Due Process and Terrorism Series

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Exploring Counterterrorism Detention Alternatives

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A Post-Workshop Report
September 2009

American Bar Association Standing Committee on Law and National Security

National Strategy Forum

McCormick Foundation

American Bar Association Standing Committee on Law and National Security

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Report written by Wayne Massey. Research and editing support provided by Matt Owens

The "Exploring Counterterrorism Detention Alternatives" Workshop was not for attribution.

Exploring Counterterrorism Detention Alternatives

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I. Foreword

In the intensive national debate over the U.S. approach to counterterrorism detention, it has at times proven tempting to oversimplify the issues involved. Those who oppose broadening U.S. detention authority too often gloss over the reality that detention has long been part of military operations in armed conflict, and that, if lawfully conducted, detention operations in such settings can function to reduce violence and help establish order. Whatever the appropriate resolution of the unique situation of the legacy detainees now at Guantanamo Bay, 'charge or release' has never been the only option in situations of actual armed conflict. All of humanity shares an interest in ensuring that armed conflict detention is carried out in a way that ensures justice and minimizes errors.

At the same time, many who support some new form of "preventive" or administrative detention incorrectly believe that advocates of judicial process are insisting that criminal law can provide a complete answer to the threat of terrorism. Yet it is now widely recognized that effective counterterrorism policy must use all instruments of national power – diplomatic, economic, cultural, military, and, where lawful and appropriate, criminal processes. The false notion that there is a black and white choice to be made in counterterrorism policy generally between a criminal approach or a military approach wrongly assumes that we cannot, under appropriate circumstances, do both. It also obscures the fundamental questions at issue in the detention debate – who should be detained, under what circumstances, and why.

To explore this vexing set of questions, the ABA Standing Committee on Law and National Security convened this third in a series of workshops on Due Process and Terrorism. This workshop focused on whether new or different detention authority is necessary and wise for effective counterterrorism policy. While there was no expectation that participants would reach consensus – indeed, participants were chosen to ensure that a diverse range of views would be represented – participants were able to move past the rhetorical debate and move forward with some shared understandings. There was no dispute that some detention authority was necessary for the United States to be effective at countering terrorism. There was likewise no dispute that too much detention – mistaken detention, overly broad sweeps, or programs that mandate the prolonged detention of any who may pose even the smallest threat to U.S. interests without taking account of the range of likely consequences – poses a strategic risk to U.S. national security. And there was no dispute that all three branches of U.S. government should be active participants in authorizing and policing any kind of detention regime going forward.

As with the previous reports in this series, the summary of discussion that follows is most valuable not for its conclusions, but for its description of the insights and experiences of the expert practitioners and scholars who participated. As the new Administration continues its works to develop a sustainable approach to counterterrorism detention policy, we are hopeful that this report, like its predecessors, will be useful in informing the discussions of policymakers and the public.

Working Group Members:

Albert C. Harvey
Chair
Standing Committee on
Law and National Security
American Bar Association

Suzanne E. Spaulding
Advisory Committee Chair
Standing Committee on
Law and National Security
American Bar Association

Richard E. Friedman
President and Chair
National Strategy Forum

M.E. Spike Bowman
Distinguished Fellow
University of Virginia
School of Law

Deborah Pearlstein
Visiting Scholar
Program in Law and Public
Affairs
Princeton University

Harvey Rishikof
Professor of Law and
National Security Studies
National War College

II. Reporter's Note

This report was prepared by Wayne Massey ("the reporter") based on his notes of the workshop and the editorial comments of the workshop discussants. The reporter attempted in good faith to set forth an accurate record of the discussion, including the discussion's more nuanced details and its general tenor. The report distinguishes between points of consensus, substantial agreement, some agreement, and disagreement or contrast. However, even points characterized as consensus or substantial agreement are not generally points on which there was complete or uniform agreement amongst the discussants. In order to accurately report the discussion and ensure a factually accurate report, the reporter added background and introductory information, primarily by using footnotes. The reporter intended that the additional information would help to clarify the discussion for the reader.

Finally, it is worth noting that the report does not follow the workshop discussion temporally. For the benefit of the reader and for the sake of clarity, the reporter attempted to organize points made throughout the day into a logical framework as defined by the workshop organizers in the agenda.

III. Overview

In one of the first acts of his new administration, President Obama established an interagency task force to develop policies for the detention and trial of suspects captured in connection with armed conflicts and counterterrorism operations.[1] As the administration task force continues working to develop long-term policy in the field, the ABA Standing Committee on Law and National Security perceived a pressing need to ensure that the debate over detention is informed by experts with first-hand experience in current U.S. detention law and policy, as well as potential alternatives.

To that end, on June 2, 2009, a group of legal and policy experts, experienced practitioners, and scholars gathered at Bingham McCutchen, LLP in Washington, D.C. for a day-long workshop entitled "Exploring Counterterrorism Detention Alternatives." The workshop participants were drawn from the military, intelligence and law enforcement communities, private and non-profit sectors, government, and academia, and were encouraged to express their diverse viewpoints. The discussants spoke under Chatham House Rule, meaning that their remarks were recorded without attribution. In addition, the workshop hosted expert presenters and a number of observers.

The workshop, the third in a series on related topics,[2] explored current U.S. detention powers under the criminal and military models and considered potential alternative models for the administrative detention of future terrorist suspects. The discussants considered and attempted to define, to the extent possible: (1) the classes or categories of individuals the United States has a strong national

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[1] See Exec. Order No. 13,493, 74 Fed. Reg. 4,901, 4,901 (Jan. 22, 2009) (establishing a "Special [Interagency] Task Force on Detainee Disposition (Special Task Force)" in order to "develop policies for the detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations that are consistent with the national security and foreign policy interests of the United States and the interests of justice."

