

TRIALS BY FIRE

COUNTERTERRORISM AND THE LAW

ERIC ROSENBACH AND AKI J. PERITZ



HARVARD Kennedy School

BELFER CENTER for Science and International Affairs

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I think the world was very simple before 9/11. We knew what the law was, and I understood it to apply to everyone in the government. Now there's real uncertainty.

Senator Richard Durbin

* Senator Richard Durbin quoted in Mayer, Jane. "A Deadly Interrogation." The New Yorker. 14 November 2005.

CONTENTS

Introduction	2
<hr/>	
The Legal Architecture of American National Security	5
The Importance of National Security Laws	5
The Constitution	6
Four Important National Security Laws, and Why They Matter	11
Consequential Case Law	17
Executive Orders and Presidential Directives	19
Public International Law	21
<hr/>	
Defining Terrorism in US Law and Policy	23
The Difficulty With Defining Terrorism	23
The Foreign Terrorist Organization List and Legal Sanctions	24
US Definitions of International Terrorism	25
Definitions of Terrorism Under International Law	26
Counterterrorism	28
One Man's Freedom Fighter...	28
<hr/>	
The Balance of Powers in National Security	31
The President's Power	31
Executive Overreach	33
Judicial Pushback	34
The Legislative Check	35

An Additional Constraint? The War Powers Resolution (1973)	36
Congressional Notification	37
<hr/>	
Covert Action	41
Parameters of Covert Action	42
Covert Action Reporting Requirements	43
<hr/>	
Signals Intelligence, Electronic Surveillance and FISA	45
Signals Intelligence	45
Electronic Surveillance with a Domestic Nexus, FISA and Its Legal Basis	47
How FISA Works	48
Controversy Regarding Electronic Surveillance	48
FISA Modernization	49
The FISA Amendments Act of 2008	50
Roving Wiretaps	51
<hr/>	
Renditions	55
Defining Renditions & Extraordinary Renditions	56
Rendition as a Legal Mechanism	57
The Case for Rendition	58
The Case Against Rendition	60
The Rendition Program Prior to 9/11	61
The Rendition Program After 9/11	62
The Future of Renditions	64
<hr/>	
National Security Interrogations	67
Overview: Current Law and Policy	68
Interrogations: Definition and Brief History	69
The Efficacy of Coercive Interrogations?	72
Debate over the Legality of Coercive Interrogation	73

History of CIA's Enhanced Interrogation Program	74
FBI Interrogation Policies	76
Department of Defense Interrogation Policies	78
Current Government-Wide Legal Provisions	78
Proposed Legal Defenses	79
Issues Moving Forward	80

Information Operations and Counterterrorism	83
Defining Information Operations	83
Influencing Audiences	85
IO in a Counterterrorism Context	86
IO's Legal Framework	86
When IO becomes Public...	87
The Future of IO?	88

Targeted Killings and the Drone War	91
Reassessing the Assassination Ban	91
The Murky Legality of Targeting Terrorists	93
Advantages to Targeting Terrorists	94
Targeted Killings' Disadvantages	95
The War of the Drones	96

Domestic Counterterrorism: Roles, Responsibilities, and Legal Authorities	101
The Department of Homeland Security	102
The Federal Bureau of Investigation	104
The National Counterterrorism Center	105
Central Intelligence Agency	106
Local Government Agencies	107

Detentions Outside the Criminal Justice System	111
General Laws Governing Detention Outside the Criminal Justice System	112
Laws Governing the Detention of al Qaeda and Taliban Members	114
Prosecuting Terrorists in US Criminal Courts	119
Investigative Tools	119
Charging Statutes	121
Introducing Evidence in Court	122
Difficulties with Going to Trial	123
Sentencing	124
Military Commissions	127
What are Military Commissions?	128
Establishing Military Commissions	128
The Detainee Treatment Act (2005)	129
The Military Commissions Act of 2006	130
Military Commissions Under the Obama Administration	130
The Military Commissions Act of 2009	132
The Future of Military Commissions	132
Endnotes	134
List of Acronyms	150
Bibliography	154
About the Authors	170
Acknowledgments	171

INTRODUCTION

In the decade following the attacks of 11 September 2001, the United States has attempted to better combat the threat of terrorism through two general mechanisms—by unleashing its fearsome military and intelligence might upon foreign and domestic enemies; and by building upon preexisting legal infrastructure to account for the new menace to the country. Yet many critical questions remain: What is a ‘terrorist?’ Does Cicero’s claim that, “In times of war, the laws fall silent” apply to this new sort of amorphous conflict? What is the appropriate balance between implementing the counterterrorism mission and maintaining an open society? How can we safeguard our liberty while minimizing our chances for another attack? What do the laws say what we can or cannot do in the pursuit of our enemies? And what are these laws worth if they do not protect citizenry from danger?

The primary purpose of *Trials By Fire* is to help policymakers, legislators, and the general public gain a better understanding of the complex nexus between counterterrorism efforts and the law. Given the controversial nature of the topic, we have tried to present these issues in a nonpartisan manner in order to allow the reader to make an informed decision on the subject without delving into the legal minutiae.

We also authored this book to provide students of national security policy with a foundation on counterterrorism law. This work certainly does not supplant the volumes of learned books and intricately analyzed law journal chapters that have been published in this area over the last several years; rather, we encourage our students to use this as a ‘jumping off point’ for deeper research.

Despite their most concerted efforts, terrorists will not cause the systemic collapse of American civilization. As such, this publication is ultimately not about *them*. Rather, it is about *us* and whether we as a people and as a nation can craft appropriate, legitimate mechanisms to safeguard our society from external danger without compromising too many of our core national values along the way. Terrorists may be able to inflict deaths and destruction upon innocents in this country and abroad, but it is more important that the American public and its political class make the choices to keep this nation intact in the 21st century.

Policymakers, legislators and jurists have made and will continue to make—in the harsh light of hindsight—ill-advised choices. Despite the best intentions and efforts of hundreds of thousands of soldiers, case officers, analysts and cops, terrorists will attempt to strike the country and its citizenry again, and may occasionally succeed. Nevertheless, it will be through our laws and our system of government that we will find, if not a permanent safe harbor against danger, at least the most American means to safeguard our nation and our people.

Any mistakes, omissions, errors or oversights contained within this publication are our own.

We thank you for reading our book.

Sincerely,

Eric Rosenbach and Aki J. Peritz

August 2010

Safety from external danger is the most powerful director of national conduct.

Alexander Hamilton, Federalist Paper #8

THE LEGAL ARCHITECTURE OF AMERICAN NATIONAL SECURITY

The United States is in a struggle against violent, fanatical non-state actors who seek to harm its open society and global national interests. To balance the dual mandate of protecting the country from adversaries and safeguarding personal liberties, the United States government relies upon a complex system of law, policy and norms of conduct.

This legal architecture—constructed from the Constitution, hundreds of statutes, legal precedents and thousands of unique agency and departmental guidelines and requirements—undergirds the American national security system and, when faithfully executed, gives the nation the legitimacy to fight adversaries while protecting what the Constitution terms the “blessings of liberty.” This chapter provides the reader with a general overview of this architecture and examines what it means for the US in the fight against terrorist organizations and their extremist allies.

THE IMPORTANCE OF NATIONAL SECURITY LAWS

In any discussion of national security laws, one basic question arises: Why should the rule of law be paramount in national security affairs? In sum, maintaining a robust national security legal system remains critically important because it:

- Provides the US Government a framework for security policymaking.
- Circumscribes the behavior of elected and unelected officials who, in the real or perceived pursuit of security, may abuse their authority.

- Differentiates the US from other actors by placing the country on a higher ethical plane of behavior. As national security legal expert James E. Baker once noted, “Part of our revulsion and contempt for terrorism derives from the terrorists’ indiscriminate, disproportionate and unnecessary violence against civilians; in other words, the terrorists’ disdain for the legal principles of discrimination, proportionality and necessity.”¹

Given the difficulty of adapting a complex legal system to a protean foe, national security decisionmakers often encounter legal issues that are far from clear or settled. Complicating matters, many of the decisions regarding counterterrorism must be made beyond the public view. Hence, carrying out justice through the mechanisms of national security law is a perilous task—fraught with the potential for missteps—for policymakers and intelligence professionals alike.

When attempting to determine the legality of a counterterrorism policy or program, national security lawyers will usually look to the Constitution, congressional authorization for the use of force, settled ‘black letter’ law, Executive Orders, Supreme Court decisions, public international law and their own professional guidelines to determine the appropriate course of action. The following provides an overview of the aspects that carry the most weight in determining the ability or inability of the US government to take a particular course of action.

THE CONSTITUTION

As the fundamental legal document that establishes the overall framework for the US national security apparatus, the US Constitution assigns roles to each of the government’s three branches. **Article I** of the Constitution gives the legislative branch several critical national security powers, including the powers to declare war, to conduct oversight and to control the budget.

- Congress can declare war, raise armies, ratify treaties, collect taxes and “...make Rules concerning Captures on Land and Water.”

- The ‘Necessary and Proper Clause’ gives Congress the power to conduct oversight of executive branch programs and policies. Congressional oversight focuses on crafting and approving proposed budgets, maintaining the quality of terrorism analysis and determining the legality of actions as well as the efficacy of intelligence and military operations.
- Congress controls the budgets of the nation’s national security organizations through annual appropriations bills for defense, intelligence and homeland security.

Article II, however, has been interpreted to concentrate ‘national security power’ in the executive branch, as the Founding Fathers recognized the importance of having a ‘unity of command’ in the President. Thus, Article II has been widely accepted as granting the President the leadership role in crafting foreign and national security policy.

- The President’s Commander-in-Chief power has been interpreted to include the power over almost all military, intelligence and national security functions.
- As Commander-in-Chief, the President has authority over state secrets.² Hence, the White House can control access to classified information by Congress, the Judiciary and the public.

Finally, **Article III** gives the judicial branch the authority to interpret and determine the constitutionality of national security laws, evaluated in the context of cases it hears. While courts have historically tended to defer to the executive branch on national security issues, they nevertheless have played an increasingly important role in shaping the parameters of national security law over the past decade. Most importantly, the courts can curb executive overreach, as in the 2006 Supreme Court ruling *Hamdan v. Rumsfeld*.³

In addition to outlining the authorities of each branch of government in the national security realm, the Constitution also seeks to protect individuals from excessive government power. In the counterterrorism context, the **Fourth Amendment** protection “against unreasonable searches and seizures” is an invaluable aspect of the national security legal framework. Particularly

when considering counterterrorism programs with a US domestic nexus, the government must assess the implications of the Fourth Amendment. Policy debates about electronic surveillance and the detention of suspected terrorists inevitably revolve around the degree of Fourth Amendment protection afforded individuals in the US. Determining the balance between security and civil liberties is perhaps the most difficult—and politically fraught—aspect of counterterrorism policymaking.

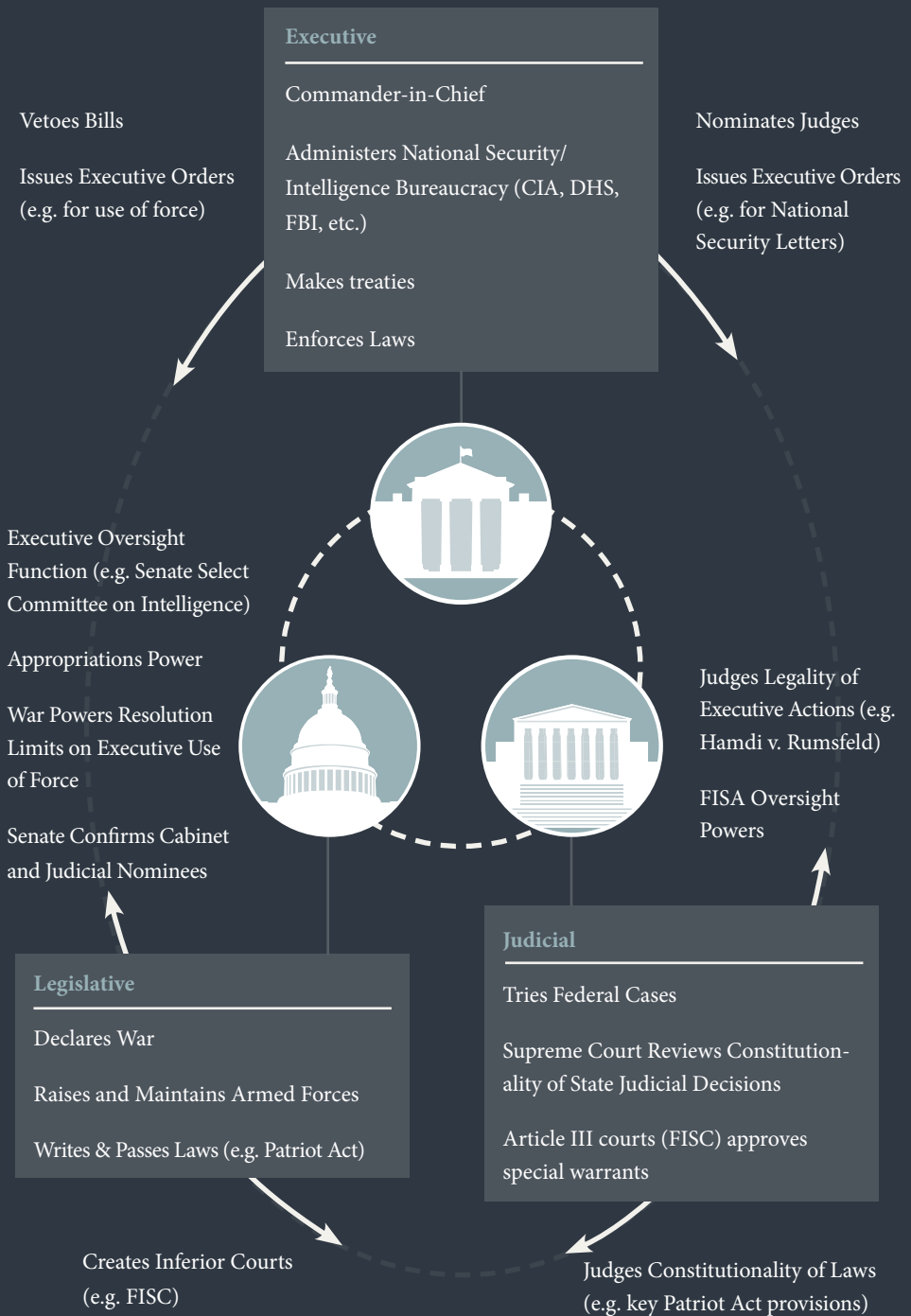
The Authorization for Use of Military Force (AUMF) (2001)

In order to carry out assertive counterterrorism operations abroad, the President often needs more authority than the Article II powers outlined in the Constitution. On 14 September 2001, Congress responded to al Qaeda's attacks on New York and Washington by passing the Authorization for Use of Military Force (AUMF). The AUMF is a public law, but it differs significantly from the other national security laws outlined in the following section. It deserves special attention because of the degree to which the Executive Branch relies on it for counterterrorism programs. The AUMF states:

The President is authorized 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 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.⁴

The Act explicitly empowered the President to take military action against al Qaeda and its affiliates and represents the ceding of power from Congress to the executive during wartime. The law met the requirements set out by the controversial *War Powers Act of 1973*, which stipulates that Congress must authorize the President's extended deployment of military forces abroad. Notably, it was the first AUMF that permitted action against persons or organizations as opposed to states.

THE SEPARATION OF POWERS



Although Congress clearly intended the AUMF to authorize military force, both the Bush and Obama Administrations have relied on the AUMF as the primary legal justification for a number of controversial counterterrorism programs implemented by non-military personnel. National security lawyers in both Administrations argue that the AUMF provides the President with the authority to conduct all necessary operations that are an inherent aspect of war, such as intelligence collection and detention of combatants.

President Bush used the Act to justify warrantless electronic surveillance, coercive interrogations and ad-hoc military tribunals for suspected terrorists at Guantanamo Bay. For example, to conduct the surveillance program, in which the NSA warrantless monitored and collected the electronic communications of suspected terrorists located in the United States and individuals abroad, the Bush Administration explicitly claimed that the AUMF gave it the necessary authority:

In the specific context of the current armed conflict with al Qaeda and related terrorist organizations, Congress by statute has confirmed and supplemented the President's recognized authority under Article II of the Constitution to conduct such warrantless surveillance to prevent further catastrophic attacks on the homeland.⁵

President Bush's reliance on the AUMF, however, was over expansive. Today, many aspects of the Bush Administration's interpretation of the actions warranted under the AUMF have eroded. Judicial and legislative pressure eventually forced Bush to cede that the AUMF did not provide sufficient authority for warrantless surveillance and brought the program back under the oversight of the judicial branch. In 2006, the Supreme Court struck down the Guantanamo Bay military tribunals in *Hamdan v. Rumsfeld*. In that case, the Court found that the military tribunals in fact violated standing law in the Uniform Code of Military Justice, as well as the Geneva Conventions. The Supreme Court explicitly noted that, "there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter" previous military tribunal authorizations.⁶

Despite a more conservative interpretation of the authority afforded the President under the AUMF, the Obama Administration continues to rely on the law for many of its most important counterterrorism programs and policies. Nearly ten years after 11 September, the AUMF remains a crucial aspect of the national security legal framework.

FOUR IMPORTANT NATIONAL SECURITY LAWS, AND WHY THEY MATTER

Beyond the Constitution and the AUMF, the foundation for much of the modern national security system dates back to the years following the Second World War, when, for the first time in history, the US stood astride the global stage like a colossus. As the US shifted from fighting hot wars in Europe and Asia to waging the Cold War against the Soviet Union, the government crafted new legal mechanisms in order to manage the emerging existential conflict.

In the 21st century, threats of terrorism and nuclear proliferation have replaced the competition between the superpowers. To deal with these new threats, the US government has continued to refine, however imperfectly, its laws to address the security challenges to the nation in an ever-evolving global landscape. Presidents most often look to these laws when they share a strong nexus with domestic issues and political concerns. The following laws are perhaps the most important legal devices used to define and implement the national security policy today.

The National Security Act (1947)

The National Security Act of 1947 is the fundamental blueprint for the modern national security bureaucracy in the post-WWII political order. The Act remains bedrock law concerning the governance of intelligence and national security issues.⁷

In passing the Act, Congress sought to “provide a comprehensive program for the future security of the United States,” mandating a major reorganization of the foreign policy and military establishments of the US Government. Notably, the Act:

- *Centralized control of the US Armed Forces.* The Army, Navy, Marine Corps and newly created Air Force were placed under the Department of Defense (DoD) and instructed to report to the new cabinet-level Secretary of Defense. A later amendment to the Act also established the Joint Chiefs of Staff (JCS) to further integrate military policy for the President and top policymakers.



President Truman signs the National Security Act Amendment of 1949 in the Oval Office.
(Source National Archives and Records Administration.)

- *Founded the National Security Council (NSC).* The NSC is an executive council that advises the President on national security affairs, establishes executive control over foreign policy and directs covert action.
- *Established the Central Intelligence Agency (CIA).* This new organization's mission was to conduct all-source analysis, clandestine operations and covert action. The Act limited CIA's power, however, stating that the organization would have neither law enforcement powers nor domestic security functions.

One of the main purposes of the National Security Act was to centralize the national security decision-making process. In doing so, the Act reaffirmed the central role of the executive branch on national security-related issues, an authority over which the President already had a great deal of formal and informal control.⁸

- This centralization of control forced the entrenched national security bureaucracy—a motley series of quasi-independent, military-dominated organizational fiefdoms—to work together in a reasonably cohesive manner, despite fierce resistance from various established agencies and departments.⁹
- The Act also institutionalized the business of spying and intelligence gathering, which had been performed in an informal manner dating back the Revolutionary War; with CIA's founding, many national

security successes and failures could be assigned to—or blamed on—that organization.

The National Security Act and subsequent amendments also provided an oversight framework for Congress. Under various provisions, most notably the ‘Fully Informed Clause,’ the Act requires that the President notify Congress about US intelligence activities. Amendments to the Act have further strengthened Congress’ oversight role.

- The amended Act restricts the usage of funds for covert action prior to production of a signed, written document called a **Presidential Finding**, and mandates that the President inform Congress of any covert action, or changes to previously approved covert actions, as soon as possible.
- The President can limit reporting of covert actions under “extraordinary circumstances;” the President must nonetheless report the findings as soon as possible after the fact and produce a written statement indicating why this lack of reporting was warranted.

Importantly, any exceptions to the President’s overall ‘duty to report’ are intended to be limited to covert actions and are not related to traditional clandestine intelligence collection activities.

The Foreign Intelligence Surveillance Act (FISA) (1978 and 2008)

FISA allows the US government to electronically collect “foreign intelligence information” from “foreign powers” and “agents of foreign powers,”—which may include US citizens and permanent residents—suspected of engaging in espionage and violating the law in US-controlled territory.

In late 2005, the press revealed that President Bush authorized the NSA to conduct a warrantless electronic surveillance program that circumvented the FISA process.¹⁰ In the wake of these revelations, the White House officially admitted that the program allowed the NSA to target international communications with a US nexus of individuals connected to al Qaeda without obtaining FISA warrants. What later became popularly, if erroneously, known as ‘warrantless wiretapping’¹¹ served as the impetus for the passage of the *FISA Amendments Act of 2008*.¹²

The FISA Amendments Act of 2008:

- Introduced a number of added oversight and reporting requirements stipulating that Congress play a more active role in reviewing the government's use of FISA. As a result of the amendment, relevant Senate and House committees will receive from the Attorney General a semi-annual report on electronically surveilled targets.¹³
- Strengthened the FISA court's role in protecting US citizens' privacy at home and abroad. The FISA amendment prohibited the US government from invoking war powers or other authorities to supersede surveillance rules in the future.
- Protected telecommunication companies that had cooperated with the warrantless surveillance program from litigation.
- Relaxed requirements to provide detailed descriptions of surveillance targets and increased the government's ability to conduct warrantless surveillance timelines to 72 hours under exigent circumstances.¹⁴

The USA-PATRIOT Act (2001, reauthorized in 2005)

The **Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act** of 2001 (aka the USA-PATRIOT Act) was passed shortly after 9/11 and was designed to facilitate intelligence collection and sharing within the Intelligence Community, particularly within US borders and by law enforcement agencies.

- The Act increased the ability of law enforcement agencies to search records, eased restrictions on foreign intelligence gathering in the US and extended the definition of 'terrorism' to include domestic terrorism. For instance, the FBI used a USA-PATRIOT Act-sanctioned tactic colloquially known as a 'sneak and peek' to break into al Qaeda operative Najibullah Zazi's car in New York City. As a result of doing so, the FBI discovered he had bomb-making recipes on his laptop.¹⁵
- The Act authorized 'roving wiretaps' which enable authorities to track all communication associated with an individual or group instead of a particular number—that is, to track all email, text, and even dis-

posable cell communication associated with a suspect or suspects. Although Congress had originally intended the roving-wiretap provision to ‘sunset’ at the end of 2005, they have renewed it twice, most recently in February 2010.

- The Act expanded the use of **National Security Letters** (NSLs), which allow the FBI to search certain telephone, email, and financial records without a court order. NSLs are written commands comparable to an administrative subpoena and give government agencies responsible for certain foreign intelligence investigations (principally the FBI) issuing authority. Though originated in the 1970s, the USA-PATRIOT Act expanded the FBI’s ability to use NSLs to access the records of people suspected of being foreign agents. Notably, 47,000 NSLs were issued in 2005, compared with 8,500 in 2000.

Intelligence Reform and Terrorism Prevention Act (IRTPA) (2004)

In response to recommendations made by the National Commission on Terrorist Attacks Upon the United States (popularly known as the 9/11 Commission), Congress passed the **Intelligence Reform and Terrorism Prevention Act** in 2004. IRTPA, combined with Executive Order 12333, established the Director of National Intelligence (DNI) to oversee the Intelligence Community, causing the largest bureaucratic restructuring of the national security bureaucracy since 1947.¹⁶

- The DNI became the statutory head of the Intelligence Community as well as the President’s “principal advisor...for intelligence matters related to national security,”¹⁷ supplanting the Director of CIA, who since 1947 had served in that function.
- *IRTPA* also established the *National Counterterrorism Center* (NCTC) and the *National Counterproliferation Center* (NCPC), interagency organizations dedicated to coordinating and integrating analysis of terrorism threats and halting nuclear proliferation and related technologies, respectively.

Some controversies emerged during the Congressional IRTPA debate, most of which involved jurisdictional concerns held by the Pentagon. For example, some expressed concern that a DNI with control of defense intelligence assets



President Barack Obama meets with NCTC Director Michael Leiter, center right, leadership and analysts in the secure video teleconference room at the National Counterterrorism Center in McLean, Va, Oct. 6, 2009. (Official White House Photo by Samantha Appleton)

could undermine the chain of command between the Secretary of Defense and field commanders, especially during a time of crisis. To counter this criticism, the Bush Administration pushed for compromises that protected the Pentagon's sphere of authority while still creating a national intelligence authority to focus, guide, and coordinate the Intelligence Community.

It remains unclear whether the IRTPA has enhanced US intelligence capabilities and lowered US vulnerabilities to terrorist attack. For instance, the ODNI's Inspector General in early 2009 publicly released a scathing report faulting the Office for evolving into a bureaucratically bloated organization that has so far failed to achieve its overall mission.¹⁸ The report stated:

- “Many ODNI employees understand the objectives of IRTPA but do not know how the ODNI is implementing those objectives.” Also, “the majority of the ODNI and IC employees (including many senior officials)...were unable to articulate a clear understanding of the ODNI’s mission, roles, and responsibilities with respect to the IC.”¹⁹
- The ODNI staff’s authorities are perceived to remain unclear, encouraging some agencies “...to go their own way, to the detriment of the unified and integrated intelligence enterprise envisioned by IRTPA.” Compounding this issue is the fact that IC computer systems are “largely disconnected and incompatible.”²⁰

It remains to be seen whether further amendments to IRTPA will change the ODNI in a meaningful manner as the US moves to confront challenges in the 21st century.

CONSEQUENTIAL CASE LAW

Despite the fact that national security case law continues to evolve, two of the three commonly cited cases in this arena were settled by the Supreme Court over fifty years ago: *United States v. Curtiss-Wright Export Corporation* (1936) and *Youngstown Sheet & Tube Co. v. Sawyer* (1952). Both defined the modern national security paradigm and the relationship between the three branches of government as we interpret it today.

United States v. Curtiss-Wright Export Corporation (1936)

Curtiss-Wright is significant for its broad interpretation of the Presidential prerogative to determine the US role in foreign affairs. During the mid-1930s, Bolivia and Paraguay were locked in a vicious conflict over the Chaco border region, where oil deposits were mistakenly thought to exist. Congress passed legislation in 1934 granting President Roosevelt the authority to prohibit the sale of arms by American companies to those countries. Roosevelt then implemented the embargo, but a US-based company, the Curtiss-Wright Export Corporation, kept selling weaponry to the belligerents. Indicted for violating the embargo, the corporation challenged its conviction in court. Specifically, it argued that Congress had illegitimately delegated its power to the President.²¹

- The Supreme Court sided 7-1 with the US government, stating that it was “dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the *sole organ* of the federal government in the field of international relations.”
- *Curtiss-Wright* gave legitimacy to the idea of Presidential dominance in determining foreign policy – including national security issues. However, this broad interpretation was later challenged in the *Youngstown* case, where the Supreme Court suggested that the *Curtiss-Wright* decision narrowly dealt only with the issue of Congressional authorization.²²

Youngstown Sheet & Tube Co. v. Sawyer (1952)

The *Youngstown* case the Supreme Court continued to delineate the contours of Presidential powers as they relate to domestic actions with foreign policy ramifications. In 1952, during the Korean War, a nationwide steel strike threatened to bring the US war effort to a halt. As a precautionary measure, President Truman issued Executive Order 10340, commanding his Commerce Secretary to seize domestic steel mills. President Truman claimed authority to do so as Commander-in-Chief to maintain the flow of military goods to the Korean Peninsula.²³

- The Court rejected Truman's claim by a 6-3 margin, stating, "we cannot with faithfulness to our constitutional system hold that the Commander-in-Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's law-makers, not for its military authorities."
- A concurring opinion noted, "Congress has reserved to itself the right to determine where and when to authorize the seizure of property in meeting such an emergency. [The President's order] violated the essence of the principle of the separation of governmental powers."

One widely-cited opinion from this case established the idea of a "zone of twilight" of overlapping authorities between the executive and the legislature. When the President takes measures that are against Congressional wishes, the opinion declared, his "power is at it lowest ebb." Conversely, when the President acts with the consent and support of Congress, his power is at its apex. Hence, it is often important for the President to work with Congress to achieve certain national security goals, instead of working at loggerheads.

Hamdan v. Rumsfeld (2006)

Hamdan is perhaps the most consequential national security-related Supreme Court decision in the post-9/11 era because it constrained the power of the President to try suspected terrorists. Salim Hamdan, a Guantanamo Bay detainee who admitted to being Osama bin Ladin's driver, brought a habeas corpus suit challenging the legality of the military commissions created to try him and other Guantanamo Bay detainees.

- The Supreme Court held that the military commissions were unlawful because they violated the Geneva Conventions. Specifically, the commissions implemented by the Bush Administration were held to violate the basic protections afforded enemy combatants under Common Article III of the Conventions.
- Among other concerns, the military commissions were faulted for forbidding a defendant from seeing—or even knowing about—certain evidence used against him, and for allowing statements made under coercion to be admitted as evidence.

After the Supreme Court's ruling, new military commissions were created that provided greater protection for the rights of detainees. This case also opened the door to other challenges to executive power and limits to the AUMF. Hamdan was found guilty of material support for terrorism and sentenced to a five-and-a-half year prison sentence, with five years credit for time served at Guantanamo. In 2009, he was deported and is now living in Yemen.

EXECUTIVE ORDERS AND PRESIDENTIAL DIRECTIVES

The President may execute the laws or give direction and guidance on national security policy through an **Executive Order** (EO). Executive Orders do not require Congressional approval, but they have the force of law if made in pursuance of an Act of Congress that gives the President discretionary power. An early precursor to an Executive Order occurred when President George Washington declared in 1793 that the US would remain neutral during a time of Anglo-French belligerency; he made this 'Neutrality Proclamation' despite Congressional authority over matters of war and peace.²⁴

Along similar lines, a National Security Directive—sometimes called a Presidential Directive, but whose formal title usually changes with a transfer of power between administrations—is drafted by the National Security Council (NSC) and carries legal force when signed by the President.²⁵ There is no substantive legal difference between a Presidential Directive and an Executive Order, and both can be challenged in the courtroom or through Congressional intervention.²⁶

Below are several examples of terrorism-related Presidential Directives issued in the past 20 years:

- Ronald Reagan's **NSDD-180**, which involved anti-terrorism issues in civil aviation;
- Bill Clinton's **PDD-62**, which established the Office of the National Coordinator for Security, Infrastructure Protection and Counterterrorism;
- George W. Bush's still-classified **NSPD-9**, which is the cornerstone for the US government's strategy to eliminate al Qaeda;
- Barack Obama's **PPD-1**, which organizes his National Security Council System.

The Intelligence Community's Most Important Executive Order: EO 12333

Executive Order 12333, also known as "**United States Intelligence Activities**," designates the role and purpose of the sixteen agencies (or components of agencies) constituting the US Intelligence Community. Issued by President Reagan, this Order defined the purpose of the US intelligence effort as one that would, "Provide the President...with the necessary information on which to base decisions concerning the conduct and development of foreign, defense and economic policy, and the protection of United States national interests from foreign security threats."

- The Executive Order was intended to "enhance human and technical collection techniques" as well as bolster the IC's ability to detect and counter "international terrorist activities and espionage."
- Further, EO 12333 states that both the head of the requesting agency and the Attorney General must personally approve any "electronic surveillance, unconsented physical search, mail surveillance, physical surveillance, or monitoring devices" of US citizens.

The directive also bans assassination by US government officials. However, the term 'assassination' is not defined in the Order and is subject to interpretation. As the US combats terrorism worldwide, it remains controversial whether the targeted killings of al Qaeda members in foreign countries violate the letter or the spirit of this Order.²⁷

In July 2008, President Bush amended EO 12333, further strengthening the DNI's role in managing the Intelligence Community.

PUBLIC INTERNATIONAL LAW

Finally, the growing body of public international law plays a significant role in the calculus of how the US approaches national security issues, especially in times of conflict. Since public international law governs the legal relationships between and among nation-states, American security and counterterrorism action relies upon these treaties and norms of conduct.

International law most directly impacts US national security through a web of treaties, executive agreements and other customary legal mechanisms such as the Geneva Conventions and United Nations Security Council resolutions. While the US acts in concert with international organizations to achieve certain security goals, the US also reserves the right to pursue its own national objectives independent of international guidelines. This is especially true when confronting the nebulous threat of international terrorism, as international law has yet to produce a comprehensive mechanism to approach the problem.

