

Long-Term Terrorist Detention and Our National Security Court

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

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February 4, 2009

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Introduction

For years there has been a debate about whether to create a national security court to supervise the non-criminal military detention of dangerous terrorists. The debate has many dimensions and is often confusing. Some national security court opponents are really opposed to the non-criminal military detention system that such a court would supervise, and insist that terrorists be tried in criminal court or released. Other opponents of a national security court accept the need for non-criminal military detention but do not favor institutionalizing a new and “secret” court to oversee these detentions. Proponents of a national security court come in many stripes as well. They advocate many versions of the court with many different tasks, ranging from various forms of detention supervision to the conduct of criminal trials.

This essay attempts to simplify these issues, at least a bit. It argues that the national security court debate – a debate in which I have participated¹ – is largely a canard. The fundamental issue is whether the United States should have a system of non-criminal military detention for enemy terrorists who for many reasons are difficult to convict by trial. If the Obama administration chooses to maintain a system of non-criminal military detention – and for reasons set forth below, I think it should – it will necessarily also choose to have a national security court. This is so because federal courts constituting a “national security court” must supervise non-criminal detention under the constitutional writ of *habeas corpus* and a likely statutory jurisdiction conferred by Congress. Viewed this way, we have had a centralized and thinly institutionalized national security court for years in the federal courts of the District of Columbia, which have been supervising Guantanamo Bay military detentions. The hard question about a national security court, once we accept the need for non-criminal military detention, is not whether it should exist but rather what its rules should be and, just as important, who should make these rules. In my view, Congress and the President, rather than the courts, must play the predominant role in crafting these rules. After explaining these points, I outline some of the issues and legal policy tradeoffs that the political branches should address, including whether such a court should be an independent institution akin to the Foreign Intelligence Surveillance Court and whether it should conduct criminal trials in addition to supervising detention.

The Necessity and Legality of a Long-Term Detention System

The principle that a nation at war has the power to hold members of the enemy’s armed forces until the cessation of hostilities is as old as warfare itself and should be uncontroversial.² The purpose of military detention, former Justice Sandra Day O’Connor explained in 2004, “is to prevent captured individuals from returning to the field of battle and taking up arms once again.”³ As the Nuremberg Tribunal noted, the

captivity and detention of enemy soldiers is “neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.”⁴ Military detention of enemy soldiers is the military equivalent of the longstanding practice of non-criminal administrative or preventive detention of dangerous persons such as the mentally ill, those infected with contagious diseases, or sexual predators.⁵

The wisdom of the rule of detention to prevent return to the battlefield has become clear as we learn more about what has happened to some of the released Guantánamo detainees. Although reports about the severity of the problem differ, it is clear that a good number of the detainees released on grounds that they were “non-dangerous” have ended up back on the battlefield, shooting at Americans or non-American civilians abroad.⁶ One such person, Said Ali al-Shihri, became the deputy leader of Al Qaeda’s Yemeni branch and is suspected of involvement in the 2008 bombing of the U.S. Embassy in Yemen.⁷

Yet if the detention rule is so clear, why is it so controversial in the war against Al Qaeda and its affiliates? One reason is that many observers believe we are not, or cannot be, at war against non-state actors. This is simply wrong. The United States has fought congressionally authorized wars against non-state actors such as slave traders and pirates.⁸ During the Mexican-American War, the Civil War, and the Spanish-American War, U.S. military forces engaged military opponents who had no formal connection to the state enemy.⁹ Presidents also have used force against non-state actors outside of congressionally authorized conflicts. President McKinley’s use of military force to put down the Chinese Boxer Rebellion was primarily directed at non-state actors.¹⁰ President Wilson sent more than seven thousand U.S. troops into Mexico to pursue Pancho Villa, the leader of a band of rebels opposed to the recognized Mexican government.¹¹ And President Clinton authorized cruise missile strikes against Al Qaeda targets in Sudan and Afghanistan.¹² In all of these instances, presidents as commanders-in-chief exercised full military powers against non-state actors—sometimes with congressional authorization and sometimes without.

