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H. THOMAS WELLS JR., ABA PRESIDENT
ABA Journal – November 2008 Issue

Memorandum to the Next President

From: H. Thomas Wells Jr., ABA President, and Thomas M. Susman, Director, ABA Gov’t Affairs Office
Re: Your First 30 Days in Office
Date: November 2008

Once you take office in January, Mr. President-elect, you will face all manner of challenges related to the rule of law—issues with dramatic impact on the day-to-day lives of all Americans and others who come into contact with the U.S. government.

The American Bar Association—with nearly 408,000 members, the world’s largest professional organization—has made numerous policy proposals for improving the justice system and promoting the rule of law. Those policies also seek to ensure the nation’s security while continuing to protect civil liberties. The association’s policies—which are adopted by the 556-member House of Delegates—include measures we are recommending to help the administration and Congress achieve these objectives.

Many of the goals reflected in the ABA’s policies require legislative action. That means, as the Constitution prescribes, joint efforts by the executive and legislative branches. The president, however, has the power to take executive action on certain urgent matters.

You can start working on some of these pressing matters as part of your transition process and then take executive action right after your inauguration, even as the 111th Congress is organizing. The ABA urges you to act in the following areas where progress can be made, without legislation, in a very short time:

Judicial Selection and Nomination. The federal judicial nomination and confirmation process is a critical constitutional responsibility shared by the president and the Senate. Although the process is political by design, it functions poorly when contentiousness and partisanship rule the day. To restore a sense of common purpose and bipartisanship to the judicial nomination and confirmation process, you should, as president: (1) Pledge to consult in good faith with the home-state senators and with Senate leaders of both parties prior to nominating individuals for lifetime appointments to the federal bench, (2) support establishment of bipartisan commissions to assist in identifying qualified candidates for possible nomination to the courts of appeals, and (3) urge senators in each state to establish bipartisan commissions to identify qualified individuals whom the senators might consider recommending to the president as possible nominees to the district courts. Pre-nomination consultation and bipartisan commissions will benefit all parties while preserving constitutional prerogatives.

Immigration. As a nation of immigrants, the United States has the obligation to ensure that our immigration adjudication and detention systems are effective, fair and humane. To ensure appropriate treatment of individuals in immigration detention, including access to legal representation and basic medical care, you should instruct the secretary of the Department of Homeland Security to promulgate the Immigration and Customs Enforcement National Detention Standards—which provide guidance on a range of issues related to detention conditions and detainee treatment—as regulations with the force of law. In addition, to restore fairness to the appellate review process, you should direct the attorney general to take steps to rescind the Board of Immigration Appeals: Procedural Reforms to Improve Case Management, which were instituted in 2002.

The measure greatly diminished the quality of BIA reviews and resulted in a crushing appellate caseload in the federal circuit courts.

Attorney-Client Privilege. The Department of Justice, through a series of memorandums spanning a decade, instructed prosecutors to deny cooperation credit to corporations and other organizations that refused to
waive their fundamental attorney-client privilege, work product and employee legal protections during investigations. Many other federal entities—including the Securities and Exchange Commission, the Environmental Protection Agency and the Department of Housing and Urban Development—adopted similar waiver policies that also undermine these bedrock legal rights. Although the Justice Department issued new cooperation standards in August prohibiting prosecutors from seeking waiver of the privilege or employees’ legal rights, policies undermining the attorney-client privilege and other protections remain in place at other federal entities. You should immediately direct all federal entities to adopt binding internal policies that mirror the protections contained in the new Justice Department standards and follow up by endorsing legislation in Congress that makes these reforms permanent and gives them the full force of law that only a statute can achieve.

**Interrogation Practices for Detainees.** An executive order issued by President Bush on July 20, 2007, authorizes the CIA to operate a program of detention and interrogation that is inconsistent with U.S. obligations under Common Article 3 of the Geneva Conventions of Aug. 12, 1949. You should rescind that executive order and ensure that whenever a foreign person is captured, detained, interned or otherwise held within the custody of or under the physical control of the United States, or interrogated in any location by agents of the United States (including private contractors), he or she is treated in accordance with the minimum protections afforded by Common Article 3 and in a manner fully consistent with standards of treatment and interrogation techniques contained in U.S. Army Field Manual 2-22.3, Human Intelligence Collector Operations, issued September 2006.

**International Criminal Court.** The United States has a long history of promoting justice and the rule of law on an international scale. Yet in 2002, President Bush withdrew the United States’ signature from the 1998 Rome Statute for an International Criminal Court, thereby removing the United States from any involvement with the ICC. You should restore the U.S. signature to the treaty and initiate the appropriate executive branch process that will lead to the treaty’s submission before the Senate for ratification during the 111th Congress. Until the United States ratifies the Rome Statute, you should instruct the secretary of state to ensure that the U.S. government cooperates and assists in ongoing investigations and prosecutions by the ICC, and exercises its right to participate as an observer at meetings of the court’s governing and planning bodies.

**Presidential Signing Statements.** During his administration, President Bush has issued signing statements in conjunction with certain bills he signed in which he claimed the authority or stated the intention to disregard or decline to enforce all or part of the new laws, or to interpret the laws in a manner inconsistent with the clear intent of Congress. While the use of presidential signing statements is not new, the outgoing administration has used them as a vehicle, often unnoticed, for effectively vetoing or amending the very legislation being signed. This is contrary to the rule of law and our constitutional system of separation of powers. You should make clear at the start of your administration that you reject this constitutionally suspect use of signing statements. If you believe that any provision of a bill pending before Congress would be unconstitutional if enacted, you should communicate those concerns to Congress before passage and use your veto power if you conclude that all or part of a bill is unconstitutional.

Mr. President-elect, the ABA is strongly committed to advancing the rule of law through implementation of these initiatives. They are neither partisan nor ideological and are of concern not only to the lawyers of America but to all Americans.

Our membership includes a diverse group of highly experienced lawyers with expertise in each of the areas addressed above. The ABA is prepared to convene, in a very short time frame, nonpartisan working groups of our volunteer experts to assist your transition teams and staff in developing and executing the steps necessary to implement these policies during the first few weeks of your term in office. We urge you to take us up on this offer.

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Modern terrorism raises myriad questions for our traditional institutions of government and justice: Is a terrorist action a criminal violation or a political act? Should terrorism be prosecuted under the laws of armed conflict or the criminal-justice system? Is terrorism primarily a domestic or foreign issue? Do international conventions govern the process of confinement and interrogation of terrorists? Does it make a difference if the victims of terrorism are combatants or non-combatants? What is the appropriate “due process” for different categories of detainees, unlawful belligerents, and terrorists?

The current administration, Congress, and the federal courts have struggled with these questions—and many others like them—for the last six years. The answers they have come up with so far have satisfied neither the American public nor the international community.

As I pointed out in a New York Times editorial in June 2002 and in a subsequent 2003 law review article, terrorism cases are compromising our traditional court structures. Our current court system is ill equipped for the difficult task of trying quasi-international conflicts with non-state actors who plot, abet, and carry out attacks against civilian targets. We need to consider new approaches that fit the challenges of our times.

The Merits of a Federal Terrorism Court

One such approach would be the establishment of a secure and specialized Federal Terrorism Court dedicated to these cases. The thrust of the idea is to have a dedicated set of federal trial judges working with an expert bar of federal and military prosecutors and defense counsel—all with high-level security clearances. Such a court could accommodate the particular challenges of prosecuting terrorism cases in a manner wholly consistent with the Constitution, the common law, and relevant statutes. This would be no sealed-off Star Chamber; trials would be open to the public.
unless there were truly compelling reasons to limit access in a particular case. Such openness would help give our people and our allies the necessary proof that the United States is reasserting its national identity as a champion of human rights and due process.

We already have specialized courts in the federal system for particularly complex issues requiring unique knowledge, including bankruptcy, patents, copyrights, tax, and international trade. In short, we have ample precedent for a court dedicated to vital, complicated issues requiring the development of substantive and procedural expertise.

A specialized court for terrorism cases would allow our system to handle not only the unique legal complexities of terrorism, but the physical risks as well. Such a court could be situated in a designated courthouse with security measures that are more stringent than those found in most federal courts, with state-of-the-art facilities and procedures for holding and transporting suspects; storing evidence; protecting judges, jurors and witnesses; and transmitting or receiving televised testimony. The court could be established anywhere in the United States, probably in a location far removed from such potential targets as New York or Washington, D.C.

Ultimately, however, the rationale for establishing a Federal Terrorism Court lies less in the need for physical security than in the need for a more effective, more open, more credible means of trying accused terrorists. The current adjudicative framework for the post-9/11 terrorism detentions and prosecutions has undermined American credibility at a crucial juncture; weakened national confidence in our political institutions; and called into question our commitment to the letter and spirit of our laws.

The Current Flawed Institutional Approach

General dissatisfaction was reflected in a fall 2007 Atlantic Monthly poll of foreign-policy experts, in which 87 percent of the respondents agreed that the Guantanamo Bay prison system has hurt the United States in its fight against global terrorism. Said one, “Our strongest asset internationally was our reputation and credibility on human rights. We’ve squandered that.”

The root of the problem lies in an unwillingness to think constructively about the different possible legal responses to terrorism. In asserting primarily a war-footing approach with an expansive definition of executive privilege, the constitutionally defined roles of the other two branches of government were muted. Denying the applicability of the Geneva Conventions for the trials of accused terrorists; arguing against the jurisdiction of the courts for judicial review of decisions; and asserting presidential authority for “coercive interrogation” without consulting Congress all represent a policy of expediency at the expense of the rule of law.

The Supreme Court has rejected the exclusionary assertions of executive power and the denial of the applicability of international conventions. The question remains, however, as to what constitutes “due process” for detainees under U.S. and international law. The Supreme Court has yet to determine this issue. As a result, our procedures for trying suspected terrorists remain uncertain after six years of prosecution and litigation.

The Congress, for its part, eventually passed the Detainee Treatment Act of 2005 and the Military Commission Act (MCA) of 2006. These measures, however, remain controversial. They afford neither the protections of the American criminal-justice system nor those of the traditional military code of justice. The trial procedures of the MCA have received substantial criticism, including provisions for the handling of evidence and testimony. The result of this legislation is an ungainly civil-military hybrid process overseen by judges with limited expertise in terrorism and security matters.
As critics such as U.S. attorney general and former district court judge Michael B. Mukasey have pointed out, even the supposedly successful prosecution of José Padilla under traditional criminal prosecutorial rules displayed the flaws of our system, because the confession he made in military custody without legal counsel was inadmissible. Thus far, the domestic criminal prosecution of terrorists has strained the resources of federal courts and garnered only about three dozen convictions. In addition, the existing approach has put at risk future operations through disclosure in open court of methods and sources of intelligence, despite the Classified Information Procedures Act, and it has caused distortions by applying criminal-law rules of evidence to national-security cases that may sometimes require different standards of admissibility.

So what is the solution to this legal quagmire? The answer, one that many of our allies have employed, is a new adjudicatory framework focused on terrorism—a national Federal Terrorism Court.

Lessons From Abroad

The French, under the legendary magistrate judge Jean-Louis Bruguière, have created a terrorism-court system that, while not wholly applicable to the American system, might still offer some ideas for how to proceed. As explained by Marc Perelman in the pages of Foreign Policy magazine (January 2006), in 1986 France established a comprehensive anti-terrorism law, establishing a centralized unit of investigating magistrates in Paris, with jurisdiction over all terrorism cases.3

In the French system, an investigating judge is the equivalent of a special prosecutor in charge of a secret, grand jury-like inquiry through which he can file charges, order wiretaps, and issue warrants and subpoenas. Judges can request the assistance of the police and intelligence services, order the preventive detention of suspects for six days without charge, and justify keeping someone behind bars for several years pending an investigation. The judges have international jurisdiction when a French national is involved in a terrorist act, be it as a perpetrator or as a victim.

The combined role of judge and prosecutor is not something we can or should seek to install in the United States. In addition, a non-jury system such as the one the French have established for terrorism cases would run afoul of U.S. constitutional principle and raise the specter of replicating the infamous Diplock courts that Britain employed to try suspected terrorists in Northern Ireland.

It is worth noting, however, at least one benefit of the French system that we could readily emulate: It has produced a pool of specialized judges and investigators adept at prosecuting terrorist networks.

In building a Federal Terrorism Court, some basic issues need to be addressed: How would such a court fit into the existing judicial system? How would the judges be assigned? What would be the scope of the court’s power, and who would oversee it?

Naturally, there are a variety of policy responses to such questions. The court could be similar in structure to a federal trial court, as provided for under Article III of the Constitution, with appeals to a designated circuit. This is the approach taken in the MCA.

The court could, however, also be established under the authority of Congress as defined in the Constitution’s Article I, with a 10-year or 14-year appointment for the judges. The precedent here would be federal bankruptcy court, in which an expert bench decides cases that fall within its specialized area of expertise, and appellate cases proceed to a federal circuit. The new court could have jurisdiction for terrorist cases both domestic and international, involving either American or foreign defendants. The court would need to craft flexible rules of procedure
to accommodate the nuances of the cases presented, and the development of such rules would be yet another benefit of a specialized terrorism court.

A further wrinkle that needs to be ironed out is the relationship of the new terrorism court to the court established by Congress in the Foreign Intelligence Surveillance Act (FISA). One approach would be to expand the jurisdiction of the present FISA trial court to become a new terrorism court. Clearly, however, some modifications would be needed for the appointment of FISA judges, which currently is the sole prerogative of the Chief Justice of the United States. In addition, the in camera (closed chamber) nature of FISA proceedings would need to change in order to accommodate a broader class of terrorism cases.

To appropriately explore and resolve all these critical issues, a Federal Terrorism Court Commission should immediately be established, with the mission to create a model legislative proposal within six months. The commissioners should be representatives drawn from the executive branch, the legislative branch, the military, the private defense bar, the non-governmental organization community, and other knowledgeable parties. The report might be structured to include an objective analysis of the advantages and disadvantages of various proposals for the scope and structure of a specialized terrorism court.

Scholars from both sides of the political spectrum are supporting the idea of a terrorism court. The proponents range from Neal Karlen, a defense counsel for detainees, to Jack Goldsmith, a former Department of Justice official in the Bush administration. Attorney General Mukasey himself has indicated his support for such a proposal.

Terrorists do not fit into our traditional legal classifications. We can continue to improvise, compromising our federal criminal procedures, trespassing upon our constitutional values, and alienating our allies. Alternatively, we can demonstrate our commitment to the rule of law by creating an institution that can handle new challenges without damaging our principles. Samantha Power, a Harvard social theorist, has called “for new tools, new rules, and new mindsets” for the problems of the 21st century. A Federal Terrorism Court meets all three requirements.

Endnotes
Thank you, Mr. Chairman for the honor and opportunity to testify today on behalf of the Center for National Security Studies. The Center is a civil liberties organization, which for more than 30 years has worked to ensure that civil liberties and human rights are not eroded in the name of national security. The Center is guided by the conviction that our national security must and can be protected without undermining the fundamental rights of individuals guaranteed by the Bill of Rights. In our work on matters ranging from national security surveillance to intelligence oversight, we begin with the premise that both national security interests and civil liberties protections must be taken seriously and that by doing so, solutions to apparent conflicts can often be found without compromising either.

Introduction

After the terrible attacks of September 11, the international community was united in its support for the United States and condemnation of the attacks. Since then, however, the United States has lost much of the good will and cooperation of the international community as a result of its flawed detention policies. We welcome this Committee’s examination of how these failed detention policies have hurt, rather than advanced the national security and what needs to be
done now to put detention policy on a sound legal footing consistent with national security interests.

As this Committee is well aware, since 2001, the Executive Branch has advanced extraordinary and unsupported claims that the President is free to ignore and even violate established law in order to conduct the “war against terror.” These claims underlie the detention policies and the administration’s posture that neither Congress nor the judiciary have any role in legislating or overseeing detentions. While the Supreme Court has rejected that view on four occasions and Congress has since legislated, the administration continues to claim unprecedented authority to create new forms of detention and decide who may be detained without regard to established law or constitutional limits.

On November 13, 2001, the President publicly instituted these policies with the issuance of Military Order No. 1. In addition to establishing military commissions, the Order authorized the military detention of any non-citizen found in the United States without charge solely on suspicion of being involved in terrorist activities. In May 2002, the President directed the military to seize a U.S. citizen in Chicago, who was then held for more than three years incommunicado without charge or access to a lawyer, solely on the say-so of the President. The administration also directed the military to ignore the Geneva Conventions and established military law and regulations when detaining individuals fighting in Afghanistan. It seized individuals in Bosnia, Europe and elsewhere and held them in secret prisons. It built a detention facility at Guantanamo in order to put detainees outside the reach of the law.

The administration still claims the right to seize any individual anywhere in the world, hold him incommunicado in a secret prison indefinitely without trial. It is now clear that its core reason for doing so was to be able to use “enhanced interrogation techniques” that are internationally recognized and outlawed as torture. (In the case of U.S. citizen Jose Padilla who was held incommunicado for more than three years, the government confessed that it did so in order to interrogate him.1)

The result of this approach is the international view that the United States is not following the law, but is instead making up rules for detentions and interrogations. Most

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significantly, the argument that the United States is engaged in a “global war on terror” has been used to justify detentions that violate human rights and constitutional protections. Guantanamo Bay in particular, has come to be seen by the world as a symbol for lawlessness and abuse.

These detention policies have undermined rather than strengthened U.S. power. They have discouraged and interfered with, rather than advancing international cooperation and have provided fuel to al Qaeda efforts to recruit foreign terrorists. The universal calls to close Guantanamo reflect the recognition that these detention policies that are inconsistent with the U.S. commitment to the rule of law and human rights have also harmed our national security.

This Committee’s examination of how to replace these failed policies and undo the damage done to the rule of law and to U.S. standing in the world is most timely and welcome. A new President and a new Congress will have the opportunity to work together to move forward. The Supreme Court’s decision in Boumediene provides the first step towards restoring the rule of law regarding the detainees held at Guantanamo. While the details of closing Guantanamo and replacing current detention policies will be complex, the established law of war in conjunction with established criminal law provides a straightforward framework for doing so. Using this established framework of military and criminal law side-by-side will enable suspected terrorists to be detained and tried in a way that will advance rather than undercut the effort to win hearts and minds around the world.

**War or Crime?**

Much of the public debate about treatment of detainees in Guantanamo and elsewhere has turned on questions of whether the law of war or criminal justice rules should apply to counterterrorism operations. But the absolutist positions adopted in this debate obscure more than they clarify.

The Bush Administration has argued that the threat from al Qaeda is unprecedented in magnitude and nature. Accordingly it has claimed a plenary right to use military force without, however, acknowledging any obligation to follow the rules of war as traditionally understood and articulated by the U.S. military. Thus, while the administration claims that being at war justifies its extraordinary and unprecedented detention practices, its adherence to the rules universally acknowledged to be applicable to military conflicts has been at best ad hoc and

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inconsistent. For example, the administration claimed that the Geneva Conventions had little or no applicability to the fighting in Afghanistan. (That claim was rejected by the Supreme Court in *Hamdan v. Rumsfeld*, when it held that Common Article 3 of the Geneva Conventions applies to all detainees.\(^3\))

At the same time, policy-makers have been reluctant to adopt the stance that the threat posed by al Qaeda terrorists to the United States and its allies can be addressed by criminal law enforcement alone. This perspective is sometimes articulated as the proposition that all current detainees must either be charged with a crime or released.

Yet, in reality, since September 11, the United States has employed both congressionally authorized military force, including consequent military detention, in foreign armed conflicts such as Afghanistan and Iraq, and also criminal law enforcement tools against alleged al Qaeda terrorists, including prosecutions of Zacharias Moussaoui, the “American Taliban,” John Walker Lindh and Richard Reid, the British “shoe bomber.”

In particular, there is general agreement that the attacks of September 11, 2001 by al Qaeda rank as an act of war. Congress responded with the Authorization to Use Military Force “as necessary and appropriate” against al Qaeda and the Taliban in Afghanistan as well as those individuals, who “planned, authorized, committed or aided” the 9/11 attacks.\(^4\) The United Nations Security Council recognized the attacks as threats to the peace and security justifying the international use of force in Afghanistan under the United Nations charter.\(^5\) And since 2003, al Qaeda fighters have attacked U.S. and allied troops in Iraq.

At the same time, many individuals suspected of involvement with al Qaeda, who have been seized in the United States, Europe or elsewhere, have been charged with crimes, prosecuted, convicted and sentenced to long imprisonments.

In sum, even this administration has used both military force and criminal law enforcement in the fight against terrorism. As a matter of both common sense and law, detention policy should reflect this complex reality. Not even the most aggressive advocate of the war model claims that we can persuade our allies to abandon their criminal law traditions, to extradite

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suspects to us for military detention, or to allow open-ended military operations on their soil. Simply put, it is not realistic to claim that the “war on terror” is only, or even mostly, a matter of military force.

Moreover, when Congress authorized the use of military force as “necessary and appropriate,” it did not replace the time-tested constitutional requirements of the criminal justice system, due process or military detention authority. Whatever the extent and nature of the “armed conflict with al Qaeda,” 6 it differs fundamentally from the traditional wars of the past. Outside the battlefields of Afghanistan and Iraq, apart from the known al Qaeda leaders who have publicly boasted of their participation in these war crimes, there are no enemy soldiers, indisputably identifiable by uniform or nationality, who may be targeted and detained by the military as combatants under the law of war.

New detention policies are needed that recognize that law enforcement and military force are both important tools for counterterrorism. Respect for the rule of law and individual rights is critical to a successful counterterrorism policy by the United States with its commitment to democracy, freedom and the rule of law. The following recommendations take into account the ongoing military operations in Afghanistan and Iraq. They are based on and consistent with the relevant rulings by the Supreme Court in Hamdi, Rasul, Hamdan, and Boumediene concerning the law of war and the scope of the Authorization to Use Military Force adopted by Congress in September 2001. These recommendations focus on the threat of terrorism posed by al Qaeda because to whatever extent al Qaeda terrorism poses an existential threat to the United States, no other terrorist group does so. 7

Recommendations


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7 See Glenn L. Carle, Overstating Our Fears, WASH. POST, July 13, 2008 at B07 (member of the CIA’s Clandestine Service for 23 years, retired in March 2007 as deputy national intelligence officer for transnational threats outlining the limited threat posed by al Qaeda.)
A. Application of the Law of War or Criminal Law:

- When military force is used consistent with constitutional authorization and international obligations the United States shall follow the traditional understanding of the law of war, including the Geneva Conventions. Individuals seized in a theater of active hostilities are subject to military detention and trial pursuant to the law of war.
- When suspected terrorists are apprehended and seized outside a theater of active hostilities, the criminal law shall be used for detention and trial.

A new detention policy based on these principles would result in a stronger and more effective counterterrorism effort. It would ensure the detention and trial of fighters and terrorists in accordance with recognized bodies of law and fundamental notions of fairness and justice. It would ensure cooperation by key allies in Europe and elsewhere who have insisted that military detention be limited. It would begin to restore the reputation of the U.S. military, damaged by the international condemnation of the abuses of this administration. And it would deprive al Qaeda of the propaganda and recruiting opportunities created by current policies.

The Supreme Court has reaffirmed that under the law of war, when the U.S. military is engaged in active combat, it has the authority to seize fighters on the battlefield and detain them as combatants under the law of war.\(^8\) The traditional law of war, including the Geneva Conventions and Army Regulation 190-8,\(^9\) should be followed when capturing and detaining individuals seized on a battlefield/in a theater of armed conflict/during active hostilities, such as Afghanistan or Iraq. Of course, following the traditional rules for detaining battlefield captives would in no way require “Miranda” warnings or other “Crime Scene Investigation” techniques. Nevertheless, the Bush administration deliberately ignored these military rules – including the requirement for a hearing under Article 5 of the Geneva Conventions -- when it seized individuals in Afghanistan who are now held at Guantanamo.\(^10\)

(While some have claimed that the “battlefield” in the “war against terror” is the entire world, that claim is inconsistent with traditional understandings in the law. For example, one

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\(^9\) Enemy Prisoners of War, Retained Persons, Civilian Internees and Other Detainees, Army Regulation 190-8, § 1-6 (1997).
\(^10\) Article 5 requires that captives be given a hearing to determine whether they are prisoners of war.
characteristic of a battlefield is the existence of Rules of Engagement, which permit the military to use force offensively against an enemy.\textsuperscript{11} Military Rules of Engagement for the armed forces stationed in Germany or the United States for example, are quite different from those applicable to troops in Afghanistan or Iraq. Troops in the United States or Germany are not entitled to use deadly force offensively.)

Outside these battlefields, in countries where there is a functioning domestic judiciary and criminal justice system, criminal laws should be used to arrest, detain and try individuals accused of plotting with al Qaeda or associated terrorist organizations. Outside the war theater, criminal law has proved to be successful at preventing and punishing would-be terrorists, protecting national security interests and ensuring due process.\textsuperscript{12}

**B. The government must distinguish between the different categories of detainees, who are subject to different rules.**

One of the key sources of confusion in the debates to date about detention policy has been to speak about “terrorism detainees” in general as if they are all subject to the same legal regime. Recognizing that the law of war must be followed when seizing individuals on the battlefield and that criminal law must be followed when arresting suspects in Chicago or Italy, makes it clear that there are different categories of detainees.

- The first category includes fighters in Afghanistan or Iraq (or other countries where U.S. military forces are engaged in active hostilities in the future); the second category is Osama bin Laden and the other self-proclaimed planners and organizers of the 9/11 attacks. Pursuant to the congressional authorization, individuals in the first or second categories may be targeted, captured and tried under the law of war.
- The third category includes suspected al Qaeda terrorists seized in the United States or elsewhere, other than Afghanistan or Iraq, who must be treated as suspects under criminal law.
- The last category is current detainees at Guantanamo, which includes individuals alleged to fall within all three categories listed above. The detainees in Guantanamo are *sui

\textsuperscript{11} Corn and Jensen, *supra* note 1.

generis for a number of reasons, including that their treatment has violated military law and traditions and that it has become an international symbol of injustice.

_Fighters captured in Afghanistan or Iraq (or other countries where U.S. military forces are engaged in active hostilities in the future) subject to military detention and/or trial:_

Pursuant to the Supreme Court’s ruling in *Hamdi*, individuals fighting in the Afghanistan or Iraq hostilities may be captured and detained pursuant to the law of war and may be held until the end of hostilities in the country in which they were captured.

All such individuals, immediately upon capture, shall be provided a hearing pursuant to Article 5 of the Geneva Conventions and military regulations to determine whether they are entitled to be treated as prisoners of war, should be released as innocent civilians, or may be held as combatants pursuant to the Supreme Court’s decision in *Hamdi*.

Any such individuals who are accused of violations of the law of war shall be subject to trial by a regularly constituted military tribunal following the rules of the Uniform Code of Military Justice as outlined below.

*Osama bin Laden and the other planners and organizers of the 9/11 attacks:*

In the September 2001 Authorization for the Use of Military Force, Congress specifically authorized the use of military force as "necessary and appropriate" against those individuals who “planned, authorized, committed or aided” the 9/11 attacks. The administration has identified approximately six individuals detained at Guantanamo as planners of the attacks and a limited number of others, including bin Laden, remain at large.

If such individuals are captured rather than killed, they shall be treated humanely and protected from torture and cruel, inhumane or degrading treatment.

They may be held by the military until they are tried by a military tribunal or the end of the conflict with al Qaeda.

They may be tried by a regularly constituted military tribunal as outlined below.

Such individuals may also be tried in the federal district courts on criminal charges.

The best course from the standpoint of discrediting and opposing al Qaeda may be to conduct a fair public trial of these individuals, rather than detain them without trial.

*Suspected al Qaeda terrorists seized in the United States or elsewhere other than Afghanistan or Iraq:*
Individuals found in the United States or in other countries with a functioning judicial system (other than Afghanistan and Iraq) who are suspected of terrorist plans or activities, must be detained and charged pursuant to the criminal justice system and/or deported in accordance with due process.

Any such individuals may be transferred to other countries only in accordance with the rules outlined below. They must be protected against the danger of torture and may only be transferred in accordance with due process and to stand trial on criminal charges.

Individuals suspected of terrorist plotting may be subject to surveillance in accordance with domestic laws.

*Individuals currently held at Guantánamo:*

The United States should begin a process to close the Guantánamo detention facility. There are many difficult questions about how to accomplish this arising in part from the administration’s failure to follow the law in detaining and seizing these individuals. The Center for American Progress has recently issued a report detailing an approach in line with these recommendations.  

The government shall expeditiously transfer all those detainees it has determined are eligible for release to their home country or to some other country where they will not be subjected to abuse or torture.

Those individuals in Guantánamo who are not alleged to have been captured on the battlefields of Afghanistan or Iraq or fleeing therefrom may not be held by the military as combatants, but must be either charged with a crime, transferred to another country for prosecution on criminal charges, or released.

As recognized in *Boumediene*, all detainees at Guantánamo are also entitled to habeas corpus.

Those Guantánamo detainees who are alleged to have been captured in Afghanistan or Iraq and been part of al Qaeda or Taliban forces may be detained until the end of hostilities in those countries if the habeas court finds that they are such.  

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14 Whether al Qaeda fighters may be detained beyond the end of hostilities in Afghanistan need not be addressed, because peace in Afghanistan does not appear likely in the near future.
authorized by the AUMF. At the same time, there are likely to be counterterrorism benefits to choosing to bring charges against such individuals and providing them with a fair trial.

Those detainees who are alleged to be planners or organizers of the 9/11 attacks may be detained until the end of the conflict with al Qaeda if the habeas court finds that they personally participated in the planning of the attacks.

Those detainees who are subject to military detention as described above and who are also charged with violations of the law of war may be tried by a regularly constituted military tribunal as outlined below.

C. **Military tribunals for individuals who are properly held as combatants, either having been captured on the battlefield or having planned or organized the 9/11 attacks:**

As recognized by the Supreme Court in *Hamdan*, combatants may be tried by military tribunals for offenses properly triable by such tribunals. Such tribunals must accord due process and be “regularly constituted courts.” In addition, such tribunals must be seen by the world as fair and be consistent with the proud history of U.S. military justice in the past 50 years. The military commission system created for Guantanamo will never be seen as legitimate and thus should no longer be used to try detainees.

If military trials are sought for combatant detainees at Guantanamo, they should be conducted pursuant to the United States Uniform Code of Military Justice courts martial rules to the greatest extent possible.

D. **End torture and cruel, inhumane and degrading treatment.**

As the Supreme Court has made clear, all of these detainees are protected by Common Article 3 of the Geneva Convention and must be treated humanely. In particular:

All detainees shall be treated humanely and shall be protected from torture and cruel, inhumane or degrading treatment.\(^\text{15}\)

No individual may be detained in secret.

The government must institute new mechanisms to ensure that no person is transferred to a country where it is reasonably likely that he would be in danger of torture.

Individuals may only be seized and transferred to other countries in order to stand trial on criminal charges in accordance with due process and the domestic laws of the country they are transferred to.

The CIA program of secret detention and interrogation of suspected terrorists shall be ended.

The administration shall consider whether any overriding national security reason exists for CIA involvement in terrorism detentions and interrogations, which outweighs the demonstrated harm these activities have caused to the national security. Before determining that the CIA shall again participate in any detention or interrogation activity, the administration shall report to the Congress concerning the national security interests at stake and specifically outline how, if such participation is authorized, it would be conducted with adequate checks to ensure that its operation conforms to law and is fully consistent with the United States’ commitment to human rights.

Conclusion

The administration ignored both the law of war and constitutional requirements and established a new detention regime, largely in order to conduct illegal and abusive interrogations. The results have been disastrous. “Guantanamo” has become a symbol throughout the world of U.S. disregard for the rule of law, even though the Afghanistan invasion itself was widely supported as justified and legal, and even though the taking of prisoners is a natural (and humane) consequence of such an invasion. Detention policies have strained relations with allies and may help terrorist recruiting efforts for years to come. Disrespect for the law has harmed, not enhanced, our national security.

The Supreme Court has now taken the first steps in restoring constitutional limits and the rule of law and the lower courts will continue that task in considering the habeas petitions from Guantanamo detainees. A new administration should pledge a return to respect for the rule of law and commit to following the law of war on the battlefield and the criminal law when plotters are found in the United States or elsewhere. Doing so will serve the national security and help restore basic human rights.
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAKHDAR BOUMEDIENE, et al.

Petitioners,

v.

GEORGE WALKER BUSH, et al.

Respondents.

Civil Action No. 04-cv-1166(RJL)

DECLARATION OF GARY D. SOLIS, J.D., Ph.D.

I, Gary D. Solis, hereby declare:

1. My name is Gary D. Solis. I am over 18 years old and I am prepared to testify to the facts and opinions stated herein, if called upon to do so.

2. This Declaration is a complete statement of opinions that I hold in connection with this case, as well as the bases and reasons for them, including information that I considered in forming my opinions. I am prepared to testify about the knowledge, skill, training, education and experiences that I have acquired which informs my opinions, and the principles and methods I applied in reaching them.

3. I have not received any compensation or benefit of any kind for providing this Declaration.

4. I am a citizen of the United States. I am an adjunct professor of law at Georgetown University Law Center, and at the United States Military Academy, at West Point, New York. A copy of my curriculum vitae is attached as Exhibit A. My qualifications are summarized in this Declaration and are also contained in my curriculum vitae, which includes all publications I have authored in the previous ten years.

Background and Experience

5.a. I hold a Juris Doctorate (1971) from the University of California at Davis, where I am a Distinguished Graduate. My LL.M. (1978, criminal law) is from George Washington University law school. My Ph.D. (1992, law of war) is from The London School of Economics & Political Science, where I taught law for three years.

5.b. For seven years (1996-2001, 2004-2006) I taught at the United States Military Academy, from where I retired as a Professor of Law in 2006. For six of those
years I headed West Point’s law of war program. Courses I taught included the law of war, advanced law of war, and military law. I continue to teach the USMA Philosophy Department’s law of war instruction block. For my teaching I was awarded the Army’s Meritorious Civilian Service, Superior Civilian Service, and Outstanding Civilian Service Medals, and was selected West Point’s 2006 outstanding instructor.

5.c. At the Georgetown University Law Center I teach a law of war seminar for LL.M. candidates. I taught a semester-long law of war course at Catholic University’s Columbus School of Law. I am on the teaching staff of the International Institute of Humanitarian Law, in San Remo, Italy, where I teach law of war courses, including one for military and diplomatic officers responsible for training their nations’ armed forces in the law of armed conflict.

5.d. I was the 2007-2008 scholar in residence at the Law Library of the Library of Congress, in Washington D.C.

5.e. I have written two books: Marines and Military Law in Vietnam; and, Son Thang: An American War Crime, the U.S. Naval Institute’s 1997 Book of the Year. I am writing a law school textbook, The Law of Armed Conflict, to be published by Cambridge University Press in 2009. An incomplete draft of my textbook is currently in use in the Law Departments of West Point and the U.S. Air Force Academy. I have published war-related book chapters and peer-reviewed articles. A recent piece on targeted killing was selected the Naval War College Review’s best 2007-2008 article.

5.f. I lecture on law of war topics at the Army’s Judge Advocate General’s School, the Marine Corps’ Command and Staff College, the U.S. Naval War College, National Defense University, Canadian Forces College, the Royal Military College of Canada, the Council on Foreign Relations, the Aspen Institute, the Library of Congress, the Smithsonian Institution, the Rand Corporation, and various law schools, universities and institutions, including Harvard University Law School, Columbia University, and the University of Virginia Law School.

5.g. I have testified as an expert witness in two Marine Corps general courts-martial involving law of war crimes against detainees. In U.S. v. Sgt. Gary Pittman, (Camp Pendleton California, 22-25 August 2004), involving charges of dereliction of duty and multiple assaults resulting in the death of an Iraqi prisoner. I provided expert testimony for the government regarding the standard of care due a detainee. In U.S. v. Cpl. Marshall Maginicalda, (Camp Pendleton California, 31 May 2007), a general court-martial Article 32 investigation involving the homicide of an Iraqi noncombatant. I testified telephonically for the defense regarding the effect extended combat might have on an individual’s judgment and the place such effect should have in a subsequent trial. I have also been consulted on other war-related courts-martial and civilian cases.
5.h. I am an inactive member of the bars of Virginia, Maryland, the District of Columbia, Pennsylvania, and Texas, and the bars of the Court of Appeals for the Armed Forces, and the Supreme Court of the United States. For five years I was an appointed member, and vice-chairman, of the Board of Governors of the Virginia bar’s Military Law Section.

5.i. I am a retired United States Marine Corps lieutenant colonel with twenty-six years active service, including seventeen months in Vietnam, where I was a platoon commander and company commander. I dealt with enemy prisoners on a frequent basis.

Opinions

6.a. I have been asked to state my opinion regarding State practice – particularly United States practice – under the law of armed conflict with respect to the treatment of combatants and civilians.

6.b. At the outset I note that the law of armed conflict concepts of combatants, “enemy combatants,” and prisoners of war, arise only in international armed conflicts – conflicts involving combat between two States. Nevertheless, I accept the government’s predicate that it seeks to detain “enemy combatants” under the law of armed conflict, and I tender my opinions based on the concept of “combatant” as it is used in the law of armed conflict applicable in international armed conflicts, including the 1949 Geneva Conventions in their entirety, and 1977 Additional Protocol I thereto.

6.c. In the law of armed conflict, the definition of “combatant” is found in Additional Protocol I, Article 43.2: “Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains...) are combatants; that is to say, they have the right to participate directly in hostilities.” The United States has signed but has not ratified Additional Protocol I, but the Department of State has not objected to this article, as it has several others. The United States has accepted and applied this definition since at least 1988. The International Committee of the Red Cross (ICRC) identifies this definition as being customary international law. Further indicating its customary status, binding all States, Additional Protocol I has been ratified by 168 States, including every ally of the United States, save Israel and Turkey.

The import of being a combatant was first clarified for U.S. forces in the 1863 Lieber Code, adopted as Army General Orders 100. Lieber wrote that the “combatant’s privilege” is that he or she may kill or wound opposing combatants, and destroy lawful enemy targets or objects, without penalty. Concomitantly, a combatant is a lawful target for opposing combatants, and may be killed or wounded whenever and wherever he/she may be identified. Upon capture in an international armed conflict, a combatant is entitled to treatment as a prisoner of war (POW).
In the war on terrorism, the term “enemy combatant” has come into use. The addition of the word “enemy” has no particular significance in the law of armed conflict, other than to specify that the combatant is a member of a group in armed conflict with the United States or its allies, and is a lawful target who may be killed by United States and allied combatants.

6.d. A civilian, on the other hand, is essentially anyone not a member of the armed forces of a State. Additional Protocol I, Article 50.1 defines “civilian” in the negative as anyone not entitled to POW status upon capture, adding, “In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” Thus, combatants are, in most cases, members of the armed forces of a Party to the conflict. Civilians are not members of any State’s armed forces and they may not lawfully be targeted, except in circumstances described in the following paragraph.

6.e. The law of armed conflict recognizes two instances in which civilians lose their protected status. Additional Protocol I, Article 51.3 provides: “Citizens shall enjoy the protection afforded by this Section [General Protection Against Effects of Hostilities], unless and for such time as they take a direct part in hostilities.” Civilians who take a direct part in hostilities in international armed conflict are commonly referred to as “unlawful combatants,” although that term is not found in the 1949 Geneva Conventions or 1977 Additional Protocols. The consequence of being an unlawful combatant in an international armed conflict is that the individual loses his/her civilian immunity and becomes a lawful target who may be killed by opposing combatants. If captured, unlawful combatants are not entitled to POW status and they may be tried for their unlawful acts by a military tribunal or a domestic court.

The second instance is a levée en masse. Upon invasion by an enemy force, civilians not having time to form into military units may take up arms and they are lawful combatants. This circumstance is obviously not a factor in the present case and will not be further discussed.

6.f. As stated in Additional Protocol I, Article 51.3, a civilian may be treated as a combatant (albeit an unlawful combatant) whenever he/she takes a direct part in hostilities. This position is adopted in the U.S. Army’s 1956 Field Manual, FM 27-10, The Law of Land Warfare, paras. 80-81, and in the United Kingdom’s 2004 Manual of the Law of Armed Conflict, para.5.3.2., and all other law of war references with which I am familiar. Absent direct participation in hostilities a civilian is not a combatant, and not a lawful object of either military armed force or detention as a combatant, and he is not subject to prosecution in a military forum.

6.g. Commentators, military and civilian, have offered numerous descriptions and examples of conduct that constitutes taking “a direct part in hostilities.” The United States has indicated agreement with the ICRC definition that “direct participation in hostilities” implies a direct causal relationship between the
activity engaged in and the harm done to the enemy at the time and the place where the activity takes place. In my opinion, conduct of a civilian that has a direct harmful effect on the enemy’s combat operations constitutes “taking a direct part in hostilities.” Conduct having only a tangential effect on an enemy’s combat operations does not constitute “taking a direct part in hostilities.”

For example, firing a weapon at opposing forces clearly is taking a direct part in hostilities. A frequently raised example of taking a direct part in hostilities is the civilian who volunteers to drive an ammunition truck to re-supply combatants engaged in armed conflict. While he drives that truck, he loses his civilian immunity and may be targeted, for he clearly is taking a direct part in hostilities because his actions have an immediate harmful effect on the enemy’s combat operations. Similarly, a civilian contractor clearing enemy landmines during an engagement is directly participating in hostilities. However, when a civilian clearly ends his direct participation in hostilities, the law of armed conflict is clear that he no longer may be targeted. His actions no longer have any effect on combat operations. Thus, the civilian contractor clearing mines in an area in which there is no enemy present at the time and place of his activities would not be taking a direct part in hostilities.

At the other end of the continuum, a civilian going peacefully about her daily business clearly is not directly participating in hostilities. Many forms of support civilians commonly provide their State’s armed forces do not constitute direct participation in hostilities. As long as the civilian’s support does not have a direct harmful effect on the enemy’s combat operations that civilian may not be considered, or be treated as, a combatant. Thus, a woman growing vegetables in a victory garden for later donation to the armed forces is not directly participating in hostilities. A civilian budget analyst employed by the U.S. Navy and working in the Pentagon is not directly participating in hostilities. Supporting a military cause through financial contributions or public speeches does not constitute direct participation in hostilities. An individual considering, planning, or even en route to a combat zone with the intention of becoming a participant in hostilities is not directly participating in hostilities because his considerations, plans and travels do not produce a direct harmful effect on the enemy’s combat operations.

There are debatable cases. For example, may the civilian volunteer driver of the military ammunition truck be targeted as he first walks toward the truck? In my opinion, he begins his direct participation in hostilities when he unequivocally commits to an action that has a direct harmful effect on enemy combat operations – driving the truck. May a civilian government employee remotely piloting an armed drone over Afghanistan be targeted? In my opinion, the drone’s pilot, no matter where located and whether or not he launches a missile, is directly participating in hostilities and may be targeted because his actions have a direct harmful effect on enemy combat operations.

In my opinion, senior terrorist leaders and terrorist weapons specialists and fabricators should be considered to continually be taking a direct part in
hostilities. (In this limited respect, I take a broader view of “for such time as” than does 1977 Additional Protocol I, Article 51.3.) Osama bin Laden, for example, is continually taking a direct part in hostilities and is always a lawful target, no matter where located, no matter what his activity. Such persons, by virtue of their ongoing special skills or senior leadership positions and involvement in or planning of combat operations, are always combatants, albeit unlawful combatants. Like the uniformed individuals they target, they should be considered legitimate targets whenever found. However, individuals whose involvement is unconfirmed, or unrelated to combatant operations, such as financial supporters and vocal advocates of terrorist aims are not subject to targeting.

Over the past several years, the ICRC and The Hague’s Asser Institute have sponsored several meetings of experts to discuss and define what constitutes “direct participation in hostilities.” Their report is due in early 2009. But I agree with the International Criminal Tribunal for the former Yugoslavia’s Tadić Trial Chamber decision that an exact definition of taking “a direct part in hostilities” is often unnecessary, because in most cases an examination of the facts will indicate the answer.

6.h. My opinion is formed, in part, by my experience in the Vietnam conflict where I was a Marine officer (armor) commanding at first a platoon and, eventually, a company of Marines. We often encountered enemy combatants and occasionally captured armed enemy personnel as they approached or entered or departed villages, their status confirmed by informants, by former VC, by recent wounds, or by their weaponry. We also daily encountered Vietnamese civilians who we were confident were supporting the enemy by providing him shelter, food, and concealment. Captured enemy personnel were apprehended and passed to MPs for processing. The families or villagers with whom our captives were living and associating were sometimes questioned but rarely seized, as we required evidence of the villagers’ direct participation in hostilities to do so. It did not take a judge advocate to inform us that our authority to apprehend and detain did not extend to anyone we encountered in the combat zone who might have in any way associated with, or even provided support for, the enemy in hostilities. As does the law of armed conflict, I required my Marines to have knowledge of a specific instance of engagement in hostilities before acting. The mere threat of possible future hostile action was, and remains, an insufficient basis for military apprehension and detention.

6.i. I have read the Government’s unclassified legal basis for the detention of the Petitioners in this case, filed 5 September 2008, particularly its description of an “enemy combatant,” and I have read the Government’s definition contained in its 9 September 2008 filing. Neither of the descriptions/definitions is in accord with accepted law of armed conflict definitions of “enemy combatant.” Both reach too broadly to be reasonable, and both are too vague to comport with law of armed conflict notions. No member of the Armed Forces could be expected to implement the full scope of either.
The Government’s description contained in its 5 September 2008 filing allows the application of enemy combatant status to civilians who have never been in any combat zone or theater of operations, and who have never committed or attempted any conflict-related act (“...even if ‘they have not actually committed or attempted to commit any act...’”). I am aware of no customary law of war, no law of war multinational treaty, and no case law that supports such an expansive view. The classic little old lady in Dubuque who donates money to a mosque discovered to be funding al Qaeda operations in Iraq would be within the Government’s original description as supporting enemy forces, and thus be targetable as an enemy combatant. If an enemy combatant can exist outside any combat zone, without committing or attempting any hostile activity or act, or by merely associating with the enemy, then the use of military force against civilians has virtually no limit. An insubstantial connection between a civilian and an activity a military commander considered to be supporting the enemy would be sufficient for him to order that civilian captured or, if capture was not feasible, killed.

The Government’s 5 September 2008 filing refers to persons “who associate themselves with the military arm of the enemy government,” a phrase employed in Ex Parte Quirin. But, Quirin, in its two references to the “military arm” refers to the uniformed armed forces of an enemy State in an international armed conflict, not to international or domestic criminal groups, no matter how well armed. The Government misleadingly expands the meaning of the Quirin term by adding the phrase, “or enemy organization.” I am unaware of any authority in the law of armed conflict that permits such an expansion. As the law of armed conflict now stands, there is no basis for asserting that merely being a member of, or associating with, an enemy organization is a legal basis for the application of military force.

The Government’s 5 September 2008 filing contains the phrase, “directly supporting hostilities.” It is unclear to me what is meant by those words in the context of the filing. If the Government refers to individuals who are members of groups in armed conflict with the United States and its allies who directly participate in hostilities – that is, individuals who direct large or small groups in actual combat, who fire a weapon, who manufacture a bomb, who actually commit a belligerent act, or who otherwise take a direct part in hostilities within the meaning of Additional Protocol I, Article 51.3 – I agree with the description. But if the Government refers to individuals who do less than directly participate in hostilities, its reference conflicts with the law of armed conflict, which prohibits treating as a combatant any civilian who does not meet the “direct participation” standard.

For similar reasons, the Government’s 9 September 2008 definition, which defines an enemy combatant as an individual “who was...supporting Taliban or al Qaeda or associated forces,” or who “directly supported hostilities,” sweeps more broadly than any law of armed conflict definition.
6.j. For the foregoing reasons, I believe the Government's description and definition of an enemy combatant are incorrect and not in accord with the law of armed conflict, the laws and customs of war, or with U.S. military practice. In my opinion, other than members of the armed forces of an enemy State, a levée en masse, and members of enemy State militias and volunteer groups meeting the preconditions of Geneva Convention III, Article 4A. (2), individuals may be considered "combatants" only to the extent that they directly participate in hostilities, as that term is recognized and applied in military and state practice.

7. I have expressed the opinions stated herein in writings, lectures, and law courses in America and Europe, and have passed them to, and continue to pass them to U.S. Military Academy cadets who are dealing with detainees in combat zones world-wide. In my professional view, and to the best of my knowledge, these opinions accurately reflect generally accepted law of armed conflict principles, and are recognized and generally practiced by the United States and its allies.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 10th, 2008.

[Signature]

Gary D. Solis, J.D., Ph.D.
A CRITIQUE OF “NATIONAL SECURITY COURTS”

A REPORT BY THE CONSTITUTION PROJECT’S LIBERTY AND SECURITY COMMITTEE & COALITION TO DEFEND CHECKS AND BALANCES

JUNE 23, 2008
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I. INTRODUCTION

Recently, some scholars and government officials have called for the creation of “national security courts”—specialized hybrid tribunals that would review the preventive detention of suspected terrorists (both within and outside of the territorial United States), conduct the detainees’ criminal trials, or, in some cases, both. Advocates for these courts claim that they offer an attractive middle ground between adherence to traditional criminal processes and radical departures from those processes.

For the reasons that follow, we, the undersigned members of the Constitution Project’s Liberty and Security Committee and its Coalition to Defend Checks and Balances, believe that the proposals to create these courts should be resisted. The proposals are surprisingly—indeed alarmingly—underdeveloped. More seriously, they neglect basic and fundamental principles of American constitutional law, and they assume incorrectly that the traditional processes have proven ineffective. The idea that there is a class of individuals for whom neither the normal civilian or military criminal justice systems suffice presupposes that such a class of individuals is readily identifiable—and in a manner that does not necessarily pre-judge their guilt. The idea that national security courts are a proper third way for dealing with such individuals presupposes that the purported defects in the current system are ones that cannot adequately be remedied within the confines of that system, and yet can be remedied in new tribunals without violating the Constitution.

We believe that the government can accomplish its legitimate goals using existing laws and legal procedures without resorting to such sweeping and radical departures from an American constitutional tradition that has served us effectively for over two centuries. We separately address below proposals for a national security court for criminal prosecutions of terrorism suspects and proposals for such a court to review preventive detention decisions, and the reasons why each should be rejected.

* The Constitution Project sincerely thanks Stephen I. Vladeck, Associate Professor, American University Washington College of Law, for his extensive researching and drafting work on this statement as well as a background report for committee members, and for his work in guiding committee members to consensus on these issues.


II. CRIMINAL TRIALS FOR TERRORISM SUSPECTS

Advocates of national security courts that would try terrorism suspects claim that traditional Article III courts are unequipped to handle these cases. This claim has not been substantiated, and is made in the face of a significant — and growing — body of evidence to the contrary. A recent report released by Human Rights First persuasively demonstrates that our existing federal courts are competent to try these cases. The report examines more than 120 international terrorism cases brought in the federal courts over the past fifteen years. It finds that established federal courts were able to try these cases without sacrificing either national security or the defendants’ rights to a fair trial. The report documents how federal courts have successfully dealt with classified evidence under the Classified Information Procedures Act (CIPA) without creating any security breaches. It further concludes that courts have been able to enforce the government’s Brady obligations to share exculpatory evidence with the accused, deal with Miranda warning issues, and provide means for the government to establish a chain of custody for physical evidence, all without jeopardizing national security.

Of course, our traditional federal courts have not always done everything that the government would like them to do. They are, after all, constrained by well-established constitutional limits on prosecutorial power. For example, no federal court would permit the prosecution to present witnesses without protecting the defendant’s constitutional right to confront those witnesses against him or her. Nor would a federal court permit the prosecution to rely on a coerced confession in violation of a defendant’s Fifth Amendment right against self-incrimination. But creating a new set of courts would not repeal existing constitutional rights. Conversely, to the extent that the existing rules are not constitutionally compelled, ordinary federal courts (or Congress, where applicable) can modify them when it is shown that the modification is necessary to accommodate the government’s legitimate interests.

Most importantly, there is the intrinsic and inescapable problem of definition. Whereas the argument for specialized courts for tax and patent law is that expert judges are particularly necessary given the complex subject-matter, proposals for specialized courts for terrorism trials are based on the asserted need for relaxed procedural and evidentiary rules and are justified on the ground that terrorists do not deserve full constitutional protections. This creates two fundamental constitutional problems. First, justifying departures from constitutional protections on the basis that the trials are for terrorists undermines the presumption of innocence for these individuals. Second, if a conviction were obtained in a national security court using procedural


5. Although some proponents of national security courts analogize their proposals to the Foreign Intelligence Surveillance Court, there is a marked difference between a specialized court for obtaining a particular type of warrant and a specialized court to conduct a criminal trial. The Foreign Intelligence Surveillance Court does not handle contested trials; rather, its only role is to handle government surveillance applications under FISA. In the analogous context of specialized non-Article III courts, the Supreme Court has itself warned that the legitimacy of such courts is closely linked to the limited nature of their jurisdiction. See, e.g., CFTC v. Schor, 478 U.S. 833, 851 (1986).
and evidentiary rules that imposed a *lesser* burden on the government, then the defendant would be subjected to trial before a national security court based upon less of a showing than would be required in a traditional criminal proceeding. The result would be to apply less due process to the question of guilt or innocence, which, by definition, would increase the risk of error. And, if the government must make a preliminary showing that meets traditional rules of procedure and evidence in order to trigger the jurisdiction of a national security court, such a showing would also enable it to proceed via the traditional criminal process.

National security courts for criminal prosecutions are not just unnecessary; they are also dangerous. They run the risk of creating a separate and unequal criminal justice system for a particular class of suspects, who will be brought before such specialized courts based on the very allegations they are contesting. Such a system undermines the presumption of innocence for these defendants, and risks a broader erosion of defendants’ rights that could spread to traditional Article III trials. It was Justice Frankfurter who wrote that “It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.” Committee members strongly believe that the shadow of terrorism must not be the basis for abandoning these fundamental tenets of justice and fairness.

In addition, these proposals are alarmingly short on details with respect to the selection of judges for these national security courts. Although there *is* a history of creating specialized federal courts to handle particular substantive areas of the law (e.g., taxation; patents), unlike tax and patent law, there is simply no highly specialized expertise that would form relevant selection criteria for the judges. Establishing a specialized court solely for prosecutions of alleged terrorists might also create a highly politicized process for nominating and confirming the judges, focusing solely on whether the nominee had sufficient “tough on terrorism” credentials — hardly a criterion that lends itself to the appearance of fairness and impartiality.

None of the above is to deny that there *is* a class of individuals who may be tried in appropriate military tribunals. Persons captured by the U.S. military as part of an armed conflict have traditionally been subject to military jurisdiction under the laws of war. This principle is well-established, but it has long coexisted with the complementary principle that *only* individuals who are properly subject to military jurisdiction under the laws of war may be so tried. Military

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6. Indeed, it is also likely that the overwhelming majority of defendants in such proceedings would be of particular national and religious backgrounds, a point that would only further undermine the appropriateness of such a “separate” system. Cf. Neal Kumar Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365 (2007). The creation of a different court to try suspects, most of whom, if not all of whom, are likely to be Muslims, would be widely seen as the creation of a second-class justice system for Muslims. That result would further tarnish the United States’ reputation for justice and fairness in the Arab and Muslim world, and would be counterproductive for U.S. foreign policy and our efforts to combat terrorism.

7. This concern is more than speculative. As Professor Laura Donohue has recently documented, a series of “temporary” relaxed judicial procedures adopted by the United Kingdom in response to perceived threats of terrorism from Ireland ultimately became permanent, and were broadened to apply to non-terrorist crimes as well. See LAURA K. DONOHUE, THE COST OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY 14-16 (2008).

tribunals may not try offenders or offenses unless they are encompassed by traditional laws of war.9

Just as there is no need to establish national security courts to replace traditional Article III courts, so too there is no need to create such tribunals to handle cases that would normally be tried by military courts. Individuals should be tried either in our traditional criminal justice system or in properly constituted military courts.

III. PREVENTIVE DETENTION OF TERRORISM SUSPECTS

National security courts have also been proposed to serve as a forum for resolving challenges to preventive detention, not only for individuals currently detained at Guantánamo, but also for both citizens and non-citizens arrested within the United States. We reject the proposals because we believe that such a forum would be both unnecessary and unconstitutional. As the Supreme Court’s recent decision in Boumediene v. Bush illustrates, existing Article III courts are fully capable of adjudicating issues regarding the legality of detention.10 There is no need to create a specialized tribunal either for the Guantánamo detainees or for anyone else who may be subject to detention under existing law.

The Supreme Court has held that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”11 Committee members recognize that individuals can be detained for limited time periods for certain specific and carefully delineated purposes. Thus, non-citizens in immigration proceedings may lawfully be detained pending deportation where they pose a risk of flight or a danger to the community and detention is necessary to effectuate removal. Criminal suspects may lawfully be detained pending trial, again, if they pose a risk of flight or a danger to the community. And, during armed conflicts, members of the enemy armed forces may lawfully be detained as prisoners of war until the cessation of hostilities. The precise scope of detention authorized in the course of the conflict

9. Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (plurality). Thus, although the substantive provisions of the Military Commissions Act of 2006 (“MCA”), Pub. L. No. 109-366, 120 Stat. 2600, include within their scope authorization for military tribunals for offenses and offenders that were traditionally subject to military jurisdiction, it also sweeps much more broadly. To the extent that the MCA’s personal and subject-matter jurisdiction extend beyond the confines of that military jurisdiction consistent with the laws of war, the Committee believes that the MCA is unconstitutional.

10. Boumediene v. Bush, No. 06-1195, 2008 WL 2369628 (U.S. June 12, 2008). The decision recognizes the constitutional rights of the Guantánamo detainees to challenge their detentions through federal habeas petitions. Traditional Article III courts are fully capable of handling such habeas petitions and are the proper forum for resolving these claims.

11. United States v. Salerno, 481 U.S. 739, 755 (1987) (upholding preventive detention pending a criminal trial only where there is a showing of a threat to others or risk of flight, the detention is limited in time, and adequate procedural safeguards are provided). Also, as Justice Thomas explained in Kansas v. Hendricks, “States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety.” 521 U.S. 346, 357 (1997) (citations omitted). While the Supreme Court has “consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards,” that is not to say that such “civil commitment” statutes do not raise their own panoply of constitutional questions. But regardless of those issues, such cases are easily distinguishable from preventive detention of terrorism suspects. The purported danger from suspected terrorists stems from alleged criminal conduct. Consequently, a suspected terrorist should be prosecuted in a criminal court.
with the Taliban and Al Qaeda in Afghanistan, remains a matter of dispute, but there is no reason that traditional Article III courts cannot resolve it. But potentially indefinite preventive detention, either for the purposes of interrogation and intelligence-gathering or because the government believes it cannot prosecute the detainee but does not want to release the individual, falls into none of these categories. And because such preventive detention without charge is unconstitutional, there is no reason to create national security courts to supervise it.

In short, existing law, administered by existing courts, authorizes the government to detain individuals where they fit recognized limited categories of persons subject to detention. Even if an individual is not subject to detention under the laws of war, the government may seek to detain an individual suspected of a terrorism-related offense by bringing charges and asking for denial of bail before trial. Once charges are filed and a probable cause showing has been made, the Bail Reform Act empowers the government to seek to detain criminal suspects without bail, upon a showing of potential dangerousness. If the government is not yet ready to proceed to trial at the time of such a showing, the Speedy Trial Act includes substantial flexibility, especially where “the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial,” or where relevant evidence is located in a foreign country.

IV. **Recommendations**

For these reasons, we, the undersigned members of the Constitution Project’s Liberty and Security Committee and Coalition to Defend Checks and Balances, make the following recommendations:

1. Prosecutions for terrorism offenses can and should be handled by traditional Article III courts, except that combatants captured on the battlefield who would be subject to traditional military jurisdiction may be tried by military courts for offenses properly triable by such courts. We do not need to, and should not, create specialized national security courts for this purpose.

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12. Justice O’Connor’s plurality opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality) stated that even beyond the authority to hold prisoners of war, the government may also detain individuals captured on the battlefield as “enemy combatants” until the cessation of active hostilities. There is some disagreement among committee members as to whether the *Hamdi* plurality position is correct. Some committee members find Justice Souter’s opinion more convincing. As Justice Souter explained in *Hamdi*, the government could have detained alleged “enemy combatants” such as Hamdi as POWs. Because it chose not to do so, Justice Souter concluded that the Authorization for Use of Military Force (“AUMF”) was an insufficiently clear statement of congressional intent for other forms of preventive detention. However, even under the plurality’s formulation, the detention authority extending beyond POWs only applies to individuals who are captured on the battlefield. As several studies have shown, the percentage of post-9/11 detainees actually captured on the battlefield is comparatively small. See, e.g., *Mark Denbeaux et al., Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data* (2006).


15. See id. § 3161(h)(9).
2. We should not create specialized national security courts to oversee a system of preventive detention for terrorism suspects. Apart from detention under the laws of war, the United States government should only be permitted to detain an individual suspected of a terrorism offense if it can make a probable cause showing to a judge and it intends to prosecute that individual, or if appropriate, as part of immigration removal proceedings.

V. CONCLUSION

No one denies that hard questions remain to be asked and answered concerning the most appropriate means by which our legal system deals with the continuing threat posed by international terrorism. But establishing a new, unprecedented, and unnecessary system of tribunals risks undermining the constitutional protections enshrined in our criminal justice system, and would ultimately create far more problems than it could possibly solve.

The idea that national security courts are a proper third way for dealing with such individuals presupposes that the purported defects in the current system are ones that cannot adequately be remedied within the confines of that system, and yet can be remedied in hybrid tribunals without violating the Constitution. We strongly disagree. Traditional Article III courts can meet the challenges posed by terrorism prosecutions, and proposals to create national security courts should be rejected as a grave threat to our constitutional rights.
Members of the Constitution Project’s
Liberty and Security Committee &
Coalition to Defend Checks and Balances
Endorsing a Critique of “National Security Courts” *

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The Case Against a National Security Court

By Jordan Paust

From JURIST, October 23, 2008

JURIST noted in June that a group of high-level national security experts convened by the Constitution Project had issued a report opposing creation of a special national security court because it would pose “a grave threat to our constitutional rights”, and observed that a similar report issued by Human Rights First in May had stated that terrorism cases should be tried in the ordinary federal district courts [PDF]. Shortly afterward, also on JURIST, Professor Ben Davis warned against creating “Star Chamber justice” by establishing such a body.

Now, however, proponents of what Ben termed “un tribunal d’exception” are pushing the matter before Congress. For this reason, it is important to note several additional reasons why a special national security court should not be created.

During an actual armed conflict to which the laws of war apply, a national security court would have to comply with the customary and treaty-based requirements set forth in common Article 3 of the 1949 Geneva Conventions which, as noted in my book Beyond the Law, are absolute and minimum requirements applicable with respect to any person detained during either an internal or an international armed conflict. These mandate that a court be “regularly constituted” and afford “all the judicial guarantees” of due process that are reflected in customary international law – which include, at a minimum, those mirrored in Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

The Supreme Court aptly affirmed in Hamdan v. Rumsfeld that the “core meaning” of the phrase “regularly constituted” has been authoritatively set forth in general commentary by the International Committee of the Red Cross and excludes “‘all special tribunals’” and requires that courts be “‘established ... [and] already in force in a country.’” While concurring in Hamdan, Justice Kennedy noted that there is little doubt that the phrase relates to “standards deliberated upon and chosen in advance.” As Hamdan recognized, a court (1) must not be a “special” tribunal, and (2) must already be in existence. A special national security court simply could not meet the first test and, if otherwise proper, could only operate prospectively with respect to incidents arising after its creation.

Additionally, a national security court would comply with common Article 3 only if it provides “all the judicial guarantees” of due process reflected in customary international law. As the Supreme Court stated in Hamdan, “[i]nextricably intertwined with the question of regular constitution is the evaluation of the procedures governing the tribunal,” and “the phrase ‘regularly constituted court’ ... must be understood to incorporate the barest of those trial protections that have been recognized by customary international law.” The Supreme Court correctly added that “[m]any of these [due process requirements] are described in Article 75 of [Geneva] Protocol I” and in “the same basic protections set forth” as minimum human rights to due process in Article 14 of the ICCPR. Importantly, customary minimum human rights to due process reflected in Article 14 of the ICCPR apply in any social context and pertain, therefore, even when the laws of war are not applicable.
As documented in *Beyond the Law* and recognized by the Supreme Court in *Hamdan*, violations of customary rights to due process would include: (1) preclusion of the accused and defense counsel from learning what evidence was presented in closed hearings, (2) admission of hearsay evidence, (3) admission of unsworn statements, (4) denial of access by an accused and defense counsel to evidence in the form of classified information, (5) denial of confrontation of all witnesses against an accused, (6) use of “evidence obtained through coercion,” (7) denial of the right to be tried in one’s presence (absent disruptive conduct or consent), and (8) denial of review by a competent, independent, and impartial court of law (i.e., an Article III court). It seems unavoidable that a special national security court with special procedures that deviate from the federal rules of criminal procedure would not be designed to enhance fairness, fully meet bilateral and multilateral treaty requirements of equality of treatment, or provide more general equal protection of the law to criminal accused.

It is likely that some will propose the creation of a special court in order to facilitate convictions that would not be possible in a regular federal district court, especially through use of “evidence obtained through coercion” as part of what John Yoo and President Bush have admitted was a “common, unifying” plan or “program” of coercive interrogation that most know involves several manifest violations of customary and treaty-based international law and that can form the basis for criminal prosecution of (1) direct perpetrators, including those who authorized or ordered coercive interrogation; (2) leaders who were also or merely derelict in duty; (3) those who participated in a “joint criminal enterprise;” and (4) those who aided and abetted coercive interrogation or who were otherwise complicit (through memos or elsewise) in denials of rights under the laws of war, other violations of the laws of war, and violations of other international criminal law such as violations of the Convention Against Torture and customary prohibitions of secret detention. Quite clearly, lack of an intent to commit a crime would not obviate such forms of criminal responsibility and orders or authorizations will not lessen criminal responsibility for conduct that is manifestly unlawful. For example, an aider and abettor need only be aware that his or her conduct would or does assist that of a direct perpetrator. It is pertinent in this regard that there are reports that during multiple sessions in the White House beginning in 2002 Condoleezza Rice, Dick Cheney, George Tenet, Donald Rumsfeld, John Ashcroft, John Bellinger, and others viewed simulations of and/or discussed and approved use of waterboarding, the “cold cell,” use of dogs to instill intense fear in detainees, and stripping naked, among other patently illegal tactics that were to be used as part of the admitted program of coercive interrogation.

Perpetuating illegality with a national security court would not serve our traditional values and the best interests of the United States, especially as we seek to regain our honor and international stature during a new Administration committed to the rule of law.

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The National Security Court: A Natural Evolution

May 10, 2006

JURIST Guest Columnist Glenn Sulmasy, a professor of law at the US Coast Guard Academy, says it's time for US military commissions to evolve and morph into a national security court appropriate to handle the international jihadist threat...

The Global War on Terror has created ambiguities in both the laws of armed conflict and how best to fight the new war of the 21st century. The asymmetric threat of terrorism itself, no defined nation state to fight against, the relative problems with the Military Commissions in Guantanamo Bay (GITMO), allegations of torture and the recent constitutional issues surrounding wiretap efforts of the National Security Agency all highlight the lack of appropriate laws to govern this new conflict. Nowhere is this ambiguity more evident than in the United States’ handling of detainees.

The “enemies” in the Global War on Terror (GWOT) are men and women who fight not for nation but for ideology, do not wear standard uniforms and, as doctrine, flout the laws of war. These new “warriors” have created extreme difficulties since they are not, de jure belli, prisoners of war and thus the Geneva Conventions simply do not apply to them. Adjudicating their status and crimes has become increasingly chaotic. It initially appeared, relying in large part on Ex Parte Quirin [1], that the military tribunals (currently referred to as military commissions by the Bush Administration) would provide the appropriate venue for handling the prosecution of the detainees. I would concur this was appropriate assertion – particularly when viewed through a post 9/11 lens. But now, over four years later, there has not been a completed prosecution. Over 500 detainees remain in Guantanamo Bay and allegedly another 450 are reportedly are being held in Afghanistan. National consensus and international support of the Commissions has eroded significantly – most notably over the past two years.

As this problem escalates, a new approach must be entertained. This is a new war, one that mixes law enforcement and warfare, and does not fit neatly in either regime. The Bush administration and Congress have adapted U.S. resources strategically, tactically and militarily to meet the new threat. They enacted the USA PATRIOT ACT, conducted the largest reorganization of government since 1948 by creating the Department of Homeland Security (merging 177,000 employees and over 22 agencies), and created a flexible new foreign policy embodied by the National Security Strategy of the United States in 2002 (recently re-released and reaffirmed in 2006). They were, and remain, conscious that this is a new type of war requiring new policies. Ironically, there have been no changes in how we handle the new enemy “warriors” of the GWOT once captured. It is now time for the military commissions to evolve and morph into a court appropriate to handle the international jihadist threat. The formation of national security courts seems a logical solution to the ongoing threat posed by international terror.

In cooperation and concert with an updated Foreign Intelligence Surveillance Act (FISA), a national security court apparatus needs to be statutorily created. The detainee issue will not be resolved soon, nor will the Global War on Terror end in the foreseeable future. Policy makers must achieve both the reality and appearance of justice for the short and long term. Clearly, many issues need to be hammered out in regards to court composition. The current thrust should simply be to inject new ideas into the national debate over the proper handling of detainees. In that vein, I humbly offer fundamental guidelines for a National Security Court:
1. **Article I judges with law of armed conflict expertise.** The courts would be led by judges, appointed by the President, who are experts in the law of armed conflict and have some background in national security law. These Article I judges should possess the educational background necessary to determine the lawfulness of intelligence gathering, terrorist surveillance, etc. Several scholars, advocating against judicial intervention in the war, correctly note that those who are making such decisions now are not necessarily versed in this unique area of the law [2]. Whether you agree or disagree, the nature of this war seems to necessitate judicial intervention more than has been customary, in previous U. S. military operations and wartime. As it stands now, the existing systems (the FISA court and Article III federal courts) permit judges who have no background in warfare or national security to intervene, conduct hearings and decide on cases and issue warrants. Unfortunately, such actions are beyond the scope of their scholarship or expertise [3]. The complex threat we now face demands specialty courts staffed by appropriate personnel.

2. **Prosecutors** – Five dedicated prosecutors, assigned by the Department of Justice (DoJ) would represent the government and exercise prosecutorial discretion on whether or not to proceed in cases. Oversight would be conducted by the Chief, Criminal Division of DoJ [4]. The powers of these prosecutors, as currently exists in other democratic, E.U. nations, would be great. However, these prosecutors would still operate under the ethical rules standard for all US government attorneys.

3. **Specified and Qualified Defense Counsel(s)** – Judge advocates would serve as the government-provided defense counsel. This group would be similar to what has been provided for the detainees in the military commissions. The judge advocates would be assigned from the Department of Homeland Security [5] and the Department of Defense. Initially, a pool of ten judge advocates would serve on the defense teams. As an option, the jihadist could employ, at his own expense, civilian counsel so long as such counsel have requisite classified document clearance(s).

4. **Trials Proceedings would be closed** - As a result of the sensitive nature of intelligence gathering and specialized methods employed – as well as ensuring such hearings do not become propaganda tools for the enemy - the trials would be closed to the public. One need look no further than the World Trade Center bombings in 1993 and the recent Moussaoui case [6] to see the heightened need for such hearings to be closed to the media and public audiences. However, qualified representatives from designated NGO’s and the United Nations would be permitted to attend as “observers” to ensure trial fairness and witness the procedural protections expected of a nation dedicated to upholding the rule of law.

5. **Trials Held on Military Bases within the Continental U. S.** – This would keep the detainees held in a location that is secure, like Gitmo, but located within the United States on one of our military bases. This would, in part, alleviate some of the international concerns about the detention centers located in Gitmo. Since Eisentrager has been essentially overruled by recent cases [7], the extraterritoriality needs are no longer applicable and, in essence, are moot [8].

6. **Convicted Defendants Imprisoned at Military Brigs** – If convicted and sentenced to jail time, military brigs are by far and away not only the best but also the right place to imprison those convicted by the National Security Courts. This is the most secure place
to imprison such illegal combatants and affords the same protection against abuse given to those U.S. service members who are tried, convicted and sentenced under the UCMJ by courts-martial.

7. **Appropriate Appellate Rights** – Consistent with the theme of the National Security Courts being a military-civil hybrid, appeals would go through the Courts of Appeals of the Armed Forces (CAAF) [9]. This limited right of appeal would ensure these cases were heard by an outside panel of judges versed in military law and the laws of war, as well as have some background in the procedural nuances of national security law. Appellate counsel would be provided by experienced Air Force, Coast Guard, Navy-Marine Corps, and Army appellate attorneys.

8. **Death Penalty** - The death penalty would still be an authorized punishment as it currently still is under certain UCMJ offenses (and the commissions) a possibility for convicted military members. This penalty would only be authorized in those cases deemed egregious enough and ones that severely impact the homeland security of the United States. Certain aggravating factors would have to be codified to distinguish between what offenses are appropriate for life sentence or those better suited to capital punishment. Cognizant this would still cause concern among our European and certain other international colleagues, this proposal must undergo intense scrutiny prior to implementation.

The Global War on Terror has introduced ambiguity in the choice of the appropriate legal regime best suited to comport with the law of armed conflict and satisfy customary international legal obligations. Of the myriad new issues and legal problems confronting policy makers in the West, the most problematic has been the proper handling of jihadists once captured. The Gitmo “distraction” is impacting our ability to effectively lead the world in other areas of national security. International concern over Gitmo is detracting from our ability to provide guidance, counsel and policy in this and other arenas. Regardless of blame or why this has occurred, the United States needs to take a fresh look at how best to deal with detainees, the proper adjudication of detainees in Guantanamo Bay now, and for those detainees yet to come, as they surely will. A blue ribbon commission, created by the President, should immediately be employed to look at the possibilities of creating a national security court system which will address questions as to proper detention, adjudication, intelligence gathering, terrorist surveillance and other such legal issues associated with the threat of international terror. The National Security Court, an evolution of the military commissions, affords an opportunity for U.S. policy makers to respond forcefully and effectively to calls, both domestically and internationally, for a way out of the Guantanamo issue. The time is now for the United States to once again be viewed as the “shining city on the hill,” a vision so eloquently defined by President Reagan. It is time to regain the initiative, and reaffirm our leadership in the humane prosecution of those who would undermine the ideals of democracy.

Notes


3. Military Deference Doctrine outlined in cases dealing with warfare, modes of warfare and conduct during warfare.

4. Roughly analogous to the powers of prosecutors for terrorist cases in France, GB and even the


7. See, note 21, 22.

8. It appears the concept of ensuring no access to Federal courts when held outside of US, or extraterritoriality, is no longer a legitimate policy to employ; See Steven C. Welsh, Supreme Court Guantanamo Decision, June 30, 2004 available at http://www.cdi.org/news/law/gtmo-sct-decision.cfm

9. The Court of Appeal of the Armed Forces (CAAF) is the intermediate appellate court for all military law cases. The CAAF is currently employed as a civilian “check” over the military justice program and the level of review before access to the Supreme Court. Many judges on the court have either experience in national security or the law of armed conflict. This skill set seems most apropos for a judicial check on surveillance and other activities now necessary to effectively fight the jihadist threat of international terror.