There are several nascent international judicial systems, but they lack mechanisms to punish offenders without the specific assistance of nation-states. While there is precedent for courts to be created for specific occasions—the Nuremberg trials following WWII and the International Criminal Tribunal for Rwanda are two examples—and while the International Criminal Court (which the US, China, Russia and other countries have declined to join) exists to prosecute genocide and other crimes against humanity, the ability of the international community to develop a global judicial system remains in its infancy. For the foreseeable future, then, countering terrorists will remain a national, and not an international, enterprise.

*Terrorism means premeditated,
politically motivated violence
perpetrated against noncombatant
targets by sub-national groups or
clandestine agents.*

Terrorism definition provided in 22 USC § 2656f(b)

DEFINING TERRORISM IN US LAW AND POLICY

The United States Government is obliged to protect its citizens and interests from ‘terrorist’ threats. The term *terrorism*, however, is frequently misused by the media, academics, politicians, policymakers and the public at large. In order to understand the US government’s multi-billion dollar anti-terrorism apparatus, as well as its legal and policy stances toward this subject, developing a clear understanding of what terrorism is—and what terrorism is not—is critical. This chapter will examine how the terms terrorism and *counterterrorism* are used (and misused) by the US government in the effort to combat this threat. It will also delineate the moral dilemmas that terrorism poses for the state—and for the terrorists themselves.

THE DIFFICULTY WITH DEFINING TERRORISM

There is no standard definition for terrorism, and therefore efforts to describe it in precise terms often get stuck in a “semantic swamp.”²⁸ Originally a positive term to describe those who supported Robespierre and the Terror in France in the mid-1790s,²⁹ terrorism today has almost exclusively negative connotations. In its maximalist form, terrorism “always involves violence or the threat of violence.”³⁰ National security expert Bruce Hoffman offers a slightly narrower definition of terrorism, piquantly noting, “virtually any especially abhorrent act of violence that is perceived as directed against society...is often labeled ‘terrorism.’”³¹

In the post-WWII era, the term terrorism has been most commonly used to refer to violent political actions directed at civilians by non-state actors. As such, states battling an insurgency or rebellion frequently exploit the term ‘ter-

rorist' in order to deny their adversaries legitimacy. For example, after the US invasion of Iraq in 2003, the multiple groups that arose to violently confront US and Iraqi forces were often lumped together as 'terrorists' by Baghdad and Washington, despite their differing strategies, tactics, doctrines and targets.³²

Although precisely defining a terrorist adversary is critical to effectively countering the threat it poses, the US government surprisingly has no common definition of *terrorism*. This definitional deficit also means various government agencies are able to define the term to their own parochial specifications, and such specified definitions may drive agencies' individualized policy approaches to the problem.

- In its 2002 National Security Strategy, the White House defined terrorism as, "premeditated, politically motivated violence perpetrated against innocents,"³³ an overly broad definition that could conceivably encompass all forms of violence perpetrated by states and non-state actors.
- The Department of Defense defines terrorism as, "the calculated use of violence or threat of violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological."³⁴
- The Department of Justice and the FBI define terrorism as, "the unlawful use of force or violence against persons or property to intimidate or coerce a Government, the civilian population, or any segment thereof, in furtherance of political or social objectives."³⁵
- Most of the Intelligence Community, including CIA, NCTC and the Department of State, utilize the terrorism definition provided in **22 USC § 2656f(b)**: "premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents."³⁶

THE FOREIGN TERRORIST ORGANIZATION LIST AND LEGAL SANCTIONS

Title 22 of the US Code defines a *terrorist group* as, "any group practicing, or which has significant subgroups which practice international terrorism."³⁷ To

this effect, the Department of State maintains an official ‘Foreign Terrorist Organization’ (FTO) list that specifies which groups the US Government believes promote terrorism. Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (8 USC § 1189), the Secretary of State can declare an organization a FTO if:

- The entity is foreign.
- It engages in terrorist activity.
- The terrorist activity threatens the security of the United States or its nationals.³⁸

Being placed on the FTO list results in severe penalties for the affected organization and its members:

- Anyone who provides “material support or resources” to the FTO may be prosecuted and imprisoned for up to fifteen years.
- The Secretary of the Treasury can immediately freeze the FTO’s funds within the United States.
- The FTO’s members cannot enter the United States legally.

The process to place individual groups on the FTO list can become politicized, as some policymakers have tried to broaden the list to incorporate fully state-run organizations. In January 2007 the US Senate voted 76-22 in favor of a non-binding resolution to designate the Iranian Revolutionary Guard Corps (IRGC), an Iranian state-run organization, a FTO.³⁹ Had the Department of State declared the IRGC a FTO—it declined to do so—the US could have levied severe financial sanctions against the organization, as well as opened individual Iranian government employees to worldwide US targeting operations.

US DEFINITIONS OF INTERNATIONAL TERRORISM

Title 22 also defines *international terrorism* as, “terrorism involving citizens or the territory of more than one country.” The best-known transnational terrorist group with a global agenda is al Qaeda, which has perpetrated attacks worldwide in pursuit of its articulated goal of establishing a pan-Islamic state.

- Other transnational groups, such as Lashkar-e-Tayyiba in Pakistan and the Mujahidin-e-Khalq Organization in Iraq, have perpetrated attacks on foreign (albeit neighboring) soil.
- *State-sponsored terrorist groups* can fall under this definition as well. Hezbollah—which holds seats in Lebanon’s parliament—is considered a terrorist group by the Department of State because it has committed attacks outside its home country. In addition, if the Secretary of State asserts that a country has “repeatedly provided support for acts of international terrorism,” US foreign aid will be cut off to the country.⁴⁰

Interestingly, most terrorist groups are not ‘international’ terrorist groups but are rather local organizations with parochial concerns. For example, of the 45 groups the State Department officially designates as FTOs, only a handful have committed attacks outside of a specific geographical region, or have clearly defined internationalist designs.

DEFINITIONS OF TERRORISM UNDER INTERNATIONAL LAW

Various international conventions since the 1960s have attempted not only to define and combat terrorism, but also to establish legal mechanisms to punish terrorist offenses. Efforts to comprehensively define terrorism under public international law have met with the same frustrating difficulties that have bedeviled US agencies. Since 9/11, the most important mechanisms crafted by international bodies to approach the threat of international terrorism are:

- *United Nations Security Council Resolution (UNSCR) 1373*: Passed in September 2001, this resolution decreed that States should, “prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other countries and their citizens.” It also decreed that terrorist acts should be established as “serious criminal offences” under each state’s domestic law.⁴¹
- *UNSCR 1566*: Passed in 2004, this resolution builds on UNSCR 1373 by calling upon member States to, “extradite or prosecute any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens.”

TERRORISM AS A TOOL TO ACHIEVE NATIONHOOD?

It is easy to condemn all terrorism as evil, but countries such as Ireland, Israel and Algeria won their independence from colonial authorities and achieved nationhood in part by committing 'terrorist' actions. Many of these actors later gained state-sanctioned legitimacy and ironically are now victims of violence from other terrorist groups.



Irish nationalists violently targeted British officials and symbols of British rule in the early decades of the 20th century; **Éamon de Valera**, a leader of the Easter Rising of 1916 who barely escaped execution at the hands of British authorities, eventually became the head of the Irish state.



The Stern Gang's July 1946 bombing of the King David Hotel, the British headquarters in Palestine and Transjordan, killed 91 people and remains one of the most lethal terrorist attacks conducted in Jerusalem in the 20th century. **Menachem Begin**, one of the Gang's leaders, later became Prime Minister of the independent State of Israel.

Images: Éamon de Valera(c. 1922-30) image is a press photograph from the National Photo Company Collection at the Library of Congress United States Library of Congress

Israeli Prime Minister Menachem Begin (1978) delivers an address upon his arrival in the US for a state visit. Location: Andrews Air Force Base, Maryland. Source:U.S. Air Force



However, since the UN has few enforcement mechanisms to compel states to fight terror, international cooperation among states in combating terrorist groups tends to spring from national self-interest rather than international diktat.

COUNTERTERRORISM

Adding to this definitional confusion is the general state-based response to fight terrorism through mechanisms broadly termed *counterterrorism*. The lack of a uniform definition for terrorism within the US government renders the meaning of counterterrorism vague as well, impacting the ability to craft both strategy and law.

- The Pentagon defines counterterrorism as, “offensive measures taken to prevent, deter, and respond to terrorism.”⁴²
- NCTC only publicly defines counterterrorism on its online Kid’s Page, blandly stating, “Counterterrorism is our way of responding to acts of terrorism. Counterterrorism is not specific to any one field or organization; rather it involves people from all levels of society... Building a counterterrorism plan involves all parts of a society and many government agencies.”⁴³

It remains unclear what these generalities mean in the context of taking action to thwart the terrorist threat.

ONE MAN’S FREEDOM FIGHTER...

By labeling a group a terrorist organization, the state takes a subjective action intended to undermine the moral legitimacy of the group. Specifically, affixing the ‘terrorist’ moniker upon the group is a useful public relations weapon in that it can have a hand in influencing the public’s conception of the group’s nature.⁴⁴ In fact, because the term ‘terrorist’ has such a negative connotation, violent political groups generally eschew the label, preferring instead to be referred to as ‘freedom fighters’ or ‘mujahidin.’

But the state must be judicious about using the terrorist label. Muddying this issue's moral waters is the fact that political violence committed by sub-national groups is oftentimes used as a tool to combat unjust authority or foreign occupation. As Dr. Jeffrey Record at the US Air War College notes,

Condemning all terrorism as unconditionally evil strips it of political context and ignores its inherent attraction to the militarily helpless. This is not to condone terrorism; it is simply to recognize that it can reflect rational policy choice.⁴⁵

Along these lines, violent political groups (such as rebel or guerrilla organizations) oftentimes commit actions that might be considered terrorist actions. Or, as counterinsurgency specialist David Kilcullen noted in 2008, "all insurgents...[commit] gruesome atrocities in the service of insurgent ends."⁴⁶ Yet, for various reasons, these groups avoid the terrorist label.

Even killing one's countrymen in the service of political ends may be seen afterwards as morally justified. In describing the French Underground's tactics during WWII, journalist Bernard Fall noted, "they had to kill some of the occupying forces and attack some of the military targets. But above all, they had to kill their own people who collaborated with the enemy."⁴⁷

Still, it would be remiss to view all terrorist behavior through a relativistic lens. The term connotes violent actions unencumbered by moral codes toward civilians and state infrastructure, and actions of terrorist groups like al Qaeda clearly fall within this standard. While the rules of warfare and other state-sponsored violence theoretically protect noncombatants and respect neutral territory (as well as provide a term for noncompliance with the rules: *war crime*), terrorists respect no rules and "recognize no neutral territory, no non-combatants, no bystanders."⁴⁸ Ultimately, it is this failure to play by the rules of warfare that give the state the moral and legal legitimacy to pursue aggressive counterterrorism actions against these groups and individuals.

*The accumulation of all power,
legislative, executive, and judiciary
in the same hands...may justly be
pronounced the very definition of
tyranny.*

James Madison, Federalist Paper #46

THE BALANCE OF POWERS IN NATIONAL SECURITY

Over 220 years ago, James Madison wisely cautioned against the aggregation of power in one branch of government, noting, “The accumulation of all power, legislative, executive, and judiciary in the same hands...may justly be pronounced the very definition of tyranny.”⁴⁹ However, in questions of war and peace, of security and liberty, the potential for error is higher than usual—and in the effort to prevent the next terrorist strike, some have argued that the White House must have the prerogative to pursue a counterterrorism agenda without infringement by Congress or the Courts.⁵⁰

While this theoretical framework runs counter to the American system of checks and balances in government, it won a number of supporters in the years following 9/11. And, despite the election of a new Presidential administration with different philosophical underpinnings, the notion of a supreme executive in national security affairs still has its adherents today.

In order to protect the nation and its citizens from the tyranny that Madison discussed in 1788—while simultaneously defending the nation and its interests from terrorism—it is integral to understand how the branches of the US government interact, admittedly uneasily and inefficiently, in the national security realm. As Madison noted, “ambition must be made to counteract ambition,” and nowhere is this more true than in the murky world of counterterrorism.

THE PRESIDENT’S POWER

As mentioned earlier in this book, the Constitution and applicable statutes confer upon the executive branch the most amount of national security power



Jan. 23, 2009 "The President meets with his national security and intelligence team in the Situation Room of the White House for the first time." (White House photo by Pete Souza)

in the federal government. In practical terms, the President derives national security power through various mechanisms:

- The President controls multiple national security-oriented federal departments and agencies, including the Department of Defense (DoD), the Department of Justice (DoJ), the Office of the Director of National Intelligence (ODNI), the Department of Homeland Security (DHS) and the Central Intelligence Agency (CIA).
- The executive branch controls the ability of Congress and the Judiciary to access classified information. The executive branch can also de-classify classified information to the public.
- The White House nominates officials for top positions within the national security system. While some are subject to Senate confirmation, many are not, allowing the President to largely pick national security officials of his choosing.
- The President is responsible for authorizing covert action.

The President's centrality in the national security decision-making system exacerbates the usual intergovernmental friction between the legislative and

executive branches. Scholars further note the executive branch's decision-making powers tend to increase in times of conflict or prolonged crisis, often at the expense of the legislative branch's powers.⁵¹ Specifically, in times of crisis the legislative branch often willingly defers power to the executive—or, less charitably, surrenders its explicit or implicit powers and decision-making responsibilities—for the sake of efficiency and speed. For example, seven days after the attacks of 9/11, Congress passed the *Authorization for Use of Military Force* (AUMF), granting President Bush broad powers to pursue the terrorist group al Qaeda. The law 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 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.

This sweeping authorization has since become the touchstone for a variety of the executive branch's national security and counterterrorism decisions—most notably the 2001 invasion of Afghanistan.

The AUMF has also served as the primary justification for the executive branch's more controversial counterterrorism actions, including the establishment of a so-called enhanced terrorist interrogation program and certain electronic surveillance projects. By authorizing these hot-button programs, critics charge that the executive branch has exceeded its statutory authority, as the AUMF was not intended to cover such a broad scope of activities like electronic surveillance.

EXECUTIVE OVERREACH

During times of conflict, the executive branch's relatively unconstrained national security powers pave the way for certain excesses, and even abuses. Until the 1970's and the passage of post-Watergate legislation designed to curb executive overreach, in fact, the President had relatively few constraints on his ability to wield the instruments of national intelligence and diplomatic power.



Los Angeles, California. The evacuation of the Japanese-Americans from West Coast areas under U.S. Army war emergency order. (Russell Lee, Library of Congress)

A few historical examples of executive overreach include:

- In 1942 President Franklin Roosevelt issued EO 9066, ordering the internment of US citizens of Japanese descent who lived on the West Coast.⁵² Years later, EO 9066 was rescinded, and the US Government made a public apology to those citizens forcibly interred during WWII.
- Presidents Kennedy, Johnson and Nixon exploited the Internal Revenue Service (IRS), using it as a national security instrument to collect information and undermine domestic political opponents.⁵³

JUDICIAL PUSHBACK

Following 9/11, a controversial decision made by the Bush Administration to try captured al Qaeda detainees in secret military tribunals led to the seminal case *Hamdan v. Rumsfeld*, which struck down certain broad assertions of executive power. This ruling barred the White House from creating military commissions that denied defendants the presumption of innocence and a public trial, and in doing so claimed that it had violated international law.⁵⁴

- Justice Stevens wrote in the majority opinion that, “The Executive is bound to comply with the Rule of Law that prevails in this jurisdiction,” suggesting the executive branch had not, in fact, complied with the rule of law.
- The President’s actions were also held to have violated Common Article 3 of the Geneva Conventions, which requires that as a ‘law of war’ detainees must be tried by a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”⁵⁵

More broadly, the *Hamdan* case illustrates that despite the executive branch’s sweeping wartime national security power, there is room for maneuver for the other two branches of government to reassert their powers. As Justice Stevens puts it, “Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”⁵⁶

The Courts also have the ability to constrain presidential power of surveillance under the 4th Amendment. For example, the Foreign Intelligence Surveillance Court (FISC) must issue warrants before executive branch agencies can conduct electronic surveillance on foreign powers or international terrorists that have a US nexus. In practice, however, the FISC rarely turns down requests for warrants by the executive branch.⁵⁷

THE LEGISLATIVE CHECK

Congress, through its oversight responsibilities and investigative authority, can check national security overreach by the executive branch. Specifically, validation from and support of Congress and the Courts can lend the White House legitimacy in pursuit of national security objectives, giving it broader latitude to pursue its national security objectives.

Conversely, if the White House generally acts without the consent of the other branches of government, its ability to wield the law in the name of national security is significantly curtailed. For instance, the Reagan White House au-

thorized unsanctioned, covert dealings with Iran and the Contras in Nicaragua, despite explicit laws forbidding such dealings. The resulting Iran-Contra scandal caused Congress—upset that its authority had been undermined by the White House—to pass laws further constraining the President’s ability to engage in covert action.

- Despite its ability to check the executive, Congress often acquiesces to the executive when it comes to foreign affairs and national security-related issues due to ineffective legislative tools, political disagreements and a lack of long-term political will.⁵⁸
- Along these lines, the 9/11 Commission concluded that many aspects of congressional oversight of the IC were “dysfunctional.”

AN ADDITIONAL CONSTRAINT? THE WAR POWERS RESOLUTION (1973)

Following the Vietnam War and the perceived irrelevance of legislative national security powers during that conflict, Congress passed the *War Powers Resolution* (also known as the War Powers Act) in order to strengthen its role in war making process. The Resolution states that the President, acting as Commander-in-Chief, can only commit the US military to hostilities or “imminent hostilities” after a declaration of war, specific statutory authorization, or a national emergency created by an attack on US forces.⁵⁹

The War Powers Resolution also compels the White House to “consult” with Congress prior to hostilities “in every possible instance.” Most controversially, if the President unilaterally makes the decision to commit US forces to hostilities, the Resolution imposes a 60-day ‘clock’—a period during which Congress can debate the action’s legitimacy and legal consequences. If Congress has not explicitly authorized the White House’s action at the end of 60 days, US forces must be withdrawn.

The controversial War Powers Resolution has been unpopular with both Presidents and outside observers who argue that the legislation is not only constitutionally suspect, but also impractical. Every Administration since 1973 has claimed that the Resolution is unconstitutional, as it infringes upon the President’s constitutional authority as Commander-in-Chief.⁶⁰ The Courts have yet to rule on its constitutionality.

According to former Secretaries of State James Baker and Warren Christopher, the War Power Resolution is poorly crafted law because it “too narrowly defines the president’s war powers to exclude the power to respond to sudden attacks on Americans abroad; it empowers Congress to terminate an armed conflict by simply doing nothing; and it fails to identify which of the 535 members of Congress the president should consult before going to war.”⁶¹

Presidents have taken military action without explicit Congressional authorization multiple times since the resolution’s 1973 passage. For instance, President Carter attempted to unilaterally rescue American hostages in Iran in 1980, President Reagan unilaterally bombed Libya in 1986 and President Clinton unilaterally initiated military engagements in Somalia and Kosovo in the 1990s.

Members of Congress may actually prefer that the White House bear the political risks for international conflicts. According to one scholar, Congress often expresses support for US military action despite not having ‘authorized’ the President from engaging in overseas military actions.⁶² This suggests that Members of Congress could demur from making tough decisions in war and peace, leaving the White House to ultimately succeed or fail in these critical national security endeavors.

CONGRESSIONAL NOTIFICATION

The executive branch claims the power to classify documents and programs and the prerogative to withhold classified information from Members of Congress. By doing so, the executive branch can greatly influence the legislative branch’s ability to make competent decisions. Cognizant of this political dynamic, Congress has attempted to maintain a stake in national security affairs by passing laws to ensure they remain as informed as possible on critical national security issues.

The 1947 National Security Act states Congress must be kept “fully informed” of significant intelligence activities; however, under “extraordinary circumstances,” only the so-called *Gang of Eight* must be informed of intelligence

activities rather than the full membership of the congressional intelligence committees. The Gang of Eight consists of the Senate and House Majority and Minority Leaders, as well as the Chairs and ranking members of the House and Senate Intelligence Committees.

The Act does not explicitly define “extraordinary circumstances.” Nevertheless, Congress intended that the Gang of Eight exception would apply only to specific, time-sensitive covert actions, and *not* all intelligence activities.

- The 1991 legislation notes, “This provision [should] be utilized when the President is faced with a covert action of such extraordinary sensitivity or risk to life that knowledge of the covert action should be restricted to as few individuals as possible”.
- If the President finds there are “extraordinary circumstances” and does not immediately inform the committee or the Gang of Eight about the covert action, the President must still ultimately report the activity to the Congress in a “timely fashion” and explain the delay.

Congress and the White House have also disagreed on the meaning of the requirement for reporting in a “timely fashion”. Congress has generally interpreted “timely fashion” to mean within two days, but past Presidents have withheld information for a longer period. This disagreement has led to understandable friction between the two branches.

Hence, each branch of government has its own functions in determining US national security. While the executive branch may be ‘first among equals’ in this regard, both the judicial and the legislative play important roles in constraining the potential for tyranny Madison cautions against, so long as they serve their appropriate roles. For only if policymakers choose to fulfill their appropriate national security responsibilities will the government then have the institutional legitimacy to confront those terrorist adversaries who wish to undermine the US.

An activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.

Covert action as defined by National Security Act Section 503 (e)

COVERT ACTION

Covert action is one of the least understood counterterrorism tools used by the United States government. Led by the White House and overseen by Congress, covert action advances certain national interests overseas under the cloak of deep secrecy and deniability. According to National Security Act Section 503 (e), covert action is:

An activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.

Legal covert actions are undertaken because policymakers—and *not the intelligence agencies*—believe that secret methods are the best way to accomplish specific policy goals.

- Covert actions in the counterterrorism realm range from the seemingly benign, such as the US training other nations' police forces to fight terrorism, to large-scale paramilitary operations, such as have occurred in Afghanistan over the last 30 years.⁶³
- Covert actions are not exclusive to related overt actions, and in fact frequently run in tandem with overt US actions such as military or diplomatic maneuvers.

Covert action encompasses a broad spectrum of activities, but may include:

- *Propaganda*: Intelligence agencies covertly disseminate specific information or perform influence operations to advance foreign policy goals. American law prohibits, however, the use of intelligence agencies to influence domestic media and opinion.
- *Political/Economic Action*: Intelligence agencies covertly influence the political or economic workings of a foreign nation.

- *Paramilitary Operations:* Intelligence agencies covertly train and equip personnel to attack an adversary or to conduct intelligence operations. These operations normally do not involve the use of uniformed military personnel as combatants.
- *Lethal Action:* During times of war or armed conflict, the US may need to use covert lethal force against enemies who pose a threat. Recall, however, that the US formally banned the use of political assassinations in 1976.

One distinction between covert action and other public activities is that American officials can plausibly deny involvement in a covert action. This ability to deny US involvement, however, is predicated upon the covert action remaining secret.

Of course, covert action does not always remain shielded from public view. For example, American covert assistance to the Peruvian Air Force in 2001 in detecting airborne drug traffickers accidentally led to the shootdown of a small floatplane carrying US missionaries near the Amazon river.⁶⁴ Two Americans were killed in the mishap and the event quickly became public; CIA Director George Tenet later called it “my worst day as [Director of Central Intelligence] before 9/11.”⁶⁵

PARAMETERS OF COVERT ACTION

US law authorizes CIA to “conduct covert action activities approved by the President.” The amended Executive Order 12333 (July 2008) further clarifies:

- The National Security Council (NSC) will “consider and submit to the President a policy recommendation, including all dissents, on each proposed covert action.” EO 12333 also tasks NSC with conducting periodic reviews of all ongoing covert action activities, including evaluating their effectiveness and consistency with current national policy, and their consistency with applicable law.⁶⁶
- The Director of National Intelligence (DNI) will oversee and provide advice to the President and the NSC with respect to all ongoing and proposed covert action programs.

The fallout from the mid-1980s Iran-Contra scandal led Congress to pass legislation giving it a more formalized role in the oversight and authorization



After addressing the nation, President George W. Bush meets with his National Security Council in the Presidential Emergency Operations Center Sept. 11, 2001. (White House photo by Eric Draper)

of covert action. In the 1991 Intelligence Authorization Act, Congress established the following procedures for covert action:

- The executive branch must determine through a *Presidential finding* that a specific covert action is necessary to support “identifiable foreign policy objectives” of the US. A finding must be issued within 48 hours after the official policy decision that approves the covert action.
- The CIA Director and the heads of all departments, agencies, and entities of the Government involved in a covert action will keep the congressional intelligence committees—the House Permanent Select Committee on Intelligence (HPSCI) and the Senate Select Committee on Intelligence (SSCI)—fully and currently informed.

COVERT ACTION REPORTING REQUIREMENTS

Congress expects the White House-controlled Intelligence Community to brief all *significant* covert action findings to the full membership of the intelligence oversight committees. Furthermore, the National Security Act of 1947 requires the President to report a finding to the intelligence committees “as soon as possible after...approval and before initiation” of the covert activities. While this would seem to be a clear-cut demarcation of executive responsibilities, legislation nevertheless allows the White House to occasionally circumvent complete reporting requirements.

*Get a good night's sleep and don't bug
anybody without asking me.*

President Richard Nixon

SIGNALS INTELLIGENCE, ELECTRONIC SURVEILLANCE AND FISA

Electronic surveillance is one of the core mechanisms the Intelligence Community utilizes to gather information on foreign adversaries and terrorist organizations. Global electronic intercepts captured by the National Security Agency (NSA) through the catch-all term, signals intelligence (SIGINT), reportedly support more than 60% of the flagship intelligence product, the President's Daily Brief (PDB).⁶⁷ Furthermore, electronic surveillance has been a critical component for the US in combating terror, helping US forces capture or kill multiple terrorist leaders since 9/11.

The government's use of electronic surveillance can prove to be nevertheless controversial. Public revelations in 2005 that President Bush authorized NSA to perform electronic surveillance with a domestic nexus *without* a court-issued warrant resulted in significant debate about the tool's means, legality and effectiveness. This chapter will describe electronic surveillance, the FISA process and the roving wiretap provisions within the USA-PATRIOT Act.

SIGNALS INTELLIGENCE

Collecting intelligence through technical means is one of the foremost mechanisms the US uses to gain advantage over state and non-state adversaries. As former CIA Director George Tenet noted in Congressional testimony in 2000 that this type of data, broadly termed **signals intelligence** (SIGINT), is “critical” for the US to monitor regional conflicts, assess foreign capabilities, protect military forces, stymie terrorism and fight WMD proliferation.⁶⁸ As detailed in EO 12333, the National Security Agency (NSA) is the lead overseas SIGINT collector, and is authorized to “collect (including through clandestine means), process, analyze, produce, and disseminate signals intelligence information



Headquarters of the the NSA at Fort Meade, Maryland. (source NSA)

and data for foreign intelligence and counterintelligence purposes to support national and departmental missions.”⁶⁹

Given this wide range of collection requirements, the overall US endeavor to collect, analyze and disseminate SIGINT is truly a massive one, utilizing space- and aerial-based platforms, surface ships, submarines, and a network of listening posts in overt and covert US facilities scattered throughout the world.⁷⁰ This effort also costs the US taxpayer billions of dollars annually.

The Intelligence Community’s invasive SIGINT collection *outside the US* is permitted under American law as long as the government does not collect on US persons or entities for intelligence-gathering purposes. SIGINT collection without a US nexus has historically generated little controversy within the American political discourse because it doesn’t affect US citizens. In the event US persons are the electronically targeted for intelligence purposes (and not, for example, a criminal investigation), US authorities are first required to procure FISA warrants in order to proceed with the surveillance.

ELECTRONIC SURVEILLANCE WITH A DOMESTIC NEXUS, FISA AND ITS LEGAL BASIS

Electronic surveillance refers to the acquisition of the contents of wire, radio and other electronic communications. It has emerged as a critical tool for detecting and intercepting international terrorists within the United States and overseas.

There are two main frameworks for government authorities to obtain electronic surveillance warrants. One, based on Title III of the US Code, covers surveillance in the investigation of serious domestic crimes. The second, based on the Foreign Intelligence Surveillance Act (FISA), covers foreign intelligence surveillance and serves as the main tool for electronic surveillance of foreign targets and terrorism suspects.

Congress passed FISA in 1978 in the wake of revelations that the White House authorized warrantless surveillance of US citizens. In brief, the legislation stated:

- FISA would be the “exclusive means” governing the use of electronic surveillance in international terrorism and other foreign intelligence investigations.
- The Federal Bureau of Investigation (FBI) and NSA would serve as the lead agencies to gather foreign intelligence relevant to the FISA framework.
- The Intelligence Community would work through the Foreign Intelligence Surveillance Court (FISC) to secure a warrant before undertaking foreign intelligence surveillance of a domestic nature.

Following 9/11, Congress and the White House agreed the IC needed greater flexibility to address the threat posed by international terrorism. Congress therefore passed amendments to the FISA legislation in the USA-PATRIOT Act in 2001.⁷¹ The USA-PATRIOT Act significantly eased the standard required of a federal officer to apply for intelligence collection under the FISA framework. Congress also adjusted and modernized FISA in the Protect America Act of 2007 and the FISA Amendments Act of 2008.⁷²

HOW FISA WORKS

Intelligence agencies do not need to obtain warrants for collecting information on foreign adversaries and foreign terrorists that communicate electronically (i.e. via cellphones) outside the United States. Officials must use a FISA warrant, however, when electronic communications transit or occur within the US, involve US citizens or utilize US corporate entities in some manner. Furthermore, a *significant purpose* of the electronic surveillance must be to obtain intelligence in the US on foreign powers (such as enemy agents or spies) or individuals connected to international terrorist groups.⁷³

In order to receive a FISA warrant, the government must show probable cause to the FISC that the “target of the surveillance is a foreign power or agent of a foreign power.” Furthermore, since the Fourth Amendment to the Constitution protects US citizens, legal residents and US corporations (known as *US persons*) from illegal search and seizure, FISA explicitly states that, “no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the First Amendment of the Constitution of the United States.”

While surveillance of US persons is permitted under FISA, authorities must ‘minimize’ and obscure the collection of information not directly applicable to the intended target. These strict minimization procedures require officials to obscure the identity of any protected communications incidentally captured as part of the surveillance. Unlike Title III criminal warrants, however, minimization occurs after collection under FISA.

CONTROVERSY REGARDING ELECTRONIC SURVEILLANCE

In December 2005, it became public that President Bush authorized the NSA to conduct a *warrantless* surveillance program.⁷⁴ The White House stated that the program targeted the international communications of individuals connected to al Qaeda or other foreign terrorist organizations. Skeptics of the program feared that the President had overstepped the bounds of his authority and spied on Americans. The surveillance activities became known as either the *Terrorist Surveillance Program* (TSP) or ‘warrantless wiretapping.’

As reports of the electronic surveillance efforts gradually became public, some argued the program was necessary to intercept al Qaeda-related communications more quickly than the FISA process allowed. They claimed that the process for obtaining FISA warrants for each individual target prevented the government from obtaining this data in a timely fashion.

As questions about the legality of the surveillance program grew, proponents argued that the President could legally ignore FISA because he possessed the inherent authority to conduct warrantless surveillance for intelligence purposes as part of his constitutional Article II powers as Commander-in-Chief. Furthermore, the Authorization for Use of Military Force (AUMF) provided authority for the President to take these actions.

On the other hand, others argued the President could not completely bypass the FISA process because Congress had explicitly intended FISA to be the “exclusive means” for authorizing this type of surveillance. This perspective indicated that the AUMF was not intended to cover electronic surveillance, particularly since Congress passed the USA-PATRIOT Act to amend various parts of FISA almost immediately after it passed the AUMF. Furthermore, some argued the program offered too few protections to prevent the government from monitoring the communications of innocent Americans and lacked appropriate congressional oversight.

In January 2007, Attorney General Alberto Gonzales informed Congress that the FISC had issued orders authorizing the collection of international communications into or out of the United States when the government had probable cause to believe that the communications belonged to a terrorist organization. Gonzales noted that because of the FISC order, the President would discontinue his authorization of TSP and conduct all electronic surveillance under FISA.

FISA MODERNIZATION

By 2007, many Members of Congress agreed that technological evolutions required ‘modernization’ of the FISA legal framework. One reason for updating the law was that the telecommunications industry had evolved significantly since the inception of FISA in 1978. Most importantly, a large portion of in-

ternational communications moved from satellites, which are ‘radio’ communications under FISA, to fiber-optic cables, which are ‘wire’ communications under FISA.