Consistent with these precedents, every branch of our government today agrees that we are in an “armed conflict” (the modern legal term for “war”) with Al Qaeda, its affiliates and other Islamist militants in Afghanistan, Iraq, and elsewhere. Former President Bush took this view beginning in September 2001 and President Obama shows no sign of adopting a different stance. Congress embraced this view in the September 2001 Authorization to Use Military Force (“AUMF”) and reaffirmed it in the Military Commissions Act of 2006 (“MCA”).¹³ And the Supreme Court has stated or assumed that we are at war many times.¹⁴

In light of these principles, why has there been so much controversy about holding enemy soldiers in Guantánamo? Part of the reason is the suspicion of abuse there. But even if there were no such suspicions, this war has three characteristics that, taken together, make a non-trial military detention authority problematic:

- First, for most detainees in most prior wars, it was easy to determine who was a member of the enemy armed forces because those people wore uniforms and usually fought for a nation-state. In this war, the enemy wears no uniforms and blends with civilians. These unfortunate facts dramatically increase the possibility of erroneous detention.
- Second, this war, unlike any other in our past, seems likely to continue indefinitely; indeed, we do not even know what the end of the war will look like. This means among other things that mistaken detentions might result in the long-term or even indefinite detention of an innocent person.
- Third, even if a mistake is not made, indefinite detention without trial or charge strikes many as an excessive remedy for “mere” membership in an enemy terrorist organization, especially since the detainee may, after some period, no longer pose a threat to the United States.

These three concerns challenge the detention paradigm. They do nothing to eliminate the need for detention to prevent detainees returning to the battlefield. But many believe that we can meet this need by giving trials to everyone we want to detain and then incarcerating them under a theory of conviction rather than of military detention. I disagree. For many reasons, it is too risky for the U.S. government to deny itself the traditional military detention power altogether, and to commit itself instead to try or release *every* suspected terrorist.

For one thing, military detention will be necessary in Iraq and Afghanistan for the foreseeable future. For another, we likely cannot secure convictions of all of the dangerous terrorists at Guantánamo, much less all future dangerous terrorists, who legitimately qualify for non-criminal military detention. The evidentiary and procedural standards of trials, civilian and military alike, are much higher than the analogous standards for detention. With some terrorists too menacing to set free, the standards will prove difficult to satisfy. Key evidence in a given case may come from overseas and verifying it, understanding its provenance, or establishing its chain of custody in the manners required by criminal trials may be difficult. This problem is exacerbated when evidence was gathered on a battlefield or during an armed skirmish. The problem only grows when the evidence is old. And perhaps most importantly, the use of such evidence in a criminal process may compromise intelligence sources and methods, requiring the disclosure of the identities of confidential sources or the nature of intelligence-gathering techniques, such as a sophisticated electronic interception capability.

Opponents of non-criminal detention observe that despite these considerations, the government has successfully prosecuted some Al Qaeda terrorists—in particular, Zacharias Moussaoui and Jose Padilla. This is true, but it does not follow that prosecutions are achievable in every case in which disabling a terrorist suspect represents a surpassing government interest. Moreover, the Moussaoui and Padilla prosecutions highlight an under-appreciated cost of trials, at least in civilian courts. The Moussaoui and Padilla trials were messy affairs that stretched, and some observers believe broke, our

ordinary criminal trial conceptions of conspiracy law and the rights of the accused, among other things. The Moussaoui trial, for example, watered down the important constitutional right of the defendant to confront witnesses against him in court, and the Padilla trial rested on an unprecedentedly broad conception of conspiracy.¹⁵ An important but under-appreciated cost of using trials in all cases is that these prosecutions will invariably bend the law in ways unfavorable to civil liberties and due process, and these changes, in turn, will invariably spill over into non-terrorist prosecutions and thus skew the larger criminal justice process.¹⁶