**Momentum for a National Security Court**

July 13, 2007

JURIST Guest Columnist Glenn Sulmasy, a professor of law at the US Coast Guard Academy who made the case for a US national security court on JURIST a year before a recent op-ed backing the proposal ran in the *New York Times*, says that implementing a new court system will provide new opportunities for success in the war on terrorism...

As Congress and the current administration struggle over how to proceed with the detention and adjudication of alleged jihadists imprisoned at Guantanamo, increased attention is being paid to the creation of a hybrid court to best meet the needs of policy makers, the Department of Defense, U. S. citizens, our allies and the detainees themselves. Resolution of these concerns is increasingly important as the United States continues its war against al Qaeda.

Recently, both sides of the debate have become entrenched in two paradigms regarding the future of GTMO: 1) Factions in Congress want to gut the Military Commissions Act (MCA) and use the U.S. federal criminal system to try the alleged international terrorists and 2) Some in the administration and many conservatives want to preserve the original military commission process or the MCA and not change the existing structure. The reality is that both sides are right; yet both sides are wrong. As I have previously written in JURIST and elsewhere, the real answer, and most viable long term solution, is the creation of a national terrorist court system – similar to the FISA court.

This new national terrorist court could be created as part of an update to the FISA and its system. FISA is outdated and antiquated as it was written in 1978 to address the conventional threat of the
Soviet Union during the Cold War and can not confront the realities of the wars of the 21st century which mix law enforcement and warfare. This type of war against international terrorism we are engaging in is new – and so is the ability for non-state actors to engage in sustained warfare against nation-states (with the capability to inflict massive damage including the use of WMD). We must break away from three-decade-old paradigms and move forward to meet the new challenges of 21st century warfare. Updating FISA and implementing a new court system will provide new opportunities for success.

Guantanamo and the military commissions, historically effective and arguably lawful and in line with 20th Century Supreme Court precedent, have now become the focus of mounting criticism. Although much of this criticism is often unfounded and without merit, it has de facto hampered our ability to be a leader in human rights issues worldwide. The negative international reaction has hindered the exertion of our leadership in so many other areas where the world expects, and needs, U. S. assistance, resources and moral influence. Since the war we are fighting is itself a hybrid, it is critical for policy makers to create a compromise out of the existing positions and consider a new court system as part of the debate. A National Security Court (or Homeland Security Court) offers a system that will be permanent, balances the requirements of law and the successful prosecution of war, addresses human rights concerns, and permits the United States to focus on winning the war against al Qaeda. Like the enemy and this “new” war, it would be a blend, taking the most relevant aspects of both our federal criminal system and the military commissions. Briefly, the proposed court would include standing federal judges learned in intelligence law and the law of armed conflict, ensure the detention and trials for citizens and non-citizens could be conducted at military bases within the United States, provide military judge advocates as detainee defense counsel, and have the program run by the Department of Justice to ensure civilian oversight.

It is important to note that others are now agreeing that this new, proposed system is worthy of consideration for policy makers struggling with what to do with these “warriors” or jihadists. Andy McCarthy, senior fellow at the Foundation for the Defense of Democracies has written (in the National Review and elsewhere) and spoken extensively on the need for this new type of court. Columnist Stuart Taylor, Jr. of the National Journal has written at least two pieces calling for these new courts, and recently, Professors Jack Goldsmith and Neal Katyal have written a New York Times op-ed declaring some form of a national security court is the best means to move the nation forward.

However, the creation of a National Security Court is not a course change or repudiation of what has been legally done for the past six years. Additionally, these new courts should not be perceived as a victory for al Qaeda propaganda. Rather, the new national security courts would be an evolution of the existing processes used for trying illegal combatants in times of war. Warfare has changed, the enemy is different from those in the past, the means and methods to conduct warfare has changed radically, and now our system for detaining and trying these illegal belligerents needs to adapt to these new realities. The enemy is unique in that they represent no nation-state or flag, but are instead warriors of an ideology. The situation demands consideration must be given to morph the military commissions into “hybrid” national security courts.

Washington policy makers need to inject fresh ideas such as this new court system into their deliberations as the nation continues to fight al Qaeda around the world.
STATEMENT
OF
GLENN M. SULMASY
BEFORE THE SUBCOMMITTEE ON
INTERNATIONAL ORGANIZATIONS, HUMAN RIGHTS, AND OVERSIGHT
COMMITTEE ON FOREIGN AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
MAY 20, 2008

Chairman Delahunt and members of the Subcommittee: I am honored to appear before the Subcommittee today, and to address the legal ambiguities about the detention facility in the United States Naval Station at Guantanamo Bay, Cuba. I believe the issues surrounding Guantanamo Bay (Gitmo) and the military commissions are the seminal ones of our time – how we detain, adjudicate and handle detainees captured in the War on al Qaeda help to define America as to who we were, who we are, and who we will be in the future. Resolving the ambiguities of Gitmo is crucial to America’s ability to continue to lead in the new world order of the 21st century. I appreciate this Subcommittee taking the time to address these concerns and, hopefully, to entertain fresh, new ideas for the “way ahead.” Up front, I must emphasize I attend the hearing in my personal capacity and my views are mine alone and do not imply endorsement by any of the entities, governmental or otherwise, that I am associated with.

Almost seven years after the attacks of 9/11, it is critical to move this debate forward. We must refrain from partisanship, constant criticism, calling one another unpatriotic, or labeling people as war criminals, and rise above the bickering and look to find real solutions. Thus far, the advocacy has essentially been divided into two paradigms: 1) those who view the conflict with al Qaeda requiring a law enforcement response and thus, the need for use of civilian courts and due process ordinarily accorded U. S. citizens; and 2) those who view the conflict as an armed conflict and desire to use the law of war paradigm to handle the detainees. Unfortunately, neither solution is working effectively. It seems as though both sides are jamming “a square peg into a round hole.” Unfortunately, if we remain on this tack, nothing will ever be resolved and U. S. foreign policy will continue to be hampered. Advocates on both sides of the debate, rather than attacking each other, should be viewed as thoughtful patriots – each viewpoint earnestly promoting what they believe to be the correct way to handle the detention and trial of the captured al Qaeda fighter. All policy makers, academics, and lawyers are trying to determine the best course to proceed. This new armed conflict of the 21st century has shattered all previous notions of traditional warfare. It offers an enemy who is not a signatory to the Geneva Conventions, does not represent a nation state, does not wear a uniform, violates the laws of war as doctrine, and as a non-state actor, has declared war on the United States. Thus, neither paradigm fits neatly - in fact, both sides (in many respects) are right and both sides are wrong in applying their analyses to the current threat. The armed conflict we are fighting is truly a mix of law enforcement and warfare and the al Qaeda fighter is a mix of international criminal and traditional warrior. Viewing the conflict in this fashion, as a hybrid, makes both of the prevailing paradigms ineffective as a framework for detention and prosecution. Having
asserted this, I will briefly analyze the Gitmo situation from three perspectives: 1) legal perspective; 2) a policy perspective; 3) and then offer a new solution or “third way” to move the debate forward.

**Law:** Different from others on the panel, I believe the military commissions are lawful as a matter of history, statute and Supreme Court precedent. They have evolved and will continue to evolve and morph in the future. Contrary to some assertions, the administration did not make up the idea of using military commissions as the proper venue to try illegal belligerents in time of war. In fact they have been used throughout history; the most famous early commission being employed by General Washington against Major Andre during the American Revolution. Field Commanders and Presidents throughout American history have made use of the commission for handling illegal belligerents with virtually little, if any input from the Congress. Generals Washington and Jackson, Presidents Lincoln and Franklin D. Roosevelt all made use of military commissions during periods of armed conflict. The Uniform Code of Military Justice, enacted by Congress in 1950, provides in at least two sections of legislative authority to use such tribunals or commissions. And in *Ex Parte Quirin*, the case most relied upon by the Bush administration; the Supreme Court unanimously upheld the use of commissions. The President’s order of November 13, 2001 and the choice of initially choosing Gitmo as a location for many of the detainees during a period of attack (or at the minimum, armed conflict) was a reasonable, legally supportable decision to make in the atmosphere of the post 9/11 environment. Intelligence reports and the “chatter” being intercepted revealed imminent attacks were operational and the American citizenry, as well as the government, all anticipated additional attacks. As ongoing combat was taking place in Afghanistan, a decision had to be made as to the best way to detain and adjudicate the war crimes being committed by the illegal belligerents, or enemy combatants. Thus, the President and his staff appropriately relied on the historical use of military commissions during a period of armed conflict by warfare commanders and Presidents, the statutory authority embodied in the UCMJ (although ambiguous), as well as Supreme Court precedent.

The original Order of November 13, 2001, however, did not remain stagnant for long. It began to mature into appropriate 21st century military law jurisprudence. It was, in fact, modified and “updated” over the next few years – some of which was *sua sponte* and some at the prompting of the Congress, academics and the bar. Just six months after the original order, in the Spring of 2002, the Department of Defense made modifications to provide more process to the detainees. Again, in March of 2003, when promulgating the orders for the Military Commissions, the DoD adopted further updates to the specific orders to ensure a more progressive, justice oriented process was being used. After several cases came before the Supreme Court (*Hamdi* and *Rasul*) creating minor adjustments, the Court in the *Hamdan* case declared the existing military commissions unlawful as constructed. Congress reacted, and in bi-partisan fashion, enacted the Military Commissions Act (MCA) in October of 2006 – just four months after the decision by the Supreme Court in *Hamdan*. The MCA addressed the two major concerns expressed by the Court: 1) Congress must approve the commissions and 2) that Common Article 3 of the Geneva Conventions must apply. It is under this legislation (the MCA) the commissions currently operate. Contrary to many reports about the lack of process afforded detainees, the fact remains that many of the detainees have greater rights than
they would receive in their home countries. Additionally, the detainees at Gitmo now enjoy greater rights than would a Prisoner of War (POW) under the Geneva Conventions who would never have access to U.S. courts to challenge their detention. Objectively, the detainees now enjoy a laundry list of process rights, to include:

— right to a full and fair trial
— right to know the charges against him as soon as practicable
— presumption of innocence
— right to counsel, government-provided defense counsel, and civilian counsel (at own expense)
— opportunity to obtain witnesses, and other evidence, including government evidence
— obligation on the government to disclose exculpatory evidence to the defense
— right to cross-examine witnesses
— right to not testify against himself
— limitations on the admission of hearsay evidence, focusing on its probity and the danger of unfair prejudice
— ban on statements obtained by torture
— limitations on statements obtained through coercion, focusing on their reliability and probity
— assurance that no undue influence or coercion of a Commission itself or members of a Commission can be exercised
— assurance that Commission proceedings will be open, unless extraordinary circumstances are present
— right to, at a minimum, two appeals, one through the military justice system, and the other through the civilian justice system, beginning with the D.C. Circuit
— assurance against double jeopardy – accused cannot be tried twice for the same offense.

It seems the commissions have morphed, adapted and changed since 2001 with input from the Executive branch, the military, the judiciary and, most recently, the Congress. In a new war in a new century, we have watched our republic deal with the detainees in uncomfortable fashion. The process is evolving and morphing before our eyes. As currently constructed, the military commissions appear lawful.

**Policy:** However, beyond the legality of the detention center, policy issues must be measured. Critics of the commissions and Gitmo itself have increased dramatically over the past three years. We have not had a single prosecution in the seven years since the order of 2001. Allegations that Gitmo is the “gulag of our time” by Amnesty International in 2005 had a major impact on how the commissions were viewed internationally. Allegations of torture by the detainees – particularly after the Abu Grahib incident – added to concerns both domestically and internationally. Greater focus was placed on the operations at Gitmo by non-governmental organizations, the media and the U.S. government. Some of these allegations may have been accurate, while others were hyperbolic or exaggerated. Indeed, several of these allegations have been used as propaganda tools by al Qaeda. An example of hyperbole was Newsweek’s (later retracted) article about soldiers flushing Koran’s down the toilet. This story fueled
suspicion of our actions by many within the international community about our intentions in our “war on terror.” Regardless of merit or exaggeration, however, the impression by most, both domestically and internationally, is that Gitmo has been tainted. Affirming some of these suspicions or criticisms is the glaring fact that some 275 persons remain at Gitmo without a single trial completed – and the likelihood for any successful, fair prosecutions diminishing daily. Many question the United States commitment to human rights and to our role as a world power. Gitmo, regardless of blame or fault, has hurt the United States in its ability to prosecute the War on al Qaeda and lead in many other areas of geo-political concern. Whether allegations being made are correct or not, it is clear that we have lost the public relations war about the circumstances, safety, and the treatment of detainees at Gitmo.

Recommendation - With this policy backdrop and its impact on U. S. foreign policy, many have called to close Gitmo. In fact, President Bush, Secretary Gates, and Secretary Rice have all stated their desire to close the facility – mostly based upon policy concerns. All three current Presidential candidates support closing the facility. Five former Secretaries of State (from both parties) have called to close the facility. The question still emerges then, what do we do with these detainees and the inevitable future detainees if we close the facility and use a different system? Different from the existing law enforcement or law of war paradigms, a “third way” must be entertained. It seems logical that since we are fighting a hybrid warrior - in a hybrid war - that the best means to detain and adjudicate the detainees is through the use of a hybrid court – a mix of our Article III Courts and the military commissions. This court would be run by the Department of Justice and the detention, trial and incarceration held on military bases. As I have written elsewhere, this seems to be the right solution if properly constructed and incorporated with human rights considerations. Obviously, in creating such a court the devil will be in the details. The key in statutorily creating these courts is that they are adjudicatory in nature and that we begin to move away from preventative detention models advocated by some. We need to try the detainees accused of war crimes. The terrorist court, like the bankruptcy and immigration courts, would be used for this niche area of the law and ensure civilian oversight of the process. In doing so, we further distinguish the unique nature of the conflict, and ensure military commissions (authorized and appropriate in traditional armed conflict) are not removed from military jurisprudence. The Terrorism courts offer a solution out of the Guantanamo Bay concerns and ambiguities. I remain hopeful that policy makers begin to study this idea of a hybrid model, used to try international terrorists, as the best, most appropriate “way ahead.”

I am available and happy to answer any questions from members of the subcommittee.
Two Takes: The Supreme Court Made a Mistake in 'Boumediene'

By Glenn Sulmasy


Glenn Sulmasy is a national security and human rights fellow at the John F. Kennedy School of Government at Harvard University and an associate professor of law at the U.S. Coast Guard Academy. The views expressed herein are his own.

The Supreme Court's 5-4 decision in Boumediene v. Bush last week justifiably sent shock waves through the legal community. The majority opinion, authored by the ever wandering Justice Anthony Kennedy, disregarded both centuries of precedent and the military deference doctrine and also intruded on what is clearly the province of the political branches. As a result of this case, Guantánamo Bay detainees now formally have more rights than do prisoners of war under the Geneva Conventions. To say the least, citizens, regardless of political affiliation or views of the status of Guantánamo, should be concerned about the ramifications of this decision.

**Precedent.** The Boumediene holding permits aliens to exercise constitutional rights within U.S. courts of law. This has never been the policy of the United States, nor has the court ever granted such rights to those detained outside of U.S. jurisdiction. Additionally, it should be noted that this is the first of the Supreme Court cases since the attacks of 9/11 that actually declares that the military commission process contains a constitutional violation. While many on both sides of the aisle believe that Guantánamo and the military commissions might be flawed as a matter of policy (and, some say, of law) and think it is in the best interests of the nation to close Guantánamo, this case actually goes further and will have greater impact than if the commissions themselves were found to violate the Constitution. Justice Kennedy went to lengths to limit the decision to only those detained at Gitmo now, but his decision clearly will be analogized by some to other military bases overseas (e.g. Afghanistan) where detainees are held. The practical effect of flooding an already overburdened federal court system is more than likely. These detainees will not only have access to federal district courthouses but will gain the rights of American citizens to challenge their cases within the United States. One can only imagine further unprecedented constitutional challenges, such as applying the Fourth Amendment and the Fifth Amendment to the detainees, arguing these provisions of the Constitution apply to those searched or captured on the field of battle. This is not a stretch but a frightening, arguably unintended consequence of the decision.

**Military deference.** Boumediene has removed the military from the habeas corpus process altogether. Few will doubt we are a nation at war, and the military is detaining and adjudicating, through the military commissions, those unlawful combatants accused of war crimes. Under the holding, however, only civilian federal judges (without any opportunity for the military to formally review or determine the status of those they detain) within the district courts will decide whether or not to issue a writ of habeas. Ordinarily, courts refrain from interfering with ongoing military operations or policy
decisions and have repeatedly refrained from intruding in this arena if at all possible. In Boumediene, the Supreme Court has inserted itself and removed the military altogether from the habeas process. Strangely, Justice John Paul Stevens had asserted in *Hamdan v. Rumsfeld* that the Uniform Code of Military Justice should be applied to these detainees. *Boumediene* disregards *Hamdan* and the code completely for determining lawfulness of detention. Additionally, the court has intruded in what the Founders clearly intended to be decisions best left to the political branches. With so much angst over executive power in the past few years, one hopes reasonable minds will recognize this overreach by the court. Clearly, Congress and the president are better able to make these decisions.

**Prisoners of war.** Ironically, the holding affords greater protections to the alleged unlawful belligerents than prisoners of war are entitled to under the Geneva Conventions. This absurdity should be shocking to the American citizenry. POWs are supposed to receive the "gold standard" of treatment, but it was never envisioned to permit such access to the domestic courts of the detaining country. The detainees, of course, are not even signatories to the tradition of the Geneva Conventions. But now nine unelected, life-tenured justices have determined that someone such as Khalid Shaikh Mohammed should be given access to our great courts of justice. If such a policy decision is to be made, it needs to be made by our elected representatives who have the voice of the people. The inaction on such concerns by the political branches should not be the catalyst for the Supreme Court to intervene—particularly when such decisions impact a nation at war.

Rather than argue back and forth on the case, however, policymakers must quickly review the implications of the decision and find mutual ground on how best to proceed. The political branches must seek a third way—neither the existing federal courts nor the military commissions but a specialized hybrid court with civilian oversight (often called a national security court)—as the best means to balance the interests of both national security and human rights. Such a federal terrorist court could be structured to better meet the policy concerns of many both in America and abroad: to detain and adjudicate cases against unlawful belligerents in the war on al Qaeda. *Boumediene*, for all its faults, might just be the catalyst necessary for such action.

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A new look for the war on al Qaeda

By Glenn Sulmasy

From the San Francisco Chronicle, September 11, 2007

Our public discourse about the "war on terror" has become stale and mired in hyperbole. The nation needs to forge a new path in the armed conflict against al Qaeda. At the sixth anniversary of 9/11, the public debate is void of any fresh ideas about how to move the country forward in the conflict of our generation.

This lack of vision in the public debate is readily apparent as the 2008 presidential primary election heats up. We are deluged with debates, commercials and solicitations but no new ideas about how to win the "war on terror."

There needs to be a new doctrine embraced by policymakers. This is not a partisan issue but rather one that we as a nation that promotes human rights must rally behind. Our standing among friends and foes alike has been tarnished. A new doctrine, with four major components, is needed. They are:

1) Change the name of the war.

2) Morph the military commissions into a permanent national security court.

3) Lead an international call for a convention to review the Geneva Conventions to determine if, and how, the conventions might be updated to meet the needs of handling the detainees captured in the war.

4) Make the recent FISA reforms permanent while striking the right balance for the Terrorist Surveillance Program.

Call the war what it is - a war against al Qaeda: From a strategic level, this name change will help focus our efforts. We can win a war against al Qaeda. It gives a face to the entity we fight. It gives us the chance to defeat this enemy and to declare victory at some point. As it now stands, the nebulous "war on terror" sounds all too similar to the "war on poverty" and the "war on drugs," neither of which are "winnable."

Tactically, changing the name of the conflict will permit decision-makers in Washington to sharpen their efforts to provide adequate resources.

Legally, this titular change affords a more concrete jurisprudential foundation to detain, interrogate and adjudicate crimes against the international terrorists. The ambiguities as to the status of the detainees, as compared to traditional POWs, remain a sore point with our allies. This will help remove some of the cynicism, both domestically and internationally, about who we are detaining and will detain in the future.
Create a standing terrorist court: The president, the secretary of defense and the secretary of state all have declared their desire to close Guantanamo Bay as a detention center. A natural maturation from the Military Commissions Act would be a hybrid court - a mix of both the military commissions and the Article III federal courts. The war itself is unique - it requires a mixture of both a law enforcement response as well as a military response. These are hybrid warriors in a hybrid war - thus, the need for a new hybrid court to better detain, interrogate and adjudicate their cases.

Lead the call for an international conference to review the Geneva Conventions: This is a global conflict, and as such, we need to have consensus from our global partners as to how best to proceed. The United States should determine if a new protocol might be necessary to identify and handle the al Qaeda international terrorists as they are different from both traditional warriors and terrorists seeking national revolution or other domestic political changes.

Update the Foreign Intelligence Surveillance Act (FISA): Few disagree that there needs to be some intelligence collection program conducting surveillance overseas, however, controversy has arisen when some of these "intercepts" include U.S. citizens. FISA was drafted in 1978 - before computers, cell phones and other electronic means of communication. During the fall session of the Congress, clear guidelines need to be created for FISA and the reforms legislated last session need to be made permanent. In doing so, however, we must balance our constitutional and human rights obligations with our legitimate national security needs.

These four cornerstones of a new strategy are critical to moving the debate forward and to fight the war. Instead of battling over what already has occurred, we need to be debating what to do in the future as al Qaeda plans its next major attack upon the U.S. homeland.
Administrative Detention:
The Integration of Strategy and Legal Process

A Working Paper of the Series on Counterterrorism and American Statutory Law, a joint project of the Brookings Institution, the Georgetown University Law Center, and the Hoover Institution

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July 24, 2008

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Editor's Note

This paper is the second in a paper series on reforms to the statutory architecture of American counterterrorism policy, to be published jointly by the Brookings Institution, the Georgetown University Law Center, and the Hoover Institution. The series is intended to suggest changes to areas of American statutory law pertinent to the War on Terrorism. Because of its obvious importance to an ongoing public policy debate over the future of detention policy in the wake of *Boumediene v. Bush*, we are releasing Mr. Waxman's paper as a working document that may undergo changes as the debate evolves over the coming months.

Benjamin Wittes

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Introduction

The Supreme Court’s recent decision in *Boumediene v. Bush*, holding that prisoners at Guantanamo have a constitutional right to *habeas corpus* review of their detention by federal courts, has injected new fuel into the debate about whether Congress should enact administrative detention legislation. To its advocates, administrative detention—or detention by the Executive branch without criminal prosecution in the courts—is a potentially important counter-terrorism tool. New legislation, they argue, would more effectively and legitimately regulate detention practices of suspected terrorists that to date the Bush Administration has conducted under an expansive notion of unilateral war powers. But critics warn that administrative detention is a dangerous tool as well, not just because it threatens liberty and entails expanded powers of the State, but also because its overuse or injudicious use may be counter-productive in combating violent extremism. Rather than institutionalizing and regulating it through legislation, opponents and skeptics of administrative detention generally argue that, especially outside combat zones, detention of suspected terrorists should be handled through criminal prosecution, with its tight rules limiting state powers and safeguarding individual suspects’ liberties. According to a recent statement by the Constitution Project, administrative detention proposals “neglect basic and fundamental principles of American constitutional law, and they assume incorrectly that the traditional processes have proven ineffective.”

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1 No. 06–1195, slip op. (June 12, 2008).
3 Most of those proposals begin with the assumptions that criminal prosecution of suspected terrorists is the preferred option when possible and consistent with national security imperatives and that capture and detention of enemy military forces on traditional battlefields should be excluded from any new administrative detention regime, because the law of war deals with those cases satisfactorily. In other words, there are categories of very threatening individuals for whom existing detention frameworks serve well, and any new system should not significantly disrupt that effectiveness. See, e.g., Goldsmith & Katyal, supra; Wittes, supra; McCarthy & Velshi, supra at 6.
My purpose in these pages is not to convince the reader that a new administrative detention regime is necessary, nor do I mean to offer a specific legislative roadmap towards one. I have argued elsewhere for “a durable, long-term framework for handling detainees—one that lets [the United States government] hold the most dangerous individuals [it captures] and collect intelligence from them (including through lawful interrogation), but also (unlike Guantanamo Bay) has rules and procedures that are politically, legally and diplomatically sustainable.” Other papers in this series argue for various approaches to preventive detention. In this paper, rather, I aim to examine what seem at first like simple questions underlying the discussion of administrative detention and the possible need for new laws: in combating terrorism, why administratively detain, and detain whom?

The answers to these questions seem obvious at first. We should detain individuals to prevent terrorism and, to that end, we should detain terrorists. And with those basic ideas apparently settled, the administrative detention debate tends to jump quickly to the question of how to detain: What procedural protections should we afford suspects? What rights should we grant them to challenge evidence proffered against them? What kinds of officials will adjudicate cases? Those advocating new administrative detention laws generally call for robust judicial review of what have largely been executive-only detention decisions since the early days of the Bush Administration’s Global War on Terror—perhaps by a new “national security court” charged with overseeing a process that includes adversarial process and meaningful assistance of lawyers. And at that point, the discussion moves just as quickly to questions of institutional design, and such procedural details as evidentiary rules, the type of judges who will hear these cases, detainee access to counsel, and counsel’s own access to classified information. Administration detention critics, too, focus heavily on the procedural dynamics of administrative detention proposals: how would detention decision-making and, for that matter, the standards and rules governing those decisions, deviate from normal criminal justice rules?

The Supreme Court similarly focused almost exclusively on procedural mechanisms in its *Boumediene* ruling. While mandating that Guantanamo detainees receive access to U.S. federal courts empowered to correct errors after “meaningful review of both the cause for detention and the Executive’s power to detain,” the Court made clear that it was “not address[ing] the content of the law that governs petitioners’ detention.”

The questions everyone seems keen to skip over, however, are not nearly as obvious as their omission suggests. In this paper, I therefore take a step back from the issues surrounding how to make and review detention decisions and engage the antecedent questions of why detain and, therefore, whom to detain. In doing so, I mean to advance two overarching arguments that should guide the discussion of whether the United States needs administrative detention laws and, if so, of what type. First, any discussion of administrative detention should begin with a

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7 See Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUMBIA LAW REVIEW 1013 (2008) (detailing how most court decisions in cases challenging Bush Administration counter-terrorism detention policies have not directly addressed substantive rights, but instead have focused on procedural rights).

8 Boumediene v. Bush, slip op. at 54.
clear understanding of the strategic rationale for administrative detention and a sense of how
detention fits within a broader counter-terrorism and national security strategy. Our answers to
the “why detain?” question will drive our answers to the “whom to detain?” question, and those
answers together will significantly affect the matrix of costs and benefits of legal innovation.
Second, the way we answer the “why” and “whom” questions will, in turn, significantly
determine the procedural architecture of any new administrative detention regime. This paper
therefore cautions against jumping too quickly in administrative detention discussions to the
issue of procedural design, or the “how” questions.

To whatever extent Congress decides that the United States needs a new administrative detention
apparatus, this analysis points in favor of narrowing significantly the strategic flexibility and
expansive operational latitude the Bush Administration has asserted through its legal
interpretations. It recommends that architects of proposed administrative detention schemes
focus on the strategic objectives of either immediate-term disruption of terrorist plots or long-
term incapacitation of suspected terrorists (and, as this analysis shows, it may not be as easy as it
seems to design a system that does both effectively). Further, it advises against broad
substantive criteria like “enemy combatancy” or “membership” in favor of a more narrow and
specific inquiry of an individual’s supposed dangerousness, perhaps supplemented with
additional substantive requirement. With those strategic aims and substantive detention criteria
in mind, this paper comes back to the procedural debate and concludes with a discussion of
effective, corresponding procedural design.

The Bush Administration Approach and Calls for Reform

The Bush Administration’s approach to detention began with the notion that the United States is
at war with Al Qaeda and those aligned with it. The administration has relied in turn on an
expansive interpretation of its domestic executive war powers and the international law of war to
assert that those fighting—broadly-defined—on behalf of Al Qaeda and its affiliates, or in some
cases those supporting that fight, are enemies in an ongoing armed conflict. As such, the United
States may lawfully capture any of these constituent enemies, or “combatants,” and detain them
for the duration of hostilities, just as a state would be entitled in the course of a war with another

Of course, this is not a war between states, and—despite any analogical appeal such an
understanding of war may have—some problems with this approach are quickly apparent.
Although even in conventional warfare the notion of “enemy combatants” may defy either clear
definition or easy application, members of terrorist organizations generally try to obfuscate their
identities and blend indistinguishably into civilian populations. The organizations themselves
lack the formalized structures of states, thereby greatly exacerbating the likelihood of
misidentifying an innocent civilian as an enemy (a problem discussed in greater detail below).
The stakes of such errors are also magnified by the likelihood that this conflict with Al Qaeda or
its spinoff organizations will last for decades, raising the specter of indefinite deprivation of
innocents’ liberty.  

Critiques of the Bush Administration’s reliance on this “enemy combatancy” theory to justify detentions have focused heavily on the inadequacy of the process by which detention decisions are made. Whether arguing that those detained deserve full-fledged criminal trials or that detentions should be judicially reviewed or that the government failed even to provide the minimal battlefield hearings required by the Geneva Conventions, critics have tended to focus their attacks on the “how” questions of detention. Less often discussed is the “whom” question, that is, the substantive scope of the detention class.

The U.S. government has so far avoided demarcating the outer bounds of this class in order to maximize its freedom of action in combating major terrorist networks. In explaining to a UN human rights committee its legal authority to detain suspected Al Qaeda fighters, it stated that its detention authority extended to “members of al-Qaida, the Taliban, and their affiliates and supporters, whether captured during acts of belligerency themselves or directly supporting hostilities in aid of such enemy forces.” In one (often-cited) litigation colloquy, the government went so far as to argue that merely providing a charitable gift could qualify the so-called “little old lady in Switzerland” donor as an “enemy combatant” if the recipient turned out to be an al Qaeda front. Even having backed off a bit from this extreme view, the government has steadfastly avoided detailed public discussion of what it means to be a “member”, how it defines “Al Qaeda” or its affiliates and supporters, and what activities constitute belligerency or support or aid to any of these groups or activities.

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12 As an example of one of the few, thorough judicial treatments of this issue, see Al-Marri v. Pucciarelli, No. 06-7427, slip op. at 25 (4th Cir. en banc, July 15, 2008) (Motz, J., concurring in the judgment) (interpreting prior Supreme Court precedent as supporting the conclusion that “enemy combatant status rests on an individual’s affiliation during wartime with the ‘military arm of the enemy government.’”)
13 See Annex 1 to the Second Periodic Report of the United States of America to the Committee Against Torture, May 6, 2005, para. 47. The Combatant Status Review Tribunals at Guantanamo similarly define “enemy combatant” as:

An individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

DoD Order Establishing Combatant Status Review Tribunal (July 7, 2004), at E-1 § B.
15 See Al-Marri v. Pucciarelli, No. 06-7427, slip op. at 19-20 (4th Cir. en banc, July 15, 2008) (Motz, J., concurring in the judgment). The breadth of the Government’s definition came under attack recently by the D.C. Circuit, see Parhat v. Gates, No. 06-1397, slip op. (June 20, 2008), and a minority of the Fourth Circuit, see Al-Marri v. Pucciarelli, No. 06-7427, slip op. at 179 (4th Cir. en banc, July 15, 2008) (Motz, J., concurring in the judgment).
The case of *Hamdi v. Rumsfeld* 16 highlights how the Bush Administration has steadfastly maintained ambiguity on this critical definitional question. *Hamdi* involved a U.S. citizen captured in Afghanistan and held at Guantanamo, challenging the legality of his detention. While not stating clearly the substantive reach of its “enemy combatant” definition, the government argued that the Executive’s “wartime determination that an individual is an enemy combatant is a quintessentially military judgment” that no court should second-guess. 17 That is, it argued until *Hamdi* (1) that the Executive should have unreviewable discretion to decide if an individual falls within the definition of enemy combatant, and (2) that it should have unreviewable discretion to determine the scope of the definition itself. 18

This double-move was even more starkly visible in the government’s argumentation in *Rasul v. Bush*, which involved the question of whether the federal habeas corpus statute extended federal court jurisdiction to claims arising at Guantamano: “The ‘enemy’ status of aliens captured and detained during war is a quintessential political question on which the courts respect the actions of the political branches.” 19 The government went on to argue in that case that “courts have … no judicially-manageable standards … to evaluate or second-guess the conduct of the President or the military” on such matters. 20

So suppose the Congress wants to regulate the detention of suspected enemy terrorists using new administrative detention laws that include establishing a stronger oversight role for courts. Taking as a point of departure the Bush Administration’s assertion that defining whom to detain is an issue of tremendous policy and strategic significance—but believing that it is one that Congress and the courts ought to regulate—how should the legislature constitute an administrative detention regime in substantive terms?

The vast bulk of discussion of administrative detention jumps quickly back to procedural architecture, based on the assumption that setting the appropriate level of procedural protection can better balance security and liberty than the current approaches do. Several major elements of procedural design are most consistently and notably thought to be key to this balance: judicial review, adversarial process with lawyer representation, and transparency. 21 And, indeed, each of them—individually and in tandem—has a vital role to play in any effective administrative detention system.

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18 The *Hamdi* plurality held that an individual captured on the battlefield in Afghanistan fell within the implicit detention authority of the 2001 Authorization of the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, but it explicitly left “[t]he permissible bounds of the category [of enemy combatant to] be defined by the lower courts as subsequent cases are presented to them.” 542 U.S. at 522 n. 1.
20 Id. at 37.
Judicial review can help safeguard liberty and enhance the credibility at home and abroad of administrative detention by ensuring neutrality of the decision-maker and publicly certifying the legality of the detention in question. Most calls for reform of existing detention laws start with a strong role for courts. Some commentators believe that a special court is needed, perhaps a “National Security Court” made up of designated judges who would build expertise in terrorism cases over time. Others suggest that the Foreign Intelligence Surveillance Court already has judges with expertise in handling sensitive intelligence matters and mechanisms to assure secrecy, so its jurisdiction ought to be expanded to handle detention cases. Still others insist that specialized terrorism courts are dangerous; the legitimacy of a detention system can best be assured by giving regular, generalist judges a say in each decision.

Adversarial process and access to attorneys can help further protect liberty and enhance the perceived legitimacy of detention systems. As with judicial review, though, proposals then tend to split over how best to organize and ensure this adversarial contest. Some argue that habeas corpus suits are the best check on administrative detention. Others argue that administrative detention decisions should be contested at an early stage by lawyers of the detainee’s choosing. Still others recognize an imperative need for secrecy and deep expertise in terrorism and intelligence matters, necessitating a specially designated “defense bar” operated by the government on detainees’ behalf.

This issue of secrecy runs in tension with a third common element of procedural and institutional reform proposals: openness and transparency. The Bush Administration’s approach to date has allegedly been prone to error in part because of excessive secrecy and hostility to the prying eyes of courts or Congress, as well as to the press and advocacy groups. Open or at least partially-open hearings or written judgments that can later be scrutinized by the public or congressional oversight committees, critics and reformists argue, would help put pressure on the Executive branch to exercise greater care in deciding which detention cases to pursue and put pressure on adjudicators to act in good faith and with more diligence.

These three elements of procedural design reform—judicial review, adversarial process, and transparency—may help reduce the likelihood of mistakes and restore the credibility of detention decision-making. Rarely, though, do these discussions pause long on the antecedent question of

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22 Goldsmith & Katyal, supra; McCarthy & Velshi, supra; Guiora, supra


25 Guiora, supra, at 15.

26 Goldsmith & Katyal, supra; Wittes & Gitenstein, supra, at 10; McCarthy & Velshi, supra, at 36.

27 Goldsmith & Katyal, supra; Wittes & Gitenstein, supra, at 10.
what it is that these courts—however more specifically constituted—will evaluate. Judicial review of what? A meaningful opportunity to contest what with the assistance of lawyers? Transparent determinations of what?

To answer these questions—that is, to define the class of individuals subject to administrative detention and the substantive standards by which detentions will be judged—it is necessary to step back even further to consider carefully the strategic rationale for new proposed legal tools. Discussion of the class should begin with a clear understanding of detention’s strategic purpose: What exactly is non-criminal detention for? The answer to that basic question will help determine the necessity and wisdom of administrative detention, and if one concludes that it is necessary, help define who should fall within the scope of an appropriately drawn regime. Only then can we devise the precise procedural contours and weight the overall merits of legal innovation.

Why Administratively Detain?

The reason administrative detention is widely discussed at all is that proponents believe terrorism to involve a category of individuals for whom neither criminal justice nor the laws of war—the two legal systems that generally authorize and regulate the long-term detention of dangerous threats—offer effective and just solutions. The argument generally begins with the notion that exclusive reliance on prosecution, along with its usual panoply of defendant rights and strict rules of evidence, cannot effectively, expeditiously, or exhaustively remove the threat of dangerous terrorists. The reasons for this include: information used to identify terrorists and their plots may include extremely sensitive intelligence sources and methods, the disclosure of which during trial would undermine or even negate counter-terrorism operations; the conditions under which some suspected terrorists are captured (especially in far-away lawless or combat zones) make it impossible to prove criminal cases using normal evidentiary rules; prosecution is designed to punish past conduct, but fighting terrorism requires stopping suspects before they act; and criminal justice is deliberately tilted in favor of defendants so that few if any innocents will be punished, but the higher stakes of terrorism cannot allow the same likelihood that some guilty will go free.  

These concerns about relying on the criminal justice system to detain suspected terrorists are subject to much debate. Anti-terrorism statutes have been expanded in recent years, making prosecution a more powerful tool. The organization Human Rights First recently published a study of federal prosecutions of terrorism cases since 9/11 and concluded that Article III courts are generally well-equipped to handle many of the challenges just listed. Administrative


30 See Zabel & Benjamin, supra. The Constitution Project’s report condemning administrative detention proposals echoed those findings, and concludes that “the United States government should only be permitted to detain an
detention proponents, however, remain unpersuaded: while acknowledging that prosecution is one important tool among many, they worry that it is not sufficient to deal with the full range of suspected terrorist cases.  

Viewing, on the one hand, criminal law as inappropriate or inadequate, administrative detention proponents then usually argue, on the other hand, that the law of war—under which individual enemy fighters can be captured and held for the duration of hostilities without trial—does not work satisfactorily either.  These rules grew out of conflicts primarily between professional armies (acting as agents responsible to a state) that could be expected to last months or maybe years but would likely end definitively.  Terrorism, by contrast, involves an enemy whose fighters cannot be identified with similar precision and is unlikely to end soon or at all or with certainty.  Applying the traditional law of war detention rules therefore opens the possibility of indefinite detention without trial combined with a substantial likelihood of error.  

The idea behind administrative detention is to free the State from the stark choice between these two systems: rather than trying to jam the square peg of terrorist threats into the round holes of criminal justice or the law of war, we might design a system better tailored to the special problems of terrorism.  Most likely any sensible alternative scheme will include some elements that resemble criminal justice and others that resemble the law of war, for the simple reason that terrorism shares some features of crime and some features of warfare.  Consequently, we need to think through how to define the set of cases that fall between the two existing systems and that may demand an alternative.  This requires first a clear notion of the needs: what is it about terrorism that might necessitate a step so precipitous as creating a new detention regime?

This may sound like an obvious point, but there is remarkably little discussion in the policy or academic realms of precisely how detention fits within a broader strategy to combat terrorism, or perhaps more specifically, to combat Al Qaeda.  At least within the public domain there appears to be no comprehensive effort by the U.S. government to review lessons learned to date about whom it has chosen to detain or not detain.  The 9/11 Commission Report contained only one significant recommendation with respect to detention, and that had to do with treatment standards, not the power to detain.  The White House’s publicly-released National Strategy for Combating Terrorism mentions several times the need to capture enemy terrorists but mentions

individual suspected of a terrorism offense if it can make a probable cause showing to a judge and it intends to prosecute that individual, or if appropriate, as part of immigration removal proceedings.” The Constitution Project, supra, at 6.

31 See Wittes, supra.  Judge Wilkinson goes through the various obstacles to prosecuting many terrorism cases in his opinion in Al-Marri.  See Al-Marri v. Pucciarelli, No. 06-7427, slip op. at 143-156 (4th Cir. en banc, July 15, 2008) (concurring in part and dissenting in part).  One limitation of the Human Rights First report is that by using as its data set those cases actually prosecuted by the Justice Department, it may have excluded many of the most difficult cases, since prosecutors presumably only brought forward cases they were confident they would win.

32 See Waxman, Detention as Targeting, supra.

not a single time the role or utility of the broad detention authorities it has asserted since September 11, 2001—a striking omission given the vast resources that have been devoted to detention operations at Guantanamo and elsewhere and the immense opposition to those operations it has weathered.

That said, it is virtually undisputed among those who advocate administrative detention that its purpose is preventive—a prophylactic measure against terrorist threats. Indeed, the term “preventive detention” is often used interchangeably with “administrative detention.” Whereas criminal justice also has a preventive component, it is usually retrospective in focus, in that it addresses past acts. The resulting punishment, including incarceration, serves preventive purposes insofar as it keeps a perpetrator off the street (for some period of time) and deters both him and others from future crime. But at base criminal justice generally addresses past harms.

Administrative detention proposals, by contrast, tend to be prospective in focus. They start with a notion that terrorist acts—especially major attacks—must be addressed before they occur at all. The consequences of failure to prevent terrorist attacks are too high, the argument goes, to rely on retrospective responses alone. When it comes to crime, we do not typically use the mere likelihood that someone will act—even a high likelihood of even a violent crime—to justify detention. The entire criminal justice system, including the burden of proof beyond reasonable doubt, is tilted in favor of defendants: let ten (or a hundred) guilty go free rather than convict one innocent. And we tolerate high levels of recidivism in parole programs, reasoning that it is more costly to keep all convicts locked up than to accept a certain level of crime. But terrorism, according to administrative detention proponents, is different. The ability of small groups harnessing modern technology (including, especially in the future, weapons of mass destruction) to cause mass casualties, damage, panic and threats to effective governance puts terrorism on a different plane.

This notion of prevention, however, needs to be further unpacked, because it contains several sub-elements. Each of them has its own implications for how to cast administrative detention laws and how to design institutions for adjudicating terrorism cases. Detention may serve the cause of prevention in a number of ways, including (1) by incapacitating suspects, (2) by deterring potential terrorists from joining up with violent extremists or undertaking violent acts, (3) by disrupting specific, ongoing plots, and (4) by enabling the government to gather information about enemy organizations.

The most natural inclination of a government facing threats of terrorism is to incapacitate suspected terrorists. Someone has the will and capability to commit terrorism, so keep him off the streets. The purpose of such detention is not punitive or retributive (though such desires might operate in the background), but protective—to put threats out of action. As Attorney General Michael B. Mukasey recently remarked along these lines, “[t]he United States has every right to capture and detain enemy combatants in this conflict, and need not simply release them.

to return to the battlefield—as indeed some have after their release from Guantanamo. We have every right to prevent them from returning to kill our troops or those fighting with us, and to target innocent civilians.” A prevention strategy emphasizing incapacitation assumes the State’s ability to assess accurately who likely poses a future danger, and to therefore devote resources to stemming their future dangerous activities.

Beyond incapacitating existing threats, the threat of detention might deter future terrorist recruits from joining the cause or participating in terrorist activities. In other words, the possibility of getting caught and held by the government may dissuade terrorists or future terrorists from joining the cause or perpetrating bad acts. The more credible the threat of capture and detention, and the more severe the consequences (say, the longer the threatened period of detention), so the theory goes, the greater the deterrent pressure. Whereas an incapacitation strategy begins with the assumption of identifying accurately individual threats, a prevention strategy emphasizing deterrence assumes the State’s ability to manipulate sufficiently the fears of future terrorists at large.

These notions of incapacitating or deterring terrorists or future terrorists may potentially point at large groups of individuals and their dangerous activities. If we can discern who has the intent and capability to commit or support terrorist acts—or the potential to develop that intent and capability—we will try to block or dissuade them. But a narrower way to formulate the preventive purpose of administrative detention might be to disrupt terrorist plots. A group of individuals is preparing to hijack a plane or detonate a dirty bomb, so use the detention of certain key persons to foil that plot. Whereas incapacitation focuses heavily on the characteristics of particular individuals, disruption focuses on their joint or individual activities. It is not so much about neutralizing very dangerous people as such but about going after their imminent schemes. The critical assumption here is the State’s ability to identify plots in advance and their key individual enablers.

All three of these preventive approaches assume substantial and accurate knowledge about terrorist network members and supporters, which raises a fourth preventive reason to detain: to gather information. Preventing and disrupting terrorist plots requires getting inside the heads of network members, to understand their intentions, capabilities and modes of operation. Detention can facilitate such intelligence collection through, most obviously, custodial interrogation, but also perhaps through monitoring conversations among prisoners or even “turning” terrorist agents and releasing them as government informants. Governments usually justify publicly counter-terrorism detentions on incapacitation or disruption grounds, but no doubt information-gathering has been at the forefront of Bush Administration thinking on the issue, as demonstrated by the lengths to which it has gone to defend permissive interrogation standards and programs.


37 Discussion of deterrence is usually divided into two concepts, both of which are relevant here: specific deterrence, which discourages an individual from certain conduct by instilling an understanding of negative consequences, and general deterrence, which makes an example of an individual’s punishment to discourage the broader population from deviant conduct.

38 Scott Shane, David Johnston & James Risen, Secret U.S. Endorsement of Severe Interrogations, NEW YORK 12 66
During the early phases of the government’s enemy combatant litigation against alleged Al Qaeda dirty-bomber Jose Padilla, the Defense Intelligence Agency director attested:

[T]he War on Terrorism cannot be won without timely, reliable, abundant intelligence. That intelligence cannot be obtained without robust interrogation efforts. Impairment of the interrogation tool—especially with respect to enemy combatants associated with al Qaida—would undermine our Nation’s intelligence gathering efforts, thus jeopardizing the national security of the United States.\(^\text{39}\)

As this last point about facilitating information-gathering shows, the preventive purposes of detention often work in tandem. Incapacitating individuals suspected of posing serious dangers may deter individuals from engaging in or supporting dangerous activities. Disrupting major plots and interrogating the plotters may tell us a lot about how future schemes will hatch and who among the many dangerous individuals remaining at large are most likely to play critical roles in those schemes. Any sound counter-terrorism strategy will combine all of these elements to some degree.

But there are also tensions and tradeoffs among these elements of prevention, in part because detention is but one among an array of tools the government will use in implementing its counterterrorism strategy. For example, the government can monitor suspects’ movements and communications, not only to foresee and forestall plots but to gain a more complete picture of the terrorist network and its activities; the moment the government detains someone, however, those movements and communications may cease along with its ability to track them. Releasing a captured individual still believed to pose a danger may offer opportunities to follow him, perhaps with more to be gained through information collection than lost by assuming the marginal risk of his committing major violence. In other words, an aggressive incapacitation approach may sometimes undermine information-gathering activities.\(^\text{40}\) Aside from other policy costs to detention, some of which are discussed below, the government formulates counterterrorism detention strategy—and with it consideration of administrative detention’s utility in certain circumstances—in an environment of constrained resources. This means that we must prioritize among these preventive functions, and sometimes sacrifice one in the service of another.


\(^{40}\) The case of the “Lackawanna 6” provides an illustration of how this tension among priorities has played out in practice. Upon discovering a possible Al Qaeda sleeper cell outside Buffalo, New York, in 2002, some elements within the United States favored immediate arrest while others favored surveillance. See Robert Chesney, The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention, 42 HARVARD JOURNAL ON LEGISLATION 1, 40-44 (2005).
A final reason that consideration of administrative detention must begin with a clear understanding of its strategic purposes is that the ultimate policy question will not simply be whether administrative detention will effectively serve preventive functions but how it does so and in comparison with the alternatives. Even if not foolproof or able to cast as wide or dense a detention net, criminal law is able to serve each of the preventive functions just mentioned to at least some significant degree, and the government has an array of other tools at its disposal including surveillance and non-custodial questioning as well. The critical question is by what margin, if any, administrative detention might improve the effectiveness of an integrated counter-terrorism strategy, and at what cost.

**Whom to Administratively Detain?**

Greater clarity on the “why detain” question will not merely help clarify the strategic advantages motivating proposed administrative detention programs; it will also help guide the substantive definition of the class subject to that detention—that is, it will help answer the “whom” question. In other words, it is difficult to define legislatively the factual predicate of detention decisions without knowing precisely the main strategic rationale.

If we were to continue using the Bush Administration’s notion of enemy combatancy as the relevant inquiry, courts might be charged with reviewing whether an individual is a “member” of a certain organization, or committed a “belligerent act,” or “supported” those who are or have. The government’s claim in *Hamdi* and *Rasul* notwithstanding, one can certainly construct judicially manageable standards for any of these inquiries. After all, any of these concepts have analogues in criminal law (say, conspiracy liability in the case of membership or aiding and abetting in the case of support, or perhaps even the concept of agency of a foreign power under the Foreign Intelligence Surveillance Act) that judges apply regularly.  

More to the point, though, in designing an administrative detention regime, enemy combatancy need not, and probably should not, be the starting point at all, and there are a range of other possible ways to define the class of individuals subject to detention. After all, the traditional notion of enemy combatancy grew out of a warfare context in which participation in an enemy army could reasonably be assumed to serve as an accurate indicator of one’s future threat, measured in traditional military terms. But even those who cling to a “war on terror” paradigm acknowledge that the fight against terrorism generally or Al Qaeda in particular is unlike any previous war, in terms of the nature of the enemy, its threat, and the way we think about success. Moreover it is widely believed that since 2001 the terrorist threats to the United States and its allies have become less centralized, less hierarchical, and less formalized, even further complicating direct application of legal standards developed for traditional armies.

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41 See the forthcoming paper by Robert Chesney in this series.

42 Although there exists a major debate among terrorism experts as to the continuing strength of Al Qaeda, even those who assess Al Qaeda as resurgent acknowledge that “informal local terrorist groups are certainly a critical part of the global terrorist network.” Bruce Hoffmann, *The Myth of Grass-Roots Terrorism: Why Osama bin Laden Still Matters*, FOREIGN AFFAIRS, May/June 2008; see also MARC SAGEMAN, LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY (2008) (arguing that the major terrorist threat to the United States
One model for defining the class might be based on what are, in essence, already existing examples of administrative detention in U.S. law, which permit the long-term detention of certain categories of individuals judicially adjudged as “dangerous.” Some state laws, for example, authorize the detention of charged or convicted sex offenders who, due to a “mental abnormality,” are likely to engage in certain acts of sexual violence. These statutory schemes might be a particularly apt analogue because, as is often supposed about religiously-extremist terrorists, they were premised legislatively on a view that some sexual predators are undeterrable from future violence. Under federal bail law, authorities can hold suspects pending trial upon sufficient showing that no release conditions would reasonably assure community safety. To be sure, it remains highly debatable whether dangerousness alone as an administrative detention standard would pass constitutional muster, at least with respect to U.S. citizens. But in the terrorism context, as in other areas of American law, an administrative detention regime might include future dangerousness at least as one critical element. And, accordingly, a central inquiry for courts might be to review the Executive’s dangerousness assessment.

The United Kingdom’s 2005 Prevention of Terrorism Act, as another model, allows for the imposition of “control orders” (or restrictions on an individual’s movements, communications or other freedoms) when the government “has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity,” which is further defined as “(a) the commission, preparation or instigation of acts of terrorism; (b) conduct which facilitates the commission, preparation or instigation of such acts, or which is intended to do so; (c) conduct which gives encouragement to the commission, preparation or instigation of such acts, or which is intended to do so; (d) conduct which gives support or assistance to individuals who are known or believed to be involved in terrorism-related activity.” Under this model, the critical inquiry for courts focuses not on an individualized assessment of future dangerousness but on whether an individual committed a certain type of act. Parliament presumably selected these types of acts because it believed them to serve as good indicators of future dangerousness. But the narrow

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44 See id. at 351, 362-63.
46 The complex constitutional issues are beyond the scope of this paper, but of course they are highly relevant and any administrative detention scheme would face intense judicial challenge. Throughout this paper I cite a number of U.S. federal and state preventive detention laws that have been upheld, though usually on very narrow grounds. In Zadvydas v. Davis the Court made clear that indefinite administrative detention of a removable alien would raise constitutional due process concerns, see 533 U.S. 678 (2001), though it noted that a statutory scheme directed at suspected terrorists might change its analysis, see id., at 691. For views skeptical of the constitutionality of preventive detention laws related to terrorism, see Justice Scalia’s dissent in Hamdi, 542 U.S. at 554-557.
47 Ch. 2, Sec. 1, Para. 9. The UK statute is available at http://www.opsi.gov.uk/acts/acts2005/ukpga_20050002_en_1
focus on acts tends to tidy the judicial inquiry considerably. Determining whether a suspect committed alleged deeds, after all, is something that courts do all the time.

As yet another set of models, consider several Israeli administrative detention schemes. Under one statutory scheme, Israel’s domestic “Emergency Powers Law,” the Executive can order judicially reviewed detention based on the extremely broad standard of “reasonable cause to believe that reasons of state security or public security require that a particular person be detained.” This statute does not presuppose a state of war, and it contrasts with Israel’s 2002 Unlawful Enemy Combatant statute. The statute, recently upheld by the Israeli Supreme Court, provides the authority to detain an individual fighting on behalf of foreign forces with which Israel regards itself in a state of armed conflict, pursuant to strict judicial review requirements, if that individual “participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel” and whose “release will harm State security.” In other words, detention under the latter scheme requires a showing of either certain acts or membership plus dangerousness.

These examples illustrate just part of the spectrum of possible definitions of the detention class; any of them is susceptible to judicial application. So which one makes sense? A broad “state security” class? Dangerousness? Membership? Commission of proscribed acts? Knowledge? The answer depends heavily on strategic purpose.

If, for example, the overwhelming focus of administrative detention is to incapacitate and deter individuals likely to pursue threatening terrorist activities, then the authority to detain would most naturally turn on an individual’s supposed dangerousness. In that regard, a statutory scheme might resemble administrative detention laws mentioned a moment ago, aimed at supposedly dangerous sex offenders whose prison term has expired or pre-trial arrestees. Secondary questions then arise. What type of dangerousness: Likelihood of one day participating in a major terrorist attack? Likelihood of attacking U.S. forces or citizens? Likelihood of supporting those who carry out terrorist attacks? And what level of dangerousness: Substantial likelihood? More likely dangerous than not?

Rather than making purported dangerousness itself the test, a statute might rely on proxy indicators of future threat, such as membership in a particular terrorist organization or commission of particular acts, supposing that such membership and activities are good predictors of an individual’s likely behavior if allowed to roam free. With regard to membership, consider

49 Incarceration of Unlawful Combatants Law, 5762-2002. See Anonymous v. State of Israel, Cr. App. 6659/06 (S. Ct. Israel, June 11, 2008). The law passed in 2002 following the Israeli Supreme Court’s concerns over the detention of Hezbollah fighters’ family members as bargaining chips
50 The 2001 PATRIOT Act contains provisions authorizing the short-term detention of aliens on grounds similar to those discussed in the previous examples. It authorizes the Attorney General to detain, among others, any alien whom he has reason to believe is “likely to engage after entry in any terrorist activity,” has “incited terrorist activity,” is a “representative” or “member” of a terrorist organization, or “has received military-type training” from a terrorist organization. USA PATRIOT Act § 412(a), 8 U.S.C.A. § 1182(a)(3)(A)-(B). The Act, which has never seen use, also authorizes the Attorney General to detain aliens who are “engaged in any other activity that endangers the national security of the United States.”
the Alien Enemy Act, a statute enacted in 1798 and later amended. It authorizes that during a declared war and upon presidential proclamation, “all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies.”\textsuperscript{51} The statute, which remains on the books today, was clearly premised on the idea that during wartime an individual’s citizenship of an enemy state is a strong indicator of dangerousness.\textsuperscript{52}

With regard to past acts as a proxy for dangerousness, recall that the United Kingdom’s 2005 Prevention of Terrorism Act, for example, allows for the imposition of control orders when the government “has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity,” which it then further enumerates. Note that “for the purposes [of the UK statute] it is immaterial whether the acts of terrorism in question are specific acts of terrorism or acts of terrorism generally.”\textsuperscript{53}

If, by contrast, the emphasis of administrative detention is not to incapacitate individuals but to disrupt impending plots, then the focus of authority to detain might be cast differently, in some ways more narrowly but in some ways perhaps more broadly. A law might authorize detention on a showing that “failure to detain that [international terrorist] will result in a risk of imminent death or imminent serious bodily injury to any individual or imminent damage to or destruction of any United States facility” (this language is drawn from a 2007 Senate bill).\textsuperscript{54} On the one hand, in theory, authorities can disrupt plots by nabbing only key leaders and planners and those directly involved in the specific plots; even if some very dangerous but peripherally-involved associates remain free, the scheme may be ruined. On the other hand, detention to disrupt might justify detaining for some period of time even individuals who are not very dangerous at all (perhaps not very committed to the terrorist cause or trained to do much harm) but who play a minor role in a particular plot, or might just have information about it.\textsuperscript{55} As explained further below, disruption detention along these lines also points toward a short duration of detention, whereas dangerousness detention may in some cases point toward long-term detention.

\textsuperscript{51} In \textit{Ludecke v. Watkins}, 335 U.S. 160 (1948), the Supreme Court upheld the Act’s World War II implementation through a presidential directive calling for detention and removal of all alien enemies “who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States.”

\textsuperscript{52} Similarly, as mentioned a moment ago, Israel’s Unlawful Enemy Combatant statute requires a showing of both membership in an enemy organization as well as individual dangerousness. In upholding the statute, the Israeli Supreme Court explained its incapacitation logic: “[W]e are dealing with an administrative detention whose purpose is to … remov[e] from the cycle of hostilities anyone who is a member of a terrorist organization … in view of the threat that he represents to the security of the state and the lives of its inhabitants.” Anonymous v. State of Israel, Cr. App. 6659/06 (S. Ct. Israel, June 11, 2008), at para. 15.

\textsuperscript{53} Ch. 2, Sec. 2, Para. 1.

\textsuperscript{54} National Security with Justice Act, S.1876, introduced July 25, 2007 (available at: http://thomas.loc.gov/cgi-bin/bdquery/z?d110:s.01876:)

\textsuperscript{55} Human Rights Watch has criticized France’s use of broad criminal liability for supporting terrorism and heavy investigatory powers to disrupt terrorist plotting by casting very wide arrest nets. See Human Rights Watch, Preempting Justice: Counterterrorism Laws and Procedures in France (July 2008), at 22-27.
Note that the key inquiry in the last example looks different than it does for incapacitation: detention to disrupt assumes a functional linkage between an individual and a plot (or set of plots), whereas incapacitation might look to an individual’s general will and capacity to do harm. A statutory regime focused on disruption might accordingly define the class around plots or a showing that “but for” detention of a particular individual, terrorist attacks are likely. There will no doubt be overlap of these categories, but not complete overlap. Take, for example, a terrorist financier who provides money to a range of terrorist organizations. Authorities may regard him as extremely dangerous and believe his detention might reduce generally the likelihood and effectiveness of future terrorist attacks and frighten others from funding terrorism (incapacitation and deterrence). But he is unlikely to fall within the terms of a law requiring a showing that failure to detain him will substantially increase the risk of a specific, imminent attack. For an example running in the other direction, consider an Al Qaeda courier believed to be carrying messages to other members about an impending attack; measured for future dangerousness on an individual basis (depending on how high the bar is set and what factors are used in determinations), authorities might regard him as not very threatening at all. But his specific, not-itself-violent involvement in an imminent attack might put him squarely within a law aimed at disruption.

If the major focus of administrative detention is information-gathering, the natural definition of the detention class would look different still. Administrative detention might target individuals believed to have critical information about either terrorism threats generally or, more narrowly, specific terrorism plots. Again, often this category of individuals will overlap with inquiries of dangerousness or involvement in specific plots, and a law might require a showing of membership in a terrorist organization or commission of a terrorist act as a threshold matter before even considering the information question. But these categories will not always overlap. Consider, for example, an Al Qaeda paymaster who might not be individually very dangerous, but who might have substantial information about associates who are. Taken to the extreme, a law authorizing detention based on suspected knowledge alone might be used to justify holding the spouse or roommate of a suspected terrorist—even if not complicit—in order to question them about the suspect’s actions, communications and intentions. Some argue that the federal government used (or abused) its material witness powers in similar ways after 9/11, taking individuals into custody solely to question them about any possible knowledge of terrorist activity.\footnote{An example of a similar law is the Material Witness statute, 18 U.S.C. § 3144, which under certain imperative circumstances allows arrest of an individual with information critical to a criminal proceeding. For critical accounts of its use after 9/11, see \textit{Cole} \& \textit{Lobel}, supra, at 250; Human Rights Watch, \textit{Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11} (June 2005).}

In sum, the strategic focus of administrative detention proposals will bear heavily on how the law should define the substantive class.

\textbf{Narrowing the Class}
If the United States needs new tools to effectively combat new forms of terrorism, why not simply define the class broadly—as the Bush Administration has done—to give the Executive maximum latitude to design appropriate responses? As noted earlier, the Bush Administration has argued that administrative detention is needed for the entire range of reasons listed above, and has therefore argued for an expansive definition of the class. Even if one rejects the full breadth of these claims, the notion is certainly correct that all elements of prevention listed above feature in any sensible counter-terrorism strategy.

The main reason for restricting the class liable to detention is that every expansion comes at a price—one reason among many to carefully consider strategic priorities in detention. The policy calculus must include consideration not just of the general dangers attached to enacting any new detention regime but also the marginal dangers that come from expanding the size and shape of the susceptible class. A full discussion of all of those dangers is beyond the scope of this paper, but it is worth highlighting a few because they bear on its broader thesis, namely that the ultimate policy merits of administrative detention will turn at least as much on the tough issue of defining the substantive class as fashioning the right procedures. Moreover, U.S. experience since 9/11 as well as that of our allies in combating terrorism in the past offer lessons for how to narrow the class.

Debates about administrative detention are usually cast in terms of liberty versus security. But administrative detention—both its use as well as its mere enactment—carries risks to both liberty and security. Experience since September 2001 suggests that those costs are unlikely to be mitigated even by robust procedural protections without also constraining tightly the substantive detention criteria.

Opponents and skeptics of administrative detention rightly point out that creating new mechanisms for detention with diluted procedural protections (compared to those granted criminal suspects) potentially puts liberty at risk. The most obvious liberty concern is that innocent individuals will get swept up and imprisoned—the “false positive” problem. Civil libertarians rightly worry too that beside the specific risk to particular individuals, any expansion of administrative detention (and I say “expansion” because, as noted earlier, it already exists in some non-terrorist contexts in American law) risks more generally eroding checks on state power. To some, the idea of administrative detention for suspected terrorists is the kind of “loaded gun” that Justice Robert Jackson worried about at the time of Japanese internment. Even if we are satisfied that the U.S. government can use administrative detention responsibly, there are many unsavory foreign regimes that will not. We need, therefore, to be cautious about justifying principles that might be exploited pretextually by less-democratic regimes to crack
down, for example, on dissidents it might label “terrorists” or “national security threats.”

In considering these liberty risks, one usually thinks about the procedural protections afforded suspects (such as access to an opportunity to rebut evidence) or the burdens of proof placed on the government (beyond-reasonable-doubt, probable cause, etc.). But the substantive definition of the detention class is key to managing these risks as well, and a narrow definition can help mitigate them. Some relatively restrictive definitions—say, those who commit certain acts—might generally be provable to great certainty, whereas some very broad conceptions—say, those who harbor devotion to a hostile ideology—may be impossible to prove with high confidence. A very broad definition of conduct or dangerousness justifying detention will also likely result in scooping up many individuals who will not actually have engaged in terrorist conduct. Indeed, that a broad substantive definition of the detention class can overwhelm even the most robust procedural protections is reflected in criticisms that recently-expanded criminal liability for providing “material support” to terrorist organizations or engaging in terrorist conspiracies has netted many individuals who were actually unlikely to engage in serious acts of terrorism.

Finally, as to the international dimension, a narrow set of definitional criteria—requiring, for example, a showing of certain specific acts or a linkage to specific plots—stands a better chance of winning legitimacy among allies and averting over-expansive interpretation among other countries. Although creating any new category of administrative detention risks chipping away at international norms generally demanding criminal prosecution to lock away bad actors, the more narrowly such a carve-out is defined the less prone it will be to political manipulation or to further stretching to deal with other types of public policy problems.

Besides these liberty risks, administrative detention may sometimes be counterproductive from a security standpoint, and again the substantive criteria of detention law may help mitigate these risks. Historically, detention practices—especially those viewed as overbroad—have proven ill-suited to combating terrorism and radicalization, and the strategic matrix of administrative detention should include these dangers. The British government learned painfully that internment of suspected Northern Ireland terrorists was viewed among Northern Irish communities as a form of collective punishment that fueled violent nationalism, and detention helped dry up community informants. And in Iraq and Afghanistan, though exceptional because combat still rages there, detention has played an important role in neutralizing threats to coalition forces but has also contributed to anti-coalition radicalization, especially when perceived as applied overbroadly.

60 See COLE & LOBEL, supra, at 49. Human Rights Watch has expressed similar concern that France’s criminal laws against “criminal associating in relation to a terrorist undertaking” have been used to net large numbers of people who pose little threat and with little evidence against them. See Human Rights Watch, supra, at 1.
61 See DAVID BONNER, EXECUTIVE MEASURES, TERRORISM AND NATIONAL SECURITY, 87-96; Tom Parker, Counterterrorism Policies in the United Kingdom, in PHILIP B. HEYMANN & JULIETTE N. KAYYEM, PROTECTING LIBERTY IN AN AGE OF TERROR 119, 125-28 (2005).
One role that well-crafted definitional criteria can play is mitigating an executive’s propensity to over-detain. Observers from both the right and the left worry correctly that in the face of terrorist threats the Executive is likely to push detention powers to or even past their outer bounds in order to prevent catastrophe as well as head off accusatory political backlash for having failed to take sufficient action. Such overbroad detention sweeps risk further radicalizing and alienating communities from which terrorists are likely to emerge or whose assistance is vital in penetrating or discerning extremist groups. Moreover, several important studies of counter-terrorism strategy have emphasized the need to target coercive policies (including military and law enforcement efforts) narrowly and precisely to avoid playing into Al Qaeda propaganda efforts to aggregate local grievances into a common global movement. These problems are fundamentally policy, not legal ones, and will require sound executive judgments no matter what the legal regime looks like. But once the role of detention is firmly situated in a broader counter-terrorism strategy that seeks to balance the many competing policy priorities, a carefully-drawn administrative detention statute can help constrain this propensity to over-reach in the short-term to long-term strategic detriment.

Returning to the preventive purposes outlined above, the process of narrowing the class subject to proposed administrative detention laws should begin by excluding deterrence or information-gathering as the dominant strategic driver. As for deterrence, virtually any very dangerous terrorist or terrorism-supporter the government could target with a deterrence detention strategy would either be deterred already by the threat of criminal prosecution or military attack or would be sufficiently committed to violent extremism as to render the marginal deterrent threat of administrative detention negligible. As for information-gathering, an administrative detention law premised on detaining individuals with valuable knowledge independent of an individual’s nefarious activities sets a precedent too easily abused or overused at home or abroad. Information gathering (including through lawful interrogation) will no doubt be a strong motivating objective behind almost any administrative detention scheme, and an individual’s knowledge about terrorist operations or planning could be a reason not to release someone otherwise validly detained on other independent grounds. But using a person’s suspected knowledge alone as the basis for detention and completely delinking detention from an individual’s voluntary and purposeful actions cuts even deeper than most other administrative


65 Also, in upholding Israel’s Unlawful Enemy Combatant statute, the Israeli Supreme Court noted that deterring others from committing acts is not a legitimate purpose of administrative detention. Anonymous v. State of Israel, Cr. App. 6659/06 (S. Ct. Israel, June 11, 2008), at para. 18.

66 Opponents of administrative detention will argue that detention, outside of criminal prosecution, even based on activities or threat is still too broad and prone to abuse. See COLE & LOBEL, supra, at 47-50.
detention into traditional civil liberties principles and safeguards. A detention law that allows incarceration based on knowledge might also perversely deter individuals with important information from coming forward voluntarily to the government.

The more promising strategic bases for new detention laws are incapacitation and disruption, though, as just mentioned, information-gathering is likely to be an important secondary benefit. As noted earlier, opponents of administrative detention argue that criminal law and other non-detention tools are adequate to incapacitate or disrupt the activities of most individuals whom the government would reasonably feel compelled to target, and proponents of administrative detention insist that the risk is too high of some terrorists slipping through that net. Much of this debate comes down to differing assessments of the marginal danger posed by that remainder, but, importantly, even opponents of new administrative schemes acknowledge that stopping an individual from carrying out a terrorist attack (as opposed to merely acquiring information or to instill fear) is a legitimate purpose of detention. The dispute is over what factual predicate is required and by what standards and processes the state must substantiate it.

Narrowing the strategic focus of proposed new detention rules to incapacitation or disruption still leaves the question of how, more precisely, Congress should define the susceptible detention class. The ultimate merits of various definitional approaches (including membership, past acts, future dangerousness, or some combination thereof) depend heavily on the processes and standards of proof with which they are paired. Recent experience and some judgments about the future threat of terrorism, however, can help further narrow the range of sensible choices.

The previous section offered some models drawn from other countries with long histories of combating terrorism and from other legal contexts based on incapacitation. An incapacitation strategy points naturally toward a future dangerousness approach to defining the class, though proxies such as past acts might form part of the inquiry. Indeed, requiring some showing of an individual’s past terrorist activity in addition to indications of future dangerousness has the advantage of tying detention more tightly with individual moral culpability. If one thinks that the number of (or danger posed by) terrorists who cannot be prosecuted in criminal trials is high, an incapacitation strategic rationale of administrative detention makes sense. But the U.S. experience at Guantanamo, for example, casts some doubt on the ability of the government to

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67 Cf. Hamdi, 542 U.S. at 521 (noting that, with respect to Congress’s 2001 Authorization for the Use of Military Force, “[c]ertainly we agree that indefinite detention for the purpose of interrogation is not authorized”).

68 An additional worry among administrative detention critics is that building a detention system outside the criminal justice system with reduced evidentiary and procedural requirements might dramatically undercut the incentive for the government to use prosecution. This concern is valid, though the benefits of justice and finality as well as bureaucratic interests might mitigate it. An administrative detention regime might also build in a requirement that the government show that prosecution is impracticable.


70 Though this carries the disadvantage of intruding more directly into the traditional province of criminal law.
assess dangerousness accurately: on the one hand it brought many supposedly-dangerous individuals to Guantanamo who were then released because they were believed not to pose much threat after all; on the other hand, some of those released have turned out to be quite dangerous, and have re-engaged in terrorist activity. A central question for Congress to probe in considering new administrative detention proposals is whether accurate dangerousness assessments are realistic, and what would be necessary to improve them.

A disruption strategy points naturally toward including a “but for” standard of dangerousness: the government would have to show that unless the individual is detained, a terrorist attack is likely. Such an approach might effectively limit the detainable class to individuals who are either tied to specific plots or are highly central to a terrorist organization’s planning. An advantage of this approach is that it would probably be less prone to false positives or overbroad detention than would a more general dangerousness standard (depending, of course, on exactly how each standard is drawn); it would, after all, be limited by intelligence—specifically, the ability to link individuals to plotting or specific plots in advance. The skeptic might then ask, however: why, if the government is so confident it knows who is about to perpetrate a terrorist scheme, cannot it simply arrest and prosecute the plotters? This approach makes sense if one believes there exists a significantly dangerous set of individuals for whom the government is likely to have sufficient information to link them to such plotting or plots yet insufficient admissible evidence to support timely use of the criminal justice system to stop them.

Note that both of these definitional approaches—detention based on individual dangerousness or a showing that an attack is likely to occur absent detention—look very different from the one based on enemy combatancy, certainly as the government has interpreted and used it since 2001. Indeed, once freed from the need to cast detention in terms of the law of war and traditional war powers, past experience and the logic underlying most administrative detention proposals at least caution against defining the class heavily based on “membership” in or “support” of a particular enemy organization or set of organizations.

A definitional approach based on mere membership or support to a particular enemy like Al Qaeda is simultaneously too broad and too narrow. The main reason modern forms of terrorism might necessitate new detention powers, after all, is because the catastrophic harms of attacks require recalibrating the balance struck by criminal law between security and protection of innocents. A “membership” or “support” to certain groups approach to administrative detention has already proven prone to over-use against individuals who, while perhaps individually dangerous, pose little or low threat of a major terrorist attack. An agency requirement—does the individual operate under the effective control of an organization?—makes more sense, and actually has more in common with traditional notions of traditional enemy combatancy than does

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mere membership. At the same time, if the ultimate concern is stopping major terrorist attacks, it seems odd to restrict the targeting of administrative detention powers to intended perpetrators who are affiliated with groups involved in the September 2001 attacks. This is especially true if Al Qaeda and other terrorist organizations are likely to become less centralized and more organizationally dispersed.

In the end, whether it aims primarily at long-term incapacitation or immediate-term disruption, an effective definitional approach would tie the detainable class quite directly to the specific strategic aim by including a relatively high substantive standard of prospective or “but for” dangerousness, including proxy indicators likely to improve the accuracy of adjudications.

**How to Administratively Detain**

Along with narrowing the substantive definition of the detention class, a final reason to ground any consideration of administrative detention statutes in a careful analysis of strategy and a firm conception of “why detain?” is that such reasoning will inform significantly the logic of procedural design.

I noted above an emerging consensus among advocates of administrative detention reform around a set of minimum procedural elements. These elements, common to most administrative detention proposals, include judicial review, adversarial process, and transparency. After Boumediene, it is also fairly clear that robust judicial review and a meaningful opportunity to contest the legal and factual basis for detention are also constitutionally required, at least for detainees held inside the United States or at Guantanamo. Beyond identifying such minimum elements, however, it is difficult to work out the secondary details of procedural design without knowing more precisely what the scheme aims to achieve and whom it is built to detain. Greater strategic clarity and a clearer idea of how we mean to define the substantive detention class might help shed light on this procedural debate.

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72 Judge Wilkinson adopts a similar interpretation of “enemy combatant” in Al-Marri v. Pucciarelli, No. 06-7427, slip op. at 179 (4th Cir. en banc, July 15, 2008) (concurring in part and dissenting in part), when he reasons that to be classified as an enemy combatant a person must “(1) be a member of (2) an organization or nation against whom Congress has declared war or authorized the use of military force, and (3) knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of the enemy nation or organization.”

73 An alternative approach could have Congress designate on an ongoing basis which terrorist organizations pose sufficient threat that their members—or, better, its agents—are subject to the administrative detention statute. Some might argue that the 2001 Authorization of the Use of Military Force did just that, with respect to Al Qaeda, and Congress could pass additional resolutions to take account of new threats or repeal resolutions to take account of diminished ones.

74 Besides these definitional standards themselves, there are other ways to restrict the class of individuals susceptible to new administrative laws. Detention of an individual might require an additional showing of prior terrorism-related acts, or it might require showing that less-coercive means than detention could not alleviate the risk. The more such protections are added, however, the less useful administrative detention becomes over other legal tools like criminal prosecution.