FISA originally regulated international wire communications only when the surveillance was conducted in the US. Since a significant portion of the global fiber-optic network currently passes through the US, the government argued that FISA should be modified to allow for foreign intelligence surveillance of non-US persons from within the country.

Nevertheless, attempts to modernize FISA risked weakening civil liberties protections by removing the individualized warrant requirement that underpinned the original FISA law.⁷⁵ Some believed that program warrants and longer periods of emergency warrantless surveillance could have further undermined the intent of original protections.⁷⁶ Some further argued the ‘communications revolution’ argument was overblown, and the shift of international communications that from satellites to fiber should not impact the FISA review process. Finally, FISA modernization was viewed as a way to facilitate additional back-door intelligence gathering practices, such as large-scale data mining.

THE FISA AMENDMENTS ACT OF 2008

While a number of FISA-related issues remain for Congress to resolve in the future, the FISA Amendments Act of 2008⁷⁷ (set to expire in 2012) addressed the following issues:

- FISA and Title III remain the *exclusive means* for conducting electronic surveillance.
- In order to conduct electronic surveillance of US persons located outside the country, the government must now proceed through the FISA court order process; previously, the Attorney General could certify this collection under an executive order.
- A provision permits greater use of *program warrants* in order to target broad groups of foreign targets, as opposed to more individualized ones.

- The Attorney General has an extended period during which he can approve surveillance without a warrant in emergency situations.
- Congress granted telecommunications service providers immunity from prosecution for cooperating with government surveillance programs, as long as they received written government assurances about the legality of their cooperation from the government.⁷⁸
- Relevant Senate and House committees will receive from the Attorney General a semi-annual report on FISA-based targets.⁷⁹ In general, Congress included a number of added oversight and reporting requirements in order to play a more active role in reviewing the government's use of FISA warrants.⁸⁰

ROVING WIRETAPS

One of the most controversial provisions of the USA-PATRIOT Act has been the authorization of the use of the electronic surveillance tool called the 'roving wiretap.' Unlike a traditional 'wiretap' where a single line of communication, such as a phone line, is monitored,⁸¹ a roving wiretap follows communication associated with a suspect or suspect instead of a specific number. It has been used with increasing frequency in recent years in response to advances in communications systems, as suspects will routinely utilize multiple electronic means to communicate in an attempt to evade surveillance. A roving wiretap allows authorities to track each new means of communication instead of applying for a new warrant each time.

Roving wiretaps were originally used to target organized criminal syndicates, and are governed under Title III of *The Omnibus Crime Control and Safe Streets Act* of 1968 and its subsequent 1986 amendment, *The Electronic Communications Privacy Act*. This power was only expanded to include surveillance of international terrorist suspects under the FISC's authority; however, following 9/11, it became a new legal authority provided to US officials by the USA-PATRIOT Act.



George W. Bush shakes hands with U.S. Senator Arlen Specter after signing H.R. 3199, the USA PATRIOT Improvement and Reauthorization Act of 2005 in the East Room of the White House. (White House photo by Kimberlee Hewitt)

In 2002, then-NSA Director Hayden argued that countering evolving national security concerns required more flexible legal tools, as terrorists could shift modes of communication just as quickly and easily as criminals. He said,

“We’ve gone from chasing the telecommunications structure of a slow-moving, technologically inferior, resource-poor nation-state”—that is, the USSR—“to chasing a communications structure in which an al Qaeda member can go into a storefront in Istanbul and buy for \$100 a communications device that is absolutely cutting edge, and for which he has had to make no investment for development.”⁸²

Critics argue that roving wiretaps as conducted under FISA as opposed to Title III lacked appropriate checks and balances. After all, the government was neither required to identify the target nor the location of the surveillance to FISC, which some believed allowed the FBI to monitor virtually anyone. This would thus be in violation of the Fourth Amendment that all warrants “particularly describ[e] the place to be searched.” The executive branch has

argued, however, that in a terrorism investigation, requirements to specify the identity and location of the surveillance are oftentimes difficult to meet—for example, if officials were to discover a cellphone number among the possessions of a captured al Qaeda operative, they would want to monitor it despite not knowing the identity of the individual associated with that number.

Although Members of Congress had originally intended the roving wiretap provision to ‘sunset’ at the end of 2005, they have instead renewed it twice, most recently in February 2010. Congress did however add certain new restrictions to roving wiretaps in the USA-PATRIOT and Terrorism Prevention Reauthorization Act of 2005. In this case, the legislation required officials, if unaware of the identity of the surveilled individual, must specify the overall target of the surveillance. If officials could neither specify the individual’s identity nor the locations where the surveillance would be conducted beforehand, they must at the very least send descriptions and justifications of the surveilled locations to FISC within ten days. These fixes are naturally not perfect. However, these cumbersome legislative mechanisms over the roving wiretap issue indicate how the evolving nature of terrorist communications continue to bedevil lawmakers wrestling with the problem, and how easy legal answers to effectively monitor them remain elusive.

Of course it's a violation of international law, that's why it's a covert action. The guy is a terrorist. Go grab his ass.

Vice President Al Gore discussing a possible rendition in 1993, as recounted in Richard Clarke's *Against all Enemies*

RENDITIONS

On the bitterly cold winter day of 25 January 1993, Mir Aimal Kasi, a Pakistani national brimming with contempt for US Middle East policies, stepped out of his Datsun station wagon and onto a busy road next to CIA headquarters in suburban Virginia. Clutching a locally bought AK-47, he opened fire on vehicles idling at a traffic signal, killing two CIA employees and wounding several more.

Kasi fled the scene of his brutal slayings and evaded capture during the subsequent law enforcement manhunt. Within twenty-four hours, Kasi was lounging on a flight bound for Pakistan, where he would remain at large for the next four years.

Eventually, the US located Kasi—with Pakistan’s assistance—in the central Pakistani town of Dera Ghazi Khan, and a joint US/Pakistani team succeeded in capturing him in a daring raid.⁸³ But because Kasi’s murderous actions made him a popular figure in Pakistan, Washington and Islamabad decided to remove him quickly and quietly from South Asia to the US through a process called *rendition*.⁸⁴ Kasi was found guilty of capital murder in a Virginia courtroom and executed in 2002.⁸⁵

The renditions program has emerged as one of the most controversial national security tools utilized by the US government is its program to disrupt terror networks. Reported at great length in the media, the term *rendition* has become shorthand for the White House’s short-circuiting of well-established legal mechanisms to either incarcerate individuals from foreign lands or to transfer suspected terrorists to third countries where they may be subject to harsh interrogation methods. However, the Bush White House was not the first Administration to use rendition as a national security tool – the US has been rendering suspected terrorists since the 1980s. Hence, the use of rendition as a legal mechanism to undermine threats against the US deserves special scrutiny.

DEFINING RENDITIONS & EXTRAORDINARY RENDITIONS

A rendition occurs when the US, working in concert with another country, transfers a captured fugitive or suspect to another country without performing the formal diplomatic mechanisms of extradition.⁸⁶ In a rendition, the captured individual may be transferred from the country where he was captured either to the US or, alternatively, to another foreign country (e.g. from Pakistan to Egypt) without ever setting foot on American soil. As of 2010, most of the individuals in Guantanamo Bay were rendered there after capture in Afghanistan and Pakistan.

- Former CIA Director George Tenet testified that prior to 9/11 the US rendered 70 individuals, at least 20 of which were brought to the US for trial.⁸⁷
- Although the vast majority of individuals rendered by the US have been terror suspects, at least one was involved in the narcotics trade. In 1990, President George H. W. Bush authorized Mexican national Dr. Humberto Alvarez Machain's rendition after Machain was implicated in the torture and murder of a Drug Enforcement Agency officer.⁸⁸ Dr. Alvarez was later acquitted due to lack of evidence.

An *extraordinary rendition* occurs when the US renders an individual *without* the consent of the host country. Indeed, an Office of Legal Counsel (OLC) opinion from 1989 stated that the Executive could authorize US officials to violate the territorial sovereignty of a country that has contravened international legal norms.⁸⁹

Given the complex logistics required for their execution and the diplomatic fiascos they can create, however, extraordinary renditions are incredibly hard to execute. According to Daniel Benjamin, the State Department's counterterrorism coordinator, the US never carried out an extraordinary rendition before 9/11.⁹⁰ Still, former national coordinator for security and counterterrorism Richard Clarke claims that prior to 9/11 he authorized an unspecified number of extraordinary renditions.⁹¹

- CIA in 1998 hatched a plan to snatch Osama bin Ladin from Afghanistan without the consent of his Taliban protectors; had this plan been successfully executed rather than scrapped during the planning stages, it would have been a case of extraordinary rendition.⁹²



Adolf Eichmann inside his glass booth takes notes during his trial in Jerusalem.

- Perhaps the most famous historical case of extraordinary rendition occurred when the Israeli intelligence service tracked, kidnapped and rendered Nazi war criminal Adolf Eichmann from Argentina to Israel in 1960. Despite Eichmann's notoriety and the fair trial he was given, Israel received much criticism for its actions and was condemned by the UN Security Council.⁹³

RENDITION AS A LEGAL MECHANISM

The ability of US officials to legally transfer a suspect out of the country in which he resides—with permission from the host country's government but without adhering to strict extradition procedures—has been authorized by multiple White House directives since the mid-1980s. Congress has been regularly briefed on this rendition procedure.⁹⁴

- President Bill Clinton, in a series of Presidential Decision Directives (PDD) issued in 1995 and 1996, established terrorism as a top intelligence priority and mandated that the intelligence community increase efforts to capture terrorists abroad. Accordingly, the Clinton Administration significantly increased the use of renditions throughout the 1990s.⁹⁵

When properly approved and executed, rendition is legal. In order to render a suspected terrorist to a country other than the US, however, domestic law dictates that officials must prove that it is *more likely than not* that the rendered individual will not be tortured by the recipient country. To satisfy this standard, US officials often seek explicit assurances from the recipient country that the rendered individual will not be tortured.

These assurances may be formal (for example, in the form of an official Memorandum of Understanding, or MOU)⁹⁶ or informal (such as in the form of an oral promise between officials from each nation).⁹⁷ The US will often attempt to perform due diligence on such assurances through diplomatic and intelligence channels.⁹⁸

Once rendered individuals leave US custody, however, the ability of the US to control and monitor their treatment is greatly reduced. “We have a responsibility of trying to ensure that [detainees] are properly treated,” former CIA Director Porter Goss told the Senate in 2005. “And we try and do the best we can to guarantee that. But, of course, once they’re out of their control, there’s only so much we can do. But we do have an accountability program for those situations.”⁹⁹

From a policy perspective, some former CIA officers argue against rendition not because of legal concerns but because of practical concerns, claiming that intelligence gathered from suspects rendered to third-party countries is of relatively little use, and the CIA usually retains custody of the most valuable detainees.¹⁰⁰ “The reason we did interrogations [ourselves] is because renditions for the most part weren’t very productive,” said a former senior CIA official.¹⁰¹

THE CASE FOR RENDITION

Rendition has several advantages over formal extradition:

Terror suspects are removed from the streets. Rather than remaining on the streets while lengthy extradition procedures are carried out, captured and rendered terror suspects are prevented from harming US citizens and interests. The act of rendition may also disrupt terrorist plots in their planning phases, as individuals critical to the successful planning of a terrorist operation are

incapacitated from continued participation in the plot. Presumably, rendered individuals will ultimately be convicted of a crime through a formal legal process, although in recent years this has not always been the case.



Khalid Shaikh Mohammed, phot taken by U.S. forces when KSM was captured.

The US can collect time-sensitive intelligence. Critical information from rendered individuals can be gleaned from rendered suspects' subsequent interrogations. For example, according to CIA director George Tenet's memoirs, after 9/11 mastermind Khalid Shaykh Mohammed (KSM) was arrested in Rawalpindi, Pakistan, and handed over to US custody for interrogation, he quickly provided his debriefers actionable information that was used to arrest the leader and several top members of Jemaah Islamiya, an extremist group based in Southeast Asia.¹⁰²

Some countries prefer rendition to extradition. Certain nations prefer secretly handing suspects over to US custody instead of keeping them in their own detention facilities for domestic legal proceedings.

Reasons for this preference vary widely. Some nations fear their rudimentary legal infrastructure will be unable to handle a high-profile case. Others fear that judges overseeing terror trials will be bribed or susceptible to intimidation. For instance, after the 1993 New York World Trade Center bombing mastermind Ramzi Yousef was arrested in Islamabad, he was rendered to the US because the Pakistani government determined local public pressure to release him from custody would be too great.¹⁰³

Some countries have lower thresholds for criminal convictions than the US. The US civilian legal system has strict standards governing the admission of evidence. Thus, one of the thorniest problems facing prosecutors of rendered suspects is that critical evidence is often either classified, and therefore cannot be presented at trial, or inadmissible due to failure to follow constitutional

evidence gathering procedures. But as Georgetown University professor Daniel Byman noted in Congressional testimony, “Many US allies in the Middle East have a far lower standard of evidence and are willing to bend what rules they have in response to a US request.”¹⁰⁴

Rendering individuals to nations with lower evidentiary standards at trial maximizes the likelihood they will remain incarcerated for a long time and not pose a threat to American citizens and interests, while at the same time ensuring that US intelligence sources and methods remain secret.

THE CASE AGAINST RENDITION

Of course, the grave legal, ethical and political problems posed by renditions should not be discounted:

Rendition violates global norms of conduct. Renditions undermine the notion that the US is a nation of laws that adheres to permissible codes of international behavior. The formal process of extradition involves the issue of a warrant subject to independent review by both the State and Justice Departments; the Secretary of State ultimately signs off on the warrant, making him or her accountable.¹⁰⁵ Due to its secretive nature, however, rendition blurs the lines of accountability and responsibility. As such, the act of rendition irritates US allies and can undermine otherwise friendly international relationships.

Human beings are fallible; the US occasionally renders innocent people. Since intelligence is almost always based on incomplete, perishable information, sometimes the US accidentally renders innocent people. These mistakes make the Intelligence Community—specifically CIA—seem foolish and incompetent, while also undermining the technique’s overall legitimacy.

This is publicly known to have happened at least several times – perhaps the most egregious example being the rendition of Khaled al-Masri, a Lebanese-born German citizen who was mistaken for an al Qaeda operative and rendered to Afghanistan where he was held for several months before US officials

determined that he was innocent.¹⁰⁶ In the past several years, al-Masri has filed several diplomatically embarrassing, high-profile lawsuits against the US and Germany over his treatment.¹⁰⁷

The US has rendered people to countries known to brutalize detainees. The US has been accused of rendering suspects to countries with dubious human rights records, including Egypt, Jordan, Morocco, Syria and Libya.¹⁰⁸ These countries are known to use techniques to elicit information during interrogation outlawed in the US, up to and including torture.

The Convention Against Torture, to which the US is a signatory, guarantees that, “No State party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹⁰⁹ However, Michael Scheuer, former head of CIA’s bin Ladin Group, dismisses these efforts as a “legal nicety” and admits that interrogations performed upon terrorism suspects by foreign countries to which they are rendered “might yield treatment not consonant with United States legal practice.”¹¹⁰

THE RENDITION PROGRAM PRIOR TO 9/11

The first rendition occurred in 1987 when the US tricked Fawaz Younis, a Lebanese national implicated in the 1985 hijacking of TWA Flight 847 and the death of a US Navy diver, into sailing to a boat in international waters. Waiting FBI agents then detained and rendered him to the US for trial and subsequent conviction.¹¹¹

As noted previously, the renditions program had morphed into an actively used counterterrorism tool by the mid-1990s, when President Clinton developed a more robust program to transfer suspects between nations without utilizing the formal mechanisms of extradition.¹¹² For example, according to public reports, Croatian authorities in 1995 detained Egyptian militant Talaat Fouad Qassem, who was wanted in connection with Egyptian President Anwar Sadat’s 1981 assassination. With the help of the US, the suspect was

then rendered back to Egypt.¹¹³ In 1998, the US, with the assistance of Albanian authorities, also rendered several individuals with links to al Qaeda from Tirana to Cairo.¹¹⁴

Several sources suggest that under Clinton-era rules, nominal safeguards were put in place to ensure that prisoners were not abused. For instance, the foreign country to which a suspect was rendered needed to have a legal case pending against the suspect in question prior to rendition.¹¹⁵ Rendered individuals were then supposed to be treated in accordance with international human rights norms, although it was usually unclear whether this requirement would in fact be followed.¹¹⁶ Furthermore, the US would abstain from sending people to certain countries due to their poor human rights record. Daniel Benjamin notes that post-9/11 renditions to nations like Syria were “off the table” during the Clinton years since the US “didn’t do business with those people.”¹¹⁷

THE RENDITION PROGRAM AFTER 9/11

The US ramped up its renditions and detentions program soon after the devastating attacks of 9/11. In the weeks and months that followed, the Intelligence Community scrambled to obtain accurate information about the threat. According to former CIA Director Michael Hayden, questioning detained al Qaeda militants as they were captured worldwide quickly came to be considered the best way to elicit vital intelligence information.¹¹⁸ Hayden believed that the intelligence gleaned from these captured militants was “absolutely irreplaceable” and formed “more than 70 percent of the human intelligence” that became the basis of at least one National Intelligence Estimate on terrorism.¹¹⁹

Major al Qaeda figures like KSM and his replacement Abu Faraj al-Libi were captured and brought to the US or to third countries through the rendition process, even if their legal status remained a question mark.¹²⁰ Renditions and follow-up interrogations of these individuals helped thwart several attacks. For example, Ibn Shaykh al-Libi, an individual who would later gain notoriety for providing false information about links between al Qaeda and Saddam Hussein’s Iraq, provided FBI interrogators actionable intelligence

that thwarted an imminent attack on the US Embassy in Yemen.¹²¹ Presumably, plans exist to render other figures in the al Qaeda hierarchy, including bin Ladin and his deputy Ayman al-Zawahiri, in the event the US or other countries capture them alive.

The number of suspects rendered since 9/11 is classified, but Columbia Law School adjunct professor Scott Horton suggests that roughly 150 individuals were rendered between 2001 to 2005.¹²² In 2007 CIA Director Hayden said as much, stating, “apart from that 100 that we’ve detained, the number of renditions is actually...mid-range two figures.”¹²³ Since most if not all of the individuals who were incarcerated in the Guantanamo Bay prison facility after 9/11 arrived there outside a formal extradition process, it stands to reason that they were brought there through the process of rendition or in a ‘rendition-like’ manner.

The US rendition program began to run into serious legal problems when, after 9/11, the previously small-scale program became a favored tool to deal with terror suspects captured in foreign countries by the host government. While many rendered suspects were most likely part of terrorist groups, their subsequent legal limbo status—whether ultimately detained under US custody or by a foreign country—has proven problematic for the US court systems, causing what one former lawyer at CIA’s Office of General Counsel called, “a nightmare.”¹²⁴

Certain high-profile cases, upon becoming public knowledge, caused firestorms of criticism to erupt. For example, dual Canadian/Syrian national Maher Arar became a cause célèbre after being detained in late 2002 at JFK Airport in New York City on the grounds that he was a member of a foreign terrorist organization.¹²⁵ Arar was flown to Jordan and then on to Syria, where he alleged that Syrian officials tortured him for the better part of 2002 and 2003. After his release from Syrian detention, a Canadian inquiry into the matter judged Arar innocent of all charges, and he received C\$10.5 million and an apology from the Canadian Prime Minister.¹²⁶

THE FUTURE OF RENDITIONS

The Obama Administration is now forced to contend with several festering issues stemming from the rendition policy – including what the US should do with truly dangerous individuals already in custody, as well as the numerous lawsuits brought against both the US government and private contractors the government hired by people caught up in renditions.¹²⁷ Moreover, the current White House has been placed in the unenviable position of defending, on state secrets grounds, actions taken by the previous administration that have been criticized by many in the President's party.

Still, renditions have proved an effective—if contentious—tool in thwarting terror acts. In order to provide some degree of legitimacy for the practice of rendition in US law, as well as spread responsibility for the potentially negative outcomes of rendered suspects to elected officials, lawmakers should be regularly informed of these activities. Of course, it would not be wise to allow a cumbersome, congressional deliberative process to impede critical, fast-moving events on the ground, but since rendition nearly always falls under covert action authorities, the Intelligence Community should fulfill all reporting responsibilities to Congress. By doing so, the IC can avoid the regrettable claim that lawmakers were kept out of the loop on discussions about using such an important but controversial counterterrorism tool.

Advance knowledge cannot be gained from ghosts and spirits, inferred from phenomena, or projected from the measures of Heaven, but must be gained from men, for it is the knowledge of the enemy's true situation.

Sun Tzu, *The Art of War*

NATIONAL SECURITY INTERROGATIONS

On 24 August 2009, Attorney General Eric Holder ordered a preliminary investigation into whether certain CIA employees broke the law during coercive interrogations of suspected terrorists in the years after the 9/11 attacks. While the investigation's scope is limited to determining whether CIA interrogators exceeded the bounds of legal opinions drafted by Department of Justice and CIA lawyers,¹²⁸ the investigation nonetheless represents a pivotal development in the ongoing controversy surrounding the US government's use of coercive interrogation techniques to gain information critical to national security.

Given their importance as a means of collecting vital foreign intelligence information and evidence for law enforcement purposes,¹²⁹ national security interrogations have traditionally played a fundamental role in military and intelligence operations.¹³⁰ Since 9/11 they have become more critical than ever to the success of these operations.¹³¹ The recent debate, both within and outside the Obama Administration,¹³² over whether the government should have utilized military and intelligence resources rather than criminal law enforcement methods to interrogate Umar Farouk Abdulmutallab,¹³³ the alleged 2009 "Christmas Day Bomber," underscores broader concerns over the proper roles of government agencies and personnel in conducting interrogations of individuals believed to be in possession of information critical to national security.

This chapter outlines the legal authorities and historical developments that undergird interrogations conducted to acquire actionable intelligence information, as distinct from ordinary police interrogations performed with a view toward criminal prosecution.

OVERVIEW: CURRENT LAW AND POLICY

On 22 January 2009, President Obama issued an executive order mandating that all government agencies conducting interrogations of persons detained in armed conflict must adhere to the guidelines set forth in the US Army Field Manual on Interrogation (FM 2-22.3 or the Army Field Manual).¹³⁴

Although the order (EO 13491) is binding across all executive agencies and brings US interrogation policy in line with the Geneva Conventions, the White House left open the possibility that new, separate guidelines could be established in the future to govern interrogations conducted by intelligence agencies.

This Executive Order also established a ‘Special Task Force on Interrogation and Transfer Policies’ to evaluate whether the interrogation techniques set forth in the Army Field Manual, “when employed by departments or agencies outside the military, provide appropriate means of acquiring the intelligence necessary to protect the Nation, and, if warranted, to recommend any additional or different guidance for other departments or agencies.”¹³⁵ In fact, the Task Force on Interrogation concluded that “the Army Field Manual provides appropriate guidance on interrogation for military interrogators and that no additional or different guidance was necessary for other agencies.”¹³⁶

Notwithstanding this conclusion, CIA Director Leon Panetta has indicated that he would be willing to request authorization from the President to order the use of techniques that exceed FM 2-22.3 if the information sought thereby is critical to forestalling an imminent terrorist attack on the United States.¹³⁷ In his nomination hearing before the Senate Intelligence Committee, Director Panetta noted, “If we had a ticking bomb situation, and obviously, whatever was being used I felt was not sufficient, I would not hesitate to go to the President of the United States and request whatever additional authority I would need.”¹³⁸

Concurrent with its mid-2009 decision to investigate CIA interrogators, the Obama Administration announced that it would create a new interagency interrogation unit for extracting information from important terrorist suspects in American custody.¹³⁹

- Dubbed the High-Value Detainee Interrogation Group (HIG), the team will be housed within the FBI and charged with a primarily intelligence-gathering function.¹⁴⁰

- The HIG will have authority to operate outside the United States, but it will adhere to the legal boundaries set forth in the Army Field Manual.¹⁴¹

INTERROGATIONS: DEFINITION AND BRIEF HISTORY

The Army Field Manual defines interrogation as:

The systematic effort to procure information to answer specific collection requirements by direct and indirect questioning techniques of a person who is in the custody of the forces conducting the questioning.¹⁴²

According to the Field Manual, successful interrogations yield information that is timely, complete, clear and accurate. The goal of interrogations is to “... obtain the maximum amount of usable information . . . in a lawful manner, in a minimum amount of time.”¹⁴³

Department of Defense and certain Intelligence Community components such as CIA and FBI are the primary agencies responsible for US national security interrogations. Through these entities, the US has implemented a number of interrogation programs in response to various national security threats:¹⁴⁴

- In the Pacific theater during the latter part of World War II, the US Marine Corps established an interrogation program based on establishing rapport with captured Japanese prisoners. This program proved so successful that the Marines in June 1944 were able to provide US commanders with the complete Japanese order-of-battle within 48 hours of arriving on the islands of Saipan and Tinian.¹⁴⁵
- The CIA in the 1960s and early 1980s published interrogation manuals that described various forms of coercion that might elicit information such as “threats and fear,” “pain” and “debility.” Some of these manuals were subsequently amended to state that certain practices are both illegal and immoral.¹⁴⁶
- In the current conflicts in Iraq and Afghanistan, CIA,¹⁴⁷ DoD,¹⁴⁸ and FBI¹⁴⁹ teams have interrogated thousands of individuals without the use of coercive or harsh techniques.

ARMY FIELD MANUAL DIRECTIVES ON INTERROGATIONS



Examples of Prohibited Techniques

According to the Army Field Manual, the following acts are explicitly—though not exclusively—prohibited:

- Forcing a detainee to be naked, perform sexual acts, or pose in a sexual manner.
- Placing hoods or sacks over the head of a detainee; using duct tape over the eyes.
- Beatings, electric shock, burns, or other forms of physical pain.
- “Waterboarding” (usage of term undefined in FM 2-22.3).
- Using military working dogs (usage of term undefined in FM 2-22.3).
- Inducing hypothermia or heat injury.
- Conducting mock executions.
- Depriving the detainee of necessary food, water, or medical care.¹⁵⁰



Examples of Permitted Techniques

The Army Field Manual explicitly authorizes interrogators to employ the following techniques:

- Direct Approach (direct questioning)
- Incentive Approach (trading something the subject wants for information)
- Emotional Approach (linking satisfaction of subject’s dominant emotion to the subject’s cooperation)
 - Love (identifying an incentive for cooperation that can evoke subject’s love)
 - Hate (identifying an incentive for cooperation that can satisfy subject’s hate)
 - Fear-Up (creating fear or identifying it within the subject and linking reduction of fear with cooperation)
 - Fear-Down (mitigating existing fear in exchange for subject’s cooperation)
 - Pride and Ego-Up (exploiting low self-esteem through flattery)
 - Pride and Ego-Down (attacking self-image of subject to induce

him to reveal information proffered to justify or rationalize his actions)

- Futility (convincing subject that resistance to questioning is futile)
- Other Approaches
 - We Know All (convincing subject that any information he has is already known)
 - File and Dossier (reviewing large “file” on subject in his presence)
 - Establish Your Identity (insisting subject has been correctly identified as infamous individual wanted by higher authorities on serious charges)
 - Repetition (repeating question and answer several times to induce boredom and candid responses from subject in his effort to avoid the monotony)
 - Rapid Fire (asking series of questions without allowing sufficient time for response so as to confuse subject)
 - Silence (staring at subject, refusing to break silence with questioning for long time)
 - Change of Scenery (placing subject in more comfortable setting)
 - Mutt and Jeff (making subject identify with one of the interrogators to establish rapport) (requires heightened oversight procedures)
 - False Flag (convincing subject that interrogators are from country other than US) (requires heightened oversight procedures)

A final technique is restricted to individuals not covered by the Geneva Convention Relative to the Treatment of Prisoners of War, and requires stringent oversight procedures for its authorization:

- Separation (i.e. solitary confinement) (denying subject the opportunity to communicate with other detainees in order to keep him from learning resistance techniques or gathering new information to support a cover story; designed to prolong the shock of capture and decrease resistance to interrogation)
 - Physicians for Human Rights has objected to this provision for so-called “unlawful enemy combatants.”
 - It is currently unclear how, if at all, the Obama Administration will interpret this provision given its decision to cease using the term “unlawful enemy combatant.”¹⁵¹

THE EFFICACY OF COERCIVE INTERROGATIONS?

It remains controversial whether coercive interrogation methods effectively elicit timely and accurate information from detainees. A number of officials have offered indications that interrogations are of vital importance to US national security.

- During a 2006 speech, President Bush claimed that CIA's use of "enhanced interrogation techniques" on a number of al Qaeda members protected US interests and gave interrogators information that stopped new attacks from reaching the operational stage.¹⁵²
- Former CIA Director Michael Hayden claimed in 2007 that CIA interrogations of high-value detainees have been "historically the single greatest source of information we've had" on al Qaeda.¹⁵³
- Current CIA Director Leon Panetta echoed Hayden's sentiments, noting that through its interrogation program CIA had "obtained intelligence from high-value detainees when inside information on al Qaeda was in short supply."¹⁵⁴ It is nevertheless unclear whether these interrogations used coercive methods or more traditional means of eliciting information.

Coercive techniques, however, may result in the US obtaining faulty information, which in turn may lead to poor analytical outcomes and misinformed policy decisions.

- Experts disagree whether Abu Zubaydah, one of the first al Qaeda operatives caught after 9/11, provided critical information to US interrogators through enhanced interrogation techniques. According to press reports from 2009 quoting senior US officials, Abu Zubaydah provided the most useful information prior to being subjected to harsh measures, and no significant al Qaeda plot was thwarted due to information gathered through these harsh measures.¹⁵⁵
- According to a Defense Intelligence Agency (DIA) report issued in February 2002, al Qaeda operative Ibn Shaykh al-Libi probably provided false, coerced information concerning a high-level relationship

between al Qaeda and Iraqi leader Saddam Hussein (intelligence used by the Bush Administration to partly justify Operation Iraqi Freedom) after he was detained and possibly aggressively interrogated by a third country.¹⁵⁶

- Psychologists and other specialists commissioned by the Intelligence Science Board issued a report in 2007 claiming there is little evidence that harsh interrogation methods produce better intelligence than traditional interrogation techniques.¹⁵⁷

DEBATE OVER THE LEGALITY OF COERCIVE INTERROGATION

Significant debate about the legality of interrogation policies erupted following revelations that the Bush Administration authorized CIA to utilize “enhanced interrogation techniques” on high-value al Qaeda detainees following the 9/11 attacks.¹⁵⁸ Recent reports suggest that there were sharp disagreements over the use of such techniques even within the Bush White House.¹⁵⁹ Ultimately, the legal controversy’s outcome was decided by a team of lawyers in a small office in the Department of Justice: the Office of Legal Counsel (OLC).

OLC bears responsibility for “provid[ing] authoritative legal advice to the President and all the Executive Branch agencies.”¹⁶⁰ After 9/11, the Office was charged with determining the government’s stance on the legality of coercive interrogation techniques.¹⁶¹ Through a series of classified memoranda it drafted findings that stated that CIA’s enhanced interrogation methods were legal, providing legal cover to interrogators utilizing enhanced interrogation techniques.¹⁶²

The Obama Administration in April 2009 declassified four OLC memos, all of which were subsequently retracted, that provided legal justification for enhanced interrogation techniques.