[2] The first workshop in the series was entitled "Due Process and Terrorism." See AMERICAN BAR ASSOCIATION (ABA) STANDING COMMITTEE ON LAW AND NATIONAL SECURITY ET AL., DUE PROCESS AND TERRORISM (2007) (discussing, primarily, cases pending at that time in which the Supreme Court considered what, if any, process was due to terrorist suspects detained by the U.S. Government), available at: http://www.abanet.org/natsecurity/publications/due_process_and_aba_stcolns_nsf_mtf.pdf [hereinafter REPORT ON DUE PROCESS & TERRORISM]. The second workshop in the series was entitled "Trying Terrorists in Article III Courts ." See ABA STANDING COMMITTEE ON LAW AND NATIONAL SECURITY ET AL., TRYING TERRORISTS IN ARTICLE III COURTS: CHALLENGES AND LESSONS LEARNED (2009) (discussing, primarily, some of the most difficult challenges associated with trying terrorist suspects in the regularly-constituted Article III courts), available at http://www.abanet.org/natsecurity/trying_terrorists_artIII_report_final.pdf [hereinafter REPORT ON ARTICLE III TERRORISM TRIALS].

security interest in detaining; (2) the nature and scope of existing U.S. detention powers; (3) any present gaps in existing U.S. detention powers, focusing on classes of individuals identified at step (1) for which the United States currently has no lawful power to detain; and (4) the potential benefits and costs of instituting alternative detention models for suspects captured in the future. Finally, the discussants briefly considered what procedural features should characterize any such administrative detention model. The moderators intended for the discussion to be prospective, and requested that the thrust of the discussion focus on future detainees and detention law and policy rather than "legacy detainees" held at Guantanamo Bay or elsewhere.

While the objective of the workshop was not to reach uniform conclusions on any particular issue, the discussants reached substantial, though not unanimous, agreement on a few broad conclusions and principles. The following list of points of agreement, while accurate, necessarily glosses over many of the nuances of the discussion that the report fully accounts for in the following sections. Thus, the following points should be considered in the context of the report as a whole because the context is vital to understanding the issues surrounding each point of agreement.

• The 2001 Authorization for the Use of Military Force, as informed by International Humanitarian Law (IHL), authorized the U.S. military to detain individuals lawfully who were under the command of enemy armed forces or who participated, directly or indirectly, in the international armed conflict in Afghanistan. Current IHL as accepted by the United States does not prohibit the detention of individuals in non-international armed conflict.[3]

• In order to avoid the negative and potentially severe drawbacks of a sweeping counterterrorism detention policy, the United States should define narrowly the classes of individuals that are subject to its detention authority. In determining who to detain, the United States should focus its detention efforts on (i) non-fungible terrorist personnel and (ii) terrorist personnel who pose an imminent threat to the safety or security of the United States, its citizens, or interests. A suspect's membership in a known terrorist organization or intelligence value may be im-

[3] There exist widely accepted international safeguards to protect civilians in non-international armed conflicts, but the United States is currently not a party to the relevant treaties. See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 75, Dec. 7, 1978, 1125 U.N.T.S. 3, 37 (outlining a procedural framework for the treatment of any individual detained in relation to an armed conflict, whether of international or non-international character).

portant factors in determining whether to detain, but neither of these factors on its own is necessary or sufficient to prove that an individual is a threat to the security of the United States justifying detention.

There was no agreement as to the necessity for or benefits of an administrative detention regime for terrorist suspects beyond that authorized by the AUMF. However, the discussants did agree that the following principles should characterize any contemplated administrative detention regime.

•Any contemplated administrative detention regime for terrorist suspects should include articulable criteria describing who may be detained and specifying under what circumstances and conditions a detainee will be released. Furthermore, the government should bear the burden of proving that each detention is necessary, meaning that there is no other lawful means available for achieving the government's asserted detention interest.

•Ideally, any administrative detention model for terrorist suspects should feature cooperation between the three branches of the U.S. government. An independent judicial body should review the detention of individual suspects actively and frequently. In addition, many discussants agreed that the government should have a rising burden of proof to justify detention as the length of detention increases over time.

IV. Who Needs to be Detained and Why

A. Introduction

The discussants were asked to consider first: Who needs to be detained and why? In defining who needs to be detained, the discussants attempted to distinguish between the innumerable potential threats that exist in the world, and the narrow category of individuals who pose such a substantial or imminent threat that the United States is compelled to detain them. In defining why individuals need to be detained, the discussants similarly attempted to outline the overriding (and permissible) reasons for detaining some individuals over other potentially threatening individuals.

Although the moderators provided a short list describing potential targets for detention, including combatants captured in an active zone of combat and terrorist suspects apprehended on U.S. soil, they asked the discussants to ignore the list except as a beginning point for the discussion. For this portion of the discussion, the moderators intended that the discussants be unconstrained by current legal designations and frameworks, wanting to elicit a principled and policy-based analysis as a starting point for identifying what types of threats or conduct warrant detention.

B. Rationales for Detention

The discussants considered the following general rationales for detention: (1) Incapacitation, (2) Disruption, (3) Deterrence, and (4) Information Gathering.[1] A majority of the discussants agreed that incapacitation, disruption, or deterrence each may justify detention depending on the circumstances. As an example, a majority of the discussants agreed that military detentions in armed conflict are justifiable solely as a lesser means of incapacitation than killing the enemy. However, a number of discussants asserted that the government cannot justify long-term detention solely on the basis of gathering information. As an example, discussants noted that U.S. law enforcement may detain "material witnesses" lawfully for only a short time period while they collect and organize the neces-

[1] See Matthew Waxman, Administrative Detention of Terrorists: Why Detain, and Detain Whom? 3 J. OF NAT'L SEC. L. & POLICY 1 (forthcoming 2009) (discussing the listed justifications for detention models in great detail, as well as the respective strengths and limitations of each), available at http://www.mcgeorge.edu/Documents/publications/jnslp/Waxman_V13_3-19-09.pdf.

sary evidence for a criminal prosecution.[2] The discussants attempted to keep the forgoing rationales for detention in mind, as well as the relative limitations, as they considered who needs to be detained and why.

C. Distinguishing between Potential Detainees

1. Limits on Detention

As a beginning point, a majority of discussants agreed that while the United States might need to detain some individuals who pose a threat to U.S. citizens, interests, or national security, the United States certainly cannot and should not detain all individuals who may pose a threat. The discussants believed that a sweeping detention policy would have far greater negative consequences than positive.

First, the discussants viewed an overly broad detention policy as a waste of finite resources. [3] One discussant commented that Guantanamo Bay has been a "black hole" for at least three different types of resources: (1) funds, (2) military and intelligence personnel in operational, penal, and interrogative capacities, and (3) investigative man-hours not spent on the "harder core" of the threat. However, there was no agreement on this characterization of Guantanamo Bay.

Second, the discussants recognized that other nations would view an overly broad detention policy in a highly negative light. Some discussants opined that the implications for U.S. foreign relations could be so negative that foreign liaison, intelligence, and law enforcement services might stop cooperating with the United States on terrorism and other security initiatives. Many discussants believed that such "blow back" from the international community in response to an overly broad detention policy seems likely to outweigh any potential benefits.

Third, several discussants questioned whether a sweeping detention policy would comport with the Due Process and Confrontation Clauses of the U.S. Constitution.