Consider first the issues of judicial review and adversarial process. Whatever the test or factual predicate used to justify detention as part of a counter-terrorism strategy (dangerousness, for example, or proximity to a plot, knowledge of terrorist activities, or some other criterion), effective administrative detention ought to involve adjudicative mechanisms likely to produce accurate and fair determinations of that factual predicate. If the dominant strategic purpose of detention is the incapacitation of suspects and the critical detention test is therefore dangerousness, for example, we should strive for hearings designed to assess and predict future behavior, with adjudicators who have access to information relevant to that inquiry and processes that effectively test the quality of that information. True, regular federal judges make similar determination based on adversarial hearings all the time (as in the example cited above of bail conditions pending trial). But terrorist dangerousness is different from criminal dangerous in kind and degree and requires understanding not just an individual’s probable activities and the magnitude of their threat but how they relate to activities of fellow terrorists. If the dangerousness test includes a further inquiry of whether less liberty-restrictive means can mitigate the threat (as the British Law Lords have held to apply in the case of recent British counter-terrorism laws), courts would further need to understand and assess the effectiveness of an array of government tools, including monitoring and surveillance and international cooperative efforts. These inquiries would be better-suited to a specialized court (perhaps a “national security court”), so that judges could accumulate experience and expertise in these technical and operational matters.

By contrast, if the detention standard is not future dangerousness itself but whether someone committed certain acts or is a member of a particular group (perhaps as proxies for dangerousness), this again starts to look very much like an inquiry that regular courts conduct all the time, using common analytic tools and types of evidence, though perhaps with special provisions for classified information. There is little reason why an acts requirement could not be handled effectively by generalist judges.

The strategic purpose of administrative detention and the corresponding definition of the substantive class will also guide discussion of other aspects of institutional design, including how long individual detentions ought to last. If administrative detention focuses on incapacitation, and therefore defines the class according to dangerousness or some proxy for it, individual detentions would logically last as long as that condition exists—that is, as long as the individual

76 Those who believe that terrorism should be treated as crime may disagree with this point, but other ways in which terrorist dangerousness generally differs from criminal dangerous include its strategic purpose, individual motivation, and long-term as well as short-term consequences.

77 House of Lords, A(FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent), [2004] UKHL 56, paras. 30-43.

78 See Goldsmith & Katyal, supra; Kenneth Anderson, Law and Terror, POLICY REVIEW, Oct. 2006, at 1. Some analysts credit the success of France’s counterterrorism efforts in part to its development of a specialized, centralized terrorism court; this court’s magistrates became “the type of expert on the subject of terrorism that is difficult to create within normal judicial institutions.” Jeremy Shapiro & Benedicte Suzan, The French Experience of Counter-Terrorism, 45 SURVIVAL 67-78 (2003).
poses that danger, presumably with periodic reassessment along the way. By contrast, a disruption-based administrative detention system could be effective with very short-term detentions; indeed, merely arresting, then releasing, a terrorist plot member might cause his collaborators to stand down. And relatively short-term detentions might satisfy most information-collection requirements, but would provide little deterrent threat to would-be terrorist collaborators.

Finally, the manner in which we define our strategic purposes and, consequently, the subject class of individuals also drives the logic of decision-making transparency. An incapacitation strategy is compatible with high levels of public scrutiny, since there will usually be little reason to hide (and indeed much to gain from disclosing openly) the underlying justification for a detention. Such transparency may be critical to deterrence, at least if detention aims to dissuade individuals from certain specific conduct. But the transparency of disruption is trickier, since the government may not wish to tip off other plot collaborators or scare the public. And information-collection detention may require high levels of secrecy to avoid disclosing sensitive intelligence or tipping off the targets of possible stings. In any of these contexts the government will likely need to safeguard sensitive intelligence information from public dissemination, but in the latter cases (systems emphasizing disruption or information-gathering) the government might also need to shield the very proceedings themselves, at least temporarily, from disclosure, and therefore they may have greater need for closed or perhaps even ex parte hearings than they would in a system emphasizing incapacitation or deterrence. As a related matter, the nature of information used to prove or disprove the imperative need for detention in a disruption or information-gathering regime might also be better understood and handled by a dedicated bar of specialist attorneys with clearance and access to highly-sensitive intelligence, whereas the need for restricting attorney choice in a comparatively transparent incapacitation regime will likely be lower.

On the whole this analysis interestingly points toward a very different design for an incapacitation administrative detention regime than a disruption regime, the two most promising strategic objectives for administrative detention outlined above. An incapacitation system could feature generalist judges and lawyers conducting relatively open and transparent hearings to regulate long-term detention. A disruption system, by contrast, might require specialized courts and lawyers operating with greater secrecy to regulate short-term detentions. The legislature may therefore need to choose between strategic approaches in fashioning a new law, or need to consider a bifurcated system to handle two distinct types of detention.

The broader point is that effective procedural design is not independent of strategic purpose or the issue of substantive scope. It depends heavily on both.

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79 See Goldsmith & Katyal, supra; Wittes & Gitenstein, supra; see also Waxman, Detention as Targeting, supra.

80 The Spanish government, for example, uses criminal investigatory detention powers—sometimes for very brief periods—in similar ways. See Victoria Burnett, After Raids, 14 Held in Spain on Suspicion of a Terror Plot, NEW YORK TIMES, Jan 21, 2008, at A3.
Conclusion

The precarious step of legislating an administrative detention regime for suspected terrorists carries many risks to both liberty and, especially over the long-term, security. Most of the debate about whether these risks outweigh the marginal strategic utility of administrative detention and about how to mitigate the risks moves too quickly to procedural design. This quick move overlooks a major piece of the puzzle: the scope and definition of the detention class and the substantive criteria by which any new procedural machinery will make individual decisions.

Any consideration of administrative detention legislation or, more generally, the need for legal innovation in this area should begin with a hard look at the key purposes such tools aim to fill. This hard look should help guide discussion of the substantive class. From the other end of the cost-benefit matrix, the way the substantive class is defined can exacerbate or mitigate the policy risks of administrative detention, and experience since September 2001 supports narrowing that definition, even at the expense of executive operational flexibility. The more focused and narrowed the strategic purpose and substantive definition of the target class of individuals, the better able we will be to consider procedural mechanisms for carrying out and applying them.

There will be a natural temptation for those considering new detention laws to take as a starting point existing enemy combatant detention policies and to build onto them more robust and refined procedural protections. This analysis suggests that temptation is misguided. Congress should first decide whether the strategic priority of proposed new administrative detention laws is incapacitation, disruption, or both; only then can the details of detention proposals be intelligently developed and evaluated.
A Legal Framework for Detaining Terrorists
Enact a Law to End the Clash over Rights

Benjamin Wittes and Mark Gitenstein

Summary

Six years after the September 11 attacks, the United States still lacks a stable, legislatively established policy for detaining suspected foreign fighters captured in the war on terrorism. American detention policy has eroded this country’s international prestige and public image, embroiled its military in continuous litigation, and cast a pall of legal uncertainty and impropriety over the detention of several hundred suspected enemy fighters. (The Supreme Court will soon take up a new round of litigation over detainees and may well undermine further the detention system the current administration has put in place.)

Specific elements of a long-term detention regime that should be supported by the next President include:

- An impartial decision-maker in charge of making status determinations
- Basic procedural protections for detainees, including the assistance of counsel, the ability to see and challenge a reasonable summary of the government’s evidence, and the ability to call witnesses
- A written, public opinion explaining the basis for each status determination, and review of such determinations by federal civilian courts
- For those deemed properly subject to detention, some form of regularized ongoing judicial review to ensure that continued detention is necessary and appropriate.
A variety of possible structures could accommodate these elements. What is essential is that this system be crafted in statutory law, thereby reflecting the considered judgment of the Congress of the United States—not merely the unilateral will of the executive branch or the judiciary’s response to executive policy. As the Supreme Court has pointed out on several occasions, government decisions are most credible when all three branches agree.

Developing rules for detaining suspected enemies engaged in unconventional warfare against the United States and its interests represents the core challenge facing American legal policy in the war on terrorism today. The next President should work with Congress to assure that those rules conform to constitutional principles and fundamental American values, are as widely accepted as possible both domestically and abroad, and buttress rather than undermine the global campaign against terrorism and extremism.

Context

The Debate over Detentions

Debate among presidential candidates, opinion leaders, foreign policy experts, and judicial commentators over the treatment of Al Qa’eda and Taliban fighters—so called “unlawful enemy combatants”—has been extensive and spirited, but unfortunately it has avoided the core of the problem: what U.S. policy toward detaining foreign combatants should be.

For several years, the detention debate has been playing out in the federal court system and in Congress, and, more recently, in the 2008 presidential campaign. The origin of the debate was a series of executive actions by the Bush Administration to create special detention procedures and facilities, including a detention center at Guantanamo Bay Naval Base in Cuba. These actions prompted rebukes by the Supreme Court, which, in turn, have led so far to two rounds of legislation: the Detainee Treatment Act of 2005 (“DTA,” P.L. 109-148) and the Military Commissions Act of 2006 (“MCA,” P.L. 109-366).
The DTA followed two Supreme Court decisions handed down in June 2004: *Hamdi v. Rumsfeld*, an 8-1 decision in which the Supreme Court held that detainees who are U.S. citizens are entitled to certain procedural rights; and *Rasul v. Bush*, a 6-3 decision holding that the Guantanamo Bay facility does not lie, as the administration had contended, beyond the jurisdiction of the federal courts. In addition to addressing jurisdiction, the DTA also contained a provision sponsored by Senator John McCain (R-Ariz.), requiring that interrogations of detainees by the military at Guantanamo Bay and elsewhere conform to techniques prescribed in the Army Field Manual, thus precluding inhumane methods.

The MCA came in response to the 2006 *Hamdan v. Rumsfeld* decision, in which the Supreme Court decided 5-3 that the military commissions established by the administration violated the Uniform Code of Military Justice and the Geneva Convention on the treatment of enemy combatants. The MCA establishes procedures for using military commissions to try detainees for war crimes. Both the DTA and the MCA seek to erase the jurisdiction the Court had asserted to hear *habeas corpus* cases brought by or on behalf of detainees—a subject the Court will again take up in the current term.

**The Administration’s Position**

The Bush Administration has correctly insisted on the authority to detain foreign fighters outside of the four corners of the American criminal justice system. The current conflict has enough in common with traditional warfare to warrant giving the executive branch a detention authority, based in part on the power to hold enemy soldiers in a conventional military conflict.

The administration has taken this analogy too far, however. The war on terrorism is not a conventional war. Too much factual uncertainty attends the status of individual detainees to permit their long-term detention based on procedures created solely by the executive branch and lacking in basic fairness to the accused, who may face a lifetime of incarceration. The proper detention regime for the war on terrorism is a
hybrid of different legal structures, drawing on elements of the laws of war and the
criminal law and tailored to the unique threat posed by global catastrophic terrorism.
The system should produce decisions that have credibility both with the American
public, to preserve support for the broader effort to combat terrorism, and with foreign
audiences, to bolster support for—rather than zealous opposition to—American anti-
terrorism policy.

Arguments Raised About Guantanamo and Habeas Corpus

As this controversy continues, presidential candidates have focused on two questions:
whether to shut down the Guantanamo Bay facility, and whether to restore *habeas
corpus* for detainees held there. All of the Democratic candidates for president would
close the facility, and all of those who have spoken to the issue would restore *habeas
corpus* jurisdiction as well. On the Republican side, all but two of the candidates
(McCain and Representative Ron Paul of Texas) would keep the facility open, and none
has argued for restoration of *habeas* rights to detainees.

The Guantanamo issue turns largely on the public diplomacy impact of the facility, and
of alleged abuses there. Illustrating the Democratic viewpoint, Senate Foreign
Relations Chair Joseph Biden (D-Del.) has said Guantanamo “. . . has become the
greatest propaganda tool that exists for recruiting terrorists around the world.”
Former Arkansas Governor Mike Huckabee has summed up the prevailing Republican
view by observing that, “[i]f we’re going to make a mistake right now, let’s make it on
the side of protecting the American people.”

Many proponents of closing the facility would transfer the detainees to high-security
facilities within the United States, such as the military detention facility at Fort
Leavenworth, Kansas. An amendment to the 2008 Defense Authorization Act proposed
by Senators Dianne Feinstein (D-Calif.) and Tom Harkin (D-Iowa) would require the
Administration to do just that.

Advocates for restoring *habeas* rights for detainees argue that *habeas corpus* is central
to American law and life. Senator Chris Dodd (D-Conn.) has asserted, “To deny this
right not only undermines the rule of law, but damages the very fabric of America. It is not who we are, and it is not who we aspire to be.” By contrast, Representative Duncan Hunter (R-Calif.) has argued that restoring habeas jurisdiction “will create an avalanche of litigation that will bring our detainee policy to a grinding halt.”

**Distractions from the Real Issue**

The arguments over both Guantanamo and habeas corpus skirt the real issue. Granted, whether to accord habeas rights to detainees nabbed and held abroad, and where to hold such people under military control, are important questions. But, they are not the central question at hand; indeed, they are distractions from the central question. Their prominence in the campaign is a matter of a tail—or pair of tails—wagging the dog. The dog is the detention policy itself.

The role of habeas review of detentions is significant, after all, only in the absence of a more cohesive mechanism for evaluating the legality of the detentions. (Habeas corpus is the ancient writ by which a court can review the lawfulness of an incarceration and free a prisoner whose imprisonment cannot be justified.) In the criminal justice system, habeas review is only a stopgap against injustice. It is not a front-line defense. An inmate brings a habeas case in our country only after trial, conviction, and the exhaustion of all appeals. And, only after state-level habeas review fails to provide relief may an inmate take up the matter in federal court. What’s more, because the criminal justice system is so fully developed that our political system highly regards its integrity, courts conducting habeas review treat its results with great deference—disturbing them only when substantial constitutional error plagues the outcome, and sometimes not even then.

In the context of war on terrorism detentions, however, habeas has perversely become the principal avenue of judicial review. This has happened, not because habeas lawsuits are the most sensible initial check on administrative detention decisions, but rather because a viable front-end mechanism does not exist. The administration initially declined to develop a front-end mechanism at all, and, in response to adverse court rulings, developed only a cursory one, which courts understandably distrust.
Specifically, detainees now have their status reviewed by a Combatant Status Review Tribunal (CSRT), which decides whether they have been properly determined to be unlawful enemy combatants. CSRTs’ judgments are made with the detainee permitted to contest only the sparest summary of the evidence against him and without the aid of a lawyer, although decisions may be appealed to a federal appeals court.

Habeas review of detentions has been an attempt on the part of the courts to fill the void, but, ironically, has filled it with a system of judicial review far more disruptive than one the administration could obtain legislatively. Because the law is still very much in flux, courts do not know what law to apply, the jurisdiction of the courts themselves is hotly contested, and habeas lawyers are busily attacking CSRT procedures before appeals have been exhausted. The administration, meanwhile, has tenaciously sought to eliminate habeas review of Guantanamo detentions, but has not created a system in which the public, the international community, and the courts have confidence. The result is that commentators and candidates are spending a lot of time debating the role of habeas corpus within the detention system without discussing the makeup of the system itself.

The debate over Guantanamo likewise skirts the core of the problem. Admittedly, the public diplomacy problem is real. Rightly or wrongly, Guantanamo has become a symbol around the world of injustice and excess in America’s response to terrorism. But, closing Guantanamo will not fix this problem. Many of the detainees cannot simply be released or charged, as many critics have contended they should be. Some are sworn enemies of the United States committed to fighting it militarily, although they have committed no crime. Others may have committed crimes, but the crime cannot be proved in a traditional courtroom, either because the evidence is too thin or because it was obtained by unsavory means. These people may be too dangerous to release, and the laws of war do permit long-term detention of military enemies.

Address the Core Questions
One way or another, the United States is going to be holding some number of Al Qa’eda and Taliban fighters outside the criminal justice system for some time to come.
So, if the military closes the detention operation at Guantanamo, it will simply have to recreate it somewhere else. As long as there is no accepted procedure for making detention decisions, the public diplomacy problem that plagues the base will continue to plague any future detention site—which will become, in the public mind, Guantanamo by another name. Debating Guantanamo in the absence of a larger debate about detention policy is really an exercise in debating the setting for a policy in lieu of debating the policy itself.

Simply put, if America puts the underlying system right, the problems of habeas corpus and Guantanamo will take care of themselves. Habeas will, one way or another, prove a non-problem—either because it will not be necessary at all or because it will not be intrusive. Guantanamo will either grow less controversial as detention policy improves or it can be closed and a new facility opened without the taint of its history. By contrast, if America fails to get the system right, neither restoring habeas rights nor closing Guantanamo will compensate for the failure. One step will merely inject judges into the confusion; the other will require the costly construction of a new facility and movement of detainees. The right approach is to create the appropriate system first and then figure out what role habeas corpus and Guantanamo should play within it.

Developing rules for detaining suspected enemies engaged in unconventional warfare against the United States represents the fundamental challenge facing American legal policy in the war on terrorism today. While problems such as interrogation techniques, the treatment of detainees, the CIA’s program of secret prisons, and extraordinary rendition are vital to address as well, they are ancillary issues, which policy-makers cannot resolve without first taking on the core questions: who can be detained, for how long, under what rules, what are the detainee’s rights under these rules, and what role should the courts play in overseeing detentions?
An Administrative Detention Law Is Necessary

Balancing Civil Liberties and Wartime Needs
The detention of Taliban and Al Qa’eda fighters presents difficult questions to a democracy that values civil liberties and the rule of law yet wishes to prevail in a long-term conflict with irregular forces of extreme violence. Indefinite detention, even of non-citizens, runs counter to foundational notions of what this country stands for. The conflict between basic American values and indefinite detention energizes, as it should, the controversy over habeas corpus rights of detainees at Guantanamo.

But, the issue is complicated. Our legal system tolerates indefinite detention for a number of purposes, including protecting the U.S. population from aliens the government does not wish to admit but who cannot be returned home, preventing the dangerously mentally ill or sexually deviant from injuring people in the community, and isolating individuals with potentially fatal communicable diseases. Further, the concept that foreign fighters can be held indefinitely during times of war is incontrovertibly established in international and constitutional law. The Third Geneva Convention specifically authorizes and regulates the detention of uniformed military captives, who can lawfully be kept off the field of battle for the duration of hostilities.

Terrorists Are a Unique Case
The problem is that the Guantanamo detainees, whom the Administration terms “unlawful enemy combatants,” do not fall within the Geneva Convention definition of “prisoners of war.” They are not members of a uniformed army with a clear hierarchy of command. Rather, like saboteurs, they infiltrate the civilian community and engage in violence against non-combatants—activity that often meets the definition of “war crimes.” Such forces, under the laws of war, are also subject to detention for the duration of the hostilities, assuming they can be identified; but they forfeit the generous protections afforded to POWs.

The administration argues that the Geneva protections should not extend to fighters who have no intention of reciprocating. Taliban and Al Qa’eda, after all, do not apply
those rights to their detainees, whom they have been known to behead. In almost every way, rather, they flout the rules of warfare—at great peril to civilians.

The United States’ refusal to give such people the protections due to prisoners of war is not new. Although President Carter submitted to the Senate a protocol to the Third Geneva Convention that would have treated many members of terrorist groups as prisoners of war, the Reagan Administration withdrew the protocol, arguing that this erosion of the line between honorable soldiers and terrorists “would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves.” The New York Times and Washington Post, among others, sided with the Reagan Administration.1

The paradox is that, precisely because terrorists flout the rules of warfare and make themselves harder to distinguish from civilians when captured, they necessitate a level of due process that conventional forces, which make no secret of their status as belligerents, do not require. The question is what sort of process might identify these unlawful combatants accurately and with public credibility. The Geneva Conventions require only that, in cases of doubt, all individuals receive review by a “competent tribunal”—historically, cursory field panels that provide few procedural protections. But such panels are a bad fit with the war on terrorism. In many of these cases, the factual issues are too complicated, the lines between civilian and combatant too hazy, the duration of the conflict too uncertain, and the consequences to the liberty of individuals too vast.

Congress therefore needs to create new statutory procedures for handling “unlawful enemy combatants” of the Guantanamo type. The procedures must not be subject to the whim of the executive. Instead, they should be blessed by all three branches of government, reflecting the unified will of the American political system. These processes need not include all the protections of a criminal trial. But, they need to be

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considerably more robust than the process applied to prisoners in a conventional military conflict or the process applied to detainees today at Guantanamo.

The Detention Law Should Specify Safeguards

Defining Combatants
The threshold question for Congress is how to define the universe of people subject to detention. At a minimum, this group includes overseas fighters who are not members of any uniformed military but have engaged in hostilities against the United States or its allies. It also should include individuals who have purposefully planned, or knowingly and materially supported, those hostilities.

It is important to exclude individuals taken into custody within the United States or in Iraq or any other theater of war where the United States applies the Geneva Conventions to detentions, either by law or policy. The new process should be limited to the types of individuals currently in custody at Guantanamo—that is, long-term detainees held as part of the global conflict with Al Qa’eda and its affiliates.

Assuring Due Process Protections
This detention system will not have all the attributes of the criminal justice system, but it must have some, and it must create an adversarial process whereby detainees have a meaningful opportunity to dispute and contest the evidence against them. Key elements should include the following new features:

- **Impartial finder of fact.** The presiding officer should be a judicial officer, either a military or civilian judge. (Currently, CSRT panels consist of three military officers, none necessarily trained in law and all part of the normal chain of command.)

- **Right to Counsel.** The detainee should be represented by competent military counsel. (Under current rules, detainees may be assisted by a “personal representative”—a non-legal military officer who has no obligation to keep
conversations with the detainee confidential and who is not charged to represent the detainee’s legal interests rigorously.)

- **Access to Evidence.** Counsel for the detainee should be able to see the evidence against his or her client, including classified information and all exculpatory materials. And, the detainee personally should be given a summary of the prosecution’s evidence, specific enough to allow a fair opportunity to respond to it.

- **Full and Fair Hearing.** The detainee should be able to present evidence, obtain witnesses, compel testimony, cross-examine government witnesses, and respond to the government’s evidence admitted against him. (The CSRTs have never permitted a detainee to hear testimony by a government witness, have denied all detainee requests to question witnesses not held at Guantanamo, and have denied detainees requested access to unclassified evidence 40 percent of the time. Only 10 percent of detainees have presented any evidence at all to their CSRT. The government itself has never produced a witness during the unclassified portion of a CSRT. In most cases, rather, it has relied solely on classified evidence. What’s more, it has adopted a definition of classified information so broad as to include the interrogation of the detainee himself—meaning that detainees in CSRTs do not have access to their own interrogations.²)

- **Exclusion of Illegally Obtained Evidence.** The law should bar the tribunals from considering statements obtained by torture or conduct just short of it. (Although current interrogation rules at Guantanamo do not permit coercion, some detainees are being held based on statements previously elicited under coercion, including statements obtained in a CIA detention program in which coercive interrogation was a central objective.)

- **Findings of Fact and Conclusions of Law.** The process should result in a reasoned, written document that explains the detention judgment and is subject to review by the civilian courts of the United States.

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- **Periodic Review.** Some form of ongoing status review must ensure both that the continued detention of each enemy combatant is necessary and that the conditions of confinement are humane and lawful. Review decisions should be subject to appeal, but judicial review should be deferential. Detainees should have help in the process from their lawyers. And, the review process ought to be codified in law.³ (Currently, detainees can obtain annual review by Administrative Review Boards to determine if they remain too dangerous to either release or transfer to their home governments. In two years of this process, review boards have so far recommended 14 releases and 174 transfers.)

- **Habeas Corpus.** *Habeas* review should indeed be preserved for detainees. It should, however, be applied as it is in criminal cases today—only after the process is complete and with considerable deference to the judgments that precede it.

### Weighing Two Judicial Models

Two broad models are worth considering to create such a system. First, a *National Security Court* would be a specialized federal court responsible for making detention judgments under the new law.⁴ Such a court would be staffed by federal judges, making the judiciary the first-line decision-maker in these cases. Like the special court that authorizes surveillance in national security cases, it would have the advantage of maximizing the legitimacy of detention decisions, as federal court judgments enjoy unique credibility, domestically and abroad.

A specialized court approach would put detentions in the hands of judges with all the prestige of the federal court system, yet with particular expertise in applying rules that protect classified information and national security concerns. The disadvantage of this model is that it would profoundly change the existing system, disrupting current

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³ We do not attempt to discuss here the specific substantive standard that should be applied for purposes of determining whether individual detainees pose a sufficient ongoing threat to national security to justify continued detention. Nor do we discuss what enhanced procedures ought to apply to military commissions when detainees are tried for alleged crimes.

⁴ The idea of a national security court has been advanced by a politically diverse array of legal scholars, including Harvard law professor Jack Goldsmith, Georgetown law professor Neal Katyal, and former terrorism prosecutor Andrew McCarthy.
operations and requiring civilian judges to make military decisions, rather than merely review them.

The other alternative, bolstered CSRTs, is reflected in legislation proposed by Senate Armed Services Committee Chair Carl Levin (D-Mich.). This approach would beef up the procedural rights a detainee would receive from the CSRTs, making the existing military panels more court-like but leaving the first-line judgments in the hands of the military justice system. The role of the federal courts would be to review these judgments in much the same way these courts routinely review actions by administrative agencies.

This model would harmonize more readily with current practices, as it builds on a system that already exists, under which CSRT judgments may be appealed to the U.S. Court of Appeals for the District of Columbia Circuit. It also would preserve the executive’s authority over military matters. The major disadvantage of this model is that, by keeping judges at a distance, it might garner less public and international legitimacy than would a national security court. Its similarity to a discredited prior policy also might carry the taint of executive detention with a judicial rubber stamp.

**Making the Legislative Decision**

Deciding between these two models is less important, ultimately, than the substance of the rules within the chosen model. The national security court approach has worked effectively in the surveillance arena for 30 years and could be tailored to the detention arena. The military justice system, which provides first-rate tribunals for criminal trials of American service personnel every day, surely could be adapted to the detention regime as well.

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Either approach would work, if the process is adversarial, fair, enshrined in statute to reflect the judgment of the American political system, and recorded in each case in a complete, written, publicly accessible opinion explaining the basis of the detention decision. With these attributes, either model would dramatically improve America’s legal and public diplomacy standing yet still permit the lengthy detentions of terrorists.

There is little doubt that the Supreme Court would uphold such a detention regime. In *Hamdi*, a majority of justices considered even the detention of an American citizen to be clearly within the purview of the president’s war powers. “We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they are captured, is so fundamental and accepted an incident of war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use,” wrote Justice Sandra Day O’Connor for a court plurality. O’Connor’s opinion faults the military for not giving the detainee an adequate way to determine his legal status. But, the process she labels adequate is far less generous procedurally than the approach sketched here.

With the recommended system in place, there will be no reason for the current administration, or its successor, to fear habeas review. Such review will merely constitute a duplicative check, which may create a considerable amount of litigation but should operate with maximum deference to the decisions of the tribunals making detention judgments. It will serve merely as a last line of defense against egregious system failure, and not—as it is now—a first-line challenge to unstable and shifting rules in the face of weak factual records and an uncertain combination of international and domestic law.
Concluding Observations

As a practical matter, the United States has no alternative to some form of administrative detention. Numerous detainees now at Guantanamo—and those likely to be captured in future—cannot realistically be put on trial, either because they have not committed crimes or because the main body of evidence is, for one reason or another, inadmissible. These people, however, may be too dangerous to set free. Across a number of areas of law—mental illness, warfare, immigration—the courts have approved carefully crafted schemes that permit non-criminal detentions in order to protect the public. The war on terrorism requires its own scheme, tailored to its particularities.

The Bush Administration’s insistence on deriving this scheme purely from the laws of war, without involving the other branches of government, has resulted in a confused, widely criticized, poorly justified, and sometimes unfair system for which Congress has so far needed to take no responsibility. It is long past time for Congress to take ownership of this problem and to create the rules—rules that both authorize detentions and put limits on them—that will govern Guantanamo or whatever facility replaces it. Candidates for President should advocate this reasoned middle way.

About the Author and the Project

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Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System

Benjamin Wittes

Senate Committee on the Judiciary

June 04, 2008 —

In a recent testimony to the Senate Committee on the Judiciary, Benjamin Wittes discusses how to improve America's policy on terrorism detainees within our justice system.

Thank you, Mr. Chairman and members of the committee, for inviting me to testify concerning what is probably the single most important unresolved legal policy challenge affecting America’s confrontation with international terrorism: The design of an appropriate regime for detaining alien terrorist suspects seized abroad.

I am a Fellow in Governance Studies and Research Director in Public Law at the Brookings Institution. I am the author of the book, Law and the Long War: The Future of Justice in the Age of Terror, which is forthcoming this month and from which this testimony is partly adapted. I have written extensively on the challenges to the legal system posed by the detention operations that became necessary after the September 11 attacks. I also serve on the Hoover Institution Task force on National Security and the Law. The views I am expressing here are my own.

It is difficult to overstate the scope and magnitude of our political system’s collective failure in detention operations to date. In the fall of 2001 and the winter of 2002, almost nobody doubted the proposition that in an international conflict involving a congressionally-authorized use of force and characterized by repeated military engagements, the United States is entitled to detain enemy forces. Yet today, doubt concerning the legitimacy of war-on-terrorism detentions is more the norm than the exception. The reason is simple, and it is not that the rationale for these detentions has grown less powerful. The current administration has refused to tailor the detention system contemplated by the laws of war to the unusual features of the current conflict—a set of circumstances that demand more nuanced fact-finding than does traditional warfare and consequently also demand greater procedural protections for detainees. Congress has declined to create a better system legislatively. And the courts have so far provided next to no guidance on the ground rules for detention, other than to emphasize the fact of their own habeas jurisdiction.

The result is a recipe for public and judicial suspicion: A system in which complex questions of fact get resolved in closed proceedings that produce a minimal administrative record based on information—some of it undoubtedly flawed—that detainees have had virtually no opportunity to rebut.
Let me be as clear as I can: The current system has not worked and it cries out for reform by this body to make detentions fairer, more transparent, and more defensible both before the public and the courts.

But let me be candid on another point as well: The appropriate reform will almost certainly not rely exclusively on civilian prosecutions in American federal courts as the source of the power to detain the enemy. This is the case for two distinct reasons:

First, relying exclusively on federal court prosecution would likely require the release of portions of the detainee population at Guantanamo whose continued detention prudence requires. Nobody outside of the executive branch knows exactly how many current detainees are too dangerous to release yet could not face criminal charges in federal court—because they have not committed crimes cognizable under American law, because evidence against them was collected in the rough and tumble of warfare and would be excluded under various evidentiary rules, or because the evidence is tainted by coercion. Without access to a great deal of material that remains classified, one can only guess how many such detainees there are. But the number is almost certainly not trivial. Even under the somewhat relaxed rules of the Military Commissions Act (MCA), military prosecutors have estimated that they might under ideal circumstances be able to bring to trial only as many as 80 detainees. Excluding those current detainees already cleared for transfer from Guantanamo, that still leaves roughly 100 whom the military deems too dangerous to transfer yet against whom charges are not plausible. Even if we assume the military is being hopelessly conservative in clearing detainees for repatriation, there is almost certainly still a gap. That gap involves dangerous men who want to kill Americans.

Consider, for example, the case of Mohamed Al Kahtani, an alleged September 11 conspirator against whom the military recently dropped criminal charges. According to the 9/11 Commission, Kahtani flew to Orlando International Airport, where Mohammed Atta was waiting to meet him. Kahtani did not end up on a plane on 9/11 only because he was denied entry to the United States that day. This is a man, in other words, who allegedly took active steps to kill large numbers of Americans. Yet the brutal circumstances of his interrogation make his prosecution now difficult, perhaps even impossible. If that proves to be the case, American forces would likely have to set him free absent some extrinsic non-criminal detention authority. Whatever the right remedy may be for the interrogation tactics used upon Kahtani, such an outcome seems to me maladaptive for any society with an instinct for self-preservation.

Second, even if we could magically repatriate, resettle, or free all current detainees, a pure prosecution model would face prohibitive obstacles with respect to future captures. Specifically, American forces often obtain custody of detainees—either in the field or from allied governments or militias—without knowing precisely who they are. Abu Zubaydah, for example, was captured in a safe-house raid by Pakistani forces along with a handful of other people. While we can plausibly imagine an extant warrant permitting American forces to take custody of such an Al Qaeda bigwig himself, it is highly implausible to imagine pending warrants against all those who may accompany him. If
the rule, however, is that anyone against whom charges are not either outstanding or imminent must go free, what authority would American forces have even to take custody of future non-battlefield detainees whom opportunity might present to them? The honest answer is that they would have none.

To put the matter bluntly, there simply has to be some detention authority broader than the four corners of the criminal justice system. This necessity should not be a matter for national shame or embarrassment. American law authorizes preventive detentions across a range of areas, many less compelling than the situation of sworn military enemies of the country against whom Congress has authorized the use of force. That the laws of war apply uncomfortably to the task at hand does not mean that no detention authority is appropriate here at all.

For all its errors, in other words, the current administration is not being eccentric in insisting on some authority to detain the enemy outside of the conventional justice system. While I try to avoid making predictions, I believe the next administration—of either party—is most unlikely to forswear this power entirely. The right question for this body is not whether to force it to do so, but what appropriate rules for detention ought to look like, what the substantive standards for detention ought to be, and how to construct appropriate mechanisms of judicial review for those detentions.

Not all detainees require new law. The laws of war work well for the preponderance of those in American custody around the world. A relatively small subset, however, comprises detainees for whom release at the termination of hostilities, an endpoint key to law of war detention, is something of a fiction—detainees whom, even if they have committed no crime, American forces cannot and will not blithely set free. This type of fighter, who generally hides among civilians, can be much harder to identify accurately than the traditional detainee, whom the laws of war assume will identify himself by wearing a uniform. So relying for these detentions on the laws of war produces at once too low a threshold for the detention itself and paradoxically a requirement for release that is quite unsuited to a global fight with a non-state actor. The hallmark of this type of detainee is that one regards him as dangerous not merely as an arm of a particular military force but in his individual capacity as well—and that one cannot imagine relinquishing custody of him without some mechanism to manage the danger that he poses.

Defusing the controversy over such detentions requires the creation for each detainee of a rigorous set of factual findings and a documentary record justifying the decision to hold the person, a record available to the public and the press to the maximum extent possible and reviewed by an independent judicial body.

Towards that end, I make the following suggestions in my book:

First, civilianize the detention regime by severing the authority to detain this limited class of terrorists from the laws of war and putting such detentions under judicial supervision. The premises of these detentions differ considerably from those of traditional wartime
captures. So the reviewing body should be a civilian federal court assessing whether each
detainee meets a legislatively prescribed standard, not a military panel assessing whether
or not the detainee meets the definition of an “unlawful enemy combatant.”

Second, enhance the procedural protections for the accused. A solid legislative scheme
requires a few core elements not present in the current Combatant Status Review
Tribunals (CSRT), all designed to make the process more adversarial and courtlike and to
produce an outcome that speaks with enough authority to support a detention in the
public and judicial arenas. The first of these is an impartial finder of fact, specifically a
federal judge. The detainee should also receive representation from competent counsel.
Lawyers for the detainees should be cleared to see the evidence against their clients,
including classified information and all exculpatory materials. The detainee himself
should be given a more detailed summary of the evidence against him, one sufficiently
specific to provide a fair opportunity for rebuttal. The detainee should also receive a more
meaningful opportunity than the current CSRT process offers to present evidence, obtain
witnesses, compel testimony, cross-examine witnesses against him, and respond to
evidence admitted against him.

Third, the Court must retain jurisdiction over each detention for as long as it persists to
ensure that detention remains necessary and that the conditions of detainees’ confinement
are humane. The government should be obliged on a regular basis to argue for the
continued necessity of detention, and counsel for each detainee should have the
opportunity to argue that, for one reason or another, his client no longer meets the
statutory criteria for detention: that, as an alien terrorist, he poses a substantial threat to
the security of the United States.

The best way to implement such a system would be through some kind of specialized
national security court, an idea others have proposed with varying levels of specificity.
Modeled on the special court that authorizes surveillance in national security cases, such
an arrangement would maximize the public and international legitimacy of detention
decisions. It would put detentions in the hands of judges with all the prestige of the
federal court system yet with particular expertise applying rules designed to protect
classified information and manage legitimate security concerns. Such a court is also, in
my view, the best venue in which to try terrorists accused of war crimes, using rules that
hybridize the current Military Commissions Act with normal federal court practice.

In sum, the current administration’s reliance on a pure law of war model for detentions
has been a fateful error. But the attempt to revert to a prosecutorial model for disabling
terrorists would supplant that error with a system unsuited to the challenges we currently
face as a society. The right answer is—as it has been since September 11—to design the
detention system we need to handle the unique situation of global jihadist terrorism. That
is a task only Congress can accomplish and it is long overdue.
PANEL VI:

Due Process and Issues Surrounding Detention: Considerations for the New Administration

Moderator: Prof. Harvey Rishikof

Updated September 27, 2007

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Summary

On November 13, 2001, President Bush issued a Military Order (M.O.) pertaining to the detention, treatment, and trial of certain non-citizens in the war against terrorism. Military commissions pursuant to the M.O. began in November 2004 against four persons declared eligible for trial, but proceedings were suspended after a federal district court found that one of the defendants could not be tried under the rules established by the Department of Defense (DOD). The D.C. Circuit Court of Appeals reversed that decision in *Rumsfeld v. Hamdan*, but the Supreme Court granted review and reversed the decision of the Court of Appeals. To permit military commissions to go forward, Congress approved the Military Commissions Act of 2006 (MCA), conferring authority to promulgate rules that depart from the strictures of the Uniform Code of Military Justice (UCMJ) and possibly U.S. international obligations. The Department of Defense published regulations to govern military commissions pursuant to the MCA.

The Court of Military Commissions Review (CMCR), created by the MCA, issued its first decision on September 24, 2007, reversing a dismissal of charges based on lack of jurisdiction and ordering the military judge to determine whether the accused is an “unlawful enemy combatant” subject to the military commission’s jurisdiction. The CMCR rejected the government’s argument that the determination by a Combatant Status Review Tribunal (CSRT) that a detainee is an “enemy combatant” was a sufficient basis for jurisdiction, but also rejected the military judge’s finding that the military commission was not empowered to make the appropriate determination.

This report provides a background and analysis comparing military commissions as envisioned under the MCA to the rules that had been established by the Department of Defense (DOD) for military commissions and to general military courts-martial conducted under the UCMJ. After reviewing the history of the implementation of military commissions in the “global war on terrorism,” the report provides an overview of the procedural safeguards provided in the MCA. The report identifies pending legislation, including H.R. 267, H.R. 1585, H.R. 2543, H.R. 2826, S. 1547, S. 1548, H.R. 1416, S. 1876, S. 185, S. 576, S.447, H.R. 1415 and H.R. 2710. Finally, the report provides two tables comparing the MCA with regulations that had been issued by the Department of Defense pursuant to the President’s Military Order with standard procedures for general courts-martial under the Manual for Courts-Martial. The first table describes the composition and powers of the military tribunals, as well as their jurisdiction. The second chart, which compares procedural safeguards required by the MCA with those that had been incorporated in the DOD regulations and the established procedures in courts-martial, follows the same order and format used in CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, to facilitate comparison with safeguards provided in federal court and international criminal tribunals.
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Introduction

Rasul v. Bush, issued by the U.S. Supreme Court at the end of its 2003-2004 term, clarified that U.S. courts do have jurisdiction to hear petitions for habeas corpus on behalf of the approximately 550 persons then detained at the U.S. Naval Station in Guantanamo Bay, Cuba, in connection with the war against terrorism,1 establishing a role for federal courts to play in determining the validity of the military commissions convened pursuant to President Bush’s Military Order (M.O.) of November 13, 2001.2 After dozens of petitions for habeas corpus were filed in the federal District Court for the District of Columbia, Congress passed the Detainee Treatment Act of 2005 (DTA),3 revoking federal court jurisdiction over habeas claims, at least with respect to those not already pending, and creating jurisdiction in the Court of Appeals for the District of Columbia Circuit to hear appeals of final decisions of military commissions. The Supreme Court, in Hamdan v. Rumsfeld,4 overturned a decision by the D.C. Circuit that had upheld the military commissions, holding instead that although Congress has authorized the use of military commissions, such commissions must follow procedural rules as similar as possible to courts-martial proceedings, in compliance with the Uniform Code of Military Justice (UCMJ).5 In response, Congress passed the Military Commissions Act of 2006 (MCA)6 to authorize military commissions and establish procedural rules that are modeled after, but depart from in some significant ways, the UCMJ.

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5 10 U.S.C. § 801 et seq.

The Department of Defense has issued regulations for the conduct of military commissions pursuant to the MCA.\(^7\) One detainee, David Matthew Hicks of Australia, was convicted of material support to terrorism pursuant to a plea agreement. Trials began for two other defendants, but were halted after the military judges dismissed charges based on lack of jurisdiction, finding in both cases that the defendants had not properly been found to be “unlawful enemy combatants.” The prosecutors appealed the cases to the Court of Military Commissions Review (CMCR), which reversed the dismissal of charges in one case and remanded it to the military commission for a determination of whether the accused is an “unlawful enemy combatant.”\(^8\) The CMCR decision rejected the government’s contention that the determination by a Combatant Status Review Tribunal (CSRT) that a detainee is an “enemy combatant” was a sufficient basis for jurisdiction, but also rejected the military judge’s finding that the military commission was not itself empowered to make the appropriate determination.

**Military Commissions: General Background**

Military commissions are courts usually set up by military commanders in the field to try persons accused of certain offenses during war.\(^9\) Past military commissions trying enemy belligerents for war crimes directly applied the international law of war, without recourse to domestic criminal statutes, unless such statutes were declaratory of international law.\(^10\) Historically, military commissions have applied the same set of procedural rules that applied in courts-martial.\(^11\) By statute, military tribunals may be used to try “offenders or offenses designated by statute or the law of war.”\(^12\) Although the Supreme Court long ago stated that

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10 See U.S. Army Field Manual (FM) 27-10, The Law of Land Warfare, section 505(e) [hereinafter “FM 27-10”].


12 10 U.S.C. § 821. There are only two statutory offenses under the Uniform Code of Military Justice (UCMJ) for which convening a military commission is explicitly recognized: aiding the enemy and spying (in time of war). 10 U.S.C. §§ 904 and 906, respectively. The circumstances under which civilians accused of aiding the enemy may be (continued...)
charges of violations of the law of war tried before military commissions need not be as exact as those brought before regular courts,\textsuperscript{13} it is unclear whether the current Court would adopt that proposition or look more closely to precedent.

The President’s Military Order establishing military commissions to try suspected terrorists was the focus of intense debate both at home and abroad. Critics argued that the tribunals could violate any rights the accused may have under the Constitution as well as their rights under international law, thereby undercutting the legitimacy of any verdicts rendered by the tribunals. The Administration established rules prescribing detailed procedural safeguards for the tribunals in Military Commission Order No. 1 (“M.C.O. No. 1”), issued in March 2002 and amended in 2005.\textsuperscript{14} These rules were praised as a significant improvement over what might have been permitted under the language of the M.O., but some continued to argue that the enhancements did not go far enough and called for the checks and balances of a separate rule-making authority and an independent appellate process.\textsuperscript{15} Critics also noted that the rules did not address the issue of indefinite detention without charge, as appeared to be possible under the original M.O.,\textsuperscript{16} or that the Department of

\textsuperscript{12} (...continued)

\textsuperscript{13} \textit{In re} Yamashita, 327 U.S. 1, 17 (1946) (“Obviously charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment.”).

\textsuperscript{14} Reprinted at 41 I.L.M. 725 (2002). A revision was issued August 31, 2005. The Department of Defense (DOD) subsequently released ten “Military Commission Instructions” (“M.C.I. No. 1-10”) to elaborate on the set of procedural rules to govern military tribunals. The instructions set forth the elements of some crimes to be tried by military commission, established guidelines for civilian attorneys, and provided other administrative guidance and procedures for military commissions.


\textsuperscript{16} The Administration has not explicitly used this authority; instead, it characterizes the prisoners as “enemy combatants” detained pursuant to the law of war. \textit{See, e.g.}, Response (continued...
Defense may continue to detain persons who have been cleared by a military commission. President Bush determined that twenty of the detainees at the U.S. Naval Station in Guantánamo Bay were subject to the M.O., and 10 were subsequently charged for trial before military commissions.

Hamdan v. Rumsfeld

Salim Ahmed Hamdan was captured in Afghanistan and charged with conspiracy for having allegedly worked for Osama Bin Laden. He challenged the lawfulness of the military commission under the UCMJ and claimed the right to be treated as a prisoner of war under the Geneva Conventions. A ruling in his favor at the district court was reversed by the D.C. Circuit Court of Appeals, which, while rejecting the government’s argument that the federal courts had no jurisdiction to...
interfere in ongoing commission proceedings, agreed with the government that the Geneva Conventions are not judicially enforceable; that even if they were, Hamdan was not entitled to their protections; and that in any event, the military commission would qualify as a “competent tribunal” for challenging the petitioner’s non-POW status. The appellate court did not accept the government’s argument that the President has inherent authority to create military commissions without any authorization from Congress, but found such authority in the Authorization to Use Military Force (AUMF), read together with UCMJ arts. 21 and 36.

The Supreme Court granted review and reversed. Before reaching the merits of the case, the Supreme Court dispensed with the government’s argument that Congress had, by passing the Detainee Treatment Act of 2005 (DTA), stripped the Court of its jurisdiction to review habeas corpus challenges by or on behalf of Guantanamo detainees whose petitions had already been filed. In addition, regardless of whether the Geneva Conventions provide rights that are enforceable in Article III courts, the Court found that Congress, by incorporating the “law of war” into UCMJ art. 21, brought the Geneva Conventions within the scope of law to be applied by courts. Further, the Court found that, at the very least, Common Article 3 of the Geneva Conventions applies, even to members of al Qaeda, according to

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25 Hamdan, 415 F.3d at 37.
26 P.L. 109-148, §1005(e)(1) provides that “no court … shall have jurisdiction to hear or consider … an application for … habeas corpus filed by … an alien detained … at Guantanamo Bay.” The provision was not yet law when the appellate court decided against the petitioner, Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), rev’d 126 S.Ct. 2749 (2006). At issue was whether this provision applies to pending cases. The Court found that the provision does not apply to Hamdan’s petition, but did not resolve whether it affects other cases that fall under the DTA’s provisions regarding final review of Combatant Status Review Tribunals. Slip op. at 19, and n.14. For an overview of issues related to the jurisdiction over habeas corpus, see CRS Report RL33180, Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court, by Jennifer K. Elsea and Kenneth Thomas.
27 Hamdan, 126 S.Ct. at 2769. To resolve the question, the majority employed canons of statutory interpretation supplemented by legislative history, avoiding the question of whether the withdrawal of the Court’s jurisdiction would constitute a suspension of the Writ of Habeas Corpus, or whether it would amount to impermissible “court-stripping.” Justice Scalia, joined by Justices Alito and Thomas in his dissent, interpreted the DTA as a revocation of jurisdiction.
28 10 U.S.C. § 821 (“The provisions of [the UCMJ] conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.”). The Hamdan majority concluded that “compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.” Hamdan, at 2794.
29 The Court disagreed that the Eisentrager case requires another result, noting that the Court there had decided the treaty question on the merits based on its interpretation of the Geneva Convention of 1929 and that the 1949 Conventions were drafted to reject that interpretation. Hamdan, at 2802-03.
them a minimum baseline of protections, including protection from 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.”

The Court concluded that, although Common Article 3 “obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict” and that “its requirements are general ones, crafted to accommodate a wide variety of legal systems,” the military commissions under M.C.O. No. 1 did not meet these criteria. In particular, the military commissions were not “regularly constituted” because they deviated too far, in the Court’s view, from the rules that apply to courts-martial, without a satisfactory explanation of the need for such deviation. Justice Scalia, joined by Justices Thomas and Alito, dissented, arguing that the DTA should be interpreted to preclude the Court’s review.

**The Military Commissions Act of 2006**

In response to the *Hamdan* decision, Congress enacted the Military Commissions Act of 2006 (“MCA”) to grant the President express authority to convene military commissions to prosecute those fitting the definition under the MCA of “alien unlawful enemy combatants.” The MCA eliminates the requirement for military commissions to conform to either of the two uniformity requirements in article 36, UCMJ. Instead, it establishes a new chapter 47A in title 10, U.S. Code and excepts military commissions under the new chapter from the requirements in article 36. It provides that the UCMJ “does not, by its terms, apply to trial by military commissions except as specifically provided in this chapter.” While declaring that the new chapter is “based upon the procedures for trial by general courts-martial under [the UCMJ],” it establishes that “[t]he judicial construction and application of [the UCMJ] are not binding on military commissions established under this chapter.” It expressly exempts the new military commission from UCMJ articles 10 (speedy trial), 31 (self-incrimination warnings) and 32 (pretrial investigations), and amends articles 21, 28, 48, 50(a), 104, and 106 of the UCMJ to

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30 GPW art. 3 § 1(d). The identical provison is included in each of the four Geneva Conventions and applies to any “conflict not of an international character.” The majority declined to accept the President’s interpretation of Common Article 3 as inapplicable to the conflict with al Qaeda and interpreted the phrase “in contradistinction to a conflict between nations,” which the Geneva Conventions designate a “conflict of international character.” *Hamdan*, at 2794-96.

31 *Id.* at 2796-97 (plurality opinion); *Id.* (Kennedy, J., concurring) at 2803. Justice Stevens, joined by Justices Ginsburg, Breyer, and Souter, further based their conclusion on the basis that M.C.O. No. 1 did not meet all criteria of art. 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I). While the United States is not party to Protocol I, the plurality noted that many authorities regard it as customary international law.

32 MCA § 4 (adding to 10 U.S.C. § 836(a) the words “except as provided in chapter 47A of this title” and to § 836(b) the words “except insofar as applicable to military commissions established under chapter 47A of this title”).

33 10 U.S.C. § 948a (as added by the MCA).
except military commissions under the new chapter.\textsuperscript{34} Other provisions of the UCMJ are to apply to trial by military commissions under the new chapter only to the extent provided therein.\textsuperscript{35}

**Jurisdiction**

The President’s M.O. was initially criticized by some as overly broad in its assertion of jurisdiction, because it could be interpreted to cover non-citizens who had no connection with Al Qaeda or the terrorist attacks of September 11, 2001, as well as offenders or offenses not triable by military commission pursuant to statute or the law of war.\textsuperscript{36} A person subject to the M.O. was amenable to detention and possible trial by military tribunal for violations of the law of war and “other applicable law.”\textsuperscript{37} M.C.O. No. 1 established that commissions may be convened to try aliens designated by the President as subject to the M.O., whether captured overseas or on U.S. territory, for violations of the law of war and “all other offenses triable by military commissions.” The MCA largely validates the President’s jurisdictional scheme for military commissions.

**Personal Jurisdiction.** While many observers agreed that the President is authorized by statute to convene military commissions in the “Global War on Terrorism,” some believed the President’s constitutional and statutory authority to establish such tribunals does not extend beyond Congress’ authorization to use armed force in response to the attacks.\textsuperscript{38} Under a literal interpretation of the M.O., however, the President could designate as subject to the order any non-citizen he believed had ever engaged in any activity related to international terrorism, no matter when or where these acts took place.

The M.O. was not cited for the authority to detain; instead, the Department of Defense asserted its authority to be grounded in the law of war, which permits belligerents to kill or capture and detain enemy combatants. The Department of

\textsuperscript{34} MCA § 4 (amending 10 U.S.C. §§ 821(jurisdiction of general courts-martial not exclusive), 828 (detail or employment of reporters and interpreters), 848 (power to punish contempt), 850(a) (admissibility of records of courts of inquiry), 904(aiding the enemy), and 906(spying)).

\textsuperscript{35} 10 U.S.C. § 948b(d)(2).


\textsuperscript{37} M.O. § 1(e) (finding such tribunals necessary to protect the United States and for effective conduct of military operations).

\textsuperscript{38} P.L. 107-40, 115 Stat. 224 (2001) (authorizing military force against those who “planned, authorized, committed, [or] aided” the September 11 attacks or who “harbored such ... persons”).
Defense defined “enemy combatant” to mean “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners,” including “any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”

The MCA applies a somewhat broader definition for “unlawful enemy combatant,” which includes

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

Thus, persons who do not directly participate in hostilities, but “purposefully and materially” support hostilities, are subject to treatment as an “unlawful enemy combatant” under the MCA. Citizens who fit the definition of “unlawful enemy combatant” are not amenable to trial by military commission under the MCA, but may be subject to detention.

The MCA does not define “hostilities” or explain what conduct amounts to “supporting hostilities.” To the extent that the jurisdiction is interpreted to include conduct that falls outside the accepted definition of participation in an armed conflict, the MCA might run afoul of the courts’ historical aversion to trying civilians before military tribunal when other courts are available. It is unclear whether this principle would apply to aliens captured and detained overseas, but the MCA does not appear to exempt from military jurisdiction permanent resident aliens captured in the United States who might otherwise meet the definition of “unlawful enemy combatant.” It is generally accepted that aliens within the United States are entitled to the same protections in criminal trials that apply to U.S. citizens. Therefore, to subject persons to trial by military commission who do not meet the exception carved out by the Supreme Court in *ex parte Quirin* for unlawful belligerents, to the extent such persons enjoy constitutional protections, would likely raise significant constitutional questions.

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40 10 U.S.C. § 948a(1).

41 See, e.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); Duncan v. Kahanamoku, 327 U.S. 304 (1945).

42 317 U.S. 1 (1942).
The MCA did not specifically identify who makes the determination that defendants meet the definition of “unlawful enemy combatant.” The government sought to establish jurisdiction based on the determinations of Combatant Status Review Tribunals (CSRTs), set up by the Pentagon to determine the status of detainees using procedures similar to those the Army uses to determine POW status during traditional wars.\(^{43}\) The CSRTs, however, are not empowered to determine whether the enemy combatants are unlawful or lawful, which recently led two military commission judges to hold that CSRT determinations are inadequate to form the basis for the jurisdiction of military commissions.\(^ {44}\) One of the judges determined that the military commission itself is not competent to make the determination, while the other judge appears to have determined that the government’s allegations did not set forth sufficient facts to conclude that the defendant, Salim Hamdan, was an unlawful enemy combatant.\(^ {45}\) The Court of Military Commission Review (CMCR) reversed the dismissal in the first case.\(^ {46}\) While it agreed that the CSRT determinations are insufficient by themselves to establish jurisdiction, it found the military judge erred in declaring that the status determination had to be made by a competent tribunal other than the military commission itself.

In denying the government’s request to find that CSRT determinations are sufficient to establish jurisdiction over the accused, the CMCR interpreted the MCA to require more than establishing membership in Al Qaeda or the Taliban. The CMCR found

\[\text{no support for [the government’s] claim that Congress, through the M.C.A., created a “comprehensive system” which sought to embrace and adopt all prior C.S.R.T. determinations that resulted in “enemy combatant” status assignments, and summarily turn those designations into findings that persons so labeled could also properly be considered “unlawful enemy combatants.” Similarly, we find no support for [the government’s] position regarding the parenthetical language contained in § 948a(1)(A)(i) of the M.C.A. — “including a person who is part of the Taliban, al Qaeda, or associated forces.” We do not read this language as declaring that a member of the Taliban, al Qaeda, or associated forces is per se an “unlawful enemy combatant” for purposes of exercising criminal jurisdiction before a military commission. We read the parenthetical comment as simply}\]

\[^{43}\text{See Department of Defense (DOD) Fact Sheet, “Combatant Status Review Tribunals,” available at [http://www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf]. CSRT proceedings are modeled on the procedures of Army Regulation (AR) 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997), which establishes administrative procedures to determine the status of detainees under the Geneva Conventions and prescribes their treatment in accordance with international law. It does not include a category for “unlawful” or “enemy” combatants, who would presumably be covered by the other categories.}\]

\[^{44}\text{See Josh White and Shailagh Murray, \textit{Guantanamo Ruling Renews The Debate Over Detainees}, WASH. POST, June 6, 2007, at A3.}\]

\[^{45}\text{The orders are available on the DOD website at [http://www.defenselink.mil/news/ courtofmilitarycommissionreview.html] (last visited September 14, 2007).}\]

elaborating upon the sentence immediately preceding it. That is, that a member of the Taliban, al Qaeda, or associated forces who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents will also qualify as an “unlawful enemy combatant” under the M.C.A. (emphasis added [by the court]).

The CMCR further explained that executive branch memoranda defining “enemy combatant” status were implemented solely for purposes of continued detention of personnel captured during hostilities and applicability of the Geneva Conventions. By contrast,

Congress in the M.C.A. was carefully and deliberately defining status for the express purpose of specifying the in personam criminal jurisdiction of military commission trials. In defining what was clearly intended to be limited jurisdiction, Congress also prescribed serious criminal sanctions for those members of this select group who were ultimately convicted by military commissions.

Further, because detainees could not have known when their CSRT reviews were taking place that the determination could subject them to the jurisdiction of a military commission, the CMCR suggested that the use of CSRT determinations to establish jurisdiction would undermine Congress’s intent that military commissions operate as “regularly constituted court[s], affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of Common Article 3 of the Geneva Conventions.”

As a consequence of the decision, the Department of Defense will not have to institute new status tribunals, but the prosecution has the burden of proving jurisdiction over each person charged for trial by a military commission.

Subject-Matter Jurisdiction. The MCA provides jurisdiction to military commissions over “any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant....” Crimes to be triable by military commission are defined in subchapter VII (10 U.S.C. §§ 950p - 950w). Offenses include the following: murder of protected persons; attacking civilians, civilian objects, or protected property; pillaging; denying quarter; taking hostages; employing poison or similar weapons; using protected persons or property as shields; torture, cruel or inhuman treatment; intentionally causing serious bodily injury; mutilating or maiming; murder in violation of the law of war; destruction of property in violation of the law of war; using treachery or perfidy; improperly using a flag of truce or distinctive emblem; intentionally mistreating a dead body; rape; sexual assault or abuse; hijacking or hazardous a vessel or aircraft; terrorism; providing material support for terrorism; wrongfully aiding the enemy; spying; contempt; perjury and obstruction of justice. 10 U.S.C. § 950v. Conspiracy (§ 950v(b)(28)),

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47 Id. at 13.
48 Id.
49 Id. at 15 (citing 10 U.S.C. § 948b(f)).
50 10 U.S.C. § 948d.
Military commissions under M.C.O. No. 1 were to have jurisdiction over crimes listed in M.C.I. No. 2, Crimes and Elements for Trials by Military Commission, which appears to have served as a basis for the MCA list. The list of crimes in M.C.I. No. 2 was not meant to be exhaustive. Rather, it was intended as an illustration of acts punishable under the law of war or triable by military commissions, but did not permit trial for ex post facto crimes.

Although many of the crimes defined in the MCA seem to be well-established offenses against the law of war, at least in the context of an international armed conflict, a court might conclude that some of the listed crimes are new. For

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51 M.C.I. No. 2 was published in draft form by DOD for outside comment. The final version appears to have incorporated some of the revisions, though not all, suggested by those who offered comments. See NATIONAL INSTITUTE OF MILITARY JUSTICE, MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK 95 (2003) [hereinafter “SOURCEBOOK”].

52 Crimes against the law of war listed in M.C.I. No. 2 are: 1) Willful Killing of Protected Persons; 2) Attacking Civilians; 3) Attacking Civilian Objects; 4) Attacking Protected Property; 5) Pillaging; 6) Denying Quarter; 7) Taking Hostages; 8) Employing Poison or Analogous Weapons; 9) Using Protected Persons as Shields; 10) Using Protected Property as Shields; 11) Torture; 12) Causing Serious Injury; 13) Mutilation or Maiming; 14) Use of Treachery or Perfidy; 15) Improper Use of Flag of Truce; 16) Improper Use of Protective Emblems; 17) Degrading Treatment of a Dead Body; and 18) Rape.

53 Crimes “triable by military commissions” include 1) Hijacking or Hazarding a Vessel or Aircraft; 2) Terrorism; 3) Murder by an Unprivileged Belligerent; 4) Destruction of Property by an Unprivileged Belligerent; 5) Aiding the Enemy; 6) Spying; 7) Perjury or False Testimony; and 8) Obstruction of Justice Related to Military Commissions. Listed as “other forms of liability and related offenses” are: 1) Aiding or Abetting; 2) Solicitation; 3) Command/Superior Responsibility - Perpetrating; 4) Command/Superior Responsibility - Misprision; 5) Accessory After the Fact; 6) Conspiracy; and 7) Attempt.

54 See M.C.I. No. 2 § 3(A) (“No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question.”).

55 For example, Article 3 of the Statute governing the International Criminal Tribunal for the former Yugoslavia (ICTY) includes the following as violations of the laws or customs of war in non-international armed conflict:

 Such violations shall include, but not be limited to:
(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

(continued...)
example, a plurality of the Supreme Court in *Hamdan* agreed that conspiracy is not a war crime under the traditional law of war.\(^{56}\) The crime of “murder in violation of the law of war,” which punishes persons who, as unprivileged belligerents, commit hostile acts that result in the death of any persons, including lawful combatants, may also be new. While it appears to be well-established that a civilian who kills a lawful combatant is triable for murder and cannot invoke the defense of combatant immunity, it is not clear that the same principle applies in armed conflicts of a non-international nature, where combatant immunity does not apply. The International Criminal Tribunal for the former Yugoslavia (ICTY) has found that war crimes in the context of non-international armed conflict include murder of civilians, but have implied that the killing of a combatant is not a war crime.\(^{57}\) Similarly, defining as a war crime the “material support for terrorism”\(^{58}\) does not appear to be supported by historical precedent.

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\(^{55}\) (...continued)

UN Doc. S/Res/827 (1993), art. 3. The ICTY Statute and procedural rules are available at [http://www.un.org/icty/legaldoc-e/index.htm]. The Trial Chamber in the case Prosecutor v. Naletilic and Martinovic, (IT-98-34) March 31, 2003, interpreted Article 3 of the Statute to cover specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as grave breaches by those Conventions; (iii) violations of [Common Article 3] and other customary rules on internal conflicts, and (iv) violations of agreements binding upon the parties to the conflict” *Id.* at para. 224. See also Prosecutor v. Tadic, (IT-94-1) (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 86-89.

The Appeals Chamber there set forth factors that make an offense a “serious” violation necessary to bring it within the ICTY’s jurisdiction:

(i) the violation must constitute an infringement of a rule of international humanitarian law;
(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met ...;
(iii) the violation must be “serious,” that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim....
(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

*Id.* at para. 94.


\(^{57}\) *Prosecutor v. Kvocka et al.*, Case No. IT-98-30/1 (Trial Chamber), November 2, 2001, para. 124: (“An additional requirement for Common Article 3 crimes under Article 3 of the Statute is that the violations must be committed against persons ‘taking no active part in the hostilities.’”); *Prosecutor v. Jelisic*, Case No. IT-95-10 (Trial Chamber), December 14, 1999, para. 34 (“Common Article 3 protects “[p]ersons taking no active part in the hostilities” including persons “placed *hors de combat* by sickness, wounds, detention, or any other cause.”); *Prosecutor v. Blaskic*, Case No. IT-95-14 (Trial Chamber), March 3, 2000, para. 180 (“Citizens within the meaning of Article 3 are persons who are not, or no longer, members of the armed forces. Civilian property covers any property that could not be legitimately considered a military objective.”).

\(^{58}\) 10 U.S.C. § 950v(b)(25)(incorporating the definition found in 18 U.S.C. § 2339(A)).
Part IV of the Manual for Military Commissions (M.M.C.) sets forth the elements of crimes defined by the MCA. There are few substantive differences between the M.M.C. definitions and those previously set forth in M.C.I. No. 2. The M.M.C. definition of “Aiding the Enemy” incorporates the element of wrongfulness added by 10 U.S.C. § 950v(26), necessitating a new finding that the accused owed some form of allegiance to the United States at the time the conduct took place. Two crimes, “mutilation or maiming” and “causing serious injury,” were altered to remove the element that required that the victim was in the custody or control of the accused. The new definitions appear to clarify that combat activities, including attacks against combatants, are covered when the accused lacks combatant immunity. The crime “murder by an unprivileged belligerent” was broadened in the definition of “murder in violation of the law of war” to include not just killing, but also deaths resulting from an act or omission of the accused, where the accused intended to kill the victim or victims.

**Temporal and Spatial Jurisdiction.** The law of war has traditionally applied within the territorial and temporal boundaries of an armed conflict between at least two belligerents. It traditionally has not been applied to conduct occurring on the territory of neutral states or on territory not under the control of a belligerent, to conduct that preceded the outbreak of hostilities, or to conduct during hostilities that do not amount to an armed conflict. Unlike the conflict in Afghanistan, the “Global War on Terrorism” does not have clear boundaries in time or space, nor is it entirely clear who the belligerents are.

The broad reach of the M.O. to encompass conduct and persons customarily subject to ordinary criminal law evoked criticism that the claimed jurisdiction of the military commissions exceeded the customary law of armed conflict, which M.C.I. No. 2 purported to restate. The MCA provides jurisdiction to military commissions

59 10 U.S.C. § 950v(b)(13-14). For “serious bodily injury,” the MCA specifically includes “lawful combatants” as possible victims.

60 See WINTHROP, supra note 11, at 773 (the law of war “prescribes the rights and obligations of belligerents, or ... define[s] the status and relations not only of enemies — whether or not in arms — but also of persons under military government or martial law and persons simply resident or being upon the theatre of war, and which authorizes their trial and punishment when offenders”); id at 836 (military commissions have valid jurisdiction only in theater of war or territory under martial law or military government).

61 Some may argue that no war has a specific deadline and that all conflicts are in a sense indefinite. In traditional armed conflicts, however, it has been relatively easy to identify when hostilities have ended; for example, upon the surrender or annihilation of one party, an annexation of territory under dispute, an armistice or peace treaty, or when one party to the conflict unilaterally withdraws its forces. See GERHARD VON GLAHN, LAW AMONG NATIONS 722-730 (6th ed. 1992).

over covered offenses “when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.”

However, certain definitions used in describing the offenses triable by military commissions would seem to limit many of them to conduct occurring in an armed conflict.

A common element among the crimes enumerated in M.C.I. No. 2 was that the conduct “took place in the context of and was associated with armed conflict.” The instruction explained that the phrase required a “nexus between the conduct and armed hostilities,” which has traditionally been a necessary element of any war crime. However, the definition of “armed hostilities” was broader than the customary definition of war or “armed conflict.” According to the M.C.I., “armed hostilities” need not be a declared war or “ongoing mutual hostilities.” Instead, any hostile act or attempted hostile act might have had sufficient nexus if its severity rose to the level of an “armed attack,” or if it were intended to contribute to such acts. Some commentators have argued that the expansion of “armed conflict” beyond its customary bounds improperly expanded the jurisdiction of military commissions beyond those that by statute or under the law of war are triable by military commissions. The elements of crimes set forth in the M.M.C. also include a nexus to an armed conflict, but neither the manual nor the MCA contains a definition. The Supreme Court has not clarified the scope of the “Global War on Terrorism,” but has not simply deferred to the President’s interpretation.

In enacting the MCA, Congress seems to have provided the necessary statutory definitions of criminal offenses to overcome previous objections with respect to subject matter jurisdiction of military commissions. However, questions may still arise with respect to the necessity for conduct to occur in the context of an armed conflict in order to be triable by military commission. There is no express requirement to that effect in the MCA. The overall purpose of the statute together with the elements of some of the crimes arguably may be read to require a nexus.

The definition for “Enemy” provided in M.C.I. No. 2 raised similar issues. According to § 5(B), “Enemy” includes

any entity with which the United States or allied forces may be engaged in armed conflicts or which is preparing to attack the United States. It is not limited to

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62 (...continued)
of treating terrorist attacks as war crimes, but identifying possible pitfalls of creating a new international legal regime).

63 10 U.S.C. § 948d.

64 M.C.I. No. 2 § 5(C).

65 Id.

66 See SOURCEBOOK, supra note 51, at 38-39 (NACDL comments); id. at 51 (Human Rights Watch (HRW) comments); id. at 59-60 (LCHR). However, M.C.I. No. 9 lists among possible “material errors of law” for which the Reviewing Panel might return a finding for further procedures, “a conviction of a charge that fails to state an offense that by statute or the law of war may be tried by military commission...” M.C.I. No. 9 § 4(C)(2)(b).
foreign nations, or foreign military organizations or members thereof. “Enemy” specifically includes any organization of terrorists with international reach.

Some observers argued that this impermissibly subjected suspected international criminals to the jurisdiction of military commissions in circumstances in which the law of armed conflict has not traditionally applied. The distinction between a “war crime,” traditionally subject to the jurisdiction of military commissions, and a common crime, traditionally the province of criminal courts, may prove to be a matter of some contention during some of the proceedings. The MCA does not define “enemy.” Military commissions trying persons accused of spying or aiding the enemy, for example, face the challenge of determining whether the conduct assisted an “enemy of the United States” as required under the MCA.

### Composition and Powers

M.C.O. No. 1 provided for military commissions to consist of panels of three to seven military officers as well as one or more alternate members who had been “determined to be competent to perform the duties involved” by the Secretary of Defense or his designee, and could include reserve personnel on active duty, National Guard personnel in active federal service, and retired personnel recalled to active duty. The rules also permitted the appointment of persons temporarily commissioned by the President to serve as officers in the armed services during a national emergency. The presiding officer was required to be a judge advocate in any of the U.S. armed forces, but not necessarily a military judge.

The MCA provides for a qualified military judge to preside over panels of at least five military officers, except in the cases in which the death penalty is sought, in which case the minimum number of panel members is twelve. Procedures for assigning military judges as well as the particulars regarding the duties they are to perform are left to the Secretary of Defense to prescribe, except that the military judge may not be permitted to consult with members of the panel outside of the presence of the accused and counsel except as prescribed in 10 U.S.C. § 949d. The military judge has the authority to decide matters related to the admissibility of evidence, including the treatment of classified information, but has no authority to compel the government to produce classified information.

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67 See SOURCEBOOK, supra note 51, at 38 (NACDL comments).
68 See id. at 98 (commentary of Eugene R. Fidell and Michael F. Noone).
69 M.C.O. No. 1 § 4(A)(3).
70 See 10 U.S.C. § 603, listed as reference (e) of M.C.O. No. 1.
71 M.C.O. No. 1 § 4(A)(4). See NIMJ, supra note 36, at 17 (commenting that the lack of a military judge to preside over the proceedings is a significant departure from the UCMJ). A judge advocate is a military officer of the Judge Advocate General’s Corps of the Army or Navy (a military lawyer). A military judge is a judge advocate who is certified as qualified by the JAG Corps of his or her service to serve in a role similar to civilian judges.
72 10 U.S.C. §§ 948m and 949m.
Like the previous DOD rules, the MCA empowers military commissions to maintain decorum during proceedings. M.C.O. No. 1 authorized the presiding officer “to act upon any contempt or breach of Commission rules and procedures,” including disciplining any individual who violates any “laws, rules, regulations, or other orders” applicable to the commission, as the presiding officer saw fit. Presumably this power was to include not only military and civilian attorneys but also any witnesses summoned under order of the Secretary of Defense pursuant to M.C.O. No. 1 § 4(A)(5). The MCA, 10 U.S.C. § 950w authorizes the military commissions to “punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder.” It is unclear whether this section is meant to expand the jurisdiction of military commissions to cover non-enemy combatant witnesses or civilian observers, but the M.M.C. provides for jurisdiction over all persons, including civilians, and permits military judges to sentence those convicted with both fines and terms of confinement. The UCMJ authorizes other military commissions to punish contempt with a fine of $100, confinement for up to 30 days, or both. The M.M.C. does not set a limit on punishment for contempt.

The MCA provides that military commissions have the same power as a general court-martial to compel witnesses to appear in a manner “similar to that which courts of the United States having criminal jurisdiction may lawfully issue.” However, rather than providing that the trial counsel and the defense are to have equal opportunity to compel witnesses and obtain evidence, the MCA provides the defense a “reasonable opportunity” to obtain witnesses and evidence. The M.M.C. provides the trial counsel with responsibility for producing witnesses requested by the defense, unless trial counsel determines the witness’s testimony is not required, but the defense counsel may appeal the determination to the convening authority or, after referral, the military judge.

Under article 47 of the UCMJ, a duly subpoenaed witness who is not subject to the UCMJ and who refuses to appear before a military commission may be prosecuted in federal court. This article is not expressly made inapplicable to the military commissions established under the MCA. The M.M.C. provides the military judge or any person designated to take evidence authority to issue a subpoena to compel the presence of a witness or the production of documents. As is the case with

73 See M.C.O. No. 1 § 3(C) (asserting jurisdiction over participants in commission proceedings “as necessary to preserve the integrity and order of the proceedings”).

74 Rule for Military Commissions (R.M.C.) 809.

75 See 10 U.S.C. § 848. This section is made inapplicable to military commissions in chapter 47a by MCA § 4.

76 10 U.S.C. § 950j.

77 R.M.C. 703.

78 See 10 U.S.C. § 847. It is unclear how witnesses are “duly subpoenaed;” 10 U.S.C. § 846 empowers the president of the court-martial to compel witnesses to appear and testify and to compel production of evidence, but this statutory authority does not explicitly apply to military commissions. The subpoena power extends to “any part of the United States, or the Territories, Commonwealth and possessions.”
general courts-martial, the military judge may issue a warrant of attachment to compel the presence of a witness who refuses to comply with a subpoena.  

One of the perceived shortcomings of the M.O. had to do with the problem of command influence over commission personnel. M.C.O. No. 1 provided for a “full and fair trial,” but contained few specific safeguards to address the issue of impartiality. The President or his designee were empowered to decide which charges to press; to select the members of the panel, the prosecution and the defense counsel, and the members of the review panel; and to approve and implement the final outcome. The President or his designees had the authority to write procedural rules, interpret them, enforce them, and amend them. Justice Kennedy remarked in his concurring opinion that the concentration of authority in the Appointing Authority was a significant departure from the structural safeguards Congress has built into the military justice system.

The MCA, by providing requirements for the procedural rules to guard against command influence, may alleviate these concerns. In particular, the MCA prohibits the unlawful influence of military commissions and provides that neither the military commission members nor military counsel may have adverse actions taken against them in performance reviews. Many of the procedural rules are left to the discretion of the Secretary of Defense or his designee, more so than is the case under the UCMJ. Rule 104 of the Rules for Military Commissions (R.M.C.) prohibits command influence in terms similar to those in the Manual for Courts-Martial, except that they apply more broadly to “all persons” rather than only to “all persons subject to the [UCMJ].”

### Procedures Accrued the Accused

M.C.O. No. 1 contained procedural safeguards similar to many of those that apply in general courts-martial, but did not specifically adopt any procedures from the UCMJ; even those that explicitly apply to military commissions. The M.C.O. made clear that its rules alone and no others were to govern the trials, perhaps precluding commissions from looking to the UCMJ or other law to fill in any gaps.
Without explicitly recognizing that accused persons had rights under the law, the M.C.O. listed procedures to be accorded to the accused, but specified that these were not to be interpreted to give rise to any enforceable right, benefit or privilege, and were not to be construed as requirements of the U.S. Constitution. Prior to the DTA, the accused had no established opportunity to challenge the interpretation of the rules or seek redress in case of a breach.