- An August 2002 memo gave approval for specific coercive techniques, including waterboarding, on grounds that they were not “specifically intended” to cause “severe physical or mental pain or suffering.”¹⁶³

- Three May 2005 memos found that waterboarding and other harsh techniques, whether individually or in concert, did not violate the federal criminal prohibition against torture since CIA had implemented certain safeguards and limitations to the techniques. However, a footnote in one of the memos noted that according to CIA's Inspector General, these rules were not always followed.¹⁶⁴

After releasing the controversial memos, the Obama Administration stated it was not interested in prosecuting current and former CIA officers who carried out coercive interrogations within the confines of OLC's legal reasoning.¹⁶⁵ President Obama initially played down—but did not rule out—the possibility that the lawyers and policymakers who authored these opinions may face civil or criminal penalties.¹⁶⁶

A July 2009 Justice Department Office of Professional Responsibility (OPR) report concluded that the principal OLC lawyers responsible for the memos, John Yoo and Jay Bybee, had committed professional misconduct by failing to exercise independent legal judgment.¹⁶⁷ However, Associate Deputy Attorney General David Margolis overrode that finding in a memorandum of decision he issued following consideration of Yoo and Bybee's responses to the OPR report. Issued in January 2010, the Margolis memo effectively cleared the OLC lawyers of any wrongdoing in their oversight of CIA interrogation practices.¹⁶⁸

In August 2009, the Justice Department appointed a special prosecutor to conduct a preliminary investigation into allegations of abuse by CIA interrogators that first surfaced in a 2004 CIA Inspector General report.¹⁶⁹ The decision to open the probe was controversial and opposed by the current CIA Director and several former Directors. However, the Attorney General has insisted that those interrogators who did not stray beyond the legal boundaries for interrogation set by the Justice Department during the Bush Administration would not be subject to prosecution.¹⁷⁰

HISTORY OF CIA'S ENHANCED INTERROGATION PROGRAM

In the months following the 9/11 attacks, political leaders and the Intelligence Community felt pressure to take steps necessary to prevent future—and possibly imminent—terrorist attacks. Thus, after being given permis-

DOMESTIC LAWS AND INTERNATIONAL TREATIES ON INTERROGATION

Domestic Law	International Law
US Constitution, Fifth Amendment (Due Process)	International Covenant for Civil and Political Rights, Articles 9, 14 and 15. (On arrest, detentions and legal tribunals)
US Constitution, Eighth Amendment (No cruel and unusual punishment)	International Covenant on Civil and Political Rights, Article 7 (Prohibits cruel, inhuman and degrading treatment or punishment of any person)
18 USC §§ 2340–2340A (Federal torture statute – criminalizes acts that occur outside the special maritime and territorial jurisdiction of the United States)	UN Convention Against Torture (Ratified by US with various reservations, understandings, and declarations, including a condition that the definition of torture comport with the federal torture statute)
18 USC § 2441 (War Crimes Act – criminalizes grave breaches of the Geneva Conventions)	Geneva Conventions, Common Article 3 (Prohibits “cruel treatment and torture” of wounded and sick military personnel, prisoners of war, and civilians)
18 USC § 113 (Federal assault statute)	
18 USC § 114 (Federal maiming statute)	
18 USC § 2261A (Federal “stalking” statute)	
10 USC §§ 893, 924, 928, 934 (Uniform Code of Military Justice, articles 93, 124, 128, 134)	
42 USC § 2000dd (Detainee Treatment Act of 2005)	
Pub. L. 109–366 (Military Commissions Act of 2006)	
28 USC §1350 (Torture Victims Protection Act)	



sion by the White House and the Justice Department, CIA began using alternative interrogation techniques to gather intelligence from high-value al Qaeda detainees.¹⁷¹ The subsequent disclosure of these techniques to the public, referred to as ‘coercive interrogation’ or ‘enhanced interrogation techniques,’ fueled an ongoing debate over whether these interrogation techniques are effective, lawful and ethical.

- The CIA program reportedly subjected detainees to such techniques as waterboarding, confinement in a small box, prolonged sleep deprivation and restriction of detainees’ caloric intake.¹⁷²
- In 2004 a civilian contractor working for CIA was convicted of beating to death an Afghani detainee during the course of a two-day interrogation.¹⁷³

In September 2006, President Bush acknowledged the existence of a secret CIA prison system for detention and interrogation of ‘high-value’ al Qaeda members.¹⁷⁴ The program reportedly involved the operation of ‘black sites’ in eight foreign countries where high-value al Qaeda detainees were held incommunicado and subjected to coercive interrogation techniques.¹⁷⁵ CIA also reportedly operated a prison in northern Afghanistan where, in November 2002, a detainee allegedly froze to death after a CIA case officer ordered prison guards to strip him naked and chain him to a concrete floor overnight.¹⁷⁶ Due to popular pressure and the *Hamdan* ruling, the Bush White House closed these black sites in 2006.

FBI INTERROGATION POLICIES¹⁷⁷

According to FBI Inspector General Glenn A. Fine, most of the interrogation policies promulgated by the Federal Bureau of Investigation (FBI)—which are set forth in the FBI Legal Handbook for Special Agents,¹⁷⁸ the Manual of Investigative Operations and Guidelines (MIOG)¹⁷⁹ and the Manual of Administrative and Operational Procedures (MAOP)¹⁸⁰—reflect the Bureau’s primary focus on domestic law enforcement and are less accommodating of coercive techniques than the Army Field Manual.¹⁸¹

The policies are designed to ensure that statements made by witnesses during interrogation (or ‘witness interview’) are voluntary and in compliance with

the Constitution and US statutes. By observing such procedures, the FBI ensures that these statements will be admissible in court. It also ensures the admissibility of other evidence gathered during an investigation that might be collaterally ‘tainted’ by a botched investigation.¹⁸²

The policies also reflect a judgment of efficacy. The FBI has repeatedly stated its belief that the most effective way to obtain accurate information for both evidentiary and intelligence purposes is to use rapport-building techniques in interviews.¹⁸³

FBI interrogation guidelines prohibit interrogators from attempting to obtain statements by force, threats, or promises. The policies also prohibit brutality, physical violence, duress, or intimidation of individuals under interrogation. As such, FBI policy requires interrogators to separate themselves from other agencies that use non-FBI-approved techniques.¹⁸⁴

The FBI adopted this agency-separation policy following two FBI agents’ participation in the 2002 interrogation of Abu Zubaydah, after which the FBI interrogators expressed strong concerns about the techniques employed by their CIA colleagues.¹⁸⁵

- A 2008 investigation by the FBI Inspector General found that the “vast majority” of FBI agents deployed to Guantanamo Bay, Iraq and Afghanistan were adhering to FBI interrogation policies.¹⁸⁶ Of those “infrequent” instances that utilized techniques that would not normally be permitted on US soil, they were sometimes “related to the unfamiliar circumstances agents encountered in the military zones.”¹⁸⁷
- The Inspector General report indicated that FBI interrogators—in accordance with agency policy—were in fact separating themselves from other agencies’ interrogators who used non-FBI-approved techniques.¹⁸⁸

In 2008, the FBI Inspector General testified, “the FBI’s approach [to interrogations of terrorist suspects], coupled with a strong substantive knowledge of al Qaeda, had produced extensive useful information in both pre-September 11 terrorism investigations as well as in the post-September 11 context.”¹⁸⁹

DEPARTMENT OF DEFENSE INTERROGATION POLICIES

The Army Field Manual governs interrogations conducted by or at the behest of military personnel.

CURRENT GOVERNMENT-WIDE LEGAL PROVISIONS

As the legal terrain of interrogation is a complex one, there is extensive and ongoing debate about which laws apply to interrogations conducted by agents of the US government. In any given context, the actions of US interrogators may be constrained by international treaties such as the Geneva Conventions and the Universal Declaration of Human Rights; US statutes such as the War Crimes Act and the Detainee Treatment Act; judicial doctrine interpreting international and domestic law, such as the Supreme Court's decision in *Hamdan v. Rumsfeld*; Executive Orders issued by the President of the United States, which bind all actors in the executive branch, and internal regulations promulgated by the federal agency employing the interrogating agent.¹⁹⁰

Executive Order 13491, issued by President Obama on 22 January 2009,¹⁹¹ goes some distance toward clarifying the murky legal boundaries of interrogation because it applies uniform standards to all executive branch departments and agencies. Executive Order 13491 dictates that all government agencies conducting interrogations of persons detained in armed conflict must adhere to the guidelines set forth in the Army Field Manual, and that such interrogations shall be "consistent with" the requirements of the federal torture statute (18 USC §§ 2340–2340A), the Detainee Treatment Act of 2005 (42 USC § 2000dd), the Convention Against Torture and Common Article 3 of the Geneva Conventions.¹⁹²

The Field Manual does not purport to clarify the precise contours of statutory, constitutional, and international legality with respect to interrogation techniques. However, the Manual expressly prohibits acts of violence or intimidation, including physical or mental torture, and exposure to inhumane treatment, as a means of or aid to interrogation.¹⁹³

The Detainee Treatment Act (DTA) adopts the language of the UN Convention Against Torture (CAT) in prohibiting “cruel, inhuman, or degrading treatment or punishment” of detainees, as interpreted through the Fifth, Eighth, and Fourteenth Amendments to the US Constitution.¹⁹⁴

- When passed in 2005, the DTA applied only to individuals in Pentagon facilities, and not to facilities maintained by other government agencies. However, EO 13491 sets the DTA as a guideline for *all* executive agencies by invoking the Army Field Manual as the government-wide standard for interrogations.¹⁹⁵
- The DTA’s proscription of “cruel, inhuman, or degrading treatment” constitutes a more stringent protection than the mere prohibition of ‘torture’ in the federal torture statute.¹⁹⁶

EO 13491 explicitly disallows US government officers and agents from relying upon interrogation law interpretations issued by the Department of Justice between 11 September 2001 and 20 January 2009.¹⁹⁷ Thus, all government employees must comply with the Army Field Manual guidelines, unless and until further guidance is issued.

PROPOSED LEGAL DEFENSES

As noted in the foregoing discussion, EO 13491 explicitly prohibits reliance upon the Bush-era OLC interrogation memos, certain of which purport to provide legal justification for interrogation techniques generally considered illegal by lawyers and academics. For example, an August 2002 OLC memo suggested that a defendant could raise a necessity—or “choice of evils”—defense to an allegation that the interrogator had violated the federal torture statute or other statutory prohibitions against torture.¹⁹⁸ Another related legal defense proffered by the memo was a self-defense (against the threat of an impending attack on American citizens) theory.¹⁹⁹ While these legal theories have not been rejected by superseding OLC opinions or binding judicial decisions, their validity has been the subject of considerable debate.²⁰⁰

ISSUES MOVING FORWARD

The debate raging over the appropriate means for interrogating Umar Farouk Abdulmutallab highlights the degree to which interrogation law and policy remain unsettled. A number of lawmakers have decried the fact that FBI agents treated Abdulmutallab as a criminal suspect, reading him his legal rights and questioning him with a view toward prosecution in civilian court. They desire that he be turned over to military authorities to be handled as an unprivileged enemy belligerent.²⁰¹



Umar Farouk Abdulmutallab, a Muslim Nigerian citizen who attempted to detonate plastic explosives hidden in his underwear while on board Northwest Airlines Flight 253, en route from Amsterdam to Detroit. Criminal suspect or unprivileged enemy belligerent? (Source US Marshals Office/EPA)

Legislative and executive branch actors will almost undoubtedly be considering and debating the following interrogation-related issues in the weeks and months to come:

Interagency HIG team. What are the precise boundaries of its authority? What will be the role of CIA and the Pentagon in HIG given the team's center of gravity within the FBI? Will HIG-obtained evidence be admissible in federal court?

On 20 January 2010, FBI Director Robert Mueller disclosed that the HIG team was not operational at the time of Abdulmutallab's attempted attack on Northwest Airlines Flight 253. This statement appears to contradict congressional testimony by Director of National Intelligence Dennis Blair indicating that the HIG team should have been used to interrogate Abdulmutallab.²⁰² Shortly after the 20 January revelation, the Obama Administration approved the HIG team's charter and the group became operational.²⁰³

It is an open question whether HIG, even if operational, would have been tasked to interrogate Abdulmutallab. Since Abdulmutallab is not an al Qaeda

leader, he might not be considered “high-value” enough for HIG’s services to be required.²⁰⁴

The feasibility of a single standard. Should the Army Field Manual remain the single standard governing interrogation methods for HIG and across the various components of the US intelligence community? Or rather, should the IC have its own interrogation standard?

The possibility of legislation. Should Congress seek to codify some or all of the reforms undertaken by the Obama Administration? Similarly, should Congress continue to debate the costs, benefits, and legality of coercive interrogation techniques when, as a matter of policy, use of such techniques has already been substantially curtailed?

*Political language...is designed to
make lies sound truthful and murder
respectable, and to give an appearance of
solidity to pure wind.*

George Orwell, 1946

INFORMATION OPERATIONS AND COUNTERTERRORISM

All governments attempt to advance their own interests by influencing foreign and domestic audiences through messaging. In the United States, this official messaging ranges from that performed by benign *public affairs* sections of various government departments, to *public diplomacy* practiced by the Department of State, to the more aggressive *information operations*, *influence operations* and *information warfare* undertaken by the Department of Defense and certain intelligence agencies. Complicating matters is that, in its efforts to influence foreign audiences, the US government must be kept from inappropriately influencing American citizens.

Since the global nature of communications today allows state and non-state actors to amplify their messages to an extent unprecedented in history, it is important to understand the legal framework that constrains the US government. This is especially true given that the domestic press often picks up information aimed at overseas audiences. This chapter focuses upon the broadest of the official messaging categories—information operations (IO) for foreign audiences—and its intersection with US law and counterterrorism efforts. It will also examine how the US attempts to counter terrorist messaging efforts.

DEFINING INFORMATION OPERATIONS

Using information to influence foreign audiences is an essential tool in projecting US power. While crafting official messages to influence foreign nations and governments has long been a staple of American statecraft, its application has only recently been used to advance US interests in fighting terrorism.

Given current US wartime efforts in Iraq, Afghanistan and elsewhere, the Pentagon has become the main disseminator of IO. The DoD dryly defines it as:

...Actions taken to affect an adversary's information and information systems while defending one's own information and information systems. [IO can also include] actions taken in a noncombat or ambiguous situation to protect one's own information and information systems as well as those taken to influence target information and information systems.²⁰⁵

In simpler terms, IO allows the US government to harness and exploit information—during times of war and peace—to persuade or coerce an individual or group to undertake (or decline to take) specific actions.²⁰⁶ From the Department of Defense's perspective, controlling information is as important as occupying physical space with military, diplomatic and intelligence units. The Pentagon's *Joint Vision 2020*, the primary document articulating modern IO doctrine, states that in order to achieve "full spectrum dominance," US forces must conduct operations "...in all domains – space, sea, land, air, *and information*."²⁰⁷

A Pentagon document from 2003 (and declassified in 2006) entitled *Information Operations Roadmap* further highlights the relationship between gaining an informational advantage over one's adversaries—including terrorist organizations—and success on and off the battlefield. It states that:

...the ability to rapidly disseminate persuasive information to diverse audiences in order to directly influence their decision-making is an increasingly powerful means of deterring aggression. Additionally, it undermines both senior leadership and popular support for employing terrorists or using weapons of mass destruction.²⁰⁸

Finally, the government's role in crafting and disseminating IO is usually hidden because knowledge of an American hand in the information would often undermine its presumed political or social impact. As a commander of psychological operations support at Special Operations Command once noted, "We don't want somebody to look at the product and see the US government and tune out."²⁰⁹ Nevertheless, certain more conspicuous IO campaigns—such as dropping leaflets over enemy territory—constitute overt attempts to change perceptions and opinions of an intended audience.



Sgt. 1st Class Dain Christensen, of Company C, 9th Psychological Operations Battalion, places anti-terrorist flyers over graffiti Aug. 16 in Mosul, Iraq. (Photo by Sgt. Jeremiah Johnson, 55th Signal Company)

INFLUENCING AUDIENCES

IO has been compared to other countries' propaganda efforts. But are 'Information Operations' indeed synonymous with 'propaganda?' Although the US government would most likely decline to describe its efforts as such, the Merriam-Webster Dictionary's definition for propaganda—"the spreading of ideas, information, or rumor for the purpose of helping or injuring an institution, a cause, or a person"—is uncannily similar to the Pentagon's definition for IO.

In fact, even intelligence professionals are divided over whether there is any real difference between IO and propaganda. For example, the former commander of the US Army's Fourth Psychological Operations Group, a military unit that produces covert and overt messages to support the US government, acknowledged the apparent double-standard, admitting, "We call our stuff information and the enemy's propaganda," but "some public affairs professionals see us unfavorably...[and call us] lying, dirty tricksters."²¹⁰ Perhaps, then, the difference between IO and propaganda is merely a matter of perspective.

IO IN A COUNTERTERRORISM CONTEXT

Terrorist and extremist groups, such as al Qaeda and Hizbollah, have sophisticated media strategies that allow them to propagate their message to a world-wide audience. An effective, long-term ‘counternarrative’ IO campaign could, in part, stymie an extremist messaging strategy and ultimately protect US interests abroad.

Furthermore, terrorists (and the populations that harbor them) can be influenced by properly executed IO campaigns.

- The US government has widely publicized the various atrocities al Qaeda in Iraq (AQI) has committed against Iraqi civilians since 2004. These efforts have provided local tribal leaders with the intellectual ammunition needed to rally local communities against the group.²¹¹
- In 2006, the US attempted to puncture AQI head Abu Musab al-Zarqawi’s tough terrorist leader image by publicizing a captured video of him sneaker-clad and struggling to correct a simple weapons malfunction.²¹²

On the other hand, by exploiting US reliance on information systems to conduct its military, political and civilian affairs, terrorist and extremist groups could utilize their own form of IO to wreak havoc on US interests. As CIA Director warned in 2001 Congressional testimony, “attacks on our military, economic, or telecommunications infrastructure can be launched from anywhere in the world, and they can be used to transport the problems of a distant conflict directly to America’s heartland.”²¹³ More specifically, he added that, “computer-based information operations could provide our adversaries with an asymmetric response to US military superiority by giving them the potential to degrade or circumvent our advantage in conventional military power.”²¹⁴ While the danger warned about by CIA’s Director has yet to materialize, damage to US information systems remains a concern to American policymakers.

IO’S LEGAL FRAMEWORK

IO’s legal architecture depends upon which government agency is running the operation. For example, CIA conducts influence campaigns as part of its covert action responsibilities; these operations can be legally denied in public, but they have certain carefully delineated reporting requirements to both the House and Senate Intelligence committees. On the other hand, the Pentagon

cannot officially deny the existence of such programs unless operating under covert action authorities.

One legal requirement that is uniform across all US government agencies that conduct IO is a prohibition against directing information operations towards the American public.

- *The US Information and Educational Exchange Act of 1948* (amended in 1972 and 1998)—also known as the *Smith-Mundt Act*—is the cornerstone for public diplomacy in the post-WWII era. The Act prohibits the government from disseminating information within the US that is meant for foreign audiences.²¹⁵
- Several Presidential directives and Executive Orders, such as NSD-77 (1983), PDD-68 (1999), and NSPD-16 (2002) further specify the legal parameters of public diplomacy and information operations. However, as PDD-68 and NSPD-16 are currently classified, the contours of current IO guidelines are unknown to the general public.²¹⁶

Of course, given the interconnected nature of global media and the Internet, clandestine IO efforts often will inadvertently be replayed in the US. As one commentator recently said, “In this day and age it is impossible to prevent stories that are fed abroad as part of psychological operations propaganda from blowing back into the United States—even though they were directed abroad.”²¹⁷ In fact, the Pentagon’s 2003 *Information Operations Roadmap* recognizes this issue and suggests the utility of formally separating public diplomacy from IO, but does not actually provide steps to separate the two disciplines. It remains unclear whether such IO blowback violates US law.

WHEN IO BECOMES PUBLIC...

When exposed in the press, IO campaigns can quickly metastasize into public relations fiascos, setting back overall US strategic goals.

- Several military contractors received contracts worth up to \$100 million for questionable information operations efforts in Iraq, including bribing Iraqi newspaper boards to place pro-US articles in local newspapers. Once exposed in the press, the contractors’ tactics were deemed lawful by a subsequent Pentagon investigation because they were part of a legitimate psychological operations campaign.²¹⁸

- A US military psychological operations unit clandestinely publishes the Iraqi newspaper *Baghdad Now*, but its impact on swaying local public opinion remains unclear. One analyst calls its tone similar to that of “[former Iraqi President] Saddam [Hussein’s] own propagandist” and that its Arabic is “awkward and clearly translated from English texts.”²¹⁹

Still, IO has proven itself in the recent past to be important in deciding the outcome of hostilities, possibly saving hundreds of American and foreign lives. For example, during the 1991 Gulf War, the US military dropped millions of leaflets on Iraqi troops instructing them about how to surrender. Included on the leaflets was information about a ‘surrender hotline’ that Iraqis could receive via their two-way radios. Some believe this campaign helped reduce casualties when US-led ground forces entered Kuwait.²²⁰

THE FUTURE OF IO?

Despite its disadvantages, IO will remain a core part of the US national security policy toolkit for the foreseeable future. It remains to be seen, however, whether the US government will pursue a long-term, multi-agency IO strategy, or whether a specific government agency will take the lead in IO in the future.

Given the problems that large bureaucracies face in properly coordinating intelligence, effective ‘message discipline’—especially over a period of many years against an ever-evolving series of counterterrorism targets—will be especially difficult to sustain with a multi-agency IO strategy.

Furthermore, many Americans are leery about the prospect of their government developing an organ devoted to disseminating information, as it would evoke shades of the nefarious Ministry of Truth in George Orwell’s *1984*.

- A Pentagon effort in 2001 to establish an Office of Strategic Influence (OSI) in order to “influence the hearts and minds of the opposition” met with fierce criticism when news of this organization came to light; then Secretary of Defense Rumsfeld claimed in 2002 to have closed it down, but subsequent news reports suggested the office’s responsibilities were merely shifted to other departments.²²¹

- The Obama Administration shuttered OSI's successor, the DoD's "Office for Support to Public Diplomacy" in 2009 and then devolved responsibility for messaging to regional military combatant commanders in an effort to distance itself from previous practices.²²²

Due to the concern over a shift toward a single IO organ, the ad hoc nature of the US government's current counterterrorism IO strategy, mostly pursued by the Pentagon but also pursued by CIA and other intelligence agencies, will likely remain in place. Still, the development and muscular articulation of a 'counternarrative' to combat terrorist and extremist media messaging should not just be an academic exercise but a core aspect of US counterterrorism and counterinsurgency strategy. As counterinsurgency expert David Kilcullen recently noted:

"...along with other Western countries the United States must also, as a matter of priority, articulate and enact its own narrative that explains and demonstrates to what end American actions are being taken, and why the world's population would be better off participating in the international community under U.S. leadership than accepting [al Qaeda] domination and the takfiri extremist agenda."²²³

Detractors have commented that the US has had limited success in establishing an effective counternarrative against its terrorist adversaries, especially al Qaeda. For instance, one RAND researcher in 2006 noted that the US has "so far failed to conduct anything approaching an effective counterideological campaign" against al Qaeda and its allies, and that efforts to undermine terror groups' extreme viewpoints clash with "liberal notions about the importance of religious liberty and the need to maintain the separation of church and state."²²⁴ While these criticisms are valid, the need to develop a strong countermesssage challenging the violent ideas espoused by terror groups—and then sustain credible media platforms to broadcast this message—will be critical to discrediting the ideological justifications undergirding the menace of international terrorism.

*The CIA employs lawful, highly precise, battle-tested tactics and tools against al Qaeda and its violent allies.**

CIA spokesman, October 2009

*If the circumstances of these killings have been reported accurately, the USA has carried out an extrajudicial execution, in violation of international law.***

Amnesty International report after an al Qaeda operative's death in Pakistan, May 2005

* Ambinder, Marc. "Igniting the Debate over Obama's Secret War." *The Atlantic.com*. 21 October 2009.

** "Document – USA: An Extrajudicial Execution by the CIA?" Amnesty International. AI Index: AMR 51/079/2005. 18 May 2005.

TARGETED KILLINGS AND THE DRONE WAR

The air is crisp and clear on 5 August 2009, the last day of Baitullah Mehsud's life.²²⁵ As leader of Tehrik-e-Taliban Pakistan (more commonly known as the Pakistani Taliban), Mehsud has orchestrated scores of suicide attacks perpetrated by his group, as well as Prime Minister Benazir Bhutto's assassination. But this morning he is relaxing, enjoying a leg massage on the roof of a South Waziristan house and breathing in the late-summer air. Suddenly two Hellfire missiles launched from a US Unmanned Aerial Vehicle (UAV) collide with the house and detonate, incinerating Mehsud, his wife, and nine others.²²⁶ A week later, President Barack Obama reported, "we took out" Mehsud, confirming it was indeed a US strike that felled the Taliban commander.²²⁷

Policymakers in Washington and Islamabad were pleased with the US air strike that eliminated Mehsud, but such targeted killings raise a slew of thorny questions: Is the targeted killing of a terrorist a legitimate legal tool, or an extrajudicial execution? Does killing a foreign national on foreign soil violate national sovereignty? What evidence was used to determine Mehsud's guilt, and who selected him for liquidation? And even if a targeted killing can be justified domestically, does such a unilateral action violate international law, thereby giving rise to the possibility of criminal sanctions being brought against US personnel and policymakers? This chapter first addresses these complex legal issues and later provides an overview of the drone war over the skies of Pakistan and other countries.

REASSESSING THE ASSASSINATION BAN

The most critical legal question raised by the targeted killing of a suspected terrorist is one of classification; should the lethal action taken be classified as

an assassination? Executive Order (EO) 12333 states, “No person employed by or acting on behalf of the US Government shall engage in, or conspire to engage in, assassination.” Therefore, if targeted killings are classified as assassinations, the US program to lethally eliminate terrorists is in violation of this Executive Order.

Current US government interpretation of EO 12333 holds that targeted killings of suspected terrorists are not assassinations, and are therefore permitted under domestic law.²²⁸ This ban on assassinations was implemented in 1976 after it came to light that CIA officers—at the behest of the White House—had tried unsuccessfully to kill foreign heads of state.

While EO 12333 does not define the term ‘assassination,’ the US government interprets it narrowly to mean the intentional killing of a political leader, and the US generally does not consider terrorist leaders to be political leaders.²²⁹ Furthermore, US officials have interpreted EO 12333 to mean that enemy commanders may be targeted during wartime. Thus, the ‘decapitation strikes’ against Iraqi leader Saddam Hussein at the beginning of Operation Iraqi Freedom in 2003 were indeed legal.

The US has also claimed that terrorist groups pose an imminent threat to US national security since at least the late 1990s, providing an additional self-defense rationale for US forces to legally target terrorist individuals and organizations for capture-or-kill operations. For example, after the 1998 al Qaeda attacks on US Embassies in Kenya and Tanzania, President Clinton authorized in a classified presidential finding the use of lethal force against al Qaeda.²³⁰ Clinton’s National Security Advisor later testified to Congress that then-Justice Department rulings did not prohibit “our effort to try to kill Bin Laden because it did not apply to situations in which you are acting in self defense.”²³¹ In the aftermath of 9/11, President Bush built on President Clinton’s 1998 finding by signing a classified presidential finding authorizing the capture and killing of al Qaeda operatives worldwide, clearing the way to further target the terrorist group.²³²

THE MURKY LEGALITY OF TARGETING TERRORISTS

The US government has argued that a program to target and kill terrorists is fully compliant with domestic and international law. Legal rationales for the program include:

- The Authorization for the Use of Military Force (AUMF), which was passed in September 2001. AUMF permits the President to “use all necessary and appropriate force...in order to prevent any future acts of international terrorism against the United States.”²³³ The White House interprets this statute to allow targeted killings of al Qaeda operatives.
- Article 51 of the UN Charter proclaims that states have an “inherent right of individual or collective self-defence if an armed attack occurs against [them].”²³⁴ The US argues that lethal preemptive strikes against al Qaeda and its allies are legal since they are necessary to defend against imminent attacks.²³⁵
- The ‘law of armed conflict,’ which permits attacks on enemy combatants even if they are not engaged in hostilities at the moment of the attack. The US argues that al Qaeda operatives are enemy combatants and therefore can be lawfully attacked in foreign countries such as Pakistan & Yemen. Local government approval for the attack—or at minimum a secret understanding with the local government—negates concerns about violating the country’s sovereignty.

Critics contend that US targeted killings are illegal, and argue:

- The International Covenant on Civil and Political Rights (ICCPR) declares, “Every human being has the inherent right to life...No one shall be arbitrarily deprived of his life.”²³⁶ States must therefore follow standard due process procedures when ordering strikes on suspected terrorists. These procedures ensure that the use of force is absolutely necessary and used only to counter an imminent threat.²³⁷ Because targeted killings are not thought to meet standard due process procedures, they violate ICCPR and are extrajudicial executions.

- Under Article 3 of the 1949 Geneva Convention, individuals who are not actively engaged in hostilities cannot be murdered or subject to violence, torture, or cruel treatment.²³⁸ Targeted killings via missile strikes or small unit incursions are illegal under Article 3 because they usually cause the deaths of innocent bystanders.
- Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War states that lawful combatants must have a commander, wear an insignia, operate in accordance with the law of armed conflict, and carry weapons openly.²³⁹ The operation of drones does not comport with the “open-carry” condition,²⁴⁰ and therefore violates human rights law and the law of armed conflict.

Indeed, the international community has paid heed to these criticisms. In October 2009 the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions sent a report to the UN General Assembly expressing concerns that US strikes violate international humanitarian and human rights law.²⁴¹

ADVANTAGES TO TARGETING TERRORISTS

Beyond the legal explanations of self-defense, the targeted killings program provides numerous operational advantages to the US counterterrorism mission.

Active terrorists are eliminated. The US program has eliminated numerous top al Qaeda leaders—individuals who would presumably be plotting to attack the US and its allies if still alive. In 2008, the US successfully killed (among others) al Qaeda senior military commander Abu Layth al-Libi, al Qaeda’s WMD chief Abu Khabab al-Masri, and al Qaeda-Pakistan head Abu Haris.²⁴²

Plots are disrupted & remaining terrorists spend less time planning attacks. Presumably, the remaining al Qaeda operatives following a targeted killing spend time worrying about their physical safety—time that is not spent putting together operations against US civilian and military installations. The ever-present threat of aerial assault also forces terrorists to train clandestinely rather than in the open, limiting their operational abilities. As journalist Peter Bergen noted, the US targeted killing campaign “...certainly has hurt al Qa-

eda's leadership, which increasingly has had to worry about self-preservation rather than planning attacks or training recruits.”²⁴³

Risk to US personnel is mitigated. Since the US's preferred method of killing utilizes missiles fired from airborne drones, pilots are not placed in harm's way.

Collateral damage is minimized. Deploying US troops to capture or kill a single person often results in a messy, bloody affair, especially when the troops are deployed in hostile territory. For example, US ground forces in 1993 tried to capture associates of Somali clan leader Mohammad Farah Aidid in Mogadishu, Somalia; the resulting melee killed 18 US servicemen and hundreds of Somali militia and civilians.²⁴⁴ By contrast, targeted strikes from a single airborne platform, rather than flattening an entire neighborhood, let military officials precisely pinpoint the location for the hit.

TARGETED KILLINGS' DISADVANTAGES

Despite its benefits, the targeted killing program nevertheless raises other troubling ethical and political concerns. These include:

Violations of national sovereignty: Lethal US strikes on foreign soil may constitute violations of national territorial sovereignty, even if they do not violate domestic US law. Although it should be noted that many of these strikes occur in areas that the nominal state government does not fully control—such as the Federally Administered Tribal Areas (FATA) in Pakistan—whether or not a particular place has fallen into ‘failed state’ status is often subject to debate.

Even if there is a secret understanding between the head of a foreign country's government and the US over targeting specific individuals, the rest of the foreign country's political structure may be unaware of the relationship. For instance, after a September 2008 US Special Forces ground assault into the FATA resulted in the deaths of at least 15 people, Pakistan Army Chief of Staff Afshaq Kayani angrily stated, “...no external force is allowed to conduct operations inside Pakistan” and the military would defend its territorial sovereignty “at all costs.”²⁴⁵

Backlash from targeted killings' aftermath: Targeted killings are often highly unpopular among the local population in targeted countries. Civilians are more often than not killed in these strikes, and collateral damage greatly angers the local population. Recent analysis suggests that 250 to 320 noncombatants have been killed since 2006, with each strike killing between a few and a dozen individuals.²⁴⁶ However, at least one drone strike in Pakistan in June 2009 killed more than 60 people, most of whom were unlucky civilians.²⁴⁷ Properly assessing civilian casualties, however, remains difficult since militants targeted have incentive to exaggerate the number of deaths for propaganda purposes.

US international credibility is undermined: By pursuing terrorists in other countries and killing them, the US undermines its global credibility as the upholder of international laws and norms. One potential consequence is that countries providing the US intelligence information vital to counterterrorism efforts may stop doing so if they perceive that the US will use the information to commit extrajudicial executions. Furthermore, targeted killings may provide certain undemocratic regimes the excuse to execute political enemies in the name of fighting terrorism.

Intelligence is lost: When a high-level terrorist is killed, the knowledge he possesses about his confederates and his organization's future plots is also destroyed, denying intelligence services the opportunity (through interrogation, interception of the terrorist's communications, etc.) to reap valuable insight from him.

THE WAR OF THE DRONES

The US government considers missile-enabled UAVs—that is, drones—an essential weapon in its counterterrorism arsenal. Indeed, CIA Director Leon Panetta calls the program “the only game in town in terms of confronting or trying to disrupt the al Qaeda leadership.”²⁴⁸ And one recent analysis bears out Director Panetta's faith in the program: more than half of the CIA's “twenty most wanted ‘high-value targets’” have been killed through drone strikes.²⁴⁹

So convinced is the Obama Administration by the program's efficacy that it has increased missile strikes in the FATA dramatically since taking over from the Bush White House. A recent study identifies roughly 80 drone strikes in Pakistan since 2006, and over 40 strikes in 2009 alone.²⁵⁰

In fact, DNI Blair said in February 2010 that it is permissible, with specific per-



A fully armed MQ-9 Reaper taxis down an Afghanistan runway. (U.S. Air Force photo/Staff Sgt. Brian Ferguson)

mission from the White House, to lethally target US citizens in other countries who have joined al Qaeda.²⁵¹ The targeted person would have to meet certain standards and pose “a continuing and imminent threat to US persons and interests,” said one former intelligence official.²⁵² Of course, this policy raises troubling questions about whether the US President should have the power to order the killing of US citizens overseas without due process of the law.

