the U.S. Department of the Treasury’s Mr. Stuart A. Levey, Undersecretary, Office of Terrorism and Financial Intelligence. Although Committee Chairman Max Baucus (D-Montana) observed that the bill would be useful in reducing traditional tax evasion, Senator Baucus, Senator Grassley and Mr. Levey focused primarily on how the proposed

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legislation would be useful in hindering terrorist financing.

However, if 18 U.S.C. § 1956 were amended such that any act that is illegal under U.S. law could serve as a predicate act for money laundering, under what circumstances might this present a problem? Three situations come readily to mind:

- 1) If the accused is not convicted abroad of the crime serving as the predicate offense, is it appropriate (or even possible) for a U.S. court to determine whether the predicate offense was committed?
- 2) If the question is raised whether it is proper for a U.S. court to rely on criminal convictions by foreign courts in all instances?
- 3) If the question is raised about whether U.S. courts should be required to make case-by-case determinations to examine whether the relevant individuals' convictions occurred under circumstances that were consistent with U.S. concepts of due process or substantial justice? Furthermore, one should ask if U.S. judges are capable of making such determinations? What should be done if the convicted individuals claim they were deprived of effective counsel or could not obtain fair hearings of their convictions?

Questions such as these should be considered before the U.S. enacts legislation that would apply aspects of its laws extra-territorially. In addition, in today's global economy any temptation to expand jurisdiction carries with it the risk of "blow back" – that is, what will be the consequences if foreign courts act in a similar manner with respect to U.S. persons. There are dangers lurking for those who believe in American exceptionalism.

Thus, while U.S. anti-money laundering legislation already uses overseas acts constituting crimes as predicate offenses for some instances of money laundering—as noted previously, for 15 out of 66 predicate offenses—it does not do so for all U.S. qualifying offenses. One route to enhancing compliance would be simply to criminalize the other 51 offenses, regardless of where they occur. The fact is that there is a commonality to what is already extra-territorially regulated by the Patriot Act—they are all consensus international crimes. Given that there are also international instruments against (i) trafficking in illegal narcotics, (ii) transnational organized crime, (iii) human trafficking and (iv) corruption, perhaps it would be possible to expand the number of foreign qualifying crimes organically, based on whether international consensus exists or is forming in U.S. anti-money laundering legislation. So it appears that there is a basis in international law for increasing the number of crimes, which if committed overseas could validly be deemed to be a predicate offense for money laundering under U.S. law, but careful research would have to be done before enumerating them conclusively.

Unfortunately, given our concern in strengthening anti-money laundering programs the desire to eliminate all loopholes may be overwhelming. In addition, few legislators want to be seen as being weak on "terrorism." A lot of thought nonetheless needs to be given to the problem of how to reach an appropriate balance between the competing demands of eliminating provisions in the U.S. money laundering legislation that seemingly make it easy for U.S. institutions to be the last actor facilitating the placement of laundered funds without creating other legal problems.

Perhaps, the best solution for anti-money laundering programs is to increase the demands of know your customer rules. Unfortunately, the high cost involved in conducting thorough know your customer investigations provide various interest groups with major incentives for ensuring that U.S. requirements in this area not terribly demanding. In addition, in light of the global economic crisis, banks and governmental officials dealing with international finance issues will be more concerned with liquidity and solvency than national security.

Careers in National Security Law

On March 30, the Standing Committee on Law and National Security, and the George Washington University Law School National Security Law Association held a program on Careers in National Security Law. Professor and Standing Committee Member Peter Raven-Hansen acted as moderator with a talented group of panelists, including Athena Rudolph Arguello, Senior Associate General Counsel, Office of the Director of National Intelligence, CIA, Andrew Levy, attorney with Paul Weiss, Rind, Wharton & Garrison LLP, Andrew Borene, Associate Deputy General Counsel, Office of the General Counsel, Department of Defense, and Captain Afsana Ahmed, Assistant Judge Advocate, Air Force Judge Advocate General's Corps.

Read the full panel summary prepared by Sarah E. Hunter at our website - <http://www.abanet.org/natsecurity>.

American Bar Association Standing Committee on Law and National Security
2009 National Security Law Student Writing Competition
“Redefining Liberty in the 21st Century”

Topic: 2009 marks the bicentennial of the birth of Abraham Lincoln, regarded by many as our nation’s greatest and most eloquent president. Lincoln, who devoted much of his adult life to the practice of law, was the quintessential American lawyer-president. Lincoln’s “Legacy of Liberty” lives on today. But, few remember that during the early days of the civil war, it was Lincoln who suspended citizen’s habeas corpus rights and had begun limited military arrests in an effort to keep Maryland from seceding from the union. The resulting clash between the administration, civilian courts and military leaders during that time stirred great public debate and established case law regarding war time executive powers that remained in effect for over 140 years. This year’s topic: *Advancing Liberty in the 21st Century While Preserving National Security*, seeks to encourage scholarly debate regarding current issues related to detaining and prosecuting terrorists; the impact of the nation’s immigration policy on National Security; the status of international treaties and their impact on National Security; as well as the many issues related to the area of surveillance and intelligence gathering. **Students are encouraged to consider the full range of topics related to “Liberty.” All papers should include an analysis of the selected topic/issue and suggestions for reform.**

Eligibility: The competition is open to all students attending an ABA accredited law school between Nov 1, 2008 and August 15, 2009. Only original and previously unpublished papers are eligible. Papers prepared for law school credit are eligible provided they are original work. Jointly authored papers are not eligible. Entrants can have a faculty member or practicing lawyer review and critique their work, but the submission must be the student’s own work product. The name of the reviewing professor or lawyer must be noted on the entry cover page. Committee members, staff, and selection committee members shall not participate in the contest. Only one essay may be submitted per entrant.