A final problem with using any trial system, civilian or military, as the sole lawful basis for terrorist detention is that the trials can result in short sentences (as the first military commission trial did) or even acquittal of a dangerous terrorist.¹⁷ In criminal trials, guilty defendants often go free because of legal technicalities, government inability to introduce probative evidence, and other factors beyond the defendant's innocence. These factors are all exacerbated in terrorist trials by the difficulties of getting information from the place of capture, by classified information restrictions, and by stale or tainted evidence. One way to get around this problem is to assert the authority, as the Bush administration did, to use non-criminal detention for persons acquitted or given sentences too short to neutralize the danger they pose. But such an authority would undermine the whole purpose of trials and would render them a sham. As a result, putting a suspect on trial can make it hard to detain terrorists the government deems dangerous. For example, the government would have had little trouble defending the indefinite detention of Salim Hamdan, Osama Bin Laden's driver, under a military detention rationale. Having put him on trial before a military commission, however, it was stuck with the light sentence that Hamdan is completing at home in Yemen.

As a result of these considerations, insistence on the exclusive use of criminal trials and the elimination of non-criminal detention would significantly raise the chances of releasing dangerous terrorists who would return to kill Americans or others. Since non-criminal military detention is clearly a legally available option—at least if it is expressly authorized by Congress and contains adequate procedural guarantees—this risk should be unacceptable. In past military conflicts, the release of an enemy soldier posed risks. But they were not dramatic risks, for there was only so much damage a lone actor or small group of individuals could do.¹⁸ Today, however, that lone actor can cause far more destruction and mayhem because technological advances are creating ever-smaller and ever-deadlier weapons. It would be astounding if the American system, before the advent of modern terrorism, struck the balance between security and liberty in a manner that precisely reflected the new threats posed by asymmetric warfare. We face threats from individuals today that are of a different magnitude than threats by individuals in the past; having government authorities that reflect that change makes sense.

Nonetheless, in supplementing our trial system with a detention system, we must design that detention system with careful attention to the three problems with detentions identified above: the possibility of mistaken detention, the indefiniteness of the war, and the possibility that terrorists will become less dangerous over time. While these problems do not argue for eliminating military detention, they also do not simply argue for

applying the standards of the Geneva Conventions. The dirty little secret is that the United States already provides detainees with rights far in excess of what Geneva requires. But it does not offer enough processes to overcome the anxieties produced by these three problems. The problems with indefinite detention for modern terrorists argue for a more rigorous process, and for higher standards, than was available for non-criminal military detention than in past wars with nation-states. And they argue as well for individualizing both the detention assessments and the determinations of which detainees are ripe for release. They argue, in short, for updating the traditional military detention model in ways appropriate for the novel problems of terrorism and consistent with modern notions of due process. What these updates should look like is the subject of the remainder of this essay.

We Already Have A National Security Court

Once one accepts the need for some system of non-criminal military detention, suddenly much less is at stake in the debate over a national security court than the heat generated by that debate would suggest. This is because any system of long-term non-criminal detention of terrorists must and will be supervised by federal judges. At a minimum, federal judges will exercise constitutional *habeas corpus* jurisdiction over the incarceration of suspected terrorists. This will give them the final legal say over any detention system. In addition, Congress will likely – as it has already done – establish statutory federal court review over any detention program. So one way or another, Article III judges will be in the detention game, helping to regularize, legalize, and legitimize the detention process, while reviewing the adequacy of the factual basis for each detention judgment.

In other words, once we accept that there will be a system of long-term, non-criminal, military detention of alleged terrorists and that federal judges will supervise that process, the debate about a national security court becomes a debate about what form this federal judicial supervision should take. Those favoring a national security court prefer a relatively centralized and institutionalized form of federal court supervision. Those disfavoring it prefer relatively decentralized and non-institutionalized federal court supervision.