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[2] Several discussants noted that even short periods of law enforcement detention between arrest and indictment are justified by more than gathering evidence; such detention helps to ensure incapacitation, disruption, and deterrence of the individual in custody and his accomplices while officers develop fully a criminal prosecution. See infra Part IV.C.1for a more detailed account of the discussion regarding whether intelligence value alone can justify detention.

[3] For the purposes of this report, an "overly broad detention policy" is one that detains individuals that are less than substantial or imminent threats to U.S. citizens, interests, or national security.

Fourth, a majority of discussants were highly skeptical that an overly broad detention policy would accomplish the desired security results because the vast majority of detainees would be low-level, fungible terrorist suspects. Detaining fungible terrorist personnel would (1) have little impact on discrete terrorist operations and (2) incite, potentially, more moderate individuals to join terrorist organizations.

The discussants also considered factors or criteria that should be insufficient on their own for the purposes of detention. One such factor, membership, was of particular importance to several discussants. One discussant noted that several well-known terrorist organizations include government-type social-welfare arms. The discussant asserted that members of the social-welfare arm of a terrorist organization may pose a threat to the United States, but questioned whether such individuals should be detained on the basis of membership alone. Another discussant asserted that there is an important difference between Al Qaeda "the movement" and Al Qaeda's "foreign fighters," implying that not everyone associated with Al Qaeda represents an imminent threat to the United States. Another discussant noted the difficulty in defining the term "membership" in the context of modern terrorism. As an example, the discussant argued that there are militias allied with the Taliban in Afghanistan and Pakistan that pose an imminent threat to U.S. soldiers but are not members of a well-defined terrorist organization or of the Taliban. The same discussant also noted that there are thousands of individuals across the world calling themselves members of Al Qaeda, but that the majority of such individuals have almost no connection to the broader terrorist organization. Due to the totality of these considerations, a majority of the discussants agreed that membership may be one factor in determining who to detain, but membership alone is neither necessary nor sufficient for the purposes of detention.

Additionally, several discussants argued that intelligence value alone should not justify detention. These discussants argued that an individual's intelligence value, without more, has never been sufficient for even military detention, noting that military detention serves at least two overriding purposes: (i) it serves as an alternative to lawfully killing the enemy and (ii) serves to remove an enemy soldier from the battlefield. In addition, a few discussants argued that detaining low-level individuals, such as cooks, and non-terrorist individuals for the mere purpose of gathering information would be unjust. Regardless of the rationale, a majority of discussants agreed that intelligence value may be a factor in determining whether to detain an individual, but should be insufficient on its own in

the majority of cases without more.

The totality of the considerations against an overly broad detention policy led to a point of substantial agreement: if the United States is going to detain administratively, it must define narrowly the category of individuals subject to detention in order to avoid the drawbacks of an overly broad detention policy.

2. *Essential* and *Instrumental* Terrorist Personnel

The discussants agreed that one narrow class of suspects worth detaining might include those individuals who are essential or instrumental to terrorist activities,[4] rather than fungible. However, there was no agreement on whether the United States needs new detention authority to achieve this goal. There was some debate between the discussants as to whether essential personnel exist in modern terrorism. Some discussants pointed to terrorist financiers as essential to terrorist activity, and relatively small in numbers. (As the later discussion showed, these individuals may be detainable under current IHL in only a small set of circumstances).[5] It was noted, however, that there exist means to disrupt a terrorist financier other than administrative detention, such as freezing his assets, criminal imprisonment, and different types of house arrest. Some discussants also pointed to high-level terrorist organizers and recruiters, such as Khalid Sheikh Mohammed, as instrumental to terrorist activity. The discussants implied that these types of individuals are instrumental because of their skill as organizers. However, one discussant noted the regenerative capabilities of terrorist organizations, noting that the United States has targeted nearly a dozen different "Al Qaeda number 3's" for Predator strikes in Afghanistan and Pakistan. Though there was no agreement on whether essential personnel really exist in terrorist organizations that have such regenerative capabilities, there was at least some agreement that the most-skilled terrorist personnel are instrumental and may be worthwhile targets for counterterrorism detention.

3. *Imminent Threats*

The discussants also identified a second narrow class of threatening suspects: those individuals who pose an *imminent threat* (again, there was no agreement on whether the United States needs new authority to this purpose). For this

[4] The discussants did not explicitly draw a distinction between essential and instrumental personnel during the workshop; however, the distinction was implicit. The discussants primarily used the term essential to describe all suspects in this section.

[5] See infra Part V.A.

class, the discussants agreed that whether the individuals are essential or fungible becomes much less important. As one example, the workshop participants discussed how a suicide bomber on the verge of perpetrating a terrorist act is no more essential than cannon fodder, but may pose an imminent and substantial threat to the safety and security of the United States. Another discussant offered the example of a combatant captured on the battlefield in Afghanistan, who poses an immediate threat to U.S. soldiers, but may be a fungible asset in the hierarchy of the terrorist organization. The workshop discussants reached broad consensus that the U.S. military is authorized to detain such imminent threats on the battlefield under current law.

Some of the discussants attempted to lay out elements of a further definition of threat by offering a few relevant factors, namely, (i) how the battlefield is defined, (ii) how the suspect is captured, (iii) where the suspect is captured, and (iv) what activity(ies) the suspect was engaged in before or during capture. Using these criteria, some discussants noted that a combatant on a conventional battlefield would easily qualify as a threat. However, many discussants reasoned that such rationale was unnecessary for battlefield threats, again, because when a U.S. soldier has the lawful right to kill the enemy, he should also have the lawful right to detain.[6]

[6] See supra Part IV.B.

V. Detention Powers

The discussants next considered the scope of current U.S. and international laws authorizing and regulating the detention of terrorist suspects. Because participants were more generally familiar with detention authority under U.S. criminal law, the workshop hosted two expert presenters to provide some background on less familiar bodies of law.

A. Permissible Detention Under IHL

The first expert provided an overview of permissible detention under International Humanitarian Law ("the IHL Expert"). The IHL Expert focused on the outer limits of what IHL permits during an international armed conflict and during a non-international armed conflict. The IHL Expert did not address whether other sources of international or domestic law authorize, permit, or prohibit different types of detention. The IHL Expert also expressly refrained from offering policy judgments, speaking solely to the legality of detentions under IHL. The following is a brief summary of the IHL Expert's comments.