The MCA lists a minimum set of rights to be afforded the accused in any trial, and provides the accused an opportunity to appeal adverse verdicts based on “whether the final decision was consistent with the standards and procedures specified” in the MCA, and “to the extent applicable, the Constitution and the laws of the United States.” The Department of Defense rules provided the accused was to be informed of the charges sufficiently in advance of trial to prepare a defense; the MCA provides that the accused is to be informed of the charges as soon as practicable after the charges and specifications are referred for trial. The accused continues under the MCA to be presumed innocent until determined to be guilty. As was the case with the previous DOD rules, the presumption of innocence and the right against self-incrimination are to result in an entered plea of “Not Guilty” if the accused refuses to enter a plea or enters a “Guilty” plea that is determined to be involuntary or ill informed. The accused has the right not to testify at trial and to have the opportunity to present evidence and cross-examine witnesses for the prosecution, as was the case under the previous DOD rules.

Open Hearing. The M.C.O. rules provided that the trials themselves were to be conducted openly except to the extent the Appointing Authority or presiding officer closed proceedings to protect classified or classifiable information or information protected by law from unauthorized disclosure, the physical safety of participants, intelligence or law enforcement sources and methods, other national security interests, or “for any other reason necessary for the conduct of a full and fair trial.” However, at the discretion of the Appointing Authority, “open proceedings” did not necessarily have to be open to the public and the press.

83 Id. § 10.
84 Id.; M.C.I. No. 1 § 6 (Non-Creation of Right).
85 M.C.O. No. 1 § 5(A).
86 10 U.S.C. § 948q.
87 M.C.O. No. 1 §§ 5(B) and 6(B); 10 U.S.C. § 949i.
88 10 U.S.C. § 949a(b).
89 Id. §§ 4(A)(5)(a); 5(K); 6B(3).
90 M.C.O. No. 1 § 6(D)(5).
91 M.C.O. No. 1 at § 6(B)(3) (“Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press, and public release of transcripts at the appropriate time.”). In courts-martial, “public” is defined to include members of the military as well as civilian communities. Rules for Court-Martial (R.C.M.) Rule 806.
Because the public, and not just the accused, has a constitutionally protected interest in public trials, the extent to which trials by military commission are open to the press and public may be subject to challenge by media representatives. The First Amendment right of public access extends to trials by court-martial, but is not absolute. Trials may be closed only where the following test is met: the party seeking closure demonstrates an overriding interest that is likely to be prejudiced; the closure is narrowly tailored to protect that interest; the trial court has considered reasonable alternatives to closure; and the trial court makes adequate findings to support the closure.

The MCA provides that the military judge may close portions of a trial only to protect information from disclosure where such disclosure could reasonably be expected to cause damage to the national security, such as information about intelligence or law enforcement sources, methods, or activities; or to ensure the physical safety of individuals. The information to be protected from disclosure does not necessarily have to be classified. To the extent that the exclusion of the press and public is based on the discretion of the military judge without consideration of the constitutional requirements relative to the specific exigencies of the case at trial, the procedures may implicate the First Amendment rights of the press and public. The M.M.C. provides, in Rule 806, that the military judge may close proceedings only to protect information designated for such protection by a government agency or to secure the physical safety of individuals. However, the rule also provides that “in order to maintain the dignity and decorum of the proceedings or for other good cause, the military judge may reasonably limit the number of spectators in, and the means of access to, the courtroom, and exclude specific persons from the courtroom.” Such limitations must be supported by written findings.

Although the First Amendment bars government interference with the free press, it does not impose on the government a duty “to accord the press special access to information not shared by members of the public generally.” The reporters’ right to gather information does not include an absolute right to gain access to areas not open to the public. Access of the press to the proceedings of military commissions may be an issue for the courts ultimately to decide, even if those tried by military

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95 10 U.S.C. § 949d(d).


97 See Juan R. Torruella, On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power, 4 U. PA. J. CONST. L. 648, 718 (2002) (noting that proceedings held at the Guantánamo Bay Naval Station may be de facto closed due to the physical isolation of the facility).
commission are determined to lack the protection of the Sixth Amendment right to an open trial or means to challenge the trial.\footnote{Cf. Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (finding closure of immigration hearings based on relation to events of September 11 unconstitutional infringement on the First Amendment right to free press). But see North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) cert denied 538 U.S. 1056 (2003)(no presumption of openness for immigration hearings).}

**Right to be Present.** Under UCMJ art. 39,\footnote{10 U.S.C. § 839.} the accused at a court-martial has the right to be present at all proceedings other than the deliberation of the members. Under the DOD rules for military commissions under M.C.O. No. 1, the accused or the accused’s civilian attorney could be precluded from attending portions of the trial for security reasons, but a detailed defense counsel was to be present for all hearings. The MCA does not provide for the exclusion of the accused from portions of his trial, and does not allow classified information to be presented to panel members that is not disclosed to the accused. The accused may be excluded from trial proceedings (other than panel deliberations) by the military judge only upon a determination that the accused persists in disruptive or dangerous conduct.\footnote{10 U.S.C. § 949d(e).}

**Right to Counsel.** As is the case in military courts-martial, an accused before a military commission under both M.C.O. No. 1 and the MCA has the right to have military counsel assigned free of charge. The right to counsel attaches much earlier in the military justice system, where the accused has a right to request an attorney prior to being interrogated about conduct relating to the charges contemplated. Under the MCA, at least one qualifying military defense counsel is to be detailed “as soon as practicable after the swearing of charges….\footnote{10 U.S.C. § 948k.} The accused may also hire a civilian attorney who is a U.S. citizen, is admitted to the bar in any state, district, or possession, has never been disciplined, has a SECRET clearance (or higher, if necessary for a particular case), and agrees to comply with all applicable rules. If civilian counsel is hired, the detailed military counsel serves as associate counsel.\footnote{10 U.S.C. § 949c(b); R.M.C. 804.} Unlike the DOD rules, the MCA provides that the accused has the right to self-representation.\footnote{10 U.S.C. § 949a(b)(2)(D). M.C.I. No. 4 required detailed defense counsel to “defend the accused zealously within the bounds of the law ... notwithstanding any intention expressed by the accused to represent himself.” M.C.I. No. 4 § 3(C).}

Previous DOD rules provided that defense counsel was to be assigned free of cost once charges were referred, but permitted the accused to request another JAG officer to be assigned as a replacement if available in accordance with any applicable instructions or supplementary regulations that might later be issued.\footnote{M.C.O. No. 1 § 4(C). M.C.I. No. 4 § 3(D) listed criteria for the “availability” of selected...} The MCA
does not provide the accused an opportunity to request a specific JAG officer to act as counsel. However, the accused may request a replacement counsel from the Chief Defense Counsel if he believes his detailed counsel has been ineffective or if he is otherwise materially dissatisfied with said counsel.\textsuperscript{105} If the accused retains the services of a civilian attorney, the MCA provides that military defense counsel is to act as associate counsel.\textsuperscript{106} The M.M.C. provides that, in the event the accused elects to represent himself, the detailed counsel shall serve as “standby counsel,”\textsuperscript{107} and the military judge may require that such defense counsel remain present during proceedings.\textsuperscript{108}

The MCA requires civilian attorneys defending an accused before military commission to meet the same strict qualifications that applied under DOD rules.\textsuperscript{109} Under M.C.O. No. 1, a civilian attorney had to be a U.S. citizen with at least a SECRET clearance,\textsuperscript{110} with membership in any state or territorial bar and no disciplinary record, and was required to agree in writing to comply with all rules of court.\textsuperscript{111} The MCA provides similar requirements,\textsuperscript{112} but does not set forth in any detail what rules might be established to govern the conduct of civilian counsel. Under the previous rules, the Appointing Authority and DOD General Counsel were empowered to revoke any attorney’s eligibility to appear before any commission.\textsuperscript{113} Under the present regulation, the Chief Defense Counsel has the responsibility of determining the eligibility of civilian defense counsel, and may reconsider the determination based on subsequently discovered information indicating material nondisclosure or misrepresentation in the application, or material violation of obligations of the civilian defense counsel, or other good cause."\textsuperscript{114} Alternatively, the Chief Defense Counsel may refer the matter to either the convening authority or the

\textsuperscript{104} (...continued)
detailed counsel.

\textsuperscript{105} Regulation for Trial by Military Commissions, Para. 9-2. The accused may request a specific JAG officer from the cadre of officers assigned to the Defense Counsel’s Office, but does not have a right to choose.

\textsuperscript{106} 10 U.S.C. § 949c(b)(5).

\textsuperscript{107} R.M.C. 501.

\textsuperscript{108} R.M.C. 506(c).

\textsuperscript{109} 10 U.S.C. § 949c(b).

\textsuperscript{110} Originally, civilian attorneys were required to pay the costs associated with obtaining a clearance. M.C.I. No. 5 §3(A)(2)(d)(ii). DOD later waived the administrative costs for processing applications for TOP SECRET clearances in cases that would require the higher level of security clearance. See DOD Press Release No. 084-04, New Military Commission Orders, Annex Issued (February 6, 2004), available at [http://www.defenselink.mil/releases/2004/nr20040206-0331.html] (Last visited August 15, 2007).

\textsuperscript{111} M.C.O. No. 1 § 4(C)(3)(b).

\textsuperscript{112} 10 U.S.C. §949c, R.M.C. 502(d)(3).

\textsuperscript{113} M.C.I. No. 5 § 3(e)(B)(6).

\textsuperscript{114} Regulation for Trial by Military Commissions, Para. 9-5(c).
DOD Deputy General Counsel (Personnel and Health Policy), who may revoke or suspend the qualification of any member of the civilian defense counsel pool.

The MCA does not address the monitoring of communications between the accused and his attorney, and does not provide for an attorney-client privilege. Rule 502 of the Military Commission Rules of Evidence (Mil. Comm. R. Evid.) provides for substantially the same lawyer-client privilege that applies in courts-martial. With respect to the monitoring of attorney-client communications, the previous DOD rules for military commissions initially provided that civilian counsel were required to agree that communications with the client were subject to monitoring. That requirement was later modified to require prior notification and to permit the attorney to notify the client when monitoring is to occur. Although the government was not permitted to use information against the accused at trial, some argued that the absence of the normal attorney-client privilege could impede communications between them, possibly decreasing the effectiveness of counsel. Civilian attorneys were bound to inform the military counsel upon learning of information about a pending crime that could lead to “death, substantial bodily harm, or a significant impairment of national security.” The required agreement under the present regulations imposes a similar duty to inform, but does not mention monitoring of communications.

**Evidentiary Matters**

The Sixth Amendment to the U.S. Constitution guarantees that those accused in criminal prosecutions have the right to be “confronted with the witnesses against [them]” and to have “compulsory process for obtaining witnesses in [their] favor.”

The Supreme Court has held that “[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of

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115 Mil. R. Evid. 502.

116 See M.C.O. No. 3, “Special Administrative Measures for Certain Communications Subject to Monitoring.” The required affidavit and agreement annexed to M.C.I. No. 3 was modified to eliminate the following language:

I understand that my communications with my client, even if traditionally covered by the attorney-client privilege, may be subject to monitoring or review by government officials, using any available means, for security and intelligence purposes. I understand that any such monitoring will only take place in limited circumstances when approved by proper authority, and that any evidence or information derived from such communications will not be used in proceedings against the Accused who made or received the relevant communication.

117 M.C.I. No. 5, Annex B § II(J).

118 Regulation for Trial by Military Commissions, Figure 9.2. Affidavit and Agreement by Civilian Defense Counsel, II(J).

fact.”120 The Military Rules of Evidence (Mil. R. Evid.)121 provide that “[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States [and other applicable statutes, regulations and rules].”122 Relevant evidence is excluded if its probative value is outweighed by other factors.123 At court-martial, the accused has the right to view any documents in the possession of the prosecution related to the charges, and evidence that reasonably tends to negate the guilt of the accused, reduce the degree of guilt or reduce the punishment,124 with some allowance for protecting non-relevant classified information.125

Supporters of the use of military commissions to try suspected terrorists have viewed the possibility of employing evidentiary standards that vary from those used in federal courts or in military courts-martial as a significant advantage over those courts. The Supreme Court seemed to indicate that the previous DOD rules were inadequate under international law, remarking that “various provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 [of Protocol I to the Geneva Conventions] and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him.”126

The MCA provides that the “accused shall be permitted to present evidence in his defense, to cross-examine the witnesses who testify against him, and to examine and respond to evidence admitted against him on the issue of guilt or innocence and for sentencing.”127 It is not clear what evidence might be excluded from this requirement as irrelevant to the issues of guilt, innocence, or appropriate punishment. A likely issue will be whether evidence relevant to the credibility of a witness or the authenticity of a document is permitted to be excluded from the accused’s right to examine and respond to evidence, unless expressly provided elsewhere in the MCA.

122 Mil. R. Evid. 402.
123 Mil. R. Evid. 403 (relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence”).
124 See R.C.M. 701(a)(6); NIMJ, supra note 36, at 31-32.
125 Mil. R. Evid. 505 provides procedures similar to the Classified Information Protection Act (CIPA) that applies in civilian court.
126 Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2798 (2006)(while accepting that the government “has a compelling interest in denying [the accused] access to certain sensitive information,” stating that “at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him”).
**Discovery.** The MCA provides that defense counsel is to be afforded a reasonable opportunity to obtain witnesses and other evidence, including evidence in the possession of the United States, as specified in regulations prescribed by the Secretary of Defense. Unlike M.C.O. No. 1, the MCA does not expressly direct the prosecution to provide to the accused all of the evidence trial counsel intends to present. However, as noted above, the accused is entitled to examine and respond to evidence relevant to establishing culpability. Both M.C.O. No. 1 and the MCA provide that the accused is entitled to exculpatory information known to the prosecution, with procedures permitting some variance for security concerns.

Like M.C.O. No. 1, the MCA provides for the protection of national security information during the discovery phase of a trial. The military judge must authorize discovery in accordance with rules prescribed by the Secretary of Defense to redact classified information or to provide an unclassified summary or statement describing the evidence. However, where M.C.O. No. 1 permitted the withholding of any “Protected Information,” the MCA permits the government to withhold only properly classified information that has been determined by the head of a government agency or department to require protection because its disclosure could result in harm to the national security.

Under M.C.O. No. 1, the presiding officer had the authority to permit the deletion of specific items from any information to be made available to the accused or defense counsel, or to direct that unclassified summaries of protected information be prepared. The accused was to have access to protected information to be used by the prosecution and exculpatory protected information “to the extent consistent with national security, law enforcement interests, and applicable law.” Defense counsel was permitted to view the classified version only if the evidence was to be admitted at trial. The MCA does not provide defense counsel with access to the classified information that serves as the basis for substitute or redacted proffers.

The MCA provides for the mandatory production of exculpatory information known to trial counsel (defined as exculpatory evidence that the prosecution would not deem to be protected under Sec. 6(D)(5)).

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129 M.C.O. No. 1, § 5(E) (requiring such information, as well as any exculpatory evidence known by the prosecution, to be provided to the accused as long as such information was not deemed to be protected under Sec. 6(D)(5)).
131 M.C.O. No. 1, § 6 (defining “Protected Information” to include classified or classifiable information, information protected “by law or rule from unauthorized disclosure,” information that could endanger trial participants, intelligence and law enforcement sources, methods or activities, or “information concerning other national security interests”).
132 M.C.O. No. 1, § 6(D)(5)(b). Some observers noted that protected information could include exculpatory evidence as well as incriminating evidence, which could implicate 6th Amendment rights and rights under the Geneva Convention, if applicable. See HRF, supra note 62, at 3.
133 M.C.O. No. 1 § 6(D)(5)(b).
be required to disclose in a general court-martial\textsuperscript{134}, but does not permit defense counsel or the accused to view classified information. The military judge is authorized to permit substitute information, in particular when trial counsel moves to withhold information pertaining to the sources, methods, or activities by which the information was acquired. If the military judge finds that evidence is classified, he or she must authorize the trial counsel to protect the sources and methods by which such evidence was acquired.\textsuperscript{135} The military judge may (but need not) require that the defense and the commission members be permitted to view an unclassified summary of the sources, methods, or activities, to the extent practicable and consistent with national security.\textsuperscript{136}

R.M.C. 701(e) provides that trial counsel must provide exculpatory evidence that he would be required to produce in general courts-martial, subject to exceptions where the government asserts a national security privilege. In such a case, the military judge may issue a protective order, but the defense is entitled to an adequate substitute for the information.\textsuperscript{137} Such a substitute may involve, to the extent practicable, the deletion of specified items of classified information from documents made available to the defense; the substitution of a portion or summary of the information for such classified documents; or the substitution of a statement admitting relevant facts that the classified information would tend to prove.\textsuperscript{138}

In the event the military judge determines that the government’s proposed substitute would be inadequate or impracticable for use in lieu of evidence that the government seeks to introduce at trial, evidence that is exculpatory, or evidence that is necessary to enable the defense to prepare for trial, and the government objects to methods the judge deems appropriate, the judge is required to “issue any order that the interests of justice require.”\textsuperscript{139} Such an order must give the government an opportunity to comply to avoid a sanction, and may include striking or precluding all or part of a witness’s testimony, declaring a mistrial, ruling against the government on any issue as to which the evidence is probative and material to the defense, or

\textsuperscript{134} It is not clear what information would be required to be provided under this subsection. Discovery at court-martial is controlled by R.C.M. 701, which requires trial counsel to provide to the defense any papers accompanying the charges, sworn statements in the possession of trial counsel that relate to the charges, and all documents and tangible objects within the possession or control of military authorities that are material to the preparation of the defense or that are intended for use in the prosecution’s case-in-chief at trial. Exculpatory evidence is not defined, but it appears to be encompassed under “evidence favorable to the defense,” which includes evidence that tends to negate the guilt of the accused of an offense charged, reduce the degree of guilt, or reduce the applicable punishment. The M.M.C. defines “exculpatory evidence” in those same terms. R.M.C. 701(e).

\textsuperscript{135} R.M.C. 701(f)(3).

\textsuperscript{136} 10 U.S.C. § 949j.

\textsuperscript{137} R.M.C. 701(f)(5). Protective orders are covered under Mil. Comm. R. Evid. 505, and include orders that limit the scope of direct examination and cross examination of witnesses.

\textsuperscript{138} R.M.C. 701(f)(2).

\textsuperscript{139} Mil. Comm. R. Evid. 505(e)(4).
Admissibility of Evidence. The standard for the admissibility of evidence in the MCA remains as it was stated in the M.O.; evidence is admissible if it is deemed to have “probative value to a reasonable person.” However, the MCA provides that the military judge is to exclude evidence if its probative value is substantially outweighed by the “danger of unfair prejudice, confusion of the issues, or misleading the commission”; or by “considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

Coerced Statements. M.C.O. No. 1 did not specifically preclude the admission of coerced evidence. In March 2006, DOD released M.C.I. No. 10 prohibiting prosecutors from introducing, and military commissions from admitting, statements established to have been made as a result of torture.

The MCA prohibits the use of statements obtained through torture as evidence in a trial, except as proof of torture against a person accused of committing torture. For information obtained through coercion that does not amount to torture, the MCA provides a different standard for admissibility depending on whether the statement was obtained prior to or after the enactment of the DTA. Statements elicited through such methods prior to the DTA are admissible if the military judge finds the “totality of circumstances under which the statement was made renders it reliable and possessing sufficient probative value” and “the interests of justice would best be served” by admission of the statement. Statements taken after passage of the DTA are admissible if, in addition to the two criteria above, the military judge finds that “the interrogation methods used to obtain the statement do not violate the cruel, unusual, or inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution.”

Accordingly, Mil. Comm. R. Evid. 304 provides that an accused’s statements that were elicited by torture may not be admitted against him if he makes a timely motion to suppress or an objection to the evidence. Statements introduced by any party that are allegedly produced by lesser forms of coercion, where the degree of coercion is disputed, may only be introduced after the military judge makes the

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131 Id. The corresponding rule for courts-martial, Mil. R. Evid. 505, provides that the military judge, upon finding that the lack of production of information would materially prejudice a substantial right of the accused, must “dismiss the charges or specifications or both to which the classified information relates.”

141 M.C.O. No. 1 § 6(D)(1). At courts-martial, evidence is admitted if it is “relevant,” meaning “tending to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Mil. R. Evid. 401. At military commissions, evidence meets the standard of “probative to a reasonable person” if “a reasonable person would regard the evidence as making the existence of any fact that is of consequence to a determination of the commission action more probable or less probable than it would be without the evidence.” Mil. Comm. R. Evid. 403.

appropriate findings according to the above formula. The defense is required to make any objections to the proposed use of any statements by the accused prior to entering a plea, if the trial counsel has disclosed the intent to use the statement, otherwise the objection will be deemed to have been waived.\textsuperscript{143} The military judge may require the defense to establish the grounds for excluding the statement. However, the government has the burden of establishing the admissibility of the evidence. If the statement is ruled admissible, the defense is permitted to present evidence with respect to the voluntariness of the statement, and the military judge must instruct the members to consider that factor in according weight to the evidence. Testimony given by the accused for the purpose of denying having made a statement or for disputing the admissibility of a statement is not to be used against him for any purpose other than in prosecution for perjury or false statements.\textsuperscript{144}

Mil. Comm. R. Evid. 304 is modeled on Mil. R. Evid. 304, which prescribes rules for courts-martial to provide for the admission into evidence of confessions and admissions (self-incriminating statements not amounting to an admission of guilt). Under court-martial rules, such a statement and any evidence derived as a result of such a statement are admissible only if the statement was made voluntarily. Involuntary statements are those elicited through coercion or other means in violation of constitutional due process. To be used as evidence of guilt against the accused, a confession or admission must be corroborated by independent evidence.

**Hearsay.** Hearsay evidence is an out-of-court statement, whether oral, written, or conveyed through non-verbal conduct, introduced into evidence to prove the truth of the matter asserted. M.C.O. No. 1 did not exclude hearsay evidence. The MCA allows for the admission of hearsay evidence that would not be permitted under the Manual for Courts-Martial\textsuperscript{145} only if the proponent of the evidence notifies the adverse party sufficiently in advance of the intention to offer the evidence, as well as the “particulars of the evidence (including [unclassified] information on the general circumstances under which the evidence was obtained).”\textsuperscript{146} However, the evidence is inadmissible only if the party opposing its admission “clearly demonstrates that the evidence is unreliable or lacking in probative value.” An issue that may arise is whether the rules provide for adequate information regarding the source of evidence for an accused to be in a position to refute the reliability of its content.\textsuperscript{147}

The rule regarding hearsay is provided in Mil. Comm. R. Evid. 801 to 807. In contrast to the relatively restrictive rule applied in courts-martial, where hearsay is

\textsuperscript{143} Mil. Com. R. Evid. 304(d).
\textsuperscript{144} Mil. Com. R. Evid. 304(f).
\textsuperscript{145} Mil. R. Evid. 801-807 provide procedures for determining the admissibility of hearsay evidence in courts-martial. It is unclear how, under the MCA, it is to be determined whether certain hearsay evidence would be admissible in a general court-martial.
\textsuperscript{146} 10 U.S.C. § 949a(b)(3)).
\textsuperscript{147} See Jencks v. United States, 353 U.S. 657 (1957)(“Requiring the accused first to show conflict between the reports [in the possession of the government] and the testimony is actually to deny the accused evidence relevant and material to his defense.”).
not admissible except as permitted by a lengthy set of exceptions, the military commission rules provide that hearsay is admissible on the same basis as any other form of evidence except as provided by these rules or an act of Congress. The rules do not set forth any prohibitions with respect to hearsay evidence. Mil. Comm. Evid. 803 provides that hearsay may be admitted if it would be admissible at court-martial. Alternatively, hearsay is admissible if the party proffering it notifies the adverse party thirty days in advance of trial or hearing of its intent to offer such evidence and provides any materials in its possession regarding the time, place, and conditions under which the statement was procured. Absent such notice, the military judge is responsible for determining whether the opposing party has been provided a “fair opportunity under the totality of the circumstances.” The opposing party may preclude the introduction of such hearsay evidence by demonstrating by a preponderance of the evidence that such hearsay is unreliable under the totality of the circumstances.

**Classified Evidence.** At military commissions convened pursuant to the MCA, classified information is to be protected during all stages of proceedings and is privileged from disclosure for national security purposes. Whenever the original classification authority or head of the agency concerned determines that information is properly classified and its release would be detrimental to the national security, the military judge “shall authorize, to the extent practicable,” the “deletion of specified items of classified information from documents made available to the accused”; the substitution of a “portion or summary of the information”; or “the substitution of a statement admitting relevant facts that the classified information would tend to prove.” The military judge must consider a claim of privilege and review any supporting materials in camera, and is not permitted to disclose the privileged information to the accused.

With respect to the protection of intelligence sources and methods relevant to specific evidence, the military judge is required to permit trial counsel to introduce otherwise admissible evidence before the military commission without disclosing the “sources, methods, or activities by which the United States acquired the evidence.”

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148 Mil. R. Evid. 803 (exceptions for which the availability of the declarant is immaterial); Mil. R. Evid. 804 (exceptions applicable when declarant is unavailable); Mil. R. Evid. 807 (residual exception, which permits all other hearsay not covered by express exceptions when there are “equivalent circumstantial guarantees of trustworthiness” and the military judge determines the statement relates to a material fact, is more probative to that fact than other reasonably obtainable evidence, and that its introduction into evidence “serves the general purposes of the rules and the interest of justice”).

149 Mil. Comm. R. Evid. 803(b)(2).

150 Mil. Comm. R. Evid. 803(c).

151 Defined in 10 U.S.C. §948a(4) as “[a]ny information or material that has been determined by the United States Government pursuant to statute, Executive order, or regulation to require protection against unauthorized disclosure for reasons of national security” and “restricted data, as that term is defined in section 11y of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).”

if the military judge finds that such information is classified and that the evidence is reliable. The military judge may (but need not) require trial counsel to present an unclassified summary of such information to the military commission and the defense, “to the extent practicable and consistent with national security.”

The MCA does not explicitly provide an opportunity for the accused to contest the admissibility of substitute evidence proffered under the above procedures. It does not appear to permit the accused or his counsel to examine the evidence or a proffered substitute prior to its presentation to the military commission. If constitutional standards required in the Sixth Amendment are held to apply to military commissions, the MCA may be open to challenge for affording the accused an insufficient opportunity to contest evidence. An issue may arise as to whether, where the military judge is permitted to assess the reliability of evidence based on ex parte communication with the prosecution, adversarial testing of the reliability of evidence before the panel members meets constitutional requirements. If the military judge’s determination as to reliability is conclusive, precluding entirely the opportunity of the accused to contest its reliability, the use of such evidence may serve as grounds to challenge the verdict. On the other hand, if evidence resulting from classified intelligence sources and methods contains “particularized guarantees of trustworthiness” such that adversarial testing would be expected to add little, if anything, to [its] reliability, it may be admissible and survive challenge.

Classified evidence is privileged under Mil. Comm. R. Evid. 505. Commentary to the rule notes that, because the defense has had no opportunity to evaluate the evidence to formulate any objections, “the military judge’s consideration must encompass a broad range of potential objections.” During the examination of witnesses at trial, the trial counsel may make an objection to any question or motion that might lead to the disclosure of classified information. The military judge is required to take appropriate action, such as reviewing the matter in camera or granting a delay to allow the trial counsel to confer with the relevant agency officer to determine whether the privilege should be asserted. The judge may order that only parts of documents or other materials be entered into evidence, or permit proof of the contents of such materials without requiring introduction into evidence of the original or a duplicate. In the event the defense reasonably expects to disclose classified information at trial, defense counsel must notify the trial counsel and the judge, and is precluded from disclosing information known or believed to be classified until the

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153 Cf. Crane v. Kentucky, 476 U.S. 683 (1986)(evidence about the manner in which a confession was obtained should have been admitted as relevant to its reliability and credibility despite court’s determination that the confession was voluntary and need not be suppressed).


155 M.M.C. at III-26.

government has had a reasonable opportunity to move for an in camera determination as to protective measures.\textsuperscript{157}

**Sentencing**

M.C.O. No. 1 required the prosecution to provide in advance to the accused any evidence to be used for sentencing, unless good cause could be shown. The accused was permitted to present evidence and make a statement during sentencing proceedings; however, this right did not appear to mirror the right to make an unsworn statement that military defendants may exercise in regular courts-martial,\textsuperscript{158} and apparently the statements were subject to cross-examination. The MCA provides that the accused is entitled to have access to evidence relevant to sentencing, but does not provide that the accused must be given the opportunity to make a statement.

Possible penalties under M.C.O. No. 1 included execution,\textsuperscript{159} imprisonment for life or any lesser term, payment of a fine or restitution (which may be enforced by confiscation of property subject to the rights of third parties), or “such other lawful punishment or condition of punishment” determined to be proper. Detention associated with the accused’s status as an “enemy combatant” was not to count toward serving any sentence imposed.\textsuperscript{160} A sentence agreed to by the accused in plea agreements was binding on the commission, unlike regular courts-martial, in which the agreement is treated as the maximum sentence. Similar to the practice in military courts-martial, the death penalty could only be imposed upon a unanimous vote of the commission.\textsuperscript{161} In courts-martial involving any crime punishable by death, however, both the conviction and the death sentence must be by unanimous vote.\textsuperscript{162}

The MCA provides that military commissions may adjudge “any punishment not forbidden by [it or the UCMJ], including the penalty of death....”\textsuperscript{163} It specifically proscribes punishment “by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, ... or [by the] use of irons, single or double.”\textsuperscript{164} A vote of two-thirds of the members present is required for sentences of up to 10 years. Longer sentences require the concurrence of three-

\begin{itemize}
\item\textsuperscript{157} Mil. Comm. R. Evid. 505(g). This rule is virtually identical to Mil. R. Evid. 505(h).
\item\textsuperscript{158} See NIMJ, supra note 36, at 37 (citing United States v. Rosato, 32 M.J. 93, 96 (C.M.A. 1991)).
\item\textsuperscript{159} The method of execution used by the Army to carry out a death sentence by military commission is lethal injection. See U.S. Army Correctional System: Procedures for Military Executions, AR 190-55 (1999). It is unclear whether DOD will follow these regulations with respect to sentences issued by these military commissions, but it appears unlikely that any such sentences would be carried out at Ft. Leavenworth, in accordance with AR 190-55.
\item\textsuperscript{160} M.C.I. No. 7 § 3(A).
\item\textsuperscript{161} M.C.O. No. 1 § 6(F).
\item\textsuperscript{162} 10 U.S.C. § 851.
\item\textsuperscript{163} 10 U.S.C. § 948d.
\item\textsuperscript{164} 10 U.S.C. § 949s.
\end{itemize}
fourths of the members present. The death penalty must be approved unanimously, both as to guilt and to the sentence, by all members present for the vote.

In cases where the death penalty is sought, a panel of 12 members is required (unless the convening authority certifies that 12 members are not “reasonably available” because of physical conditions or military exigencies, in which case no fewer than nine are required), with all members present for the vote agreeing on the sentence. The death penalty must be expressly authorized for the offense, and the charges referred to the commission must have expressly sought the penalty of death. The death sentence may not be executed until the commission proceedings have been finally adjudged lawful and all appeals are exhausted, and after the President approves the sentence. 10 U.S.C. § 950i(b)-(c). The President is permitted to “commute, remit, or suspend [a death] sentence, or any part thereof, as he sees fit.” 10 U.S.C. § 950i(b). For sentences other than death, the Secretary of the Defense or the convening authority are permitted to adjust the sentence downward. 10 U.S.C. § 950i(d).

Chapter X of the Rules for Military Commissions covers sentencing. “Aggravating factors” that may be presented by the trial counsel include evidence that “any offense of which the accused has been convicted comprises a violation of the law of war.” Unlike the rules for courts-martial, there is no express opportunity for the trial counsel to present evidence regarding rehabilitative potential of the accused. However, the rules provide that the accused may make a sworn or unsworn statement to present mitigating or extenuating circumstances or to rebut evidence of aggravation submitted by the trial counsel. In the case of an unsworn statement, which may be written or oral, the accused is not subject to cross-examination by the trial counsel.

The death penalty may only be adjudged if expressly authorized for the offense listed or if it is authorized under the law of war, all twelve members of the commission voted to convict the accused, found that at least one of the listed aggravating factors exists, agreed that such factors outweigh any extenuating or mitigating circumstances, and voted to impose the death penalty. Aggravating

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165 The MCA permits the death penalty for convictions of murder of a protected person or murder in violation of the law of war, or spying; and if death results, any of the following crimes: attacking civilians, taking hostages, employing poison or similar weapon, using protected persons as a shield, torture or cruel or inhuman treatment, intentionally causing serious bodily injury, maiming, using treachery or perfidy, hijacking or hazarding a vessel or aircraft, terrorism, and conspiracy to commit any of the crimes enumerated in 10 U.S.C. § 950v.

166 10 U.S.C. § 949m.

167 An accused sentenced to death may neither waive his right to appeal nor withdraw an appeal. 10 U.S.C. § 950c.

168 R.M.C. 1001(b)(2). Otherwise, aggravating factors are similar to those listed in R.C.M. 1001(b)(5)(D) for courts-martial.

169 R.M.C. 1001(c)(2)(D). The trial counsel may rebut the statement. This procedure does not appear to differ substantially from that used in courts-martial.
factors include that “the accused was convicted of an offense, referred as capital, that is a violation of the law of war,” that the offense resulted in the death of or substantially endangered the life of one or more other persons, the offense was committed for the purpose of receiving money or a thing of value, the offense involved torture or certain other mistreatment, the accused was also found guilty of another capital crime, the victim was below the age of fifteen, or that the victim was a protected person.\textsuperscript{170} Other aggravating circumstances include specific law-of-war violations, which, except for spying, are not to be applied to offenses of which they are already an element.

Post-Trial Procedure

Criticism leveled at the language of the M.O. included concern that it did not include an opportunity for the accused to appeal a conviction and that it seemingly barred habeas corpus relief.\textsuperscript{171} Other concerns were that it appeared to allow the Secretary of Defense (or the President) the discretion to change the verdict from not guilty to guilty, and that it did not adequately protect persons from double jeopardy.\textsuperscript{172}

Review and Appeal. M.C.O. No.1 addressed some of the above concerns by providing for an administrative review of the trial record by the Appointing Authority and then by a review panel consisting of three military officers, one of whom was required to have experience as a judge. The review panel could, at its discretion, review any written submissions from the prosecution and the defense, who did not necessarily have an opportunity to view or rebut the submission from the opposing party.\textsuperscript{173} The review panel, upon forming a “firm and definite conviction that a material error of law occurred,” could return the case to the Appointing Authority for further proceedings. The Appointing Authority was bound to dismiss a charge if the

\textsuperscript{170} R.M.C. 1004(c).

\textsuperscript{171} Persons subject to the M.O. were described as not privileged to “seek any remedy or maintain any proceeding, directly or indirectly” in federal or state court, the court of any foreign nation, or any international tribunal. M.O. at § 7(b). However, the Administration originally indicated that defendants were permitted to petition a federal court for a writ of habeas corpus to challenge the jurisdiction of the military commission. See Alberto R. Gonzales, Martial Justice, Full and Fair, NEW YORK TIMES (op-ed), November 30, 2001 (stating that the original M.O. was not intended to preclude habeas corpus review). Rasul v. Bush clarified that the detainees at Guantanamo Bay do have access to federal courts, but the extent to which the findings of military commissions will be reviewable was not clarified. 124 S. Ct. 2686 (2004). Congress, by enacting the DTA and the MCA, has revoked the jurisdiction of federal courts over habeas corpus petitions filed by or on behalf of aliens detained by the United States as enemy combatants. For an analysis of the habeas provisions in these Acts, see CRS Report RL33180, Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court, by Jennifer K. Elsea and Kenneth Thomas.


\textsuperscript{173} The convening authority of a general court-martial is required to consider all matters presented by the accused. 10 U.S.C. § 860. The MCA contains a similar provision. 10 U.S.C. § 950b.
the review panel determined that one or more charges should be dismissed. For other cases involving errors, the Appointing Authority was required to return the case to the military commission. Otherwise, the case was to be forwarded to the Secretary of Defense with a written recommendation. (Under the UCMJ, the trial record of a military commission would be forwarded to the appropriate JAG first.) After reviewing the record, the Secretary of Defense was to forward the case to the President, or he could return it for further proceedings for any reason, not explicitly limited to material errors of law. The M.C.O. did not indicate what “further proceedings” might entail, or what was to happen to a case that had been “disapproved.”

The MCA provides for the establishment of a new review body, the Court of Military Commission Review (CMCR), comprised of appellate military judges who meet the same qualifications as military judges or comparable qualifications for civilian judges. The accused may appeal a final decision of the military commission with respect to issues of law to the CMCR. If this appeal fails, the accused may appeal the final decision to the United States Court of Appeals for the District of Columbia Circuit. Appellate court decisions may be reviewed by the Supreme Court under writ of certiorari.

Like the UCMJ, the MCA prohibits the invalidation of a verdict or sentence due to an error of law unless the error materially prejudices the substantial rights of the accused. The M.C.O. did not contain such explicit prohibition, but M.C.I. No. 9 defined “Material Error of Law” to exclude variances from the M.O. or any of the military orders or instructions promulgated under it that would not have had a material effect on the outcome of the military commission. M.C.I. No. 9 allowed the review panel to recommend the disapproval of a finding of guilty on a basis other

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174 M.C.I. No. 9 § 4(C).
175 10 U.S.C. § 8037 (listing among duties of Air Force Judge Advocate General to “receive, revise, and have recorded the proceedings of ... military commissions”); 10 U.S.C. § 3037 (similar duty ascribed to Army Judge Advocate General).
177 10 U.S.C. § 950g. No collateral attack on the verdict is permitted. 10 U.S.C. § 949j(b) provides that

Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

178 10 U.S.C. § 950g.
180 M.C.I. No. 9 § 4(C)(2)(a).
than a material error of law, but did not indicate what options the review panel would have with respect to findings of not guilty.

Post-trial procedures for military commissions are set forth in Chapter XI of the Rules for Military Commissions. Post trial proceedings may be conducted to correct errors, omissions, or inconsistencies, where the revision can be accomplished without material prejudice to the accused. Sessions without members may be ordered to reconsider any trial ruling that substantially affects the legal sufficiency of any findings or guilty or the sentence.

Once the record is authenticated and forwarded to the convening authority, the accused is permitted, within twenty days unless additional time is approved, to submit matters relevant to whether to approve the sentence or disapprove findings of guilt. The convening authority is required to consider written submissions. If the military commission has made a finding of guilty, the legal advisor also reviews the record and provides recommendations to the convening authority. The convening authority may not take an action disapproving a finding of not guilty or a ruling that amounts to a finding of not guilty. However, in the case of a finding of not guilty by reason of lack of mental responsibility, the convening authority may commit the accused to a suitable facility for treatment pending a hearing to determine whether the accused may be released or detained under less than the most stringent circumstances without posing a danger to others.

Rehearings of guilty findings may be ordered at the discretion of the convening authority, except where there is a lack of sufficient evidence to support the charge or lesser included offense. Rehearings are permitted if evidence that should not have been admitted can be replaced by an admissible substitute. Any part of a sentence served pursuant to the military commission’s original holding counts toward any sentence that results from a hearing for resentencing.

In all cases in which the convening authority approves a finding of guilty, the record is forwarded to the Court of Military Commission Review (CMCR), unless the accused (where the sentence does not include death) waives review. No relief may be granted by the CMCR unless an error of law prejudiced a substantial trial

181 M.C.I. No. 9 § 4(C)(1)(b).
182 R.M.C. 1102(b).
183 R.M.C. 1105.
184 R.M.C. 1106.
185 R.M.C. 1107.
186 R.M.C. 1102A.
187 R.M.C. 1107(e).
188 R.M.C. 1107(f)(5).
189 R.M.C. 1111. Courts-martial findings are first forwarded to the Judge Advocate General of the particular service for legal review, R.C.M. 1112.
right of the accused. The accused has twenty days after receiving notification of the CMCR decision to submit a petition for review with the U.S. Court of Appeals for the District of Columbia Circuit. Within two years after a military commission conviction becomes final, an accused may petition the convening authority for a new trial on the ground of newly discovered evidence or fraud on the military commission.

Protection against Double Jeopardy. The M.C.O. provided that the accused could not be tried for the same charge twice by any military commission once the commission’s finding on that charge became final (meaning once the verdict and sentence had been approved). Therefore, apparently, jeopardy did not attach — there would not have been a “trial” — until the final verdict was approved by the President or the Secretary of Defense. In contrast, at general courts-martial, jeopardy attaches after the first introduction of evidence by the prosecution. If a charge is dismissed or is terminated by the convening authority after the introduction of evidence but prior to a finding, through no fault of the accused, or if there is a finding of not guilty, the trial is considered complete for purposes of jeopardy, and the accused may not be tried again for the same charge by any U.S. military or federal court without the consent of the accused. Although M.C.O. No. 1 provided that an authenticated verdict of not guilty by the commission could not be changed to guilty, the rules allowed either the Secretary of Defense or the President to disapprove the finding and return the case for “further proceedings” prior to the findings’ becoming final, regardless of the verdict. The possibility that a finding of not guilty could be referred back to the commission for rehearing may have had double jeopardy implications.

Like M.C.O. No. 1, the MCA provides that “[n]o person may, without his consent, be tried by a military commission under this chapter a second time for the same offense.” Jeopardy attaches when a guilty finding becomes final after review of the case has been fully completed. The MCA prevents double jeopardy by

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190 R.M.C. 1201.
191 R.M.C. 1210.
192 M.C.O. No. 1 § 5(P). The finding was to become final when “the President or, if designated by the President, the Secretary of Defense makes a final decision thereon pursuant to Section 4(c)(8) of the President’s Military Order and in accordance with Section 6(H)(6) of [M.C.O. No. 1].” Id. § 6(H)(2).
193 10 U.S.C. § 844. Federal courts and U.S. military courts are considered to serve under the same sovereign for purposes of double (or former) jeopardy.
194 In regular courts-martial, the record of a proceeding is “authenticated,” or certified as to its accuracy, by the military judge who presided over the proceeding. R.C.M. 1104. None of the military orders or instructions establishing procedures for military commissions explains what is meant by “authenticated finding.”
195 M.C.O. No. 1 § 6(H)(2).
196 The UCMJ does not permit rehearing on a charge for which the accused is found on the facts to be not guilty.
197 10 U.S.C. § 949h.
expressly eliminating the possibility that a finding that amounts to a verdict of not guilty is subject to reversal by the convening authority or to review by the CMCR or the D.C. Circuit. The severity of a sentence adjudged by the military commission cannot be increased on rehearing unless the sentence prescribed for the offense is mandatory.\textsuperscript{198} These protections are covered in Chapter XI of the Rules for Military Commission. Proceedings are not authorized to reconsider any ruling that amounts to a finding of not guilty as to any charge or specification, except with respect to a charge where the record indicates guilt as to a specification that may be charged as a separate offense under the MCA.\textsuperscript{199} Proceedings for increasing the severity of a sentence are not permitted unless the commission failed to adjudge a proper sentence under the MCA or the sentence was less than that agreed to in a plea agreement.\textsuperscript{200}

M.C.O. No. 1 did not provide a specific form for the charges, and did not require that they be authenticated by an oath or signature.\textsuperscript{201} The inadequacy of an indictment in specifying charges could raise double jeopardy concerns.\textsuperscript{202} If the charge does not adequately describe the offense, another trial for the same offense under a new description is not as easily prevented. The MCA requires that charges and specifications be signed under oath by a person with personal knowledge or reason to believe that matters set forth therein are true.\textsuperscript{203} The charges must be served on the accused written in a language he understands.\textsuperscript{204} There is no express requirement regarding the specificity of the charges in the MCA, but the Rules for Military Commission provide that the charge must state the punitive article of the act, law of war, or offense as defined in the Manual for Military Commissions that the accused is alleged to have violated.\textsuperscript{205} A specification must allege every element of the charged offense expressly or by necessary implication.\textsuperscript{206} The Rules for Military Commissions make the trial counsel responsible for causing the accused to be served a copy of the charges in English and another language that the accused understands, where appropriate.\textsuperscript{207} After the accused is arraigned, the military judge may permit minor changes in the charges and specifications before findings are announced if no

\begin{itemize}
\item \textsuperscript{198} 10 U.S.C. § 950b(d)(2)(B).
\item \textsuperscript{199} R.M.C. 1102(c).
\item \textsuperscript{200} \textit{Id.} At courts-martial, sessions to increase the severity of a sentence are permitted only if the sentence is mandatory. R.C.M. 1102(c).
\item \textsuperscript{201} See M.C.O. No. 1 § 6(A)(1).
\item \textsuperscript{202} See NIMJ, \textit{supra} note 36, at 39.
\item \textsuperscript{203} 10 U.S.C. § 948q.
\item \textsuperscript{204} 10 U.S.C. § 948s.
\item \textsuperscript{205} R.M.C. 307.
\item \textsuperscript{206} \textit{Id.}
\item \textsuperscript{207} R.C.M. 602.
\end{itemize}
substantial right of the accused is prejudiced, but no major changes may be made over the objection of the accused without a new referral.208

The M.O. also left open the possibility that a person subject to the order might be transferred at any time to some other governmental authority for trial.209 A federal criminal trial, as a trial conducted under the same sovereign as a military commission, could have double jeopardy implications if the accused had already been tried by military commission for the same crime or crimes, even if the commission proceedings did not result in a final verdict. The federal court would face the issue of whether jeopardy had already attached prior to the transfer of the individual from military control to other federal authorities. The MCA does not expressly prohibit trial in another forum.

Conversely, the M.O. provided that the President may determine at any time that an individual is subject to the M.O., at which point any state or federal authorities holding the individual would be required to turn the accused over to military authorities. If the accused were already the subject of a federal criminal trial under charges for the same conduct that resulted in jurisdiction over the accused under the MCA, and if jeopardy had already attached in the federal trial, double jeopardy could be implicated by a new trial before a military commission. The MCA does not explicitly provide for a double jeopardy defense under such circumstances, but the Rules for Military Commissions provide the accused a waivable right to move to dismiss charges on the basis that he has previously been tried by a federal civilian court for the same offense.210

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208 R.C.M. 602.
209 M.O. § 7(e).
210 R.M.C. 907.
Proposed Legislation

A number of bills have been introduced in the 110th Congress to amend the MCA. For additional legislation pertaining to detainees and habeas corpus, see CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea and Kenneth R. Thomas.

**H.R. 1585**, the National Defense Authorization Act for Fiscal Year 2008 (as passed by the House of Representatives on May 17, 2007), would require a report within 60 days after enactment that contains a plan for the transfer of each individual presently detained Guantanamo Bay, Cuba, who is or has ever been classified as an “enemy combatant.” It would also require a report identifying detainees who are charged with crimes, those who are eligible for release, and those who are not charged but ineligible for release, supplemented by a list of “actions required to be undertaken, by the Secretary of Defense, possibly the heads of other Federal agencies, and Congress, to ensure that detainees who are subject to an order calling for their release or transfer from the Guantanamo Bay facility have, in fact, been released.” Section 1057.

**H.R. 2543**, the Military Commissions Revision Act of 2007, would redefine “unlawful enemy combatant” to mean “a person who has engaged in, attempted, or conspired to engage in acts of armed hostilities or terrorism against the United States or its co-belligerents, and who is not a lawful enemy combatant.” It would permit the admission into evidence of statements obtained by a degree of coercion less than torture in military commission only if the military judge finds that

1. the totality of the circumstances indicates that the statement possesses probative value to a reasonable person;  
2. the interests of justice would best be served by admitting the statement into evidence; and  
3. the interrogation methods used to obtain the statement do not amount to cruel, inhuman or degrading treatment.

The bill would also repeal 10 U.S.C. § 948d(c) so that CSRT determinations would no longer be dispositive for the purpose of establishing jurisdiction of military commissions, and would restore habeas corpus for persons detained as ‘enemy combatants’ for more than two years and have not been charged with a crime.

**S. 1547** and **S. 1548**, the National Defense Authorization Act for Fiscal Year 2008 (reported by the Senate Armed Services Committee and the Senate Select Committee on Intelligence on June 5 and June 9, respectively), would make CSRTs mandatory for all detainees and would require the Secretary of Defense to provide procedural rules in some ways similar to those prescribed by the MCA for military commissions. Section 1023. Specifically, detainees would have a right to an attorney for CSRT proceedings, would be entitled to obtain evidence and witnesses under rules consistent with those that apply to military commissions, and the detainee’s counsel would have an opportunity to view classified evidence, including evidence to be admitted against the detainee and any potentially exculpatory
evidence, consistent with the procedures for the protection of classified information in section 949d(f) of title 10, U.S. Code. The detainee would be entitled to have access to all unclassified evidence and “an unclassified summary of the classified evidence admitted against the detainee that is sufficiently specific to provide the detainee a fair opportunity to respond, with the assistance of counsel, to such evidence.” Information obtained through torture would not be admissible into evidence before a CSRT. Information obtained through lesser forms of coercion would be admissible under the same standards as in military commissions, amended as described below.

With respect to military commissions, the bills would define “unlawful enemy combatant” to include any alien who has been a “knowing and active participant in an organization that engaged in hostilities against the United States.” They would also prohibit the use of information acquired through coercion not amounting to cruel, inhuman or degrading treatment unless the statement is found to be reliable and probative; its admission would best serve the interests of justice; and either

1) the tribunal determines that the alleged coercion was incidental to the lawful conduct of military operations at the point of apprehension;
2) the statement was voluntary; or
3) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. § 2000dd).

The rules for the admission of hearsay evidence would be amended to eliminate the reference to the requirements and limitations applicable to the disclosure of classified information.” Rather than requiring the party opposing admission to demonstrate that the evidence is unreliable or lacking in probative value, the bills would make the military judge responsible for determining whether “the totality of the circumstances render the evidence more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts, taking into consideration the unique circumstances of the conduct of military and intelligence operations during hostilities.”

H.R. 2710 would restore habeas corpus for detainees. It would eliminate the CSRT review procedure, but retain the DTA provision for appealing military commission decisions, in addition to habeas corpus. H.R. 1416 and S. 185, the Habeas Corpus Restoration Act of 2007, would remove habeas corpus restrictions on detainees and clarify that habeas corpus is available to challenge military commission decisions. H.R. 1416 would also strike the prohibition in section 5 of the MCA on the use of the Geneva Conventions as a source of rights in habeas corpus and other court actions against the United States or its officers and employees. H.R. 2826 would amend 28 U.S.C. § 2241(e) to allow habeas corpus actions and requests for injunctive relief against transfer, except in cases of detainees held in an active war zone where the Armed Forces are implementing the Prisoner of War (POW) regulation, AR 190-8, but would prohibit all other court actions by detainees. However, it would also amend the MCA in such a way as to maintain the current limited appeal of military commission decisions, in addition to habeas corpus. H.R.
267, the Military Commissions Habeas Corpus Restoration Act of 2007, would eliminate restrictions on habeas corpus in 28 U.S.C. § 2241(e), but would eliminate jurisdiction over all other actions, except for DTA challenges of CSRT determinations and military commission decisions.

S. 1876, the National Security with Justice Act of 2007, would redefine “enemy combatant” to mean a person who is not a lawful enemy combatant who has engaged in hostilities against the United States; or has purposefully and materially supported hostilities against the United States (other than hostilities engaged in as a lawful enemy combatant). It would expressly exclude from the definition of “enemy combatant” U.S. citizens and aliens lawfully within the United States who are taken into custody there. Section 201. The bill would eliminate the MCA provision for exclusivity of its appeals provisions, 10 U.S.C. § 950g, and would eliminate the provision in the DTA for appeals of status determinations, but would extend a statutory right of habeas corpus to detainees, giving the D.C. Federal District Court jurisdiction to hear challenges to detention and challenges of final decisions of military commissions. Section 301. Habeas corpus challenges would not be permitted by persons detained in a foreign zone of military operations where the Secretary of Defense certifies that the United States is implementing its detainee regulations, Army Regulation 190-8, or any successor regulation.

S. 576 and its companion bill, H.R. 1415, the Restoring the Constitution Act of 2007, would redefine “unlawful enemy combatant” to mean an individual who is not a lawful combatant who “directly participates in hostilities in a zone of active combat against the United States,” or who “planned, authorized, committed, or intentionally aided the terrorist acts on the United States of September 11, 2001,” or harbored such a person. The bills would also expressly limit the definition of “unlawful enemy combatant” for use in designating individuals as eligible for trial by military commission.

The bills would require procedural and evidentiary rules for military commissions to conform to the UCMJ except where expressly provided otherwise, and would limit the Secretary of Defense’s authority to make exceptions to commission procedures and rules of evidence to those made necessary by unique circumstances of military or intelligence operations during hostilities.

The bills would repeal the authority for civilian attorneys to act as trial (prosecution) counsel in a commission proceeding, but would permit civilian attorneys to act as defense counsel, with the assistance of detailed defense counsel. An accused who elects to represent himself would be authorized to obtain the assistance of civilian counsel in addition to detailed defense counsel.

The bills would modify the evidentiary requirements of the MCA in several respects. The provision for permitting evidence acquired without a warrant would not apply to evidence acquired within the United States. The responsibility for determining the reliability of hearsay evidence would fall on the military judge, on motion of counsel, rather than requiring the party opposing the evidence to demonstrate its lack of reliability. All statements obtained through coercion would...
be inadmissible before a military commission, except against a person accused of coercion. The military judge would have the authority to order trial counsel to disclose to defense counsel the sources, methods, or activities by which witnesses or evidence against the accused was obtained, if he determines that that information might reasonably tend to affect the weight given to the out of court statement by the members of the military commission. The prosecution could withdraw the evidence in lieu of compliance with such an order. If the military judge were to determine that substitute information describing evidence of an exculpatory nature insufficiently protected the accused’s opportunity for a fair trial, the judge could dismiss some or all of the charges or specifications or take such other action as he deemed necessary in the interest of justice.

Habeas corpus would be available to detainees to challenge their detention, but other causes of action would be eliminated. The bills would route appeals of military commissions to the Court of Appeals for the Armed Forces rather than the Court of Military Commissions Review. They would also eliminate the MCA provision excluding Geneva Conventions as a “source of rights,” 10 U.S.C. § 948b(g), replacing it with a provision stating that military commission rules that are determined to be inconsistent with the Geneva Conventions are to have no effect. The MCA would expressly state that the President’s authority to interpret the Geneva Conventions is subject to congressional oversight and judicial review. The bills would provide for expedited challenges to the MCA in the D.C. district court.


The following tables provide a comparison of the military tribunals under the regulations issued by the Department of Defense, standard procedures for general courts-martial under the Manual for Courts-Martial, and military tribunals as authorized by the Military Commissions Act of 2006. Table 1 compares the legal authorities for establishing military tribunals, the jurisdiction over persons and offenses, and the structures of the tribunals. Table 2, which compares procedural safeguards incorporated in the previous DOD regulations (in force prior to the Hamdan decision and the enactment of the MCA) and the UCMJ, follows the same order and format used in CRS Report RL31262, Selected Procedural Safeguards in Federal, Military, and International Courts, by Jennifer K. Elsea, in order to facilitate comparison of the proposed legislation to safeguards provided in federal court, the international military tribunals that tried World War II crimes at Nuremberg and Tokyo, and contemporary ad hoc tribunals set up by the UN Security Council to try crimes associated with hostilities in the former Yugoslavia and Rwanda.
Online Debate

Are Civilian Courts Appropriate for Prosecuting Individuals Classified as Enemy combatants?

Discussants: David B. Rivkin
Karen J. Greenberg

The Bush administration has used the “enemy combatant” designation as an attempt to keep terrorists out of U.S. civilian courts. This strategy suffered a setback in June 2006, when the Supreme Court ruled that the military tribunals set up to try detainees in Guantanamo Bay were illegal. But the Court's decision did not resolve the debate over how to prosecute suspected terrorists.

Legal expert David B. Rivkin and Karen J. Greenberg, executive director of the NYU Center on Law and Security, debate whether civilian courts are the proper place to prosecute these individuals.

February 12, 2007

Karen J. Greenberg

The unfortunate news is that there is yet to be a consistent policy set by the U.S. government on how to charge and try detainees. We have, essentially, ad hoc, piecemeal justice, implemented without regard for either consistency or any overall legal theory. The charges against Padilla have changed repeatedly. The rules of the CSRTs [Combatant Status Review Tribunals] and of the rights of the enemy combatants vis-à-vis legal representation have been altered numerous times. This embrace of inconsistency brands the administration’s position as unreliable and undermines its claims to legitimacy, countering the very nature and purpose of the rule of law in a society.

It is in this context that the military commissions need to be assessed. The claim that the current military commissions conform to the principles and procedures codified under the UCMJ [Uniform Code of Military Justice] are inaccurate. Denying the right of a detainee to hear the evidence against him, the right to a lawyer at the CSRTs, and the right of habeas corpus are not considerations which fall into any of the categories of military commissions as we have traditionally understood them. This tactic has kept defense attorneys and others off balance, but just as important is its impact on the rule of law itself. If you can change the rules at whim, how do we know what the rules are? And if Congress wants to follow the current executive and thinks it is necessary to toss the Geneva Conventions or the UCMJ aside, then they owe us a long-term strategy for going forward, one that does not propose one constitution for wartime and one for peacetime, but gives allegiance to lasting and well-vetted legal principles.
If David Rifkin and his colleagues in the administration want to argue for the use of “war’s distinctive legal paradigm,” then let’s do just that—respect the distinctive legal paradigm rather than change it willy-nilly. And if we as a nation decide that change is warranted, let’s create reforms that reflect a coherent long-term strategy that includes accountability and adherence to the U.S. Constitution. We are in serious times; inconsistent and short-sighted policy decisions seem all too frivolous and unthinking when the times demand so much more.

February 9, 2007

David Rivkin

After a couple of exchanges, it is unlikely that Karen and I would agree on the key underlying legal issues. However, it would be helpful at least to lay out where the true disagreements reside. First, while the war against al-Qaeda, Taliban, and affiliated entities is not a new kind of war in the historical sense—as described in my previous post—it is a challenge that has not arisen in the recent past. Hence, the natural human tendency is to treat it as new and unprecedented. As to how much, or how little, the Bush administration has done to make the American people understand that we are in a state of war against a tough and resolute enemy and that this war will go on for a long time, this is something reasonable people can disagree about. We know from past history that Presidents have done a variety of things to make people feel that they were at war—most of FDR’s [Franklin D. Roosevelt] rationing policies were not driven by real wartime necessities but were primarily symbolic in nature. I am not sure whether there is an analog for this today. In any case, these are policy matters that have nothing to do with the key question—what is the appropriate legal paradigm for dealing with captured enemy combatants.

Second, I am troubled that, after two exchanges which I believed elaborated upon in some detail both the legitimacy and legality of the wartime’s legal architecture, e.g., the use of a military justice system, detaining captured enemy combatants for the duration of hostilities, etc., Karen can still try to cast what is being done by the Bush administration as a violation of our democratic principles and constitutional traditions. Quite frankly, there is nothing insidious, immoral, or unlawful about a democracy using war’s distinctive legal paradigm whenever it finds itself at war. While much of the rest of the world, including most of our allies, have chosen to grant irregular fighters rights equivalent to lawful soldiers, and vociferously criticizes such basic U.S. wartime policies as detaining enemy combatants at Gitmo for the duration of hostilities, this does not mean that they are right and we are wrong. Incidentally, I do not understand Karen’s reference to “traditional military commissions”; the military commissions in place today are the traditional military commissions, except with a lot more due process thrown in as compared with the military commissions of the Civil War or World War II vintage. Military commissions are, of course, different from courts martial. This is as it should be; as explained in my first post, courts martial deal with lawful combatants, both one’s own and the enemy’s, and are meant to be operating differently than military commissions, which handle unlawful enemy combatants.
Third, and last, our enemies, the Islamists of various stripes, espouse so many alleged grievances—e.g. our resistance to their interpretation of Islam and the reconstitution of an Islamic caliphate; our veneration of democracy coupled with a secular and, at times, promiscuous culture; our engagement with the various Arab governments that they do not find sufficiently devout; our support for Israel; the cartoons allegedly insulting the Prophet, etc.—that I find it utterly implausible that it is the few aspects of our wartime legal policies that are singularly and uniquely responsible for inciting jihadism. Al-Qaeda did, after all, attack us before the Bush administration began detaining their operatives at Gitmo. To put it differently, in the face of the enemy that already hates us for twenty different reasons, adding another reason or two does not a difference make.

February 8, 2007

Karen J. Greenberg

I am greatly indebted to David Rivkin for his clarification of the Bush administration’s position. Both in substance and in style his argument is revealing. Mr. Rivkin argues that this is not a new kind of war, but at the same time he argues that measures set up to handle enemies in prior conflicts are not appropriate to this conflict. The idea that nothing has changed but everything has changed has characterized the administration’s message to the American people since the very onset of the war on terror. The American public has been told to live their lives as before, but also that fundamental changes in the balance of power, the role of the courts, and the uses of secrecy must be altered.

This is a war, by the way, which I very much accept and think it is imperative to win. The assertion that my preference for using traditional military commissions and civilian courts to try terrorists means that I do not believe we are in a time of war sets up a false dichotomy, echoing all too readily the repeated theme that those who criticize current policy are somehow subjecting the country to greater danger.

The courts are not an exclusive mechanism for counterterrorism; they are one of many tools that can help protect American citizens from harmful enemies. More importantly, the use of the courts signifies a refusal to succumb to the jihadi terrorists’ goal of forcing their enemies to react in ways that violate basic premises of democracy and that, in fear, embrace repression and heavy-handed responses to terror. Citing Nazi Germany and colonial Spain vastly misunderstands the conflict at hand. Our moral superiority and our respect for the rule of law are precisely the characteristics of our national identity that terrorists desire to dismantle. These are the last things we should surrender, not the first ones we should relinquish, in the name of national security. A more appropriate parallel might be the Soviet Union, which succumbed ultimately to the avalanche of ideas, economic prowess, and wise public diplomacy in the face of a repressive and threatening enemy.

In terms of fighting this particular war against al-Qaeda and other jihadi groups, it is important to note that unlike the 9/11 attacks, the subsequent attacks in Madrid, in England, and elsewhere,
were not the result of a centralized al-Qaeda structure but of ideologically inspired groups who
drew support in part from the U.S. willingness to violate its own laws and traditions.
Unwittingly, we supplied a weapon for our enemies in turning our backs on our own codes of
law and honor.

In our general urge toward proving we can “take the gloves off,” we have taken our eye off of
the strategic agenda. This is a war that will be won on ideological grounds and on creating an
international consensus that spans the globe. Civilian courts are but one dimension of this
ideological allegiance to our legal and moral heritage. The magnitude of the conflict in which we
find ourselves should not be underestimated. Only through a persistent commitment to our own
way of life can we win this war, a war that is as much about perceptions and ideology as it is
about violence.

February 7, 2007

David B. Rivkin

Karen Greenberg and I seem to disagree about pretty much everything—law, policy, and even
history. If we are to move this discussion forward, we should at least try to identify crisply what
are the key disagreements involved.

First, contrary to Karen’s view, there is nothing particularly new about this conflict. Civilized
states have in the past waged armed struggles against non-state groups (e.g. pirates or
condottiere) which lasted for years. It does not mean that they are endless or cannot be brought to
a successful conclusion; while there may not be a grand surrender ceremony, international law
recognizes that a conflict is brought to an end when the ability of one’s enemies—in this case al-
Qaeda, Taliban, and affiliated jihadi groups—to offer effective resistance has been eradicated.
Ironically, and this is the point that many critics do not seem to understand, failure by the United
States to employ all legitimate tools of warfare, including the correct legal paradigm—laws of
war—rather than a peacetime criminal justice paradigm, will make this war much longer than it
has to be or may even cause us to lose.

Second, the notion that a war can be waged on a global scale, rather than being confined to a few
geospatially limited battlefields, is also not new. To give but a few examples, the War of the
Spanish Succession and World Wars I and II were waged globally. Moreover, unlawful spies and
saboteurs—the classic examples of unlawful combatants—have always tended to operate far
away from battlefields, often attacking civilian targets. In that, they are no different from
[accused dirty bomber José] Padilla or [radical cleric Abu Hamza] al-Masri—two jihadis seized
as enemy combatants in the United States since September 11.

Third, the Military Commissions in place today are “richer” in due process and closer to the
civilian courts than in any time in the past. The Supreme Court’s Hamdan decision was
predicated solely upon statutory grounds, which Congress altered in the Military Commissions
Act. Meanwhile, the CSRTs [Combatant Status Review Tribunals] in place today provide
captured enemy combatants far greater opportunities to vindicate their rights than the past Article 5-type “competent tribunals” [prescribed in the Third Geneva Convention].

Fourth, the fundamental difference between Karen and me is that, deep down, she does not really accept the proposition that we are at war. This is evident in her remarks about civilian courts having been successful in trying terrorists. This may be true, but enemy combatants captured in time of war are different than peacetime terrorists and should be treated differently. Just like a war cannot be successfully fought without using military force, it cannot be waged properly without employing war’s unique legal architecture.

February 7, 2007

Karen J. Greenberg

Granted we are involved in a new kind of conflict, with no end in sight. Nevertheless, the idea of summarily changing our system of trial, both military and civilian, gives up all too easily on the standards of procedure, accountability, and justice that have guaranteed the rights of defendants in the United States. In theory, I agree with David Rivkin on the point that enemy combatants picked up on the battlefield can be tried by military commissions. But to get to his point that military commissions are an apt means of trial for unlawful enemy combatants relies upon summarily asserted redefinitions of legal terms and practices and thus to misleading conclusions. Notably, the battlefield is assumed to extend to anywhere in the globe; enemy combatants are classified as such in relative secret; and the term military commissions is now used to refer to a new kind of military commission that is absent the basic standards of evidence and procedure that have traditionally defined those commissions. The problem is not military commissions per se but these particular military commissions, as the defense argued successfully before the Supreme Court in Hamdan. Nor should the CSRTs [Combatant Status Review Tribunals] be considered an acceptable alternative. The absence of legal counsel, the low evidentiary standards, and the lack of accountability are contrary to traditional military commissions which follow the rules of courts martial.

Yet another weakness of Rivkin’s argument is his dismissal of the civilian courts as a potential tool in prosecuting suspected terrorists: The current trend, as evidenced in the Military Commissions Act, is similarly contrary to the use of the civilian courts as it essentially strips jurisdiction over habeas petitions and gives the courts limited review of CSRT decisions. The question of civilian courts should not be ruled out. There are numerous arguments for empowering civilian courts to try these cases, among them the fact that civilian courts have proven successful in the past in trying terrorists, from the Blind Sheikh and Ramzi Yousef [1993 World Trade Center bombing] to Timothy McVeigh [Oklahoma City bombing].

It is resource intensive to mount such cases in part because it requires transparency and a higher level of proof in defining the enemy, but as the 9/11 Commission Report attested, the amassing of facts in the pre-9/11 cases deepened the law enforcement community’s and the country’s understanding of al-Qaeda and the terrorist threat in unparalleled ways. So, too, the changing of
the rules by the United States runs the risk of alienating the cooperation in terms of information collection and extradition from other countries. Ultimately, the use of civilian trials is not about expediency, nor a way of compensating for a lack of knowledge about the accused, but a concern for the careful, long-tested rules and procedures designed to ensure that justice is served.

February 6, 2007

David B. Rivkin

Under both international law of war and the U.S. Constitution, individuals classified as enemy combatants are detained and, if appropriate, prosecuted through the military justice system, comprised of two distinct components—courts martial and military commissions. Lawful enemy combatants, entitled upon capture to POW [prisoner of war] status, can only be prosecuted for the commission of war crimes. Moreover, they can be legally tried only by military courts martial, under the same rules and procedures as U.S. servicemen accused of similar offenses. Indeed, to subject them to trial in the U.S. civilian courts would be a serious breach of U.S. international law obligation to treat POWs in the same way as its own troops. Meanwhile, unlawful enemy combatants—individuals who did not comply with the four key criteria of lawful belligerency (did not wear an identifiable uniform or insignia, did not bear their arms openly, did not have a discernable chain-of-command, did not make an institutional commitment to comply with the laws of war)—can be punished for any and all of their unlawful acts, and are subject to the jurisdiction of military commissions.

Significantly, both lawful and unlawful combatants are liable to be detained for the entire duration of hostilities, to ensure that they do not return to the fight. The United States has evolved the world’s most elaborate military system for reviewing the enemy combatant classification decisions, as well as whether their continued detention is advisable. This system, with the Combatant Status Review Tribunals (“CSRTs”) as its key element, while not providing the same degree of due process protections as the criminal justice system, nevertheless furnishes unlawful enemy combatants with more rights than they are entitled under international law.

In the U.S. legal system, the civilian courts play a limited, essentially an appellate, role of reviewing at an appropriate time decisions rendered by the military justice system. Thus, in the famous World War II Quirin case, involving Nazi saboteurs, the U.S. Supreme Court upheld the verdict of the military commission, which sentenced most of the defendants to death. In another significant post-World War II case, the Supreme Court upheld the death penalty imposed by a military commission on the former Japanese commander in the Philippines, General Yamashita. While traditionally the civilian justice system was not engaged in reviewing the decision to classify an individual as an enemy combatant, and detaining him on that basis, in the post-9/11 legal environment, the civilian courts have begun to review such decisions through a habeas-styled process, albeit using a highly differential standard. Since the enactment of the Military Commissions Act of 2006, the D.C. Circuit has been designated as the court with exclusive jurisdiction to review the decisions of military commissions and CSRTs.
The American Way of Justice

By LT. Cmdr. Charles Swift

From Esquire, March 1, 2007

The author, a U. S. Navy attorney, successfully challenged the president in the Supreme Court over the constitutionality of holding suspected enemy combatants without trial. That case made history but cost him his naval career. For the first time, he writes the inside story of that case—and argues that our government is still bent on a disastrous course for American justice.

It's time for some perspective, please. It's time to close Guantánamo bay. Yes, I am the military officer who sued my commander in chief and the secretary of defense on behalf of a Guantánamo bay detainee named Salim Hamdan.

What I sought was simply that the president, just like the soldiers, sailors, and marines under his command, be required to comply with the Uniform Code of Military Justice and the Geneva Conventions. Because I believe that resorting to secret prisons, coercive interrogations, and the abandonment of the rule of law is not the way to keep our country safe from a handful of fanatics. Last summer, with the help of my civilian cocounsel, Professor Neal Katyal, and the law firm of Perkins Coie, I won the case in the Supreme Court of the United States. The problem is that the victory, as big as it was, was disdained by the administration, which has attempted to defy the Supreme Court and the rule of law by building Guantánamo up in the wake of the decision, instead of down. That needs to change.*

WHY DID I SUE MY CHAIN OF COMMAND?

Before I go any further, let me introduce myself. I am from a small town in western North Carolina called Franklin. I have been in the Navy since I entered the United States Naval Academy in the summer of 1980. Before going to law school, I spent seven years serving as a surface-warfare officer in the greatest navy the world has ever known. After law school, I returned to active duty in the Navy as a member of the Judge Advocate General's Corps. That means that I am both a uniformed officer in the United States Navy and a licensed and practicing attorney. This May I will retire from active service. Serving in the United States armed forces as both a combat officer and a lawyer is the greatest privilege I will ever have, because of both who we are and what we defend. And part of who we are and what we defend are the Geneva Conventions.

I say that not just because I am Hamdan's lawyer; I say that because it is what I was taught from plebe summer on. General John Vessey, who retired after serving as chairman of the joint chiefs of staff under President Reagan, summed up those teachings better than I ever could in a recent letter to Senator John McCain. In the letter, he quoted General George Marshall:
"The United States abides by the laws of war. Its Armed Forces, in dealing with all other peoples, are expected to comply with the laws of war, in the spirit and the letter. In waging war, we do not terrorize helpless non-combatants, if it is within our power to avoid so doing. Wanton killing, torture, cruelty, or the working of unusual hardship on enemy prisoners or populations is not justified under any circumstance. Likewise respect for the reign of law, as that term is understood in the United States, is expected to follow the flag wherever it goes. . . ."

It does not matter that Al Qaeda does all of the terrible things that General Marshall enumerated and more. It is not about them. It is about us.

That fact was driven home to me early in the Hamdan case. In the fall of 2004, I went back to the Naval Academy for my twenty-year reunion. My classmates were kidding me about being famous and asked what it was like to be a media star. Whether I was right or not in what I was doing did not come up until the end of the reunion. As the tailgate party was winding down, a friend I had gone through plebe summer with came up to me. After the academy, he had gone into the Marine Corps and done superbly. He made colonel, and everyone expects that he will be a general. When he took me aside, I was a little nervous. I believed in what I was doing, but I could understand why he might not. But what he said was all the inspiration I have ever needed when things got rough. He told me simply, "The rule of law is what I fight for. Men die for this. Don't stop."

This man is a hero.

Let's not forget what our heroes are dying for.

My first in-depth legal study of the Geneva Conventions was not until the summer of 1997, when I attended the Law of War course sponsored by the Naval Justice School in Newport, Rhode Island. The course was kicked off by the then-dean of the Center for Naval Warfare Studies at the War College, Robert S. Wood, who gave an address about a phenomenon he called tribal war. His point was that after the decline of the Soviet Union, the U. S. military would increasingly face enemies that were not organized in nation-states. There might be an occasional nation-state conflict like the Gulf war, but the principal threat we would face was increasingly going to be enemies bound together by religious and/or ethnic ties rather than the armed forces of another nation. This enemy was not going to use the tactics or follow the rules that we were about to study, and the provost said that we should start thinking about this new battlefield and how the rules of war would apply to it.

During the question period, I asked him, "If the armed forces abandon the rules that govern our conduct in fighting a war, won't we be subject to intense international and domestic opposition? And if we lose that support, like in Vietnam and Somalia, how will we be able to sustain a combat effort long enough to win?"

He answered with a story of an experience he had while teaching at Harvard in the 1960s. He wrote a paper recommending a U. S. approach to the Palestinian question. His paper
circulated among the faculty until it landed on Henry Kissinger's desk. As Dr. Wood recalled it, Dr. Kissinger called him in and told him, "You Americans, you're all engineers. You think that all the world's problems are puzzles that can be solved with money and matériel. You are wrong. All of the world's great problems are not problems at all. They are dilemmas, and dilemmas cannot be solved. They can only be survived."

His answer, while thought provoking, struck me as no answer at all. The rest of the course ignored the question. Besides, way back in 1997 at least, there remained a certain theoretical quality to the whole discussion.

ARE OUR CIVILIAN AND MILITARY COURTS THE PROBLEM?

It stopped being theoretical for me in March 2003, when I reported to the chief defense counsel's Office for Military Commissions. From the start, the commissions appeared legally pointless. If all of the detainees in Guantánamo had been captured on a battlefield carrying weapons, as had been claimed publicly by the Department of Defense, why have trials at all? The Geneva Conventions clearly give the United States both the legal and moral authority to hold combatants and even civilians of an enemy nation until the end of hostilities, and hostilities were certainly ongoing. What is the point of holding a trial when the prize for conviction or acquittal is the same-back to the cell?

The reasons the Departments of Defense and Justice gave for using a commission instead of the regular military or civilian court were simply not accurate. For example, it was suggested that if a court-martial or a federal court was used to try members of Al Qaeda or the Taliban, then our soldiers would have to get a warrant before they could search a cave. This is not true. The Supreme Court, in The United States v. Verdugo-Urquidez, ruled unequivocally that there is no requirement for a search warrant outside the United States. Under no circumstances would our armed forces have to get a warrant to search anywhere overseas, much less a cave.