At one extreme is the wholly decentralized and de-institutionalized system of *habeas* review that prevailed before the Supreme Court's initial 2004 assertion of *habeas* jurisdiction in *Rasul v. Bush*.¹⁹ Before then, terrorist suspects at Guantánamo could bring *habeas* suits in any federal district court in the country where they could obtain jurisdiction; although that jurisdiction itself was very much in doubt, these *habeas* suits were filed in courts across the country. No special statute governed the substance or procedure of these cases. Under this regime, the “national security court” consisted of all federal district courts in the country acting with practically no guidance from Congress, subject to appellate review in the courts of appeals and finally in the Supreme Court.

Very few people thought this system was a good idea, and since the summer of 2004 the de facto “national security court” supervising detention has become centralized and institutionalized in two ways. First, after *Rasul* federal courts spontaneously determined that all *habeas* cases from Guantánamo should be brought to the federal district court of the District of Columbia, subject to appellate review in the D.C. Circuit.²⁰ Justice Anthony Kennedy confirmed the appropriateness of this judicial centralization of *habeas* review in 2008 in his opinion in *Boumediene v. Bush*.²¹ Following *Boumediene*, the federal court of the District of Columbia placed Judge Thomas F. Hogan in charge of coordinating and managing the Guantánamo Bay cases; of ruling on procedural issues common to these cases; and of identifying substantive issues that are common to all.²² The second centralizing and institutionalizing move came from Congress, which in 2006 required all appeals from Combatant Status Review Tribunal determinations go to the United States Court of Appeals for the District of Columbia Circuit, and provided minimal statutory guidance on both the substance and procedure for review.

In effect, then, we already have a thinly institutionalized “national security court” in the federal courts of the District of Columbia. This national security court possesses, and is further developing, some of the virtues that national security court proponents have long argued for. It is relatively centralized, it contains a limited number of judges under the procedural supervision of a single judge, it has seen many different terrorism detention cases already, and it deals with them much more efficiently than the decentralized system. The court has been developing, and will continue to develop, specialized expertise in the issues before it. It has also been developing, and will continue to develop, relatively coherent substantive and procedural doctrines and rules to deal with these cases—coherent, that is, in terms of learning from the run of cases and in treating like cases alike, especially as compared to a system where every district judge and circuit court in the country is potentially involved.

The main problem with the national security court as it now exists is that it is almost entirely a creature of the federal courts. With respect to judicial supervision of terrorist detainees, Congress has done little more than authorize the use of force against Al Qaeda and its affiliates in September 2001 and establish an undefined judicial review over Combatant Status Review Tribunal decisions in 2006—one whose existence is now entirely redundant of the *habeas* jurisdiction the courts are now exercising. Every other question about our current national security court—involving novel issues of institutional design, as well as the substantive and procedural rights of long-term terrorist detainees—are being answered by the courts on an ad hoc basis with little guidance from precedent and even less guidance from Congress.

The real question about the national security court, therefore, is not whether we will have one, but rather whether it will be designed by judges or by the political branches. The answer to this question must be the political branches. Judges should find facts and enforce basic constitutional, statutory, and treaty norms, but they should not design the national security court system from scratch and should not legislate the details of the law for that system. For one thing, no single branch of government should determine the entire content of the law and then apply the law, least of all the judicial branch in the area

of national security and terrorism. Every single decision about the national security court will affect both the nation's security and the liberty of those in the government's custody. Any rule can potentially push the country in the direction of excessive security or excessive liberty, with many costs in both directions. Courts lack expertise about the nature and goals of terrorism and the optimal policy responses to terror threats to make these tradeoffs.²³ And they lack accountability to the People if they get it wrong in either direction.

Justice O'Connor summed up these points well in a 2005 speech at West Point, responding to the criticism that the Supreme Court had done too little in its war-on-terrorism decisions:

The [Supreme] Court is only one branch of government, and it cannot, and should not, give broad answers to the difficult [war-on-terror] policy questions that face our nation today . . . We guard the ground rules, so that the people, through their elected representatives, can run the country. . . I think it is not too much to say that I believe some clarity from Congress and the President would be welcomed by our armed forces.²⁴

Unfortunately these words remain as relevant and true today as when Justice O'Connor spoke them.