1. Categories of Participation in Armed Conflict under IHL

The IHL Expert identified four categories of individuals, each subject to different rules under IHL: (1) members of regular armed forces and irregular forces; (2) Direct Participants in hostilities; (3) Indirect Participants in hostilities; and (4) Nonparticipants in hostilities.[1] While a member of a regular armed force is relatively easy to differentiate from the other three categories, and is subject to little debate with regard to the permissibility of detention, the other three categories are not as clearly distinguished and are central to determining the types of individuals that the United States may lawfully detain under IHL. Of particular importance for the detention debate is the dividing line between Indirect Participants and Nonparticipants, because Indirect Participants but not Nonparticipants may be detained under IHL.[2]

The IHL Expert explained that terrorists and non-state supporters of terrorism would generally fall into one of the last three categories depending on individual levels of involvement. Direct Participants include anyone who may be described colloquially as a soldier, whether captured on the battlefield or elsewhere. Indirect Participants traditionally include individuals such as supply contractors

[1] See Ryan Goodman, Editorial Comment, The Detention of Civilians in Armed Conflict, 103 AM. J. INT'L L. 48 (2009), for a more detailed discussion and analysis of these categories under IHL.

[2] See Geneva Convention Relative to the Treatment of Prisoners of War, art. 4(A)(4), Aug. 12, 1949, 6 U.S.T. 3316, 3320, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

and munitions transporters operating away from the battlefield; such individuals may also be detained under IHL. The IHL Expert pointed to Article 4(A)4 of the Third Geneva Convention, for example, to show that civilians accompanying the armed forces as logistical support are subject to detention under IHL.

The IHL Expert argued that conflating one category of individual with another can lead to undesirable results. For example, if one conflates Direct Participants and Indirect Participants, then it is possible that private military contractors may become subject to targeted killing without directly participating in hostilities. Similarly, if one interprets narrowly what it means to "participate in hostilities," then legal prohibitions begin to erode regarding the recruitment and deployment of child soldiers. For these and other reasons, the IHL Expert cautioned against the practice of broadening or conflating categories, noting that such manipulation of the traditional IHL categories could create serious legal loopholes in IHL, and thus, serious negative consequences for the United States and other nations in the future.

Additionally, the IHL Expert argued that the same general legal regime, including categories of behavior and associated rules, apply across both international armed conflict and non-international armed conflict, stating that permissive rules (but not prohibitive rules) in international armed conflict serve as a baseline for permissiveness in non-international armed conflicts. This position provoked disagreement from some workshop discussants. It was the view of the IHL Expert that, even in non-international armed conflict, a nation state is permitted to detain civilian security threats. The IHL Expert noted that such a rule is not at odds with International Human Rights Law, citing the first decision of the European Court of Human Rights in which that court permitted the administrative detention of individuals who qualified as security threats.[3]

2. The Requirement of Necessity under IHL

The IHL Expert indicated that IHL may require a showing that each detention is necessary under the circumstances. The Expert defined necessity under IHL by alluding to the internment of civilians under Article 42 of the Fourth Geneva

[3] See Lawless v. Ireland (No. 1), 1 Eur. Ct. H.R. (ser. A) (1961) (ruling, among other things, that Ireland's detention without trial of an IRA suspect, subject to certain safeguards, was "a measure strictly required by the exigencies of the situation within the meaning" of The Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention"), and ultimately holding that the detention without trial was permitted under the Convention).

Convention[4], and the least restrictive means clause as stated by the International Committee of the Red Cross (ICRC) in its Commentary to Article 42.[5] The Expert stated that detention is necessary where no less restrictive means for neutralizing the threat exists at the moment. The IHL Expert also indicated that necessity may include circumstances where an individual's contribution to the cycle of hostilities makes it necessary to detain. The IHL Expert referred to the Israeli example at this point, noting that it requires more than mere membership in a terrorist organization to justify detention; it requires a showing of a "nontrivial contribution" to future hostilities.

3. IHL Applications and Examples

First, some of the workshop discussants inquired whether the government could detain a terrorist financier as an Indirect Participant in an armed conflict. One discussant noted that Israel considers a terrorist financier as a Direct Participant at the moment he is engaged in a substantial act of financing. Thus, under the Israeli system, a financier may be detained or even targeted for killing when detention is impracticable. However, the IHL Expert responded that a terrorist financier seems to fall into the categories of Indirect Participant or Nonparticipant. The IHL Expert implied, however, that financing alone may be insufficient for detention as an Indirect Participant under IHL. Though it was not explicit, the IHL Expert's assessment of financiers seemed to hinge on the facts that there is often no link between a financier and a particular terrorist attack and that there are far less restrictive alternatives to detention for disrupting a financier. At one point, the IHL Expert implied that the detention of financiers as a general rule seems to intrude significantly into the realm of domestic criminal law, but the Expert did not elaborate on this comment.

Second, some of the workshop discussants questioned whether the government could detain terrorist recruiters under IHL. The IHL Expert suggested that recruitment does not constitute direct participation but is sufficiently connected to

[4] See Convention Relative to the Protection of Civilian Persons in Time of War, art. 42, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 135, 168 [hereinafter Fourth Geneva Convention] ("The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.")

[5] See INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, Art. 42, at 254 (Jean S. Pictet gen. ed. 1958) [hereinafter GENEVA IV COMMENTARY] (concluding that, under Article 42, "[h]enceforward only absolute necessity, based on the requirements of state security, can justify recourse to [internment or assigned residence], and only then if security cannot be safeguarded by other, less severe means.") (emphasis added).

the exercise of force against an enemy to constitute indirect participation. Hence, if they are engaged in a relevant armed conflict, terrorist recruiters could be detained lawfully under the IHL regime.

Third, some of the workshop discussants questioned whether the government could detain a hypothetical bomb-maker who was previously present in Afghanistan and making bombs used against U.S. soldiers, but who was captured away from the battlefield, either in a foreign country or on U.S. soil. The IHL Expert found this to be an "easier case" than the financier. He responded that a "traveling bomb-maker" who had previously and indirectly supported hostilities in Afghanistan could be detained under IHL regardless of where the bomb-maker was captured. The IHL Expert qualified this response, however, to restate that he was not considering issues of state sovereignty, international human rights law, or whether the U.S. government has the requisite domestic authority to effectuate the capture. The IHL Expert reasserted that IHL permits, but does not authorize, such detention; such authorization would likely come from a nation's domestic laws, and a nation's domestic laws can prohibit actions that IHL permits.

B. The Israeli Model for Administrative Detention

Though several nation-states, including France, Israel, and the United Kingdom, have instituted alternative detention models designed to combat terrorism,[6] the workshop primarily considered Israel's administrative detention model. To enhance this part of the discussion, the workshop hosted a second expert presenter to outline and clarify different aspects of the Israeli system ("the Expert on Israeli Detention").