Format: Essays **may not** exceed 4,000 words including title and citations. Essays over 4,000 words will be rejected. The text of the essay must be double-spaced, with twelve-point Times New Roman font and one-inch margins. Entries should reflect the style of ABA Standing Committee on Law and National Security’s *National Security Law Report* articles rather than law review style. Entrants are encouraged to review past copies of the Report available at www.abanet.org/natsecurity prior to drafting their submissions. Citations must be embedded in text **not footnotes or endnotes**. Citations must conform with the Court Documents and Legal Memoranda style (Bluepages) of *The Bluebook: Uniform System of Citation*.

Entry Procedure: Submissions must be postmarked no later than **August 15, 2009** and mailed to: American Bar Association, Standing Committee on Law and National Security, 740 15th Street NW, Washington, DC 20005; or sent via email to hmcMahon@staff.abanet.org. Each submission must include a **separate cover page** with the entrant’s name, law school, year of study, mailing and email address, and phone number. Following the cover page, the contestant must include an executive summary, no more than 200 words, single spaced, providing a brief overview of their paper. The contestant’s name and other identifying markings, such as school name, **may not** appear on any copy of the submitted essay or the executive summary. Winner will be notified by **September 25, 2009**. By submitting an entry in this contest, the entrant grants the ABA and the ABA Standing Committee on Law and National Security permission to edit and publish the entry in the Committee’s *National Security Law Report*. Please direct any questions about the contest to the Committee Staff Director at hmcMahon@staff.abanet.org.

Judging: The winning entry will contain a clearly written original analysis of a national security law issue that is substantively accurate and persuasive, supported by citations. The entries will be judged anonymously by members of the ABA Standing Committee on Law and National Security and the Advisory Committee.

Prize: The winner will receive a cash prize and free registration to the November 2009 Annual Review of the Field of National Security Law Conference. Registration for the conference will include reimbursement for travel, housing, and per diem up to **\$500**. Additionally, an edited version of the winning article will be published in the *National Security Law Report*. Winner must be present at the Annual Review Conference, which will be held in Washington, DC, likely the second week in November, to receive the award.

THE ABA NATIONAL SECURITY LAW REPORT
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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 The University of Texas 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 rchesney@law.utexas.edu.

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

1. **Rasul v. Myers (D.C. Cir. Apr. 24, 2009)**

A D.C. Circuit panel (Henderson and Randolph, plus a concurrence from Brown) has concluded that the Supreme Court’s *Boumediene* decision does not alter its earlier determination that the civil claims brought by a group of former GTMO detainees should be dismissed. As to the plaintiffs constitutional claims, the panel concluded that the defendants would be entitled to qualified immunity even if *Boumediene* “portends application of the Due Process Clause and the Cruel and Unusual Punishment Clause to Guantanamo detainees,” since “[n]o reasonable government official would have been on notice that plaintiffs had any Fifth Amendment or Eighth Amendment rights” prior to *Boumediene*.

The panel also noted, in footnote 5, an alternative ground to dismiss the *Bivens* claim: “federal courts cannot fashion a *Bivens* action when “special factors” counsel against doing so,” and the Circuit had held in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C.Cir.1985), that “the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad.”

2. **Basardh v. Obama (D.D.C. Apr. 15, 2009)**

Judge Huvelle had previously granted the habeas petition of GTMO detainee Yasin Muhammed Basardh (an individual whose cooperation with the government in terms of inculcating other detainees has been the subject of considerable media attention), and on April 15th published an opinion explaining the grounds for that decision. Excerpts follow:

“Petitioner raises a myriad of novel legal arguments as to why his petition should be granted based on his post-detention conduct and his alienation from enemy forces as a result of his [redacted] The issue, however, can be decided without resort to [such arguments]. ... Rather, the Court can limit itself to addressing respondents’ contention that the Authorization for the Use of Military Force (“AUMF”)... as interpreted by *Hamdi*, authorizes the government to imprison petitioner regardless of whether he continues to pose any threat of returning to the battlefield so long as the United States is still engaged in hostilities with al-Qaeda or the Taliban, and since those hostilities are still ongoing, Basardh’s [redacted] irrelevant to the determination of whether he is lawfully detained. Respondents’ position is contrary to both the AUMF and *Hamdi*.

As conceded by the government, its authority to imprison individuals at Guantanamo Bay is derived from the AUMF, which the government contends is “informed by the principles of the laws of war.” ... This statutory language of the AUMF, which defines the Executive’s detention authority in plain and unambiguous terms, speaks only to the prevention of “future acts of international terrorism against the United States.” *Id.* (emphasis added). It does not authorize unlimited, unreviewable detention. Instead, the AUMF requires some nexus between the force (*i.e.*, detention) and its purpose (*i.e.*, preventing individuals from rejoining the enemy to commit future hostile acts). Accordingly, the AUMF does not authorize the detention of individuals beyond that which is necessary to prevent those individuals from rejoining the battle, and it certainly cannot be read to authorize detention where its purpose can no longer be attained.

* * * *

For all the foregoing reasons, and for the reasons stated during the hearing held on March 31, 2009, the Court grants the petition for a writ of habeas corpus. The Court further orders the government to take all necessary and appropriate diplomatic steps to facilitate petitioner’s release. The Court, however, must deny petitioner’s request that he be released into this country or be transported to a safe haven in light of *Kiyemba v. Obama*, 555 F.3d at 1024.