How to Improve our National Security Court

We already have a national security court, but Congress must – if it wishes to maintain non-criminal military detention generally – get involved to provide the court with rules and institutional structure to create better organization and greater legitimacy and effectiveness for the long haul. Sensible legislation would address several distinct issues.

Citizenship

The first and most important challenge for Congress is to define who the enemy is for purposes of detention—that is, to define the universe of people subject to detention. I will discuss the definition of the enemy directly below. But whatever definition of the enemy Congress adopts, the definition should extend to American citizens as well as aliens. Detention policy to date has drawn sharp distinctions between the treatment of American citizens and the treatment of aliens. But for two reasons, going forward we should eliminate this distinction.

The first reason was captured by Justice Robert Jackson, who wrote that, “there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.”²⁵ Designing detention procedures that are appropriate and legitimate for detaining dangerous U.S. citizen terrorists will ensure, and will credibly demonstrate to domestic courts and to the world, that the unusual detentions and the unusual procedures associated with them are legitimate and fair.

Second, there is no reason to think that the threat of terrorism is limited to non-citizens. Intelligence officials have made clear that Al Qaeda and its associates are trying to recruit westerners, including U.S. citizens, for attacks within the United States.²⁶ And as former Attorney General Alberto Gonzales warned, “the threat of homegrown terrorist cells . . . may be as dangerous as groups like Al Qaeda, if not more so.”²⁷ The next attacker cannot be presumed to be an alien. We must design a system not just for the last attack, but for likely future attacks as well.

Definition of the Enemy

I now turn to the hardest question in detention policy: the definition of the enemy that will determine the universe of people potentially subject to detention. The standard articulated by the Bush administration, based on the Authorization for the Use of Military Force, is too vague and malleable. It extends the government’s detention power to include:

an individual who was part of or supporting Taliban or Al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.²⁸

The phrase “associated forces” is indeterminate, and without further elaboration—perhaps by reference to a concept of co-belligerency²⁹—it might justify sweeping up persons who lack the dangerousness that would warrant indefinite non-criminal detention. The phrase “directly supported” is also potentially quite broad. Might it, for example, support detention of minor terrorist financiers? The ubiquitous “little old lady in Switzerland” who unwittingly gives money to a charity that turns out to be a front for Al Qaeda?

But crafting a narrower standard that ensures detention of very dangerous terrorists is tricky. The main problem is that the group of people dangerous enough that the government would reasonably want to detain them does not fit within traditional criteria for enemy combatancy. They do not fit both because the terrorists blend in with civilians and do not organize themselves into traditional hierarchical commands, and also because the threat of terrorism is increasingly dispersed into copycat cells.

Two definitions promise more discipline than the current enemy combatant definition: terrorists who are in the command structure of Al Qaeda and its co-belligerent terrorist organizations, and terrorists who directly participate in an armed conflict against the United States.

Membership in Command Structure of a Covered Terrorist Organization

Terrorist organizations have leadership and command structures, however diffuse, and persons who receive and execute orders within this command structure are analogous to traditional combatants. The most promising and least controversial detention criterion is thus *membership in the command structure of Al Qaeda and its co-belligerent terrorist organizations*.³⁰ This criterion would include the leadership of Al Qaeda (people such as Osama Bin Laden or Khalid Sheik Mohammad), subordinate Al Qaeda personnel who occupy an operational role (such as Mohammed Atta), and people like Ali Saleh Kahlah al-Marri, an alleged Al Qaeda operative who, in Judge Wilkinson's formulation "knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of an enemy nation or organization."³¹

The "command structure" criterion is consistent with Congress's authorization to the President to use of force "against those . . . organizations" responsible for "the terrorist attacks that occurred on September 11, 2001," a descriptor that expressly includes members of Al Qaeda, and under traditional principles of co-belligerency includes Al Qaeda's affiliated terrorist organizations.³² Independent of the AUMF, the command structure criterion is also consistent with traditional detention understandings in non-international armed conflicts, which the Supreme Court has deemed the conflict with Al Qaeda to be.³³ And the command structure criterion makes intuitive sense. If there is a group of people who are highly likely to be dangerous, it is the group formed by those who voluntarily associate themselves with the command structure of a terrorist organization whose aim is to kill Americans.