Moreover, it remains unclear—due to the secretive nature of the decision-making process—precisely how the US government determines whom to strike. Specifically, what evidence is used when making targeting plans? And how carefully is this evidence vetted to ensure a high degree of success? In addition, there seems to be no overall consensus within the US government on how to determine whether a terrorist target is ‘proportional,’ or what is an acceptable threshold for civilian casualties.

- The US military uses a formula to determine where and whom to strike. According to Scott Silliman, the Executive Director of Duke University’s Center on Law, Ethics and National Security, it involves “a very sophisticated target-review process that checks and cross-checks any potential target with regard to constraints of international law, appropriateness of choice of munitions, blast effects as they relate to collateral damage, etc.”²⁵³

- CIA's review process is more secretive, but both the CIA Director and its legal department likely sign off on each strike before it is carried out.²⁵⁴

Finally, some suggest the drone war, while tactically effective, is undermining the US's ability to prosecute a long-term counterterrorism strategy in the region. For example, two counterinsurgency specialists recently argued that "Devoting time and resources toward killing or capturing "high-value" targets—not to mention the bounties placed on their heads—distracts us from larger problems...Our experience in Iraq suggests that the capture or killing of high-value targets has only a slight and fleeting effect on levels of violence."²⁵⁵

Ultimately, the drone war will continue for as long as there remains American political will for it and as long as no international consensus emerges challenging its legality. While some in the domestic and international legal community believe that the US is engaging in extrajudicial executions, the legitimate need for the US to protect itself from future terrorist attacks—and the unique American ability to do so via armed drone attacks, absent a new shock to the political system—will most likely trump critics' concerns for the foreseeable future.

OTHER COUNTRIES USE TARGETED KILLINGS

The US is not the only country that has lethally attacked terrorist groups and individuals in the name of national security.



Since at least the 1970s, the State of Israel has utilized special tactical units and missile strikes to eliminate terrorists responsible for attacks upon Israeli civilians and Jewish targets.



Beginning in late 2007, Turkey has occasionally mounted air assaults into Iraqi territory in an effort to eliminate Kurdish militants that menace the Turkish state. In February 2008, Turkish ground forces entered Iraq for the same purpose.²⁵⁶



In February 2008, Columbia attempted to crush the Revolutionary Armed Forces of Columbia (FARC) by attacking the leftist terrorist group's bases in Ecuador. During its offensive, Columbia killed at least one of FARC's top leaders hiding in the neighboring country.²⁵⁷



Fighting terrorism is like being a goalkeeper. You can make a hundred brilliant saves but the only shot that people remember is the one that gets past you.

Paul Wilkinson, Chairman of the Advisory Board of the Centre for the Study of Terrorism and Political Violence at the University of St Andrews, 1992

DOMESTIC COUNTERTERRORISM: ROLES, RESPONSIBILITIES, AND LEGAL AUTHORITIES

In the spring of 2007, a rash of firebombings in the Denver neighborhood of Cherry Creek destroyed two sport utility vehicles and damaged five others.²⁵⁸ Local law enforcement officials, unsuccessful in their initial efforts to apprehend the perpetrator of these acts of domestic terrorism, requested assistance from the Colorado Information Analysis Center (CIAC), a state ‘fusion center’ combining federal, state, local and tribal authorities. Analysts at the CIAC responded by pooling relevant intelligence gathered by the agencies it represented and producing a report on the suspect that included a description of the suspect’s vehicle.

One day after the seventh attempted firebombing, a Denver Police Officer out on a ‘saturation patrol’ in pursuit of the perpetrator pulled over a vehicle that looked similar to that detailed in the CIAC report and detained its driver. The suspicious vehicle was found to contain seven improvised incendiary devices that were intended for use in future attacks and the driver, a radical environmentalist linked to domestic terrorism group the Earth Liberation Front, was sentenced to 12 years in prison after pleading guilty to one count of using an incendiary device and one count of second degree arson.

In the effort to combat terrorists on US soil, intelligence and law enforcement agencies may have access to resources not available in international investigations; however, the Constitution obliges national security professionals to contend with more limits to their power. Domestic counterterrorism efforts have three main objectives:

- Collect intelligence to disrupt attacks against the homeland
- Protect critical infrastructure
- Investigate and prosecute those responsible for attacks against the homeland

Today, the FBI and DHS are the principal agencies responsible for domestic counterterrorism activities, but CIA, NCTC and various local law enforcement agencies also play key roles.

As the Denver anecdote illustrates, given the wide range of counterterrorism activities conducted by a number of scattered federal, state and local agencies, domestic counterterrorism requires a high degree of interagency & interjurisdictional cooperation and information sharing. With the creation of DHS in 2002, legislative action and agency initiatives have sought to foster such cooperation, to varying degrees of success.

THE DEPARTMENT OF HOMELAND SECURITY

The Department of Homeland Security's authorizing statute, *The Homeland Security Act of 2002*, nominally gives it primary authority over attack-prevention efforts in the United States, as well as recovery efforts if such a terrorist attack should occur.²⁵⁹



- More than twenty DHS component agencies carry out missions related to protection of the border (Customs and Border Patrol [CBP]), transportation (Transportation Security Administration [TSA]) and consequence management (Federal Emergency Management Agency [FEMA]), among other critical counterterrorism missions. DHS also participates in government-wide efforts to share counterterrorism information and intelligence through what is known as an *Information Sharing Environment* and seeks to share information with state, local, and tribal governments through state-run fusion centers.²⁶⁰
- However, Section 101(b)(2) of the Act states that, “primary responsibility for investigating and prosecuting acts of terrorism shall be vested not in the Department, but rather in federal, state, and local law enforcement agencies with jurisdiction over the acts in question.” Thus, since terrorism is often prosecuted as a Federal crime, the Department of Justice remains the lead agency for terrorism investigation and prosecution efforts.

DHS is responsible for *Critical Infrastructure Protection* (CIP), a mission that presents unique legal challenges. CIP involves ‘hardening’ critical infrastructure and resources—such as nuclear plants, water systems, and power grids—against terrorist attack.

The CIP programs operate pursuant to three legal authorities. The Homeland Security Act of 2002 charges DHS with recommending measures necessary to protect all critical infrastructure and key resources in the US.²⁶¹ Homeland Security Presidential Directive 7 designates the DHS Secretary as the principal federal official to lead critical infrastructure protection efforts of federal departments and agencies, state and local governments and the private sector.²⁶² The Critical Infrastructure and Information Act, noted below, provides another set of legal tools.

DHS is not always legally equipped with the means necessary to achieve its legally authorized goals. For example, most of the critical infrastructure and key resources DHS is charged with protecting are owned and controlled by private entities, many of whom are reluctant to share information about their infrastructure vulnerabilities because they do not wish to disclose trade secrets or fear that such disclosures would expose them to potential civil liability.²⁶³ DHS largely lacks the means to compel disclosure of such information.

The *Critical Infrastructure Information Act*, enacted in conjunction with the Homeland Security Act, seeks to increase voluntary disclosure by protecting certain information disclosed to DHS pertaining to critical infrastructure from Freedom of Information Act (FOIA) requests, state and local disclosure laws and use in civil litigation.²⁶⁴ However, the critical infrastructure exemption from FOIA requests has been criticized for creating a loophole through which a company can shield information on environmental or safety hazards from the public view.²⁶⁵

DHS has also faced criticism in the past both for how it distributes counterterrorism funding to states and localities and for how it conducts risk assessments. The 2006 National Infrastructure Protection Plan, for example, identified nearly three times more potential terrorism targets in Indiana than in California.²⁶⁶ Today, more counterterrorism funds from DHS are distributed

based on risk, although all states are still guaranteed a minimum percentage of funding through 2012.²⁶⁷ The Urban Areas Security Initiative prioritizes funding for ten ‘Tier One’ urban areas, which include Los Angeles, New York, Philadelphia, Washington DC and the San Francisco Bay area.²⁶⁸

There is also disagreement about how to measure DHS’s progress in meeting its overall mission. Some argue that DHS should spend more of the money it is appropriated on all-hazards management rather than on counterterrorism alone, since Americans face a greater risk from natural disasters than from terrorism, and an all-hazards approach would allow government to prepare for both.²⁶⁹ Others argue that DHS should utilize a cost-per-life-saved metric when distributing money and resources.²⁷⁰ Since these remain unanswered questions, DHS’s proper role in the domestic counterterrorism mission will likely remain a source of contention among intelligence professionals, policy-makers and the public.

THE FEDERAL BUREAU OF INVESTIGATION

The FBI retains primary authority to investigate and disrupt terrorist activity in the United States, coordinating counterterrorism activities through its Joint Terrorism Task Forces (JTTFs). The first JTTF was established in New York City in 1980, but after 9/11, FBI Director Mueller instructed all 56 FBI field offices to establish JTTFs, and today there are over 100 operating in every major city in the United States.²⁷¹



JTTFs bring together local representatives from up to 35 federal agencies, as well as local law enforcement officers within a particular jurisdiction. The facilities are funded and managed by the FBI, and the FBI provides additional financial support to detailees from other agencies by funding overtime work and reimbursing travel expenses, as well as sponsoring security clearances.²⁷² JTTFs are primarily responsible for terrorism investigations and other terrorism-related operations unrelated to ongoing prosecutions.²⁷³

JTTFs have been successful in disrupting terror plots and initiating terrorism prosecutions around the country, and the JTTF model continues to enjoy sup-

port from Congress and the Obama Administration. In 2009, JTTF investigations led to terrorism-related arrests in North Carolina,²⁷⁴ New York,²⁷⁵ and Texas,²⁷⁶ among other states.

The FBI has come under criticism, however, for a possibly botched JTTF investigation of Major Nidal Malik Hasan, who in November 2009 killed 12 fellow servicemen at Fort Hood, Texas.²⁷⁷ Though the Washington DC-area JTTF investigated communications between Hasan and a foreign al Qaeda figure, it did not alert the US Army about his suspicious contacts. In response to criticism that it failed to foresee the threat, the FBI has responded that privacy laws often hamper its ability to share information about the US citizens it investigates.

THE NATIONAL COUNTERTERRORISM CENTER

NCTC, a component of the *Office of the Director of National Intelligence* (ODNI), was established by the *Intelligence Reform and Terrorism Prevention Act* (IRTPA) of 2004, and operates pursuant to Executive Order 13354.²⁷⁸ Before 2004, the organization had existed as the *Terrorist Threat Integration Center*.



In accordance with Executive Order 13354, NCTC serves as the primary federal organization for analyzing and integrating all intelligence pertaining to counterterrorism, “excepting purely domestic counterterrorism information.”²⁷⁹ Both Executive Order 13354 and IRTPA stipulate that NCTC may receive and disseminate information among federal, state and local authorities if it is necessary to fulfill its mission.

However, NCTC’s access to other agencies’ information unrelated to counterterrorism is limited; ODNI and the Justice Department have executed a Memorandum of Agreement (MOA) outlining when NCTC may access databases containing non-terrorism-related information. The purpose of the agreement was to regularize the process by which NCTC can access information not originally collected for intelligence purposes.²⁸⁰

The agreement only grants NCTC permission to access information about US citizens if it is “reasonably believed to constitute terrorism information.”²⁸¹ If it is later determined that such information is not terrorism-related, it must be “promptly removed from NCTC’s systems.”²⁸² The MOA further mandates that NCTC analysts “may not ‘browse’ through records...that do not match a query with terrorism datapoints, or conduct ‘pattern-based’ queries or analyses.”²⁸³

CENTRAL INTELLIGENCE AGENCY

Since the reforms of the Church/Pike era in the 1970s, CIA employees’ participation in domestic intelligence collection and law enforcement activities has been restricted.



Nevertheless, since 9/11, CIA has stationed case officers and analysts at many JTTFs around the country.²⁸⁴

Though CIA employees are still not permitted to act in a law enforcement capacity, those working at JTTFs do share terrorism-related intelligence with the JTTFs and help plan FBI operations.²⁸⁵

Executive Order 12333 and its 2006 amendment govern CIA’s activities within the US, which only permit the Agency to “participate in law enforcement activities to investigate or prevent clandestine intelligence activities by foreign powers, or international terrorist or narcotics activities.”²⁸⁶ Thus, any CIA activity conducted in conjunction with US law enforcement or within the United States must have a foreign intelligence rationale.

In addition, CIA also operates a National Resources (NR) Division, which is responsible for recruitment of sources and assets within the United States.²⁸⁷ NR seeks to gather information from US citizens who make frequent trips overseas, as well as foreigners living temporarily in the United States.²⁸⁸ Its goal is to collect information from cooperative US citizens and visitors who have access to countries and locations where CIA does not have strong contacts of its own.²⁸⁹

Though it is allowed to collect information that is publicly available and to interview US citizens, the National Resources Division’s activities must fall within the scope of Executive Order 12333. As a result, its impact on the domestic counterterrorism mission is limited.²⁹⁰

LOCAL GOVERNMENT AGENCIES

State and local governments serve significant support functions by detecting and reporting suspicious activity, as well as acting as first responders to an attack. Some localities, however, are playing a greater role in the core domestic counterterrorism mission.

NYPD/LAPD Counterterrorism Bureaus

Since 9/11, major cities, including New York and Los Angeles, have established counterterrorism operations independent of the federal government. NYPD's Counterterrorism Bureau (CTB) is funded by the City of New York, and nearly 1,000 NYPD officers are dedicated to its counterterrorism mission.²⁹¹

In 2004, NYPD CTB was responsible for disrupting the so-called Herald Square plot,²⁹² in which two local extremists planned to bomb the Herald Square subway station in midtown Manhattan. NYPD arrested the suspects with the help of a confidential informant cultivated by its Intelligence Division. Though some have criticized NYPD for exaggerating the threat posed by the plot, it could not have been disrupted at such an early stage without the NYPD's investigative efforts.²⁹³

In New York and elsewhere, local counterterrorism units cooperate closely with federal authorities. Counterterrorism units refer information about potential terrorist threats—often via Suspicious Activity Reports (SARs)—to their local JTTFs for follow up. Over an 18-month period in 2008-2009, for example, of the 2,063 SARs that were generated in Los Angeles, 151 were accepted by a JTTF for follow up and 47 arrests were made as a result. (It should be noted, however, that not all arrests were for terrorism-related crimes.)²⁹⁴

Counterterrorism unit officers are also frequently assigned to work directly with JTTFs. In New York, for example, over 100 NYPD Detectives are assigned to the local JTTF.²⁹⁵ This is by far the largest commitment of police personnel to a JTTF, however, and most other cities assign only a few officers to their task forces.²⁹⁶

Relations between federal and state law enforcement can become strained, however, at times.²⁹⁷ For example, the FBI and NYPD have repeatedly clashed

over NYPD's practice of stationing detectives abroad to collect intelligence.²⁹⁸ On the other hand, the Department of Justice's requirement that NYPD must receive federal pre-approval before applying for electronic surveillance warrants in terrorism-related cases has often led to conflict over the speed with which New York's requests are handled.²⁹⁹

Fusion Centers

Fusion Centers, located across the country and run by local officials, are intelligence analysis centers that facilitate the dissemination of counterterrorism information among local, state and federal officials. The federal government provides funding to these centers, largely through DHS's State Homeland Security Grant Program and its Urban Area Security Initiative.³⁰⁰

Currently, 72 fusion centers operate in all 50 states, and are located in every major US city.³⁰¹ At least 16 of these state fusion centers are co-located with a JTTF or FBI field office. Though both DHS and FBI provide personnel to the centers, they are managed by, and operate under, the legal authority of local government agencies, including state police agencies or bureaus of investigation.³⁰²

Fusion centers, however, are occasionally controversial organizations. The American Civil Liberties Union (ACLU) and other privacy watchdog groups have criticized the manner in which fusion centers disseminate and retain confidential information.³⁰³ Still, a Congressional Research Service review found the suggestion that fusion centers have access to vast amounts of private data "largely unfounded."³⁰⁴ Representative Jane Harman (D-CA) later noted that when she met with the authors of the ACLU report, they were unable to cite a single specific instance when a fusion center violated a US citizen's civil liberties.³⁰⁵

Fusion centers have also been called redundant—that is, some allege that they merely duplicate the work of JTTFs.³⁰⁶ A recent study found that fusion centers have played a greater role in disseminating data among local police departments than in serving their primary purpose as a focal point for accumulating information.³⁰⁷ Despite criticisms, federal support for fusion centers is now required pursuant to a Congressional mandate, and DHS intends to expand state fusion centers.³⁰⁸

SPOTLIGHT

NYPD, the JTTF and Najibullah Zazi

On 19 September 2009, FBI agents arrested Afghan national Najibullah Zazi in his Aurora, Colorado home. Zazi, who had attended a militant training camp in Pakistan earlier that year, had just returned from a whirlwind trip to New York City, where it was later discovered he had intended to bomb trains leaving Grand Central Station and Times Square. The FBI had been tracking Zazi's suspicious activities for months before his trip and, soon after he headed in the direction of New York, went on high alert.³⁰⁹



As a result of their concerns, the FBI asked NYPD to gather intelligence on Zazi and provided the department with photos of Zazi to facilitate its request. Detectives from the NYPD's Intelligence Division, however, inadvertently undermined the case when they instructed one of their sources, who had been instructed to track down information on Zazi, in fact tipped Zazi off to the investigation. Despite this misstep, Zazi was indicted in September 2009 on the charge of conspiracy to use WMDs against US citizens and pled guilty in February 2010.³¹⁰

Zazi's investigation can be viewed either as an example of successful FBI-NYPD cooperation resulting in the disruption of a terrorist plot—or as a botched operation in which NYPD officers undermined the FBI's ability to gather intelligence on Zazi's associates and connections. The FBI and NYPD did, after all, prevent a terror attack, and the FBI did bring NYPD in on the case. Still, the two organizations proved unable to communicate effectively, leaving the FBI scrambling to construct a case against Zazi and his associates.

Image: An NYPD helicopter transports suspected terrorist Najibullah Zazi, to a police facility in Brooklyn. (Source NYPD)

...there is always a temptation to invoke security “necessities” to justify an encroachment upon civil liberties. For that reason, the military-security argument must be approached with a healthy skepticism: its very gravity counsels that courts be cautious when military necessity is invoked by the Government to justify a trespass on First Amendment rights.

Justice William Brennan, *Brown v Glines*, 1980

DETENTIONS OUTSIDE THE CRIMINAL JUSTICE SYSTEM

Shortly after the events of 9/11, the Bush Administration began to detain suspected terrorists at a newly constructed prison at the US Naval Base at Guantanamo Bay, Cuba. It also began to hold especially dangerous suspects at so-called ‘black sites,’ secret extraterritorial prisons completely cut off from access to the US judicial system.³¹¹

During its second term, the Bush Administration closed these black sites due to widespread public criticism from both inside the US and abroad and the legal implications of the Supreme Court’s *Hamdan* ruling. Within a day of his inauguration, President Obama promised to also close the prison at Guantanamo Bay. More than a year later, however, Guantanamo Bay remains open despite the fact that some detainees have been released.

A panel created to evaluate those confined in Guantanamo concluded that the US can continue to hold some detainees without trial because they are too dangerous to be released.³¹² This issue is of enormous practical import, as detaining suspected terrorists is a critical tool in the fight against Islamic extremism. In many cases, detention is seen as the only way of preventing the planning and execution of terrorist attacks.

A serious question remains: by what legal authority can the US government detain individuals outside of our ordinary criminal justice system? This chapter seeks to explore this question first by laying out the law governing detention outside the US criminal justice system and second by describing how this law is applied to captured al Qaeda and Taliban members.

GENERAL LAWS GOVERNING DETENTION OUTSIDE THE CRIMINAL JUSTICE SYSTEM

Detentions have always been a function of war. But, power is not unconstrained—hence, two general categories of laws exist that generally govern detention outside the US criminal justice system: the Laws of Armed Conflict and, more controversially, human rights law.

The Law of Armed Conflict

The laws of armed conflict are also known as ‘the laws of war’ or ‘international humanitarian law.’ A body of international law composed of both treaties and customary international law (the customary conduct of states), the laws of armed conflict govern both international and intra-state armed conflict. Within this body of law, the Geneva Conventions play a particularly strong role.³¹³ Specifically, the Third and Fourth Geneva Conventions govern the detention of individuals during an international armed conflict.

Under the Geneva Conventions, different categories of detainees are subject to different detention rules:

Prisoners of War: Members of a belligerent state’s military and members of an armed militia that fulfill certain specific requirements (such as wearing a fixed, distinctive emblem recognizable at a distance) may be detained until the end of hostilities as POWs. The rules governing the detention of POWs are quite strict. POWs may be questioned but may not be tortured, abused, coerced or threatened. They are only obligated to give their name, date of birth, rank, and serial number.³¹⁴ A “competent tribunal” must resolve cases where there is doubt as to whether a person is subject to detention as a POW.³¹⁵

Civilians: Under the Geneva Conventions, no aggressive action, including detention, can usually be taken against civilians unless they have taken direct part in hostilities. There is disagreement about what it means to take “direct part in hostilities,” but it is generally thought to mean that the civilian must take an action directly causing harm to the soldiers or civilians of a foreign country.³¹⁶

Civilians who do take direct part in hostilities may be detained. Additionally, Article 42 of the Fourth Geneva Convention allows for the internment of civilians (even of civilians who take *no* part in hostilities) by an occupying power if “the security of the Detaining Power makes it absolutely necessary.”³¹⁷

Civilians can also be detained temporarily in the immediate area of ongoing military operations for their own protection and to ensure they do not interfere with military operations.³¹⁸

Unlawful Enemy Combatants: While the Geneva Conventions only explicitly recognize POWs and civilians, terrorists and other individuals engaged in modern warfare do not fit neatly into these two categories. For this reason the Bush Administration created the category of “unlawful enemy armed combatants.” Although this designation is controversial, the Fourth Geneva Convention anticipates that some people who are neither civilians nor POWs will be detained.³¹⁹ The Convention “does not purpose to restrict the substantive criteria for determining who in particular may be detained.”³²⁰ Both the Bush and Obama Administrations believe that persons who do not obey the laws of war and who pose an armed threat may be detained pursuant to this authority.

According to the Supreme Court’s decision in *Hamdan v. Rumsfeld*, Common Article III³²¹ of the Geneva Conventions protects at minimum unlawful enemy combatants.³²² Common Article III prohibits cruel treatment, torture, and humiliating treatment. Moreover, Article III requires that a “regularly constituted court” mete out any punishment, and that detainees be afforded “all the judicial guarantees which are recognized as indispensable by civilized people.” Thus, it is an open question whether ad hoc military tribunals are a prohibited means of trying such detainees. Not disputed, however, is that in accordance with *Hamdan* CIA black sites are illegal. Consequently, President Bush announced the closure of these secret prisons shortly after the *Hamdan* decision was handed down.

Human Rights Law

There is significant controversy over whether human rights law also applies to detentions during a period of conflict. Human rights law, like the laws of war, is a body of international law consisting of treaties and the customary practice of states. It is usually thought to govern how states treat their own citizens rather than conflict between states.

Nevertheless, many scholars and practitioners of international law strongly believe that human rights law applies to armed conflicts. For example, in 2006 the United Nations Commission on Human Rights (which has since been replaced by the UN Human Rights Council) criticized the US for failing to appropriately apply the International Covenant on Civil and Political Rights (IC-

CPR) to its Guantanamo Bay detainee policy. The ICCPR prohibits arbitrary detention. (The US responded that the ICCPR only applies within US territory and that the laws of war govern the continuing armed conflict against al Qaeda.)³²³ As with most forms of international law, however, there is little direct enforcement of human rights law.

There has been some controversy as to whether the protections for detainees listed in the Third and Fourth Geneva Conventions apply to non-international armed conflicts (armed conflicts between state and non-state actors). For example, in 2002 then-assistant Attorney General John Yoo argued in a now famous memorandum that Common Article III did not apply to the conflict with al Qaeda because it was not an international armed conflict.³²⁴ However, in *Hamdan* the Supreme Court held firmly that Common Article III *does* apply in non-international armed conflicts such as the current military action against the Taliban.

LAWS GOVERNING THE DETENTION OF AL QAEDA AND TALIBAN MEMBERS

The Authorization for the Use of Military Force (AUMF) allows for the detention of al Qaeda and Taliban members. In *Hamdi v. Rumsfeld*, discussed in greater detail below, the Supreme Court upheld the legality of the AUMF, and the Obama Administration issued its interpretation of the AUMF shortly after the 2009 Inauguration.

The Authorization for the Use of Military Force

The text of the AUMF is extremely short; its two sections consist of only four paragraphs. Despite its brevity, it gives authority to the President to use all necessary and proper force against those who committed the 9/11 terror attacks and to “prevent any future acts of terrorism against the United States by such nations, organizations, or persons.”³²⁵ It does not explicitly authorize detention of enemy combatants. However, most legal scholars and national security lawyers agree that implied in this authorization is the power to “target, capture, and *detain* enemy combatants.”³²⁶

There is serious disagreement over the scope of the AUMF’s detention autho-

PROFILES OF THREE FORMER GUANTANAMO DETAINEES

Abdullah Saleh al-Ajmi: Al-Ajmi was captured in Afghanistan in 2001 and held at Guantanamo Bay until his 2005 transfer to Kuwaiti custody. Kuwait released him shortly thereafter. In 2008 he and another man blew themselves up in a suicide attack on an Iraqi police force that killed six people.



Abu Baqir Qassim: Qassim was one of several Uighur separatists from China held at Guantanamo Bay. Qassim was accused of receiving terrorist training. He was captured in 2001, and held in Guantanamo Bay until 2006. He was then transferred to Albania where he was granted political asylum. There he wrote an editorial in the New York Times urging Congress not to remove the right of habeas corpus from Guantanamo detainees. He has said that he feels isolated in Albania, particularly because his wife and children are unable to leave China to join him.

Salim Hamdan: Hamdan was captured in Afghanistan in 2001. He was accused of being Osama bin Laden's driver. He contested his imprisonment in *Hamdan v. Rumsfeld*, and was released from Guantanamo Bay in 2008. He returned to Yemen where he reunited with his family and now, fittingly, works as a part-time driver.

Image: The cell block on a typical ward in Camp Delta, Naval Station Guantanamo Bay, Cuba. (Source Department of Defense)



rization—specifically the length and manner of detention that it authorizes. Detention policy critics question whether the AUMF in fact authorizes *indefinite* detention of al Qaeda members. There is also debate over whether it authorizes the detention of *anyone* affiliated with a terrorist organization, or only those who take part in direct hostilities.³²⁷

Hamdi v. Rumsfeld (2004)

In *Hamdi v. Rumsfeld*, the Supreme Court explicitly upheld the constitutionality of detention of enemy combatants pursuant to the AUMF.³²⁸ The case involved the detention of Yaser Hamdi, an American citizen held in a US military jail on US soil due to his Taliban ties. The Court held that the President had the authority under the AUMF to detain Hamdi even though the bill contains no explicit detention provision.

The Court also ruled that the US could detain suspected Taliban members—and more broadly, al Qaeda members—for as long as the US is actively engaged in combat in Afghanistan. Specifically, the Court declared that since “active combat operations against Taliban fighters apparently are ongoing in Afghanistan . . . The United States may detain, for the duration of these hostilities, individuals . . . who ‘engaged in an armed conflict against the United States.’”

2009 Obama Administration Memo

In March 2009, only a few months after President Obama’s inauguration, the Justice Department filed a memorandum with a federal district court laying out its position with regard to the Guantanamo Bay detainees.³²⁹ Specifically, the memorandum stipulated that it had authority to detain Taliban and al Qaeda members under the AUMF. Furthermore, even members of these militant groups not actively engaged in armed conflict could be detained, as a different interpretation “would ignore the United States’ experience in this conflict, in which Taliban and al Qaeda forces have melted into the civilian population and then regrouped to relaunch vicious attacks.”

The Administration also asserted that international law does not prohibit these detentions. The Justice Department did, however, promise that it would establish comprehensive new guidelines for detentions.

Although two presidential administrations and the Supreme Court have now upheld the legality of detentions outside the criminal justice system in one form or another, it is likely that this topic will remain enmeshed in controversy for some time. As the conflict in Afghanistan shows little sign of ending, there remains serious legal debate over how *long* detention may continue under the AUMF. This is especially true since the Obama Administration has announced it could hold some of the Guantanamo detainees indefinitely—a proposal that has been met with significant skepticism by the legal community.³³⁰ In the future, the Obama Administration will likely need to clarify both the amount of time it intends to hold detainees and under what conditions they may be held.

SPOTLIGHT

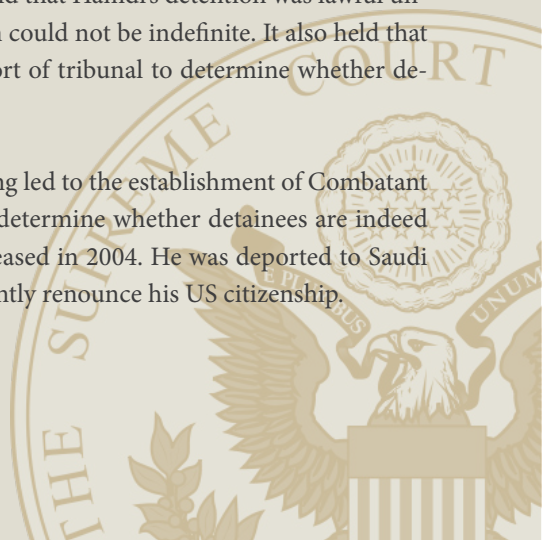
Hamdi v. Rumsfeld

Background: Yaser Hamdi, the child of two Saudi immigrants, was born in Baton Rouge, Louisiana. He was captured in Afghanistan in 2001 and was accused of being a member of the Taliban. After being transferred to the US, he was confined in a Navy brig in Virginia and then in a military jail in Charleston. In 2002 he brought a habeas corpus suit challenging the legality of his detention without trial.

Supreme Court Ruling: The Court held that Hamdi's detention was lawful under the AUMF, but that the detention could not be indefinite. It also held that the government must create some sort of tribunal to determine whether detainees are "enemy combatants."

Follow-up: The Supreme Court's ruling led to the establishment of Combatant Status Review Tribunals (CSRTs) to determine whether detainees are indeed "enemy combatants." Hamdi was released in 2004. He was deported to Saudi Arabia and was required to permanently renounce his US citizenship.

Image: The United States Navy Brig,
Norfolk Virginia



We need not cower in the face of this enemy. Our institutions are strong, our infrastructure is ready, our resolve is firm, and our people are ready.

Attorney General Eric Holder on the criminal trial of Khalid Shaykh Mohammed

* Savage, Charlie. "Holder Defends Decision to Use U.S. Court for 9/11 Trial." *The New York Times*. 18 November 2009.

PROSECUTING TERRORISTS IN US CRIMINAL COURTS

On 13 November 2009, Attorney General Eric Holder announced his decision to try Khalid Shaykh Mohammed and several other men accused of participating in the 9/11 attacks in civilian court in New York City. Holder's announcement served to reinvigorate the dispute regarding federal terrorism prosecutions, as did the subsequent White House backpedaling on holding the trials in Lower Manhattan.

The debate over the policy benefits of trying terrorism suspects in domestic criminal courts rather than in military tribunals is well known. Less understood are the legal issues involved in trying a terrorism suspect in federal court. This section will examine the various legal tools that are available to prosecutors and law enforcement officials to investigate, charge and ultimately try terrorists. It will also highlight legal problems that can arise during terrorism prosecutions. Finally, it will provide an overview of sentencing practices in terrorism-related cases.

INVESTIGATIVE TOOLS

All the law enforcement tools used in investigating criminal activity are available in investigating terrorist suspects. These tools include wiretaps, subpoenas for financial and travel documents, grand jury testimony and police questioning. Prosecutors also have the option of using material witness subpoenas to detain suspects who may possess information material to a terrorism trial. For example, a material witness subpoena was used to detain suspected terrorist José Padilla, for a month following his arrest in a Chicago airport.³³¹

Commonplace investigative techniques, however, often do not prove sufficient in terrorism cases, particularly given the extraordinary danger to public safety that such cases present. This is compounded by the fact that suspects and evidence may be located overseas. Thus, Congress has authorized a number of

special investigative tools for prosecutors and law enforcement officials to employ in terrorism cases. Some of these tools were created after 9/11, while others predate 2001, reflecting the evolving difficulty of prosecuting international terrorists in domestic criminal courts.