Another claim, made by a spokesman of the Department of Defense to the Senate Judiciary Committee, is that in order to conform with the Uniform Code of Military Justice, military interrogators would have to read detainees their rights before questioning them. Again, this is contrary to what military courts had already said in a case called Lonetree v. The United States. Clayton Lonetree was a Marine sergeant assigned to the United States embassy in Moscow. He had a Russian girlfriend who turned out to be working for the KGB. Lonetree gave an accomplice of hers classified information about the embassy. He became a spy for them. Eventually he was arrested and interrogated. At trial, Lonetree argued that because the investigators who interrogated him had failed to read him his rights, his statements to them should be excluded. The Court of Appeals for the armed forces rejected Lonetree's argument. The court ruled that because the purpose of the interrogation was to learn how badly the embassy's security had been compromised, it was for operational intelligence and was not conducted as part of a criminal investigation, and so the investigators were not required to read Lonetree his rights.
It is a safe bet that if it was not necessary to read a U. S. marine his rights during an interrogation, then a court is not going to require intelligence officers to do so when interrogating enemy combatants.

Even calling the case I was assigned to a "military commission" is misleading. Historically, military commissions have punished battlefield crimes and been run by the uniformed services and overseen by the Judge Advocate Generals of whatever service was holding the commission. They largely followed the same rules as courts-martial and in all cases were required to afford the accused all of the protections necessary for a fair trial. This time, however, the general counsel of the Defense Department—a political appointee—rather than the uniformed JAGs, who are the recognized experts on both military justice and the laws of war, wrote the rules and oversaw the process. When the JAGs expressed concern about the procedures proposed by the general counsel, they were cut out of the conversation to the point that when the final draft was sent around, the JAGs were given only a few hours to comment, effectively removing them from the process. There was no actual desire to get the professionals' opinions.

And despite the Pentagon's claim that both regular military and civilian courts would be unable to deal with terrorists captured on a battlefield, the fact is that no one has asked the federal prosecutor's office in New York—which has great experience trying and convicting terrorists—whether they have sufficient evidence that was legally obtained to try and convict those responsible for the attacks of 9/11. And absent that, the fact is that more than one hundred terrorism trials have been held in the United States since 9/11.

I like to give the example of Sheik al-Moayad, from Yemen, who was raising funds for Osama bin Laden. [See "Brian Murphy v. the Bad Guys," below.] The FBI lured him to Germany and arrested him in a sting operation. We chose not to treat him as a combatant and send him to Guantánamo. Instead we marshaled evidence and put him on trial, and it was a fair trial, and even the Islamic opposition party in Yemen would have to say, Well, he got a fair trial. He did not become a martyr, just a common criminal.

And on the battlefields of Afghanistan and Iraq, we've had more than three hundred courts-martial. There was no need to delay justice for the victims of 9/11 for five years in order to create a new justice system, because the system we have works.

By contrast, commission proceedings are political trials. Any time the president of the United States is the guy signing the order to have your trial—each individual person—that's a political trial. The military doesn't even get any discretion over who they think is the most guilty.

And what's the problem with that? Well, there's a significant possibility that you'll convict innocent people. And it gives the Khalid Sheik Mohammeds of the world the ability to say it's a political trial. And they're right! Khalid Sheik Mohammed can take the moral high ground for an afternoon. How could we get ourselves to such a point?
In fact, the commissions violated the very law of war they were supposedly enforcing, so it is not that surprising that the Supreme Court unequivocally rejected them, holding that the president had failed to give any justification for deviating from the rules of evidence and procedures governing the military and civilian court systems.

I submit to you, my fellow Americans, that the real reason the president abandoned 250 years of American jurisprudence was that doing so was the only way to use confessions obtained through physical and mental coercion, and to shield the methods being used to obtain these confessions from public scrutiny.

I didn't see Professor John Yoo's infamous torture memo—written when he was deputy assistant attorney general—until it was posted on the Web by The Washington Post. I did not need to see it, though, to conclude that the United States was probably interrogating people using the highly coercive methods countenanced by Professor Yoo. Why did I believe that? Well, the rules for commissions allowed evidence that had been obtained by coercion—some call it torture—to be both admitted at trial and kept secret forever. Commissions were not necessary for justice, but they were necessary if this kind of evidence was going to be used.

Here's how the commission rules permit such a thing to happen. Some of the nation's most classified materials fall into the category of "sources and methods." Normally, sources and methods refers to things like the location and capabilities of intelligence satellites and the identities of spies and informants, information that gets people killed in the intelligence business. Prior to 9/11, the methods of interrogation approved for the questioning of combatants were not classified and were in fact published in the Army's interrogation manual. However, when the president announced that he had transferred fourteen high-value detainees, including Khalid Sheik Mohammed, from undisclosed prisons to Guantánamo, he refused to answer questions regarding the methods of questioning detainees, beyond admitting that the interrogations were "tough," on the grounds that the specific interrogation techniques were classified sources and methods.

Classifying the physical and mental abuse of a detainee as "sources and methods" of intelligence guarantees that the way these interrogations were conducted will never be discussed in an open session of a commission. The public will know that an accused person confessed to something, but the conditions in which the confession was obtained will remain secret.

It goes further than that. The commission itself may never know. Because the military interrogations of my client are classified, I cannot show them to Hamdan. That's right. Even though he was present at the interrogation, Hamdan cannot see them. Nor can I ask him about what he allegedly said, because he does not have security clearance. The result is that a defense counsel cannot ask his client why he confessed. His client, for example, may have confessed because he was strapped down, unable to breathe because a wet towel was over his face, and, after passing out a third time, was ready to admit to anything. That would be the end of any trial in military or federal court, but commission
rules prevent the attorney from discussing this classified interrogation with his client, because to do so might reveal a method or source to his uncleared client.

In either a civilian or military trial, the prosecutor would be obligated to both find out and tell me if my client was subjected to coercion. Again, that is not the case in commissions. In both the military and the federal systems, a prosecutor is in charge at the trial, and if he fails to give the defense potentially exculpatory evidence-like, say, if the accused was kept awake for twenty-four hours before the interrogation-that alone can be grounds for dismissing the entire case. So the prosecutor has both the power and obligation to search all of the evidence in the government's possession for any exculpatory evidence.

WHAT IS THE REAL REASON FOR THE COMMISSIONS?

In the commissions, the prosecutor doesn't control the information he sees or is permitted to turn over to the defense. The CIA, the FBI, and military intelligence decide what they are willing to turn over. They decide what I get to see. The result is, if information is damaging to the government's case, there is no guarantee that I am going to see it.

This is not speculation. This is exactly what has happened. In fact, after meeting with a government agency, military attorneys assigned to the prosecution expressed concern to the chief prosecutor that the agency had made it clear that it was going to withhold 10 percent of the evidence, and that the exculpatory evidence, if there was any, would be among the evidence withheld. Translation: We are going to leave out how we got these statements. The chief prosecutor's response was blunt: The rules do not require us to look into this. Don't worry about it. After the officers filed a complaint, both they and the chief prosecutor left the commissions. The rules, though, did not change.

The rules also permit hearsay, which means that the agent who conducted the interrogation does not have to actually appear before the tribunal and be subjected to cross-examination. Instead, a written summary of the interrogation is entered—an edited summary, of course. You cannot cross-examine a piece of paper to find out what happened. So all the commission and the public ever see is the confession.

Each of these things is a perversion of justice. All of them, taken together, mean we really have arrived at a kafkaesque kind of justice.

WHAT HAPPENS WHEN 250 YEARS OF JURISPRUDENCE ARE THROWN OUT?

I was assigned to represent Salim Ahmed Hamdan, a Yemeni national who had been picked up in Afghanistan and had once worked as Osama bin Laden's driver. When I met Hamdan, he was in solitary confinement awaiting trial. I was told that he would stay in solitary confinement until his trial was over and that my access to him was conditioned on negotiating a guilty plea. So I put in a demand for a speedy trial. And the answer was no, Hamdan did not have the right to a speedy trial. In other words, he could be held in solitary until he pleaded guilty.
That made me think of a time years ago, when I was in Quito, Ecuador, and I took a tour of the city. The tour went by the prison. I asked about the justice system, and the guide explained that everyone just pleaded guilty. When I asked why, he explained that trials were not held until after the prisoners had already been held for the length of the sentence they would have served if convicted. So if they pleaded guilty, they could go home. If they pleaded not guilty, they had to wait for a trial and spend years more in jail. It was a great way to ensure a conviction, and no way to ensure justice.

So I filed suit against my chain of command, including my commander in chief.

When it became clear that Hamdan's case would be heard in federal court, the prosecution finally brought charges against him of conspiracy to commit terrorism. From the start, though, it was clear that Hamdan was not going to get a fair trial. The trouble started when the court was seated. Two of the officers of the court had played key roles in Afghan operations. One was a senior intelligence officer, the other was in charge of transporting prisoners to Guantánamo. But when I tried to ask them about what their roles had been, the judge kicked Hamdan out of the courtroom—he couldn't hear what they said, because that information was classified. Ultimately, the officer in charge of the trial refused to remove them from the court, saying that he was confident in their ability to be impartial.

Why would you put guys who were involved in the operation on the court in the first place? Surely there are enough people in the United States military who were not involved in operations in Afghanistan to have an unbiased panel. But of the five officers on the court, two were directly involved. How did that happen?

Either the screening process is grossly incompetent or intentionally unfair. I do not know which it was. I do know that the same prosecutors who objected to evidence being hidden also reported that the chief prosecutor had stated that the courts would be handpicked and that they did not need to worry about acquittals.

When I appealed, the officers were removed and the press reported that I had won that round. The truth was that I had won nothing, because the officers were not replaced. Under the rules for commissions, the government has to get two thirds of the court to vote guilty to get a conviction. Hamdan's court started with five members, so the prosecution needed four votes for a conviction, and Hamdan needed two votes for an acquittal. After the two officers were removed and not replaced, the prosecution needed two votes for a conviction and Hamdan needed two votes for an acquittal. The prosecution's job had actually gotten easier.

The justification for all of this is that after 9/11, this is what it takes to keep us safe. Never mind that terrorism has been around forever and we have faced far greater threats—like the Soviet Union, with enough nuclear weapons to destroy this planet many times over, whose leader banged his shoe, and said he would bury us. That was a threat. German submarines lying off our coast and sinking our ships. That was a threat. A rebel army capable of destroying Washington encamped within fifteen miles of the capital.
That was a threat. And none of those grave threats caused us to jettison our most basic idea of justice: that we do not use coercion to get a confession. For that you have to go back to the witchcraft trials in Salem, or to England and the infamous treason prosecutions, or to the Spanish Inquisition.

The president has said that these methods have allowed us to obtain evidence that saved lives. I have not seen this evidence. I have not been allowed to see the list of methods that were authorized to obtain these and other statements from detainees. I do not know if they saved lives. What I do know is that if we use such evidence at trial, then we are hurting both the war against terror and our own soldiers in the long term.

Professor Yoo has cited the prosecution of Zaccarias Moussaoui as an example of why the federal justice system does not work. I completely disagree. In fact, Moussaoui is the perfect victory. Our system is shown to be fair. The court wrestled with difficult evidentiary issues and struck a balance that protects both our values and our security. We didn't lose anything. Moussaoui ultimately showed himself to be a fool-deranged, a joke, hardly someone that we'd think of as a great Middle East martyr. Ultimately he's imprisoned in a place where his name will be forgotten forever. How is that not a great victory?

Last fall, just before the elections, Congress reinstated the commissions that the Supreme Court had struck down. The bill, passed in haste, may have been good politics, but it is bad policy.

The push for this new Military Commissions Act started after the Supreme Court ruled in our favor last June that Common Article 3 of the Geneva Conventions applied to Al Qaeda. Immediately the White House claimed that legislation was necessary in part because Common Article 3 was too ambiguous. But when the Judge Advocate Generals testified before the Senate Armed Services Committee and were asked whether Common Article 3 was too ambiguous for our troops to follow, they unanimously answered no. Our troops understand Common Article 3. We train Common Article 3. There is no ambiguity. It seems that no one had taken the time to ask the experts.

This reminded me of something I was taught once by a Marine colonel during an exercise. I was assigned to write up rules of engagement for a Marine platoon going ashore to confront an embassy situation. I spent an evening and came up with my two-and-a-half-page neatly typed, carefully written and thought-out memo. And the Marine colonel threw it at me. "What is this garbage? You expect a Marine rifleman to read that? I need a three-by-five card with three sentences. Make it clear. Make it simple. Make it so he knows what he can do. He's going to have to decide this not with ten minutes to deliberate; he's going to have to decide it when somebody shoots at him."

The brilliance of the Geneva Conventions is that they are written simply and clearly for the military. It's when you try to avoid the Geneva Conventions that ambiguity is created. Ambiguity is bad for soldiers. It breaks down discipline. War is a difficult situation to begin with. There's a foreign culture for which you feel very little affinity. It's hot. You're
scared to death. Following the rules is going to be tough enough, and now you don't know what the rules are. Who did we capture today? We captured fifty terrorists. Not criminals, not soldiers, combatants, or detainees even. We have fifty terrorists. Why not just kill them?

Discipline breaks down. An Abu Ghraib happens, and we suffer a huge defeat.

The commander in chief should have significant powers during a war. When the country is at war, a president's hands should not be tied. But war should not be a blank check, either.

That balance is demonstrated very well by the Supreme Court decision during the Civil War, a ruling referred to as the Prize Cases. At the beginning of the war, Lincoln initiated a blockade of the East Coast and seized four ships. Merchants and shipowners were upset that their vessels and cargo had been seized and wanted it back, so they sued. The merchants argued that the rebels were merely criminals and that Lincoln did not have wartime powers to confiscate their goods. The Supreme Court disagreed, saying, No, he can seize them. There's a war on. Seizure conforms to the laws of war. So the president can exercise those commander-in-chief powers, and he gets to keep the ships and most of the cargo—but some he has to give back because it was bought and paid for before the war broke out. The president wasn't all-powerful—even he had to follow the rules of war. That is exactly what the Court ruled in Hamdan. Regardless of whether the president attempts to label Hamdan a civilian defendant or an enemy combatant, the president is still bound by the rule of law. That is not a recipe for defeat; it is a recipe for victory. And it is how we survive this dilemma.

WHAT DO WE DO NEXT?

In most countries, when a military officer openly opposes the president, it is called a coup. In the United States, it is called Hamdan v. Rumsfeld. After the Supreme Court's decision last summer, the world was rightly in awe of our system. On June 29, 2006, we proved once again that we are a nation of laws and not of men.

If we are to be a great nation, then we must be willing to be a nation bound by the rule of law in our treatment of all people. That means we have to be willing to be held accountable for our past actions. That means giving each detainee the fair and neutral hearing that was set out by the Supreme Court in another recent decision (Hamdi v. Rumsfeld). That means holding regular criminal trials as required by the Supreme Court in Hamdan. That means using something other than coerced confessions to convict our enemies. That means closing Guantánamo Bay, because in a nation dedicated to the rule of law, there is no need for a legal black hole.

Both Guantánamo Bay and the Military Commissions Act were deemed necessary because of a decision to interrogate prisoners in violation of both domestic and international law. To interrogate a handful of religious fanatics, we created this legal black hole and turned our back on 250 years of our jurisprudence. This is not a problem
that can be fixed by trying to change the law after the fact in an effort to cover up what we did. This is not a problem that can be fixed by cutting off access to the courts so that we will not be held accountable. This is not a problem that can be fixed by building a $125 million court complex in an effort to create an illusion of justice. None of those things will solve the problem, because it is not a problem at all. As Dr. Kissinger might say, it is a dilemma. The question is not, Will we survive Guantánamo, because of course we will survive Guantánamo. The question is: Will we survive Guantánamo as a great nation?

When I was a kid, my father was a forest scientist, and we began to have a scientific exchange with Russia under Nixon, and these Russian scientists would come and stay with us. They were fascinated with toasters. They didn't have toasters. My mom had one. She pushed it down, the bread popped up toasted. They liked toast. They wanted a toaster, badly. They wanted a better life. It's what every human being wants for his children.

When I was in Yemen, I went to Hamdan's house with a female attorney. On the next-to-last night, the grandmother called all the little girls living in the house together. There had to have been at least ten of them. They all had on blue jeans and tennis shoes and little T-shirts with Care Bears. It's not a rich family, but they're clean and they're dressed well and they look like little girls the world over. Their faces are shining and their eyes are bright and so full of promise. The grandmother pointed at my colleague and said, "She went to school and studied very, very hard and she got very good grades, and now she's a lawyer." And then she looked at them and said, "If you go to school and study very, very hard, you can be anything."

The toaster in my mother's kitchen was tangible evidence to the Soviet scientists that democracy and capitalism created a better life. Ultimately, the people of the Soviet Union saw what we had and rejected communism. The grandmother in Yemen wants her granddaughters to be treated not as rightless, faceless women but as people. If we are about equal rights, then the grandmother is with us.

President Ronald Reagan was right: In our best moments we are the shining city on the hill. The world is angry with us because they think we've failed in that promise. But if we are committed to the rule of law and remain faithful to our principles, then America will be a beacon to that grandmother, and her promise will have a chance of coming true.
PANEL VII:

PROSECUTION BY MILITARY COMMISSION: A QUESTION FOR THE NEXT ADMINISTRATION

MODERATOR: PROF. SCOTT L. SILLIMAN
Background: Detainee at United States Naval Base at Guantanamo Bay, Cuba, filed petition for review of determination by a Combatant Status Review Tribunal (CSRT) that he was an enemy combatant. Government moved to protect from public disclosure all nonclassified record information that it had labeled “law enforcement sensitive,” as well as the names and “identifying information” of all government personnel mentioned in the record.

Holdings: The Court of Appeals, Garland, Circuit Judge, held that:
(1) reliance on other detainee's interview report in determining that detainee was an enemy combatant was not consistent with standards and procedures specified by the Secretary of Defense, as required by the DTA;
(2) unclassified lists that designated organization of which detainee was a member as a terrorist organization could not be relied on to determine that detainee was an enemy combatant; evidence before CSRT was insufficient to sustain its determination that detainee was an enemy combatant;
(4) as remedy for CSRT's reliance on insufficient evidence in determining that detainee was an enemy combatant, government would be required to release or transfer detainee, or expeditiously convene a new CSRT; and
(5) government's motion to designate “protected information” would be denied without prejudice.

Petition granted and motion denied.

West Headnotes


402 War and National Emergency
4021 In General
402k11 k. Enemies, and Rights of War as to Persons. Most Cited Cases

Unclassified lists that designated organization of which detainee at United States Naval Base at Guantanamo Bay, Cuba, was a member as a terrorist organization could not be relied on to determine that detainee was an enemy combatant, where they did not disclose grounds upon which the designation was made, and they were not submitted to detainee's Combatant Status Review Tribunal (CSRT). Detainee Treatment Act of 2005, § 1005(e)(2)(C)(i), 10 U.S.C.A. § 801 note.


402 War and National Emergency
4021 In General
402k11 k. Enemies, and Rights of War as to Persons. Most Cited Cases

Evidence before Combatant Status Review Tribunal (CSRT) was insufficient to sustain its determination that detainee at United States Naval Base at Guantanamo Bay, Cuba, was an enemy combatant, where government intelligence documents relied on did not indicate where information they relied on came from, they did not provide any of the underlying reporting upon which their bottom-line assertions were founded, nor any assessment of the reliability of that reporting. Detainee Treatment Act of 2005, § 1005(e)(2)(C)(i), 10 U.S.C.A. § 801 note.


402 War and National Emergency
4021 In General
402k11 k. Enemies, and Rights of War as to Persons. Most Cited Cases

As remedy for Combatant Status Review Tribunal's
(CSRT) reliance on insufficient evidence in determining that detainee at United States Naval Base at Guantanamo Bay, Cuba, was an enemy combatant, government would be required to release or transfer detainee, or expeditiously convene a new CSRT to consider evidence submitted in a manner consistent with the Detainee Treatment Act. Detainee Treatment Act of 2005, § 1005(e)(2)(C)(i), 10 U.S.C.A. § 801 note.

Records 326

Records

326

326II Public Access

326II(A) In General

326k32

k. Court Records

Most Cited Cases

Government's motion to designate as “protected information,” and thus to bar from public disclosure, two categories of unclassified information in the record on review of determination by a Combatant Status Review Tribunal (CSRT) that detainee at United States Naval Base at Guantanamo Bay, Cuba, was an enemy combatant would be denied without prejudice to renewal, where government provided no explanation from which Court of Appeals could determine that protected status was required for the information.

Records 326

Records

326

326II In General

326k15

k. Making and Use of Copies

Most Cited Cases

Parhat is an ethnic Uighur, who fled his home in the People's Republic of China in opposition to the policies of the Chinese government. It is undisputed that he is not a member of al Qaida or the Taliban, and that he has never participated in any hostile action against the United States or its allies. The Tribunal's determination that Parhat is an enemy combatant is based on its finding that he is “affiliated” with a Uighur independence group, and the further finding that the group was “associated” with al Qaida and the Taliban. The Tribunal's findings regarding the Uighur group rest, in key respects, on statements in classified State and Defense Department documents that provide no information regarding the sources of the reporting.
Parhat contends, with support of his own, that the Chinese government is the source of several of the key statements.

Parhat's principal argument on this appeal is that the record before his Combatant Status Review Tribunal is insufficient to support the conclusion that he is an enemy combatant, even under the Defense Department's own definition of that term. We agree. To survive review under the Detainee Treatment Act, a Tribunal's determination of a detainee's status must be based on evidence that both the Tribunal and the court can assess for reliability. Because the evidence the government submitted to Parhat's Tribunal did not permit the Tribunal to make the necessary assessment, and because the record on review does not permit this court to do so, we cannot find that the government's designation of Parhat as an enemy combatant is supported by a "preponderance of the evidence" and "was consistent with the standards and procedures" established by the Secretary of Defense, as required by the Act.

To affirm the Tribunal's determination under such circumstances would be to place a judicial imprimatur on an act of essentially unreviewable executive discretion. That is not what Congress directed us to do when it authorized judicial review of enemy combatant determinations under the Act. Accordingly, we direct the government to release Parhat, to transfer him, or to expeditiously convene a new Combatant Status Review Tribunal to consider evidence submitted in a manner consistent with this opinion. As discussed in Part V, this disposition is without prejudice to Parhat's right to seek release immediately through a writ of habeas corpus in the district court, pursuant to the Supreme Court's recent decision in Bismullah v. Gates, 501 F.3d 178, 188 (D.C.Cir.2007). Without an explanation geared to the information at issue in this case, we are left with no way to determine whether that specific information warrants protection-other than to accept the government's own designation. But as we held in Bismullah, “[i]t is the court, not the Government, that has discretion to seal a judicial record, which the public ordinarily has the right to inspect and copy.” Id. *837 (internal citations omitted). We therefore deny the government's motion and direct it to file a renewed motion, accompanied by a copy of the record identifying the specific information it seeks to designate and pleadings explaining why protecting that specific information is required.


On September 11, 2001, members of al Qaida attacked the World Trade Center and the Pentagon with hijacked commercial airplanes, killing almost three thousand people. Seven days later, Congress authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred upon which the statements are based, and otherwise lack sufficient indicia of the statements' reliability.

We also deny, without prejudice, the government's motion to protect from public disclosure all nonclassified record information that it has labeled “law enforcement sensitive,” as well as the names and “identifying information” of all U.S. government personnel mentioned in the record. Although we do not doubt that there is information in these categories that warrants protection, the government has proffered only a generic explanation of the need for protection, providing no rationale specific to the information actually at issue in this case.

By resting its motion on generic claims, equally applicable to all of the more than one hundred other detainee cases now pending in this court, the government effectively “proposes unilaterally to determine whether information is ‘protected.’ ” Bismullah v. Gates, 501 F.3d 178, 188 (D.C.Cir.2007). Without an explanation geared to the information at issue in this case, we are left with no way to determine whether that specific information warrants protection-other than to accept the government's own designation. But as we held in Bismullah, “[i]t is the court, not the Government, that has discretion to seal a judicial record, which the public ordinarily has the right to inspect and copy.” Id. *837 (internal citations omitted). We therefore deny the government's motion and direct it to file a renewed motion, accompanied by a copy of the record identifying the specific information it seeks to designate and pleadings explaining why protecting that specific information is required.

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on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” Authorization To Use Military Force (AUMF), Pub.L. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (reprinted at 50 U.S.C. § 1541 note). Pursuant to the AUMF, the President ordered the United States Armed Forces to invade Afghanistan, where the Taliban (which then governed the country) had been supporting and harboring al Qaida.

In mid-October 2001, U.S. aerial strikes destroyed the camp where Parhat had been living. Thereafter, according to his undisputed testimony, Parhat and seventeen other unarmed Uighurs fled the camp, eventually crossing into Pakistan. Local villagers took the Uighurs in, gave them food and shelter, and then-in approximately December 2001-handed them over to Pakistani officials who turned them over to the U.S. military. In June 2002, the United States transferred Parhat to the U.S. Naval Base at Guantanamo Bay, Cuba, where he remains imprisoned.

In 2003, a military officer of the Criminal Investigation Task Force (CITF), U.S. Department of Defense (DOD), who was charged with reviewing Parhat's case, “recommenda[ed] the release of Parhat under a conditional release agreement.” Pet'r Br. 6 (quoting CSRT Decision, encl. 2, at 2 (App.15)).

The following paragraph is redacted from the publicly released copy of this opinion because it contains classified information. That is the explanation for all of the other redactions as well. Counsel for both Parhat and the government have full access to the unredacted opinion.

[Classified material redacted.]

On July 7, 2004, in a memorandum to the Secretary of the Navy, the Deputy Secretary of Defense issued an order establishing Combatant Status Review Tribunals (CSRTs), Order Establishing Combatant Status Review Tribunal (July 7, 2004) (DOD Order). Three weeks later, the Secretary of the Navy, whom the DOD *838 Order had designated “to operate and oversee th[e] [CSRT] process,” issued a memorandum that established the standards and procedures for those Tribunals. Implementation of Combatant Status Review Tribunal Procedures at 2 (July 29, 2004) (Navy Memorandum). The Navy Memorandum describes the Tribunals as “non-adversarial proceeding[s] to determine whether each detainee” at Guantanamo “meets the criteria to be designated as an enemy combatant.” Id. at E-1 § B. The Order and Memorandum both define an “enemy combatant” as:

an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Id.; DOD Order at 1.

A CSRT was held for Parhat on December 6, 2004. The proceedings consisted of an unclassified session, at which Parhat was present and answered questions under oath, followed by a classified session, at which Parhat was not present and in which the Tribunal considered classified documents not made available to him. The only evidence regarding the circumstances of Parhat's background and capture was his own interviews and testimony. Parhat denied association with al Qaida or the Taliban, stated that he had gone to Afghanistan solely to join the resistance against China, and said that he regarded China alone-and not the United States-as his enemy. See CSRT Decision, encl. 3, at 3-4, 6-7 (App.21-22, 24-25). The Tribunal did not find to the contrary. See id. encl. 2, at 1-4 (App.14-17).

Nonetheless, the Tribunal determined that Parhat was an enemy combatant. It did so on the theory that he was “affiliated” with a Uighur independence group known as the East Turkistan Islamic Movement (ETIM), that ETIM was “associated” with al Qaida and the Taliban, and that ETIM is engaged in hostilities against the United States and its coalition partners. See id. encl. 1, at 1 (App.11). The basis for the charge of Parhat's “affiliation” with ETIM was that the Uighur camp at which he lived and received training on a rifle and pistol was run by an ETIM leader. See id. encl. 2, at 1 (App.14); id. encl. 3, at 6 (App.24). The Tribunal acknowledged, however, that “no source document evidence was introduced to indicate ... that the Detainee had actually joined
ETIM, or that he himself had personally committed any hostile acts against the United States or its coalition partners.” Id. encl. 2, at 3 (App.16). The grounds for the charges that ETIM was “associated” with al Qaida and the Taliban, and that it is engaged in hostilities against the United States or its coalition partners, were statements in classified documents that do not state (or, in most instances, even describe) the sources or rationales for those statements. Parhat denied knowing anything about an al Qaida or Taliban association with Uighur camps. See id. encl. 3, at 4, 6-7 (App.22, 24-25).

Notwithstanding its determination that Parhat was an enemy combatant, the Tribunal stated that “this Detainee does present an attractive candidate for release.” Id. encl. 2, at 2 (App.15). It “urge[d] favorable consideration for release ... and also urge[d] that he not be forcibly returned to the People's Republic of China” because he “will almost certainly be treated harshly if he is returned to Chinese custody.” Id. at 4 (App.17). The Defense Department did not release him.


In December 2005, while Boumediene was pending, Congress passed the Detainee Treatment Act of 2005 (DTA), Pub.L. No. 109-148, 119 Stat. 2680 (2005) (reprinted at 10 U.S.C. § 801, note). The DTA granted this court “exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.” DTA § 1005(e)(2)(A). But it also provided that no court “shall have jurisdiction to ... consider ... an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.” Id. § 1005(e)(1) (amending 28 U.S.C. § 2241). In Hamdan v. Rumsfeld, the Supreme Court held, inter alia, that the DTA's bar against habeas claims did not apply to claims already pending on the date of its enactment. 548 U.S. 557, 126 S.Ct. 2749, 2769, 165 L.Ed.2d 723 (2006). Congress responded in October 2006 with theMilitary Commissions Act of 2006 (MCA), Pub.L. No. 109-366, 120 Stat. 2600 (2006) (codified in part at 28 U.S.C. § 2241 & note), which restated the habeas bar, providing that no court shall have jurisdiction to consider the habeas application 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.” MCA § 7(a) (again amending 28 U.S.C. § 2241). The MCA further declared that the habeas bar applies “to all cases, without exception, pending on or after the date of the enactment [of the MCA] which relate to any aspect of the detention ... of an alien detained by the United States since September 11, 2001.” Id. § 7(b).

In December 2006, Parhat filed a petition in this court for relief under the DTA, and, in the alternative, for a writ of habeas corpus. While Parhat's petitions were pending, another panel of the court decided Boumediene v. Bush, 476 F.3d 981 (D.C.Cir. 2007). In that decision, the panel held that the MCA bars judicial consideration of detainees' pending habeas petitions and that the bar is not an unconstitutional suspension of the writ. Id. at 994. Judge Rogers dissented, concluding that the detainees have a constitutional right to habeas and that the DTA is an inadequate substitute. See id. at 995 (Rogers, J., dissenting). The Supreme Court granted certiorari, --- U.S. ----, 127 S.Ct. 3078, 168 L.Ed.2d 755 (2007), and heard argument on December 5, 2007. On June 12, 2008, the Court reversed the panel, holding that the detainees “have the constitutional privilege of habeas corpus,” that the DTA's procedures for review of their status “are not an adequate and effective substitute for habeas corpus,” and that the MCA “operates as an unconstitutional suspension of the writ.” Boumediene v. Bush, ---U.S. ----, 128 S.Ct. 2229, 2230, 171 L.Ed.2d 41 (2008).

Meanwhile, the DTA petitions of numerous Guantanamo detainees proceeded in this circuit. In Bismullah v. Gates, decided on July 20, 2007, the court addressed a number of procedural issues common to a group of eight DTA petitioners, including Parhat. See 501 F.3d 178 (D.C.Cir. 2007). The central issue was whether the record on review in this court is limited-as the government argued—to the evidence actually presented to the CSRT, or whether
it includes all of the “Government Information.” *Id.* at 180. The latter, as defined in the Navy Memorandum, consists of all “reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant.” Navy Memorandum at E-1 § E(3); see *501 F.3d at 180.

*Bismullah* held that the record on review in this court is all of the Government Information. *501 F.3d at 180.* On September 7, 2007, the government sought rehearing and rehearing en banc. The panel denied rehearing on October 3, 2007, see *503 F.3d 137,* and the full court denied rehearing en banc on February 1, 2008, see *514 F.3d 1291.* The government then filed a petition for certiorari in the Supreme Court and sought a stay from the *Bismullah* panel pending the Supreme Court's determination. The panel granted the motion in part and stayed, pending disposition by the Supreme Court, the government's obligation in the eight cases to produce additional record material beyond that presented to the CSRTs. *See Bismullah v. Gates,* No. 06-1197, Order at 3-4 (D.C.Cir. Feb. 13, 2008). The government's petition for certiorari is currently pending.

On October 29, 2007, while its request for en banc review in *Bismullah* was still under consideration, the government produced to Parhat's counsel the record (both classified and unclassified) of what was actually presented to Parhat's CSRT. On November 1, Parhat filed a motion asking this court to review the CSRT's determination based solely upon that record. While reserving his right to future review based on all of the Government Information, to which he is entitled under *Bismullah,* Parhat contended that the materials before the CSRT are sufficient to establish as a matter of law that he is not an enemy combatant. Further delay while the government sought certiorari regarding his entitlement to a broader record, he argued, would be unnecessary and unjust. The government did not oppose Parhat's request.

On December 14, 2007, we set the case for briefing, and on April 4, 2008 we heard argument, solely on the record before the CSRT. *See Parhat v. Gates,* No. 06-1397, Order at 2 (D.C.Cir. Dec. 14, 2007). That is the case that is presently before us. Also before us is the government's motion to designate as “protected information” certain unclassified information in the CSRT record that it has produced to counsel and the court.

II

The DTA grants this court jurisdiction to “determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.” DTA § 1005(e)(2)(A). The scope of our review is “limited to the consideration of”:

(i) whether the status determination of the [CSRT] was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs] (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

*Id.* § 1005(e)(2)(C); *see Boumediene,* slip op. at 47-49 (noting the limited nature of the DTA's jurisdictional grant to this court). The DOD “standards and procedures” referenced in DTA § 1005(e)(2)(C)(i) and (ii) are set out in the DOD Order and Navy Memorandum discussed in Part I above. The *Bismullah* opinion describes those standards and procedures*841* in detail. *See 501 F.3d at 181-82; see also Boumediene,* slip op. at 37 (describing the limited nature of “the procedural protections afforded to the detainees in the CSRT hearings”). Here, we describe only those that are relevant to our disposition.

Each CSRT is composed of “three neutral commissioned officers.” Navy Memorandum at E-1 § C(1). The Recorder, also a commissioned officer, is charged with gathering the “Government Information,” which is defined as “reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee” meets the enemy combatant criteria. *Id.* at E-1 § E(3); *see id.* at E-2 § C(1). The Recorder must present to the Tribunal both the “Government Evidence,” defined as “such evidence in the.
Government Information as may be sufficient to support the detainee's classification as an enemy combatant,” and any evidence in the Government Information that is exculpatory, described as “evidence to suggest that the detainee should not be designated as an enemy combatant.” *Id.* at E-1 § H(4).

The Recorder must also make the Government Information available to the detainee's assigned Personal Representative, a military officer who is “neither a lawyer [n]or an advocate,” but who must explain the CSRT process to the detainee and may assist the detainee in preparing for it. *Id.* at E-1 § F(5); *id.* at E-2 § C(4); *id.* at E-3 §§ A, D. The Personal Representative may view the classified evidence but may not share it with the detainee. *See id.* at E-1 § F(8); *id.* at E-3 § C(4). The detainee's discussions with the Personal Representative are neither privileged nor confidential. *Id.* at E-3 §§ C(1), D. The detainee may testify or introduce relevant documentary evidence at the hearing, and may present the testimony of any witness who is “reasonably available and whose testimony is considered by the Tribunal to be relevant.” *Id.* at E-1 § F(6); *see Boumediene*, slip op. at 38 (noting, in connection with this provision, that the detainee's “ability to rebut the Government's evidence against him is limited by the circumstances of his confinement and his lack of counsel at this stage”).

The CSRT must “determine whether the preponderance of the evidence supports the conclusion that [the] detainee meets the criteria to be designated as an enemy combatant.” Navy Memorandum at E-1 § G(11). There is a rebuttable presumption that the Government Evidence is “genuine and accurate.” *Id.* The Tribunal “may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances.” *Id.* at E-1 § G(7).

An important DOD “standard” for our purposes is the definition of “enemy combatant.” As noted above, the DOD Order and the Navy Memorandum both define an “enemy combatant” as:

an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

DOD Order at 1; Navy Memorandum at E-1 § B.

Parhat contends that the record before his CSRT does not support its finding that he is an enemy combatant, even under the government's own definition, and hence that the Tribunal's determination is not “consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals.” DTA § 1005(e)(2)(C)(i). In the alternative, he argues that the government's definition is “inconsistent with the *Constitution and laws of the United States," *id.* § 1005(e)(2)(C)(ii), because it exceeds the authorization that Congress gave the President in the AUMF. Although he makes a number of arguments in this regard, Parhat's principal contention is that, by defining “enemy combatant” as including an individual who was merely “part of or supporting” forces “associated” with the Taliban or al Qaida, the government exceeded the AUMF's authorization to use force “against those nations, organizations, or persons” that the President determines “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,” or that “harbored such organizations or persons.” AUMF § 2(a).

The government responds that the evidence before Parhat's CSRT does support his designation as an enemy combatant under the DOD definition. It further maintains, based on a theory of organizational equivalence, that this definition is consistent with the AUMF. In the AUMF, the government argues, Congress authorized force not only against the Taliban and al Qaida, but also against any person or entity that is effectively part of the same organization. *See Unclassified Oral Arg. Tr. 23-24. Moreover, even if the DOD definition is not authorized by the AUMF, the government maintains that it is nonetheless within the President's constitutional authority as Commander in Chief.

While disputing the government's statutory and constitutional arguments, Parhat emphasizes that we need not reach them if we determine that the evidence that was before his CSRT is insufficient to support his status as an enemy combatant under the government's own definition. Nor does the
government argue that Parhat's status as an enemy combatant can be maintained if the evidence does not support the government's own regulatory definition. To the contrary, the government recognizes that the DTA authorizes us to determine "whether the [CSRT's determination] was consistent with the standards and procedures specified by the Secretary of Defense." DTA § 1005(e)(2)(C)(i). Accordingly, because we conclude below that the evidence that was before the CSRT is insufficient to categorize Parhat as an enemy combatant under DOD's definition, we do not reach the other issues disputed by the parties.

III

In this Part, we describe the evidence relevant to the CSRT's determination that Parhat is an enemy combatant and identify deficiencies in that evidence. In Part IV, we explain why the record evidence is insufficient to support the Tribunal's determination under the DTA.

At his CSRT, Parhat repeatedly stated that his only enemy, and the only enemy of his fellow Uighurs, is the government of China. He testified that the Uighurs have never been against the United States and we do not want to be against the United States.... The reason we went into Pakistan was because in China there is torture and too much pressure on the Uighur people.... The Uighur people only have the privilege of having two children. If a female gets pregnant with a third child, the government will forcibly take the kid through abortion.

CSRT Decision, encl. 2, at 3 (App.16). FN2 Neither the CSRT nor this court, of course, has any authority to determine whether Parhat truly is an enemy of China. As the CSRT recognized, "[t]he People's Republic of China is not a coalition partner for enemy combatant classification purposes." Id. encl. 1, at 1 (App.11).

The Tribunal nonetheless determined that Parhat was an enemy combatant. It did so on the basis of the following finding: that Parhat "is affiliated with forces associated with al Qaida and the Taliban (i.e., 'the East Turkistan Islamic Movement,) that are engaged in hostilities against the United States and its coalition partners." Id. encl. 1, at 1 (App.11).

The parties agree that, for a detainee who is not a member of al Qaida or the Taliban, DOD's definition establishes three elements that the government must prove by a preponderance of the evidence to designate an individual as an enemy combatant:

(1) the petitioner was part of or supporting "forces"; (2) those forces were associated with al Qaida or the Taliban; and (3) those forces are engaged in hostilities against the United States or its coalition partners. Accord Pet'r Br. 21-22; Resp't Br. 10-11, 18-19; Pet'r Reply Br. 14-15; Unclassified Oral Arg. Tr. 21.

A

The first element of the DOD definition of enemy combatant requires proof that Parhat was "part of or supporting" ETIM. Neither Parhat nor any other detainee stated that Parhat was a member of ETIM. And as the CSRT noted, "no source document evidence was introduced to indicate ... that the Detainee had actually joined ETIM."CSRT Decision, encl. 2, at 3 (App.16).
To support the contention that Parhat was “part of or supporting” ETIM, the government relies on evidence that comes almost entirely from Parhat’s own statements and those of other Uighur detainees. Parhat stated that, when he decided to leave China, he headed for a Uighur camp, widely known in Xinjiang province, that was located in the Tora Bora mountains of Afghanistan. See CSRT Exhibit R7, at 1-2 (App.51-52) (FBI interview report dated May 11, 2002). At the camp, he received training on a Kalashnikov rifle and a pistol, which “consisted of weapon disassembly and cleaning,” Pet’t Br. 18 n. 22 (quoting CSRT Exhibit R3, at 2 (App.37)) FN3; performed guard duty, see CSRT Exhibit R7, at 2 (App.52); and helped to build a house, see CSRT Decision, encl. 3, at 6 (App.24). He sought the training, he said, only to fight the Chinese government. Id. encl. 1, at 2 (App.12); id. encl. 3, at 3-4 (App.21-22).

FN3. [Classified material redacted.]

Parhat testified that a man named Hassan Maksum, whom the government has identified as a leader of ETIM, was a leader at the camp. See id. encl. 3, at 6 (App.24). Parhat maintains that the fact that Maksum was a leader of the camp is not enough to make it an “ETIM camp,” and that the kind of activities in which Parhat participated at the camp are not enough to establish that he was “part of or supporting” ETIM. The government argues to the contrary. We need not decide those questions. As we discuss below, the evidence on the second and third elements of DOD’s definition of enemy combatant, unlike the evidence on the first, does not disclose from whence it came. It is therefore insufficient to support the Tribunal’s determination because it does not permit the Tribunal or this court to assess its reliability.

B

The second element of DOD’s definition requires proof that ETIM was “associated” with al Qaida or the Taliban. The Navy Memorandum does not define “associated.” Parhat contends that the term is inconsistent with the AUMF, which authorizes the President to use force only against “those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.” AUMF § 2(a) (emphasis added). And he stresses that there is no allegation that ETIM itself had anything to do with the September 11 attacks or that it harbored any organization that did.

The government maintains that an entity that, subsequent to September 11, becomes so closely associated with al Qaida or the Taliban that it is effectively “part of the same organization,” Unclassified Oral Arg Tr. 23, is covered by the AUMF because it thereby becomes the same “organization[]” that perpetrated the September 11 attacks, AUMF § 2(a). This argument suggests that, even under the government’s own definition, the evidence must establish a connection between ETIM and al Qaida or the Taliban that is considerably closer than the relationship suggested by the usual meaning of the word “associated.” FN4 We need not decide the precise meaning of the term, FN5 however, as there is a more fundamental problem with the evidence employed by the government to prove this element. That problem is discussed below and in Part IV.

FN4. See Unclassified Oral Arg. Tr. 24 (“Judge Sentelle: So you are dependent on the proposition that ETIM is properly defined as being part of al Qaida, not that it aided or abetted, or aided or harbored al Qaida, but that it’s part of [?] Mr. Katsas: Correct .... in order to fit them in the AUMF.”).

FN5. We have recognized in a related context that two organizations with different names may nonetheless be the same organization, simply operating under aliases. See National Council of Resistance of Iran v. Department of State, 251 F.3d 192, 199-200 (D.C.Cir.2001) (affirming the authority of the Secretary of State to designate the NCRI as a foreign terrorist organization where the Secretary found “that the PMOI is a foreign organization engaging in terrorist activities ... and that the NCRI and the PMOI are one and the same”).

The principal evidence supporting this element comes from four U.S. government intelligence documents, one from the Department of State and
three from components of the Department of Defense. The following paragraphs describe the four documents. Because the documents are almost entirely classified, our description is redacted from the public version of this opinion.

[Classified material redacted.]

Finally, the government relies on the interview report of a single Uighur detainee,*845 Akhdar Basit, which states that Basit told the interviewer that a leader at the camp told him that the camp “had been provided to the Uigh [u]rs by the Taliban in order that the Uigh[u]rs could train to fight the Chinese oppression.” See CSRT Exhibit R4, at 2 (App.40) (FBI interview report dated December 9, 2002). Parhat's own statement was that the camp was given to the Uighurs by the “Afghani Government.” CSRT Exhibit R6, at 1-2 (App.49-50) (FBI interview report dated July 19, 2003). Of course, the Taliban was the “Afghani Government” in 2001, and not all entities provided with housing by that government—no doubt ranged from orphanages to terrorist organizations like al Qaida—were “associated” with the Taliban in a sense that would make them enemy combatants.

FN6. Parhat also testified that he did not “believe Osama bin Laden or the Taliban were financially providing for the camp,” CSRT Decision, encl. 3, at 2 (App.20), that he saw “only Uighur people” at the camp, id. at 6 (App.24), and that “[t]he people in Turkistan will not associate with al Qaida,” id. at 7 (App.25).

In any event, the government's reliance on Basit's interview report is problematic because the CSRT was not provided with exculpatory evidence on the same point. Although the report states that Basit said he had been told that the camp was provided to the Uighurs by the Taliban, Parhat's appellate counsel has called our attention to evidence from another Uighur's CSRT to the effect that the Uighur camp was actually in existence prior to the Taliban takeover of Afghanistan. See Pet't Br. 4; Affidavit of Susan Baker Manning (App.192-93) (quoting a Tribunal member's statement in the November 30, 2004 CSRT of detainee Abdul Semet, that [classified material redacted]). This evidence was not presented to Parhat's CSRT.

FN7. We note that Basit testified at his own CSRT that he had “no idea” who provided the camp. That testimony is available on DOD's website, see www. dod. mil /pubs/foi/detainees/csrt/Set-16-1363-1446.pdf (last accessed June 9, 2008), but it was not presented to Parhat's CSRT. Because the website does not disclose whether Basit's testimony pre- or post-dated Parhat's CSRT, it is unclear whether we may consider it on this review. See Boumediene, slip op. at 60-61 (holding that “the DTA review proceeding falls short of being a constitutionally adequate substitute” for habeas because the detainee has “no opportunity to present evidence discovered after the CSRT proceedings concluded”).

FN8. We also note that the government ultimately determined that Basit was not an enemy combatant and released him from

[1] As noted in Part II, the Navy Memorandum requires the CSRT Recorder to present to the Tribunal any “evidence to suggest that the detainee should not be designated as an enemy combatant.” Navy Memorandum at E-1 § H(4). This obligation certainly includes testimony given by other detainees in the course of other CSRT proceedings prior to the commencement of the detainee's own. See id. at E-2 §§ B(1), C(1); Boumediene, slip op. at 60-61 (noting that, under the DTA, the detainee has “no opportunity to present evidence discovered after the CSRT proceedings concluded” (emphasis added)). If, in order to support the proposition that ETIM is associated with the Taliban (a necessary element of the government's definition of “enemy combatant”), the government is going to rely on the statement in Basit's interview report that the camp he stayed in was provided by the Taliban, then it must also give the Tribunal an opportunity to consider contrary evidence. Because the Tribunal was not afforded that opportunity, we cannot conclude that reliance on the interview report “was consistent with the standards and procedures specified by the Secretary of Defense.” DTA § 1005(e)(2)(C)(i). We express no opinion as to whether the Recorder's failure to present exculpatory evidence to the CSRT serves as an independent ground for invalidating the Tribunal's entire determination.

FN9. We also note that the government ultimately determined that Basit was not an enemy combatant and released him from
Guantanamo, notwithstanding that-like Parhat—he acknowledged that he took weapons training at the camp. See Notice by United States of Transfer of Petitioners, Mamet v. Bush, No. 05-1886 (D.D.C. May 5, 2006) (advising the district court that the government had released from Guantanamo and transferred to Albania for release certain Uighur detainees, including Basit, who were “no longer classified as enemy combatants”).

The government contends that examination of statements from other detainees’ CSRTs is contrary to the holding in Bismullah that the DTA “does not authorize this court to determine whether a status determination is arbitrary and capricious because ... it is inconsistent with the status determination of another detainee who was detained under similar circumstances.” 501 F.3d at 186. We have not, however, examined those statements to determine whether the different CSRTs acted inconsistently, but rather to determine whether the government honored its obligation to present Parhat’s CSRT with exculpatory evidence— as required by the “procedures specified by the Secretary of Defense.” DTA § 1005(e)(2)(C)(i).

C

Proving the third element of DOD’s definition of enemy combatant requires evidence that ETIM engaged in hostilities against the United States or its coalition partners. As with the second element, the principal evidence supporting this element comes from the four government intelligence documents described above. Because the documents are classified, much of the following discussion is redacted from the public version of this opinion. As we have previously noted, there is no allegation or evidence that Parhat personally engaged in any such hostilities. See CSRT Decision, encl. 2, at 2-3 (App.15-16); [classified material redacted].

[Classified material redacted.]

In its brief, the government seeks further support in two unclassified lists that designate ETIM as a terrorist organization, one established by the Department of State and the other by a United Nations Security Council committee. Neither list discloses the grounds upon which the designation was made. In any event, because neither list was submitted to Parhat’s CSRT, neither can be relied upon to support its determination here.

FN9. The government contends that examination of statements from other detainees’ CSRTs is contrary to the holding in Bismullah that the DTA “does not authorize this court to determine whether a status determination is arbitrary and capricious because ... it is inconsistent with the status determination of another detainee who was detained under similar circumstances.” 501 F.3d at 186.

IV

As Part III indicates, the principal evidence against Parhat regarding the second and third elements of DOD’s definition of enemy combatant consists of four government intelligence documents. The documents make assertions—often in haec verba—about activities undertaken by ETIM, and about that organization’s relationship to al Qaida and the Taliban. The documents repeatedly describe those activities and relationships as having “reportedly” occurred, as being “said to” or “reported to” have happened, and as things that “may” be true or are “suspected of” having taken place. But in virtually every instance, the documents do not say who “reported” or “said” or “suspected” those things. FN10 Nor do they provide any of the underlying reporting upon which the documents’ bottom-line assertions are founded, nor any assessment of the reliability of that reporting. Because of those omissions, the Tribunal could not and this court cannot assess the reliability of the assertions in the documents. And because of this deficiency, those bare assertions cannot sustain the determination that Parhat is an enemy combatant. FN12

FN11. The only exception is the reference in three of the documents, which is repeated in almost identical language in each, to a statement by an unnamed Uighur detainee at Guantanamo: [Classified material redacted.] The government did not provide the CSRT (or the court) with the interview report of that detainee, notwithstanding that it did provide the report of another detainee upon which it relied for a different point. See CSRT Exhibit R4 (App.46) (FBI interview report of Akhdar Qasem Basit). Thus, the CSRT had no opportunity to assess how the unnamed detainee obtained this information,
or to see how the government interviewer assessed the detainee's reliability, [classified material redacted], or otherwise to do so on its own.

FN12. As we noted in Part III, several statements in the intelligence documents also appear to be inconsistent with the government's theory that ETIM and al Qaida or the Taliban are the same “organization” for purposes of the AUMF.

The CSRT's obligation to assess the reliability of evidence is expressly stated in the Navy Memorandum's provision on “Admissibility of Evidence.” This provision states that the Tribunal may consider hearsay evidence—which the intelligence reports plainly are—but in so doing it must “take[s] into account the reliability of such evidence in the circumstances.” Navy Memorandum at E-1 § G(7). That obligation, and the concomitant requirement that reliability be assessable, are also inherent in the Memorandum's direction—adopted by Congress in the DTA—that the CSRT must decide whether “a preponderance of the evidence” supports the determination that the detainee is an enemy combatant. Id. at E1 § G(11); see DTA § 1005(e)(2)(C)(i). As the Supreme Court explained in Concrete Pipe, in the course of discussing the nature of “the burden of showing something by a ‘preponderance of the evidence’ ”: “Before any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty.” Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 622, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993).

Both the obligation and the requirement likewise flow from the Memorandum's establishment of a “rebutable presumption that the Government Evidence is ‘genuine and accurate.’ ” Navy Memorandum at E-1 § G(11) (emphasis added). If a Tribunal cannot assess the reliability of the government's evidence, then the “rebutable” presumption becomes effectively irrebuttable. Cf. Bismullah, 501 F.3d at 186 (noting that a rebuttable presumption of regularity “would be irrebuttable, in effect, if neither petitioners' counsel nor the court could ever look behind the presumption to the actual facts”).

This court, in turn, has two responsibilities with respect to the reliability of the evidence presented to the CSRT. First, in order to judge “whether the [CSRT's determination] was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals,” DTA § 1005(e)(2)(C)(i), we must assure ourselves that the CSRT had the opportunity to-and did-evaluate the reliability of the evidence it considered. Second, in order to ensure, as the DTA requires, that “the conclusion of the Tribunal [is] supported by a preponderance of the evidence,” allowing only a “rebutable” presumption in favor of the Government's evidence, id., we must be able to assess the reliability of that evidence ourselves.

Insistence that the Tribunal and court have an opportunity to assess the reliability of the record evidence is not simply a theoretical exercise. Parhat contends that the ultimate source of key assertions in the four intelligence documents is the government of the People's Republic of China, and he offers substantial support for that contention. Parhat further maintains that Chinese reporting on the subject of the Uighurs cannot be regarded as objective, and offers substantial support for that proposition as well.

FN13. See Singletary v. Reilly, 452 F.3d 868, 873 (D.C.Cir.2006) (holding that hearsay presented at a parole board hearing “was not demonstrated to be reliable and that the Board's decision to revoke [the appellant's] parole was therefore totally lacking in evidentiary support” (internal quotation marks and citation omitted)).

FN14. [Classified material redacted.]

FN15. [Classified material redacted.]

The CSRT's own written decision makes clear both its inability to assess the reliability of most of the evidence presented to it and the importance of its being able to do so. Although the cover sheet of the Tribunal's decision reaches the bottom-line conclusion that Parhat “is properly designated as an enemy combatant” because he “is affiliated with forces associated with al Qaida and the Taliban (i.e., the ‘East Turkistan Islamic Movement,’) which are
engaged in hostilities against the United States or its coalition partners,” CSRT Decision, Cover Sheet (App.10), the underlying decision is considerably more qualified. It states: “The Tribunal found the Detainee to be an enemy combatant because of his apparent ETIM affiliation ... [classified material redacted], but despite the fact that the ETIM is said to be making plans for future terrorist activities against U.S. interests, no source document evidence was introduced to indicate how this group has actually done so....”Id. encl. 2, at 3 (App.16) (emphases added). It further states that the “Detainee is considered to be an enemy combatant because he is said to be affiliated with the ETIM,” and that “[t]he camp at which he trained was an ETIM camp apparently funded in part by Usama bin Laden and the Taliban.” Id. at 1 (App.14) (emphases added); see also id. at 2 (App.15) (referring again to Parhat’s “alleged ETIM affiliation” (emphasis added)).

Moreover, in the two instances in which the CSRT did have exogenous information with which to assess the reliability of statements made in the intelligence documents, it found sufficient discrepancies to question one statement and to “doubt the veracity” of the other. Id. at 2-3 (App.15-16). FN16 The Tribunal plainly fulfilled its obligation to evaluate the reliability of those two statements. In doing so, it performed the kind of assessment that a CSRT must make in order to determine whether a detainee has been properly classified as an enemy combatant. And yet, that is precisely the kind of assessment that the Tribunal could not make with respect to the bulk of the evidence before it.

FN16. The two instances, which we discuss in this footnote, involve classified information. [Classified material redacted.]

The government does not dispute that DOD’s standards and procedures require that the CSRT be able to assess the reliability of the record evidence. See Unclassified Oral Arg. Tr. 39. It argues, however, that the Tribunal was able to do so here—for two reasons.

First, the government suggests that several of the assertions in the intelligence documents are reliable because they are made in at least three different documents. We are not persuaded. Lewis Carroll notwithstanding, the fact that the government has “said it thrice” does not make an allegation true. See LEWIS CARROLL, THE HUNTING OF THE SNARK 3 (1876) (“I have said it thrice: What I tell you three times *849 is true.”). In fact, we have no basis for concluding that there are independent sources for the documents’ thrice-made assertions. To the contrary, as noted in Part III, many of those assertions are made in identical language, suggesting that later documents may merely be citing earlier ones, and hence that all may ultimately derive from a single source. And as we have also noted, Parhat has made a credible argument that—at least for some of the assertions—the common source is the Chinese government, which may be less than objective with respect to the Uighurs. Other assertions in the documents may ultimately rely on interview reports (not provided to the Tribunal) of Uighur detainees, who may have had no first-hand knowledge and whose speculations may have been transformed into certainties in the course of being repeated by report writers.

Second, the government insists that the statements made in the documents are reliable because the State and Defense Departments would not have put them in intelligence documents were that not the case. This comes perilously close to suggesting that whatever the government says must be treated as true, thus rendering superfluous both the role of the Tribunal and the role that Congress assigned to this court. We do not in fact know that the departments regard the statements in those documents as reliable; the repeated insertion of qualifiers indicating that events are “reported” or “said” or “suspected” to have occurred suggests at least some skepticism. Nor do we know whether the departments rely on those documents for decisionmaking purposes in the form in which they were presented to the Tribunal, or whether they supplement them with backup documentation and reliability assessments before using them to take actions of consequence.

To be clear, we do not suggest that hearsay evidence is never reliable-only that it must be presented in a form, or with sufficient additional information, that permits the Tribunal and court to assess its reliability. Nor do we suggest that the government must always submit the underlying basis for its factual assertions in order to make such an assessment possible. In many cases, such submissions will be advisable and reasonably available: the detainees’ counsel are
cleared for classified information, and, where its source is highly sensitive, Bismullah held that it can be shown to the court (and CSRT) alone. See 501 F.3d at 180 (“[T]he Government may withhold from counsel, but not from the court, certain highly sensitive information.”). But there may well be other forms in which the government can submit information that will permit an appropriate assessment of the information's reliability while protecting the anonymity of a highly sensitive source. Courts have frequently relied on such methods in the Fourth Amendment context. Fn17 and have permitted the use of appropriate nonclassified substitutions under the Classified Information Procedures Act (CIPA). Fn18 Indeed, the Navy Memorandum expressly directs agencies with “reasonably available information... bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant” either to provide the information to the Tribunal or to provide “an acceptable substitute,” which “may include an unclassified or, if not possible, a lesser classified, summary of the information.” Navy Memorandum at E-1 § E(3).

Fn17. Cf. Rugendorf v. United States, 376 U.S. 528, 533, 84 S.Ct. 825, 11 L.Ed.2d 887 (1964) (holding that a search warrant affidavit that withholds the name of an informant is not deficient “so long as there [is] a substantial basis for crediting the hearsay” based on other information (internal quotation marks and citation omitted)); United States v. Laws, 808 F.2d 92, 95 (D.C.Cir.1986) (affirming the sufficiency of a warrant based on a confidential informant's tip where there was “substantial reason to believe that ... the hearsay is reliable”).


In this opinion, we neither prescribe nor proscribe possible ways in which the government may demonstrate the reliability of its evidence. We merely reject the government's contention that it can prevail by submitting documents that read as if they were indictments or civil complaints, and that simply assert as facts the elements required to prove that a detainee falls within the definition of enemy combatant. To do otherwise would require the courts to rubber-stamp the government's charges, in contravention of our understanding that Congress intended the court “to engage in meaningful review of the record.” Bismullah, 501 F.3d at 180 (emphasis added); see Boumediene, slip op. at 49 (stating that the “DTA should be interpreted to accord some latitude to the Court of Appeals to fashion procedures necessary to make its review function a meaningful one”).

V

[4] Having concluded that the evidence before the CSRT was insufficient to sustain its determination that Parhat is an enemy combatant, we are left with the question of remedy. Parhat avers that, while remand for a new CSRT may be appropriate in the “usual” case in which the flaws a court identifies in the record evidence are capable of correction, see Unclassified Oral Arg. Tr. 12, his case is different because the CSRT's errors “cannot be cured,” Pet'Br. 24. Remand here would serve no purpose, he maintains, because the record on review is “the best record the Government's ever going to have in this case,” and the government has no more reliable evidence to produce. Unclassified Oral Arg. Tr. 12. He thus urges the court to order that he be released or transferred to a country “other than China or any of its satellites.”Pet'Br. 27 n. 31; see Unclassified Oral Arg. Tr. 18.

Although we are cognizant of the time that Parhat has already spent in detention, the procedural posture of this case counsels against our directing immediate release or transfer and in favor of giving the government the option of holding another CSRT. At Parhat's behest, we have limited our review to the evidence presented to his CSRT, without awaiting the production of all of the “Government Information” as required by Bismullah. We therefore cannot know whether the government has additional evidence that would cure the reliability issues we have identified.

This is not to suggest, however, that we will countenance the “endless ‘do-overs’ ” that Parhat fears. Pet'Br. 27. Even the government concedes that the case for release will be “substantially stronger” if it falls short after a second CSRT. Unclassified Oral Arg. Tr. 46. And while the DTA does not expressly grant the court release authority,
there is a strong argument (which the Supreme Court left unresolved in Boumediene, see slip op. at 59, 63, and which we need not resolve today) that it is implicit in our authority to determine whether the government has sustained its burden of proving that a detainee is an enemy combatant. Were that not the case, the DTA would consign the court to issuing an endless series of effectively advisory opinions on the quality of the government's evidence, a task we doubt Congress had in mind for the Judicial Branch.

We also note that DTA review is not Parhat's only, or his best, path to release. Boumediene made it quite clear that, at *851 least for a detainee like Parhat who has been imprisoned for a lengthy period and has already had a CSRT, a habeas corpus proceeding in the district court is also available. See Boumediene, slip op. at 65-66. He may pursue such a proceeding immediately, without waiting to learn whether the government will convene another CSRT. See id. at 66 (“The detainees in these cases are entitled to a prompt habeas corpus hearing.”); id. (holding that “both the DTA and the CSRT process remain intact” and that “the petitioners in these cases need not exhaust the [DTA] review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court”). The habeas proceeding will have procedures that are more protective of Parhat's rights than those available under the DTA. See id. at 49 (holding that the DTA's review procedures are not “as extensive or as protective of the rights of the detainees as they would be in a § 2241 proceeding”). In that proceeding, he will be able to make use of the determinations we have made today regarding the decision of his CSRT, and he will be able to raise issues that we did not reach. Most important, in that proceeding there is no question but that the court will have the power to order him released. Id. at 58 (holding that the habeas court has “authority to ... issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release”); see also id. at 50.

Accordingly, we direct the government to release Parhat, to transfer him, FN15 or to expeditiously convene a new CSRT to consider evidence submitted in a manner consistent with this opinion. If the government chooses the latter course, it must-to obviate the need for another remand-present to that Tribunal the best record of Parhat's status as an enemy combatant that it is prepared to make.

[5] Finally, we address the government's motion to designate as “protected information,” and thus to bar from public disclosure, two categories of unclassified information in the record on review.

In Bismullah, the government “propose[d] unilaterally to determine whether [unclassified] information is 'protected,' meaning that petitioners' counsel must keep it confidential and file under seal any document containing such information.” 501 F.3d at 188. “For example, the government would designate as ‘protected’ information ‘reasonably expected to increase the threat of injury or harm to any person’ and information already designated by the Government to be ‘For Official Use Only’ or ‘Law Enforcement Sensitive.’ ” Id. The court rejected this proposal, holding that, “insofar as a party seeks to file with the court nonclassified information the Government believes should be ‘protected,’ the Government must give the court a basis for withholding it from public view.” Id.

In order to establish procedures for the handling of protected information, the Bismullah court adopted a protective order applicable to a group of eight DTA cases that included Parhat's. The order states: “The Government may apply to the court to deem any information ‘protected,’ and if filed in this court to be maintained under seal. Such information must be maintained under seal unless and until the court determines the information should not be designated as ‘protected.’ ” Bismullah, No. 06-1197, Protective Order § 7.A *852 (as amended Oct. 23, 2007). The order defines “protected information” as: “any ... information deemed by the court, either upon application by the Government or sua sponte, to require special precautions in storage, handling, and control, in order to protect the security of United States Government personnel or facilities, or other significant government interests.” Id. § 3.F. Information deemed protected under the order can be viewed by opposing counsel but not by the public.


VI
Id. § 7.B. Classified material is treated under separate provisions of the order. See, e.g., id. § 5.

After the court issued the decision in Bismullah, the government filed the motion that is presently before us. It seeks to designate as “protected” the following two categories of unclassified information: (1) “any names and/or identifying information of United States Government personnel,” and (2) “any sensitive law enforcement information.” Resp’t Mot. to Designate at 2 (Oct. 1, 2007). The government's rationale for protection is brief. In support of protecting the former category, the motion states: “It is appropriate to protect from public disclosure unclassified information identifying Government personnel because ... [t]he risks to the safety of those personnel [, particularly those who often deploy to locations abroad,] would be heightened if their involvement in the detention of enemy combatants at Guantanamo were made public.” Id. In support of protecting the latter category, the motion states: “It is ... appropriate to protect Law Enforcement Sensitive material” because public disclosure “could harm the Government's ongoing law enforcement activities related to the global war against al Qaeda and its supporters.” Id. at 3.

The government filed the instant motion in identical form in over one hundred other pending DTA cases. At the time it filed the motion, the government had not yet provided Parhat's counsel-or counsel for any of the other petitioners-with the record on review. FN20

A fortiori, it had not yet submitted the designations of the information it regarded as falling into the protected categories. Granting the motion under those circumstances, without knowing which material the government would ultimately designate, would be indistinguishable from permitting the government “unilaterally to determine whether information is ‘protected.’ ” Bismullah, 501 F.3d at 188. Bismullah plainly bars that result.

FN20. The government has not yet provided the full record on review as defined in Bismullah in any DTA case, and it has not provided the full CSRT record in many cases.

The designation problem has not yet been completely resolved, even in Parhat's case. Although the government has now provided the court and Parhat's counsel with his CSRT record, its method of designating material as protected is less than clear. Some pages have been marked with the inscription “LES” for “Law Enforcement Sensitive,” without indicating whether the designation is intended to apply to all material on the page. Some pages contain blacked-out lines that appear to be intended as redactions, although the underlying words are still legible. (We understand from oral argument that some of what appear as black-outs were intended as highlights.) And some lines are completely blacked out, making review by the court impossible and acceptance of the government's unilateral determination the only ground upon which the material could be protected.

But correction of the government's marking protocol will not cure the underlying flaw in the government's motion. As set forth above, the motion relies solely on spare, generic assertions of the need to protect information in the two categories it identifies. The government does not “give the court a basis for withholding” that is specific to the information it has designated in this case. Bismullah, 501 F.3d at 188. Nor does it offer any basis upon which we may determine whether the information it has designated properly falls within the categories it has described.

We do not doubt that there is sensitive law enforcement information that warrants protection from disclosure. Nor does counsel for Parhat. See Pet'r Reply Br. 19. But “Law Enforcement Sensitive” is an imprecise term; at least seven different federal agencies define it differently. See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO 06-385, Information Sharing: The Federal Government Needs to Establish Policies and Processes for Sharing Terrorism-Related and Sensitive but Unclassified Information 24 (2006); cf. Pres. George W. Bush, Memorandum for the Heads of Executive Departments and Agencies: Designation and Sharing of Controlled Unclassified Information (CUI) (May 9, 2008) (establishing a new framework for “controlled unclassified information”). Similarly, we do not doubt that the names and identifying information of some United States Government personnel should be designated as “protected.” Again, neither does Parhat's counsel, who readily concedes that the designation is appropriate for those military personnel who participated in CSRT hearings and may be for others as well. Pet'r Reply
Br. 19. But there are also some “U.S. Government personnel” whose names appear in the record on review who are so publicly associated with Guantanamo that protected status would plainly be unwarranted.

[6] By resting its motion on generic claims applicable to all of the more than one hundred cases in which the motion was filed, the government has effectively duplicated its request “unilaterally to determine whether information is ‘protected.’” *Bismullah*, 501 F.3d at 188. Without an explanation tailored to the specific information at issue, we are left with no way to determine whether it warrants protection—other than to accept the government’s own designation. This we cannot do because, as we held in *Bismullah*, “[i]t is the court, not the Government, that has discretion to seal a judicial record, which the public ordinarily has the right to inspect and copy.” *Id.* (internal citations omitted); see also *Bismullah* Protective Order § 3.F (defining “protected information” as “information deemed by the court ... to require special precautions ... in order to protect the security of United States Government personnel or facilities, or other significant government interests” (emphasis added)).

Because we are unable to determine, on the pleadings before us, whether the information that the government has designated should be deemed “protected,” we deny the government’s motion without prejudice. “Such information must,” however, “be maintained under seal unless and until the court determines the information should not be designated as ‘protected.’” *Id.* § 7.A (emphasis added). The government is directed to file, within 30 days, a renewed motion, accompanied by a marked copy of Parhat’s CSRT record indicating the information for which it seeks protected status. That filing must also be accompanied by pleadings specifically explaining why protected status is required for the information that has been marked. Opposing counsel may file a response, and the government may file a reply, pursuant to our usual rules.

VII

Congress has directed this court “to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.” DTA § 1005(e)(2)(A). In so doing, we are to “determine,” inter alia, whether the CSRT’s decision “was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals[,] including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence.” *Id.* § 1005(e)(2)(C)(i). A CSRT’s decision regarding enemy combatant status was not consistent with those standards and procedures unless the Tribunal had—and took—the opportunity to assess the reliability of the evidence that the government presented to it. Nor can this court conclude that such a decision was consistent with those standards and procedures unless we, too, are able to assess the reliability of the government’s evidence. Because the evidence that the government submitted to Parhat’s CSRT did not permit the Tribunal to make the necessary assessment, and because the record on review does not permit the court to do so, we cannot find that the government’s designation of Parhat as an enemy combatant was consistent with the specified standards and procedures and is supported by a preponderance of the evidence.

We therefore direct the government to release or to transfer, FN21 the petitioner, or to expeditiously hold a new CSRT consistent with this opinion. This disposition is without prejudice to Parhat’s right to seek release immediately through a writ of habeas corpus in the district court, pursuant to the Supreme Court’s decision in *Boumediene*, slip op. at 65-66. We also deny, without prejudice, the government’s motion to designate certain unclassified material in the CSRT record as “protected information,” subject to the filing of a renewed motion accompanied by pleadings sufficient to explain why such designations are warranted in this case.

FN21. See supra note 19.

So ordered.

Parhat v. Gates
532 F.3d 834, 382 U.S.App.D.C. 233

END OF DOCUMENT
PANEL VIII:

ETHICAL ISSUES FOR NATIONAL SECURITY LAWYERS

MODERATOR:
ALBERT C. HARVEY
Model Rules of Professional Conduct

Client-Lawyer Relationship
Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:
(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Comment

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a).
Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [9].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.
[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

Client-Lawyer Relationship
Rule 1.0 Terminology

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.
Rule 1.11 Annotation

INTRODUCTION: WHAT DOES RULE 1.11 COVER?

Before the 2002 amendments, Model Rule 1.11 was titled "Successive Government and Private Employment." The title was changed to emphasize that the Rule applies "not only to lawyers moving from government service to private practice (and vice versa) but also to lawyers moving from one government agency to another." American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005, at 273 (2006).

Lawyers formerly employed by the government are not subject to the general rule on former-client conflicts; for them, Rule 1.11(a), (b), (c), and (e) supplant Rule 1.9(a) and (b).

Lawyers who are currently working for a governmental employer must comply with Rule 1.11(d), which expressly incorporates Rule 1.9, as well as Rule 1.7. Rule 1.11(d) applies alike to concurrent as well as successive employment.

In addition, Rule 1.11(c) prohibits a lawyer currently employed by the government from representing a private client if the lawyer possesses "confidential government information"—narrowly defined by the Rule—that could be damaging to an adverse party.

This provision is separate and distinct from the lawyer's duty of confidentiality under Rules 1.6 and 1.9(c), which remains fully applicable. See below, at "Subsection (c): 'Confidential Government Information.'"

Moving from One Governmental Agency to Another

When a lawyer moves from one governmental agency to another, it "may be appropriate," according to Comment [5], "to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency." "Successive clients," Comment [4] similarly notes, may be "a government agency and another client, public or private." See also American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005, at 276 (2006) (Rule 1.11 applicable to "successive representation between distinct government agencies").

Whether two government agencies should be regarded as the same client or different clients is "beyond the scope of these Rules," according to Comment [5]. The Model Rules do, however, touch upon the related problem of identifying the government client in the first place. See the Annotation to Model Rule 1.13(d) for discussion.

Subsection (a): Participation versus Representation

Rule 1.11(a) provides that unless the government consents, a lawyer who has been
employed (not necessarily as counsel) by the government is disqualified from representing a private client if the lawyer participated personally and substantially in the same matter while working for the government. Unlike Rule 1.9, which is phrased in terms of former clients, Rule 1.11(a) applies to lawyers who have served as government employees of any kind, whether or not in a representative capacity. See Ill. Ethics Op. 96-07 (1997) (Rule 1.11 applies to lawyer who had worked as nonlawyer child welfare supervisor in state's Department of Children and Family Services and later wanted to represent parents and children in juvenile court). See generally Boehm, Caught in the Revolving Door: A State Lawyer's Guide to Post-Employment Restrictions, 15 Rev. Litig. 525 (1996); Roberts, The "Revolving Door": Issues Related to the Hiring of Former Federal Government Employees, 43 Ala. L. Rev. 343 (1992).

Rule 1.9 and Rule 1.11 overlapped until the 2002 amendments to Rule 1.11. Rule 1.9 does not come into play at all if there was no former-client relationship, but once it does come into play, it does not look at the extent of the lawyer's participation in the previous matter. It applies if the lawyer represented a client adverse to the new client in the same or a substantially related matter. See Violet v. Brown, 9 Vet. App. 530 (1996) (finding that former counsel to Board of Veterans Appeals had not "personally and substantially" participated in decision on appeal, but finding a "representation" and therefore disqualifying him from representing appellant under Rule 1.9 anyway).

ABA Formal Ethics Opinion 97-409 (1997), codified by the 2002 amendments to Rule 1.11, declared that Rule 1.11 displaces Rule 1.9(a) and (b). The touchstone of disqualification for all subsequent representation, adverse or not, is whether the lawyer participated personally and substantially in the same matter while working for the government:

In order not to inhibit transfer of employment to and from the government, the Commission believes that disqualification resulting from representation adverse to the former government client should be limited to particular matters in which the lawyer participated personally and substantially, which is also the standard for determining disqualification [resulting from] prior participation as a public officer or employee [whether adverse or not].

CRIMINAL DEFENSE AND PROSECUTION

Government-employed counsel for indigent criminal defendants are government employees who represent private individuals being prosecuted by the government. The alignment of interests makes for an uncomfortable fit with Rule 1.11. See Richard B. v. State Dep't of Health & Soc. Servs., 71 P.3d 811 (Alaska 2003) (because public defender represents private individuals, Rule 1.9 rather than Rule 1.11 governs his move to private firm; firm therefore may not use screening to avoid imputation of his conflicts); State v. Wilson, 195 S.W.3d 23 (Mo. Ct. App. 2006) (Rule 1.9 governs prosecutor who was former public defender); D.C. Ethics Op. 313 (2002) (military lawyer assigned to represent court-martial defendant may continue to represent him after entering private practice; lawyer not "accepting other employment" within District's Rule 1.11 because client remains the individual rather than the government; same rationale applies to "former public defenders and former federal officers and employees who were authorized, while working for the government, to represent particular individuals or groups of individuals").

Conflicts created when a prosecutor participates in a criminal matter and then, in a subsequent job, files a related civil suit are analyzed in Lee, Related Representations in Civil and Criminal Matters: The Night the D.A. Ditched His Date for the Prom, 29 N. Ky. L. Rev. 281 (2002) (referring to disfavored phenomenon of privately funded prosecutions, author notes that "while the Bar has been able to see the impropriety in Barb[e] going to the prom with both Ken and Poindexter, it has been unable to recognize the impropriety in Barb[e] leaving Poindexter on the curb just because she suddenly receives an invitation from Ken").

Part-time prosecutors who concurrently handle related civil suits are governed by Rule 1.11(d) (discussed below), which expressly incorporates Rule 1.7.