1. Israel's Administrative Detention Model[7]

The Israeli model permits the administrative detention of individuals predicated on intelligence information that cannot be reviewed in an ordinary court of law.

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[6] See Waxman, supra note 4, at 10 n.50, 19—20, 35 n.162 (exploring the detention powers exercised by various foreign governments, including France, Israel, and the United Kingdom, among others).

[7] Israel employs two administrative detention regimes. One regime detains suspects apprehended within Israel proper and the other regime detains suspects apprehended within the occupied territories. The primary difference between the two regimes is the nature of the courts providing initial oversight; the initial detention hearing and first appeal (referred to as "petition" in Israel) are administered by civilian courts in Israel proper and by military courts in the occupied territories. For the purposes of the workshop, the Expert on Israeli Detention focused on the administrative detention of suspects apprehended within the occupied territories.

Within 48 hours of capture, agents must bring the individual before a military judge to review the basis for administrative detention. The judge then determines whether the individual should be subjected to detention and for how long (limited by statute to a maximum of 6 months per judicial order, but renewable under frequent judicial review). The Expert on Israeli Detention noted that the highest reviewing court is a specialized court of a sort, the High Court of Justice, composed of the regular justices of the Israeli Supreme Court. Thus, all cases of administrative detention are subject to review by the highest justices in Israel, who may override the judgment of the Executive when they deem appropriate.

The evidence supporting an administrative detention must implicate the individual in a future attack and must be: (1) valid, (2) viable, (3) reliable, and (4) corroborated by at least two individuals. There are a few limited circumstances where the court has accepted corroboration by a single individual. In addition, the evidence must create particularized, rather than generalized, suspicion relevant to the detained individual, and the detention cannot be based on previous acts; the detention model is forward-looking. Finally, the government must convince the court that detention is necessary to avert the threat on a case-by-case basis.

2. Discussant Inquiries Regarding the Israeli Model

One discussant inquired about the duration of detentions under the Israeli model. The Expert on Israeli Detention described the renewal structure of the model, stating that the government cannot detain an individual beyond the 48 hours without judicial approval and cannot hold an individual longer than 6 months without additional judicial review. The Israeli Detention Expert noted that the court renews a particular detention where its convinced that (1) releasing the detainee would lead to substantial contributions to terrorism, (2) the threat posed by a specific detainee is too great for release, or (3) the detainee is of such importance to his community that detention is necessary for its deterrent effect. The Expert on Israeli Detention commented further that there is an ongoing debate in Israel, without a clear answer, as to whether the government must present new information to justify renewal. The Expert commented that there are significant practical difficulties with requiring new information where an individual has been detained for the last 6 months. The Expert on Israeli Detention also noted that, in Israel, there is no judicial deference to the Executive in matters of national security; the Expert believed that the Israeli model works only because the Judiciary is actively engaged and does not feel the need to defer to the national security

judgment of the Executive. [8]

In concluding the presentation, a few discussants also inquired about the basis for release from detention. The Expert on Israeli Detention explained that detainees are released, ordinarily, when the overall threat has dissipated. Another discussant questioned whether the underlying justification for administrative detention was to safeguard the continued existence of the state of Israel. The Expert stated that Israel can hold a detainee only when the individual personally poses a specific future threat, implying that an ambiguous and generalized threat of the potential destruction of Israel is insufficient.

[8] See also Amos N. Guiora & Erin M. Page, Going Toe to Toe: President Barak's and Chief Justice Rehnquist's Theories of Judicial Activism, 29 HASTINGS INT'L & COMP. L. REV. 51 (2005) (comparing the differing levels of deference that the Israeli Supreme Court and the U.S. Supreme Court accord the Executive branch of their respective governments in national security matters).

VI. "Gaps" in Current U.S. Detention Authority

The workshop discussants next explored whether the United States needs an alternative detention model. There was substantial debate between the discussants regarding whether existing criminal and military detention authorities, in conjunction, are adequate to address U.S. detention needs for effective counterterrorism. Of particular importance to the discussants was identifying who cannot be incapacitated, disrupted, or deterred adequately under either of the two models as they currently stand.

The discussants attempted to identify and define classes of individuals who pose a real and imminent threat to the United States but may remain outside current U.S. detention powers. There was substantial disagreement as to whether gaps in current law actually exist and whether the potential gaps require more than minor adjustments to current law.

1. Jose Padilla-type Suspects

The facts surrounding Jose Padilla's capture, detention, and subsequent legal challenges dominated the discussion regarding potential gaps in current U.S. detention powers.[1] Padilla, a man who fought against U.S. soldiers in Afghanistan and reportedly escaped the battlefield through Pakistan,[2] was later captured on U.S. soil. However, the information needed to sustain criminal proceedings against Padilla was classified, and the Executive decided that the information was too sensitive for disclosure in a criminal court. Though Padilla was detained

[1] See Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005) (holding that the President possessed authority to detain Padilla, a U.S. citizen, as an illegal enemy combatant pursuant to Congress' Authorization for Use of Military Force (AUMF) where Padilla had taken up arms against the U.S. military on the battlefield in Afghanistan but was captured on U.S. soil). The Fourth Circuit later denied the President's attempts to transfer Padilla into civilian custody for trial, stating that "[o]n an issue of such importance, we believe that the rule of law is best served by maintaining on appeal the status quo in all respects and allowing Supreme Court consideration of the case in the ordinary course, rather than by an eleventh-hour transfer and vacatur on grounds and under circumstances that would further a perception that dismissal may have been sought for the purpose of avoiding consideration by the Supreme Court." Padilla v. Hanft, 432 F.3d 582, 587 (4th Cir. 2005). However, the Supreme Court later approved Padilla's transfer to civilian custody without considering or deciding the 'important issues,' as described by the Fourth Circuit. See Hanft v. Padilla, 546 U.S. 1084 (2006).

[2] See id. at 387 (stating that Padilla "took up arms against United States forces in [Afghanistan] in our war against al Qaeda [and] [u]pon his escape to Pakistan from the battlefield in Afghanistan, Padilla was recruited, trained, funded, and equipped by al Qaeda leaders to continue prosecution of the war in the United States").

temporarily by U.S. law enforcement authorities as a "material witness,"[3] several discussants argued that prosecutors inappropriately manipulated the "material witness" statute to serve the government's interest in detaining Padilla.[4] Padilla was transferred to military custody shortly thereafter,[5] and later, Padilla was transferred back to the criminal system, convicted, and sentenced.[6]

Some discussants cited Padilla's eventual conviction and imprisonment as evidence that the United States already has adequate detention authority for Padilla-type suspects under current criminal law. Other discussants asserted, however, that Padilla was convicted only because the Executive disclosed the needed information that had been classified, and thus unavailable, prior to Padilla's transfer back into the criminal system. Despite this disagreement, a number of discussants agreed that the United States has a strong interest in detaining Padilla-type suspects; however, this agreement was based on at least two different rationales and the discussants disagreed on the best method for serving that interest.