- ***The Foreign Intelligence Surveillance Act (FISA)***: Congress recently amended FISA³³² to make it easier to search or conduct electronic surveillance on “a group engaged in international terrorism or activities in preparation therefore.”³³³ FISA lets officials apply to the special Foreign Intelligence Surveillance Court for authorization of a search warrant rather than having to follow the more onerous application procedures necessary in a regular federal court.
- ***National Security Letters (NSLs)***: NSLs provide law enforcement agents with the power to issue administrative subpoenas for certain kinds of information—such as banking and telecommunication records—without the need for a court order. Section 505 of the USA-PATRIOT Act expanded the use of these letters to terrorism investigations.³³⁴ And while “[i]nformation from national security letters most often is used for intelligence purposes rather than for criminal investigations,”³³⁵ it has also been successfully used in terrorism prosecutions. Such administrative subpoenas are particularly useful in terrorism prosecutions because they grant law enforcement agencies to ability sidestep a number of legal hurdles presented by a court-ordered subpoena.

However, there is concern that law enforcement agencies have abused their discretion to issue NSLs. For example, the FBI self-reported and apologized in 2007 for improperly using the letters to illegally collect information.³³⁶

- ***Sneak and Peeks***: The USA-PATRIOT Act of 2001 authorized ‘sneak and peek’ searches. In a sneak-and-peek, or ‘delayed-notice’ search, law enforcement officials can enter a location where an individual might have an expectation of privacy, such as a car or a home, without immediately notifying the owner. Law enforcement officials have argued that the searches can be valuable when detectives do not want the targeted individual to know that he or she is under investigation.³³⁷ Although such searches have been challenged in the judicial system under the Fourth Amendment rights against illegal search and seizure, district courts have upheld the constitutionality of the searches. Nevertheless, these surreptitious searches are overwhelmingly used for narcotics cases.³³⁸

- **Mutual Legal Assistance Treaties (MLATs):** MLATs allow prosecutors and law enforcement officials to gather information and subpoena witnesses located outside the United States through a treaty framework. Although not specifically designed to combat terrorism, MLATs are an especially important tool in international terrorism cases, as evidence and witnesses in such cases are often located overseas.

CHARGING STATUTES

The number of statutes under which prosecutors may charge terrorism suspects has expanded greatly since 9/11. The following statutes have been especially significant in terrorism cases.

- Federal law, under 18 USC § 2339B and 8 U.S.C. § 1182(a)(3)(B)(iv) (VI), makes it illegal to provide material support, including money, training, or personnel, to groups designated by Congress as “foreign terrorist organizations.” 18 USC § 2339B has a *mens rea* requirement of knowledge— in other words, the donor must *know* that the organization “is a designated terrorist organization” or “engages in terrorist activity.” A prominent case in which an individual was indicted under 18 USC § 2339B was John Walker Lindh, the “American Taliban”, charged with two counts of providing material support to terrorist organizations.
- The law also contains a conspiracy element, which is especially useful given that proving conspiracy to commit a crime is in many instances easier than proving perpetration of the crime itself. A notable example in which this statute was used was the prosecution of the “Lackawanna Six,” a group of Yemeni-Americans arrested in upstate New York who pleaded guilty to providing material support to al Qaeda.
- 18 USC § 2339A criminalizes the providing of material support to overseas groups engaging in a number of violent crimes, including terrorism. Unlike § 2339B, it does not require that the support be provided to a group specifically designated by Congress as a foreign terrorist organization. It has been described as a “form of terrorism aiding and abetting statute.”³³⁹ For example, this statute was used to prosecute defense attorney Lynne Stewart, who was convicted of providing information to an Egyptian terrorist organization for her client, Shaykh Omar Abdel Rahman.

These two sections of the code, 18 USC § 2339B and § 2339A, play extremely important roles in prosecuting terrorism cases. As of late 2009, federal prosecutors had charged violations of one or both of these statutes in 73 cases, which involved a total of 170 terrorism-related incidents.³⁴⁰

Three recent cases—the attempted Times Square bombing by Faisal Shahzad, the Christmas “underwear bomber” Umar Farouk Abdulmutallab, and Najibullah Zazi’s plot to bomb the New York City subway in September 2009—highlight federal law enforcement’s use of 18 USC § 2332. Under this law it is a federal offense for a person “who without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction,” against a person or property within the United States. According to the statute, a weapon of mass destruction is “any destructive device” as defined by 18 USC § 921, to include “any explosive, incendiary, or poison gas bomb, grenade, or rocket having a propellant charge of more than four ounces...” Such a broad definition of “destructive device” under section 921 provides prosecutors significant legal flexibility in charging suspected terrorists.

Additionally, law enforcement officials sometimes arrest or deport those suspected of engaging in terrorism by using charges relating to immigration matters, such as the USA-PATRIOT Act Section 411 to 418: *Enhanced Immigration Provisions*, or financial fraud. On the former, a report by the Justice Department’s Inspector General found that shortly after 9/11 immigration officials held or deported hundreds of individuals who were thought to have some connection to terrorism, even when evidence of these connections was weak.³⁴¹

Other important charging statutes in terrorism cases include 18 USC § 2339D, which criminalizes receiving military training from a designated foreign terrorist organization, and 18 USC § 2332, which criminalizes homicide or serious assault with intent to conduct terrorism against US nationals located outside the United States.

INTRODUCING EVIDENCE IN COURT

Through the investigative and charging stages of a criminal trial, prosecutors benefit from the legal tools available to fight terrorism. However, prosecutors may face difficulty in introducing relevant evidence during the trial stage. Because of the national security concerns inherent in most terrorism inves-

tigations and the fact that information in terrorism cases is often classified, prosecutors are confronted with significant evidence-related challenges during the proceedings. As such, Congress and the courts have codified into law one special measure to make the process easier.

The *Classified Information Procedures Act* (CIPA)³⁴² attempts to “protect national security information from improper or unnecessary disclosure...while at the same time balancing the defendant’s fundamental right to a fair trial.”³⁴³ CIPA permits prosecutors to redact sensitive information from discovery documents under the supervision of a trial judge. Prosecutors must then either submit a summary of the deleted information or substitute a statement admitting relevant facts that the information would tend to prove. In addition, CIPA provides specific safeguards for handling classified documents.

DIFFICULTIES WITH GOING TO TRIAL

Evidentiary problems still exist during trial. Indeed, the challenge of handling evidence in terrorism cases is one of the main drivers behind the argument that the US needs a national security court or specialized military commissions. These problems include:

Miranda Difficulties: There are significant unresolved questions over the *Miranda* protections for suspected terrorists captured overseas. In *United States v. Bin Laden*,³⁴⁴ a federal judge in the Southern District of New York held that terrorism suspects interrogated abroad by US law enforcement officials were entitled to *Miranda* warnings. If such warnings were not issued, according to the judge, incriminating statements made by defendants could be excluded at trial.

Chain of Custody Issues: The prosecution of terrorist suspects has the potential to raise chain of custody problems, particularly if the evidence is brought from overseas. As the American Bar Association recently pointed out, “[i]n terrorism cases, it often proves difficult, if not impossible, to observe the mandated level of protection of evidence.”³⁴⁵ In other words, the careful procedures used by domestic law enforcement agents to preserve the chain of custody are sometimes impossible to adhere to when operating in foreign countries, especially in conflict zones. However, “gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.”³⁴⁶ Thus, problems in the chain of custody may lead to an assessment that the evidence is potentially unreliable, but does not normally result in its being thrown out.

Prudential Searches: Under the seminal cases *Brady v. Maryland*³⁴⁷ and *Giglio v. United States*,³⁴⁸ prosecutors have a “prudential search” duty to disclose exculpatory information. In terrorism cases, this means that information in the files of law enforcement and intelligence agencies that relate to the trial must sometimes be turned over to the defense. This duty can be difficult to fulfill even in ordinary trials, as it is ambiguous how far the prosecutor’s obligation extends.

In terrorism cases, prosecutors may have particular difficulty fulfilling *Brady* and *Giglio* obligations since agencies frequently hesitate to turn over sensitive information, given that justifiable concerns remain about protecting ‘sources and methods.’ Failing to disclose *Brady* and *Giglio* information may lead to reversals or other serious problems for prosecutors.

SENTENCING

Civilian judges generally hand down stiff sentences in terrorism cases. According to the New York University School of Law’s *Terrorist Trial Report Card*,³⁴⁹ between 2001 and 2009, prosecutors indicted defendants on terrorism charges or related national security violations in 828 trials. Of these trials, 88.8 percent resulted in convictions for some crime, and 78 percent resulted in convictions for terrorism or national security violations. The average sentence in these cases was 5.6 years, and the average sentence for persons convicted of terrorism was 16 years.

Thus, in large part due to post-9/11 reforms, prosecutors have a number of tools available to them when trying suspected terrorists. Moreover, judges at the sentencing stage appear willing to incarcerate terrorists for substantial periods of time.

Notwithstanding, significant obstacles to successful prosecution remain. President Obama’s decision to try several Guantanamo detainees in federal court has illustrated the complexity of these issues. It has also raised new evidentiary questions about trying terrorists subjected to harsh interrogation methods.



TIMELINE OF SELECTED US TERRORISM TRIALS

- *1994:* Conviction of four defendants for the 1993 bombing of the World Trade Center, including Shaykh Omar Abdel-Rahman, who was sentenced to life in prison.
- *1996:* Conviction of Omar Mohammed Ali Rezaq for his participation in the hijacking of EgyptAir Flight 648. Ali Rezaq was sentenced to life in prison.
- *1997:* Conviction of Timothy McVeigh for the Oklahoma City bombing. McVeigh was sentenced to death and later executed.
- *2001:* Conviction of Wadhi el-Hage for his participation in the 1998 East Africa Embassy bombings. El-Hage was sentenced to life in prison without parole.
- *2004:* Conviction of David Wayne Hull, leader of the White Knights of the Ku Klux Klan, for teaching others to use bombs in violation of an anti-terrorism statute. Hull was later sentenced to 12 years in prison.
- *2005:* Conviction of defense lawyer Lynne Stewart for material support of terrorism after she transmitted messages from convicted terrorist Omar Abdel-Rahman to a foreign terrorist organization. Stewart was sentenced to 28 months in prison.
- *2006:* Guilty plea submitted by Sami al-Arian for conspiracy to assist the terror group Palestinian Islamic Jihad. He was later sentenced to 57 months in prison but is currently under house arrest.
- *2006:* Conviction of Hamid Hayat and his father Umer Hayat for material support for terrorism after both were accused of being part of a California sleeper cell. Hamid Hayat was sentenced to 24 years. His father was sentenced to time served after pleading guilty.
- *2006:* Conviction of Zacarias Moussaoui for his participation in the 9/11 attacks. Moussaoui was sentenced to life in prison.
- *2008:* Conviction of the Holy Land Foundation and five men working with the organization for material support of terrorism. The Foundation's founders were sentenced to life in prison.

By any measure, our system of trying detainees has been an enormous failure.

Senator Barack Obama, June 2008

Military commissions have a long tradition in the United States. They are appropriate for trying enemies who violate the laws of war, provided that they are properly structured and administered.

President Barack Obama, May 2009

MILITARY COMMISSIONS

In 2002, US troops captured 15-year old Canadian national Omar Khadr in Afghanistan. The Department of Defense maintains that he threw a grenade that killed an American Special Forces soldier. Khadr's father was affiliated with al Qaeda, and Khadr was an adherent of radical Islam at the time of his capture.

Khadr has been held at Guantanamo Bay since his capture; the US government has tried twice to prosecute him before military commissions, but both attempts proved unsuccessful in the face of significant procedural and political obstacles.³⁵⁰ Now the government has new plans to try Khadr before a revamped military commission, and his case—along with other cases like his—have ignited debate over the use of military commissions to try terrorism suspects.³⁵¹

This chapter will explore the history of US military commissions and layout the significant legal challenges faced by the Bush Administration in its efforts to reinstitute commissions. It will further review major statutes relating to military commissions. Finally, it will examine the status of military commissions under the Obama Administration.

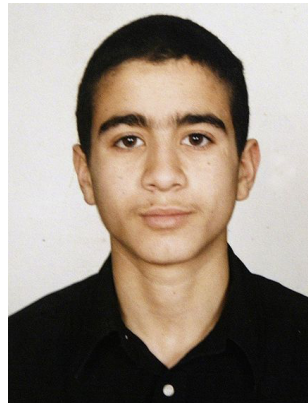


Photo of Omar Khadr, copyright released into the public domain by the Khadr family in Toronto.
Date ca. 2001



Military commissions' courtroom at Guantanamo Bay (Christopher Mobley, US Govt.)

WHAT ARE MILITARY COMMISSIONS?

Military commissions as constructed today are not regularly constituted military courts; instead, they are ad hoc institutions created to address legal issues arising from specific conflicts. Military commissions were first used by the US during the Mexican-American War, and have been used in every major war since.³⁵²

In 1942, the Supreme Court unanimously upheld the constitutionality of military commissions in a well-known and controversial case, *Ex Parte Quirin*.³⁵³ Specifically, the Court held that a military commission that tried and sentenced to death eight German saboteurs caught on US soil for violating the laws of war (for failure to wear military uniforms) had jurisdiction over the saboteurs. The fact that the commission provided only minimal procedural protections to the defendants did not sway the Court.

ESTABLISHING MILITARY COMMISSIONS

In November 2001, President Bush announced that he was authorizing the trial by military commission of non-citizens suspected of terrorism.³⁵⁴ The evidence standards for these commissions were not strict.

- US federal court has strict rules for the admission of evidence; hearsay and evidence gathered unconstitutionally are strictly prohibited. Military commission rules drafted by the Bush administration, however, would have allowed any evidence to be admitted provided “the evidence would have probative value to a reasonable person.”³⁵⁵
- The Bush Administration also made military commissions unreviewable by most US courts. Moreover, if national security required, prosecutors had a right not to inform defendants of evidence against them, and defendants could even be excluded from attending their own trials.

The White House claimed these restrictions on the rights of defendants were intended to protect national security and overcome evidentiary problems presented by trying defendants captured internationally where evidence might be hard to preserve. However, domestic and international critics alleged that the commissions deprived defendants of processes fundamental to fair trials. Critics further alleged that under the military commissions’ then rules, evidence obtained through torture could be used against defendants at trial.

Despite critics’ concerns, the first of the Bush administration military commissions convened for trial in 2004.

THE DETAINEE TREATMENT ACT (2005)

Congress further diminished protections for defendants tried by military commissions with its passage of the Detainee Treatment Act of 2005. The majority of the Act related to the interrogation of prisoners, but it included the requirement that only the Court of Appeals for the District of Columbia could review military commission decisions and hear habeas corpus petitions of military prisoners challenging their detentions as unlawful.

In 2006, the Supreme Court held in *Hamdan v. Rumsfeld* that certain military commission procedures violated international and domestic law.³⁵⁶ Specifically, the Court ruled that prohibiting a defendant from attending his own trial, admitting testimony obtained through coercion and denying the defendant access to classified information violated both the Geneva Conventions and the

US military's Uniform Code of Military Justice (UCMJ). Based on these violations, the Court found that the military commissions as they were constituted at the time were unlawful.

THE MILITARY COMMISSIONS ACT OF 2006

Reacting to the *Hamdan* decision, Congress passed the Military Commissions Act in 2006. This Act explicitly authorized trials by military commission for "unlawful enemy combatants," including members of the Taliban and al Qaeda.

- The Act strengthened procedural protections for defendants in military commissions. Specifically, it barred as evidence statements made under torture, allowed defendants to be present during commission trials and prohibited most kinds of hearsay testimony.
- The Act also included a double jeopardy prohibition barring a defendant from being tried more than once for the same crime.

However, the Act further limited the jurisdiction of the civilian court system to hear appeals from military commissions. Beyond reaffirming that only the Court of Appeals for the District of Columbia could hear military commission appeals, it also absolutely barred civilian courts from reviewing detainees' habeas corpus petitions.

In 2008, the Supreme Court in *Boumediene v. Bush* struck down as unconstitutional the Act's ban on detainees' habeas corpus rights.³⁵⁷ The Court ruled that Guantanamo Bay was similar enough to US territory that detainees held there had a constitutional right to petition for habeas corpus. Justice Kennedy's majority opinion noted, "Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person."³⁵⁸

MILITARY COMMISSIONS UNDER THE OBAMA ADMINISTRATION

During the 2008 presidential campaign, President Obama sharply criticized the military commissions system and declared that, if elected, he would "reject

the Military Commissions Act.”³⁵⁹ In the days immediately following his inauguration, President Obama followed up on his pledge by issuing Executive Order 13492, directing the Secretary of Defense to immediately take steps to halt all referrals to military commissions and to stay all pending proceedings.³⁶⁰

Nevertheless, the tangled legal web the Obama Administration inherited ultimately left the White House believing it had little choice but to use military commissions to try a select number of detainees whom the Administration’s Guantanamo review panel believed could not be tried in civilian court.³⁶¹

In spring 2009, an interagency task force of attorneys determined which of the remaining Guantanamo detainees were to be tried in a new military commissions system.³⁶² Lawyers worked under the presumption that detainees would be tried in civilian court unless they found a compelling reason not to permit a civilian trial. The President tasked Attorney General Eric Holder with making a final determination on which system each detainee would be tried under.³⁶³

In late 2009, the Attorney General announced that KSM and four others accused of planning the 9/11 attacks would be tried in civilian court in New York City. In the same announcement, he added that five other detainees accused of planning the October 2000 attack on an US Navy ship, the USS *Cole*, would receive trials by military commission. One of the rationales offered publicly for using different trial systems for the two groups of detainees was that the USS *Cole* was a military target, thereby making the attack on it a crime subject to military trial.

As noted by former top Justice Department officials Jack Goldsmith and James Comey, this rationale fails to acknowledge that the Pentagon itself, targeted on 9/11, could be considered a military target. Goldsmith and Comey speculate that the true reason for using different trial systems for the two groups of suspects is that the evidence against the *Cole* suspects admissible in federal court is much weaker.³⁶⁴ Both decisions proved controversial, and the Obama Administration has since walked back its earlier assertion that KSM would be tried in lower Manhattan. At the time of this publication, efforts to identify a suitable location for his trial in either civilian or military court remain ongoing.

THE MILITARY COMMISSIONS ACT OF 2009

Some of the Obama Administration's desired changes to the Military Commissions Act were codified into law in the Military Commissions Act of 2009, passed as part of the National Defense Authorization Act of 2010.

Among other changes from Bush-era commission rules, the new law established that:³⁶⁵

- Statements obtained through torture or cruel, inhuman or degrading treatment were to be excluded from evidence. Nonetheless, the Secretary of Defense is authorized to create rules permitting admissions of both hearsay evidence and statements that are coerced (but fall short of torture).
- Defendants have the right to attend their complete trials and examine all evidence presented against them. No longer may defendants be excluded from parts of proceedings because classified evidence is being presented.
- Military lawyers are required to disclose any exculpatory evidence to the defense.

Though they acknowledged that the amendments offered significant new procedural protections for defendants, civil liberties groups were not entirely satisfied with the changes. For example, the American Civil Liberties Union believes that the military commissions system still represents a “second class system of justice,” and that the commissions are “not only illegal but unnecessary.”³⁶⁶

THE FUTURE OF MILITARY COMMISSIONS

Controversy over the use of military commissions continues. For instance, when Nigerian national Umar Farouk Abdulmutallab was arrested following an attempt to detonate explosives on an airplane on Christmas Day 2009, there were many, including former Bush Administration officials, who argued that he should have been declared an enemy combatant and tried by

military commission. Instead, Abdulmutallab faces six indictments in a civilian court in Detroit.³⁶⁷

In the future, it is likely that the Obama Administration will encounter further legal hurdles while implementing a procedure to try the thousands of prisoners currently detained in Afghanistan. The Administration has recently granted these prisoners the right to challenge their detention, but no resolution has been reached on how to prosecute them for the crimes they are alleged to have committed.

Military commissions present not only a different set of legal issues than do civilian trials, but also have both advantages and disadvantages to civilian trials from a counterterrorism policy perspective. The primary upshot of trying a detainee by military commission is that even given the new procedural protections provided by The Military Commissions Act of 2009, less restrictive evidentiary rules maximize the odds of a conviction in cases where evidence is flimsy or was retained through coercive means.

However, since US allies view the military commissions system—even with greater procedural protections in place—as illegitimate, trying detainees by military commission has the effect of decreasing the likelihood that allies will cooperate by providing critical evidence and witnesses. In fact, when federal prosecutors in 2009 began to build a criminal case against KSM for a civilian trial, they found far greater cooperation from US allies. In particular, Germany, France, and the Great Britain all volunteered evidence and witnesses for the trial.³⁶⁸

Finally, it is important to remember that military commissions have not yet been successfully employed on a broad scale to try suspected terrorists and other enemy combatants. Since 9/11 only three people have been convicted by the US through military commission trials. By contrast, hundreds have been convicted in federal court of terrorism-related crimes. And of the three convicted by military commission, two were subsequently deported and are now living freely overseas.

ENDNOTES

THE LEGAL ARCHITECTURE OF AMERICAN NATIONAL SECURITY

1. Baker, James. *In the Common Defense: National Security Law for Perilous Times*. Cambridge: Cambridge University Press, 2007.
2. *Ibid*, p.58.
3. Baker, pp.49-50; Cole, David. "Why the Court Said No." *The New York Review of Books*. Volume 53, Number 13. 10 August 2006.
4. Authorization for Use of Military Force. 18 September 2001, Public Law 107-40 [S. J. RES. 23].
5. US Department of Justice. "Legal Authorities Supporting the Activities of the National Security Agency Described by the President." 19 January 2006. Available from Findlaw: <http://news.findlaw.com/hdocs/docs/nsa/dojnsa11906wp.pdf>.
6. Supreme Court of the United States. Syllabus for *Hamdan v. Rumsfeld, Secretary of Defense, et al.* 548 U.S. 557 (2006). <http://www.supremecourt.gov/opinions/05pdf/05-184.pdf>.
7. Shulman, Mark. *The Progressive Era Origins of the National Security Act*. Dickinson Law Review. Winter 2000; Baker; *National Security Act*, Sec 2.
8. Koh, Harold Hongju. *The National Security Constitution: Sharing Power After the Iran-Contra Affair*. New Haven: Yale University Press, 1990. p.102.
9. Connery, Robert. "American Government and Politics: Unification of the Armed Forces, the First Year." *The American Political Science Review*. Vol 43, No. 1 (February 1949). p.41. Writing in 1949, Connery recalled that, "There are many individuals who nostalgically recall the 'good old days' when each service went its separate way, and on the other hand there are those who deride the possibility of any accomplishment until a single military department has been created."
10. Risen, James and Eric Lichtblau. "Bush Lets U.S. Spy on Callers Without Courts." *The New York Times*. 16 December 2005.
11. The term "warrantless wiretapping" was technically incorrect, as the process relied upon intercepting electronic communication that oftentimes did not require the 'tapping' of a wire.
12. Bazan, Elizabeth B. "The Foreign Intelligence Surveillance Act: Comparison of the Senate Amendment to H.R. 3773 and the House Amendment to the Senate Amendment to H.R. 3773." 12 June 2008.
13. *Ibid*; Congressional Record (House) 20 June 2008. 19 March 2009.
14. Hess, Pamela. "House immunizes telecoms from lawsuits." *The Washington Times*. 20 June 2008.
15. Temple-Raston, Dina. "Terrorism Case Shows Range of Investigators' Tools." *NPR*. 3 October 2009.
16. Intelligence Reform and Terrorism Prevention Act of 2004 (H.Rpt. 108-796).

17. *Ibid.*
18. Mazzetti, Mark. "Report Faults US Spy Agencies." *The New York Times*. 1 April 2009.
19. *Ibid.*
20. *Ibid.*
21. Baker, pp.38-40; Koh, pp.93-95; Dycus, Stephen et al. *National Security Law, 4th Ed.* New York: Aspen Publishers, 2007. pp.60-67.
22. Koh, p.137.
23. Krent, Howard. *Presidential Powers*. New York: NYU Press, 2005. pp.142-144; Baker, p.41.
24. Gaziano, Todd. "The Use and Abuse of Executive Orders and Other Presidential Directives." *The Heritage Foundation*. 21 February 2001.
25. Relyea, Harold. "Presidential Directives: Background and Overview." CRS Research Service. 26 November 2008.
26. Moss, Randolph. "Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order." Memorandum for the Counsel to The President. 29 January 2000; Relyea, Harold. "Presidential Directives: Background and Overview." CRS Research Service. 26 November 2008.
27. Bazan, Elizabeth. "Assassination Ban and E.O. 12333: A Brief Summary." CRS Report-2. 4 January 2002.

DEFINING TERRORISM IN US LAW AND POLICY

28. Record, Jeffrey. "Bounding the Global War on Terrorism." *Strategic Studies Institute*. US Army War College. December 2003.
29. Wright, D.G. *Revolution and Terror in France: 1789-1795*. New York: Longman, 1974. p.88.
30. Laqueur, William. *The New Terrorism*. Oxford: Oxford University Press, 1999. p.6.
31. Hoffman, Bruce. *Inside Terrorism*. New York: Columbia University Press, 1998. p.13.
32. See Shultz, Richard and Andrea Dew. *Insurgents, Terrorists, and Militias: The Warriors of Contemporary Combat*. New York: Columbia University Press, 2006; Kilcullen, David. *The Accidental Guerrilla*. New York: Oxford University Press, 2009.
33. "The National Security Strategy of the United States of America." 2002.
34. Department of Defense Instruction. Department of Defense. No. 5240.6. 7 August 2004, available at: www.dtic.mil/whs/directives/corres/pdf/524006p.pdf
35. "Terrorism." Federal Bureau of Investigation, available at: <http://denver.fbi.gov/nfip.htm>
36. Section 2656f(b) of Title 22 of the U.S. Code, available at: http://www.law.cornell.edu/uscode/22/usc_sec_22_00002656---f000-.html
37. National Counterterrorism Center. "Country Reports on Terrorism, 2005. Statistical Annex. April 2006;" Central Intelligence Agency. "Terrorism FAQs," available at: <https://www.cia.gov/news-information/cia-the-war-on-terrorism/terrorism-faqs.html>
38. *National Council of Resistance of Iran v. Department of State and Collin L. Powell, Secretary of State*, No. 01-1480, United States Court of Appeals for the District of Columbia Circuit. 9 July 2004.
39. Murray, Shailagh. "Democrats Wage War Over Iran." *The Washington Post*. 11 October 2007.
40. 22 U.S.C. § 2371(a).

41. United Nations Security Council Press Release SC/7158. "Security Council Unanimously Adopts Wide-Ranging Anti-Terrorism Resolution." 28 September 2001.
42. "Department of Defense Dictionary of Military and Associated Terms." 12 April 2001, as amended through 19 August 2009.
43. "What We Do." NCTC, available at: <http://www.nctc.gov/kids/what.html>
44. Jenkins, Brian. "Statements about Terrorism." *Annals of the American Academy of Political and Social Science*, Vol. 463 (September 1982). p.12.
45. Record, Jeffrey. "Bounding the Global War on Terrorism."
46. Kilcullen, David. *The Accidental Guerrilla: Fighting Small Wars in the Midst of a Big One*. Oxford: New York, 2009. p.xxvi.
47. Fall, Bernard. "The Theory and Practice of Insurgency and Counterinsurgency." *Naval War College Review*, Winter 1998 (originally reprinted from April 1965). p.47.
48. Jenkins, p.12.

THE BALANCE OF POWERS IN NATIONAL SECURITY

49. Federalist Paper No. 46.
50. See "The President's Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them." Department of Justice, available at: <http://www.usdoj.gov/olc/warpowers925.htm>
51. Baker, *In the Common Defense*.
52. Transcript of Executive Order 9066: Resulting in the Relocation of Japanese (1942), available at: <http://www.ourdocuments.gov/doc.php?flash=old&doc=74&page=transcript>
53. Andrew, John. *Power to Destroy: The Political Uses of the IRS from Kennedy to Nixon*. Chicago: Ivan R. Dee, 2002.
54. Lane, Charles. "High Court Rejects Detainee Tribunals." *The Washington Post*. 30 June 2006.
55. Cole, David. "Why the Court Said No." *The New York Review of Books*. Volume 53, No. 13. 10 August 2006.
56. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).
57. Eggen, Dan and Susan Schmidt. "Secret Court Rebuffs Ashcroft." *The Washington Post*. 23 August 2002.
58. Koh, Harold Hongju. *The National Security Constitution: Sharing Power After the Iran-Contra Affair*. New Haven: Yale University Press, 1990. pp.117-133.
59. Grimmett, Richard. "War Powers Resolution: Presidential Compliance." CRS Order Code IB81050. 24 March 2003.
60. *Ibid.*
61. Baker, James and Warren Christopher. "Put War Powers Back Where They Belong." *The New York Times*. 8 July 2008.
62. Baker, *In the Common Defense*, p.182.

COVERT ACTION

63. For a more detailed explanation of covert actions, please see Rosenbach, Eric and Aki Peritz. *Confrontation or Collaboration? Congress and the Intelligence Community*. Cambridge: The Belfer Center, Harvard University, 2009.
64. Risen, James. "Mistakes Cited in Downing of Plane in Peru." *The New York Times*. 3 August 2001.
65. Tenet, George. *At the Center of the Storm*. New York: Harper Collins, 2007. p.49.
66. Executive Order: Further Amendments to Executive Order 12333, United States Intelligence Activities. 31 July 2008, available at: <http://www.whitehouse.gov/news/releases/2008/07/20080731-2.html>

SIGNALS INTELLIGENCE, ELECTRONIC SURVEILLANCE AND FISA

67. Bobbitt, Philip. "Why We Listen." *The New York Times*. 30 January 2006.
68. "DCI Statement on Allegations About SIGINT Activities." Statement by Director of Central Intelligence George J. Tenet Before the House Permanent Select Committee on Intelligence. 12 April 2000.
69. EO 12333.
70. Richelson, Jeffrey. *The US Intelligence Community, Fifth Ed*. Boulder, CO: Westview Press. 2008. p.214.
71. "H.R.3162: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 (Enrolled as Agreed to or Passed by Both House and Senate)" Library of Congress.
72. Congressional Record (Senate), 9 July 2008. FISA Amendments Act of 2008, 19 March 2009.
73. Lowenthal, Mark. *Intelligence: From Secrets to Policy*. 4th ed. Washington, D.C.: CQ Press, 2009.
74. Risen, James and Eric Lichtblau. "Bush Lets U.S. Spy on Callers Without Courts." *The New York Times*. 16 December 2005.
75. *Ibid*.
76. Liptak, Adam. "U.S. Defends Surveillance to 3 Skeptical Judges." *The New York Times*. 16 August 2007.
77. Bazan, Elizabeth B. The Foreign Intelligence Surveillance Act: Comparison of the Senate Amendment to H.R. 3773 and the House Amendment to the Senate Amendment to H.R. 3773. 12 June 2008.
78. Hess, Pamela. "House immunizes telecoms from lawsuits." *Washington Times*. 20 June 2008.
79. *Ibid*.
80. Congressional Record (House) 20 June 2008. 19 March 2009.
81. Temple-Raston, Dina. "Terrorism Case Shows Range of Investigators' Tools." *NPR*. 3 October 2009.
82. Hosenball, Mark and Evan Thomas. "Hold The Phone." *Newsweek*. 22 May 2006.