"PERSONAL AND SUBSTANTIAL"

Rule 1.11(a) uses the same "personal and substantial participation" threshold as Rule 1.12, which deals with disqualification of former judges and third-party neutrals. The phrase comes from the Ethics in Government Act, 18 U.S.C. § 207, in which it is defined as participation "through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise." This means "more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue." 5 C.F.R. § 2637.201(d); see, e.g., United States v. Phillip Morris Inc., 312 F. Supp. 2d 27 (D.C. 2004) (under Rule 1.11(a), former Department of Justice special litigation counsel's work preparing for and then responding to tobacco company suits challenging FDA's Youth Tobacco Rulemaking Initiative prohibited him from representing tobacco company seeking to intervene to defend its privilege logs in government's suit against affiliated tobacco company); Park-N-Shop, Ltd. v. City of Highwood, 864 F. Supp. 82 (N.D. Ill. 1994) (lawyer on city council when mayor granted
A former government lawyer's conflict of interest may be waived by the affected government agency if the relevant regulations permit the agency to consent. Some jurisdictions do not permit public entities to consent to a conflict of interest. See, e.g., Sorci v. Iowa Dist. Court, 671 N.W.2d 482 (Iowa 2003); In re Advisory Comm. on Prof'l Ethics, Docket No. 18-98, 745 A.2d 497 (N.J. 2000); State ex rel. Morgan Stanley & Co. v. MacQueen, 416 S.E.2d 55 (W. Va. 1992); Tenn. Ethics Op. 2002-F-146 (2002).

Subsection (b): Screening

Rule 1.11(b) restates former Rule 1.11(a): A conflict that results from an individually disqualified lawyer's service as a governmental employee will not be imputed to his or her new colleagues if the lawyer is screened and the appropriate government agency is notified. See American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005, at 274 (2006) (screening for former government employees "encourage[s] lawyers to work in the public sector without fear that their service will unduly burden their future careers in the private sector"); see, e.g., N.C. Formal Ethics Op. 14 (2004) (former defense lawyer who is now prosecutor may not handle habitual felon trial of defendant whom he represented on one of the underlying felony convictions; other lawyers in office may do so if screening and notice requirements followed); Pa. Ethics Op. 2004-08 (2004) (criminal defense lawyer who takes part-time position as domestic violence prosecutor may not handle any criminal defense work in same county; disqualification not imputed to firm colleagues if district attorney for county of prosecution consents and screening and notice requirements met; "better practice would be to obtain the written consent and approval of the prospective criminal defendant").

The exception for screening when government-employed lawyers enter the private sector was originally "legislated" into existence by an ABA ethics opinion construing the predecessor Model Code. The Code actually made no mention of screening; the committee's decision to permit screening was prompted by the "concern of many government agencies as well as ... many former government lawyers now in practice" over the harsh consequences of what was then an inflexible rule. ABA Formal Ethics Op. 342 (1975). The opinion is criticized in Hellman, When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions, 10 Geo. J. Legal Ethics 317 (1997) (screening was a policy decision made in Opinion 342, not a matter of interpretation). See also City & County of S.F. v. Cobra Solutions, Inc., 135 P.3d 20 (Cal. 2006) (when state's rule does not mention screening, court would not authorize it; entire city attorney's office must be disqualified from city's fraud action against contractor whom city attorney had personally represented in private practice, however briefly). See generally Creamer, Three Myths About Lateral Screening, 13 Prof. Law., no. 2, at 20 (2002) (distinguishing between private lawyers and former government lawyers for screening purposes is illogical and discriminatory).

For discussion of screening outside the context of former governmental employment, see the Annotation to Rule 1.10.

Model Rule 1.0(k) defines screening as "the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably
adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law." Comments [9] and [10] to Rule 1.0 explain the "isolation" procedures.

Subsection (c): "Confidential Government Information"

Rule 1.11(c) provides that a lawyer who acquired "confidential government information about a person" while working for a government entity may not thereafter represent a private client whose interests are adverse to that person "in a matter in which the information could be used to the material disadvantage of that person." "Confidential government information" is specially defined as "information that has been obtained under governmental authority and which ... the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose."
The former government employee need not have been working as a lawyer when he or she acquired the information; administrative, policy, and advisory positions also trigger this Rule.

KNOWLEDGE NOT IMPUTED

Rule 1.11(c) operates only when the lawyer has "actual knowledge" of the information; the Rule "does not operate with respect to information that merely could be imputed to the lawyer." Model Rule 1.11, cmt. [8]; see Babineaux v. Foster, No. Civ.A. 04-1679, 2005 WL 711604 (E.D. La. Mar. 21, 2005) (rejecting city's argument, in moving to disqualify former assistant city attorney from representing plaintiff in employment discrimination suit against city, that because mayor copied counsel on "confidential" response letter while he was assistant city attorney, "it can be presumed that other confidential communications transpired"); Walker v. State Dep't of Transp. & Dev., 817 So. 2d 57 (La. 2002) (former assistant attorney general's assertion in solicitation letter to other lawyers that he knew inner operations of Department of Transportation and knew location of documents essential to proving case against department did not require his disqualification from representing personal injury plaintiffs; no evidence he ever had access to confidential information regarding particular cases in which he was representing plaintiffs); NAACP v. State, 711 A.2d 1355 (N.J. Super. Ct. App. Div. 1998) (in reversing denial of pro hac vice admission, court looked to Rule 1.11 to decide that former government lawyer's work in developing entry-level exam for law enforcement candidates would not have warranted his disqualification from later representing employment discrimination plaintiffs attacking its validity; "nine-year hiatus between [his] employment with the U.S. Department of Justice and the filing of the pro hac vice application certainly suffices to mitigate any concern that this former officeholder might be seen to be taking advantage of information acquired in fresh governmental service"); see also Ark. Ethics Op. 2002-1 (2002) (former counsel to federal administrative agency may give expert testimony for defendants being sued by same agency fifteen years later; statements about enforcement policies followed during his tenure, general comments on enforcement strategy, and discussions of particular enforcement actions and refusals to act did not involve "confidential government information").
NO WAIVER

Unlike a Rule 1.11(a) conflict resulting from participation in a previous matter, a Rule 1.11(c) conflict resulting from possession of "confidential government information" cannot be waived. See Pa. Ethics Op. 94-132 (1994) (former government lawyer who obtains confidential information while employed by Department of Justice may not represent client in matter in which she had been involved as government lawyer, even with government consent); S.C. Ethics Op. 97-41 (1998) (former special prosecutor for solicitor's office may represent victims in civil suit against criminal defendant being prosecuted by solicitor's office if solicitor's office consents, but if she had access to confidential information "which could lead to an unfair advantage," she "may be prohibited").

Subsection (d): Lawyers Currently Employed by Government

Rule 1.11(d) imposes restrictions on lawyers while they are working for the government.

SUBSECTION (D)(1): RULES 1.7 AND 1.9 APPLY

Lawyers currently employed by the government are expressly made subject to Rule 1.7, the general rule on concurrent-client conflicts, and Rule 1.9, the general rule on former-client conflicts.

According to Comment [9] of Rule 1.11, a lawyer may "jointly" represent a private party and a government agency if it is permitted by Rule 1.7 and not otherwise prohibited by law. See, e.g., Ala. Ethics Op. 93-09 (1993) (lawyer who serves as part-time prosecutor may represent personal representatives of estate in wrongful death action if district attorney and personal representatives consent after consultation, even if lawyer had been involved in homicide investigation on administrative level); Kan. Ethics Op. 95-11 (1995) (lawyer may jointly represent private party and government agency if both parties waive disqualification); see also Utah Ethics Op. 06-01 (2006) (proposed pro bono work of one government lawyer will not create conflict imputable to others in same government office if she does not participate in their conflicting work, and if Rule 1.7 is strictly complied with); Vt. Ethics Op. 2003-4 (2003) (applying Rule 1.11 "by analogy" as well as Rule 1.7 to private lawyer's part-time work for attorney general's office). See generally Halperin, Ethics Breakthrough or Ethics Breakdown? Kenneth Starr's Dual Roles as Private Practitioner and Public Prosecutor, 15 Geo. J. Legal Ethics 231 (2002); Underwood, Part-Time Prosecutors and Conflict of Interest: A Survey and Some Proposals, 81 Ky. L.J. 1 (1993) (system of full-time prosecutors would be better than "watering down sound rules to facilitate the seizing of perceived practice opportunities"). See the discussion of lawyers employed by government entities in the Annotation to Rule 1.7.
SUBSECTION (D)(2)(I): ONLY THE INDIVIDUAL LAWYER IS BANNED

If a lawyer employed by the government participated personally and substantially in a matter while in private practice, he or she may not then further participate in that matter, on either side, unless the appropriate government agency consents. The prohibition is designed "to prevent a lawyer from exploiting public office for the advantage of another client," according to Comment [3]. This prohibition is symmetrical with that of Rule 1.11(a)(2), which applies when the move is in the other direction.

Note that it is the current governmental employer, rather than the former private client, whose consent Rule 1.11(d)(2)(i) requires. The former client's interests, however, are not unprotected: Rule 1.11(d)(1) expressly subjects the lawyer in government service to Rule 1.9, the general rule on former client conflicts, pursuant to which the former client's consent is already required.

The 2002 amendments deleted from Rule 1.11(d)(2) the exception for situations in which no one is available to act in the government lawyer's stead. See American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005, at 275 (2006) (government would already have requisite ability to consent in this situation).

No Imputation, but Screening Is "Prudent"

Comment [2] notes that even though there is no imputation of the lawyer's disqualification to his or her governmental colleagues, "ordinarily it will be prudent to screen such lawyers." See generally United States v. Goot, 894 F.2d 231 (7th Cir. 1990) (criminal defendant's lawyer's appointment as new U.S. attorney for district of prosecution did not disqualify other assistants; screening in effect before lawyer took office, and presumption of shared confidences rebutted by appointment of acting U.S. attorney to prosecute and by affidavits asserting no secrets disclosed); In re Grand Jury Investigation of Targets, 918 F. Supp. 1374 (S.D. Cal. 1996) (U.S. attorney's office not disqualified from investigating specific incidents of state court corruption even though one assistant U.S. attorney, not assigned to investigation, represented one subject during state's investigation of same allegations); State ex rel. Tyler v. MacQueen, 447 S.E.2d 289 (W. Va. 1994) (prosecutor's office not disqualified as long as personally disqualified prosecutor effectively screened from case). But see State v. Stenger, 760 P.2d 357 (Wash. 1988) (disqualifying prosecutor's office in death case when prosecutor's prior representation of defendant on unrelated charge involved information interwoven with prosecutor's decision to seek death penalty; screening would be unavailing because although prosecutor eventually delegated case to deputy, he already assisted in preparation of press release, attended press conference, appeared as spectator at some hearings, and attended post-arrest briefing at sheriff's office).

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SUBSECTION (D)(2)(II): NEGOTIATING FOR PRIVATE EMPLOYMENT WHILE A GOVERNMENT EMPLOYEE

Model Rule 1.11(d)(2)(ii) prohibits a lawyer working for the government from negotiating for private employment with anyone "involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially." It represents a compromise protecting the government lawyer's marketability without sacrificing the government's interest in loyal service. See Air Line Pilots Ass'n v. U.S. Dep't of Transp., 899 F.2d 1230 (D.C. Cir. 1990) (not improper for Secretary of Department of Transportation to negotiate for employment with law firm representing major airline in matter not then pending before Department; court rejected more stringent requirement that "would mean, effectively, that high government officials could not, before leaving their posts, negotiate with many, if any, of the District's large law firms"; construing federal conflict-of-interest statute, 208 U.S.C. § 208); Commonwealth v. Maricle, 10 S.W.3d 117 (Ky. 1999) (mandamus issued to require disqualification of defense lawyers at firm joined by former prosecutor who continued to participate in prosecution of their client while negotiating for job); cf. In re Relphorde, 596 N.E.2d 903 (Ind. 1992) (lawyer who entered fee agreement with criminal defendant he was appointed to represent as indigent found to have negotiated for private employment in matter in which he was participating as public employee).

Model Rule 1.11(d)(2)(ii) does not apply to law clerks, who are understood to be "on the market"; special provision is made for them in Rule 1.12.

**Subsection (e): "Matter"**

Rule 1.11(e) preserves the special definition of "matter" formerly set out in Rule 1.11(d)(1): the same "matter" means the same "particular matter involving a specific party or parties." This definition--important because it excludes legislation, rulemaking, and other policy determinations--codified ABA Formal Ethics Opinion 342 (1975): [W]ork as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations, or laws, or in briefing abstract principles of law does not disqualify the lawyer [under Model Code DR 9-101(b)] from subsequent private employment involving the same regulations, procedures or points of law; the same "matter" is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties.

See In re Sofaer, 728 A.2d 625 (D.C. 1999) (lawyer violated Rule 1.11(a) by undertaking to represent Libyan government in connection with civil and criminal disputes and litigation arising from bombing of airplane over Scotland after having served as legal advisor in State Department and personally and substantially participating in government's investigation of bombing and in related diplomatic and legal activities); Kosby v. Comm'r, 64 T.C.M. (CCH) 773 (1992) (lawyer who represented IRS as shelter coordinator and trial lawyer in prosecution of particular tax shelter's tax deficiencies may not then privately represent investors in same tax shelter; matters are the same for purposes of Rule 1.11); D.C. Ethics Op. 297 (2001) (former U.S. Department of Interior
lawyer who had been actively involved in proposed regulations may represent Indian tribe in negotiated rulemaking regarding regulations; rulemaking of general application is not a "matter" within meaning of Rule 1.11(a)); see also EEOC v. Exxon Corp., 202 F.3d 755 (5th Cir. 2000) (settlement of oil company's criminal liability for oil spill was same "particular matter" within meaning of Ethics in Government Act as EEOC's discrimination suit over oil company's policy disqualifying employees who have undergone substance-abuse treatment from certain safety-sensitive positions, as policy had been required by government as condition of oil spill settlement; court declined, however, to apply Rule 1.11 to expert testimony for defense by former government lawyers).

Comment [10] notes that a matter "may continue in another form," and that "[i]n determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed." For an illustration of this reasoning, see In re Sec. Investor Prot. Corp. v. Vigman, 587 F. Supp. 1358 (C.D. Cal. 1984) ("discrete series" of transactions involving specific situation and specific parties in ten-year-old civil action was "part and parcel" of subsequent, broader suit alleging widespread securities fraud; former SEC regional administrator disqualified from representing plaintiff in later suit). See also S.C. Ethics Op. 05-01 (2005) (former deputy solicitor who prosecuted child molester for sexual abuse at boys' residential home may not work on civil case involving abuse at same home, even though new case involves different boy and different perpetrator).
I. Revised ABA Model Rule 1.11

AS ANTICIPATED, the American Bar Association's House of Delegates adopted amendments to the Model Rules of Professional Responsibility during the February 2002 Midyear Meeting. Among those amended was Rule 1.11, formerly titled “Successive Government and Private Employment,” and now retitled “Special Conflicts of Interest for Former and Current Government Officers and Employees.” Rule 1.11 establishes standards for defining and addressing possible conflicts of interest faced by those attorneys who move from, to, and between government entities, as well as those in private practice retained as outside counsel to government agencies. Inherent in both the amended Rule 1.11 and its predecessor is the recognition that, while government and private clients of former government attorneys are both in need of protection from attorney conflicts of interest, there is also a legitimate public interest in attracting quality legal talent to public sector employment. Rule 1.11 attempts to strike a balance between these sometimes competing interests.

Most of the revisions made to Rule 1.11 are merely intended to clarify the traditional application of the rule. For example, the title change is intended to better reflect the customary application of the rule, not only to attorneys who move between governmental and private representation, but also to those who move from representation of one governmental body to another. This clarification is further indicated by the deletion of the word “private” from subsection (a), thus removing any suggestion that the rule applies only to former government attorneys who are now in private practice.

The amendments also address the interplay between Rule 1.11 and Rule 1.9, the general rule relating to an attorney's duty to former clients. Prior to the 2002 changes, Rule 1.11 did not specifically indicate which provisions of Rule 1.9, if any, applied to an attorney whose former client was a government body. The revised Rule 1.11 now expressly states that former government lawyers are subject only to section (c) of 1.9, which places strict parameters on an attorney's use of information obtained during prior government representation that is adverse to the former client. Attorneys who formerly represented government clients face disqualification only when a present representation would be “in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee” rather than simply when the matter itself is “the same or a substantially related matter.” With respect to those matters on which he or she did have personal and substantial involvement, the attorney is disqualified from undertaking new representation for another client, even if such representation would not be adverse to the former client.

In contrast, attorneys currently representing a government entity are now expressly subject to all provisions of both Rule 1.7 and Rule 1.9. Furthermore, the prior exception from disqualification, applicable in *674 those instances where governing law would allow no other person to act in the place of a disqualified government lawyer or official, has been deleted.
While the pre-existing Rule 1.11 allowed the client of a former government attorney to consent to subsequent representation that would otherwise present a conflict of interest, the revised rule now mandates that such consent must be confirmed in writing. The requirement for written confirmation is satisfied by any tangible or electronic record and can either be given in writing from the client to the attorney or vice versa. The comments to the Model Rules provide further explanation of this requirement, acknowledging that it is not always possible to obtain written confirmation of consent before representation begins. In such instances, an attorney may act upon the client's verbal consent as long as written confirmation is obtained within a reasonable time after the representation is undertaken.

Revisions to Model Rule 1.10 dispel any confusion regarding its applicability to government attorneys. While Rule 1.10 establishes the general rules regarding the disqualification imputed to other members of a disqualified attorney's firm, it also now clearly states that Rule 1.11 governs the issue of imputation of conflict as it relates to government attorneys. As before, Rule 1.11 allows the firm of a lawyer who is disqualified due to his or her former representation of government to avoid disqualification of the entire firm by establishing an ethical screen. Of significance, however, is the additional requirement that such screening be “timely.” “In order to be effective, screening measures must be implemented as soon as practical after a lawyer or firm knows, or reasonably should know, that there is a need for screening.” A definition of the term “screened” has been added, which describes the requirements for an acceptable screen as:

the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

The requirement that the lawyer's former government client be promptly informed of the need for screening and the procedures being implemented to effect it remains unchanged.

The screening requirement is not applicable to the offices of current government attorneys. With or without screening, the disqualification of one government attorney is not imputed to his or her entire office or department. However, the comments to Rule 1.11 state that “ordinarily it will be prudent to screen such lawyers.”

While the Model Rules of Professional Conduct may provide guidance regarding the standards applicable to attorneys, each individual state actually regulates the profession. Consequently, the decision by each state regarding the adoption of some or all of the revisions to the Model Rules bears directly upon every practicing attorney.

Most, if not all, states are currently engaged in active review of the Model Rules, with the objective of determining whether their state rules should be similarly revised. Arizona, Delaware, North Carolina, *676 and Tennessee have already adopted modifications in response to the ABA's revision of the Model Rules. However, with the exception of Delaware, these states have either adopted modified versions of Model Rule 1.11 or have, for the most part, declined to enact the revisions reflected in the ABA rule. Arizona's Ethics Rule 1.11 retains an exception from disqualification of a current government lawyer or official in those circumstances when no one else is lawfully authorized to serve in the lawyer's place. North Carolina's rule specifically makes the former government lawyer subject to subsections (a) and (b) of Rule 1.9, except to the extent that the term “matter” is specifically defined with respect to government representation. As a consequence, a conflict can arise without the former government lawyer having personal and substantial involvement in the earlier matter. Tennessee has incorporated the requirement that a client's consent must be in writing. However, the remaining changes reflected in the ABA Rule do not appear in Tennessee's Rule 1.11.

In Arkansas, Idaho, Louisiana, Michigan, Mississippi, Montana, New Jersey, Oregon, Pennsylvania, and South Carolina, a state bar association committee or a committee serving at the direction of the state supreme court has completed its review of the Model Rules and submitted a recommendation for adoption of certain revisions. Some of
these exactly mirror the ABA Rules and others only selectively adopt changes included in the ABA revisions. In the remaining states, various committees or subcommittees are in the midst of consideration of the revised ABA Rules, but have not yet made a formal recommendation regarding the incorporation of those revisions into their jurisdiction's rules.

II. Case Law and Advisory Opinions

A. Disqualification of Former Government Lawyers

1. WALKER v. STATE

Vidrine spent fourteen years working for the state as an attorney assigned to represent the state road department. He left state employ in 1999 and entered private practice, where he almost immediately began representing claimants in personal injury suits against the road department. The state moved to disqualify Vidrine in two cases he had pending against the department, asserting that Vidrine's knowledge of internal policy and other confidential information created a conflict of interest. In one case, the trial court granted the motion; in the other, the First Circuit denied the motion. Both orders were appealed.

The appellate court acknowledged that a former government attorney can be disqualified from subsequent representation due to confidential information obtained during his or her duration as a government employee. However, the court rejected the state's argument that the mere knowledge of some confidential information was sufficient to disqualify a lawyer. Rather, the information must be relevant to the subsequent matter and must be of a nature that can be used against the former government client. While the state could show that Vidrine may have had access to confidential information, it failed to carry its burden of showing that such information could be used against it in any of the cases brought by Vidrine against the road department.

2. EHRICH v. BINGHAMTON CITY SCHOOL DISTRICT

Kilmer, an attorney in private practice, was retained by a student to represent her in an ongoing lawsuit, which alleged the Binghamton City School District discriminated against her by refusing to allow her to join the varsity golf team. At the time Kilmer undertook the representation, he contracted with the district to audit the legal bills submitted by its outside law firm. This firm was also representing the district in the lawsuit. The district's attorneys moved to disqualify Kilmer on the basis that he was privy to confidential information that he may have obtained while serving as an auditor of the district's legal bills, including information specifically related to the student's lawsuit.

The court found the district's legal bills were privileged attorney-client communications and that the district had an expectation that Kilmer would keep them confidential. The court further found that since Kilmer's services to the district occurred during the same period as the events leading to the lawsuit and the actual commencement of the suit, his services to the district should be regarded as concurrent with his representation of the student. Thus, in the absence of the consent of both clients, representation against the district was per se improper.

3. WISDOM v. PHILADELPHIA HOUSING AUTHORITY AND BLAYLOCK v. PHILADELPHIA HOUSING AUTHORITY

Both of these cases involved motions by the Philadelphia Housing Authority to disqualify one of its former attorneys, Pileggi, from representing tenants in lawsuits filed against the housing authority. Pileggi had worked as an attorney for the housing authority for eleven years, the last four in a supervisory position. Shortly after entering private practice, Pileggi filed separate complaints against the housing authority on behalf of tenants Wisdom and Blaylock, both of whom were tenants of the housing authority. The authority moved to disqualify Pileggi in
both cases, citing the possibility that while under the authority's employ, he was likely to have been privy to confidential information relating to both Wisdom's and Blaylock's grievances. In both cases, the authority relied upon Rule 1.9 rather than 1.11 as the basis for the requested disqualification of Pileggi.

Both motions were denied, with the judges noting that the authority failed to introduce any evidence that Pileggi actually obtained confidential information relevant to Wisdom's or Blaylock's cases. Both judges also noted that while the motions to disqualify were premised upon Rule 1.9, Rule 1.11 was applicable. The *Wisdom* judge also imposed certain prohibitions on Pileggi's conduct during the case: (1) he was prohibited from eliciting testimony regarding any confidential policies or practices of the authority; (2) he was prohibited from revealing or relying upon any confidential information that he became privy to as a result of his prior position; and (3) during the trial, he was prohibited from disclosing that he was previously employed by the authority. No such restrictions were imposed on Pileggi's conduct during his representation of Blaylock.

4. ARIZONA JUDICIAL ADVISORY OPINION NO. 02-05

An attorney, now in private practice, sought guidance from the Arizona Bar regarding the propriety of representing clients in matters adverse to state agencies that he previously represented as an employee of the state attorney general's office. He also inquired about the permissibility of representing clients in matters adverse to private parties involved in matters he handled while working for the attorney general.

The bar relied upon Arizona Ethical Rule 1.11(a) in responding that, absent waiver from the former government clients, the attorney is prohibited from representing any client in connection with a matter that he or she personally and substantially participated in while in government service, regardless of whether the subsequent representation is adverse to the former client. However, the advisory opinion also emphasized that the term “matter” is separately defined in Rule 1.11 to be confined to matters involving a specific party or parties. Thus, the attorney's involvement in policy development and similar matters that did not involve actual parties would not provide the basis for disqualification.

Finally, the advisory opinion differentiates between conflicts arising from Rule 1.11(a), which relates to matters the former government lawyer was personally and substantially involved in while representing the government, and those arising under Rule 1.11(b), which relates to confidential information obtained while the lawyer was employed by the government. While the former conflict is waivable, the latter is not.

B. Current Representation of Multiple Government Agencies: Illinois State Bar Association Advisory Opinion No. 01-07

The Illinois Bar was presented with the following scenario: Lawyer A represents the city on a part time basis, while his partner, Lawyer B, represents the city park district. The two government entities had separate boards and rules, different attorneys customarily represented them, and their interests were not currently adverse. Based upon this description, the Illinois Bar issued the opinion that, for purposes of conflicts of interest, the two entities should be regarded as two separate clients. Thus, if at some future time the interests of the two entities become adverse, Lawyers A and B would have to inform their respective clients of the potential conflict and either obtain a waiver from both or withdraw from both representations.

C. Imputed Disqualification: Doe v. Perry Community School District

This case involved a civil suit against the Perry Community School District, arising from the alleged sexual abuse of a student by a *teacher. The Iowa Supreme Court was faced with determining whether screening was sufficient to obviate the disqualification of a firm representing the school district when an attorney with the firm had previously represented the victim and her family. Palmer, an associate of that firm, while employed by a different
firm, represented the abuse victim in the criminal case arising from the incident. He also participated in the representation of the victim and her family in the civil litigation.

When Palmer changed employment, his new firm was already representing the district in the civil suit brought by the victim. The new firm implemented an ethical screen, in order to ensure that Palmer would have no further involvement with the suit.

The court specifically recognized that the Iowa Board of Professional Ethics and Conduct endorsed the use of ethical screens to avoid the imputed disqualification of an entire law firm. However, the court determined that because there was a substantial relationship between his former representation and his new firm's current representation, the entire firm would be deemed to have access to confidences that might have been disclosed to Palmer by the former clients. Applying an “appearance of impropriety” test, the court held the presence or absence of an ethical screen did not matter and ordered Palmer's new firm be disqualified from further representation of the district.

D. Imputed Disqualification: Former Public Defenders

1. Richard B. v. State

Kay, an attorney in the public defender's agency in connection with a sexual assault charges, represented Richard B. One year later, the Alaska Department of Health and Social Services filed a petition to terminate the parental rights of Richard B. and his wife with respect to their three children, one of whom was the alleged victim of the assault that led to the earlier criminal charges. The Public Defender Agency (PDA) again represented Richard, but the Office of Public Advocacy (OPA) represented his wife. Kay, who had since left the public defender's agency, was now part of a private firm that contracted with OPA to provide legal services for its clients and, on several occasions, made appearances on behalf of the mother in the termination proceeding. The judge assigned to the case ordered that Kay's firm establish an ethical screen to prevent any further association by Kay with the matter, but permitted Kay's partner to continue representing the mother.

The court held the entire firm was disqualified as a result of Kay's conflict of interest. Specifically, the court found that while the government employs public defenders, they represent private individuals and, therefore, Rule 1.10, rather than Rule 1.11, applies to any imputation of conflict that arises when a public defender goes into private practice. Rule 1.10 does not make a specific provision for an ethical screen as a means of avoiding imputed conflict when the prior matter on which an attorney was involved is the same or substantially related to a matter being handled by the attorney's new firm.

2. State ex rel. Horn v. Ray and Hart v. State

The supreme courts of Missouri and Wyoming disagreed, finding that Rule 1.11 is applicable to public defenders. Both cases involved attorneys who moved from the public defender's office to the prosecutor's office. In State ex rel. Horn v. Ray, the Missouri Supreme Court considered the issue of whether the entire prosecutor's office should be disqualified because it now employed an attorney who had previously served as a public defender in the same county. The prosecutor's office had instituted extensive screening procedures, including (1) barring the former public defender from involvement in any case that was pending in the public defender's office while he was employed there, (2) establishing procedures to ensure that he did not inadvertently have access to the files relating to any such cases, (3) instructing the former public defender not to divulge any confidential information he may have obtained while still a public defender that related to any public defender clients, and (4) disqualifying the entire prosecutor's office on any case that the attorney handled while a public defender.

The Missouri Supreme Court recognized that under Missouri's Rule of Professional Conduct 4-1.11, the
disqualification of a government lawyer does not result in the disqualification of his entire office. However, in dicta the court noted that, because of apparently conflicting decisions entered since the adoption of Rule 4-1.11, it is not entirely clear whether the “appearance of impropriety” test that was part of the state's pre-1986 rules continues to have some viability. The screening measures put in place by the prosecutor's office, however, adequately dispelled any such appearance.

In Hart v. State, the Wyoming Supreme Court also considered the possible reversal of a criminal conviction because the prosecutor's office employed a former public defender, and whether the entire prosecutor's office should have been disqualified from any involvement in the prosecution. Unlike the circumstances presented to the Missouri court, however, the former public defender actually represented Hart, the criminal defendant who sought the reversal. Furthermore, unlike the prosecutor's office in Missouri, the Wyoming prosecutor did not institute any screening procedures, although the former public defender apparently had no involvement in the prosecution of Hart after he joined the prosecutor's office.

The court found that, with a government lawyer, there should be no presumption that when the lawyer moves to a different government agency, confidential information obtained during an earlier representation has been divulged to the lawyer's co-workers. In large part, the court premised this finding upon an assumed distinction between the working relationships among attorneys within government agencies, and the relationship among attorneys who practice together in private firms. The court also specifically noted, as a “pragmatic *684 reason” for its decision that the attorney representing Hart at trial was clearly aware of the former public defender's new position with the prosecutor's office and failed to object to its continued involvement in the case. Nonetheless, the court did caution the prosecutor's office that in the future, attorneys who switch from the public defender to the prosecutor should be screened from any prosecution of former clients.


The full text of the amended rule, with the changes indicated, is as follows:

**RULE 1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES**

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to
disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may
undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any
participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private
practice or nongovernmental employment, unless the appropriate government agency gives its informed consent,
confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in
a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk
to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule
1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term “matter” includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract,
claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or
parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.
Before the recent amendments to the Model Rules of Professional Conduct, courts and commentators struggled for years with the application of the conflict of interest limits in Rule 1.9(a) and in Rule 1.11(a) to lawyers in private practice who had served as government officers or employees. On February 5, 2002 the House of Delegates of the American Bar Association (ABA) had an opportunity to resolve that confusion when the House debated and adopted a number of amendments to the Model Rules, including amendments affecting Rule 1.9(a) and Rule 1.11(a). This commentary explains why states considering adoption of the amended Rules should question the value of the amendment to Rule 1.11(a) in particular.

The ABA's Commission on Evaluation of the Rules of Professional Conduct (the Commission) proposed the amendments pursuant to a charge from the ABA in 1997 to evaluate the Model Rules of Professional Conduct and to formulate "recommendations for action." The Commission translated that charge into two intertwined principles that the Commission adopted for its work: (1) developing a set of rules that are "comprehensible to the public and provide clear guidance to the practitioner" and (2) creating a set of rules that states would likely adopt, thus promoting uniformity in ethics codes among the states. The ABA and the Commission could have done more in amending the Rules to resolve the controversy concerning the relationship between Rules 1.9(a) and 1.11(a). Moreover, ambiguity added by a new Comment to amended Rule 1.11 could create unforeseen problems for lawyers caught in the "revolving door" between government service and private practice. As such, amended Rule 1.11 seems inconsistent with the principles adopted by the Commission.

In Part I, I review the circumstances that created a need to clarify the relationship between Rules 1.9(a) and 1.11(a). That review includes: (a) an analysis of the text and goals of each Rule, (b) a description of some significant differences in the practical application of each Rule, and (c) a brief history of the long-standing debate about the relationship between Rules 1.9(a) and 1.11(a). In Part II, I analyze the structure and likely effect of the amendment to Rule 1.11(a). Finally, I conclude that, despite the herculean efforts of the Commission, many questions remain concerning the scope and relationship of amended Rules 1.9 and 1.11.

I. THE NEED TO CLARIFY THE RELATIONSHIP BETWEEN RULE 1.9(a) AND RULE 1.11(a)

A. The Rules' Text and Goals

Although Rule 1.9(a) and Rule 1.11(a) both address conflicts of interest that limit current client representation because of former client representation, the texts of the two Rules contain significant differences. Rule 1.9(a) addresses conflicts of interest between current and former clients without specifying a particular context for either the current or the former representation. Rule 1.11(a), on the other hand, addresses the narrower circumstances of current client interests that conflict specifically with prior government service. The two rules do not use the same terms to describe the circumstances that create disqualifying conflicts, nor do they set forth the same means to
remedy such conflicts. For example, Rule 1.9(a) applies to current representations on matters that are "the same or substantially related" to matters on which the lawyer represented a former client, while Rule 1.11(a) applies only to matters as more narrowly defined in Rule 1.11. In addition, Rule 1.9(a) applies only if the current representation is "materially adverse" to a former client while Rule 1.11(a) does not include such a limitation. Finally, Rule 1.10(a) generally imputes the disqualification of any individual member of a firm under 1.9(a) to all members of that firm. Rule 1.11(a), however, identifies screening a disqualified member of a firm as a means to avoid imputing the disqualification to all members of the firm.

The accommodation of different goals led to some of the differences in the texts of Rules 1.9(a) and 1.11(a). For example, one treatise describes Rule 1.9(a) as intending to benefit client-lawyer relationships by providing "clients with [the] assurance during the representation that they have no need to fear suffering adverse consequences later because of having retained a lawyer currently." Rule 1.9 provides this assurance by protecting the confidential information of a former client and limiting the extent that a lawyer's current representation can attack the lawyer's work-product for a former client. Rule 1.9, however, also tries to balance the protection of former clients with current clients' needs for choice of counsel and a lawyer's need to serve a "variety of clients in a variety of matters" to maintain a law practice.

Rule 1.11(a) reflects concerns in addition to those underlying Rule 1.9(a). First, conflict of interest rules related to either former or current government service must be carefully crafted so that restrictions on employment following government service do not unduly deter qualified individuals from accepting government employment. As the Comments to Rule 1.11 note, "rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer ... to and from the government [because] [t]he government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards." Rule 1.11(a) also addresses the concern that a current government officer or employee may exploit government service by acting primarily to benefit anticipated future clients and an anticipated career after government service rather than acting primarily in the public interest. Commentators have recognized that the exploitation of public office does not depend upon the concerns reflected in Rule 1.9(a). The exploitation may be accomplished without a breach of confidentiality and without attacking one's own work product.

The differences in the text and goals of Rules 1.9 and 1.11 have caused significant variations in the scope of the representations limited by each Rule. The next section addresses the practical affects of one of those differences: the scope of matters giving rise to conflict of interests under each Rule.

B. The Application of the Differing Scope of "Matters" under Rule 1.9(a) and Rule 1.11(a)

Rule 1.11(a) prohibited a current representation only if it was "in connection with a matter in which the lawyer participated personally and substantially" as a former government agent. Amended Rule 1.11 employs the same language to describe, in part, the circumstances that limit current representations by a former government agent. Matter as used in Rule 1.11 was and is still defined as

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

It is generally accepted that the ABA intended Rule 1.11 to codify the discussion of matter originally set forth in ABA Formal Opinion 342. In that opinion the ABA's Committee on Ethics and Professional Responsibility interpreted a predecessor of Rule 1.11(a), DR 9-101(B) from the Model Code of Professional Conduct. DR 9-101(B) provided, "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." The ABA Committee recognized in Opinion 342 the need to protect the confidential information of a former government employer, but it also recognized other objectives that
supported a special disciplinary rule such as DR 9-101(B) relating only to former government lawyers. Those additional objectives included the goals identified above as peculiar to Rule 1.11 and which distinguished Rule 1.11 from Rule 1.9(a). Those goals are that rules governing lawyers should not be overbroad in constraining the lawyer's employment after leaving government service and that the rules should discourage government lawyers from exploiting government service for their own future gain.

In an attempt to accommodate all of these objectives, "insofar as possible," Opinion 342 described matter as follows:

[T]he term seems to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties. Perhaps the scope of the term "matter" may be indicated by examples. The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter. By contrast, work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations, or laws, or in briefing abstract principles of law, does not disqualify the lawyer under DR 9-101(B) from subsequent private employment involving the same regulations, procedures, or points of law; the same "matter" is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties.

The following examples provide simple illustrations of matter as described in Formal Opinion 342. Assume Lawyer, as a member of a state prosecutor's office, participates personally and substantially in the initial prosecution of Z. The prosecution results in a hung jury and Lawyer then leaves the employ of the prosecutor's office. Z subsequently seeks to have Lawyer represent Z in a retrial by the prosecutor's office. Both representations involve the same "discrete, identifiable transactions or conduct involving a particular situation and specific parties," and they would constitute the same matter under Formal Opinion 342. In contrast, assume Lawyer, who as an employee of a government agency, develops and fosters generally applicable policies of deregulation to stimulate competition among airlines. Lawyer, after leaving government service, then represents an airline as a plaintiff in a suit alleging that competitors harmed the plaintiff through various anti-competitive behaviors. While the representations in the second example may involve some of the same economic issues and affect some of the same airlines, the policy-making in the first representation was not addressed to the specific conduct of a particular party or parties. The two representations in the second example would not involve the same matter under Formal Opinion 342.

Formal Opinion 342 also excluded general knowledge of a former government client's policies or practices from the factors relevant in determining whether a current representation is the same matter as the object of former government service. Formal Opinion 342 noted:

Many a lawyer who has served with the government has an advantage when he enters private practice because he has acquired a working knowledge of the department in which he was employed, has learned the procedures, the governing substantive and statutory law and is to a greater or lesser degree an expert in the field in which he was engaged. Certainly this is perfectly proper and ethical. Were it not so, it would be a distinct deterrent to lawyers ever to accept employment with the government.

While Rule 1.11(a) applied to matters as defined above, Rule 1.9(a) has applied to current representations on matters that are "the same or substantially related" to matters in which the lawyer represented the former client. The phrase substantially related has a long and complex history. That history demonstrates that courts have not limited the meaning of substantially related matters to "discrete, identifiable transactions or conduct involving a particular situation" as Formal Opinion 342 did for matter under Rule 1.11. Moreover, contrary to the understanding of matter in Formal Opinion 342, knowledge of a former client's general policies and practices may be relevant in determining whether current and former representations are substantially related. It is necessary, then, to understand the uncertainty lurking in the phrase substantially related to comprehend the importance of clarifying the relationship between Rule 1.9(a) and Rule 1.11.

Courts and commentators have considered a former representation to be substantially related to a current representation if there is a substantial risk that confidential factual information that a lawyer normally would have
obtained in the former representation would be relevant to the current representation. This definition focuses on protecting former clients' confidential information from being used against them, and is generally considered to be the most commonly employed meaning of substantially related.

The ABA added this definition of substantially related to the Comment to amended Rule 1.9. The Comment to amended Rule 1.9 also provides the following example of substantially related matters: "[A] lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce." Because the personal financial status of the business person is likely to be relevant to material issues in the divorce proceeding such as distribution of assets, support, or alimony, the two representations could be considered substantially related despite the different legal issues in the two representations. If, however, the lawyer formerly represented the business person only in securing zoning permits for business operations, the nature of that representation would seem much less likely to require an understanding of the business client's financial assets. In this latter circumstance, the former representation and current divorce representation are less likely to be considered substantially related.

There has been some confusion about the types of information that should be considered when determining whether a current and former representation are substantially related. For example, one type of information concerns policies and practices generally applied by the former client to the type of circumstances involved in the former representation. In contrast is information about the specific acts, omissions, or conditions of the former client at issue in the former representation. Using the business client/divorcing spouse scenario from above, an example of the first type of information might include information about the client's philosophy in allocating or investing assets (risk adverse or not), while the second type would include information about what the client did with a particular asset or the specific value of a particular asset.

Including presumed knowledge of the policies and practices of a former client in the definition of substantially related significantly expands the meaning of that term and the scope of current representations prohibited as substantially related to a former client representation. Chugach Electric Association v. United States District Court has often been used as an example of how courts struggle with whether information about a former client's general policies or practices should be relevant to the definition of substantially related. In Chugach, a trustee in bankruptcy brought an antitrust suit and the defendant moved to disqualify the trustee's lawyer. The trustee's lawyer had served as general counsel to the defendant for over two years, but the lawyer resigned prior to the specific activities on which the antitrust claim were based. The district court denied the defendant's motion to disqualify because the defendant failed to establish that the lawyer, as general counsel, "received or had access to secret or confidential information related to [the antitrust claim]." Thus, the defendant failed to establish a substantial relationship between the antitrust claims and the lawyer's prior representation as general counsel. The court of appeals directed the district court to enter the order of disqualification because the antitrust claims concerned not only what the former client had done, but also why it had done so. As the court of appeals stated:

[the problem here is not limited to the question whether [the lawyer] was connected with [defendant] as its counsel at the time agreements were reached and overt acts taken, but includes the question whether, as attorney, he was in a position to acquire knowledge casting light on the purpose of later acts and agreements .... A likelihood here exists which cannot be disregarded that [the lawyer's] knowledge of private matters gained in confidence would provide him with greater insight and understanding of the significance of subsequent events in an antitrust context and offer a promising source of discovery.

That is to say, the disqualified lawyer likely obtained knowledge during his former representation of the defendant of the policies of the defendant pursuant to which the alleged antitrust violations occurred.

A concern raised by the Chugach opinion is that a lawyer who represented a client over a lengthy period of time with respect to a large variety of matters presumably learned many policies and practices of the client. Those policies and practices may be indirectly at issue or reflected in countless matters after the lawyer quits representing the client. If knowledge of such policies and practices is relevant to the meaning of substantially related, then
"virtually any [current representation] undertaken for a new client against the former client is 'substantially related' to the prior representation, and hence prohibited in the absence of client consent."

It is generally agreed, therefore, that tying the meaning of substantially related to information concerning general policies and practices of a former client should not extend too far. Commentators have recommended that when considering how knowledge about a former client's policies and practices affects whether matters are substantially related, the following should be explored: (1) whether the policy will be directly at issue in the current representation, (2) whether knowledge of the policy is of unusual value in the current representation, and/or (3) whether the policy "is blended into more specific factual information such as the same modus operandi in a particular type of matter." These recommendations require that distinctions be made on a sliding scale relating the importance of the current representation to the policy or practice of the former client.

The ABA appears to have adopted a similar cautious approach concerning the relevance of knowledge about a former client's policies and practices to the understanding of the phrase substantially related matters. Comment [3] to amended Rule 1.9 provides, in part:

In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.

The Comment does not provide that knowledge of the policies and practices of a former client cannot preclude a subsequent representation; it only provides that such knowledge ordinarily will not do so. Although Comment [3] does not specify what extraordinary circumstances would take account of a former client's policies and practices, it may suggest that knowledge of policies relevant to or at issue in a subsequent representation may preclude that representation. In short, Comment [3] may be read as requiring the same "sliding scale" distinctions suggested above.

Some courts have also used the sliding scale distinctions to determine how knowledge about a former client's policies and practices affects whether matters are substantially related. Opinions from those courts provide a reasonable understanding of how courts might apply Comment [3] to amended Rule 1.9. The results are not consistent with the longstanding assumption that a current representation would not be considered substantially related to a former representation simply because both representations involved the same type of problem or issues.

Some courts have concluded that knowledge of a former client's policies or practices for handling a type of representation is relevant in considering whether the current representation is substantially related to the former representation. For example, in Contant v. Kawasaki Motors Corp., the court disqualified the plaintiff's lawyer in a products liability action concerning one of the defendants' motorcycles because the lawyer had previously represented the defendants in defending three products liability suits involving different plaintiffs and different motorcycles. In finding the current representation "substantially related" to the former representations, the court relied in part on the fact that the lawyer "became aware of the practices used by [the defendant] in fighting a product liability action." Similarly, in Kaselaan & D'Angelo Associates, Inc. v. D'Angelo, the court disqualified a lawyer from representing the defendant in an action brought against a former employee of the plaintiffs for breach of various duties arising out of the defendant's former employment by the plaintiff. The defendant's lawyer previously represented the plaintiff in suits involving similar claims against other former employees. In finding the current representation of the defendant substantially related to the former representations of the plaintiff, the court in Kaselaan considered relevant the knowledge of the former client's "normal course of action in prosecuting and defending employment claims." The court also noted that knowledge of the former client's "tactical approach to dealing with departing employees confers a distinct advantage upon [the lawyer] arising from his retention by [the former client] in such employment matters in the recent past."

Comment [3] to amended Rule 1.9 appears to distinguish knowledge of policies of a former client from knowledge of facts about that former client. Some courts, however, have equated "knowledge of policies" with "knowledge of
facts" when the policy clearly is at issue in a subsequent representation. Accordingly, distinguishing knowledge of policies from knowledge of facts might not be as easy as Comment [3] suggests.

Ullrich v. Hearst Corp. provides a good example of when a court might equate knowledge of policies with knowledge of facts. In that case, former employees of the defendant brought claims accusing the defendant of various illegal employment activities, including age discrimination, harassment because of pregnancy, retaliatory discharge, sex discrimination, and discrimination in severance payments. The plaintiffs' lawyer previously represented the defendant for over twenty years on general matters of employment law. In ruling on the defendant's motion to disqualify the plaintiffs' lawyer, the court identified the "most significant issue" to be "by what standard the court should adjudicate the question whether the representation of these plaintiffs is 'substantially related' to [the lawyer's] prior representation of[the defendant]." The court focused on the nature of the prior representation and "the likelihood that, in the course of it, confidences were reposed ... [by the defendant] that could be used adversely to" the defendant in the current litigation. The court disqualified the plaintiffs' lawyer because the lawyer's prior representation of the defendant gave the lawyer knowledge of specific facts that would be relevant and useful to the current plaintiffs' claims. Those facts included information concerning the general performance of other employees of the defendant against whom the plaintiffs would be measured. The court also noted, however, that the plaintiffs' charges did not focus merely on "isolated tortious acts unconnected to continuing policies of [the defendant]." The plaintiffs' allegations arguably were connected to and required consideration of employment policies of the defendant. For example, the allegation of retaliatory discharge made the defendant's practices concerning retaliation against employees that complained about the defendant relevant to the lawyer's current representation of the plaintiffs. One of the plaintiffs' allegations about the defendant's failure to comply with a state statute concerning maternity leave made policies concerning maternity leave relevant. Finally, the allegation of discrimination in severance packages made policies concerning severance relevant. In concluding that the matters were substantially related, the court also relied on the fact that the lawyer's prior representation of the defendant required him to be intimately familiar with the corporation's employment practices and policies, including those described above. The court noted that the lawyer obtained this disqualifying knowledge not only from providing general counsel to the defendant in the past, but also from representing the defendant in numerous individual cases concerning employment issues. The court in Ullrich, then, equated knowledge of specific personnel facts about the defendant's employees with knowledge of the defendant's general employment practices. Both were "confidential information pertinent to [the] present [representation]" and there was a "strong, clear likelihood that [such] information ... [would] be used against the interests of that former client."

Even cases that are often cited as rejecting knowledge of former client policies and practices as relevant in any way to the definition of substantially related do not engage in such a wholesale rejection. Instead, an accurate reading of some of those cases demonstrates that the former clients seeking disqualification of a lawyer in an adverse current representation generally failed to demonstrate the likelihood that the lawyer had knowledge of a policy of the former client sufficiently at issue in the current representation.

It is important, therefore, to clarify whether Rule 1.9(a) applies in any way to current representations related to a lawyer's former government service. The scope of matters for current clients that are substantially related to matters addressed for former clients under Rule 1.9(a) can greatly exceed the scope of matters relevant under Rule 1.11. That significant difference might have fostered the intensity of the debate about the relationship between Rule 1.9(a) and 1.11(a), which I describe next.

C. The Debate About the Relationship Between Rule 1.9(a) and Rule 1.11(a)
Before Amendment of the Rules

Neither the text of Rule 1.9(a) nor the text of Rule 1.11(a) addressed whether Rule 1.9(a) should play any role in limiting representations of current clients by former government agents, and commentators offered a number of opinions to fill the void. I will briefly describe those opinions that leading treatises set forth in more detail. I will not address which is the better argument. I intend only to demonstrate that reasonable grounds existed for the
Commission to attempt to resolve the seemingly endless debate about the relationship between Rules 1.9(a) and 1.11(a).

There was general agreement that Rule 1.11(a) applied when the interests of a lawyer's current client and a former government or agency client were "congruent." There was a longstanding disagreement, however, over what rule applied when a former government lawyer represented a current client in a matter substantially related to the former government representation and materially adverse to the former government client. Some argued that Rule 1.9(a) applied because a former government client deserves Rule 1.9(a) protections from breaches of confidentiality and "side switching" as much as any former client. Rule 1.11(a), then, applied only when a current representation was not materially adverse to the interests of the former government employer. This argument treated Rule 1.11 as "supplement[ing] rather than supplant[ing]" Rule 1.9(a) because Rule 1.9(a) by its terms only limited current representations that were materially adverse to the former client's interests. Rule 1.11(a) was necessary to limit the representations of current clients whose interests were congruent with the interests of former government clients because former government lawyers could exploit government service to foster post government employment either congruent with or adverse to government interests.

Others argued, however, that Rule 1.11 alone regulated conflicts arising from current client representation and former government service, whether or not the interest of the current client was adverse to the former government agency. The ABA Standing Committee on Ethics and Professional Responsibility, in particular, concluded in 1997 that "Rule 1.11 alone determines the scope of a former government employee's conflict of interest obligations under the Model Rules, and not Rule 1.9(a) and (b)." The Standing Committee concluded from the "fact that the provisions of Rule 1.9(a) and (b) and 1.11 overlap and sometimes conflict with one another" that "both rules were not intended to apply in the same situation." In addition, the Standing Committee focused on the peculiar concerns that Rule 1.11(a) does not share with Rule 1.9(a): preventing the exploitation of public office and avoiding the creation of an undue deterrent to lawyers entering government service. These concerns exist in all circumstances where a former government agent represents a new client and thus justified the application of Rule 1.11(a) alone. The Standing Committee also asserted that its conclusion was "consistent with the position taken by most courts that had considered the [issue]."

The Comments to Rules 1.9, 1.10, and 1.11 supported both sides of the debate and thus added to the confusion about the relationship between Rules 1.9(a) and 1.11(a). For example, Comment [1] to Rule 1.9 provided that Rule 1.9, not Rule 1.11, disqualified a lawyer "who has prosecuted an accused person" from representing the accused "in a subsequent civil action against the government concerning the same transaction." This is clearly an example of former government service precluding a subsequent representation. Comment [4] to Rule 1.10 concluded that Rules 1.6, 1.7, and 1.9 generally bound individual lawyers that join private firms after leaving government service. Finally, Comment [5] to Rule 1.10 stated that "[t]he government is entitled to protection of its client confidences and, therefore, to the protections provided in Rules 1.6, 1.9 and 1.11." Commentators used these Comments to support the argument that Rule 1.9(a) was intended to apply to conflicts of interest arising from former government service.

While the bulk of the Comments supported the application of both Rule 1.9(a) and Rule 1.11(a) to former government lawyers, a portion of Comment [3] to Rule 1.11 was used to support a counter-argument. That portion provided: "However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards." The ABA Standing Committee on Ethics and Professional Responsibility relied on this Comment in concluding that Rule 1.11(a) alone applied to conflicts of interest arising from former government service.

Given the lack of direction in the text of Rules 1.9 and 1.11 and the "regrettably opaque references" in their respective Comments, it made sense for the Commission to clarify the relationship between the Rules. As described in the next part, however, the amendments to these rules and their Comments may not achieve the desired effect.
II. THE RELATIONSHIP BETWEEN AMENDED RULES 1.9(a) AND 1.11(a)

A. The Remaining Need for Clarity

The Commission's reports reflect a desire to clarify the relationship between Rules 1.9(a) and 1.11(a). The "Reporter's Explanation of Changes" for amended Rule 1.11 states:

There has been disagreement whether individual lawyers who have served as government officials or employees are subject to Rule 1.9 regarding their obligations to former clients or whether their obligations under Rule 1.11(a) are exclusive. The question is an important one .... The Commission decided that representation adverse to a former government client is better determined under Rule 1.11(a).

One may view the text of amended Rule 1.11 and its Comments as proof of the ABA's intention to make Rule 1.9(a) inapplicable to former government agents. Amended Rule 1.11(a) specifically provides that former government agents are subject to Rule 1.9(c). Amended Rule 1.11(d)(1), however, makes lawyers currently serving as government agents subject to all of Rule 1.9. One might conclude, therefore, that the ABA carefully selected the circumstances in which the particular sections of Rule 1.9 would apply to former and current government agents. Accordingly, it is reasonable to infer the ABA intended that only Rule 1.9(c) would apply to former government agents. Moreover, paragraph (a)(2) in amended Rule 1.11 incorporates the description of the circumstances that constitute an impermissible conflict of interest for a former government agent found in pre-amendment Rule 1.9. Comment [3] to amended Rule 1.11 then provides that paragraph (a)(2) applies "regardless of whether a lawyer is adverse to a former client." That is to say, amended Rule 1.11(a)(2) governs the specific circumstances on which the long debate about the relationship between Rule 1.9(a) and Rule 1.11(a) has centered.

One also might use the legislative history of amended Rule 1.11 to argue that Rule 1.9(a) should no longer regulate former government agents. The Commission originally planned to present to the House of Delegates at the ABA's annual meeting in August, 2001 an amendment to Rule 1.11(a) significantly different than the amendment presented to and adopted by the House of Delegates in February, 2002. The Commission's penultimate proposed amendment explicitly incorporated Rule 1.9(a) into Rule 1.11(a). Moreover, the "Reporter's Explanation of Changes" for that amendment provided, "[T]he Commission decided that representation adverse to a former government client is better determined under Rule 1.9 than under 1.11(a) because Rule 1.9 includes not only the very matter in which a former government lawyer participated but also matters that are substantially related." The radical change from the Commission's penultimate proposal for Rule 1.11(a) to the amendment finally proposed to and adopted by the House of Delegates might be the strongest evidence that the Commission finally concluded that Rule 1.9(a) should not apply to former government agents.

If the Commission and the ABA wanted to end the debate on the relationship between Rules 1.9(a) and 1.11, they have not done enough given the long history and vigor of the controversy. The last-minute, unexplained switching of sides by the Commission on this issue might prompt the belief that the debate is easily revived. Faith in understandings of legislative history hardly seem sufficient to quell the debate. Moreover, the significance of the eleven words added to Comment [3] to amended Rule 1.11 might not be appreciated because the Comment fails to provide any historical context. Most importantly, the Commission failed to delete from Comment [1] to Rule 1.9 the following statement of when Rule 1.9 applies: "So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction." I could not think of a better example of Rule 1.9(a) being applied to a former government agent. The example is even more troubling because of the following directive added to Comment [1] to Rule 1.9: "Current and former government lawyers must comply with this Rule [1.9] to the extent required by Rule 1.11." The Commission might have intended the latter statement to refer only to the incorporation of Rule 1.9(c) into amended Rule 1.11(a)(1) or to the incorporation of Rule 1.9 into amended Rule 1.11(d)(2). The juxtaposition of the example and the closing directive, however, will only confuse those subject to the new Rules.
States considering adopting the amended Model Rules should consider more effective methods than the current text of the amended Rules to put to rest questions about the relationship between Rules 1.9(a) and 1.11(a). The text of Rule 1.11(a) could explicitly disclaim the application of Rule 1.9(a) to circumstances governed by Rule 1.11(a). While such a disclaimer might be an unusual rule format, the amended Rules already approximate such a format in amended Rule 1.10, the general rule concerning imputed conflicts of interests. Rule 1.10(d) disavows the applicability of Rule 1.10(a) to lawyers in a firm with former or current government lawyers. At the very least, the Comments to Rules 1.9 and 1.11 should contain such explicit disclaimers.

Unfortunately, the relationship between Rules 1.9(a) and 1.11 is not the only issue for which greater clarity in the amended Rules would help. I turn now to questions raised by the addition of Comment [10] to amended Rule 1.11.

B. Uncertainty Added by Comment [10] to Amended Rule 1.11

As described above, the amendment to the text of Rule 1.11 did not alter the definition of matter with respect to which participation as a government agent could give rise to an impermissible conflict of interest in subsequent representations. The amendment to Rule 1.11, however, added Comment [10], which provides the opportunity for an understanding of matter much broader than the "same issue of fact/same parties" model presented by the text of Rule 1.11 and the presumed codification of Formal Opinion 342 in that text. Comment [10] provides: "For purposes of paragraph (e) of this Rule, a 'matter' may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed." Neither Comment [10] nor the text of amended Rule 1.11 give any hint of what "another form" might include, how the criteria identified in the Comment should relate to one another, or even if all of the criteria should be considered in every circumstance. This ambiguity in Comment [10] subverts the role of Comments to serve as guides to interpretation and to illustrate the meaning and purpose of a rule. Although the elimination of all ambiguity in the Rules is impossible, the ambiguity in Comment [10] should not be viewed as typical and therefore harmless. The ambiguity must be recognized as a source of discretion. Accordingly, states considering adoption of amended Rule 1.11 should carefully consider the lack of direction provided by Comment [10] and the likelihood it will lead to disparate readings of matter rather than uniformity in the application of Rule 1.11.

The federal Ethics in Government Act (EIGA) provides a clue in understanding the purpose and possible effects of including Comment [10] in the amendment of Rule 1.11 commentators often have tied the definition of matter in Rule 1.11 to EIGA, and the Reporter for the Commission admitted that EIGA provided a foundation for Comment [10]. The "Reporters Explanation of Changes" for amended Rule 1.11 states: "This new Comment clarifies that two particular matters may constitute the same matter ..., depending on the circumstances. The language is drawn from but is not identical to the definition of 'matter' as it is used in the federal conflicts of interest statute. Cf. 5 C.F.R. 2637.201(c)(4)." The regulation cited by the Reporter is part of a set of regulations designed to implement section 207(a) of EIGA. Section 207(a) restricts certain representations by former officers, employees, and elected officials of the executive branch after they leave government service. Similar to Rule 1.11, those EIGA restrictions apply to representations in connection with particular matters, which involved a "specific party or parties." Moreover, the regulations which implement EIGA provide that the matters of concern under section 207 (a) of EIGA typically are "specific proceeding[s] affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties." So, in many respects, Rule 1.11 and EIGA share the same concerns.

The regulations implementing EIGA, however, make clear that even if the specific party that is the focus of the matter addressed as a government agent is not the focus of the matter addressed in the representation subsequent to government service, both matters might be considered to be the same particular matter for section 207(a). As an example of a "same particular matter [that] may continue in another form" under EIGA, the regulations provide the following:

A government employee reviewed and approved certain wiretap applications. The prosecution of a person overheard during the wiretap, although not originally targeted, must be regarded as part of the same particular matter.

as the initial wiretap application. The reason is that the validity of the wiretap may be put in issue and many of the facts giving rise to the wiretap application would be involved.

This example is set forth in the regulation to which the "Reporters' Explanation of Changes for Rule 1.11" refers as indicative of the scope of Comment [10]. Both matters in the example are specific proceedings affecting the legal rights of specific parties, but neither the proceeding nor the party who is the object of the proceeding are the same in each matter. Basic facts, as suggested in Comment [10], seem to be all that make the two matters the same matter. When basic facts alone become the acceptable criterion for equating matters under Rule 1.11, the line between the scope of matter under Rule 1.11 and the scope of same or substantially related matter under Rule 1.9(a) starts to blur. This blurring effect of Comment [10] seems inconsistent with amended Rule 1.11 which the ABA suggested was intended to solidify the line between Rule 1.9(a) and Rule 1.11.

Finally, one last issue about the scope of EIGA should raise questions about adopting Comment [10], which links Rule 1.11 to EIGA. EIGA was adopted to deter representations by former government agents that raise even the appearance of impropriety. The Model Rules, however, attempted to eliminate the appearance of impropriety as a standard for determining when one representation is sufficiently related to another to create an impermissible conflict of interest. The appearance of impropriety standard has been criticized due to its lack of specificity and hence the inherently subjective nature of the application of the standard. Accordingly, before adopting Comment [10] to amended Rule 1.11, states should carefully consider how far the Comment's language derived from EIGA extends the definition of matter under Rule 1.11.

III. CONCLUSION
The ABA and the Commission should be commended for their "herculean effort [s]" to review and improve the Model Rules of Professional Conduct. The valor of that effort, however, should not cloud its utility. Before adopting the Rules amended by the ABA in February 2002, states should carefully consider what the ABA could have done as well as what it did do. There was a need to clarify whether both Rule 1.9(a) and Rule 1.11 applied to representations of current clients by lawyers who formerly served as government officers or employees. While the ABA eliminated some portions of the Model Rules which fostered confusion about the relationship between Rule 1.9(a) and Rule 1.11, states hoping to end the controversy must do more. The Rules or the Comments to the Rules should explicitly address the relationship between Rule 1.9(a) and Rule 1.11. Moreover, states should not adopt ambiguous Comments to the Rules, such as Comment [10] to amended Rule 1.11, which confound rather than clarify.
Lawyers’ Duty of Confidentiality, Government Wrongdoing and Disclosure

A Story to Consider

Jesselyn Radack was working at the Justice Department’s Professional Responsibility Advisory Office in December 2001 when she received a phone call from an FBI lawyer who wanted to find out whether the FBI could legally interrogate John Walker Lindh, an American in Afghanistan who was being held by American forces. CNN had broadcast an interview with Lindh, and the Attorney General had announced that the government would prosecute Lindh to the full extent of the law. In response, Lindh’s father hired a lawyer to represent him. Lindh’s lawyer faxed a letter to the Attorney General and the FBI Director informing them that he represented Lindh. The FBI lawyer wanted to know whether the government could legally interrogate Lindh, since a legal ethics rule prohibits a lawyer from speaking to another lawyer’s client without that other lawyer’s permission. Radack told the FBI lawyer that the ethics rule prohibited such an interrogation. A couple of days later, the FBI lawyer informed Radack that the interrogation had occurred and together they strategized about how the government should handle the situation. The FBI lawyer and Radack exchanged numerous emails, which Radack printed out and put into the case file.

About a month later, Radack was given a poor performance evaluation and told that unless she left the Justice Department, the evaluation would become part of her personnel file. Radack began looking for a different job. A few weeks later, the FBI lawyer contacted Radack again because the district court in the Lindh prosecution had ordered the Justice Department to turn over all documents related to the legality of the Lindh interrogation. Radack looked through the case file for the emails on this issue and could find only two of them. After consulting a more experienced colleague, Radack concluded that someone had cleansed the file. Radack asked the information technology specialists to recover the emails electronically, and they were able to recover some of them. When Radack informed her supervisor of the action she had taken in recovering the missing emails, the supervisor was not pleased.

Radack eventually left the Justice Department and started her new job. One morning, Radack heard Newsweek’s David Isikoff report that the Attorney General said the Justice Department had never taken the position that its interrogation of Lindh had been illegal. Radack thought that this meant that the Justice Department did not disclose her emails to the district court judge. She had retained copies of those emails and faxed them to Isikoff, who put them on the Newsweek website. After an Inspector General investigation pointed to Radack as the likely source for the leak of these emails, the Justice Department opened a criminal investigation of Radack and filed ethics charges against her in the two jurisdictions where she was licensed as a lawyer, Maryland and the District of Columbia. The Maryland bar authorities decided not to pursue a case against Radack. The District of Columbia has not yet made a decision on the Justice Department complaint.

What are the arguments that you would make on behalf of the Justice Department? What are the arguments that you would make in favor of Radack? How would you decide this matter?

Did Radack disclose confidential information?  
To whom did she owe a duty of confidentiality?  
Did Radack have any basis for disclosing this information?

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If so, did Radack follow appropriate procedures in this case?

How should a lawyer in Radack’s position have handled this situation?

Another Story to Consider

In 2000, Cindy Ossias was a lawyer in the California Insurance Department, where she investigated California insurance companies. Ossias had investigated the companies’ practices in settling cases arising out of the 1994 Northridge earthquake, concluded that the companies had violated state law, and recommended that the companies be fined. Instead, California Insurance Commissioner Chuck Quackenbush, the head of the Insurance Department and an elected official, authorized secret settlements under which the companies would donate to private foundations formed by Quackenbush. When Ossias learned of these secret settlements, she believed they were improper. She disclosed them to state legislators who were investigating the Insurance Department.

When Quackenbush discovered that Ossias had disclosed this information to the legislators, he placed her on administrative leave, and state bar authorities investigated whether Ossias had violated her professional duty of confidentiality. Ossias argued that her disclosure was authorized by state whistleblower protection laws, and bar authorities ultimately decided not to discipline her. The state bar proposed a rule allowing government lawyers to disclose government misconduct, but the state supreme court rejected the proposed rule. The California legislature passed legislation that would have clarified that a government lawyer does not violate confidentiality by disclosing government wrongdoing, but the Governor vetoed the legislation.

To whom did Ossias owe a duty of confidentiality?
Was it to the California Insurance Department, or its head, Chuck Quackenbush?
The government of California?
The people of California?

Does this situation remind you of a similar one you have faced in your practice?
If so, how did you resolve the issue of to whom a duty of confidentiality owed?
What does the rule of law require of lawyers...? Usually one thinks of the rule of law as a requirement placed on governments: the government must exercise its power through the application of general rules; it must make those rules public; it must limit the discretion of its officials; it must not impose penalties on people without due process; and so on. But the rule of law applies to the individual, too. So, what does the rule of law require of the ordinary citizen? Well, it requires that she obey the laws that apply to her. She should be alert to changes in the law; she should arrange for her legal advisors to keep her informed of her legal obligations; she should refrain from taking the law into her own hands; and she should not act in any way that impedes, harms, or undermines the operation of the legal system. Every ordinary citizen has these obligations and can properly expect the assistance of her legal advisors.

As the ordinary citizen goes about her business, she may find that there are areas where the law imposes minimal demands on her or no demands at all, instead leaving her free to her own devices. This is not a matter of regret. Allegiance to the rule of law does not mean that the citizen must wish for more law—or less freedom—than there is. Neither does it require that she play any part in bringing fresh law into existence if she does not want it. She must obey the law where it does exist, but she has no particular obligation where it does not. It is not up to individual citizens or businessmen to do the lawmakers' job for them. For example, they have no duty to extend the scope of the law's constraint (in accordance with common sense, morality, the spirit of the law, social purposes, or anything else), if the sources of law do not disclose an unambiguous enactment to that effect.

According to most conceptions of the rule of law, individual citizens are entitled to laws that are neither murky nor uncertain but are instead publicly and clearly stated in a text that is not buried in doctrine. If the state impacts individuals by way of penalty, restriction, loss, or incapacity, then individuals are entitled to advance notice through clear promulgated laws. To the extent that the law is unclear, individuals are entitled to the benefit of that uncertainty. In the absence of a clearly stated constraint laid down in a promulgated legal text (like an enacted rule or a well-known precedent), there is a presumption in favor of individual freedom: everything is permitted if it is not clearly forbidden. It is not inappropriate for lawyers to help their clients navigate the legal system with this in mind—looking for ambiguities and loopholes, taking advantage of them where they exist, and not going out of one's way to defer to laws whose application to a client's case is ambiguous or unclear.

These actions are legitimate and entirely consistent with legality because (on most accounts) the whole point of the rule of law is to secure individual freedom by providing a predictable environment in which individuals can act freely, plan their affairs, and make their decisions. To eliminate uncertainty in the interests of freedom and to furnish an environment conducive to the exercise of individual autonomy constitutes the raison d'être of the rule of law. So it is perfectly appropriate to approach legal matters in this arena with the freedom of the individual in mind—freedom from any restrictions that are not promulgated clearly in advance.

What happens when attention is turned from the individual to the government? ... Unlike the individual, the administration does not have an inherent interest in freedom of action in the
municipal arena. It does not have an interest in being unconstrained by law, in the way that the individual does. Quite the contrary: it is important that the government should in all things act in accordance with law. In doing so it upholds the ideal that, when it comes to governance, this is a nation of laws, not men. So the presumption for the government goes in a direction exactly opposite to the presumption for the individual. Governmental freedom is not the raison d'être of the rule of law. The rule of law does not favor freedom or unregulated discretion for the government. Quite the opposite is true; the government is required to go out of its way to ensure that legality and the rule of law are honored in its administration of society.

For the citizen, absence of regulation represents an opportunity for individual freedom. But absence of regulation represents a very different case for the state. It means that official discretion is left unregulated; it means that power exists without a process to channel and discipline its exercise; it means that officials are in a position to impose penalties or losses upon individuals without clear legal guidelines. Such absence of regulation is not an opportunity for freedom, but is rather a defect, a danger, and a matter of regret for the rule of law. A government committed to legality should feel pressed to remedy this situation by facilitating and taking responsibility for the emergence of new law to fill the gap. This does not correspond to any equivalent obligation placed on an individual citizen faced with the silence of the laws regarding her own conduct. So, although from the citizens' perspective “the more law the better” is definitely not true, something like that is true for the government. When it comes to the regulation of government discretion, more law is better—or at least that is true from the perspective of the rule of law, even if it has to be qualified from the perspective of other ideals that apply to the government.

Accordingly, the responsibilities of a lawyer advising the government are different from the responsibilities of a lawyer advising the private citizen or the individual businessman. The lawyer's job in private practice is certainly not to counsel law-breaking, but the lawyer may legitimately look for loopholes or other ways to avoid the impact of regulation and restraint on the freedom of her client. In government service, however, the situation is different. There, the lawyer's job is to hold the government to its responsibility under the rule of law. Government lawyers should not look for the pockets of unregulated discretion or the loopholes often present in regulations. They should not be advising their political bosses that they are entitled to avoid the impact of legal constraint where it is ambiguous or unclear. Nor should government lawyers complain when their expectations of governmental freedom from constraint are frustrated—that is, when legal constraint turns up in an area where they believed that the government had a free hand. Instead, government lawyers should proceed on the basis that the government is to act in accordance with law in all of its operations, bearing in mind at all times that this general sense of constraint is applied precisely to foster the sort of environment in which individuals can enjoy their liberty. The administration subjects itself to constraint by law so that citizens can enjoy freedom under law. The government's own freedom of action is not a value, or at least not an intrinsic value as it is for individual citizens. This is an important contrast of ethos and attitude. …
Ethical Issues Raised by the OLC Torture Memorandum

Kathleen Clark*

INTRODUCTION: A TALE OF TWO MEMOS

In the fall of 2001, the Bush administration was looking for a place to imprison and interrogate alleged al Qaeda members away from the prying eyes of other countries and insulated from the supervision of United States courts.¹ The Defense Department believed that the Naval Base at Guantánamo Bay, Cuba might work, so it asked the Justice Department’s Office of Legal Counsel (OLC) whether federal courts would entertain habeas corpus petitions filed by prisoners at Guantánamo, or whether they would dismiss such petitions as beyond their jurisdiction. On December 28, 2001, OLC responded with a thorough and balanced analysis of how the federal courts were likely to resolve the jurisdictional question.² The memorandum prepared by OLC explained the arguments against such jurisdiction,³ but it also explored possible strengths in the opposing position.⁴ The memorandum predicted that

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¹ Tim Golden, After Terror, a Secret Rewriting of Military Law, N.Y. TIMES, Oct. 24, 2004, §1, at 1 (“when searching for a place to detain hundreds of prisoners captured in Afghanistan . . . [e]very location it seriously considered . . . was outside the United States and, the administration believed, beyond the reach of the federal judiciary”).

² Memorandum for William J. Haynes II, General Counsel, Dept. of Defense, from Patrick F. Philbin & John C. Yoo, Deputy Asst. Attorneys General, Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba, Dec. 28, 2001, available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB 127/01.12.28.pdf [hereinafter Guantánamo Memorandum]. This memorandum and a number of others relating to the treatment of detainees have been published in The Torture Papers: The Road to Abu Ghraib (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter Greenberg & Dratel].

³ Guantánamo Memorandum, supra note 2, at 1-5.

⁴ Id. at 6.
federal courts would not exercise jurisdiction but explained the risk of a contrary ruling. Acting in reliance on this memorandum, the government started imprisoning and interrogating alleged al Qaeda members at Guantánamo the following month, cognizant of the risk that a federal court might find habeas jurisdiction.

In 2004, the Supreme Court considered habeas corpus claims by prisoners at Guantánamo, and reached a result contrary to that predicted by the Justice Department memorandum, ruling that the district court did have jurisdiction. The fact that the Court came to a different conclusion than that advanced by OLC does not, however, mean that the OLC attorneys failed to fulfill their professional obligations to their client. The authors appropriately explained the risk of an adverse decision, and they provided enough information for the client to understand that risk and make decisions accordingly.

Whenever a lawyer offers a legal opinion, there is always a possibility that other legal actors will take a contrary view. If that risk is substantial and the lawyer apprises the client of the magnitude of that risk, the lawyer has adequately advised and informed the client. The authors of the Guantánamo Memorandum certainly met that standard.

During the summer of 2002, CIA officials had grown frustrated with the interrogation of al Qaeda member Abu Zubaydah, who had stopped cooperating with his interrogators. The CIA wanted to use harsher
interrogation techniques against Zubaydah, and it sought the imprimatur of the Justice Department for those techniques. In particular, agency officials were concerned that certain harsh techniques might violate the international Convention Against Torture and implementing federal legislation, which makes it a crime to engage in torture under color of law outside the United States. White House Counsel Alberto Gonzales commissioned OLC to provide legal advice about the scope of the torture statute. Gonzales specifically asked that OLC explore two of the elements of the crime of torture: (1) infliction of severe pain or suffering and (2) specific intent. Deputy Assistant Attorney General John Yoo drafted a memorandum that was signed in August 2002 by Assistant Attorney General Jay Bybee, and which will be referred to here as the “Bybee Memorandum.”

11. David Johnston, Neil A. Lewis & Douglas Jehl, Nominee Gave Advice To C.I.A. on Torture Law, N.Y. TIMES, Jan. 29, 2005, at A1 (“C.I.A. lawyers went to extraordinary lengths beginning in March 2002 to get a clear answer from the Justice Department about which interrogation techniques were permissible in questioning Abu Zubaydah and other important detainees. . . . ‘Nothing that was done was not explicitly authorized,’ a former senior intelligence said.”).

12. Mike Allen & Dana Priest, Memo on Torture Draws Focus to Bush; Aide Says President Set Guidelines for Interrogations, Not Specific Techniques, WASH. POST, June 9, 2004, at A3. 18 U.S.C. §2340A provides: “Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.” Torture within the United States could already be prosecuted under existing federal and state laws prohibiting assault, maiming, and other forms of brutality. The extraterritorial reach of the federal torture statute was necessary to implement the Convention Against Torture. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].


14. Id. at 3 (“You have asked us to address only the elements of specific intent and the infliction of severe pain or suffering.”).

15. John Yoo, Behind the ‘Torture Memos;’ As Confirmation Hearings Near, Lawyer Defends Wartime Policy, SAN JOSE MERCURY NEWS, Jan. 2, 2005, at 1P (acknowledging that he “helped draft” the Bybee Memorandum); Toni Locy & Joan Biskupic, Interrogation Memo To Be Replaced, USA TODAY, June 23, 2004, at 2A (identifying Yoo as “the memo’s principal author”).