One set of discussants believed that the government needs a framework for Padilla-like individuals in order to protect U.S. citizens and national security. Another set of discussants, however, believed that the government needs a framework for Padilla-like individuals in order to avoid the ad hoc, ambiguous, and discretionary process used by the Executive Branch to incapacitate Padilla. This second rationale for an alternative process was based on at least two considerations: (a) that any Executive officers faced with a Padilla-like individual would similarly act to incapacitate the individual regardless of whether an appropriate legal framework exists, and (b) a well-defined legal framework, governed

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[3] See id. ("Padilla flew to the United States on May 8, 2002 . . . [and] was arrested by civilian law enforcement authorities upon his arrival at O'Hare International Airport in Chicago.").

[4] The federal "material witness" statute states:
If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.
18 U.S.C. § 1344 (2006).

[5] See Padilla, 423 F.3d at 387 ("the President directed the Secretary of Defense to take Padilla into military custody, in which custody Padilla has remained ever since").

[6] See generally Abby Goodnough, Padilla is Guilty on All Charges in Terror Trial, N.Y. TIMES, Aug. 17, 2007, at A1.

by articulable rules and overseen by the Judiciary, is preferable to a relatively undefined system completely within the discretion of the Executive Branch. It is important to note again, however, that many discussants believed that the current criminal model is sufficient, or requires only minor adjustments, to serve the U.S. interest in detaining Padilla-like suspects.

2. Osama bin Laden-type Suspects

Some participants pointed out a serious lag time between when Osama bin Laden was identified conclusively as a serious terrorist threat (1996) and when he could be detained under the criminal model (indicted in 1998, just before the Embassy Bombings). In response, other discussants suggested that perhaps the legal basis for detaining bin Laden existed earlier than 1998, and questioned whether the decision against the criminal process was made for operational and policy rather than legal reasons. Regardless of the precise circumstances surrounding bin Laden's identification and indictment, however, a number of discussants agreed that a lengthy delay between identification and lawful authority to detain under the criminal model would represent another gap in current U.S. detention powers.

3. Summarizing Potential "Gaps" in Current U.S. Detention Authority

By the end of this part of the workshop, several discussants had agreed to a small list of circumstances in which the criminal model may be insufficient to incapacitate serious threats:

• Where the Executive Branch decides that the information cannot be disclosed at the time because, for example, the information is classified, would compromise ongoing intelligence operations, or is provided by a foreign government on the condition that it cannot be revealed publicly;

• Where the character of the information, i.e., attenuated hearsay or third-party wiretaps, might be insufficient to sustain a criminal prosecution;

• Where the information is highly conclusive but would face major evidentiary challenges in a criminal prosecution; and

•Where detention authority through the criminal process significantly lags behind the identification of a terrorist threat.

Some discussants maintained that these potential gaps do not represent real gaps in current law. As evidence that current law already addressed the potential gaps, one discussant noted that the Classified Information Procedures Act (CIPA) already protects classified evidence disclosed for criminal proceedings.[7] In addition, there was a subset of discussants that recognized at least some gaps in current law, but asserted that the United States could address those gaps with only minor adjustments to current law rather than the creation of an entirely new detention regime.

It should be noted that "evidentiary challenges" are not equivalent to circumstances in which the evidence is somehow unreliable, discredited, or otherwise deficient. This was dubbed an "evidentiary challenges" versus "evidentiary sufficiency" distinction.[8] Several discussants argued that it would be unjust to create a system that detained individuals where the evidence was insufficient for criminal purposes. Such a system, for these discussants, would be an end-run around constitutional and procedural guarantees to a fair trial.

Several discussants noted that circumstances are constantly changing, that a "gap" suspect today might be an almost typical criminal suspect tomorrow. Given that the circumstances change quickly, and that at least some of the above categories involve high-levels of Executive discretion, several discussants were convinced that any alteration in current law must maintain active and frequent review by an independent judicial body. This point received greater attention when the discussants considered the creation of an alternative detention framework,[9] but the point is valid for any change in law, including potential adjustments to the existing criminal and military models.

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[7] See Classified Information Procedures Act (CIPA).

[8] See REPORT ON ARTICLE III TERRORISM TRIALS, supra note 2, at Parts IV and V (discussing some of the evidentiary challenges associated with trying terrorists in regularly-constituted Article III courts, including challenges related to classified and sensitive evidence, hearsay evidence, and the chain of custody for evidence collected abroad).

[9] See supra Part VII.B.

VII. Moving Forward

A. Broadening the Battlefield or Otherwise Remodeling the IHL Framework

At least one discussant advocated for a detention authority that would extend to any place where an actionable threat exists. The discussant argued that if the United States continues to use only two models, criminal and military, and the criminal model is at times insufficient to detain all who pose the kind of significant threat discussed, then broadening the military model becomes necessary from a security standpoint. Reworded, if the United States can only detain without criminal process those individuals captured as participants in an "armed conflict," then the IHL definition of "armed conflict" must adapt to meet the modern threat of transnational terrorism. There was substantial disagreement on this point, however, and a significant number of discussants seemed disinclined to expand IHL beyond its existing definitions and distinctions concerning the concept of "armed conflict."

Indeed, many discussants expressed discontent with continuing to use traditional IHL terminology to describe armed conflict with non-state actors. Some discussants noted that traditional IHL terms, such as "combatants" and "zone of active combat," were developed to describe armed conflict between nation-states, not armed conflict involving non-state terrorists and terrorist organizations. The definition of the "armed conflict" in the present context was a paramount example in the discussion, and many discussants noted that the definition remains elusive and that a definition in terms of the classical battlefield remains unhelpful at best.

At least one discussant advocated for adding new terminology to the existing IHL framework to fit modern terrorism. Some discussants noted that new terminology remains a valid option, as IHL has always been a "moving target," generally defined by evolving state practice and only occasionally agreed upon through a written document.[10] However, other discussants opined that, theoretically, the traditional breadth of IHL can stretch only so far before IHL becomes unrecognizable, implying that an entirely new framework was preferable to continual expansion of IHL. Furthermore, at least one discussant was concerned that broadening the scope of IHL through new terms or redefinition to meet the modern

[10] See generally BARRY E. CARTER ET AL., INTERNATIONAL LAW 1077—1080 (5th ed. 2007) (discussing, in brief, the historical and continuing development of international humanitarian law).

threat of terrorism could be more detrimental to individual liberties than creating a new well-defined legal framework expressly tailored to deal with terrorism. As an example, the discussant noted the growing ambiguities associated with a world-wide battlefield, implying that such an expanded concept could subject a very a large number of individuals to the risk of U.S. detention or other military action. These discussants preferred, generally, a narrowly defined and terrorist-specific framework instead of an ever-expanding military framework.