RENDITIONS

83. Coll, Steve. *Ghost Wars: The Secret History of the CIA, Afghanistan and Bin Laden, From the Soviet Invasion to September 10, 2001*. New York; Penguin Books, 2004. pp.372-375.
84. *Ibid*.
85. Glod, Maria and Eric Weiss. "Kasi Executed For CIA Slayings; U.S. Cautions Of Possible Attacks In Retaliation." *The Washington Post*. 15 November 2002.
86. Byman, Daniel. "Prepared statement before the Senate Foreign Relations Committee on 'Extraordinary Rendition, Extraterritorial Detention and Treatment of Detainees: Restoring our Moral Credibility and Strengthening Our Diplomatic Standing.'" 26 July 2007.
87. Strasser, Steven and Craig R. Whitney, eds. *The 9/11 Investigations: The Staff Reports of the 9/11 Commission*. Washington DC: Public Affairs, 2004. p.148.; Byman, "Prepared Statement."
88. Benjamin, Daniel. "5 Myths About Rendition (and That New Movie)." *The Washington Post*. 20 October 2007.
89. Reisman, William Michael and James Baker. *Regulating Covert Action: Practices, Contexts and Policies of Covert Coercion Abroad in International and American Law*. Binghamton, NY: Vail-Ballou Press, 1992. p.129.
90. Benjamin, Daniel and Steven Simon. *The Next Attack*. New York: Times Books, 2005. pp.256-257.
91. Clarke, Richard. *Your Government Failed You*. New York: HarperCollins, 2008. p.254.
92. Coll, *Ghost Wars*.
93. Bascomb, Neil. "Adolf Eichmann and the hunt for monsters." *Los Angeles Times*. 21 April 2009.
94. Coll, *Ghost Wars*, p.377.
95. Lake, Anthony. "Joint Intelligence Committee Testimony, Testimony of Anthony Lake." 19 September 2002.
96. Baker, *In the Common Defense*, p.168.
97. *Ibid*, p.168; Priest, Dana. "CIA's Assurances on Transferred Suspects Doubted; Prisoners Say Countries Break Non-Torture Pledges." *The Washington Post*. 17 March 2005.
98. Priest, "CIA's Assurances on Transferred Suspects Doubted."
99. Goss, Porter. "Testimony Before the Senate Select Committee on Intelligence." 109th Congress, 1st Session. 16 February 2005.
100. Miller, Greg. "Obama preserves renditions as counter-terrorism tool." *Los Angeles Times*. 1 February 2009.
101. *Ibid*.
102. Tenet, George. *At the Center of the Storm*. New York: Harper Collins, 2007. p.254.
103. Benjamin, Daniel. "Rendition at Risk." *Slate Magazine*. 2 February 2007.
104. Byman, Daniel. "Prepared statement before the Senate Foreign Relations Committee on 'Extraordinary Rendition, Extraterritorial Detention and Treatment of Detainees: Restoring our Moral Credibility and Strengthening Our Diplomatic Standing.'" 26 July 2007.
105. Baker, *In the Common Defense*, p.167.
106. "Man sues CIA over torture claims." *BBC News*. 7 December 2005.
107. "German sues for CIA extradition." *BBC News*. 9 June 2008; Markon, Jerry. "Lawsuit

- Against CIA Is Dismissed.” *The Washington Post*. 19 May 2006.
108. Priest, Dana and Barton Gellman. “U.S. Decries Abuse but Defends Interrogations.” *The Washington Post*. 26 December 2002.
 109. Baker, *In the Common Defense*, p.170.
 110. Scheuer, Michael. “A Fine Rendition.” *The New York Times*. 11 March 2005.
 111. Hulnick, Arthur. *Keeping Us Safe: Secret Intelligence and Homeland Security*. Westport: Praeger, 2004. pp.113-114.
 112. Benjamin, Daniel. “5 Myths About Rendition (and That New Movie).” *The Washington Post*. 20 October 2007.
 113. Mayer, Jane. “Outsourcing Torture: The secret history of America’s “extraordinary rendition” program.” *The New Yorker*. 14 February 2005; Fisk, Robert. “Cairo’s dirty war spills across Europe.” *The Independent*. 6 December 1995.
 114. Mayer, “Outsourcing Torture.”
 115. Benjamin, “Rendition at Risk.”
 116. *Ibid*.
 117. Benjamin and Simon, *The Next Attack*, pp.256-257.
 118. Hayden, Michael. “A Conversation with Michael Hayden: Transcript.” Council on Foreign Relations. 7 September 2007.
 119. *Ibid*.
 120. Musharraf, Pervez. *In the Line of Fire*. New York: Free Press, 2006. pp. 258-261.
 121. Mayer, *The Dark Side*. p.105.
 122. *Ibid*. p.109.
 123. Hayden, “Transcript.”
 124. Mayer, *The Dark Side*, p.108.
 125. Department of Homeland Security Office of Inspector General. “The Removal of a Canadian Citizen to Syria (Unclassified Summary).” OIG-08-18. 14 March 2008.
 126. Shane, Scott. “Torture Victim Had No Terror Link, Canada Told U.S.” *The New York Times*. 25 September 2006; “Harper apologizes for Canada’s role in Arar’s ‘terrible ordeal.’” *Canwest News Service*. 27 January 2007.
 127. “U.S. tries to keep rendition under wraps.” *UPI*. 13 June 2009; Tapper, Jake and Jason Ryan. “Sssshhhhh! President Obama Is Still Backing State Secrets.” *ABC News*. 13 June 2009.

NATIONAL SECURITY INTERROGATIONS

128. Mazzetti, Mark and Scott Shane. “C.I.A. Abuse Cases Detailed in Report on Detainees.” *The New York Times*. 24 August 2009.
129. Bowden, Mark. “The Dark Art of Interrogation.” *The Atlantic Monthly*. October 2003.
130. See, for example, William Ranney Levi. *Interrogation’s Law*. 118 Yale L.J. 1434, 1436 (2009); see also A.J. Barker, *Prisoners of War* 59 (1975).
131. The Independent Panel to Review DoD Detention Operations. Final Report of the Independent Panel To Review DoD Detention Operations 63–64 (2004), reprinted in *The Torture Papers: The Road to Abu Ghraib* 938–39 (Karen J. Greenberg & Joshua L. Dratel eds., 2005), available at: <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>
132. Simpson, Cam and Evan Perez. “Spy Chief Rips Handling of Terror Case.” *The Wall Street*

Journal. 21 January 2010.

133. Hunt, Kasie. "Lieberman Rips FBI on Miranda Rights." *Politico*. 25 January 2010.
134. 74 F.R. 4893, § 3(b) (Executive Order No. 13491, 22 January 2009).
135. 74 F.R. 4893, § 4(a), (e) (Executive Order No. 13491, 22 January 2009).
136. *Ibid.* ("After extensively consulting with representatives of the Armed Forces, the relevant agencies in the Intelligence Community, and some of the nation's most experienced and skilled interrogators, the Task Force concluded that the Army Field Manual provides appropriate guidance on interrogation for military interrogators and that no additional or different guidance was necessary for other agencies.")
137. Mazzetti, Mark. "Panetta Open to Tougher Methods in Some C.I.A. Interrogation." *The New York Times*. 5 February 2009.
138. *Ibid.*
139. "Press Release: Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President." *Department of Justice*. 24 August 2009, available at: <http://www.justice.gov/opa/pr/2009/August/09-ag-835.html>
140. *Ibid.*
141. *Ibid.*
142. U.S. Army Field Manual 2-22.3 (6 September 2006), p.1-8.
143. U.S. Army Intelligence and Interrogation Handbook: The Official Guide on Prisoner Interrogation. Department of the Army, 8 (2005).
144. Rosenbach, Eric and Aki J. Peritz. "Interrogations and Intelligence," in *Confrontation or Collaboration? Congress and the Intelligence Community*. Cambridge: The Belfer Center, Harvard University, 2009.
145. Hoffman, Major Carl W. "The Seizure of Tinian." USMC Historical Monograph, available at: <http://www.ibiblio.net/hyperwar/USMC/USMC-M-Tinian/USMC-M-Tinian-2.html#fn94>
146. Coh, Gary. "Torture was taught by CIA; Declassified manual details the methods used in Honduras; Agency denials refuted." *The Baltimore Sun*. 27 January 1997. ("The CIA also declassified a Vietnam-era training manual called 'KUBARK Counterintelligence Interrogation—July 1963,' which also taught torture and is believed by intelligence sources to have been a basis for the 1983 manual . . . The 1983 manual was altered between 1984 and early 1985 to discourage torture after a furor was raised in Congress and the press about CIA training techniques being used in Central America.").
147. Zelikow, Philip. "Testimony of Philip Zelikow Before the Senate Judiciary Committee." 13 May 2009, available at: http://judiciary.senate.gov/hearings/testimony.cfm?id=3842&wit_id=7907
148. Fine, Glenn. "Testimony of Glenn A. Fine, Inspector General, U.S. Department of Justice, Before the Senate Committee on the Judiciary." 10 June 2008, available at: <http://www.justice.gov/oig/testimony/t0806a/index.htm>
149. Cloonan, John. "Testimony of John E. Cloonan, Retired FBI Special Agent, Before the Senate Committee on the Judiciary." 10 June 2008, available at: http://judiciary.senate.gov/hearings/testimony.cfm?id=3399&wit_id=7228
150. U.S. Army Field Manual 2-22.3 (6 September 2006), § 5-75, p. 5-21.
151. Ackerman, Spencer. Obama Announces New Interagency Interrogation Force. *The Washington Independent*. 24 August 2009.
152. "President Discusses Creation of Military Commissions to Try Suspected Terrorists." *The*

- White House. 6 September 2006, available at: <http://georgewebush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html>
153. Hayden, Michael. "Interview by Charlie Rose with Gen. Michael V. Hayden, Director, CIA, on The Charlie Rose Show." 23 October 2007.
 154. Weber, Joseph. "Panetta Defends CIA's Post-9/11 Methods." *The Washington Times*. 24 August 2009.
 155. Eggen, Dan and Walter Pincus. "FBI, CIA Debate Significance of Terror Suspect." *The Washington Post*. 18 December 2007.
 156. Jehl, Douglas. "Iraq War Intelligence Linked to Coercion." *The New York Times*. 9 December 2005.
 157. Shane, Scott and Mark Mazzetti. "Advisers Fault Harsh Methods in Interrogation." *The New York Times*. 30 May 2007.
 158. Shane, Scott. "Book Reveals Red Cross Report on C.I.A. Torture of Qaeda Prisoners." *The New York Times*. 11 July 2008.
 159. Mazzetti, Mark and Scott Shane. "Interrogation Debate Sharply Divided Bush White House." *The New York Times*. 3 May 2009.
 160. Office of Legal Counsel, Department of Justice, available at: <http://www.justice.gov/olc/index.html>
 161. Goldsmith, Jack. *The Terror Presidency: Law and Judgment Inside the Bush Administration*. New York: W.W. Norton, 2007.
 162. Cole, David. *Introductory Commentary: Torture Law*, in *The Torture Memos* 1–40 (2009).
 163. "Memorandum for Alberto R. Gonzalez, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A*." 1 August 2002.
 164. "Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee*." 10 May 2005.
 165. Johnson, Carrie and Julie Tate. "New Interrogation Details Emerge." *The Washington Post*. 17 April 2009.
 166. *Ibid.*
 167. Lebovich, Andrew. "The LWOT: Torture Memo Lawyers Cleared; Zazi Pleads Guilty." *Foreign Policy*. 25 February 2010.
 168. *Ibid.*
 169. Mazzetti, Mark and Scott Shane. "C.I.A. Abuse Cases Detailed in Report on Detainees." *The New York Times*. 24 August 2009.
 170. Baker, Peter, David Johnston and Mark Mazzetti. "Abuse Issue Puts CIA and Justice Department at Odds." *The New York Times*. 27 August 2009.
 171. Goldsmith, Jack. *The Terror Presidency: Law and Judgment Inside the Bush Administration*. New York: W.W. Norton, 2007..
 172. Shane, Scott. "Book Reveals Red Cross Report on C.I.A. Torture of Qaeda Prisoners." *The New York Times*. 11 July 2008.
 173. Meyer, Josh. "CIA contractors will be a focus of interrogation investigation." *The Los Angeles Times*. 27 August 2009.
 174. Karl, Jonathan. "'High-Value' Detainees Transferred to Guantanamo." *ABC News*. 6 September 2006, available at: <http://abcnews.go.com/International/story?id=2400470>; "Bush

- Admits to CIA Secret Prisons.” BBC News. 7 September 2006, available at: <http://news.bbc.co.uk/2/hi/americas/5321606.stm>
175. Priest, Dana. “CIA Holds Terror Suspects in Secret Prisons.” *The Washington Post*. 2 November 2005.
 176. *Ibid.*
 177. Fine, Glenn. “Testimony of Glenn A. Fine, Inspector General, U.S. Department of Justice, Before the Senate Committee on the Judiciary.” 10 June 2008.
 178. FBI Legal Handbook for Special Agents (2003).
 179. FBI Manual of Investigative Operations and Guidelines, available at: <http://www.archive.org/details/FbiManualOfInvestigativeOperationsAndGuidelines-FrontMatter>
 180. FBI Manual of Administrative and Operational Procedures.
 181. Fine, Glenn. “Testimony of Glenn A. Fine, Inspector General, U.S. Department of Justice, Before the Senate Committee on the Judiciary.” 10 June 2008..
 182. *Ibid.*
 183. *Ibid.*
 184. *Ibid.*
 185. *Ibid.*
 186. “A Review of the FBI’s Involvement in and Observance of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq, Special Report of the FBI Inspector General.” May 2008, available at: <http://www.justice.gov/oig/reports/FBI/index.htm>
 187. *Ibid.*
 188. *Ibid.*
 189. Fine, Glenn. “Testimony of Glenn A. Fine, Inspector General, U.S. Department of Justice, Before the Senate Committee on the Judiciary.” 10 June 2008.
 190. William Ranney Levi. *Interrogation’s Law*. 118 Yale L.J. 1434, 1436 (2009).
 191. 74 F.R. 4893 (Executive Order No. 13491, 22 January 2009).
 192. 74 F.R. 4893, § 3(a) (Executive Order No. 13491, 22 January 2009).
 193. U.S. Army Field Manual 2-22.3 (6 September 2006), p. 5-26; See also *ibid* at 5-20.
 194. 42 U.S.C. § 2000dd(a) (2006).
 195. 74 F.R. 4893, § 3(b) (Executive Order No. 13491, 22 January 2009).
 196. William Ranney Levi. *Interrogation’s Law*. 118 Yale L.J., at 1434–35 (2009).
 197. 74 F.R. 4893, § 3(c) (Executive Order No. 13491, 22 January 2009).
 198. “Memorandum for Alberto R. Gonzalez, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A*, § VI(A).” 1 August 2002.
 199. *Ibid.*
 200. In this context, it may be worth noting the Israeli High Court of Justice’s acceptance of “necessity” as a defense—though not an *ex ante* justification—in *Public Committee Against Torture v. State of Israel*.
 201. Hunt, Kasie. “Lieberman Rips FBI on Miranda Rights.” *Politico*. 25 January 2010.
 202. “Intelligence chief says attempted Christmas bomb case mishandled.” *Associated Press*. 20 January 2010.
 203. Tapper, Jake. “Long-Awaited High-Value Interrogation Group—HIG—Finally Formed.” *ABC News*. 6 February 2010.
 204. Isikoff, Michael. “Intel Chief’s Comments Infuriate Obama Officials.” *Newsweek*. 20 January 2010.

INFORMATION OPERATIONS AND COUNTERTERRORISM

205. Department of Defense. *Joint Vision 2020*.
206. Armistead, Leigh, Ed. *Information Operations: Warfare and the Hard Reality of Soft Power*. Washington DC: Brassley's, Inc. p.16.
207. Department of Defense. *Joint Vision 2020*.
208. Department of Defense. "Information Operations Roadmap." 30 October 2003, declassified 2006.
209. Gerth, Jeff. "Military Information War is Vast and Often Secretive." *The New York Times*. 11 December 2005.
210. Gerth, "Military Information."
211. Cancian, Mark. "Capitalizing on al Qaeda's Mistakes." *Proceedings Magazine*. US Naval Institute, Vol. 134, No. 4. April 2008.
212. Lloyd, Karen. "Experiences From The Field: Using Information Operations To Defeat AQAM." Paper presented at the 2008 Johns Hopkins Unrestricted Warfare Symposium.
213. Central Intelligence Agency. "DCI Worldwide Threat Briefing before the Senate Select Committee on Intelligence on the 'Worldwide Threat 2001: National Security in a Changing World.'" 7 February 2001.
214. *Ibid*.
215. "About VOA." Voice of America, available at: <http://author.voanews.com/english/about/OnlinePressKit.cfm>
216. The George Washington University National Security Archive. "Rumsfeld's Roadmap to Propaganda" 25 January 2006, available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB177/index.htm>
217. Brookes, Adam. "US plans to 'fight the net' revealed." *BBC*. 27 January 2006.
218. Babcock, Charles. "Young Firm Finds a Bonanza in Middle East." *The Washington Post*. 23 December 2005. Mazzetti, Mark. "Pentagon Audit Clears Propaganda Effort." *The New York Times*. 19 October 2006.
219. Londono, Ernesto. "A High-Priced Media Campaign That Iraqis Aren't Buying; Many in Baghdad Dismiss Effort as U.S. Propaganda." *The Washington Post*. 7 June 2009.
220. Waller, Douglas. "Opening Up the Psyops War." *Time*. 16 October 2001.
221. "New Pentagon office to spearhead information war." *CNN*. 20 February 2002; Bamford, James. "The Man Who Sold the War." *Rolling Stone*. 17 November 2005.
222. Shanker, Thom. "Pentagon Closes Office Accused of Issuing Propaganda Under Bush." *The New York Times*. 15 April 2009.
223. Kilcullen, David. *The Accidental Guerrilla: Fighting Small Wars in the Midst of a Big One*. Oxford: New York, 2009. p.286.
224. Rosenau, William. "Waging the 'War of Ideas.'" RAND Reprints. RP-1218, 2006. p.1132.

TARGETED KILLINGS AND THE DRONE WAR

225. Walsh, Declan. "Air Strike Kills Taliban Leader Baitullah Mehsud." *The Guardian*. 7 August 2009; Bergen, Peter and Katherine Tiedemann. "Revenge of the Drones." *New America Foundation*. 19 October 2009.

226. Mayer, Jane. "The Predator War." *The New Yorker*. 26 October 2009.
227. "Obama: 'We Took Out' Pakistani Taliban Chief." *Reuters*. 21 August 2009.
228. Anderson, Kenneth. "Targeted Killing in US Counterterrorism Strategy and Law." Brookings Institution Working Paper on Counterterrorism and American Statutory Law, No. 9. 11 May 2009.
229. Anderson, "Targeted Killings."
230. Gellman, Barton. "CIA Weighs 'Targeted Killing' Missions." *The Washington Post*. 28 October 2001; Coll, *Ghost Wars*, pp.416-437.
231. Berger, Samuel. "Testimony Before the Joint Inquiry into the Terrorist Attacks of September 11, 2001." 19 September 2002.
232. Gellman, "CIA Weighs 'Targeted Killing' Missions."
233. Authorization for Use of Military Force. 18 September 2001, Public Law 107-40 [S. J. RES. 23].
234. Chapter VII: Action With Respect To Threats To The Peace, Breaches Of The Peace, And Acts Of Aggression. Charter of the United Nations.
235. Printer, Norman G. Jr. *The Use of Force Against Non-State Actors under International Law: An Analysis of the U.S. Predator Strike in Yemen*. 8 UCLA J. Int'l L. & Foreign Aff. 331, 334 (2003).
236. International Covenant on Civil and Political Rights. 16 December 1966 (entry into force 23 March 1976, in accordance with Article 49).
237. Fisher, W. Jason. *Targeted Killing, Norms, and International Law*. 45 Colum. J. Transnat'l L. 711, 718-19 (2007).
238. Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.
239. *Ibid*.
240. O'Connell, Mary Ellen. *To Kill or Capture Suspects in the Global War on Terror*. 35 Case W. Res. J. Int'l L. 325, 327-28 (2004).
241. "U.S. Special Forces Strike In Pakistan." *CBS News*. 3 September 2008.
242. Bergen, Peter and Katherine Tiedemann. "Revenge of the Drones." *New America Foundation*. 19 October 2009.
243. *Ibid*.
244. Bowden, Mark. *Black Hawk Down: A Story of Modern War*. New York: Penguin, 1999.
245. Perlez, Jane. "Pakistan's Military Chief Criticizes US Over a Raid." *The New York Times*. 11 September 2008.
246. Bergen and Tiedemann, "Revenge of the Drones."
247. Shah, Pir Zubair and Salman Masood. "US Drone Strike Said to Kill 60 in Pakistan." *The New York Times*. 23 June 2009.
248. "US Airstrikes in Pakistan called 'Very Effective.'" *CNN*. 18 May 2009.
249. Mayer, "The Predator War."
250. Bergen and Tiedemann, "Revenge of the Drones."
251. Lake, Eli. "'Permission' Needed to Kill US Terrorists." *The Washington Times*. 4 February 2010.
252. Priest, Dana. "U.S. military teams, intelligence deeply involved in aiding Yemen on strikes." *The Washington Post*. 27 January 2010.
253. Kaplan, Eben. "Targeted Killings." Council on Foreign Relations Background. 2 March 2006, available at: <http://www.cfr.org/publication/9627/>

254. *Ibid.*
255. Kilcullen, David and Andrew Exum. "Death From Above, Outrage from Below." *The New York Times*. 16 May 2009.
256. Bekdil, Burak Ege and Umit Enginsoy. "Turkey Extends Mandate for PKK Raids in Iraq." *Defense News*. 7 October 2009; "Turkish Troops Enter North Iraq." *BBC News*. 22 February 2008.
257. Markey, Patrick. "Colombia Says Top FARC Commander Killed in Combat." *Reuters*. 1 March 2008.

DOMESTIC COUNTERTERRORISM: ROLES, RESPONSIBILITIES, AND LEGAL AUTHORITIES

258. Pankratz, Howard. "Man Held in SUV sabotage Firebombs Found: 7 Similar Devices were Discovered in the Car of Grant Barnes, Suspected of Attempting to Detonate Them in Cherry Creek Over a Four-Day Span." *The Denver Post*. 5 April 2007.
259. Homeland Security Act of 2002, Title I, Sec. 101(b)(1).
260. See Allen, Charles. "Testimony of Charles Allen, Under Secretary for Intelligence and Analysis, Before the Senate Committee on Homeland Security and Governmental Affairs." 23 July 2008. p.1.
261. Homeland Security Act of 2002, Title II, Sec. 201.
262. 2009 National Infrastructure Protection Plan. p.2.
263. Steinzor, Rena. "Democracies Die Behind Closed Doors: The Homeland Security Act and Corporate Accountability." 12-SPG Kan. J.L. & Pub. Pol'y 641, 643 (2003).
264. Critical Infrastructure Information Act of 2002, Sec. 214.
265. "Statement Of Senator Patrick Leahy On Introduction Of The Restoration Of Freedom Of Information Act ('Restore FOIA')." Senator Patrick Leahy Press Release. 12 March 2003, available at: <http://leahy.senate.gov/press/200303/031203e.html>; "Fix This Loophole," *The Washington Post*. 10 February 2003.
266. Hsu, Spencer. "U.S. Struggles to Rank Potential Terror Targets." *The Washington Post*. 16 July 2006.
267. Reese, Shawn. "Department of Homeland Security Assistance to States and Localities: A Summary and Issues for the 111th Congress." CRS Report. 5 August 2009.
268. Gillman, Todd J. "Dallas-Fort Worth area moves to top tier of terrorism targets." *The Dallas Morning News*. 10 December 2009.
269. Reese, p.12
270. Rosen, Jeffrey. "Man Made Disaster." *The New Republic*. 24 December 2008.
271. Mueller, Robert. "Testimony of Robert Mueller, Director, FBI, Before the United States Senate, Committee on Homeland Security and Governmental Affairs." 30 September 2009, available at: <http://www.fbi.gov/congress/congress09/mueller093009.htm>
272. Sheehan, Michael A. *Crush the Cell*. New York: Random House, 2008. pp.171-172.
273. "The Challenge of Domestic Intelligence in a Free Society." Brian A. Jackson, ed. RAND Corporation. 2009.
274. "Seven Charged with Terrorism Violations in North Carolina." Department of Justice Press Release. 27 July 2009, available at: <http://charlotte.fbi.gov/dojpressrel/2009/ce072709.htm>

275. "Spate of Terrorism Arrests not Connected, Analysts Say." *CNN*. 25 September 2009, available at: <http://www.cnn.com/2009/CRIME/09/25/terrorism.cases/index.html>
276. "FBI Arrests Jordanian Citizen for Attempting to Bomb Skyscraper in Downtown Dallas." Department of Justice Press Release. 24 September 2009, available at: <http://dallas.fbi.gov/dojpressrel/pressrel09/dl092409.htm>
277. Shane, Scott and David Johnston. "Questions, Not Alarms, Met Exchanges with Cleric." *The New York Times*. 11 November 2009.
278. IIRTPA of 2004.
279. Executive Order 13354.
280. "Memorandum of Agreement Between the Attorney General and the Director of National Intelligence on guidelines for Access, Retention, Use, and Dissemination by the National Counterterrorism Center." 4 November 2009.
281. *Ibid.*
282. *Ibid.*
283. *Ibid.*
284. Priest, Dana. "CIA is Expanding Domestic Operations; More Offices, More Agents with FBI." *The Washington Post*. 23 October 2002.
285. Priest, Dana. "FBI Pushes to Expand Domain into CIA's Intelligence Gathering." *The Washington Post*. 6 February 2005.
286. EO 12333, Available at: <https://www.cia.gov/about-cia/eo12333.html#2.3>
287. Priest, "FBI Pushes to Expand Domain into CIA's Intelligence Gathering."
288. "Miller, Greg. "Military Spies Seek Authority in the U.S." *Los Angeles Times*. 8 October 2005; Soraghan, Mike, John Aloysius Farrell and Alicia Caldwell. "Beauprez IDs Site for Division's Move." *Denver Post*. 8 May 2005; Priest, "CIA is Expanding Domestic Operations."
289. Soraghan, Mike, John Aloysius Farrell and Alicia Caldwell. "Beauprez IDs Site for Division's Move."
290. *Ibid.*
291. Mahler, Jonathan. "Cops and Bombers." *The New York Times*. 30 January 2009.
292. Falkenrath, Richard. "Testimony of Richard Falkenrath, before the United States Senate, Committee on Homeland Security and Governmental Affairs." 12 September 2006, available at: <http://www.investigativeproject.org/documents/testimony/259.pdf>
293. Sheehan, p.183.
294. "Terrorism Information Sharing and the Nationwide Suspicious Activity Report Initiative." CRS Report. p.14.
295. Falkenrath, "Testimony."
296. Sheehan, p.171.
297. Sheehan, Michael A. "The Hatfields and McCoys of Counterterrorism." *The New York Times*. 26 September 2009.
298. Khalil, Lydia. "Is New York a Counterterrorism Model?" *Council on Foreign Relations Expert Brief*. 10 September 2009.
299. Johnston, David and William K. Rashbaum. "New York Police Fight With U.S. On Surveillance." *The New York Times*. 20 November 2008.
300. Rosenbach and Peritz, p.97.
301. Riegle, Robert. "Testimony of Director Robert Riegle before the United States House of

- Representatives, Committee on Homeland Security.” 1 April 2009, available at: http://www.dhs.gov/ynews/testimony/testimony_1238597287040.shtm; Senate Committee on Homeland Security and Governmental Affairs. “Eight Years After 9/11: Confronting the Terrorist Threat to the Homeland, Written Statement of Secretary of Homeland Security, Janet Napolitano.” 111th Cong., 1st sess. 30 September 2009.
302. Remarks by Janet Napolitano to National Fusion Center Conference. 11 March 2009, available at: http://www.dhs.gov/ynews/speeches/sp_1236975404263.shtm
303. Gernan, Michael and Jay Stanley. “What’s Wrong with Fusion Centers.” ACLU. 5 December 2007; Fein, Bruce. “Testimony of Bruce Fein before the House Subcommittee on Intelligence, Information Sharing, and Terrorism Risk Assessment.” 1 April 2009.
304. Masse, Todd, Siobhan O’Neil and John Rollins. “Fusion Centers: Issues and Options for Congress.” CRS Research Service. 6 July 2007. p.29.
305. Singel, Ryan. “Feds Tout New Domestic Intelligence Centers.” *Wired*. 20 March 2008.
306. Clarke, p.230.
307. Jackson, “The Challenge of Domestic Intelligence in a Free Society,” p.68.
308. PL 110-53, Sec. 511 “The 9/11 Commission Act.”
309. Dickey, Christopher. “Inside the Zazi Takedown.” *Newsweek*. 26 September 2009.
310. Rashbaum, William K. and Al Baker. “Police Official in Terror Unit is Removed.” *The New York Times*. 24 September 2009.

DETENTIONS OUTSIDE THE CRIMINAL JUSTICE SYSTEM

311. Priest, Dana. “CIA Holds Terror Suspects in Secret Prisons.” *The Washington Post*. 2 November 2005.
312. Savage, Charlie. “Detainees Will Still Be Held But Not Tried, Official Says.” *The New York Times*. 22 January 2010.
313. The Geneva Conventions are a series of treaties and protocols that govern armed conflict.
314. III Geneva Convention, Art. 17 (1949).
315. III Geneva Convention, Art. 5 (1949).
316. Goodman, Ryan and Derek Hinks. *International Law, U.S. War Powers, & the Global War on Terrorism*. 118 Harv. L. Rev. 2653, 2653 (2005).
317. IV Geneva Convention, Art. 42 (1949).
318. IV Geneva Convention, Art. 27 (“[T]he Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.”)
319. IV Geneva Convention, Art. 4 (1949).
320. Chesney, Robert M. and Jack L. Goldsmith. *Terrorism & the Convergence of Criminal & Military Detention Models*. 60 Stan. L. Rev. 1079, 1085.
321. Common Articles are articles appearing in all four Geneva Conventions.
322. 548 US 557 (2008).
323. “U.S. Response to U.N. Commission on Human Rights Report on the Situation of Detainees at Guantanamo Bay Report.” Annex II, E/CN.4/2006/120. 27 February 2006.
324. “Memorandum from John Yoo, Deputy Assistant Att’y Gen., & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel, Dep’t of Def. 1.” 9 January 2002.

325. Pub. L. No. 107-40, 115 Stat. 224 (2001).
326. Goodman and Hinks, *International Law*; Chesney and Goldsmith, *Terrorism and the Convergence of Criminal & Military Detention Models*.
327. *Ibid.*
328. 542 US 507. (2004).
329. "Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, In Re Guantanamo Bay Litigation, US District Court for the District of Columbia" (2009).
330. Finn, Peter. "Obama Endorses Indefinite Detention Without Trial for Some." *The Washington Post*. 22 May 2009.

PROSECUTING TERRORISTS IN US CRIMINAL COURTS

331. Padilla, indicted for conspiracy to commit murder and providing material support of terrorism charges, has since been convicted of aiding and abetting al Qaeda.
332. Specifically, FISA was amended by the USA-PATRIOT Act and the FISA Amendments Act.
333. 50 U.S.C. § 1801(a)(4).
334. USA-PATRIOT Act, Pub. L. No. 107-56, § 505, 115 Stat. 272, 365 (2001) (codified as amended at 18 U.S.C. § 2709(b) (2006)).
335. Office of the Inspector General. "A Review of the Federal Bureau of Investigation's Use of National Security Letters." March 2007.
336. Stout, David. "FBI Head Admits Mistakes in Use of Security Act." *The New York Times*. 10 March 2007.
337. Crawford, Kimberly. "Sneak and Peek Warrants: Legal Issues Regarding Surreptitious Searches." *The FBI Law Enforcement Bulletin*. February 1997.
338. Senator Feingold, Russell. "Statement of U.S. Senator Russ Feingold From the Senate Floor On the Reauthorization of the USA PATRIOT Act." 14 December 2005.
339. Zabel, Richard B. and James J. Benjamin, Jr. *In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Court*. Human Rights First. July 2009.
340. N.Y.U. School of Law, Terrorist Trial Report Card 49 (2009).
341. Lichtblau, Eric. "U.S. Report Faults the Roundup of Illegal Immigrants After 9/11." *The New York Times*. 2 June 2003.
342. Pub. L. No. 96-456, 94, State. 2025, 2025-31 (1980) (codified at 18 U.S.C. app. 3).
343. Zabel and Benjamin, p.82.
344. 132 F.Supp.2d 168, 173-79 (S.D.N.Y. 2001).
345. American Bar Association Standing Committee on Law and National Security. "Trying Terrorists in Article III Courts: Challenges & Lessons Learned" 25 (2009).
346. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2532 (2009).
347. 373 U.S. 83 (1963).
348. 405 U.S. 150 (1972).
349. N.Y.U. School of Law, Terrorist Trial Report Card (2009).

MILITARY COMMISSIONS

- 350. “The Case of Omar Ahmed Khadr, Canada.” *Human Rights First*. 2010.
- 351. Finn, Peter. “Former Boy Soldier, Youngest Guantanamo Detainee, Heads Toward Military Tribunal.” *The Washington Post*. 10 February 2010.
- 352. James, Randy. “A Brief History of Military Commissions.” *Time*. 19 May 2009.
- 353. 317 U.S. 1 (1942).
- 354. American Bar Association Task Force On Terrorism & The Law: Report and Recommendations on Military Commissions (2002).
- 355. Hansen, Victor. *The Usefulness of a Negative Example: What We Can Learn About Evidence Rules from the Government’s Most Recent Efforts to Construct A Military Commissions Process*, 35 Wm. Mitchell L. Rev. 1480, 1485 (2009).
- 356. 548 US 557 (2006).
- 357. 128 S.Ct. 2229 (2008).
- 358. *Ibid*.
- 359. Glaberson, William. “U.S. May Revive Guantanamo Military Courts.” *The New York Times*. 1 May 2009.
- 360. Executive Order 13492, issued 22 January 2009.
- 361. Glaberson, “U.S. May Revive Guantanamo Military Courts.”
- 362. Mayer, Jane. “The Trial.” *The New Yorker*. 15 February 2010.
- 363. *Ibid*.
- 364. Comey, Jim and Jack Goldsmith. “Holder’s Decisions on Mohammed trial defended.” *The Washington Post*. 20 November 2009.
- 365. Richey, Warren. “Obama Endorses Military Commissions for Guantanamo Detainees.” *The Christian Science Monitor*. 29 October 2009.
- 366. “President Obama Signs Military Commissions Changes into Law.” ACLU. 28 October 2009.
- 367. “Umar Farouk Abdulmutallab Indicted for Attempted Bombing of Flight 253 on Christmas Day.” Department of Justice. 6 January 2010.
- 368. Mayer, “The Trial.”