There have been news reports of another August 2002 memorandum on torture issued by a different office within the Justice Department, analyzing the legality of specific proposed interrogation techniques. This other torture memorandum has not yet been leaked or otherwise made available to the public.
defined torture narrowly, developed defenses that might be raised in any future torture prosecution, and asserted that the President could authorize torture despite the treaty and statute prohibiting it. The government apparently acted in reliance on this memorandum in setting interrogation policies for alleged al Qaeda members.  

The Bybee Memorandum purported to provide objective legal advice to government decision makers. Nevertheless, its assertions about the state of the law are so inaccurate that they seem to be arguments about what the authors (or the intended recipients) wanted the law to be rather than assessments of what the law actually is. The following section will describe the substantive inaccuracies in the memorandum. Section II will examine the legal ethics implications of those inaccuracies, with particular attention to the distinction between legal advocacy and legal advice.

I. THE SUBSTANTIVE INACCURACIES IN THE BYBEE MEMORANDUM

The Bybee Memorandum consists of 50 pages of text supporting three assertions: (1) the federal criminal statute prohibiting torture is very narrow in

Yoo is a law professor at the University of California at Berkeley whose views on unilateral executive branch authority in national security affairs were well known by the time he was chosen as a Deputy Assistant Attorney General. See John C. Yoo, The Continuation of Politics by Other Means: The Original Understanding of War Powers, 84 Calif. L. Rev. 167 (1996) (arguing that courts have no role in national security matters and that Congress’s role is limited to its spending power and the impeachment process); John C. Yoo, Clio at War: The Misuse of History in the War Powers Debate, 70 U. Colo. L. Rev. 1169 (1999) (arguing that historical sources support unilateral executive branch power to initiate war). Bybee was also an academic before being appointed as Assistant Attorney General, and he too had written about executive branch power. See Jay S. Bybee, Advising the President: Separation of Powers and the Federal Advisory Committee Act, 104 Yale L.J. 51 (1994); Adam Liptak, Author of ‘02 Memo on Torture: ‘Gentle’ Soul for a Harsh Topic, N.Y. Times, June 24, 2004, at A1.

16. There is both direct and indirect evidence of such reliance. Defense Department officials lifted much of the language from this OLC memorandum and incorporated it verbatim in their own report on interrogation practices. Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (2003) [hereinafter Working Group Report], at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.04.pdf, reprinted in Greenberg & Dratel, supra note 2, at 286; see Appendix to this article (comparing the Bybee Memorandum with the Working Group Report); see also Douglas Jehl, David Johnston & Neil A. Lewis, C.I.A. Is Seen as Seeking New Role on Detainees, N.Y. Times, Feb. 16, 2005, at A16 (the August 1, 2002 memorandum was “sought by the C.I.A. to protect its employees from liability”).

17. Bybee Memorandum, supra note 13, at 1 (“You have asked for our Office’s views regarding the standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by Sections 2340-2340A of title 18 of the United States Code.”).
scope, applying only where an interrogator specifically intends to cause the kind of extreme pain that would be associated with organ failure or death; (2) an interrogator who is prosecuted for violating the torture statute may be able to use an affirmative defense to gain an acquittal; and (3) the torture statute would be unconstitutional if it interfered with the President’s war-making powers, including the power to detain and interrogate enemy combatants as he sees fit.\textsuperscript{18} The memorandum’s claims about the state of the law in each of these areas are grossly inaccurate.

The first major inaccuracy is in the memorandum’s assertion that the federal criminal statute prohibiting torture applies only where a government official specifically intends to and actually causes pain so severe that it “rise[s] to . . . the level that would ordinarily be associated with . . . death, organ failure, or serious impairment of body functions.”\textsuperscript{19} This claimed standard is bizarre for a number of reasons. In the first place, organ failure is not necessarily associated with pain at all. In addition, this legal standard is lifted from a statute wholly unrelated to torture. It comes from a Medicare statute setting out the conditions under which hospitals must provide emergency medical care.\textsuperscript{20} That statute mentions severe pain as one possible indicator that a person is in a condition calling for such care.\textsuperscript{21} The statute goes on to define

\begin{itemize}
\item \textsuperscript{18} The memorandum is divided into six sections. The first four sections address the scope of the torture statute and argue that only treatment that results in the most extreme pain constitutes torture. Section I examines the torture statute itself. Section II, which examines the ratification history of the Convention Against Torture, argues that the legal distinction between torture, on the one hand, and cruel, inhuman, and degrading treatment, on the other, supports the narrow definition of torture claimed in the first section. Section III, which examines cases decided under the Torture Victims Protection Act, and Section IV, which examines European and Israeli court decisions, also discuss the distinction between torture and cruel, inhuman and degrading treatment. Section V makes the separation of powers argument, and Section VI describes the defenses of necessity and self-defense and asserts that they will be available to interrogators who are prosecuted under the torture statute.
\item \textsuperscript{21} \textit{Id.} The statute states: The term “emergency medical condition” means a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that
“emergency medical condition” as one in which failure to provide medical care could result in “serious jeopardy” to an individual’s health, “serious impairment to bodily functions,” or “serious dysfunction of any bodily organ or part.” The Bybee Memorandum twists this legal standard, and asserts that “severe pain” occurs only in connection with a “serious physical condition or injury such as death, organ failure, or serious impairment of body functions.”

It purports to give interrogators wide latitude to cause any kind of pain short of that associated with “death, organ failure, or serious impairment of body functions.”

A second major inaccuracy is found in the memorandum’s discussion of defenses available to those who might be prosecuted for violating the federal torture statute. The Bybee Memorandum discusses two affirmative defenses – necessity and self-defense – that could justify an interrogator’s decision to torture a prisoner in order to extract information about al Qaeda’s plans to attack other Americans. The memorandum’s analysis of the self-defense option is somewhat measured. It acknowledges that the self-defense option would be unconventional in two ways. First, the interrogator would not engage in torture to prevent harm to the interrogator himself. Rather, he would be preventing harm to other Americans who could be injured by a terrorist attack. Second, the prisoner to be tortured would not actually be in a position to harm anyone at all. Instead, it is assumed that he would have information about an attack plan that would be carried out by others. The Bybee Memorandum asserts that a government official charged with violating the torture statute could make a self-defense (or defense of another) argument, but it does not assert that such an affirmative defense

a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in –

(i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,

(ii) serious impairment to bodily functions, or

(iii) serious dysfunction of any bodily organ or part.


23. Id. at 39-46.

24. Id. at 43 (“The doctrine of self-defense permits the use of force to prevent harm to another person.”).

25. Id. at 44 (“To be sure, this situation is different from the usual self-defense justification. . . . Self-defense as usually discussed involves using force against an individual who is about to conduct the attack. In the current circumstances, however, an enemy combatant in detention does not himself present a threat of harm. He is not actually carrying out the attack; rather, he . . . merely has knowledge of the attack through his membership in the terrorist organization.”).
would necessarily succeed. The memorandum also asserts that an interrogator charged with torture might well be able to gain an acquittal using the necessity defense. Yet as David Luban has noted, the memorandum never mentions the fact that the Convention Against Torture itself seems to prescribe such a defense when it declares that “[n]o exceptional circumstances whatsoever, whether a state of war or . . . any other public emergency, may be invoked as a justification of torture.” At a minimum, the Bybee Memorandum leaves the reader with the false impression that it is likely that an interrogator will be able to avoid a torture conviction by claiming the necessity defense.

A third major inaccuracy is found in the memorandum’s discussion of presidential authority. The Bybee Memorandum asserts that the President can, at least under some circumstances, authorize torture despite the federal statute prohibiting it. This position is based on an expansive view of inherent executive power, but the memorandum does not even mention – let alone address – Youngstown Sheet & Tube Co. v. Sawyer, the leading Supreme Court case on this aspect of separation of powers. Youngtown, colloquially known as the Steel Seizure Case because it invalidated President Truman’s seizure of the nation’s steel mills during the Korean War, seriously undermines any claim of unilateral executive power. The Bybee Memorandum does not even acknowledge that the Constitution explicitly grants to Congress the powers to define “Offences against the Law of Nations; . . . make Rules concerning Captures on Land and Water; . . . [and] make Rules for the Government and

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26. See id. at 42 (“a defendant could . . . appropriately raise a claim of self-defense”); id. (“we assume self-defense can be an appropriate defense to an allegation of torture”); id. at 43 (“Under the current circumstances, we believe that a defendant accused of violating Section 2340A could have, in certain circumstances, grounds to properly claim the defense of another. . . . Whether such a defense will be upheld depends on the specific context within which the interrogation decision is made”); id. at 45 (“we conclude that a government defendant may also argue that his conduct of an interrogation, if properly authorized, is justified on the basis of protecting the nation from attack”); id. at 46 (“we believe that [the defendant] could argue that his actions were justified by the executive branch’s constitutional authority to protect the nation from attack”).

27. Id. at 40 (“It appears to us that under the current circumstances the necessity defense could be successfully maintained in response to an allegation of a Section 2340A violation.”); id. at 41 (“While every interrogation that might violate Section 2340A does not trigger a necessity defense, we can say that certain circumstances could support such a defense.”).

28. Luban, supra note 19, at 66 (quoting Article 2(2) of the Convention Against Torture, supra note 12).


Regulation of the land and naval Forces,” all of which suggest that Congress was well within its constitutional authority in banning torture.

On each of these three points – the threshold of pain that constitutes torture, the necessity defense, and unilateral executive power – the Bybee Memorandum presents highly questionable legal claims as settled law. It does not present either the counter arguments to these claims or an assessment of the risk that other legal actors – including courts – would reject them. Despite these obvious weaknesses, the memorandum apparently became the basis for the CIA’s use of extreme interrogation methods, including “waterboarding,” and shaped Defense Department interrogation policy. In fact, much of the memorandum was used verbatim in an April 2003 Defense Department Working Group Report on interrogation methods, which then became the basis for Defense Department policy.

The legal analysis in the Bybee Memorandum was so indefensible that it could not – and did not – withstand public scrutiny. Press reports about and excerpts from the memorandum began to surface in early June, 2004, and there was a wave of criticism. The Justice Department resisted congressional pressure to turn over the memorandum, insisting that the President had a right to confidential legal advice. When The Washington Post posted the complete text of the memorandum on its Web site, the wave of criticism turned into a flood. Eight days later, the Bush administration disavowed the

32. See Luban, supra note 19, at 56.
33. “Waterboarding” involves strapping a prisoner to a board and dunking him under water so that he feels like he is about to drown. Douglas Jehl & David Johnston, C.I.A. Expands Its Inquiry into Interrogation Tactics, N.Y. Times, Aug. 29, 2004, §1, at 10; see also Johnston, Lewis & Jehl, supra note 11 (reporting that the Justice Department approved the technique of “strapping a subject down and making him experience a feeling of drowning”).
34. See Working Group Report, supra, note 16. And see the Appendix to this article for a comparison of the Bybee Memorandum with the DOD Working Group Report. Unlike the Bybee Memorandum, the DOD Working Group Report provided additional legal analysis warning that its arguments are not accepted by other legal actors.
36. Schmidt, supra note 35.
Six months later, in December 2004, OLC issued a new torture memorandum that offered legal analysis that was more accurate, repudiating the Bybee Memorandum’s analysis of “specific intent” and “severe pain,” adopting a broader definition of torture, and omitting the troublesome sections claiming inherent presidential power to disregard the torture prohibition and the ready availability of criminal defenses to torture charges.

II. ETHICAL ANALYSIS OF THE BYBEE MEMORANDUM

The substantive inaccuracies in the Bybee Memorandum are so serious that they implicate the legal ethics obligations of its authors. In analyzing the legal ethics implications, it is important to make three preliminary observations. First, lawyers who work for the federal government are subject to state ethics rules. In the late 1980s and early 1990s, Attorneys General Richard Thornburgh and Janet Reno asserted that the Constitution’s Supremacy Clause gave the Justice Department the authority to exempt its lawyers from state ethics rules. In 1998, however, Congress passed the McDade Amendment, making it clear that federal government lawyers must


38. See Mike Allen & Susan Schmidt, Memo on Interrogation Tactics Is Disavowed; Justice Document Had Said Torture May Be Defensible, WASH. POST, June 23, 2004, at A1; Locy & Biskupic, supra note 15 (quoting a Justice Department official as saying, “We’re scrubbing the whole thing . . . . It will be replaced.”).


40. See Jim Lobe, Give Rumsfeld the Pinochet Treatment, INTER PRESS SERVICE NEWS AGENCY (May 25, 2005) http://www.ipsnews.net/interna.asp?idnews=28823 (Amnesty International “called on state bar associations to investigate administration lawyers who helped prepare legal opinions that sought to justify or defend the use of abusive interrogation methods . . .”).

41. See Memorandum from Richard Thornburgh, Attorney General, to All Justice Department Litigators (June 8, 1989), reprinted in In re Doe, 801 F. Supp. 478, 489-493 (D.N.M. 1992); Dept. of Justice, Communications with Represented Persons, 59 Fed. Reg. 39,910 (Aug. 4, 1994). The Justice Department resisted the application of several state ethics rules to federal prosecutors, including the restriction on a lawyer’s contacting a person who is already represented by counsel (Model Rule 4.2) and the restriction on prosecutors’ subpoenaing lawyers before grand juries (Model Rule 3.8). See Fred C. Zacharias & Bruce A. Green, The Uniqueness of Federal Prosecutors, 88 GEO. L.J. 207 (2000); Jesselyn Alicia Raddack, The Big Chill: Negative Effects of the McDade Amendment and the Conflict Between Federal Statutes, 14 GEO. J. LEGAL ETHICS 707 (2001).
comply with state ethics rules in the states where they represent the
government.42 Both Jay Bybee and John Yoo were subject to the D.C. Rules
of Professional Conduct. Bybee is licensed by the District of Columbia and
thus was and is directly subject to those rules.43 Yoo is licensed by
Pennsylvania but was subject to the D.C. Rules by operation of the McDade
Amendment, because he practiced in D.C. when he worked for the Office of
Legal Counsel.44

Second, these OLC lawyers had as their client an organization – the
executive branch of the United States government – rather than any individual
officeholder.45 Although White House Counsel Alberto Gonzales requested
the Bybee Memorandum, he was not the client. Instead, he was simply a
constituent of the organizational client. Ordinarily, lawyers must accept the
decisions made by such constituents when those constituents are authorized to
act on behalf of the organization.46 But where a lawyer knows that a
constituent is acting illegally and that conduct could be imputed to the
organization, the lawyer must take action to prevent or mitigate that harm.47

42. 28 U.S.C. § 530B(a) (2000). The McDade Amendment provides:
An attorney for the Government shall be subject to State laws and rules, and local
Federal court rules, governing attorneys in each State where such attorney
engages in that attorney’s duties, to the same extent and in the same manner as
other attorneys in that State.

43. See http://www.dcbarr.org/find_a_member (indicating that Bybee has been a member
since December 21, 1981).

44. When visited on June 16, 2005, the Web site for Boalt Hall School of Law at the
PDF, indicated that Yoo is licensed by the Commonwealth of Pennsylvania. That information
is no longer posted at the site.

An important but sometimes overlooked aspect of the McDade Amendment is that it
subjects federal government lawyers to the rules not of their state of licensure, but those of each
state where they are practicing on behalf of the government. See, e.g., Zacharias & Green, supra
note 41, at 225 n.179 (assuming, incorrectly, that the McDade Amendment makes federal
prosecutors subject to regulation of state where they are licensed). Thus, a federal government
lawyer licensed in Pennsylvania but working for the Justice Department in Washington, D.C.
is subject to the D.C. Rules of Professional Conduct.

(“Organization as Client”).

46. Id. cmt. 4 (“When constituents of the organization make decisions for it, the decisions
ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful.”).

47. Id. Comment 4 to Rule 1.13 sets out the lawyer’s obligations:
[When the lawyer knows that the organization may be substantially injured by
tortious or illegal conduct by a constituent member of an organization that
reasonably might be imputed to the organization or that might result in
substantial injury to the organization . . . it may be reasonably necessary for the
lawyer to ask the constituent to reconsider the matter. If that fails, or if the
Where the constituent can exercise control over the lawyer’s future career, taking such action may jeopardize the lawyer’s advancement. Nevertheless, the legal ethics rules require lawyers to take action to protect entity clients from harm committed by their constituents.

Third, in analyzing the performance of the lawyers who wrote the Bybee Memorandum, it is important to analyze whether they were acting as legal advisors or as legal advocates. Different ethics rules apply to these two distinct functions. The role of the lawyer as an advocate before a tribunal is a familiar one. In that role, the lawyer may make any legal argument as long as it is not frivolous. She does not need to give the court her honest assessment of how the law applies in the case. Her only obligation of candor regarding legal argument is that if her opponent fails to mention directly adverse controlling authority, she must bring it to the tribunal’s attention.

When a lawyer gives legal advice, on the other hand, she has a professional obligation of candor toward her client. One finds this obligation in Rule 2.1, which states that in representing a client, “a lawyer shall . . . render candid advice.” In advising a client, the lawyer’s role is not simply to spin out creative legal arguments. It is to offer her assessment of the law as objectively as possible. The lawyer must not simply tell the client what the client wants to hear, but instead must tell the client her best assessment of what

matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. . . . Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

48. D.C. Rule of Professional Conduct 3.1 states: “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law.” D.C. RULES, supra note 45, R. 3.1 ABA Model Rule 3.1 is identical. MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2003) [hereinafter ABA MODEL RULES]; see also FED. R. CIV. PROC. 11(b)(2) (“By presenting to the court . . . a pleading, . . . an attorney . . . is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, . . . the . . . legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law . . . .”).

49. D.C. Rule 3.3(a)(3) states: “A lawyer shall not knowingly . . . [f]ail to disclose to the tribunal legal authority in the controlling jurisdiction not disclosed by opposing counsel and known to the lawyer to be dispositive of a question at issue and directly adverse to the position of the client . . . .” D.C. RULES, supra note 45, R. 3.3(a)(3). ABA Model Rule 3.3(a)(2) is nearly identical. ABA MODEL RULES, supra note 48, R. 3.3(a)(2).

50. D.C. RULES, supra note 45, R. 2.1. ABA Model Rule 2.1 is identical. ABA MODEL RULES, supra note 48, R. 2.1.
the law requires or allows.\textsuperscript{51} Similarly, Rule 1.4(b) requires a lawyer to explain the law adequately to her client, so that the client can make informed decisions about the representation.\textsuperscript{52}

David Luban has described this obligation of candor in the following way: In many areas of law, there is not absolute agreement among lawyers about the state of the law. In those situations, knowledgeable lawyers’ opinions about the law usually fall somewhere in a range similar to the familiar bell curve. If a lawyer advises a client that the law is at an extreme end of that bell curve (rather than that the state of the law is where most knowledgeable lawyers would view it), then the obligation to give candid legal advice requires the lawyer to inform the client that the lawyer’s interpretation is at the extreme end and not shared by most knowledgeable lawyers.\textsuperscript{53}

\textsuperscript{51} Comment 1 to D.C. Rule 2.1 states that “a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.” D.C. RULES, supra note 45, R. 2.1 cmt. 1. Model Rule 2.1 is identical. ABA MODEL RULES, supra note 48, R. 2.1. cmt. 1. A leading treatise on legal ethics explains:

\begin{quote}
A client may consult a lawyer to have her own preconceptions confirmed rather than to seek genuine advice. A lawyer may be tempted to play sycophant to such a client, to ensure continued employment. Rule 2.1 prohibits such an approach, however, first by requiring that a lawyer’s advice be candid; and second, by requiring the lawyer to exercise judgment that is both independent and professional.
\end{quote}

\textsuperscript{52} D.C. Rule 1.4(b) states: “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” D.C. RULES, supra note 45, R. 1.4(b). Model Rule 1.4(b) is identical. ABA MODEL RULES, supra note 48, R. 2.1. See 1 HAZARD & HODES, supra note 9, §7.4 (“If the client is to make turning-point decisions about his legal affairs, he must be armed with sufficient information for intelligent decisionmaking.”); Bilder & Vagts, supra note 31, at 693 (“unless public officials are given competent, objective, and honest advice as to the legal consequences of proposed actions and decisions, they cannot make informed and intelligent policy judgments or properly balance the national interests involved”).

\textsuperscript{53} Telephone conversation with David Luban, Dec. 15, 2004. See David Luban, Selling Indulgences: The Unmistakable Parallel Between Lynne Stewart and the President’s Torture Lawyers, SLATE, Feb. 14, 2005 (“Independence means saying what the law is – as mainstream lawyers and judges understand it – regardless of what the client wishes it to be. Candor requires lawyers with eccentric theories to warn their clients whenever their legal advice veers away from the mainstream.”), available at www.slate.com/id/2113447; see also W. Bradley Wendel, Professionalism as Interpretation, 99 NW. U L. REV. 1167 (2005) (arguing that “professionalism” requires lawyers who advise clients contrary to the views of the prevailing professional interpretive community to warn their clients of such inconsistency).
In giving legal advice, a lawyer may provide advice that is contrary to the weight of authority, spinning out imaginative, even “forward-leaning” legal theories for the client to use. When doing so, however, the candor obligation requires the lawyer to inform the client that the weight of authority is contrary to that advice, and that other legal actors may come to the opposite conclusion. A lawyer who fails to warn a client about the possible illegality of proposed conduct has violated her professional obligations.

If a lawyer fails to candidly advise a client, she harms the client and may harm others affected by the client’s actions. A lawyer who inaccurately advises a client that a proposed legal action is illegal may be foreclosing an option that should be open to the client’s consideration, usurping the client’s role in an attempt to limit the client’s options. Similarly, a lawyer who inaccurately advises a client that proposed illegal action is legal also harms the client. On one level, a client may want to hear that conduct she wants to engage in is legal, since that makes it easier for the client to engage in the desired activity. But the client may face serious long-term consequences for

An alternative approach would allow a government lawyer to opine that the state of the law is at the extreme as long as she publicly explains and defends that position, allowing the public to assess and critique it. See The Role of the Legal Adviser of the Department of State: A Report of the Joint Committee Established by the American Society of International Law and the American Branch of the International Law Association, 85 AM. J. INT’L L. 358, 363 (1991) (“the most effective check on government advocacy of dubious or irresponsible legal positions will be the willingness of the Legal Adviser to publicly state, defend and be accountable for such arguments before other officials and Congress, the public and the community of international lawyers”).

54. See Golden, supra note 1 (“Legally, the watchword became “forward-leaning,”” said a former associate White House counsel, Bradford Berenson, “by which everybody meant: “We want to be aggressive. We want to take risks.””); Michael Isikoff, Daniel Klaidman & Michael Hirsh, Torture’s Path, NEWSWEEK, Dec. 27, 2004 (quoting Alberto Gonzales as asking a meeting of White House and Justice Department lawyers regarding the preparation of this memo, “Are we forward-leaning enough on this?”) An unnamed lawyer who participated in the meeting recalled, “That’s a phrase I heard Gonzales use many times.” Id. But, at his confirmation hearings as the nominee to be Attorney General, Gonzales denied using that phrase.

SEN. KENNEDY: . . . did you ever talk to any members of the OLC while they were drafting the memoranda? Did you ever suggest to them that they ought to lean forward on this issue about supporting the extreme uses of torture? Did you ever, as reported in the newspaper?

MR. GONZALES: Sir, I don’t recall ever using the term sort of leaning forward in terms of stretching what the law is.

Panel I of a Hearing of the Senate Judiciary Committee: The Nomination of Alberto Gonzales To Be Attorney General, FEDERAL NEWS SERV., Jan. 6, 2005.

such illegal conduct. While a client can choose to act illegally, the consequences of illegal conduct should not come as a surprise to the client. Just as a patient can take action that is contrary to medical advice, a client can take action even though it is against the law. But such a decision should not be accompanied by his lawyer’s false assurance that the conduct is legal.

The harm to the client from failing to advise about the illegal character of proposed conduct may be even greater when the client is an entity rather than an individual. Indeed, a lawyer working for an entity client has an enhanced obligation to guard the interests of the entity against wrongdoing by the entity’s constituents.56

The Bybee Memorandum purports to offer legal advice. Its authors, Jay Bybee and John Yoo, had an obligation to be candid with their client, the executive branch. The constituent who requested the Bybee Memorandum, then White House Counsel Alberto Gonzales, may have wanted a particular answer to his questions about the torture statute. But the OLC lawyers had a professional obligation to give accurate legal advice to their client, whether or not the client’s constituent wanted to hear it. Based on the available facts, it appears that Bybee and Yoo failed to give candid legal advice, violating D.C. Rule 2.1, and that they failed to inform their client about the state of the law of torture, violating D.C. Rule 1.4.

Because of the secrecy surrounding the Bush administration’s torture policy, we do not know exactly what techniques have been used against prisoners, or whether CIA interrogators or managers were informed of the Bybee Memorandum. With Congress controlled by the President’s party and no Independent Counsel statute in place, it is unclear how or when the facts surrounding the torture policy will be revealed.57

If bar disciplinary authorities investigate Yoo and Bybee, these two attorneys will have an opportunity to explain or defend their actions. In that setting, they might assert that the ethical obligations of candor and adequately informing their client did not apply because the Bybee Memorandum was never intended as legal advice in the traditional sense. In fact, David Luban and other scholars have speculated that this Bybee Memorandum was not intended as legal advice at all, but instead as an immunizing document, to ensure that CIA officials who engage in torture would not be prosecuted for that conduct.58 Indeed, the Bybee Memorandum might prove helpful to

57. A few members of Congress are seeking to establish an independent commission to examine allegations of interrogation abuse, but the Bush administration has resisted such efforts. Josh White & R. Jeffrey Smith, White House Aims To Block Legislation on Detainees, WASH. POST, July 23, 2005, at A1.
58. See Luban, supra note 19, at 55.
torturers in avoiding domestic criminal accountability. It is unlikely that even a future administration would prosecute government officials who relied on an OLC memorandum for the legality of their actions, because to do so would undermine future government officials’ reliance on OLC opinions more generally.

But if the authors of the Bybee Memorandum intended to immunize torturers in this way, they might have violated a different ethical rule, D.C. Rule 1.2(e), which prohibits an attorney from assisting a client’s criminal conduct.59 So even if their memorandum successfully immunizes torturers from criminal prosecution, it might jeopardize its authors’ licenses to practice law.60

CONCLUSION

Why would otherwise competent and skilled lawyers ever risk violating the ethics rules that require candid legal advice and adequate informing of clients? Yoo has publicly defended the Bybee Memorandum in general terms but has not addressed its substantive inadequacies.61 Bybee, now a judge on the United States Court of Appeals for the Ninth Circuit, has remained silent.62 Perhaps Yoo and Bybee thought that they would never have to explain their legal advice because the Bybee Memorandum would never be made public. Perhaps they thought that Bush administration actions based on their advice

59. D.C. Rule 1.2(e) states: “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . .” D.C. RULES, supra note 45, R. 1.2(e). Model Rule 1.2(d) is identical. ABA MODEL RULES, supra note 48, R. 1.2(d).

60. Alternatively, John Yoo might argue that he wrote the Bybee Memorandum at the direction of Jay Bybee or Alberto Gonzales, and that he was merely a subordinate lawyer, relying on the judgment of his supervisors. Subordinate lawyers can rely on “a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.” D.C. RULES, supra note 45, R. 5.2(b). Model Rule 5.2(b) is identical. ABA MODEL RULES, supra note 48, R. 5.2(b). Such a defense would not succeed, however, if violations of Rule 2.1 and 4.1 were determined to be clear, not arguable questions upon which reasonable minds could disagree.


62. If the Bybee Memorandum had been available at the time that Bybee was nominated to the Ninth Circuit, Senators would likely have asked him about his legal conclusions. The Judiciary Committee members questioned White House Counsel Alberto Gonzalez extensively about his role in this memorandum even though he was the recipient – rather than an author – of this inadequate legal advice. See Panel I of a Hearing of the Senate Judiciary Committee: The Nomination of Alberto Gonzales to Be Attorney General, FEDERAL NEWS SERV., Jan. 6, 2005.
would never come to light.\textsuperscript{63} Perhaps this advice reflected what they sincerely believed the law should be.

Bybee and Yoo are not the only government lawyers for whom the Bybee Memorandum may raise ethical concerns.\textsuperscript{64} News reports indicate that several White House lawyers reviewed drafts of the Bybee Memorandum.\textsuperscript{65} Did the White House lawyers object to the flawed analysis in the memorandum, or did they instead actually insist that the memorandum include such analysis?\textsuperscript{66} Still other Bush Administration lawyers, DOD General Counsel William Haynes and Department of the Air Force General Counsel Mary Walker read the final Bybee Memorandum and insisted that it become the basis of Defense Department interrogation policy, despite the glaring legal inaccuracies apparent on its face.\textsuperscript{67} The Defense Department’s Working Group on Detainee Interrogations adopted the Bybee Memorandum nearly verbatim in its April 2003 report.\textsuperscript{68} The Defense Department withdrew that Report in March, 2005, three months after the Justice Department issued a replacement of the August

\textsuperscript{63} In contrast, the Bush administration recognized that it would likely face a court challenge of its decision to house prisoners in Guantánamo, and hence needed an accurate assessment of how courts would rule in such a case.

\textsuperscript{64} The Bybee Memorandum is not the only memorandum on torture issued by the Justice Department in August 2002. Another Justice Department memorandum written the same month and addressing the legality of specific proposed interrogation techniques has not yet been made public. Douglas Jehl, \textit{C.I.A. Says Approved Methods of Questioning Are All Legal}, \textit{N.Y. Times}, March 19, 2005, at A7; Johnston, Lewis & Jehl, supra note 11 (“when the [Central Intelligence A]gency asked about specific [interrogation] practices, Mr. Bybee responded with a second memorandum, which is still classified.”). We do not know whether that memorandum did a better job than the first in providing candid legal advice.

\textsuperscript{65} Other Bush administration lawyers reviewed the draft memorandum before it was finalized. Dana Priest, \textit{CIA Puts Harsh Tactics on Hold; Memo on Methods of Interrogation Had Wide Review}, \textit{Wash. Post}, June 27, 2004, at A1 (reporting that the memorandum was reviewed by lawyers at the National Security Council, by deputy White House counsel Timothy E. Flanigan, and by David S. Addington, counsel to the Vice President).

During the Senate Judiciary Committee’s hearing on his nomination to be Attorney General, Alberto Gonzales resisted answering questions about his role in shaping the memorandum. \textit{See} Johnston, Lewis & Jehl, supra note 11 (referring to “Gonzales’s unwillingness to discuss his legal advice on the issue” of torture).

\textsuperscript{66} Dana Priest, supra note 65 (reporting that lawyer David Addington was “particularly concerned” that the memorandum “include a clear-cut section on the president’s authority”); Neil A. Lewis & Eric Schmitt, \textit{Lawyers Decided Bans on Torture Didn’t Bind Bush}, \textit{N.Y. Times}, June 8, 2004, at A1 (reporting that Addington was involved in Defense Department discussions of interrogation policy, which ultimately resulted in adoption verbatim of much of the language of the Bybee Memorandum).

\textsuperscript{67} \textit{See} Lewis & Schmitt, supra note 66.

\textsuperscript{68} \textit{See} Working Group Report, supra, note 16; Appendix to this article.
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2002 Bybee Memorandum. 69

Not all government lawyers accepted the patently inaccurate claims of the Bybee Memorandum. Career military lawyers who were involved in developing Defense Department interrogation policy objected to the Bybee Memorandum, and they went up the chain of command to register their objections. 70 The contrast between the career military lawyers, who objected to the Bybee Memorandum, and most of the politically appointed lawyers, who championed it, is quite striking, and it is worthy of more detailed study as more facts become public. 71

This article’s conclusion – that John Yoo and Jay Bybee apparently failed to comply with their ethical obligations to provide candid legal advice and to adequately inform their client – might seem somewhat insignificant compared to the serious human rights violations that have occurred in Guantánamo, Afghanistan, Iraq, and at secret CIA interrogation sites. 72 There will likely be long delays before any government officials are held criminally or otherwise accountable for those human rights violations. But bar disciplinary authorities have a responsibility to examine the conduct of the high-level Bush administration lawyers who wrote and propagated the Bybee Memorandum, and to hold them accountable if they violated their professional obligations.

70. Id. (“the judge advocate generals (JAGs) for the Army, Air Force and Marines” expressed their opposition in letters to Defense Department’s general counsel, but “the JAG concerns ultimately were overruled by the general counsel’s office”).
71. Not all politically appointed lawyers accepted the Justice Department’s position on torture. See Lewis & Schmitt, supra note 66 (noting that the State Department’s chief lawyer, William H. Taft, objected to the Justice Department’s conclusions); Jane Mayer, The Memo: How an Internal Effort To Ban the Abuse and Torture of Detainees Was Thwarted, NEW YORKER, Feb. 27, 2006, at 32. (Alberto J. Mora, General Counsel of the Navy, opposed adoption of John Yoo’s arguments in Defense Department’s Working Group Report).

Not all military lawyers showed such good judgment in assessing interrogation policy. An October 2002 memorandum by an Army lawyer at Guantánamo is also problematic in its legal analysis, claiming that harsh interrogation tactics such as the “use of a wet towel to induce the misperception of suffocation” do not violate the torture statute as long as it is used to obtain information rather than “maliciously or sadistically for the very purpose of causing harm.” Diane E. Beaver, Joint Task Force 170, Dept. of Defense, Legal Brief on Proposed Counter-Resistance Strategies, Oct. 11, 2002, at 5, 6, available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.10.11.pdf, reprinted in Greenberg & Dratel, supra note 2, at 229, 233, 235. This is a more explicit adoption of the same kind of “specific intent” analysis suggested by the August 2002 OLC memorandum. However, there is no indication that the author of this memorandum, Lt. Col. Diane Beaver, relied on or had access to the Bybee Memorandum.

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<td>I.A.</td>
<td>Verbatim, except for one change of tense</td>
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<tr>
<td>Severe pain/suffering</td>
<td>III.A.1.b</td>
<td>I.B.</td>
<td>Verbatim except DOD omits ¶ referring to hospital emergencies for pain</td>
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<td>Severe mental pain/suffering</td>
<td>III.A.1.c</td>
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<td>Prolonged mental harm</td>
<td>III.A.1.c.i</td>
<td>I.C.1</td>
<td>Verbatim, except DOD alters last sentence, including saying that “may be” a complete defense where OLC said it “is” a complete defense</td>
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<td>Harm caused by or resulting from predicate acts</td>
<td>III.A.1.c.ii</td>
<td>I.C.2</td>
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<td>Commander-in-Chief authority</td>
<td>III.A.3.a</td>
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<td>• refers to “unlawful” combatants rather than “battlefield” combatants on p. 24</td>
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<td>• adds final ¶ on p. 24</td>
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<td>VLA</td>
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In the Common Defense

National Security Law for Perilous Times

James E. Baker
10 The National Security Lawyer

This book has considered national security law and process in the context of four security threats. First is the threat of attack by nonstate and state-sponsored or supported actors using terrorist means. Overseas, this threat is realized on a daily basis. Within the United States the threat is continuous, but intermittent. The threat of high-explosive attack, like car and truck bombs, targeted suicide bombings, or the sabotage of aircraft, is most likely to materialize. The threat of catastrophic attack with nuclear weapons has the greatest potential impact on our way of life and in terms of human cost. It is in relation to this threat in particular that we need to evaluate and test national security law and process, both because of the potential consequence and because of the focus the enemy has placed on this means of attack.

Second, U.S. constitutional values may ebb and wane in an endless conflict against state and nonstate actors engaged in acts of terrorism or posing the threat of terrorism. In light of the interminable nature of this threat, assertions of presidential authority made in extremis may become embedded in U.S. practice and law without a corresponding application of checks and balances. Left outside the reach of effective and independent mechanisms of appraisal, broad assertions of executive authority may in time diminish both the principles of law that define American life as well as the physical security at which they are directed.

Third, sincere policy differences, as well as those that are politically inspired, regarding the nature of the terrorist threat and the corresponding measure of response may result in a zero-sum compromise; that is, a diminution of security or a diminution of law, rather than contextual formulas that advance both at once. If the executive needs broad and rapid authority to engage in intelligence collection—as it does—the better course is not to limit the authority, for fear of misuse, but to increase the opportunities for meaningful internal and external appraisal. Such appraisal will deter misuse, but as importantly, encourage effective use. In this enduring conflict we may exhaust our resources or our principles in a manner that leaves us unwilling
or unable to effectively address this century’s other certain crises, including
the proliferation of weapons of mass destruction to unreliable state actors,
the advent of pandemic disease, and environmental degradation and change.

This book has focused on the threat of terrorist attack because this is the
threat that today drives the legal debate about the president’s constitutional
authority. More generally, it drives the purpose and meaning of national secu-

rity law. It will continue to do so. It is also the threat with the greatest poten-
tial to transform U.S. national security, in both a physical and a values sense.
The importance of addressing other issues, such as conflict in the Middle
East, totalitarian regimes, or pandemic disease, must not be overlooked.
Each bears the potential to spiral beyond control resulting in catastrophe at
home and overseas. Each of these issues warrants full consideration of the
national security instruments and processes described in this book.

In each context, law and national security lawyers may contribute to
national security in multiple ways. First, the law provides an array of positive
or substantive instruments the president may wield to provide for security.
Second, the law provides procedural mechanisms offering opportunities to
consider, validate, appraise, and improve policy, as well as ensure its lawful
execution. These mechanisms include the horizontal separation of constitu-
tional powers at the federal level, and the vertical separation of powers
between the federal government and state government. They are found as
well in statute and in internal executive directive.

The most effective means of appraisal are often found through infor-
mal practice. Informal contact allows participants to speak with a freedom
not permitted or not often found when bearing the institutional mantle
of an office or branch of government. Consider the difference in reaction
between the counsel that sits down with the policymaker for a discussion
and the counsel who requests the policymaker to put down in a memoran-
dum everything that occurred. With informal practice the role of personality
and friendship can serve to facilitate information exchange and the frank
exchange of views.

Third, in the international context, law provides mechanisms to achieve
U.S. national security objectives. This is evident in the context of maritime
security, where U.S. law is pegged to an international framework, and effective
security requires international as well as domestic participation. In the
area of intelligence integration, bilateral and multilateral agreements, like
the PSI and bilateral aviation agreements, provide essential mechanisms for
identifying intelligence, sharing intelligence, and acting on intelligence.

Fourth, the law reflects and projects American values of democracy and
liberty. Values are silent force multipliers as well as positive national secu-

rity tools. As Lawrence Wright, the author of The Looming Tower, and oth-

ers argue, jihadists like Osama bin Laden offer no programs or policies
for governance, no alternative to Western democracy. They offer only the
opportunity for revenge. Rule of law is the West’s alternative to jihadist
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enlightened democracy, and sometimes good luck are as important as law. A well-crafted emergency response directive does not compel first responders to climb the stairs of a burning building – courage, leadership, and commitment do.

Law is a human endeavor that is dependent on the human factor. We are a nation of laws, but we are also a nation of men and women, or if you like a nation of laws and people. The law is a human endeavor that is dependent on the human factor. We are a nation of laws, but we are also a nation of men and women, or if you like a nation of laws and people.
nation of law and lawyers. It is men and women who write the law, interpret the law, and decide whether to uphold the law. Where national security is at stake, the human influence is manifest. "National security" necessarily involves the application of subjective values and not just security criteria. Further, as considered in Chapter 4, the law is as dependent on theory as it is on black-letter principle, and thus is dependent on human values and choice. Even where the law is clear, the facts rarely are, for the reasons articulated in Chapter 7. The application of fact to law, of intelligence to security, involves human judgment rather than the mechanical review of facts.

Law also involves moral courage. Field Marshal Slim, who served on the Western Front during the First World War and is considered one of the best commanders during World War II, compared physical and moral courage. He described moral courage as "a more reasoning attitude, which enables [a man] coolly to stake career, happiness, his whole future, on his judgment of what he thinks either right or worthwhile." Slim said,

I have known many men who had marked physical courage, but lacked moral courage. On the other hand I have seen men who undoubtedly possessed moral courage very cautious about taking physical risks. But I have never met a man with moral courage who would not, when it was really necessary, face bodily danger. Moral courage is a higher and a rarer virtue than physical courage.¹

Most lawyers will not have Field Marshal Slim's opportunity to test the comparative proposition. But they will have their moral courage tested. They will be tested sitting at a Principals Meeting when they have to decide whether, and how to speak up. They will be tested when they must step outside their personalities, loud, quiet, or in between, and step into a different role in order to apply the law more meaningfully. The quiet personality will be asked to make public presentations on behalf and in defense of the law. Sometimes the strong personality must sit down for the law, for example, at an interagency meeting where bureaucratic diplomacy may be the order of the day. But minutes later, in the face of the deputy secretary or national security advisor, the lawyer must have the courage to insist on attendance at a necessary meeting. In short, national security law is as contingent on the national security lawyer as it is on the law.

A. NATIONAL SECURITY LEGAL PRACTICE

In a constitutional democracy decisions are intended to be made according to law. That means that sound national security process must incorporate timely and competent legal advice. What form should that advice take?

In some cases, legal review is dictated by statute, as in the case of the Foreign Intelligence Surveillance Act, which requires designated officials,
The National Security Lawyer

including lawyers, to certify requests for electronic surveillance or physical search before they are submitted to the FISA court. In other cases, the president has directed a specific process of legal review, for example, in areas historically prone to peril, such as covert action. However, the majority of legal advice within the national security process is not required by law or directive, but is the product of practice, custom, and the rapport, if any, between officials and their lawyers.

At the national level the daily participants are generally the same from administration to administration: the attorney general and deputy attorney general; the Office of Legal Counsel within the Department of Justice; and other agencies’ general counsels, especially those at Defense, State, CIA, and DHS, as well as the chairman’s legal advisor. Of course, in context, senior deputies and alter egos play an equivalent role.

Traditionally, lawyers for the president engaged in national security law have included the counsel to the president and the National Security Council’s legal advisor. Practice varies as to the relative role and weight of each and the extent to which other White House lawyers, such as the deputy White House counsel, are involved in national security decision-making, if at all. Depending on administrations, and personalities, the role of the counsel to the vice president has ranged from a defining one to no role at all with respect to national security law.

Other lawyers play central roles as well. The judge advocates general of the military services, for example, are central players in the development of military law and legal policy as well as the application of the law of armed conflict. Within the Department of Justice, the assistant attorney general for national security, the head of the Office of Intelligence Policy and Review, the Office of Legal Counsel, and the assistant attorney general for the criminal division are all central players on issues of intelligence and counter-terrorism. Counsel at each of the intelligence community components and those engaged in issues of terrorism asset control and money laundering at Treasury also engage in daily national security practice. Each of these officials is supported by line attorneys who in many cases are the experts in their discipline and serve as the initial (and often) final point of contact for legal advice.

Each president, agency head, and commander will adopt his or her own approach to legal advice, ranging from active engagement with their lawyers and an understanding of the law to avoidance. Some officials do not seek legal advice unless the word “law” is mentioned and then only if it is mentioned four times in the subject line of a memo. Other officials view their lawyers as wide-ranging advisors, officials outside the policy process – non-stakeholders, and thus troubleshooters who may serve in capacity of counselor and not just legal advisors.

Officials and lawyers sometimes refer to lawyers “staying in their lane.” But with national security there is rarely a street map. It is not always clear
where the lane begins or ends, and whether the intended road is a goat path or an informational superhighway. Some lawyers will operate on a defined track — litigators litigate, Office of Intelligence Policy and Review (OIPR) attorneys process FISA requests (among other things), the AECA lawyer reviews munitions list licenses. However, for more senior lawyers there are rarely set templates outside those dictated by law or directive for how to practice national security law. That means the individual lawyer will define the role as much as he or she will assume it. Moreover, policy officials will ultimately find those lawyers whose style and advice they trust regardless of individual assignments.

Application of national security law involves the rapid review and identification of legal issues embedded in policy options, policy decisions, and policy statements. At the NSC, for example, counsel traditionally coordinate the provision of advice to meetings of the Principals and Deputies Committees, among other tasks, and, where appropriate, attend such meetings to field questions and identify issues. However, this role appears to have varied in texture depending on whether the NSC staff are viewed as facilitators of interagency process or sources of rival legal advice to department general counsel. It also depends on the national security role assumed by the counsel to the president. In addition, NSC counsel provide internal legal advice to the president, national security advisor, and NSC staff as well as review and write memoranda to the president, issue spotting and discussing the legal issues raised. However, these roles are not defined in statute and are, outside the confines of certain narrow spheres, not defined in directive. Rather, these roles are defined by practice and the adoption or modification of past practice by successor officials.

Lawyers serving in defined billets are more likely to find continuity in the form and method of practice, but not necessarily in the substance of practice. For example, the assistant attorney general for the Office of Legal Counsel and his or her deputies generally provide constitutional advice to the executive branch and arbitrate interagency legal disputes, usually through promulgation of formal (often classified) legal memoranda. They are consulted, but are usually less active on daily issues of national security implementation and NSC policy development.

Likewise, line attorneys, as well as programmatic attorneys, are more likely to specialize in particular areas of law and find defined and generally accepted roles. This description might apply, for example, to a line attorney at the State Department who reviews export control licenses, or the attorney at the Treasury Department who reviews financial transactions with foreign states, or a Justice Department lawyer who reviews FISA applications. These lawyers play critical national security roles, but are less likely to address the breadth of national security issues identified in this book. Their lanes are relatively clear and defined.

In addition, the lawyer performs or is assigned a broad range of duties. Rule 60.2 defines the lawyer’s role in more detail: 

- The National Security

In addition to performing duties related to the审议 litigation, overseeing litigation, and managing tasks, lawyers are also responsible for developing and implementing policies that impact national security. The National Security Council (NSC) oversees the implementation of national security policies and provides guidance to agency officials. The NSC is comprised of a range of officials from various executive branch agencies, including lawyers.

Harder to define is the role of the lawyer in relation to the administration of national security programs. The lawyer plays a key role in the implementation of national security policies, including the review and interpretation of laws, regulations, and agency procedures. The lawyer's role is often defined by the needs of the program or agency.

National security work is subject to various constraints, including legal, ethical, and political considerations. Lawyers must ensure that their work is in compliance with applicable laws and regulations, and must also consider the potential implications of their actions on national security, foreign relations, and other areas of public interest.

As in other areas of life, the lawyer's role is to advise and assist clients in meeting their needs and expectations. This includes providing legal advice, drafting documents, and representing clients in legal proceedings. The lawyer's role is critical in ensuring that national security policies are implemented effectively and in a manner that is consistent with the law and the interests of the country.

The lawyer's role in national security work is often complex and requires a deep understanding of the law and the policies that govern it. Lawyers who work in this area must be able to adapt to changing circumstances and to navigate the challenges that arise in maintaining national security.

Lawyers working in national security often face difficult decisions and must be prepared to make tough choices. They must also be able to work effectively within a team and to manage their time and resources in order to meet the demands of their work.

In summary, the lawyer's role in national security work is a critical one. They play a key role in ensuring that national security policies are implemented effectively and in a manner that is consistent with the law and the interests of the country. The challenges that the lawyer faces in this area are significant, but the rewards are also great. Lawyers who work in national security are able to make a real difference in the lives of others and to contribute to the well-being of the country and the world.

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In addition, lawyers serving as agency general counsel, or their equivalents, perform or oversee the performance of myriad tasks generally associated with lawyers, such as drafting legal documents, reviewing legislation, overseeing litigation, and addressing matters of budget, personnel, and contracting. Rule of law and respect for law are often defined by these tasks. Do the lawyers apply the ethics rules with reason, care, and rigor? Are legislative and public document searches conducted in earnest? These everyday tasks help to define constitutional government, involving as they do the interplay between branches of government and between the government and the public.

Harder to define is the role lawyers should take involving matters where there is discretion as to the style of practice, where the lawyer might have a choice between a proactive, active, or reactive role. In role-playing, personality can be as important as intellectual capacity and training. Not every attorney is suited to a process of decision-making that can be rapid and is conducted under stress and often involves the application of law to uncertain or emerging facts. In this context, lawyers must know when to render their best advice and let go of an issue or when to hold an issue and request time for further review, or to buck the issue up the legal line. There is rarely time to double back for a second look. This may be difficult for lawyers who prefer the deliberative and careful speed of appellate work. It may also be difficult for lawyers who prefer practice areas oriented toward black-letter law and absolute answers. In short, national security practice requires a capacity to close on issues and make decisions, identifying nuance and caveats, if necessary.

National security practice also requires a capacity to compartmentalize work. This is true in a security sense. Lawyers operate under multiple constraints regarding what they can say and to whom based on the attorney-client, deliberative process, and state secrets privileges. (A sure way for a lawyer not to be in the right place at the right time is to garner a reputation for indiscretion.) However, by compartmentalization, I also mean an emotional and intellectual ability to move from one issue to another in rapid succession without getting stuck on just one issue. Policymakers must master this same skill. In contrast, subordinates assigned to specific issues are expected to devote their attention to a single policy issue and drive that issue up and down the chain of command.

As in other legal fields, national security lawyers should learn to subordinate matters of ego to the task of meaningfully applying the law. In doing so, they will have ample opportunity to learn the maxim that it is often the messenger who pays the price for the message. How common is the disapproving refrain, “Lawyers!” The refrain might be more aptly addressed—“Legislators!” “Democracy!” or “Benjamin Franklin!”—unless, of course, it is the lawyer who has delayed decision or diluted decision out of undue
caution or concern. Lawyers must also appreciate that while steady and faithful application of the law is a hallmark of constitutional government, in most bureaucratic and substantive contexts they are a supporting arm to the policy process. Outside the Department of Justice, success is associated with the policy and not the legal work that supports the policy.

Lawyers are also subject to having their advice tested, as they should. That is part of the national security process and an essential part of internal and external appraisal. Does the lawyer understand the facts? Does the lawyer understand the law? Has the lawyer distinguished between law and legal policy? However, style varies. Where the stakes are high the distinction between understanding, testing, and bullying may be lost. Policymakers have a duty to push. Policymakers do not become policy generals by sitting back and waiting for events to unfold or opportunities to come their way. Boot camp, it turns out, is sound training for national security lawyers. National security lawyers will be tested and pushed, as they should be when national security is at stake. The lawyers will know when a bad idea has encountered a better idea and they must have the courage to adjust their views; but they will also know when they have bent under pressure, knowing the difference between a good faith argument and an inability to hold a line.

The practice of national security law, like many areas of law, requires endurance. However, in private practice the client has usually come to the counsel and now expects hard and constant effort. National security law requires comparable effort, but a different kind of endurance. Lawyers are not always invited into the decision-making room. This reluctance reflects concerns about secrecy, delay, and “lawyer creep” (the legal version of “mission creep,” whereby one legal question becomes seventeen, requiring not one lawyer but forty-three to answer). Of course, decisionmakers may also fear that the lawyer may say no to something the policymaker wants to do. Rule of law often depends on the lawyer being in the right place at the right time to render advice. This is achieved by reading agendas, attending staff meetings, and ensuring that they and not the policymaker or the secretariat define what it is the lawyer needs to see.

National security process is never designed to convenience the lawyer. Sometimes it is specifically designed to avoid the lawyer. Endurance means having fresh legs in the middle of the night as well as first thing in the morning. Some officials will wait until the late night or the weekend to move their memos, noting “not available” for a legal clearance. The lawyer avoids such traps by meeting deadlines, negating silent consent, and where necessary by laying out tripwires, alerting the executive secretary of issues they need to see, sending timely e-mail prompting inclusion in discussions, and meeting each policy staff member one-on-one to establish expectations and confidence.
Most important, counsel should gain the support of the principal official engaged. This is done by adding value to the process and articulating for the decisionmaker why lawyers should have a seat at the table (or in the Situation Room, along the wall). Counsel keeps that seat through effective practice that is proactive, entailing the same zeal in overcoming legal and bureaucratic obstacles as they show in identifying them. A lawyer engaged at the advent of policy development is more likely to influence and guide than one that clears the final memorandum to the decisionmaker, where policy advisors have already committed to both the substance of decision and means of execution. Moreover, if the lawyer waits for issues, or is perceived as an obstacle rather than a source of value, the lawyer will find he or she is only contributing to decisions where legal review is mandated and then only as the last stop on the bureaucratic bus route.

Lawyers can advance the application of law in a number of ways. First, by understanding national security process, counsel can better identify where decisions are formed and made and thus where legal input is most useful. Second, by understanding the military and intelligence instruments counsel can better apply the law to fact. For example, military lawyers can hardly apply the principles of proportionality, discrimination, and necessity to targets without having an understanding of the weapons, munitions, and tactics that inform judgments about necessity and proportionality. Likewise, counsel addressing the use of force should understand the qualitative and quantitative limits of intelligence, distinguishing between evidence, inference, and intelligence in the process. Third, counsel must understand bureaucracy, knowing when and how to provide advice in person, via memo, and through e-mail, without losing sight that each written communication is a record no matter how informal, and that tone and demeanor can get lost in e-mail.

Finally, counsel should master and proactively recommend legal methods for overcoming bureaucratic inertia and resistance. Such methods include (a) presidential directives, (b) agency directives, (c) interagency or intra-agency memoranda of understanding, (d) lead agency designations, (e) the conduct of exercises, (f) textual adjustments that defer or eliminate concerns, or (g) just the force of personality or diplomacy. Concerns about the deployment of armed forces in civil context might be addressed through resort to any one of these methodologies or by textually limiting the scope, service, or situation in which the forces might be used. Such limitations might be put in the president’s action memorandum, in the executive order, or in the rules of engagement. Alternative process may work as well, such as resorting to biweekly meetings of the agency heads, in an effort to take issues up and over bureaucratic obstacles, or holding weekly lunches of the sort that Mr. Carlucci and Mr. Berger found effective.

Where lawyers are being used to dress policy disagreements up in determinative legal clothing – “my lawyer says this is illegal” – good legal process
can allow decisionmakers to focus on the policy issues at hand. Legal issues should be culled from policy agendas and intra- or inter-agency legal meetings held in advance to review options. This allows an opportunity to send issues up the legal chain rather than letting them linger, and possibly sidetrack deliberations. Moreover, just as policymakers forum shop for “can do” lawyers, or perhaps compliant lawyers, lawyers do the same, looking for lawyers who are problem solvers and do not shoot from the hip.

As in other areas of law, preparation is essential. This means reading agendas, consulting with relevant experts on an intra-agency and inter-agency basis, and taking issues up the legal chain of command in advance of meetings so that the lawyer can speak authoritatively when presented with the opportunity to do so. The opportunity may not come again.

Lawyers should also craft, and figuratively or actually, carry walk-about books to address national security issues as they arise. There is no excuse, for example, if the Northern Command staff judge advocate or counsel to the president does not have draft declarations “in the can” to address virtually every homeland security scenario. One purpose of tabletop exercises is to alert policymakers and lawyers to legal obstacles that lie ahead so that lawyers might find the means of circumnavigation before the crisis.

Preparation also entails educating the policymaker. Absent groundwork, the policymaker may respond at the moment of crisis by seeing the law only as something that allows or does not allow the policymaker to do what he wants. Contextual advice built on a foundation already laid is readily absorbed and accepted and will add greater value to the national security mission. A 3 A.M. conference call is no time to explain for the first time the principles of proportionality, necessity, and discrimination in targeting. Nor is the immediate aftermath of a natural disaster or terrorist attack the optimal time to explore for the first time the delicate legal policy issues raised by the deployment of U.S. military personnel in a civil context. In addition, the policymaker will understand in a live situation that the lawyer is applying “hard law” — specific, well established, and sanctioned — and not kibitzing on policy or operational matters.

Advance education also helps establish lines of communication and a common vocabulary of nuance between lawyer and policymaker before the crisis. A policymaker who hears a good brief on civil–military deployment will be sure his or her lawyer fully participates in any subsequent decisional process. In a large and layered bureaucracy, where the lawyer may be less proximate to the decisionmaker, and cannot count on immediate access, the teaching process is equally important in defining roles as well as legal expectations; however, it is more likely to occur through submission of written memoranda.

National security law also entails the application of legal policy; however, lawyers must take care to distinguish between what is law and what is legal.
The identification of a preferred course as between lawful options is legal policy. The identification of a better argument among available arguments is legal policy. Identification of the long-term and short-term impact of legal arguments is legal policy. For example, will other states assert the same right to act as the United States asserts, and if so, what are the long-term costs and benefits of the United States asserting such authority? If a constitutional argument is legally available to the president, will it nonetheless generate a congressional or public response disproportionate to the benefits of using the argument?

The reality is that many national security law questions are not yes or no questions. Just as many national security policy decisions represent 51–49 judgments, legal judgments may be close calls; legal policy helps to identify the pros and cons of taking alternative positions. This is particularly the case where legal policy is national security policy as well; for example, where foreign reaction to U.S. legal choices may help or hinder alliances, or where reciprocal applications of law may harm U.S. national security.

Finally, lawyers, like policymakers, must return to appraise their work. Has the ground truth shifted in a manner that alters the legal basis for an action in either a permissive or restrictive manner? Has the president's directive been implemented in the manner intended? Do the ROE provide adequate protection and flexibility for U.S. forces? Has process been implemented in a manner that facilitates or that impedes rapid decision or the identification of policy options?

In summary, the national security lawyer must consider not only the substance of the law but also the practice and process of law and the essential decisional skills that bear on the practice of national security law. In the end, however, most senior executive branch lawyers serve at the direction and sometimes discretion of the department counsel, department head, and ultimately the president. Chances are, if the policymaker is not satisfied with the manner, method, or substance of advice he will replace his counsel, seek his reassignment, or work around counsel to work with other lawyers. Whether he is satisfied will not only depend on the performance of the lawyer but also on whether they share common expectations of how to define the duties of the national security lawyer.

B. THE DUTY OF THE NATIONAL SECURITY LAWYER

Academics and practitioners sometimes define the roles and responsibilities of lawyers through identification of the client and the client's interests. Thus, in private context, the ABA Model Rules of Professional Conduct state:

A lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.
It is the client who must decide critical questions of strategy and it is to the client to whom the attorney owes a duty of loyalty and confidentiality.

The client-based private model, however, is less apt in identifying and defining the responsibilities of the national security lawyer. To start, in government context, there are differing views on just who (or perhaps what) is the “client.” Scholars and practitioners have identified both animate and conceptual candidates, including the president, the agency, the agency head, the public interest, and the Constitution. Consider that there are at least five possible and distinct facets to the president as client alone. At any given time the president may function as chief executive, party leader, commander in chief, the embodiment of the institution of the office of the president, or the president in his personal capacity. Each facet potentially represents distinct interests and responsibilities. While the national security lawyer certainly owes the president dedication and commitment as commander in chief, he does not necessarily owe the president as party leader the same zeal. Indeed, he may be legally barred under the Hatch Act from exercising any zeal at all.

In a related manner, there are differing perspectives, or models, on how national security lawyers should practice law, which reflect but are not necessarily determined by the identification of the “client.” In the judicial model, for example, the lawyer is expected to render neutral detached views on the law, as a judge might, ultimately rendering a decision as to what the law is. The advisory model posits that the attorney will render advice on legally available options. The advocacy model, perhaps, is closest in paralleling the private model, with the attorney serving to guide the client to the client’s preferred outcomes and then defending the client’s actions. It might be said that with the judicial model the attorney works with both hands, presenting both sides of each issue. In the client-based or advocate model, the attorney works with one hand, finding a legal basis for what it is the client wishes to accomplish.

Such models bring structure to consideration of the practice of national security law and may serve as a point of departure in describing the duties of the national security lawyer. However, in the daily mix of practice, most national security lawyers do not relate their conduct back to specific theories of ethical responsibility and conflict of interest analysis, as a government or private practitioner might do in criminal practice. This reflects the nature of most national security practice. The provision of advice regarding the Foreign Assistance Act, for example, does not require identification of the client, but rather the competent official who can authorize use of the authority. This may vary depending on the section of law and internal agency process. When the assistant secretary asks whether the United States can provide aid, the question is not, who is the client? – it is whether the Act authorizes such aid and, if so, subject to what substantive and procedural thresholds.
Likewise, judge advocates in the field do not ask, who is the client? – they ask, which commander has the authority to issue the lawful order to attack?

Even where issues present what look like traditional private legal ethics questions, for example, in cases involving the waiver of a privilege, the question is not resolved through identification of the client – for example, the agency or agency head – but rather through knowledge of the substance of law and process. In the case of executive privilege the answer is the president. In the case of classified information the answer is found in some combination of the originating agency, the DNI, and the president. And in the litigation context, the answer may vary depending on who can ultimately speak for the government on the specific issue presented.

Moreover, attorneys need not resort to ethics or academic models to define their role, when so much of the role is already defined in law, and in particular in the Constitution. First, in Article II the president is charged with taking “Care that the Laws be faithfully executed.” Second,

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:

“I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.”

Third, Article VI requires that “all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.”

As a matter of statute, government officials, including attorneys, also undertake an oath of office tied to the Constitution.

An individual, except the president, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath:

“I, ___, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign or domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.”

This section does not affect other oaths required by law. As is clear from the statutory text, the oath is not exclusive, but is applied in conjunction with other ethical obligations. Thus, in context, attorneys may well have to consider questions pertaining to the identification of the client. A judge advocate, for example, must adhere to his constitutional oath and to applicable bar codes pertaining to the representation of criminal law clients.
The point is that in the private context where academics and practitioners might reasonably debate to whom the attorney owes loyalty, the government attorney takes one oath and that is to the Constitution and not to a client. Further, that oath and the Constitution require faithful application of the law. That starts with faithful application of the Constitution, its structure and its substance, in the common defense of security and liberty.

Finally, the “client,” used here to identify the official with authority to decide an issue, as well as the role of the national security attorney, will vary in context. There are more than 40,000 lawyers in the government. Only a fraction of this number practice national security law. In each context, the “client” may be different. Moreover, within each setting the lawyer will (or should) play each role described above: advisor, counselor, advocate, and judge. The practice is also sufficiently contextual that the answer to which role is appropriate is found not in identifying the client or a particular model of practice, but in the facts. The skill and art is in knowing when and how to play each role.

Consider the following hypothetical, presenting a preemption scenario likely to occur in the future. The president’s attorney is asked in the middle of the night to review a prospective target for a missile strike. For reasons of operational security, a “bigot list” is in place. It does not include the attorney general. The target is a suspected WMD weapons facility in a restricted country, but one with which the United States is nominally at peace. The facility is operating under cover as a legitimate commercial enterprise. The target is in play because of intelligence suggesting, but not confirming, that the plant is linked to an Al Qaeda affiliate.

For sound operational reasons, an up or down decision on attacking is needed within two hours, or sooner, to avoid the risk that the enemy will disperse extant WMD weapons. However, it turns out that at the staff level there is disagreement on whether the intelligence linking the target to terrorist actors or even clandestine activities is credible and persuasive. There are also differences of view as to whether additional methods of intelligence gathering may improve U.S. knowledge, although there is general agreement that the target is a hard target and that any disclosure of U.S. interest in the facility could lead to the rapid dispersion of existing WMD stockpiles (if any).

What is the role and the duty of the attorney, and is that role defined by identification of the client or application of a judicial, advocacy, or advisory model of practice?

In the advocate model, the attorney might determine that he or she will defend the president’s decision regardless of how the factual dispute is resolved, or for that matter whether it is resolved. Thus, the attorney might advise that so long as the president believes he is defending the country he has the legal authority to do so and counsel will support the decision under U.S. and international law.
In a judicial model, the attorney might ask additional questions. What is the potential for collateral consequences? And, what is the basis for the difference in intelligence opinion? He would then apply the law to the facts as they are known to determine whether a strike is lawful under U.S. and international law. To the extent the attorney believes the target is “unlawful” under U.S. law he would indicate so, and if necessary, advise the president that he could not in good faith approve the target.

Under an advisory model, the attorney might advise the president as to the legal standard and defer to the president’s judgment on the application of law to fact. Under the public interest model, the attorney might consider what is in the best interest of the United States or the public. Presumably this interest would revolve around getting the facts right, but also taking all measures necessary to defend the country, erring on the side of security.

The attorney should play all of these roles. First, under any rubric the attorney has a duty to resolve the factual ambiguity. Arguably, under an advocacy model, the attorney might sit back and defer to the president’s view of the law and facts and then defend both. However, it is not clear how such inaction would represent zealous or diligent representation. The president would still require knowledge of the facts and the law to faithfully execute his security functions. Moreover, under the advocacy model, even if the attorney were poised to validate the president’s judgment, he would still need to know the counterarguments to better represent the president’s choice. Thus, the question is how best to do so in a manner that respects the role of the president as commander in chief and chief executive.

The hypothetical also illustrates the potential range of duties, functions, and choices the attorney might (and in my view should) address in a given scenario. The national security lawyer has a duty to guide decisionmakers toward legally available options. In performing this function in a timely and meaningful manner, the lawyer provides for our physical security. In doing it faithfully, based on honest belief on the application of law, he provides for the security of our way of life, which is to say, a process of decision founded on respect for the law and subject to law.

The hypothetical presents threshold questions of authority. Therefore, the attorney must consider whether the president has the constitutional authority to authorize the missile strike. As the president is also, in effect, approving a specific military target while authorizing the initial resort to force the attorney should run through a three-pronged substantive template:

1. Does the president have the constitutional authority to use force, and is it subject to a statutory overlay? If so, must or should the president consult with the Congress, or notify the Congress in advance?
(2) Is the use of force a lawful exercise in self-defense, anticipatory self-defense, or preemption? Will such an assertion be viewed as controversial? And, what are the legal policy ramifications of U.S. decision?

(3) Is the president’s selection of targets and the means and methods of attack consistent with the law of armed conflict as reflected in U.S. and international law?

The attorney should also consider a procedural template:

(1) Who must authorize the use of force?

(2) Must the attorney general be informed? Should the attorney general be informed? If not, or if so, who must/should make that decision?

(3) Is the president aware of the factual dispute? If not, whose duty is it to inform him?

(4) Must the factual dispute be resolved before authorization may be given? If so, how can it be resolved in the timeline presented?

These questions present a mix of fact and law, law and legal policy, as well as substance and process. There are no textbook answers. There are clearly wrong answers. There are as well, as a matter of legal policy, preferred answers. One solution: the lawyer can identify the parameters of the factual dispute and ensure that they are framed and communicated within any decisional documents going to the president. But it is two in the morning. The president has already made his decision, without knowing that the facts are sliding. One solution: the president’s lawyer can call the national security advisor and identify the problem and a solution — a conference call with the DNI, national security advisor, and the secretary of defense to determine if the facts are sliding or whether analysts are rehashing judgments already made at the top, without their knowledge. Does the DNI stand by the intelligence and intelligence judgment or not? And if there is any shift in fact or analysis, is the president and the military chain of command aware?

The scenario continues. With the input and concurrence of the attorney general, the DNI, and the secretary of defense, the president decides to authorize the strike. The lawyer now becomes advocate. He clears talking points for use with the Congress, the media, and foreign governments, conscious that the talking points, as opposed to the advice rendered in advance of decision, will shape outside perspectives on the validity of U.S. assertions of authority. As a matter of legal policy, will this be cast in the language of pre-emption, anticipatory self-defense, self-defense, or under some other rubric? In doing so, he considers what information if any can be disclosed in support of the intelligence link between the target and terrorism. He adds bullets on the legal basis for the strike, not as judge or advisor, reflecting the best arguments on both sides, but as advocate, presenting the arguments in support of action. Bigot is generating an legal position as the strike occurs. What dispute has been identified and fought over, or at what qualitative level, or of consequences and presidential style. The president’s security adviser, meaningful may not make the call. In short, it is the Defense of a president, insist on legal means of place their interests.

An indeterminable and known entity. It will also have to be through law.

The sine qua non of oversight. By structure, executive-making — all is lawyers with authority to action and some law or not, is the question Lawyers merge. In the duty to adva
of action. Bigot list permitting, the lawyer ensures the State Department is generating an Article 51 report to the United Nations identifying the U.S. legal position as one of self-defense.

The strike occurs. The lawyer now shifts to the role of advisor appraising the process. What worked well and what didn’t work well? Could the factual dispute have been resolved through alternative process, or was it only identified and forced to the surface through the presentation of decision? Should the president retain case-specific decision authority over comparable strikes, or authorize such strikes in concept in the future and if so subject to what qualifications in policy, law, and legal policy? Is this a question of law, or of command preference that should be dictated by operational need and presidential style?

The hypothetical also illustrates the extent to which the application of national security law and process is dependent on culture, personality, and style. The president can direct legal review of his decisions, but if a national security advisor is not committed to such a review, it will not occur in a meaningful manner, if at all. The process would have failed if the lawyer did not make the call or if the national security advisor would not take the call. In short, it is not the presence of counsel at the NSC, the White House, or the Defense Department that upholds the law. It is the active presence of a president, a national security advisor, and department secretaries who insist on legal input in the decision-making process and lawyers who will place their integrity and careers on the line to provide it.

An indeterminate conflict, of indefinite duration, against unknown enemies and known enemies unseen will put uncommon strain on U.S. national security. It will also put uncommon strain on principles of liberty. If we meet this day’s threats without destroying the fabric of our constitutional liberty it will be through the effective and meaningful application of national security law.

The sine qua non for broad national security authority is meaningful oversight. By oversight, I mean the considered application of constitutional structure, executive process, legal substance, and relevant review of decision-making – all of which depend on the integrity and judgment of lawyers. It is lawyers who will help us find the right combination of broad executive authority to defeat terrorism with the considered application of law before action and subsequent appraisal to protect our liberty. So whether one likes law or not, it is central to national security. Lawyers and not just generals will decide the outcome of this conflict.

Lawyers reside at the intersection where physical safety and liberty merge. In this role they are indispensable to good process and should feel a duty to advocate good process. Good process permits the faithful application
of the law and the accomplishment of the security objectives. In any given context, the pressure of the moment may encourage short-term thinking and the adoption of process shortcuts. The lawyer alone may be sufficiently detached from the policy outcome to identify the enduring institutional consequences of a particular course of action. So too, the lawyer alone may be familiar, and may feel an obligation to be familiar, with applicable written procedures. Process is substance if it means critical actors and perspectives are omitted from the discussion table.

Good process is not antithetical to timely decisions, operational timelines, or to secrecy. Process must find the right balance between speed and strength, secrecy and input. But process can always meet deadlines. There is no excuse for shortcuts. Process can be made to work faster and smarter. By example, if legal review is warranted, the attorney general alone can review a matter and, if need be, do so while sitting next to the president in the Oval Office.

Third, process should be contextual. The legal and policy parameters for responding to terrorism are different from those for responding to a Balkan crisis. Clandestine and remote military operations against a hidden enemy will dictate different decision processes than NATO air operations against fixed targets, as will the different political and policy parameters of both situations. One has to maintain situational awareness, to find the measure of process and approval that ensures law is applied in a manner that is faithful to constitutional, statutory, and executive dictates and that meets operational timelines. Therefore, there will always be some tension as to who should see what when.

Finally, lawyers support and defend the Constitution and not just the policies of their government. It is not clear how a president can faithfully apply the law without faithfully applying the constitutional principles identified in Chapters 3 and 4, including the separation of powers, and checks and balances. Constitutional faith recognizes that the Constitution is a national security document, which in the face of a WMD threat is appropriately read broadly and realistically. Constitutional faith also recognizes that liberty and the rule of law are national security values, which the Constitution is designed to preserve and to protect.

A definition of national security that includes constitutional values makes lawyers schooled in history, law, and ethics essential to the national security process. Being a lawyer in such a process is more than saying yes to a clients goals; it means guiding policymakers not just to lawful outcomes, but to outcomes addressing both aspects of national security by providing for security and preserving our sense of liberty. That is one reason this book places as much emphasis on the role of the lawyer as it does on the content of the law.
There are hard questions ahead in a time of homeland insecurity from which lawyers should not shy. Hamilton observed,

The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions that have a tendency to destroy their civilian and political rights. To be more safe, they at length become willing to run the risk of being less free.

It is the national security lawyer’s duty to alert policymakers to these tensions. The lawyer’s duty is to show all sides to every issue while guiding policymakers and above all the president to lawful decisions that protect our security and our liberty. This is hardest to do when lives are at stake. But the Constitution was not designed to fail, to safeguard our security at the expense of our freedom, nor celebrate freedom at the expense of security. It is designed to underpin and protect us and our way of life. National security lawyers daily demonstrate how it can and must do both.

As a result, we should not begrudge democracy’s adherence to law, but continue to find the best contextual process for its meaningful application. In war, and no more so than in addressing a threat where the terrorists’ choice of weapons and targets may be unlimited, this means a substance, process, and practice of law that is both security effective and faithful to democratic values.

As Justice Brandeis reminded in Whitney,

Those who won independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They believed liberty to be the secret of happiness and courage to be the secret of liberty.15

The law depends on the morality and courage of those who apply it. It depends on the moral courage of lawyers who raise tough questions, who dare to argue both sides of every issue, who insist upon being heard at the highest levels of decision-making, and who ultimately call the legal questions as they believe the Constitution dictates and not necessarily as policymakers may want at a moment in time. We do not live in a moment in time. We and our children live in perilous times.
Ethical Considerations: Law, Foreign Policy, and the War on Terror

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ETHICAL CONSIDERATIONS

ALBERTO J. MORA

LAW, FOREIGN POLICY, AND THE WAR ON TERROR

Dan Rather, thank you very much for the overly generous introduction. I want to extend my thanks to the Council and to its President, Joel, for his introduction. I also want to acknowledge Joanne Myers, Director of Public Affairs Programs.

I am deeply honored to have been selected to give the Twenty-fifth Annual Hans Morgenthau Memorial Lecture. There is no more distinguished name in the field of international relations than Hans Morgenthau. Certainly, when I was a student at Swarthmore College many years ago studying international relations, I was required to read Hans Morgenthau. I trust that is still the case with contemporary students of international relations. I am very grateful to be included among the distinguished list of speakers who have been selected previously to give this lecture.

The Carnegie Council’s mission is to be “the voice for ethics in international policy.” In an era of conflict, this is a voice that always needs to be heard. But I think most of us would agree that in the context of our current war on terror the relevance of this voice carries particular currency.

In its website, the Council asks a very important question: “What does ethics have to do with international relations?” It answers this question, in part, as follows: “Today it is hard to conceive of international relations, or politics itself, without the notion of human rights somewhere near the center of our thinking.” I think this is exactly right.

My own career in foreign policy, which now spans, with interruptions, close to thirty years, has led me to the same conclusion. And yet, as all of us are aware, certain policies adopted by our Administration during this war on terror, particularly those dealing with detainee treatment, evidence a contrary view. These policies embody the principle that human rights are not at the center of our foreign policy. Indeed, these policies implicitly marginalized human rights concerns or treated them as irrelevant to our conflict. At worst, these policies violated human rights, and senior officials defended these violations as being necessary for our protection. How this happened, what this means, and the consequences of what these policies would be, if maintained, are some of the issues I propose to address this evening.
SEPTMBER 11 AND THE WAR ON TERROR

The al-Qaeda attacks of September 11th wounded our nation and served as a warning of continuing danger. Implicit in the attacks was the promise that they would attack us again, if they could. No longer, these attacks taught us, would the oceans and the distances that had so effectively shielded us from the murderous pathologies of the Middle East serve as sufficient protection. No longer would our risk be limited to isolated U.S. embassies or to warships like the USS COLE refueling in poorly policed foreign ports. Nor could we any longer take false comfort in the misleading belief that all terrorist attacks would be as amateurish as the first al-Qaeda attack against the World Trade Center in 1993—although that attack, we tend to forget, killed six and wounded more than a thousand people.