On the other side of this debate, some discussants voiced apprehension about remodeling or abandoning a proven and reliable system of law, arguing that the shortcomings of the current two-model system (criminal and military) are minor. A few discussants noted that redefining terms or creating a new system would jeopardize U.S. foreign relations, and in so doing, the national security. In addition, these discussants were generally concerned about a historical trend in which the United States legitimately expands its detention authority during wartime, but utilizes that authority excessively against, or in overreaction to, threats following the war. These discussants argued that the nation usually regrets its overreactions in retrospect. As examples, one discussant pointed to the Palmer Raids following World War I. The discussant implied that wartime expansions of authority, the Espionage Acts during WWI and Korematsu during WWII, led to these overreactions, and that expanding authority during the current war could lead to the same type of regrettable overreaction.

Throughout the workshop, some discussants voiced frustrations with the traditional IHL system in the context of terrorism, while other discussants voiced apprehension about amending or abandoning a proven and reliable system. Although the discussants reached no consensus on this issue, the question of whether the United States and other nations should continue to use the traditional IHL terminology to describe armed conflict between nation-states and transnational terrorist organizations pervaded the entire workshop.

B. An Alternative Counterterrorism Detention Model, Loosely Defined

Though there was no consensus on whether the United States needs an alternative detention regime, a majority of discussants agreed that any such system, if created, should include a well-defined and narrow framework, as well as an independent body that would review detentions on a frequent basis.

A majority of discussants, having persistently noted the difficulties with defining terrorist membership, agreed that an alternative policy model for counterterror-

ism detention should begin with an articulable standard for the meaning of threat. In addition, the discussants generally preferred articulable and narrowly defined standards regarding the bases for detention, the permissible lengths of detention, and the grounds for subsequent release.

As noted in Part IV.C, the discussants identified at least two classes of threat to the United States: First, individuals who are essential or instrumental, rather than fungible, to terrorist activity; and second, individuals who pose an imminent threat. One discussant believed that a suspect's directness of involvement in terrorist hostilities or activities should be a major consideration, stating that the United States should show "individual specificity tied to a very tight nexus" to justify alternative detention. Another discussant stated that an alternative detention model should take into account the relative hierarchy of individual threats, detaining only the very few threats that fall squarely into the above two categories. Several discussants agreed that the foreign relations implications of an overly broad or under defined alternative detention model would likely undercut any potential benefits of detention.

One discussant proposed that the government should have a rising burden of proof over time to keep an individual detained.[11] Though there was no consensus on the precise nature of the rising burden, the idea received support from a number of the discussants. One discussant also proposed that the United States adopt a period of detention similar to the United Kingdom (28 days),[12] and that the detention merely serve as a preparatory period for criminal proceedings. However, another discussant objected to this proposal, arguing that the rationale for the U.K. "pre-charge" detention regime was that U.K. officials cannot interrogate

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[11] The discussant proposed a system that required sufficient levels of proof to justify detention of a narrowly defined class of offenses. Further, the proposal required legislative implementation and Article III judicial review. The following is an account of the proposed sliding scale for the government's burden of proof:

> 15-day detention requiring probable cause, 30-day detention requiring preponderance, 60-day detention requiring clear and convincing, and 90-day detention requiring beyond reasonable doubt. After 90 days, U.S. agents must either release suspect or indict the suspect on criminal charges.

[12] See generally JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: 28 DAYS, INTERCEPT AND POST-CHARGE QUESTIONING, 2006-07, H.L. 157, H.C. 394, available at http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/157.pdf.

a suspect once charged, a justification that is inapplicable in the United States.[13] While there was no consensus on a permissible time period for detentions, a majority of the discussants voiced support for relatively short time periods in cases where the government could offer a court little evidentiary support (for example, 15-30 days upon a showing of probable cause).

Furthermore, a significant number of the discussants agreed that, ideally, an alternative model for counterterrorism detention should feature substantial engagement by all three branches of the U.S. government. The discussants generally agreed that, in theory, the Legislature should define the standards for detention, leaving adequate discretion for the Executive to act and weigh national security and foreign relations concerns, and that the Judiciary should actively and frequently review detentions as a safeguard against unilateral Executive discretion. However, several discussants were concerned that Congress might not be able to perform effectively its role as a check on executive authority. Other discussants worried that Congress might be unable to craft a detention model that permitted adequate Executive discretion. Still other discussants expressed some doubt that Congress, given the political imperatives associated with counterterrorism policy, would fashion an administrative detention model that was sufficiently limited to comport with constitutional standards of Due Process. One discussant was also concerned that the Judiciary might be unable to fulfill its role as independent adjudicator in such cases given the courts' tradition of deference to the Executive in matters of national security.[14]

C. Concerns About a New Administrative Detention Model

As noted, there was no consensus on whether the United States needs a completely new detention model for terrorist suspects, whether the United States merely needs adjustments to the criminal model, or whether any change or action is needed. While a majority of discussants recognized gaps in current U.S. detention powers, the discussants only pointed to a handful of circumstances and an even smaller number of real-world examples. Some discussants viewed the small number of circumstances and examples as indication that the problems with the current two-model system (criminal and military) are minor in nature and scope.

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[13] The United Kingdom permits authorities to detain for up to 28 days "(a) to obtain relevant evidence whether by questioning . . . or otherwise; (b) to preserve relevant evidence; or (c) pending the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining relevant evidence." Terrorism Act, 2006, c. 11, § 24(3), sched. 8 (U.K.).

[14] See Guiora, supra note 17, for a more detailed discussion of judicial deference to the executive.

Further, some discussants expressed apprehension about creating a third track by which the United States can deprive an individual of his liberty. These discussants viewed any move from two tracks (criminal and military) to three tracks (criminal, military, and a new administrative regime) for detention as a fundamental shift in American law, and thus, not merely a question of alternative procedures and definitions.