LIST OF ACRONYMS

ACLU	American Civil Liberties Union
AQI	Al Qaeda in Iraq
AUMF	Authorization for Use of Military Force
CBP	Customs and Border Patrol
CIA	Central Intelligence Agency
CIAC	The Colorado Information Analysis Center
CIP	Critical Infrastructure Protection
CIPA	The Classified Information Procedures Act
CSRT	Combatant Status Review Tribunal
CT	Counterterrorism
CTB	Counterterrorism Bureau
DHS	Department of Homeland Security
DIA	Defense Intelligence Agency
DNI	Director of National Intelligence
DoD	Department of Defense
DoJ	Department of Justice
DTA	The Detainee Treatment Act
EO	Executive Order

FARC	The Revolutionary Armed Forces of Columbia
FATA	Federally Administered Tribal Areas
FBI	Federal Bureau of Investigation
FEMA	Federal Emergency Management Agency
FISA	The Foreign Intelligence Surveillance Act
FISC	Foreign Intelligence Surveillance Court
FM	Field Manual
FOIA	Freedom of Information Act
FTO	Foreign Terrorist Organization
HIG	High Value Detainee Interrogation Group
HPSCI	House Permanent Select Committee on Intelligence
HR	House Resolution
IC	Intelligence Community
ICCPR	International Covenant on Civil and Political Rights
IO	Information Operations
IRGC	Iranian Revolutionary Guard Corps
IRS	Internal Revenue Service
IRTPA	The Intelligence Reform and Terrorism Prevention Act
JTTF	Joint Terrorism Task Force
KSM	Khalid Shaykh Mohammed
LAPD	Los Angeles Police Department
MAOP	Manual of Administrative and Operational Procedures
MIOG	Manual of Investigative Operations and Guidelines

MLAT	Mutual Legal Assistance Treaty
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
NCPC	The National Counterproliferation Center
NCTC	The National Counterterrorism Center
NR	National Resources
NSA	National Security Agency
NSC	National Security Council
NSD	National Security Directive
NSDD	National Security Decision Directive
NSL	National Security Letter
NSPD	National Security Presidential Directive
NYPD	New York Police Department
ODNI	Office of the Director of National Intelligence
OLC	Office of Legal Counsel
OPR	Office of Professional Responsibility
OSI	Office of Strategic Influence
PDD	Presidential Decision Directive
POW	Prisoner of War
PPD	Presidential Policy Directive
SAR	Suspicious Activity Report
SSCI	Senate Select Committee on Intelligence
TSA	Transportation Security Administration

UAV	Unmanned Aerial Vehicle
UCMJ	Uniform Code of Military Justice
UN	United Nations
UNCAT	United Nations Convention Against Torture
UNSCR	United Nations Security Council Resolution
USA-PATRIOT Act	The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act
USC	United States Code
USG	United States Government
WMD	Weapons of Mass Destruction
WWII	World War Two

BIBLIOGRAPHY

- Ackerman, Spencer. "Obama Announces New Interagency Interrogation Force." *The Washington Independent*. 24 August 2009.
- Allen, Charles. "Testimony of the Under Secretary for Intelligence and Analysis, Before the Senate Committee on Homeland Security and Governmental Affairs." 23 July 2008.
- Ambinder, Marc. "Igniting the Debate over Obama's Secret War." *The Atlantic.com*. 21 October 2009.
- American Bar Association.
- "Standing Committee on Law and National Security, Trying Terrorists in Article III Courts: Challenges & Lessons Learned." 25 (2009).
 - Task Force On Terrorism & The Law: Report and Recommendations on Military Commissions (2002).
- Anderson, Kenneth. "Targeted Killing in US Counterterrorism Strategy and Law." *Brookings Institution Working Paper on Counterterrorism and American Statutory Law*, #9. 11 May 2009.
- Andrew, John. *Power to Destroy: The Political Uses of the IRS from Kennedy to Nixon*. Chicago: Ivan R. Dee, 2002.
- Armistead, Leigh, Ed. *Information Operations: Warfare and the Hard Reality of Soft Power*. Washington DC: Brassley's, Inc., 2004.
- Authorization for Use of Military Force. 18 September 2001, Public Law 107-40 [S. J. RES. 23].
- Babcock, Charles. "Young Firm Finds a Bonanza in Middle East." *The Washington Post*. 23 December 2005.
- Baker, James. *In the Common Defense: National Security Law for Perilous Times*. Cambridge: Cambridge University Press, 2007.

- Baker, James and Warren Christopher. "Put War Powers Back Where They Belong." *The New York Times*. 8 July 2008.
- Baker, Peter, David Johnston and Mark Mazzetti. "Abuse Issue Puts CIA and Justice Department at Odds." *The New York Times*. 27 August 2009.
- Bamford, James. "The Man Who Sold the War." *Rolling Stone*. 17 November 2005.
- Barker, A.J. *Prisoners of War* 59 (1975).
- Bascomb, Neil. "Adolf Eichmann and the hunt for monsters." *Los Angeles Times*. 21 April 2009.
- Bazan, Elizabeth B.
- "The Foreign Intelligence Surveillance Act: Comparison of the Senate Amendment to H.R. 3773 and the House Amendment to the Senate Amendment to H.R. 3773." CRS Report. 12 June 2008.
 - "Assassination Ban and E.O. 12333: A Brief Summary." CRS Report-2. 4 January 2002.
- Bekdil, Burak Ege and Umit Enginsoy. "Turkey Extends Mandate for PKK Raids in Iraq." *Defense News*. 7 October 2009.
- Benjamin, Daniel.
- "5 Myths About Rendition (and That New Movie)." *The Washington Post*. 20 October 2007.
 - "Rendition at Risk." *Slate Magazine*. 2 February 2007.
- Benjamin, Daniel and Steven Simon. *The Next Attack*. New York: Times Books, 2005.
- Bergen, Peter and Katherine Tiedemann. "Revenge of the Drones." *New America Foundation*. 19 October 2009.
- Berger, Samuel. "Testimony before the Joint Inquiry into the Terrorist Attacks of September 11, 2001." 19 September 2002.
- Bobbitt, Philip. "Why We Listen." *The New York Times*. 30 January 2006.
- Bowden, Mark.
- *Black Hawk Down: A Story of Modern War*. New York: Penguin, 1999.
 - "The Dark Art of Interrogation." *The Atlantic Monthly*. October 2003.

- Brookes, Adam. "US plans to 'fight the net' revealed." *BBC*. 27 January 2006.
- "Bush Admits to CIA Secret Prisons," *BBC News*. 7 September 2006.
- Byman, Daniel. "Prepared statement before the Senate Foreign Relations Committee on 'Extraordinary Rendition, Extraterritorial Detention and Treatment of Detainees: Restoring our Moral Credibility and Strengthening Our Diplomatic Standing.'" 26 July 2007.
- "The Case of Omar Ahmed Khadr, Canada." *Human Rights First*. 2010.
- Cancian, Mark. "Capitalizing on al Qaeda's Mistakes." *Proceedings Magazine*. US Naval Institute, Vol. 134, No. 4. April 2008.
- Central Intelligence Agency.
- "DCI Worldwide Threat Briefing before the Senate Select Committee on Intelligence on the 'Worldwide Threat 2001: National Security in a Changing World.'" 7 February 2001.
 - "Terrorism FAQs," available at: <https://www.cia.gov/news-information/cia-the-war-on-terrorism/terrorism-faqs.html>
- "The Challenge of Domestic Intelligence in a Free Society." Brian A. Jackson, ed. RAND Corporation. 2009.
- Chesney, Robert M. and Jack L. Goldsmith, *Terrorism & the Convergence of Criminal & Military Detention Models*. 60 Stan. L. Rev. 1079, 1085.
- Clarke, Richard. *Your Government Failed You*. New York: HarperCollins, 2008.
- Cloonan, John E. "Testimony of John Cloonan, Retired FBI Special Agent, Before the Senate Committee on the Judiciary." 10 June 2008.
- Coh, Gary. "Torture was taught by CIA; Declassified manual details the methods used in Honduras; Agency denials refuted." *The Baltimore Sun*. 27 January 1997.
- Cole, David.
- *Introductory Commentary: Torture Law*, in *The Torture Memos* 1–40. 2009.
 - "Why the Court Said No." *The New York Review of Books*. Volume 53, Number 13. 10 August 2006.
- Coll, Steve. *Ghost Wars: The Secret History of the CIA, Afghanistan and Bin Laden, From the Soviet Invasion to September 10, 2001*. New York; Penguin Books, 2004.

- Comey, Jim and Jack Goldsmith. "Holder's Decisions on Mohammed trial defended." *The Washington Post*. 20 November 2009.
- Connery, Robert. "American Government and Politics: Unification of the Armed Forces, the First Year." *The American Political Science Review*, Vol 43, No. 1. February 1949.
- Council on Foreign Relations. "A Conversation with Michael Hayden: Transcript." 7 September 2007.
- Crawford, Kimberly. "Sneak and Peek Warrants: Legal Issues Regarding Surreptitious Searches." *The FBI Law Enforcement Bulletin*. February 1997.
- Critical Infrastructure Information Act of 2002.
- Department of Defense.
- "Dictionary of Military and Associated Terms." 12 April 2001, as amended through 19 August 2009.
 - Department of Defense Instruction. No. 5240.6. 7 August 2004.
 - Information Operations Roadmap. 30 October 2003.
 - Joint Vision 2020.
- Department of Homeland Security.
- Office of Inspector General. "The Removal of a Canadian Citizen to Syria (Unclassified Summary)." OIG-08-18. 14 March 2008.
 - Remarks by Janet Napolitano to National Fusion Center Conference. 11 March 2009.
- Department of Justice.
- Office of Legal Counsel, available at: www.justice.gov/olc/index.html
 - "The President's Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them."
 - "Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President." 24 August 2009.
 - "Umar Farouk Abdulmutallab Indicted for Attempted Bombing of Flight 253 on Christmas Day." 6 January 2010.
- Dickey, Christopher. "Inside the Zazi Takedown." *Newsweek*. 26 September 2009.
- Dycus, Stephen, et al. *National Security Law, 4th Ed.* New York: Aspen Publishers, 2007.

- Eggen, Dan and Susan Schmidt. "Secret Court Rebuffs Ashcroft." *The Washington Post*. 23 August 2002.
- Eggen, Dan and Walter Pincus. "FBI, CIA Debate Significance of Terror Suspect." *The Washington Post*. 18 December 2007.
- Executive Order: Further Amendments to Executive Order 12333, United States Intelligence Activities. 31 July 2008, available at: <http://www.whitehouse.gov/news/releases/2008/07/20080731-2.html>
- Executive Orders:
- 9066.
 - 13354.
 - 13491.
 - 13492.
- Falkenrath, Richard. "Testimony Before the United States Senate, Committee on Homeland Security and Governmental Affairs." 12 September 2006.
- Fall, Bernard. "The Theory and Practice of Insurgency and Counterinsurgency". *Naval War College Review*. Winter 1998 (originally reprinted from April 1965).
- Federal Bureau of Investigation.
- "FBI Arrests Jordanian Citizen for Attempting to Bomb Skyscraper in Downtown Dallas." Department of Justice Press Release. 24 September 2009.
 - FBI Legal Handbook for Special Agents. 2003.
 - FBI Manual of Investigative Operations and Guidelines.
 - Office of the Inspector General. "A Review of the Federal Bureau of Investigation's Use of National Security Letters." March 2007.
 - "A Review of the FBI's Involvement in and Observance of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq, Special Report of the FBI Inspector General." May 2008.
 - "Seven Charged with Terrorism Violations in North Carolina." Department of Justice Press Release. 27 July 2009.
 - "Terrorism." available at: <http://denver.fbi.gov/nfip.htm>
 - "Testimony of Robert Mueller, Director, FBI, Before the United States Senate, Committee on Homeland Security and Governmental Affairs." 30 September 2009.

- Fein, Bruce. "Testimony Before the House Subcommittee on Intelligence, Information Sharing, and Terrorism Risk Assessment." 1 April 2009.
- Feingold, Russell. "Statement of U.S. Senator Russ Feingold From the Senate Floor *On the Reauthorization of the USA PATRIOT Act*." 14 December 2005.
- Fine, Glenn A. "Testimony of the Inspector General, U.S. Department of Justice, Before the Senate Committee on the Judiciary." 10 June 2008.
- Finn, Peter.
- "Former Boy Soldier, Youngest Guantanamo Detainee, Heads Toward Military Tribunal." *The Washington Post*. 10 February 2010.
 - "Obama Endorses Indefinite Detention Without Trial for Some." *The Washington Post*. 22 May 2009.
- Fisher, W. Jason. *Targeted Killing, Norms, and International Law*. 45 Colum. J. Transnational L. 711, 718-19 (2007).
- Fisk, Robert. "Cairo's dirty war spills across Europe." *The Independent*. 6 December 1995.
- "Fix This Loophole." *The Washington Post*. 10 February 2003.
- Gaziano, Todd. "The Use and Abuse of Executive Orders and Other Presidential Directives." *The Heritage Foundation*. 21 February 2001.
- Gellman, Barton. "CIA Weighs 'Targeted Killing' Missions." *The Washington Post*. 28 October 2001.
- "German sues for CIA extradition." *BBC News*. 9 June 2008.
- Gernan, Michael and Jay Stanley. "What's Wrong with Fusion Centers?" ACLU. 5 December 2007.
- Gerth, Jeff. "Military Information War is Vast and Often Secretive." *The New York Times*. 11 December 2005.
- Gillman, Todd J. "Dallas-Fort Worth area moves to top tier of terrorism targets." *The Dallas Morning News*. 10 December 2009.
- Glaberson, William. "U.S. May Revive Guantanamo Military Courts." *The New York Times*. 1 May 2009.
- Glod, Maria and Eric Weiss. "Kasi Executed For CIA Slayings; U.S. Cautions Of Possible Attacks In Retaliation." *The Washington Post*. 15 November 2002.

- Goodman, Ryan and Derek Hinks. *International Law, U.S. War Powers, & the Global War on Terrorism*. 118 Harv. L. Rev. 2653, 2653 (2005).
- Goldsmith, Jack. *The Terror Presidency: Law and Judgment Inside the Bush Administration*. New York: W.W. Norton, 2007.
- Goss, Porter. "Testimony Before the Senate Select Committee on Intelligence." 109th Congress, 1st Session. 16 February 2005.
- Greenberg, Karen J. and Joshua L. Dratel, eds. *The Torture Papers: The Road to Abu Ghraib*, 2005.
- Grimmett, Richard. "War Powers Resolution: Presidential Compliance." CRS Order Code IB81050. 24 March 2003.
- Hamdan v. Rumsfeld*. 548 U.S. 557 (2006).
- Hansen, Victor. *The Usefulness of a Negative Example: What We Can Learn About Evidence Rules from the Government's Most Recent Efforts to Construct A Military Commissions Process*. 35 Wm. Mitchell L. Rev. 1480, 1485 (2009).
- "Harper apologizes for Canada's role in Arar's 'terrible ordeal.'" *Canwest News Service*. 27 January 2007.
- Hayden, Michael. "Interview by Charlie Rose with Gen. Michael V. Hayden, Director, CIA, on The Charlie Rose Show." 23 October 2007.
- Hess, Pamela. "House immunizes telecoms from lawsuits." *The Washington Times*. 20 June 2008.
- Hoffman, Bruce. *Inside Terrorism*. New York: Columbia University Press, 1998.
- Hoffman, Major Carl W. "The Seizure of Tinian." USMC Historical Monograph, available at: <http://www.ibiblio.net/hyperwar/USMC/USMC-M-Tinian/USMC-M-Tinian-2.html#fn94>
- Homeland Security Act of 2002.
- Hosenball, Mark and Evan Thomas. "Hold The Phone." *Newsweek*. 22 May 2006.
- Hsu, Spencer. "U.S. Struggles to Rank Potential Terror Targets." *The Washington Post*. 16 July 2006.
- Hulnick, Arthur. *Keeping Us Safe: Secret Intelligence and Homeland Security*. Westport: Praeger, 2004.

- Hunt, Kasie. "Lieberman Rips FBI on Miranda Rights." *Politico*. 25 January 2010.
- Intelligence Reform and Terrorism Prevention Act of 2004 (H.Rpt. 108-796).
 "Intelligence chief says attempted Christmas bomb case mishandled."
Associated Press. 20 January 2010.
- International Covenant on Civil and Political Rights. 16 December 1966
 (entry into force 23 March 1976, in accordance with Article 49).
- Isikoff, Michael. "Intel Chief's Comments Infuriate Obama Officials."
Newsweek. 20 January 2010.
- James, Randy. "A Brief History of Military Commissions." *Time*. 19 May 2009.
- Jehl, Douglas. "Iraq War Intelligence Linked to Coercion." *The New York Times*. 9 December 2005.
- Jenkins, Brian. "Statements about Terrorism." *Annals of the American Academy of Political and Social Science*, Vol. 463 (September 1982).
- Johnson, Carrie and Julie Tate. "New Interrogation Details Emerge." *The Washington Post*. 17 April 2009.
- Johnston, David and William K. Rashbaum. "New York Police Fight With U.S. On Surveillance." *The New York Times*. 20 November 2008.
- Kaplan, Eben. "Targeted Killings." *Council on Foreign Relations Backgrounders*. 2 March 2006.
- Karl, Jonathan. "'High-Value' Detainees Transferred to Guantanamo." *ABC News*. 6 September 2006.
- Khalil, Lydia. "Is New York a Counterterrorism Model?" *Council on Foreign Relations Expert Brief*. 10 September 2009.
- Kilcullen, David. *The Accidental Guerrilla: Fighting Small Wars in the Midst of a Big One*. Oxford: New York, 2009.
- Kilcullen, David and Andrew Exum. "Death From Above, Outrage from Below." *The New York Times*. 16 May 2009.
- Koh, Harold Hongju. *The National Security Constitution: Sharing Power after the Iran-Contra Affair*. New Haven: Yale University Press, 1990.
- Krent, Howard. *Presidential Powers*. New York: NYU Press, 2005.

- Lake, Anthony. "Joint Intelligence Committee Testimony, Testimony of Anthony Lake." 19 September 2002.
- Lane, Charles. "High Court Rejects Detainee Tribunals." *The Washington Post*. 30 June 2006.
- Lake, Eli. "'Permission' Needed to Kill US Terrorists." *The Washington Times*. 4 February 2010.
- Laqueur, William. *The New Terrorism*. Oxford: Oxford University Press, 1999.
- Lebovich, Andrew. "The LWOT: Torture Memo Lawyers Cleared; Zazi Pleads Guilty." *Foreign Policy*. 25 February 2010.
- Levi, William Ranney. *Interrogation's Law*. 118 Yale L.J. 1434, 1436 (2009).
- Lichtblau, Eric. "U.S. Report Faults the Roundup of Illegal Immigrants After 9/11." *The New York Times*. 2 June 2003
- Liptak, Adam. "U.S. Defends Surveillance to 3 Skeptical Judges." *The New York Times*. 16 August 2007.
- Lloyd, Karen. "Experiences From The Field: Using Information Operations To Defeat AQAM." Paper presented at the 2008 Johns Hopkins Unrestricted Warfare Symposium.
- Londono, Ernesto. "A High-Priced Media Campaign That Iraqis Aren't Buying; Many in Baghdad Dismiss Effort as U.S. Propaganda." *The Washington Post*. 7 June 2009.
- Lowenthal, Mark. *Intelligence: From Secrets to Policy*. 4th ed. Washington, D.C.: CQ Press, 2009.
- Mahler, Jonathan. "Cops and Bombers." *The New York Times*. 30 January 2009.
- "Man Sues CIA over Torture Claims." *BBC News*. 7 December 2005.
- Markey, Patrick. "Colombia Says Top FARC Commander Killed in Combat." *Reuters*. 1 March 2008.
- Markon, Jerry. "Lawsuit Against CIA Is Dismissed." *The Washington Post*. 19 May 2006.
- Masse, Todd, Siobhan O'Neil and John Rollins. "Fusion Centers: Issues and Options for Congress." CRS Research Service. 6 July 2007.

Mayer, Jane.

- The Dark Side*. New York: Random House, 2009.
- “A Deadly Interrogation.” *The New Yorker*. 14 November 2005.
- “Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program.” *The New Yorker*. 14 February 2005.
- “The Predator War.” *The New Yorker*. 26 Oct. 2009.
- “The Trial.” *The New Yorker*, 15 February 2010.

Mazzetti, Mark.

- “Panetta Open to Tougher Methods in Some C.I.A. Interrogation.” *The New York Times*. 5 February 2009.
- “Pentagon Audit Clears Propaganda Effort.” *The New York Times*. 19 October 2006.
- “Report Faults US Spy Agencies.” *The New York Times*. 1 April 2009.

Mazzetti, Mark and Scott Shane. “C.I.A. Abuse Cases Detailed in Report on Detainees.” *The New York Times*. 24 August 2009.

Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2532 (2009).

“Memorandum for Alberto R. Gonzalez, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A*.” 1 August 2002.

“Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Re: *Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee*.” 10 May 2005.

“Memorandum from John Yoo, Deputy Assistant Att’y Gen., & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel, Dep’t of Def. 1.” 9 January 2002.

Meyer, Josh. “CIA contractors will be a focus of interrogation investigation.” *Los Angeles Times*. 27 August 2009.

Miller, Greg.

- “Military Spies Seek Authority in the U.S.” *Los Angeles Times*. 8 October 2005.
- “Obama preserves renditions as counter-terrorism tool.” *Los Angeles Times*. 1 February 2009.

- Moss, Randolph. "Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order." Memorandum for the Counsel to The President. 29 January 2000.
- Murray, Shailagh.
 - "Obama Joins Fellow Senators in Passing New Wiretapping Measure." *The Washington Post*. 10 July 2008.
 - "Democrats Wage War Over Iran." *The Washington Post*. 11 October 2007.
- Musharraf, Pervez. *In the Line of Fire*. New York: Free Press, 2006.
- National Council of Resistance of Iran v. Department of State and Collin L. Powell, Secretary of State*, No. 01-1480, United States Court of Appeals for the District of Columbia Circuit. 9 July 2004.
- National Counterterrorism Center
 - Country Reports on Terrorism. 2005. Statistical Annex. April 2006.
 - "Memorandum of Agreement Between the Attorney General and the Director of National Intelligence on guidelines for Access, Retention, Use, and Dissemination by the National Counterterrorism Center." 4 November 2009.
 - "What We Do," available at: <http://www.nctc.gov/kids/what.html>
- "National Infrastructure Protection Plan of 2009."
- "The National Security Strategy of the United States of America." 2002.
- New York v. Quarles*, 467 U.S. 649 (1984).
- "New Pentagon Office to Spearhead Information War." *CNN*. 20 February 2002.
- New York University School of Law, Terrorist Trial Report Card 49 (2009).
- "Obama: "'We Took Out' Pakistani Taliban Chief." *Reuters*. 21 August 2009.
- O'Connell, Mary Ellen. *To Kill or Capture Suspects in the Global War on Terror*, 35 Case W. Res. J. Int'l L. 325, 327-28 (2004).
- Pankratz, Howard. "Man Held in SUV sabotage Firebombs Found: 7 Similar Devices were Discovered in the Car of Grant Barnes, Suspected of Attempting to Detonate Them in Cherry Creek Over a Four-Day Span." *The Denver Post*. 5 April 2007.

- Perlez, Jane. "Pakistan's Military Chief Criticizes US Over a Raid." *The New York Times*. 11 September 2008.
- "President Discusses Creation of Military Commissions to Try Suspected Terrorists." The White House. 6 September 2006.
- "President Obama Signs Military Commissions Changes into Law." ACLU. 28 October 2009.
- Priest, Dana.
- "CIA's Assurances on Transferred Suspects Doubted; Prisoners Say Countries Break Non-Torture Pledges." *The Washington Post*. 17 March 2005.
 - "CIA is Expanding Domestic Operations; More Offices, More Agents with FBI." *The Washington Post*. 23 October 2002.
 - "CIA Holds Terror Suspects in Secret Prisons." *The Washington Post*. 2 November 2005.
 - "FBI Pushes to Expand Domain into CIA's Intelligence Gathering." *The Washington Post*. 6 February 2005.
 - "U.S. military teams, intelligence deeply involved in aiding Yemen on strikes." *The Washington Post*. 27 January 2010.
- Priest, Dana and Barton Gellman. "U.S. Decries Abuse but Defends Interrogations." *The Washington Post*. 26 December 2002.
- Printer, Norman G. Jr. *The Use of Force Against Non-State Actors under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. Int'l L. & Foreign Aff. 331, 334 (2003).
- Pub. L. No. 96-456, 94, Stat. 2025, 2025-31 (1980) (codified at 18 U.S.C. app. 3).
- Rashbaum, William K. and Al Baker. "Police Official in Terror Unit is Removed." *The New York Times*. 24 September 2009.
- Record, Jeffrey. "Bounding the Global War on Terrorism." *Strategic Studies Institute*. US Army War College. December 2003.
- Reese, Shawn. "Department of Homeland Security Assistance to States and Localities: A Summary and Issues for the 111th Congress." CRS Report. 5 August 2009.

- Reisman, William Michael and James Baker. *Regulating Covert Action: Practices, Contexts and Policies of Covert Coercion Abroad in International and American Law*. Binghamton, NY: Vail-Ballou Press, 1992.
- Relyea, Harold. "Presidential Directives: Background and Overview." CRS Research Service. 26 November 2008.
- Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, In Re Guantanamo Bay Litigation, US District Court for the District of Columbia (2009).
- Richey, Warren. "Obama Endorses Military Commissions for Guantanamo Detainees." *The Christian Science Monitor*. 29 October 2009.
- Riegle, Robert. "Testimony Before the United States House of Representatives, Committee on Homeland Security." 1 April 2009.
- Risen, James. "Mistakes Cited in Downing of Plane in Peru." *The New York Times*. 3 August 2001.
- Risen, James and Eric Lichtblau. "Bush Lets U.S. Spy on Callers Without Courts." *The New York Times*. 16 December 2005.
- Rosen, Jeffrey. "Man Made Disaster." *The New Republic*. 24 December 2008.
- Rosenau, William. "Waging the 'War of Ideas.'" RAND Reprints. RP-1218, 2006.
- Rosenbach, Eric and Aki Peritz. *Confrontation or Collaboration? Congress and the Intelligence Community*. Cambridge: The Belfer Center, Harvard University, 2009.
- "Rumsfeld's Roadmap to Propaganda." The George Washington University National Security Archive. 25 January 2006.
- Savage, Charlie.
- "Detainees Will Still Be Held But Not Tried, Official Says." *The New York Times*. 22 January 2010.
 - "Holder Defends Decision to Use U.S. Court for 9/11 Trial." *The New York Times*. 18 November 2009.
- Scheuer, Michael. "A Fine Rendition." *The New York Times*. 11 March 2005.

- Senate Committee on Homeland Security and Governmental Affairs. "Eight Years After 9/11: Confronting the Terrorist Threat to the Homeland, Written Statement of Secretary of Homeland Security, Janet Napolitano." 111th Cong., 1st sess. 30 September 2009.
- Shah, Pir Zubair and Salman Masood. "US Drone Strike Said to Kill 60 in Pakistan." *The New York Times*. 23 June 2009.
- Shane, Scott.
- "Book Reveals Red Cross Report on C.I.A. Torture of Qaeda Prisoners." *The New York Times*. 11 July 2008.
 - "Torture Victim Had No Terror Link, Canada Told U.S." *The New York Times*. 25 September 2006.
- Shane, Scott and David Johnston. "Questions, Not Alarms, Met Exchanges with Cleric." *The New York Times*. 11 November 2009.
- Shane, Scott and Mark Mazzetti. "Advisers Fault Harsh Methods in Interrogation." *The New York Times*. 30 May 2007.
- Shanker, Thom. "Pentagon Closes Office Accused of Issuing Propaganda Under Bush." *The New York Times*. 15 April 2009.
- Sheehan, Michael A.
- *Crush the Cell*. New York: Random House, 2008.
 - "The Hatfields and McCoys of Counterterrorism." *The New York Times*. 26 September 2009.
- Shulman, Mark. *The Progressive Era Origins of the National Security Act*. Dickinson Law Review. Winter 2000.
- Shultz, Richard and Andrea Dew. *Insurgents, Terrorists, and Militias: The Warriors of Contemporary Combat*. New York: Columbia University Press, 2006.
- Simpson, Cam and Evan Perez. "Spy Chief Rips Handling of Terror Case." *The Wall Street Journal*. 21 January 2010.
- Singel, Ryan. "Feds Tout New Domestic Intelligence Centers." *Wired*. 20 March 2008.
- Soraghan, Mike, John Aloysius Farrell and Alicia Caldwell. "Beauprez IDs Site for Division's Move." *Denver Post*. 8 May 2005
- "Spate of Terrorism Arrests not Connected, Analysts Say." *CNN*. 25 September 2009.

“Statement Of Senator Patrick Leahy On Introduction Of The Restoration Of Freedom Of Information Act (‘Restore FOIA’).” Senator Patrick Leahy Press Release. 12 March 2003, available at: <http://leahy.senate.gov/press/200303/031203e.html>.

Steinzor, Rena. “Democracies Die Behind Closed Doors: The Homeland Security Act and Corporate Accountability.” 12-SPG Kan. J.L. & Pub. Pol’y 641, 643 (2003).

Stout, David. “FBI Head Admits Mistakes in Use of Security Act.” *The New York Times*. 10 March 2007.

Strasser, Steven and Craig R. Whitney, eds. *The 9/11 Investigations: The Staff Reports of the 9/11 Commission*. Washington DC: Public Affairs, 2004.

Tapper, Jake. “Long-Awaited High-Value Interrogation Group—HIG—Finally Formed.” *ABC News*. 6 February 2010.

Tapper, Jake and Jason Ryan. “Sssssshhhhh! President Obama Is Still Backing State Secrets.” *ABC News*. 13 June 2009.

Temple-Raston, Dina. “Terrorism Case Shows Range of Investigators’ Tools.” *NPR*. 3 October 2009.

Tenet, George. *At the Center of the Storm*. New York: Harper Collins, 2007.

“Terrorism Information Sharing and the Nationwide Suspicious Activity Report Initiative.” CRS Report.

“Turkish Troops Enter North Iraq.” *BBC News*. 22 February 2008.

United Nations Security Council.

-“Security Council Unanimously Adopts Wide-Ranging Anti-Terrorism Resolution.” Press Release SC/7158. 28 September 2001.

-“U.S. Response to U.N. Commission on Human Rights Report on the Situation of Detainees at Guantanamo Bay Report.” Annex II, E/CN.4/2006/120. 27 February 2006.

“USA: An Extrajudicial Execution by the CIA?” Amnesty International. AI Index: AMR 51/079/2005. 18 May 2005.

“US Airstrikes in Pakistan called ‘Very Effective.’” *CNN*. 18 May 2009.

- USA PATRIOT Act, Pub. L. No. 107-56, § 505, 115 Stat. 272, 365 (2001) (codified as amended at 18 U.S.C. § 2709(b) (2006)).
- U.S. Army *Intelligence and Interrogation Handbook: The Official Guide on Prisoner Interrogation*. Department of the Army, 8 (2005).
- “U.S. Special Forces Strike In Pakistan.” *CBS News*. 3 September 2008.
- “U.S. tries to keep rendition under wraps.” *UPI*. 13 June 2009.
- Voice of America. *Attorney General Defends Decision to Try 9/11 Suspects in Civilian Court*. 18 November 2009.
- Waller, Douglas. “Opening Up the Psyops War.” *Time*. 16 October 2001.
- Walsh, Declan. “Air Strike Kills Taliban Leader Baitullah Mehsud.” *The Guardian*. 7 August 2009.
- Weber, Joseph. “Panetta Defends CIA’s Post-9/11 Methods.” *The Washington Times*. 24 August 2009.
- Wright, D.G. *Revolution and Terror in France: 1789-1795*. New York: Longman, 1974.
- Zabel, Richard B. and James J. Benjamin, Jr. *In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Court*. Human Rights First. July 2009.
- Zelikow, Philip. “Testimony Before the Senate Judiciary Committee.” 13 May 2009.

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