The manned cruise missiles launched at us by al-Qaeda in 2001 were horrifying and obscene because they carried cargoes of innocent Americans and were used to murder other innocent citizens; because as weapons they were cheap and lethally efficient; and because they demonstrated practice, perseverance, and a sophisticated imagination at work, dedicated to the task of killing Americans in quantity.

On September 11, history once again surprised us with the unforeseen or poorly understood threats. Once again, as it has so many times before, the essential truth in Leon Trotsky’s dictum, that “you may not be interested in war but war is interested in you,” had been borne out.

Once again the wisdom and necessity of maintaining vigilant and strong defenses had been demonstrated. Once again we turned for protection to those courageous and selfless men and women who wear the uniform of our nation. And once again our nation was at war.

This war on terror is not like other wars. This is not just because each of the wars has a measure of uniqueness. Nor is it because today’s terrorists present an unprecedented type or level of threat, although the threat is complex and deadly. While the war is still in its early stages and its outcomes and consequences are still developing, whatever else may be said about it in the future, this war is distinctive and will be remembered because we as a nation, despite our laws, values, and traditions, consciously applied cruelty against captive individuals and sought to amend or reinterpret our laws to make this, which was illegal, legal.
THE USE OF CRUELTY

This evening I propose to address the issue of cruelty as viewed through the prism of our broad national interest. I shall discuss cruelty, not torture, because there is a legal distinction between the two, and cruelty is the lower level of abuse.

In my view, cruelty can be as effective as torture in destroying human dignity. And there is no moral distinction between one and the other. If cruelty is abolished, so is torture, but not vice versa.

How did our nation come to use cruelty in this war on terror? In the summer of 2002, at Guantánamo and elsewhere, U.S. authorities held in detention individuals thought to have information on another impending attack against the United States. Unless this information was obtained through interrogation, it was believed that more Americans, perhaps even many more Americans, would die.

In this context, our government made legal and policy decisions providing, in effect, that for some detainees labeled as “unlawful combatants,” interrogation methods constituting cruel, inhuman, and degrading treatment could be applied. These authorizations rested on four basic assumptions or beliefs:

- First, that no law prohibited the application of cruelty. Thus, the government could direct the use of cruelty as a matter of policy, depending on the dictates of perceived military necessity.

- Second, the President’s constitutional commander-in-chief authorities included the discretionary authority to order cruelty. Any existing or proposed law or treaty that would purport to limit this ability would be an unconstitutional abridgement of that authority.

- Third, the use of cruelty in interrogation of unlawful detainees held abroad would not implicate or adversely affect our values, our domestic legal order, our international relations, or our security strategy.

- Fourth, if this abuse were disclosed or discovered, virtually no one would care.

Each of these four beliefs or assumptions was profoundly mistaken. Each constitutes a legal policy or political blunder of massive proportions.

Although there is continuing debate as to the details of how, when, and why, we know cruel treatment was applied at Abu Ghraib, Guantánamo, and other locations. We know the treatment may have reached the level of torture in some instances, and may even have led to the deaths of several detainees.
But when we talk of cruelty, it is important that we not only dwell on the abstraction, but we also seek to understand what cruelty consists of in the flesh.

Here’s how we treated Mohammed al-Qahtani, the detainee believed to be the twentieth hijacker, according to journalist Jane Mayer, writing in the February 27, 2006 edition of The New Yorker magazine,¹ and I quote:

Qahtani had been subjected to a hundred and sixty days of isolation in a pen perpetually flooded with artificial light. He was interrogated on forty-eight of fifty-four days, for eighteen to twenty hours at a stretch. He had been stripped naked; straddled by taunting female guards, in an exercise called ‘invasion of space by a female’; forced to wear women’s underwear on his head, and to put on a bra; threatened by dogs; placed on a leash; and told that his mother was a whore. . . . [he] had been subjected to a phony kidnapping, deprived of heat, given large quantities of intravenous liquids without access to a toilet, and deprived of sleep for three days. . . . [At one point] Qahtani’s heart rate had dropped so precipitately, to thirty-five beats a minute, that he required cardiac monitoring.

Not all unlawful combatants were mistreated, but it is enough to say that some were. Not all were treated as badly as Qahtani, but some were treated worse. Not all who were mistreated were abused as a result of official policy. Poor training, lack of discipline, and individual sadistic tendencies were also factors in some cases.

History will ultimately judge what the cause and level of abuse inflicted was, whether it was torture or some lesser cruelty, and whether it resulted from official commission, omission, or whether it occurred despite every reasonable effort to prevent the mistreatment. Whatever the ultimate historical judgment, however, it is established fact that documents justifying and authorizing the abusive treatment of detainees during interrogation were approved and distributed and that abuse occurred as a consequence. The resulting inescapable truth is that, no matter how circumscribed these policies were or how short their duration or how few the victims, for as long as these policies were in effect our government had adopted and practiced what could only be described as a policy of cruelty.

This is not an issue that would have been too seriously debated before 9/11. Before that date, there were not two opposing sides to the debate. The national consensus held that neither cruel treatment nor punishment could be applied to

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human beings. That was then a consensus cemented by the convergence of our national values, our laws, our foreign policy interests, our human rights principles, and military doctrine. But that was then.

Now there is no longer a consensus. Now many Americans—too many Americans—are of the view that cruel treatment, or even torture, may and should be applied against our enemies, or those who may possibly be our enemies, if doing so could make us safer. And many others who have not yet abandoned our traditional abhorrence of cruel treatment are asking: How much abusive treatment can be lawfully applied to these captives?

What was once unspeakable is now the subject of polite conversation. Cruelty, once held in disrepute, has been astonishingly rehabilitated. This is astonishing because even slight reflection on the price we have already incurred in the use of cruelty during the war on terror should bring us to the realization that the cost incurred and the damage caused to all we value, including our security, is too high. And even this high cost is nothing as compared to what we would pay if we were to institutionalize cruelty as a national policy.

Both as a matter of instinct and rational deliberation, we should be astonished that our nation has applied cruelty in the course of the war. We should be astonished that such cruelty should have been authorized at the highest levels, by how easily this authorization was obtained, and by how completely those legal and policy safeguards that should have prevented this abuse failed. We should be astonished by how much acceptance and support there appears to be in our country for its use and how negligent and casual this acceptance has been both on the part of officials and citizens. Most of all, perhaps, we should be astonished by how little understanding there is of the disastrous consequences that would necessarily ensue if we were to continue to apply cruelty as a national policy.

Cruelty harms our nation’s legal, foreign policy, and national security interests. I can’t put it any plainer than that. Domestically, cruelty is contrary to and damages our values and legal system, including our constitutional order. Internationally, the effects and consequences of cruelty are contrary to our long-term strategic foreign policy interests, including many of the principal institutions, alliances, and rules that we have nurtured and fought for over years, and even decades.
THE USE OF CRUELTY HAS WEAKENED THE UNITED STATES

From the national security standpoint, the use of cruelty has been demonstrably counterproductive to the effort to wage the war on terror successfully. Cruelty has made us weaker, not stronger. It has blunted our moral authority, sabotaged our ability to build and maintain the broad alliances needed to prosecute the war effectively, and imposed a political penalty on those leaders, such as Tony Blair and José María Aznar, who would stand with us in this war. By compromising those ideals we fight for, cruelty has handicapped our ability to compete successfully in the struggle for those hearts and minds of foreign individuals whose support we need, and need to have, in order to shorten this war, limit its costs, and prevail.

I have asserted that our policy of cruelty has harmed our nation's legal, foreign policy, and national security interests. Let's examine how it has done so and what the damage has been. Each strand of this analysis begins with the starting point of our nation's valuation of the individual person, or the innate dignity that we accorded to all persons, and of the rights that naturally and consequentially flow from this.

Legally, the adoption of cruelty has damaged us in multiple ways, but I will focus on two. First, cruelty damages, and ultimately would transform, our constitutional structure because cruelty is incompatible with the philosophical premises upon which our Constitution is based.

Our forefathers, who permanently defined our civic values, drafted our Constitution inspired by the belief that law could not create, but only recognize, certain inalienable rights granted by God to every person—not just citizens and not just here, but everywhere. These rights form a shield that protects core human dignity.

Because this is so, due process is required, the equal protection of law is mandated, slavery is outlawed, coerced confessions are excluded, racial discrimination is forbidden, and men and women are to be treated equally, to cite just a few of the rights that flow from the concept of human dignity. And, most notably for purposes of today's discussion, the Eighth Amendment\(^2\) prohibits cruel punishment

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\(^2\) The Eighth Amendment to the United States Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
and the constitutional jurisprudence of the Fifth and Fourteenth Amendments bars cruel treatment.

These rights, to be sure, have been enlarged and gained greater definition during the course of our history. Not all of these rights extend as a matter of law to those who are not citizens or residents. But to adopt and apply a policy of cruelty anywhere within this world is to say that our forefathers were wrong about their belief in the rights of man, because there is no more fundamental right than the right to be safe from cruel and inhuman treatment.

If we can lawfully abuse Qahtani the way he was abused, however reprehensible his acts may have been, it is because he did not have inalienable rights to be free from cruelty. If this is so, then the right is no longer inalienable or universal. And if that is the case, then the foundation upon which our own rights are based starts to crumble because it would then be ultimately left to the discretion of every state whether and how much cruelty may be applied. In these circumstances, there would no longer exist any obvious or necessary criteria or boundaries for the application of cruelty.

Second, the infliction of cruel treatment damages not only the foundation of our laws, it damages the law itself, and it does so in two ways. If cruelty is taken out of law’s ambit and placed within the realm of policy, the scope of law by definition is diminished; it is trivialized.

In addition, cruelty violates an important policy of the law that Professor Jeremy Waldron of Columbia University terms “the principle of non-brutality.” He writes:

Law is not savage; law does not rule through abject fear and terror, or by breaking the will of those whom it confronts. . . . [T]here is an enduring connection between the spirit of law and respect for human dignity—respect for human dignity even in extremis, . . . where law is at its most forceful and its subjects at their most vulnerable. . . . [T]he rule against torture functions as an archetype of this very general policy. It is vividly

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3 The Fifth Amendment states: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

4 The Fourteenth Amendment provides a broad definition of national citizenship, and requires states to provide equal protection under the law to all persons (not only to citizens) within their jurisdictions.
emblematic of our determination to sever the link between law and terror, and between law and the enterprise of trying to break a person's will.  

By adopting a policy of cruelty, our nation has damaged our legal system by both diminishing it and creating a precedent for the disposal of the principle of non-brutality.

Internationally, the adoption of a policy of cruelty damaged our nation because it is contrary to our overarching foreign policy interests. America's substantial international influence stems from a confluence of factors: the strength of our example as a free nation and the ideals and values upon which we were founded; the strength of our economy; and the effectiveness of a foreign policy that has been successful, in large measure, because of its congruence with our national values.

The employment of cruelty not only betrayed our values, thus diminishing the strength of our example and our appeal to others; it impaired the execution of a foreign policy in ways inimical to its accomplishment, particularly the accomplishment of our traditional objectives of security, freedom, human rights, and the rule of law.

Our foreign policy mirrors our values, and this tendency developed rapidly and became more assertive after World War I, during the Wilson years, particularly during the negotiation of the Treaty of Versailles. It grew to maturity during the term of Franklin Roosevelt, during the articulation of the Four Freedoms as the principal war aims of the Allied powers, and then the establishment of the United Nations. It was Jimmy Carter who culminated this process, by seeking to align our foreign policy with our values through the adoption of a human rights strategy and the restructuring of the State Department to ensure its institutionalization in the execution of our policy.

Thirty years ago, as a young foreign service officer stationed in Lisbon, Portugal, during the Carter presidency, Portuguese citizens would often come up to me, unsolicited, and state how much they admired our president and our country for our forceful and unprecedented human rights strategy. No one should doubt the power of the human rights ideal to inspire action around the world, or that it has done so.

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Ethical Considerations: Law, Foreign Policy, and the War on Terror

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From World War II until today, American foreign policy has been grounded in a human rights strategy that pivots on the principle of human dignity. We fought tyranny and promoted democracy not only, or even primarily, because it was the right thing to do, but because the spread of democracy made us safer and protected our freedoms. Abroad, in ways that echoed the development of our legal system, we successfully promoted the development of a rules-based international order based on the rule of law. Across the world, human rights principles, treaties, laws, humanitarian laws, international criminal law, and the international law generally, and many domestic constitutions and legal systems owe their character, their acceptance, and their relevance to our inspiration, efforts, advocacy, and support. Let’s look at three examples out of many.

The Nuremberg Trials, that triumph of American justice and statesmanship that launched the modern era of human rights and international criminal law, treated prisoner abuse as an indictable crime, helped cement the principle of command responsibility, and started the process whereby national sovereignty was no longer a potential shield to protect the sovereign or the perpetrator of crimes from the long arm of justice.

The Geneva Conventions, as do all the major human rights treaties adopted and ratified by our country during the last century, forbid the application of cruel, inhuman, and degrading treatment. Thousands of American soldiers have benefited from these treaties directly.

The German Constitution, Article I Section I states: “The dignity of man is inviolable. To respect and protect is a duty of all state authority.” That this should be an element of the German Constitution today reflects credit not only on the German nation and its citizens. That it should have been adopted in 1949 by Germany reflects credit on American foreign policy and the fact that it had integrated our national values as an operational objective.

All of this has returned massive dividends to our nation. We are all the better for it. However imperfectly these rules may be observed or enforced, they have helped shape public and official opinion worldwide, created global standards of conduct, and formed the conduct of foreign individuals, groups, and nations in ways that are largely congruent with our own national interests. And when these rules fail to deter world behavior, American policymakers could be confident that significant international consensus supporting these standards would impose a cost on this outlawed behavior and, if need be, facilitate the assembly of international coalitions or the use of unilateral U.S. force.
From the foreign policy standpoint, our adoption of a policy of cruelty has been disastrous. Cruelty violated, of course, central elements of our human rights laws and principles and the culture of human rights observance that we have labored so hard to maintain and observe. The letter and spirit of the Geneva Conventions have been trampled, the Nuremberg principles of command responsibilities are not much in evidence, and the very fabric of human rights and international law has been damaged by the loosening of the requirement and fostering a spirit of noncompliance.

Cruelty has increased the incidence of prisoner abuse worldwide. Cruelty rendered incoherent, and ultimately untenable, those traditional elements of foreign policy based on the protection of human dignity through the rule of law. Cruelty created a deep legal fissure between ourselves and our traditional allies because none of them would follow the United States into the swamp of cruelty. And cruelty has exposed those U.S. policymakers and officials engaged in the practice to potential civil and criminal liability overseas. It has engendered a probability that litigation and prosecution overseas targeting U.S. officials will complicate our international relations for years to come.

None of this is to our benefit if these are precisely the costs we suffered when we adopted a policy of cruelty in this war. These are the harms we cause to ourselves when we abused Qahtani and adopted policies that permitted his abuse and that of others.

The most sobering and shameful moment I experienced as Navy General Counsel was when I was told by International Red Cross officials and representatives from senior military services from around the world that U.S. detainee practices had led to an increase in prisoner abuse in many nations, were damaging the fabric of international human rights, and were making it increasingly difficult, for legal and political reasons, to sustain the allies' cooperation with the United States on the war on terror.

From the standpoint of national security, and for some of the reasons that I have already mentioned, I maintain that our nation's security and defenses have been materially weakened—not strengthened—by our policy and practice of cruelty.

THE TRUE NATURE OF THE WAR ON TERROR
The three thousand deaths we suffered on September 11 amply justify the president's decision to respond with military force and the labeling of this as a war on terror. But the use of the term "war" should not mask the operational nature of this conflict or its essential political nature, or serve to dictate the legal regime to be applied in its prosecution. This conflict spans the gamut of force, from traditional force-on-force...
engagement, as in Afghanistan and Iraq, to intelligence or police operations directed against individual suspects in countries.

The geography of the war also varies widely. Terrorists are reported active in several dozen countries, ranging from Europe and its sophisticated legal systems to relatively lawless and ungoverned areas of western Pakistan and Yemen. This conflict does not have the military or political simplicity of our incursions in Panama and Grenada, for example.

Our use of the term “war” should not confuse us into thinking that this conflict will be won primarily by military means. The geographic dispersion of our enemies, the difficulty in locating them, and the underlying ideological nature of our adversaries’ actions—all point to a conflict in which our military actions must necessarily be subordinated to our political strategy.

This political strategy should be geared to building and maintaining large, unified alliances capable of cooperating across this spectrum of conflict. We will not be able to build this alliance unless we are able to articulate a set of consistent political objectives, and prosecute the war using methods consistent with these objectives. We will not be able to build the alliance either, unless we construct a common legal architecture with our traditional allies.

The attacks on the World Trade Center, the Madrid railway station, and the London buses, among many others, evidence a terrorist ideology of nihilism that obliterates human dignity. Today, in parts of the world there are others who fully adhere to this dark vision, or who sympathize with it. There are boys and girls aspiring to be suicide bombers, fathers taking pride in these aspirations, mothers sewing suicide vests, schools teaching ignorance, clerics preaching hate, and nations powerless to intervene, unwilling to do so, or even supportive of the cycle.

THE BEST DEFENSE IN THE WAR ON TERROR

Our defense against this phenomenon cannot only be military, for we recognize that these acts are themselves born in specific ideas that are held by many, are taught and transmitted, and are ultimately adopted by others who profligate this cycle of hate. These ideas must be defended also by our ideas and ideals.

Our defense must also consist of rallying to us and to our mutual defense those who share our values and our vision of a human civilization, at the same time that we seek to convince others who don’t agree with us that our ideals are superior to those of our enemies. To their murderers we offer life. To their savagery we offer justice. We will defend and we will attack, but as we prosecute this war we should do so with a clear vision of the world we wish to emerge from this conflict.
When our nation adopted a policy of cruelty, we compromised our ability to draw the sharpest possible distinction between these two antithetical ideals and to prosecute this aspect of the war, the war of ideas, from a position of full moral authority. Our abuses at Abu Ghraib and Guantánamo and elsewhere perversely generated sympathy for those terrorists and eroded the international goodwill and political support that we had enjoyed after September 11th.

Almost every European politician who sought to ally himself and his country with the United States in the war on terror incurred a political penalty—or experienced political difficulties, as Blair and Aznar demonstrated—as a result of that allegiance. And, because cruel treatment of prisoners constituted a criminal act in every European jurisdiction, there must be few European government officials, including military intelligence or police officials, who do not ask themselves at some point whether cooperating with the United States in the war on terror might not make them accomplices or abettors in criminal activity or expose them to civil liability.

All of these factors contributed to the difficulties our nation has experienced in forging the strongest possible alliance in this war. Because this is so, we consequently weakened our defenses. Whatever intelligence we obtain through the use of harsh interrogation tactics, on the whole these policies and practices greatly damaged our overall effectiveness and impaired our military intelligence capabilities in the war on terror.

Our adoption of cruelty will either be catalogued by history as an aberration, nothing more than a passing flirtation, or something more permanent, intimate, and lasting. We have reason to believe that the policy is no longer in effect. The Abu Ghraib abuses have been exposed. The Justice Department memoranda justifying cruelty, and even torture, have been rescinded. The authorizations for the application of extreme interrogation techniques have been withdrawn. The Detainee Treatment of 2005, which prohibits cruel, inhuman, and degrading treatment, has been enacted. And the Army Field Manual governing detainee treatment, which fully adopts Common Article 3 of the Geneva Conventions, has been adopted.

But we also know that there are those in government, and in the general public, who are still of the belief that the use of cruelty is a necessary tool in this conflict. There are some, for example, who see nothing wrong with inducing the sensation of drowning in a detainee, even though most of us would call that practice torture.

If there is another terrorist attack, these people will be heard from again. Once again, they will press the case that the national security requires harsh interrogation and demand that our views yield to their purported dictates of the threat.
If that moment comes—and it probably will—we will need to understand these issues clearly and we will need to be prepared to give the answer we would give today if asked that question.

We will answer that we shall not repeat the mistakes. We will answer that cruelty disfigures our national character and debases our heritage. We will answer that it is incompatible with our constitutional order, with our laws, and with our most prized values. And we will answer that cruelty weakens our defenses and national security.

Thank you once again for the opportunity to be here with you.
In re: Abraham D. Sofaer

728 A.2d 625 (D.C. 1999)
excerpts) (footnotes and citations omitted)

Samuel Dash, with whom David B. Isbell, Robert J. Sisk, and M. Kathleen O'Connor were on the brief, for respondent.
Leonard H. Becker, Bar Counsel, with whom Michael S. Frisch, Senior Assistant Bar Counsel, was on the brief, for Bar Counsel.
Edwin D. Williamson filed a brief as amicus curiae on behalf of respondent.

This case is before us on [appeal from the] order of the Board on Professional Responsibility (the "Board") directing Bar Counsel to issue an informal admonition to respondent for having violated Rule 1.11 (a) of the District of Columbia Rules of Professional Conduct. The rule states . . . :
A lawyer shall not accept other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee.

A hearing committee and the Board both concluded that respondent had violated this rule by undertaking to represent the government of Libya in connection with criminal and civil disputes and litigation arising from the 1988 bombing of Pan American Flight 103 over Lockerbie, Scotland, after respondent, while serving as Legal Advisor in the United States Department of State, took part personally and substantially in the government's investigation of the bombing and in related diplomatic and legal activities.

We sustain the Board's order and adopt its comprehensive report, which sets forth (and in turn adopts) the hearing committee's findings of fact, correctly explains the elements of a Rule 1.11 (a) violation, and demonstrates why Bar Counsel proved by clear and convincing evidence that respondent violated the Rule. We limit ourselves to the following discussion, which presupposes familiarity with the Board's report, annexed hereto.

1. Respondent argues that in defining the "matter" in which he took part while Legal Advisor as "the legal activities flowing from the government's efforts to address [the Pan Am 103 bombing]," the Board bundled together activities so diverse in nature as to give him no fair warning of a potential overlap when he accepted the private representation of Libya. We are not persuaded. The activities in question, including diplomatic intervention with an unnamed country, attendance at confidential briefings on the criminal investigation, and overseeing the State Department's response to civil third-party subpoenas, all centered about a distinct historical event involving specific parties,1 whether or not all had been identified. As the Board recognized, "The 'matter' is not terrorism, or even Libyan terrorism"; rather, "the core of fact at the heart of each piece of legal activity is . . . why and how Pan Am 103 blew up over Lockerbie." The contours of the bombing and the government's investigation and related responses to it were defined sharply enough to constitute a "matter" under the Rule.

2. Respondent contends that his work as Legal Advisor concerned the Pan Am 103 bombing in ways that were too minimal, infrequent, or passive to amount to "personal and substantial" participation in the matter. The main feature of the government's response, he asserts, was the criminal investigation conducted by the Department of Justice, not the Department of State; State's role (hence respondent's) consisted largely of a routine response to a third-party subpoena issued by Pan Am2 in furtherance of its theory that the U.S. government had advance warning of the bombing but failed to act.

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1 See Rule 1.11 (a), comment [3] ("'Matter' . . . encompass[es] only matters that are particular to a specific party or parties.").
2 The subpoena was issued in the mass tort litigation brought against Pan Am by relatives of the Pan Am 103 victims.
Respondent's discounting of the subpoena as routine depends partly on hindsight: the district court eventually quashed the subpoena. Until then, however, the subpoena had the potential of embroiling the government in the tort litigation, and so respondent's role in reviewing and approving the memorandum recommending the State Department's response to the subpoena cannot be considered perfunctory. But his participation went further. After Pan Am voiced its theory of government foreknowledge at a meeting with the Secretary of State which respondent either attended or knew of, respondent's judgment was sought on whether, or how fully, to inform the Department's designated witness in the subpoena matter of the meeting, in preparation for his testimony. That action, as Bar Counsel points out, did not become "insubstantial" because the legal judgment was easily arrived at or because the government subsequently concluded that Pan Am's theory of government complicity was unsupported.

Moreover, respondent's actions take on added significance when viewed in the context of his participation, as one of a small number of senior State Department officials, in confidential oral and written briefings which periodically included information about the progress of the criminal investigation and related diplomatic actions. The fact that respondent played no role in the investigation itself and was not shown to have recommended or taken action based on the briefings is not critical. As the Board explained, "Respondent was much more than the passive recipient of general agency information. As chief legal officer of the State Department, [he] was kept abreast of the progress of the investigation and the diplomatic efforts in response to the bombing precisely so that he could provide legal advice and perform legal duties concerning the bombing when called upon to do so."

All told, respondent's active participation in the Pan Am 103 matter bears no resemblance to the merely peripheral or formal involvement in a matter which the Rule does not encompass.

Respondent's assertion that by emphasizing his receipt of confidential information from the briefings the Board confused Rule 1.11 (a) with Rule 1.6 (restricting use of client confidences or secrets) is mistaken. While he is correct that "no one has ever suggested any improper disclosure of confidences by Respondent," Rule 1.11 (a) bars participation in overlapping government and private matters where "it is reasonable to infer counsel may have received information during the first representation that might be useful to the second"; "the 'actual receipt of . . . information,'" and hence disclosure of it, is immaterial. Brown v. District of Columbia Bd. of Zoning Adjustment, 486 A.2d 37, 50 (D.C. 1984) (en banc) (citations omitted).

3. Rule 1.11 (a) prohibits a lawyer from accepting employment in connection with a matter "the same as, or substantially related to," a matter in which he or she took part as a public officer or employee. The inquiry is a practical one asking whether the two matters substantially overlap. Respondent insists that he stayed clear of that overlap by restricting the terms of his agreement to represent Libya so as to "assume Libya's culpability for the [Pan Am 103] bombing." A lawyer may, of course, limit the objectives of a representation with client consent. Rule 1.2 (c). But respondent's retainer agreement exemplifies why, in our view, limiting the private representation rarely will succeed in avoiding the convergence addressed by Rule 1.11 (a). While stating that "[the firm's] efforts will not include substantial activities as litigators but rather would be limited to activities associated with agreed upon measures, including consensual dispositions," the agreement emphasized that "measures will be taken only with your [i.e., Libya's] prior consent, and without admission of liability" (emphasis added). The proposed activities included "investigating the facts and legal proceedings, preparing legal analyses, providing legal advice and proposing legal steps to deal with" the "ongoing civil and criminal disputes

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3 An apparent exception was respondent's participation, occasioned by the Pan Am 103 bombing, in a diplomatic exchange with an unnamed country intended to persuade the country to abate terrorist activity.  
4 . . . Rule 1.11 (a) carries forward the test and methodology for determining whether matters are "substantially related" set forth in Brown. Brown "broadened the scope of the 'substantially related' test" over that applicable to side-switching in the private sphere. At the same time, the Board recognized that we deal in this case with attorney discipline and not (as in Brown) a conflict of interest issue arising from a civil dispute. . . .
and litigation" stemming from the destruction of Pan Am 103--all clearly features of a comprehensive attorney-client relationship. We do not question the sincerity of respondent's belief that the representation could be insulated, factually and ethically, from the investigation and diplomatic efforts of which he had been part. The "substantially related" test by its terms, however, is meant to induce a former government lawyer considering a representation to err well on the side of caution. Respondent did not do so.5

4. Respondent points to the exact words "accept other employment" in the Rule and makes an argument which neither the Board nor the hearing committee addressed. To conclude that he had accepted employment on behalf of Libya, he maintains, the Board had to find "that [his] conditional agreement to represent Libya was capable of being legally carried out," which required that the firm obtain the necessary OFAC [Office of Foreign Assets Control] authorization6 for the representation--a critical part of which was not received before he and his firm withdrew from the representation.

[W]e reject [this argument]. Respondent did not just conditionally agree to represent Libya--the representation actually began after four things took place: OFAC issued a specific license authorizing respondent's firm to receive fees and expenses in connection with the pending criminal and civil cases affecting Libya; the firm received a letter of credit from Bank Credit Suisse for $2.5 million, ensuring payment of Libya's legal fees; the firm issued a press release announcing the representation and its receipt of the license from OFAC; and the firm received the first $250,000 installment of the legal fees. Thereafter, respondent and the firm performed the services summarized in paragraph 52 of the Board's report which included, but were not limited to, resolving continued differences with OFAC as to the correct license needed to carry on the representation. In these circumstances, it would be a wholly artificial reading of the Rule to say that respondent had not "accepted [the] employment" before withdrawing from it two weeks later for reasons unrelated to OFAC permission.

5. Joined by amici curiae who are former government officials, respondent urges that finding an ethical violation in this case will deter District of Columbia lawyers from entering the government or serving for long once there, lest Rule 1.11 (a) trip them up after they enter private practice. We are sensitive to the concern, already voiced in Brown, that over-zealous application of the revolving-door rule would be "at the cost of creating an insular, permanent legal bureaucracy." But that concern is misplaced here. Our finding that respondent violated Rule 1.11 (a) is well within the heartland of Rule 1.11 (a)'s application. Further, Bar Counsel aptly states why no lawyer need find himself inadvertently in the position of risk that respondent and amicus hypothesize:

A former government lawyer in the Respondent's position is free to solicit the views of his or her former agency concerning the proposed private legal undertaking (which the Respondent deliberately elected not to do in this case), or to consult with ethics advisers in his or her law firm (which, again, the Respondent seems not to have done concerning Rule 1.11) or with the Legal Ethics Committee of the Bar (which the Respondent never suggested he did). If, while in government service or while contemplating entry into such service, the attorney deliberates the prospect that Rule 1.11 will narrow somewhat the career choices and client selections available to the attorney following departure from the government, then the Rule will have served one of its salutary objectives.

We affirm the Board's conclusion that respondent violated Rule 1.11 (a) and the Board's order directing Bar Counsel to issue an informal admonition.

So ordered.

5 Our holding in Brown that the several transactions at issue in that case were not substantially related, hence were not the same "matter," comports with our conclusion here. That holding, although ultimately a "legal conclusion . . . for this court to make," rested critically upon findings of fact by the administrative agency negating any overlap between the earlier zoning matters and the later one. Here, in contrast, the hearing committee made factual findings fully supporting our conclusion that respondent's representation of Libya was substantially related to his involvement as Legal Advisor in the post-bombing governmental actions.

6 OFAC is the government agency that administers economic sanctions imposed on foreign countries by the United States, including sanctions imposed on Libya in 1986.
APPENDIX

In the Matter of: ABRAHAM D. SOFAER, ESQUIRE, Respondent
District Of Columbia Court Of Appeals
Board On Professional Responsibility
(1997) (excerpts)

I. INTRODUCTION

On December 21, 1988, Pan American Flight 103 was blown up over Lockerbie, Scotland, killing everyone on board and 11 people in the town below. The United States undertook an intensive investigation to identify the perpetrators of this terrorist act, and the families of the victims sued Pan Am for damages arising from the bombing. At the time of the bombing and the beginning of the investigation, Respondent was the Legal Adviser in the United States Department of State. In June 1990, Respondent left the State Department to join the Washington office of the law firm of Hughes Hubbard & Reed (HH&R). In November 1991, two Libyans were indicted by a federal grand jury for the bombing.

In July 1993, Respondent and HH&R were retained to represent Libya in connection with criminal and civil disputes and litigation arising from the Pan Am 103 bombing. Respondent intended to seek consensual monetary settlements with the families of the victims and negotiate arrangements by which Libya would surrender the two indicted Libyans for trial by the United States and the United Kingdom in a mutually agreeable venue. In mid-July 1993, soon after Respondent's retention by Libya became public, he and HH&R withdrew from the representation, stating that the adverse public and governmental reaction made it impossible to accomplish the purposes for which they were retained.

Shortly thereafter, Bar Counsel initiated an investigation into Respondent's possible violation of District of Columbia Rule of Professional Conduct 1.11(a). This rule prohibits a former government lawyer from representing a party in connection with a matter that is the same as or substantially related to a matter in which the former government lawyer participated personally and substantially while working in the government. On July 25, 1995, Bar Counsel charged Respondent with violating this rule.

[A] Hearing Committee . . . conducted an evidentiary hearing . . . [and] concluded . . . that Respondent's representation of Libya constituted a violation of Rule 1.11(a). The Committee recommended that Respondent receive an informal admonition for his misconduct. The Hearing Committee found that "most of the facts in this case are not in dispute." What is hotly contested . . . is whether these facts prove a violation of Rule 1.11(a). . . .

II. FINDINGS OF FACT

1. Respondent is a member of the District of Columbia Bar, having been admitted on November 22, 1989.

A. The Tripoli Bombing

2. Respondent served as the State Department's Legal Adviser from June 1985 to June 15, 1990. . . .

3. While Respondent was the Legal Adviser, the United States government was grappling with the appropriate response to certain acts of terrorism connected to the Libyan government. These acts included the December 1985 bombings and terrorist attacks of the Rome, Italy, and Vienna, Austria airports. . . .

4. On April 5, 1986, a bomb exploded in a discotheque in Berlin, Germany, killing several United States military personnel. The United States government learned that this bombing was also connected to the Libyan government. As a result, the United States decided to take retaliatory action...
against Libya. Respondent met with the interagency group of high-level government lawyers to
provide legal advice to administration officials on [this matter]. . .
6. On April 15, 1986, the United States government bombed Tripoli, the capital of Libya.
7. Much of the classified information that Respondent learned before the Tripoli bombing about
Libyan terrorism was publicly disclosed by the United States government after the bombing.
Respondent was not sure in his testimony at the hearing in this matter if all the information he
learned was disclosed. He testified that he thought that all of the significant information, but not the
way the intelligence was gathered, was made public. . . .

B. The Pan Am 103 Bombing
New York, was blown apart over Lockerbie, Scotland by a plastic explosive hidden in a radio cassette
player placed inside a suitcase on the flight. All 289 persons on board and 11 persons in Lockerbie
were killed.

1. The Investigation
9. The Pan Am 103 bombing sparked a massive hunt by the United States and the United
Kingdom for the perpetrators of this heinous act. As the State Department's Legal Adviser,
Respondent received the State Department's daily written briefing report about sensitive or
important matters. This classified report was provided to approximately 25 top officials in the State
Department. The report periodically contained information about the progress of the United States
government's investigation concerning the bombing, which was ongoing during the remainder of
Respondent's State Department service. Respondent also received oral briefings . . . about the
progress of the Pan Am 103 investigation. Between the time of the Pan Am 103 bombing and his
departure from the State Department, Respondent also had access to classified communications and
cables relating to the progress of the investigation and diplomatic efforts concerning the bombing.
The documents to which he had access remain classified, and Respondent did not have a specific
recollection of their exact content beyond information that was published in newspapers at the time
of the investigation.
10. While Respondent was the Legal Adviser, the United States government's investigation into
the Pan Am 103 bombing focused not on Libya but on two other countries. . . .

2. The Pan Am 103 Civil Litigation and Non-Party Subpoenas
12. In 1989, families of the victims of the Pan Am 103 bombing filed wrongful death lawsuits
against Pan Am and other defendants in several federal courts. . . .
13. On September 27, 1989, Pan Am served non-party subpoenas on the State Department and
five other government agencies, seeking documents and the identification of knowledgeable witnesses
relating to a theory by Pan Am that the United States government had advance warning of the Pan
Am 103 bombing but failed to take adequate steps to prevent it.
14. On November 21, 1989, the Justice Department, which represented government agencies on
subpoena matters such as this, moved to quash the subpoenas because of its on-going criminal
investigation into the bombing. On December 29, 1989, the Justice Department wrote to all six
agencies asking for their positions on the disclosure of their documents responsive to the subpoenas.
The letter pointed out that the Justice Department would respond to the subpoenas on behalf of all
six agencies. The letter stated that the Justice Department wanted the agencies' position on disclosure
under their "administrative or housekeeping regulations." The letter also noted that all the agencies
believed that Pan Am's allegations were unfounded.
15. On January 31, 1990, the Justice Department again wrote to the six agencies, providing a
report on the status of its motion to quash the subpoenas and describing in detail Pan Am's theory of
United States government liability for the bombing. The substance of Pan Am's theory, as described
in this letter, was that the United States government, through the CIA, received several specific
warnings in the days just before the Pan Am 103 bombing about plans for an explosive to be placed
on a Pan Am flight. Allegedly, some of the warnings and tips identified as the target of the attack the
specific Pan Am 103 flight that was bombed.
16. An attorney in the State Department's Office of the Legal Adviser drafted a memorandum
recommending the State Department's response to the subpoena. The draft memorandum was to be
transmitted from Respondent, as the Legal Adviser . . . to . . . the State Department's Director
General, who responds to such subpoenas on behalf of the State Department. The memorandum noted that a search of State Department files revealed approximately 400 documents responsive to Pan Am's request, but many of these documents originated with other agencies and would have to be referred to these agencies for their position on release. The memorandum stated that approximately half of the documents were classified and therefore could not be released under the "state secrets" privilege. The memorandum also reported that the Justice Department would ask for the documents to be withheld if it determined that their production would prejudice the criminal investigation. Finally, the memorandum recommended that Frank Moss, an official in the State Department's Office on Counterterrorism, should be designated as the appropriate State Department witness to testify on the events described in the responsive documents. Attached to the memorandum were the Pan Am subpoena and the letters from the Justice Department concerning the subpoena, but the responsive documents were not attached.

17. Respondent read the memorandum, dated January 31, 1990, and its attachments. He did not believe that he saw any of the documents that were responsive to the subpoena. After reviewing the memorandum and attachments, Respondent approved the memorandum by initialing it. . . .

18. Both Bar Counsel and Respondent advanced much testimony at the hearing relating to whether Respondent's review and approval of this memorandum was, as Respondent claimed, routine and unimportant or, as Bar Counsel argued, substantial and significant. Respondent testified that because he believed Pan Am's allegations were meritless, he did not give much consideration to the contents of the memorandum. He testified that he considered the memorandum to be a routine response to a subpoena request for documents. He also testified that, as Legal Adviser, he approved "a couple of dozen" memoranda per year dealing with State Department responses to subpoenas, and he perfunctorily approved this one as well.

19. Bar Counsel provided evidence, however, that Respondent had instituted a policy that all documents from his office going to an Assistant Secretary or higher official in the State Department had to be reviewed by him, and this memorandum fit into that category. Respondent enforced this policy because he wanted to be aware of and involved in advice given by his office to higher-level officials in the State Department. Respondent also admitted that on rare occasions, he returned a memorandum to his staff when he disagreed with its contents. Moreover, while Respondent may have approved dozens of documents dealing with the State Department's responses to subpoenas, this response was lengthier, related to a more complicated third party case, involved more documents than normal, concerned sensitive intelligence matters, and related to a criminal investigation being pursued by the Department of Justice. Therefore, . . . "Respondent's review and signing of this memorandum constituted the exercise of his discretion to approve the legal advice in the memorandum and was not an insignificant or ministerial act." . . .

4. Subsequent Events in the Pan Am 103 Investigation and Litigation

a. Attention Focuses on Libya

22. Sometime during June 1990, the United States government uncovered information linking Libya to the Pan Am 103 bombing. Investigators determined that the bomb that destroyed Pan Am 103 was activated by a sophisticated electronic timer that had been delivered to Libyan intelligence officials. This timer was identical to other timers used by Libyan terrorists who had been captured in 1988. Therefore, in June 1990, the United States government began to focus its investigation on Libya.

23. . . . Respondent did not learn of the new information linking Libya to the Pan Am 103 bombing while he was the Legal Adviser. He left the State Department to join HH&R on June 15, 1990. Although it is unclear exactly when in June 1990 the United States learned of the new evidence pointing to Libya, . . . "Respondent testified forcefully and credibly that he did not know about it while at the State Department. He said he learned about the evidence in November 1991, after he had left the State Department, when the indictment of two Libyans for the bombing was announced." Respondent's testimony was supported by an article he wrote for The Washington Post in July 1990, which suggested that Iran was responsible for the Pan Am 103 bombing.

b. The Civil Case

24. On December 12, 1990, the United States District Court overseeing the Pan Am 103 Civil Case granted the Justice Department's motion to quash Pan Am's non-party subpoenas, including the
subpoena to the State Department that was the subject of Respondent's January 31, 1990, memorandum. . . .

C. Respondent and HH&R Seek to Represent Libya

27. On June 15, 1990, Respondent left the State Department to become a partner in the Washington office of HH&R.

1. Negotiations with Libya

28. In late 1992, Graham Wisner, a Washington, D.C. lawyer who knew Respondent, asked Respondent if he was interested in assisting Wisner in representing Libya in connection with legal proceedings in the United States arising from the Pan Am 103 bombing. Respondent replied that he would not defend Libya for anything it had done, but if Libya was looking for a way to satisfy its obligations under the United Nations resolutions, he would be interested in representing Libya for that purpose.

29. Wisner told Respondent that the Libyans were interested in having Respondent write a proposal concerning his potential representation of Libya. Respondent drafted a letter, dated January 7, 1993, proposing a representation of Libya "in connection with on-going civil and criminal disputes and litigation relating to the destruction of Pan Am 103." . . .

2. The Representation Agreement

31. On April 14, 1993, Respondent and a representative of the Libyan government signed two letters, similar in terms to the January 7 letter, that established the agreement by which Respondent and HH&R would represent Libya in connection with civil and criminal litigation relating to the Pan Am 103 bombing . . .

32. The terms of the April 14 representation agreement specified that HH&R:

- would represent you [sic] committee in connection with on-going civil and criminal disputes and litigation relating to the destruction of Pan Am 103 . . . We are prepared to assist the relevant parties regarding the above incident by investigating the facts and legal proceedings, preparing legal analyses, providing legal advice and proposing legal steps to deal with this matter. Our efforts will not include substantial activities as litigators but rather would be limited to activities associated with agreed upon measures, including consensual dispositions. Measures will be taken only with your prior consent, and without admission of liability.

The letter went on to point out that "our firm has excellent litigators, including former prosecutors, former State officials, and lawyers familiar with aircraft litigation, upon all of whose talents we would draw as necessary." The agreement also stated that HH&R was unwilling to engage in any activities that would require it to register under the Foreign Agents Registration Act (FARA). This meant that HH&R would limit its activities to legal work rather than any lobbying on behalf of Libya.

33. The financial terms of the agreement specified that Libya would deposit a $3 million retainer into a mutually agreeable Swiss bank account for one year's work by HH&R. The retainer would be disbursed to HH&R at the rate of $250,000 a month. The representation would begin when the Libyans provided a letter of credit to HH&R's Swiss bank account ensuring payment of the agreed-upon fees and when HH&R confirmed that it had obtained a license from the Treasury Department's Office of Foreign Assets Control (OFAC) permitting HH&R to receive payments from Libya legally.

34. Respondent testified that the two specific objectives of the representation were: 1) to attempt to resolve the extradition request for the two indicted Libyans in a manner acceptable to the United States, the United Kingdom, and the Libyan government; and 2) to seek consensual settlements of the civil litigation arising from the Pan Am 103 bombing in a manner satisfactory to the plaintiffs, their counsel, the court, and the Libyans. Another lawyer at HH&R, Mr. Gerson, described Respondent's contemplated role as "Kissingerian"--achieving a "grand scale" settlement providing compensation to families of the victims in fulfillment of the United Nations resolutions.

35. Respondent testified that "acting as Libya's lawyer" he intended to work out an arrangement with the Department of Justice of have the two indicted Libyans produced to an acceptable venue for trial. Respondent thought that the Libyans, the United States, and the United Kingdom might agree that the trial of the Libyans could proceed in a forum other than the United States, such as Scotland.
Respondent stated that he specifically declined to represent the two indicted Libyans in the defense of their criminal case or to represent Libya in defending itself in connection with the bombing.

36. Respondent also testified that he contemplated Libya making an *ex gratia* payment to the families of the victims of the bombing, that is, a payment by Libya without any admission of fault. While Respondent was Legal Adviser, he had successfully obtained *ex gratia* payments from Iraq for the families of the servicemen killed or injured on the USS Stark, a United States Navy ship that had been attacked by an Iraqi aircraft. Respondent described the *ex gratia* payment by Iraq in the Stark case:

> You accept the responsibility to pay for the damage without saying that you were liable in a tech--you know, like Iraq did in Stark. Iraq said this was a mistake, we didn't--we wouldn't be--we wouldn't be responsible, *if you had a trial, you wouldn't be able to find us responsible, but we're paying you anyway*; accept responsibility in that sense at least, yes.

(emphasis added)

37. Respondent had in mind a figure of $1 billion as an appropriate *ex gratia* payment from Libya for the Pan Am 103 bombing. Although Libya was not a party to the Civil Case, Respondent thought that the Civil Case could be a "possible vehicle" for making payments to the families of the victims. Respondent also knew that Pan Am would seek damages from Libya from the proposed *ex gratia* payment, but Respondent was not contemplating that Libya would agree to make any such payment to Pan Am.

**D. Preparations to Represent Libya**

1. **The OFAC License**

38. In preparation for their representation of Libya, Respondent and HH&R took several steps. First, they attempted to obtain the required OFAC license. OFAC administers the economic sanctions imposed on foreign countries by the United States, including 1986 sanctions on Libya. Under those sanctions, any economic transaction with Libya was prohibited unless OFAC granted a specific license to engage in the transaction or the transaction was authorized by a general license because it fit within a general category of acceptable transactions. Providing legal advice to Libya on the United States legal system was covered by a general license. Receiving payments from Libya for legal services required a specific license.

39. On March 11, 1993, an attorney at HH&R spoke to Richard Newcomb, the director of OFAC, regarding HH&R's possible representation of Libya. Newcomb stated that "lobbying" to settle the Civil Case would not fall within OFAC's general exception for legal services. Because the exact scope of HH&R's Libyan representation was not clear at the time, Newcomb suggested that HH&R provide a written description of what it intended to do for Libya.

40. On April 19, 1993, after Respondent and the Libyan representative signed the representation agreements . . . , an HH&R attorney advised OFAC in writing that HH&R would be providing "legal representation to the Government of Libya in connection with [the Criminal Case and the Civil Case]." Respondent and HH&R believed that it could provide such legal services under a general license, but that they needed a specific license to be paid by Libya for their services. HH&R's letter therefore requested a specific license for receipt of payments from Libya for legal services.

41. On May 10, 1993, OFAC issued a specific license to HH&R to receive payments of fees and expenses in connection with the Criminal Case, the Civil Case, and any other United States court cases relevant to the Pan Am 103 litigation . . .

2. **Ethical Issues Facing HH&R . . .**

b. **Rule of Professional Conduct 1.11(a)**

. . . Respondent testified . . . that he did not specifically recall discussing Rule 1.11 with [the managing partner of the Washington office of HH&R, a member of the firm-wide ethics committee], or anyone outside the firm to determine whether this rule prevented Respondent from representing Libya. Respondent said, however, that the issue "certainly came up." He testified that he consulted with members of the firm about the ethics issues surrounding the proposed representation of Libya, but he did not "systematically" address whether his prior service as the Legal Adviser precluded his representation of Libya under Rule 1.11. Respondent testified that much more important to him was the question whether he had learned any "confidential information" as Legal Adviser that might have
to be revealed during his representation of Libya, and because he believed he had not learned such information, he "thought [Rule 1.11] was clearly inapplicable" to his representation of Libya. Respondent said he did not think that Rule 1.11 was "a major issue" or a "real issue" concerning his proposed representation.

48. Respondent . . . did not check with the State Department to determine whether he had worked on any matters while in the government that arguably could be considered substantially related to his representation of Libya. Respondent said he refrained from doing so before the representation began because he knew his representation of Libya would create a "bombshell," and he was not confident that Libya would follow through with its intent to hire him. Libya had courted other lawyers in the past but had not retained them. Moreover, . . . he believed that the limitation he placed on the scope of the representation--seeking consensual resolutions only and not helping Libya avoid liability--made everything he learned at the State Department irrelevant, since he was proceeding on the assumption that Libya was responsible for the bombing . . .

E. The Representation of Libya Begins

50. On June 24, 1993, HH&R received a letter of credit from Bank Credit Suisse for $2.5 million, ensuring payment of Libya's legal fees. On June 30, 1993, HH&R sent a statement billing Libya $250,000 for professional "services and advice" to be performed by Respondent and HH&R for Libya during the month of July 1993.

51. On July 1, 1993, HH&R received $250,000 in its Geneva bank account from Libya. Respondent and HH&R considered its representation of Libya to begin on July 1.

52. Respondent and HH&R took several initial steps as part of its representation of Libya. Various research projects were assigned to HH&R attorneys, such as compiling docket entries in the Pan Am 103 Civil Case, collecting reported decisions arising from litigation relating to the bombing, surveying United States practice regarding trials of international fugitives, surveying relevant treaties between the United States and Libya, and researching procedures for filing an OFAC license with a court. Respondent and other HH&R lawyers also met to discuss possible approaches to the resolution of the Criminal and Civil Cases. In addition, Respondent wrote to a member of the Libyan committee to request relevant documents from Libya. . . .

54. On July 12, 1993, HH&R issued a press release announcing that it had "been retained by the Government of Libya to assist it in seeking a consensual resolution of litigation arising from the Pan Am 103 disaster." The release quoted Respondent as stating: "This retention does not mean that Libya or either individual defendant has decided to appear in the criminal or civil cases. Hughes Hubbard & Reed will advise the Government of Libya with a view to developing solutions for the differences which exist in these litigations, and which are acceptable to all parties; we will not litigate actively in defense of Libya or the individual defendants."

55. The release provoked extremely negative public reaction, including an editorial on July 14 in The Washington Post comparing Respondent's representation of Libya to the movie "Indecent Proposal." On July 14, in response to media inquiries, a State Department spokesperson stated that the State Department would not comment on whether Respondent's representation of Libya created a conflict of interest . . .

F. Respondent and HH&R Withdraw from Representing Libya

58. On July 16, 1993, Respondent and HH&R withdrew from representing Libya. They issued a press release announcing the withdrawal and stating that the public perception of HH&R's undertaking and the reaction of government authorities were so negative that HH&R concluded that it could not effectively carry out the representation. Respondent testified that the public reaction and the inaccurate portrayal that HH&R was trying "to get Libya off the hook" had caused the families of the victims to react unfavorably. In addition to the families' reaction, a hostile response from United States government officials, including Senators and State Department officials, made Respondent and HH&R conclude they could not reach consensual resolutions of the Civil and Criminal Cases and therefore should withdraw. Respondent stated that he and HH&R withdrew because "we didn't think we'd be able to do the job effectively." . . .

G. Investigations into Respondent's Conduct

. . . On July 22, 1993, as a result of his review of press articles about Respondent's representation of Libya, Bar Counsel began an investigation into Respondent's conduct. Bar Counsel sent
Respondent a letter asking for his response to the allegation that his representation of Libya may have violated the District of Columbia Rules of Professional Conduct, particularly Rule 1.11(a).

III. DISCUSSION CONCERNING VIOLATION
A. Conduct Prohibited by Rule 1.11(a).

Rule 1.11(a) states in pertinent part:
A lawyer shall not accept other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee.

Therefore, the essential elements to show a violation of Rule 1.11(a) are:
(1) a government lawyer
   (a) participates as a public employee in a matter,
   (b) both personally and substantially;
(2) followed by the lawyer's leaving the government and accepting employment in another matter that is
   (a) the same as, or
   (b) substantially related to
   the original matter.

We outline first the definitions and case authority available to us in construing the Rule. We then apply these provisions to Respondent's conduct . . .

1. What is a "matter" for purposes of Rule 1.11(a)?

The definition of "matter" for purposes of Rule 1.11(a) is crucial for an analysis of whether any "matter" in which Respondent participated as Legal Adviser is the same as, or substantially related to, the representation of Libya he undertook at HH&R. At all times relevant to Respondent's conduct, Rule 1.11(g) defined "matter" as:
"Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties."

Comment [3] to Rule 1.11 explains that "the making of rules of general applicability and the establishment of general policy will ordinarily not be a 'matter' within the meaning of Rule 1.11."

The District of Columbia Court of Appeals has not been presented with a case requiring interpretation of the word "matter" in the context of Rule 1.11(a) since the Rules became effective on January 1, 1991. The leading case interpreting predecessor DR 9-101(b), Brown v. District of Columbia Zoning Adjustment, 486 A.2d 37 (D.C. 1984)(en banc), noted with approval the characterization of "matter" by the American Bar Association's Committee on Professional Ethics and Grievances, which described a matter as
"a discrete and isolatable transaction or set of transactions between identifiable parties." quoting Committee for Washington's Riverfront Parks v. Thompson, 451 A.2d 1177, 1188 (D.C. 1982). In Committee for Washington's Riverfront Parks, 451 A.2d at 1188, the Court quoted at length the description of "matter" by the ABA Committee:
Although a precise definition of "matter" as used in the Disciplinary Rule is difficult to formulate, the term seems to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties. Perhaps the scope of the term "matter" may be indicated by examples. The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter. By contrast, work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations, or laws, or in briefing abstract principles of law, does not disqualify the lawyer under DR 9-101(b) from subsequent private employment involving the same regulations, procedures, or points of law; the same "matter" is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties. [(ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 at 6 (1975) (footnotes omitted).]

2. What is participation in a matter "personally and substantially as a public officer"
or employee"?

The second essential element necessary for Bar Counsel to show a violation of Rule 1.11(a) is that the government lawyer must have participated in the government matter "personally and substantially." The Comments to Rule 1.11 do not address personal and substantial participation, and no definition of this term is provided. No District of Columbia case interprets the meaning of personal and substantial participation in the context of a disciplinary proceeding. The regulations implementing 18 U.S.C. § 207 provide some insight on this issue, although in the distinct context of guiding interpretation of a criminal statute banning conflict of interest by government employees:

"Substantially," means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue.

5 C.F.R. § 2637.201(d)(1). However, "the single act of approving or participation in a critical step may be substantial," if the act is of significance to the matter.

In an opinion interpreting DR 9-101, the D.C. Bar Legal Ethics Committee opined that a government lawyer's participation in a matter was personal and substantial because it was "direct, extensive, and substantive, not peripheral, clerical, or formal." Opinion No. 84 (1980).

3. What is a "substantially related" matter?

The third essential element for a violation of Rule 1.11(a) is that the matter in which the government lawyer participated must be "substantially related" to the subsequent matter in which he or she represents the private client. The methodology for determining whether two matters are "substantially related" in the revolving-door context, under DR 9-101(b), was the subject of extended analysis by the en banc Court in Brown. Brown concerned whether counsel for a private real estate developer should be disqualified in a Board of Zoning Adjustment proceeding where the counsel previously had been counsel for the District of Columbia in two earlier transactions relating to the same piece of real estate. In Brown, the Court noted that the substantial relationship test originated in litigation between private parties in the context of a motion to disqualify counsel on the grounds that a lawyer had unethically switched sides between private litigants. The Court cited T.C. Theatre Corp. v. Warner Brothers Pictures, Inc., 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953), aff'd, 216 F.2d 920 (2d Cir. 1954), a case in which the central purpose of the ethical prohibition against side-switching was described as preventing a private lawyer who may have received confidential information from using it against the client in a subsequent representation.

The Court described the test that was generally used to determine if two matters were substantially related in private side-switching cases:

"Initially, the trial judge must make a factual reconstruction of the scope of the prior legal representation." If the factual contexts overlap, the court then has to determine "whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those [prior] matters."

Finally, if such information apparently was available to counsel in the prior representation, the court has to determine whether it "is relevant to the issues raised in the litigation pending against the former client." If all three conditions are met, the matters will be substantially related and thus deemed the same for conflict of interest purposes, with doubts to "be resolved in favor of disqualification."

486 A.2d at 49 (citations and footnotes omitted) (quoting Westinghouse Electric Corp. v. Gulf Oil Corp., 588 F.2d 221, 225 (7th Cir. 1978)).

The Brown Court then examined the revolving-door situation, in which a lawyer leaves the government to enter private practice. The Court concluded that the revolving-door rule, like the side-switching rule, was designed to address at least a reasonable possibility that some specifically identifiable impropriety would occur. The Court emphasized that the critical issue was whether the attorney had the opportunity while participating in a matter in the government to gather specific information that the attorney could not otherwise have gained and that could be used on behalf of a private client in a later proceeding. The information of concern was not general data, or general agency expertise and contacts, but specific information.
The Brown Court concluded that the Westinghouse private side-switching test should be broadened in a government revolving-door case for several reasons. First, because government attorneys may have had access to more kinds of information than private attorneys typically do, there is a greater potential for misuse of government information in the revolving-door situation. Second, the public generally is more concerned about government improprieties than private improprieties, and the appearance problem is more severe because the public is likely to be more critical of the potential abuse of information by a government lawyer entering private practice. Third, the complainant in a revolving-door situation may not have specific knowledge of the information gathered by the government lawyer.

As a result, the Court in Brown articulated a broad test for determining whether a substantial relationship exists between two matters in revolving-door cases:

Accordingly, in cases where the complainant’s evidence shows that the factual contexts of the two (or more) transactions overlap in such a way that a reasonable person could infer that the former government attorney may have had access to information legally relevant to, or otherwise useful in, the subsequent representation, we conclude that the complainant will have established a prima facie showing that the transactions are substantially related. The burden of producing evidence that no ethical impropriety has occurred will then shift to the former government attorney, who must rebut complainant’s showing by demonstrating that he or she could not have gained access to information during the first representation that might be useful in the later representation. Absent sufficient rebuttal, the complainant will have carried the burden of persuasion as the moving party.

The Court in Brown stressed that it would not be adequate rebuttal for the former government lawyer to state that no useful information was in fact received during the government representation. The Court declared that if it was reasonable to infer that the lawyer may have received useful information during the government representation, there would be a conclusive inference that useful information was in fact received. The lawyer's rebuttal case had to focus instead on the scope of the representation involved in each matter and not the actual receipt of information:

To rebut a complainant's prima facie showing of substantial relationship, the former government attorney must produce evidence elaborating on the nature of the two matters so as to make it "clearly discernible" that the issues involved are unrelated and the court should not infer the existence of useful government-developed information. 486 A.2d at 50 n.18 (quoting Westinghouse Electric Corp., 588 F.2d at 224).

The Court also made clear that it would not inquire into the specific information or confidences disclosed during the government representation, or whether that information was used by the former government lawyer in private practice. The Court noted that it would not require proof that an attorney actually had access to or received privileged information in the prior case. "Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained." Brown, 486 A.2d at 42 n.5 (quoting T.C. Theatre Corp., 113 F. Supp. at 268-69).

While the Court in Brown set out a methodology for determining when matters are substantially related that is designed to give wide scope to the protection of the public, it made clear by its exacting analysis of the facts that it would take care in applying that test to each case, so that private employment following government service would not be unduly constrained. In Brown, the two lawyers involved, while previously at the D.C. Office of Corporation Counsel, had worked on two transactions involving the property: the developer's attempt to increase the height limitation on the property and the developer's attempt to mix residential and commercial uses on the property. When the two lawyers left the government, they were retained by the same developer to handle another zoning issue involving the same property: the developer's application for a special zoning exception to increase the number of below-grade parking spaces permitted on the property.

In deciding a motion to disqualify the two lawyers from representing the developer in the BZA proceeding involving the parking spaces, the Court applied the methodology described above to determine whether the matters were substantially related. The Court concluded that the lawyers could
not have gained any information in the earlier proceedings that would have aided them in their subsequent representation, and therefore the matters were not substantially related. The Court looked beyond the surface facts that the developer and property were the same, to the issues involved in the various representations, in reaching that conclusion.

When the District of Columbia Court of Appeals adopted the Rules of Professional Conduct in 1991, it also adopted the Comments to the Rules. Comment 4 to Rule 1.11 contains an explicit description of the Brown methodology for analyzing the substantial relationship element of Rule 1.11(a):

The leading case defining "substantially related" matters in the context of former government employment is Brown v. District of Columbia Board of Zoning Adjustment, 486 A.2d 37 (D.C. 1984) (en banc). There the D.C. Court of Appeals, en banc, held that in the "revolving door" context, a showing that a reasonable person could infer that, through participation in one matter as a public officer or employee, the former government lawyer "may have had access to information legally relevant to, or otherwise useful in" a subsequent representation, is prima facie evidence that the two matters are substantially related. If this prima facie showing is made, the former government lawyer must disprove any ethical impropriety by showing that the lawyer "could not have gained access to information during the first representation that might be useful in the later representation." In Brown the Court of Appeals announced the "substantially related" test after concluding that, under former DR 9-101(B), see "Revolving Door," the term "matter" was intended to embrace all matters "substantially related" to one another—a test that originated in "side switching" litigation between private parties. See Rule 1.9, Comment [2]. Accordingly, the words "or substantially related to" in paragraph (a) are an express statement of the judicial gloss in Brown interpreting "matter."

B. Did Respondent Violate Rule 1.11(a)?

1. What was the "matter" involved in Respondent's service as Legal Adviser that is potentially the same, or substantially the same, as his later representation of Libya in private practice?

[Bar Counsel] offered . . . two possible "matters" . . . in which Respondent was involved while he was Legal Adviser:
"1) the United States government's 1986 decision to bomb Tripoli in retaliation for Libyan terrorism; and
2) the establishment of culpability for the 1988 Pan Am 103 bombing, including the government's investigation and the ensuing litigation concerning the bombing."

. . . Bar Counsel [did] not carr[y] his burden of proving that the first of the matters was substantially related to Respondent's representation of Libya, because it was not part of the same transaction or set of transactions as the later act of terrorism, the bombing of Pan Am 103. In essence, . . . to connect the 1986 bombing of Tripoli to the 1988 Pan Am 103 bombing, one has to infer causation and retaliation not supported by the record. Applying the Brown test, [one can] not reasonably conclude that Respondent obtained specific information in connection with his assistance to State Department officials concerning the bombing of Tripoli that would be useful in his later representation of Libya. . . . [W]e do not consider the 1986 bombing of Tripoli as a potential "matter" here.

On the other hand, . . . "Respondent did participate personally and substantially while at the State Department in the response to the Pan Am 103 bombing, including the government's investigation and the establishment of liability for it." . . .

A particular matter may be a discrete and isolatable transaction or set of transactions. See Brown, 486 A.2d at 42 n.4; Committee for Washington's Riverfront Parks, 451 A.2d at 1188. While a matter may be a single particular lawsuit, it also may encompass a "claim, controversy, investigation, ... charge [or] accusation..." involving a specific party or parties according to the definition provided in Rule 1.11(g). The government's investigation and the establishment of culpability for the Pan Am 103 bombing, both criminally and civilly, were such an isolatable set of transactions involving a particular act and specific parties. The act of the bombing of Pan Am 103 is a specific and discrete
"situation or conduct," in the language of ABA Op. 342 at 6. A representation involving investigation is specifically contemplated in the Rules as one type of representation comprising a "matter," as long as it involves a specific party or parties, as required by Rule 1.11(g). Respondent concedes . . . that the government's investigation of the bombing of Pan Am 103 is a "matter" within the meaning of Rule 1.11(a). The parties are specific: the United States government, the victims of the bombing, Pan Am, and the perpetrators. The claim, controversy or investigation concerning who was responsible and liable for the bombing related to "the same issue of fact involving the same parties and the same situation or conduct." Committee for Washington's Riverfront Parks, 451 A.2d at 1188.

Respondent argues vigorously . . . that because the perpetrators of the bombing were not known to be Libyan nationals while Respondent was Legal Adviser, he cannot be said to have participated in a matter involving Libya that is the same or substantially the same as the representation of Libya that he undertook in private practice. We disagree. A "matter" can be an "investigation" or "claim," under the definition provided in the Rules. It is inherent in the nature of an investigation or claim that all actors may not be identified during the representation. In this case, the event is discrete, and all of the other actors were known. The "matter" is not terrorism, or even Libyan terrorism. Such broad definitions of the "matter" here would be analogous to defining the "matter" in Brown as the property at issue, or the developer's goal of maximizing the value permitted under the zoning laws applicable to the property. The Court rejected such a broad definition of "matter" in Brown . . . . In contrast, the bombing of Pan Am 103 is a discrete event, and the legal activities flowing from the government's efforts to address it are an isolatable set of transactions. Put another way, the Pan Am 103 bombing was a single event that spun off into a number of legal issues and proceedings as the government investigated and attempted to impose responsibility.

Respondent urges [us] to define "the matter" here as a series of separate "matters," with each matter being one step or issue concerning his involvement in responding to the Pan Am 103 bombing as Legal Adviser. Respondent would have us treat the Civil Case subpoena, the government's investigation, and the Criminal Case each as separate matters. The Board does not believe that an investigation and the proceedings that impose responsibility can be so neatly separated. Respondent received briefings concerning the investigation of the bombing on a continuing basis so that he could provide legal advice, and he did so. He thus was knowledgeable and able to assist on the third-party subpoena matters because of that information, which he received as the top legal officer in the State Department. The third-party subpoena response in the Civil Case simply was part of the legal work called for as part of the investigation and effort to impose responsibility, as was activity involving an unnamed country's support for terrorism. The fact that Respondent's legal work involving the investigation took various forms does not diminish the fact that Respondent was available as counsel, and served as counsel, on a continuing basis concerning legal work required by the Legal Adviser to support the overall investigation and assessment of responsibility. It would be strange indeed if Rule 1.11(a) permitted a government lawyer to know the confidential course of an investigation into an act, take some responsibility for legal reaction to those events, but then turn around in private practice and represent an alleged perpetrator of those same acts . . . .

If Respondent was substantially and personally involved in that activity, and then undertook a representation in private practice involving the same or substantially the same matter, he violated Rule 1.11(a). We turn to those prongs of the analysis.

2. **Was Respondent personally and substantially involved in the establishment of culpability for the Pan Am 103 bombing, including the government's investigation and the subsequent litigation?**

. . . "Respondent's involvement in this matter while in the government was personal and substantial."

Respondent received the State Department's daily written briefing reports and occasional oral briefings about sensitive or important matters, which periodically contained information about the progress of the United States government's investigation concerning the bombing. Respondent also had access to classified communications and cables relating to the progress of the investigation and diplomatic efforts concerning the bombing. Respondent personally participated in a diplomatic exchange with a country other than Libya "occasioned by the Pan Am 103 bombing," relating to
that country's responsibility for terrorist activity, which included a direct contact by Respondent with that country.

Respondent personally approved the memorandum to the State Department's Director General, regarding the response to be made by the State Department to Pan Am's third-party subpoena in the Civil Case. The Hearing Committee specifically found that Respondent's approval of the memorandum "was not an insignificant or ministerial act," because it was undertaken pursuant to Respondent's policy of personal review of documents from his office going to an Assistant Secretary or higher official in the State Department. . . . "Respondent's review and signing of this memorandum constituted the exercise of his discretion to approve the legal advice in the memorandum" . . . .

Respondent argues that even if his participation in the response to the subpoena was personal and substantial, it was not substantial participation in the underlying Civil Case. This is important to our analysis below as to whether a matter in which Respondent had personal and substantial responsibility is substantially the same as the later private representation, because Respondent's own retainer letter referenced the pending civil case as a matter that his representation would attempt to resolve. In addition, one of the first tasks undertaken by HH&R in the representation of Libya was obtaining the docket entries in the Civil Case and it became increasingly clear in HH&R's dealings with OFAC as the representation began that, in order to be compensated, services were to be in connection with U.S. court cases.

. . . [R]esponding to a third-party subpoena request alone may not in every case be the equivalent of personal and substantial participation in all of the issues of the underlying litigation, particularly if the responding lawyer learns nothing about other issues in that litigation when dealing with the subpoena. But Respondent had additional involvement in issues related to the Pan Am 103 bombing while he was the Legal Adviser. He was periodically apprised of the progress of the continuing investigation to identify the perpetrators and he participated in a diplomatic exchange with a foreign country because of the Pan Am 103 bombing to convince that country to curtail its terrorist activities. . . . Respondent also participated in a decision about how fully to inform the State Department's representative concerning the State Department contact with Pan Am, in preparation for his testimony about the documents.

While a lawsuit certainly can be a "matter" within the meaning of Rule 1.11(a), a matter that results in a lawsuit is not necessarily limited to that litigation. Respondent's overall involvement in the government's investigation and establishment of culpability for the bombing of Pan Am 103 was personal and substantial. Respondent was much more than the passive recipient of general agency information. As chief legal officer of the State Department, Respondent was kept abreast of the progress of the investigation and the diplomatic efforts in response to the bombing precisely so that he could provide legal advice and perform legal duties concerning the bombing when called upon to do so. In fact, Respondent did perform such service, when he communicated with an unidentified country concerning its sponsorship of terrorism, sent the memorandum regarding Pan Am's third-party subpoena in the Civil Case, and approved the decision to inform the State Department's witness of the substance of the Secretary of State's meeting with the CEO of Pan Am because, in Respondent's legal judgment, it would not do any harm to State Department or United States interests. . . . Respondent was substantially and personally involved in representing the interests of the Department of State in the matter of the investigation of, and establishing culpability for, the bombing of Pan Am 103.

3. **Is the matter in which Respondent was personally and substantially involved while in government the same as, or substantially related to, the representation of Libya he undertook in private practice?**

*Brown* is our guide for analyzing whether Respondent's representation of Libya in private practice was the same as, or substantially related to, the investigation and establishment of culpability for the bombing of Pan Am 103, in which Respondent had personal and substantial involvement while in government. *Brown* sets out a two-part "substantial relationship" test:

1) Do the factual contexts of the government and private practice matters overlap, upon reconstruction of the scope of the prior legal representation; and
2) If the factual contexts overlap, is it reasonable to infer that the government attorney may have had access to confidential information legally relevant to, or otherwise useful in, the subsequent representation?

The Court opined in *Brown* that if the answer to these two prongs is yes, the Respondent may attempt to demonstrate through evidence concerning the scope of the legal representation involved in each matter that no such information would have been received. The Court stressed that this rebuttal burden cannot be met "simply by claiming that no useful information was, in fact, received in the first matter."

First, the factual contexts of Respondent's government representation and private representation clearly overlap. . . . Both concerned addressing responsibility for the same, particular event: the bombing of Pan Am 103.

Second, we conclude that a reasonable inference can be drawn that the Respondent had access to confidential information legally relevant to, or otherwise useful in, the subsequent representation. Respondent had access to confidential--even classified--information concerning the Pan Am 103 bombing. He received confidential written and oral briefings on the status of the investigation; learned of or attended a meeting about Pan Am's theory of why the United States had some notice of and potential responsibility regarding the bombing; and assisted in developing strategy in the Civil Case in response to Pan Am's third-party subpoena. Respondent acknowledges that some information he learned about the investigation into the Pan Am 103 bombing may remain confidential in both the security and ethical sense.

We need not speculate about how Respondent might have used what he learned while in government in his later representation of Libya, had it continued. Indeed, the Court in *Brown* counseled against an effort to identify each bit of confidential information to determine if the government matter and private practice matter are substantially related. . . . The Court in *Brown* set out a test focusing on the overlap between matters, which is sensible so that disciplinary action or disqualification motions do not themselves become the vehicle for exposing confidential information that could jeopardize the legitimate expectations of governmental agencies or the private parties who later retain former government lawyers.

. . . While protection of confidential information is one of the policies underlying the Rule, the test of the Rule imposes no burden on Bar Counsel to demonstrate what confidential information received in the government representation could be useful in the private representation. Such a requirement would make Rule 1.11(a) enforceable only at the high cost of spilling client confidences on the public record in the disciplinary proceeding. The Court instead constructed in Rule 1.11(a) a prohibition on handling overlapping matters in the government and then later in private practice. Handling such overlapping matters is itself the disciplinary violation prohibited by Rule 1.11(a). Respondent has not been required to disprove a required element of a Rule 1.11(a) violation. He has been given the opportunity to rebut Bar Counsel's proof that the two matters were "substantially related" with any proof he cares to bring forward showing that the factual contexts involved were sufficiently different that a reasonable person would conclude he did not receive confidential information in the government matter that could be useful in representing Libya in private practice.

. . .

The Hearing Committee believed that one of the most telling pieces of evidence at the hearing was Respondent's testimony concerning whether there would have been an ethical issue had he agreed to represent Libya for all purposes, including defending it in litigation. Respondent said he would not have considered such a representation, but acknowledged that it would have raised an ethical issue because:

> I felt that if I were representing Libya at least an appearance would arise that I had access to information about the two other potential culprits--if I were defending Libya, that I would have access to information about the two other culprits that might be helpful in that context.

The Board agrees with this assessment. The fact that Respondent was privy to highly confidential communications as Legal Adviser about precisely the event that was at the heart of the negotiation presents the situation that Rule 1.11(a) was intended to prevent. Rule 1.11(a) is a broad prophylactic
rule that does not depend on the subjective intent of a lawyer, or even what a lawyer does with the information. A lawyer cannot agree to a representation and put himself in a position where he has to shape the private representation to avoid use of information learned in the government. The Rule prevents a representation in which a lawyer could use confidential information learned while employed in the government. While Respondent was employed in the government, his client had a terrible and tragic problem, which resulted in legal activity on several fronts. The core of fact at the heart of each piece of legal activity is the same: why and how Pan Am 103 blew up over Lockerbie.

We do conclude that Respondent violated a Disciplinary Rule for all of these reasons, not because he undertook to represent an unpopular client. Many difficult representations that satisfy the highest ethical demands of the legal profession involve clients who have committed despicable acts. Nor do we rely on the appearance of impropriety that caused public condemnation of Respondent's private representation of Libya. While policy considerations involving the appearance of impropriety are one of several underlying rationales for the Rule, such appearances do not constitute or prove a violation.

In sum, like the Hearing Committee, we do not believe that Rule 1.11(a) allows a government lawyer to be briefed in the course of his official duties about a particular, sensitive investigation into a discrete event, so that he can provide legal advice, thereby learning important confidential information, provide substantial and personal legal assistance concerning the government's efforts, then leave the government and represent a suspect in the same investigation. We conclude that Respondent violated Rule 1.11(a).

IV. PROPOSED SANCTION

In determining the appropriate sanction, the Court looks to the seriousness of the violation, any harm as a result of the violation, any prior disciplinary violations by Respondent, and mitigating or aggravating circumstances.

Bar Counsel urged, and the Hearing Committee agreed, that an informal admonition is appropriate here. While the offense is serious, Respondent's offense was one of omission. He failed to recognize his Rule 1.11(a) dilemma, consult the State Department, obtain an independent ethics opinion, or even have a full analysis done by his firm's ethics committee. While these steps are not required by the Rules, some additional caution at the outset could have averted this proceeding.

On the other hand, we recognize that this is a case of first impression under Rule 1.11(a). Respondent's argument that application of Brown in the disciplinary context results in inappropriate burden-shifting is hardly trivial, and is advanced in good faith.

Certainly no sanction harsher than an informal admonition is required to conform Respondent's future conduct to the Rules. Respondent has no prior disciplinary record, and has an exemplary 30-year legal career including service as a prosecutor, professor, federal judge, and senior State Department official. Little or no harm was caused by Respondent's brief representation of Libya. He withdrew very early in the representation, and while his reason for withdrawing was the adverse reaction that he felt would interfere with his ability to represent Libya effectively, there was no harm to the client or any breach of confidence.

We have no comparable Rule 1.11(a) case to use as a parallel for purposes of assessing consistent discipline, but are confident that an informal admonition is appropriate.

CONCLUSION

The Board recognizes that the application of Rule 1.11(a) is very important to the many members of our Bar who have served, or who aspire to serve, in government. The disciplinary system must protect the interest of the public by discouraging attorneys in government from shaping their practice to give unfair advantage to their later private clients, or from jeopardizing confidential information learned in government service. At the same time, government service should not be discouraged by ethical rules that prohibit government lawyers from making reasonable and appropriate use later in private practice of the expertise they have gained. The Court struck that balance in Rule 1.11(a). The Board views the application of Rule 1.11(a), and the balance struck between the policy interests served by the Rule, as fair and reasonable on the facts presented in this case.

The Board hereby directs Bar Counsel to issue an informal admonition to Respondent.