Some discussants also were concerned about the differing levels of certainty and burdens of proof from the criminal system to the administrative detention system. This apprehension was based primarily on the fact that, under the American judicial system, intelligence information is often excluded as hearsay or lacks other procedural safeguards that ensure reliability in the criminal context. One discussant asserted that the administrative detention system would permit less reliable information to reach the same result as the criminal model, incarceration of a suspect. Another discussant noted that the confrontation clause of the U.S. Constitution may limit an alternative system to some degree.[15]

Finally, another discussant questioned the scope of a detainee's rights in an alternative model for administrative detention, wondering, for example, if detainees would have the right to legal counsel and when the right to counsel would attach under administrative detention.

[15] The Confrontation Clause states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

VIII. Conclusion

As the preceding sections make clear, the discussants did not uniformly agree on whether the United States *needs* an alternative detention regime to combat terrorism effectively. There was some agreement, however, that there are potential gaps in the current two-model system (criminal and military), and that the United States may need to take some corrective action in the future to fill those gaps in current law and policy. Several discussants offered ideas for correcting those gaps, which included, among others, minimal or extensive amendments to existing legal frameworks and the creation of an entirely new administrative regime targeted narrowly at counterterrorism detention.

Whichever path policy- and law-makers choose, the discussants agreed that the United States must proceed with caution. The discussants generally favored a narrowly- and well-defined framework for counterterrorism detention, regardless of its form or paradigm, in order to avoid serious "blow back" from the international community and the public. The discussants generally favored a counterterrorism policy that targeted non-fungible terrorist personnel and terrorist personnel that pose an imminent or substantial threat. In addition, several discussants asserted that only a narrowly-defined and unambiguous framework for any alternative detention regime would pass constitutional muster. Specifically, the Due Process and Confrontation Clauses of the Constitution may represent substantial barriers to the creation of any new detention authority.

Finally, the discussants reached broad consensus that an independent judicial body should actively and frequently review the detention of terrorist suspects in order to safeguard personal liberties. The President has a responsibility to protect the United States, its citizens, and interests; the discussants viewed an independent judicial body as a necessary check on the Executive in pursuing those ends.

Appendix I

List Of Workshop Participants

John D. Altenburg, Jr.
Of Counsel
Greenberg Traurig LLP

M.E. Spike Bowman
Distinquished Fellow
University of Virginia School of Law

Jeff Breinholt
Counterterrorism Section
U.S. Department of Justice

Joshua L. Dratel
Co-Chair of the Select Cmte. on Military Tribunals
National Association of Criminal Defense Lawyers

Robert J. Eatinger, Jr.
CounterTerrorism Center
Central Intelligence Agency

Ryan Goodman
Professor of Human Rights and Humanitarian Law Harvard Law School

Ken Gude
Associate Director, International Rights and Responsibility Program
Center for American Progress

Amos Guiora
Professor of Law
S.J. Quinney College of Law

Thomas L. Hemingway
Brigadier General, USAF, ret.

Eric S. Janus
President and Dean
William Mitchell College of Law

Joanne Mariner
Director, Terrorism and Counterterrorism Program
Human Rights Watch

Kate Martin
Executive Director
Center for National Security Studies

James McPherson
Executive Director
National Association of Attorneys General

Joseph Onek
Senior Counsel to the Speaker
U.S. House of Representatives

Deborah Pearlstein
Visiting Scholar
Program in Law and Public Affairs
Princeton University

Paul R. Pillar
Visiting Professor and Director of Studies
Security Studies Program
Georgetown University

Harvey Rishikof
Professor of Law and National Security Studies
National War College

Suzanne E. Spaulding
Principal, Bingham Consulting Group
Bingham McCutchen LLP

Patricia M. Wald
Former Chief Judge
U.S. Court of Appeals for the District of Columbia

Dale L. Watson
Senior Executive Advisor
Booz Allen Hamilton

OBSERVERS

The following individuals participated as observers in the workshop and the views expressed do not reflect the official policy or position of the American Bar Association, the Department of Defense, the Joint Staff, the Department of Army, the United States Marine Corps, the U.S. Coast Guard, the U.S. government, or the attorneys representing the litigants in these issues.

Adam Ake
Member, Task Force on Detention Policy
General Counsel's Office, Department of Defense

Col. Michael Bills
Member, Task Force on Detention Policy
U.S. Army

Robert Chesney
Member, Task Force on Detention Policy
Department of Justice

Jennifer Daskal
Member, Task Force on Detention Policy
National Security Division, Department of Justice

Nathaniel Jones
Member, Task Force on Detention Policy
National Sec. Division, Department of Justice

Wayne Massey
Workshop Reporter
George Washington University Law School

Holly McMahon
Director
Standing Committee on Law and National Security
American Bar Association

Rosemary Nidiry
Member, Task Force on Detention Policy
Asst. U.S. Atty., Southern District of New York

Matthew J. Owens
Program Assistant
Standing Committee on Law and National Security
American Bar Association

Wendy Patten
Senior Policy Analyst
Open Society Institute

Kelly Brooke Snyder
Member, Task Force on Detention Policy
National Security Division, Department of Justice

Lt. Col. James Woods
Member, Task Force on Detention Policy
U.S. Air Force

Appendix II

Recommended Readings

Stella J. Burch, "Rethinking 'Preventive Detention' from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects" (2009), Student Scholarship Papers, available for download at http://digitalcommons.law.yale.edu/student_papers/87.

Feikert, Clare, "Pre-Charge Detention for Terrorist Suspects: United Kingdom" (2008), available at http://www.loc.gov/law/help/uk-pre-charge-detention.php.

Amos N. Guiora, "A Proposal for an Administrative Detention Model for the United States" (2009), available at http://www.abanet.org/natsecurity/guiora_detention_model.shtml.

Joint Committee on Human Rights, Parliament of the United Kingdom, "Counter-Terrorism Policy and Human Rights (Fifteenth Report): Annual Review of 28 Days" (2009), available at http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/119/11902.htm.

McLoughlin, et al., Security Detention, Terrorism, and the Prevention Imperative, 40 CASE WESTERN RES. J. INT'L L. 463, 492-503 (2009), available for download at http://www.case.edu/orgs/jil/vol.40.3/40_mcloughlin_noone_noone.pdf.

Dan. E. Stigall, Counterterrorism and the Comparative Law of Investigative Detention 81-181 (2009).

Lisa White, "Terrorism Laws on Control Orders: Australia" (2008), available at http://www.loc.gov/law/help/australia-control-orders.php.

Lisa White, "Terrorism Laws on Preventative Detention & Prohibited Contact Orders: Australia" (2008), available at http://www.loc.gov/law/help/australia-preventative-detention.php.

Due Process and Terrorism Series

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Exploring Counterterrorism Detention Alternatives

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A Post-Workshop Report

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