Direct Participation in Hostilities

The command structure criterion is useful as far as it goes. But it leaves out two important classes of terrorists that Congress might want to include. The first class consists of those who serve Al Qaeda and its co-belligerents in ways that do not fall under a chain of command, but who nonetheless associate with terrorist organizations in ways that indicate individual dangerousness or that promote the terrorists' dangerous goals. For example, individuals outside of the Al Qaeda command structure might receive weapons training in an Al Qaeda camp, or give logistical support related to a particular act of violence (e.g., by creating an improvised explosive device to be used by someone else), or provide logistical support on a more generalized basis (e.g., by raising funds to be used for violent activity). The second class consists of members of terrorist organizations inspired by Al Qaeda or its jihadist principles but that are not Al Qaeda co-belligerents, i.e. do not act as agents of Al Qaeda, participate with Al Qaeda in acts of war against the United States, systematically provide military resources to Al Qaeda, serve as fundamental communication links in the war against the United States, or systematically permit their buildings and safehouses to be used by Al Qaeda in the war against the United States.

Congress could address this second class of terrorists simply by adding their organization to the list of organizations against whom we are at war, but such organizations are so diffuse and can morph so quickly that this is not a stable solution, and in any event this solution does not address the problem of the first class of terrorists who provide logistical and other non-operational support for covered terrorist organizations but who are not in the command structure. If Congress chooses to extend detention authority to either class of terrorists, therefore, a status-based detention criterion like “membership in command structure” will not do, and Congress will need to craft a conduct-based criterion that best gets at the class of dangerous terrorists not already included in the “membership” test, but that is not overinclusive.

The best candidate for such a conduct-based criterion – best both in terms of its legal pedigree, and in its intuitive appeal – is the “direct participation in hostilities” standard.³⁴ This standard originated as a targeting rule that identified circumstances in which a civilian—ordinarily immune from being made the object of an attack—may be targeted with lethal force.³⁵ But it has evolved into a more general test for distinguishing those against whom military force (including detention) can legitimately be used from those against whom it cannot. The idea of detaining those who “directly participate” in hostilities captures many people’s intuition about the class of terrorists who should be detained. Unfortunately, however, “direct participation” is contested in application in at least two ways.³⁶ First, experts disagree concerning the substance of direct participation itself. Everyone agrees that the concept applies to persons who literally engage in violence, such as firing a rifle or setting off an explosive device. But uncertainty arises as we move beyond those paradigm cases to persons whose connections to violence are less direct. Does one directly participate in hostilities by ferrying ammunition to persons who are firing weapons, or by constructing IEDs to be used by others? Second, experts also disagree with respect to the temporal boundaries of direct participation. When can a person be said to have ceased being a direct participant in hostilities?³⁷ In this regard, some have expressed concern about a revolving-door interpretation enabling civilians to contribute to violence but then immediately reacquire their protected status before facing a military consequence.³⁸

There is little clear legal guidance from the laws of war, and even less clear state practice, to help Congress and the President in resolving these issues and in deciding how to define the contours of “direct participation” as a detention criterion in a war against non-state actor terrorists. Simply embracing the “direct participation” standard without more operational guidance would leave too much discretion to courts, which might interpret or apply the standard in radically over-inclusive or under-inclusive ways. In the final analysis, the proper calibration of the “direct participation” standard turns on how much and what kind of risk – to security, and to liberty – the nation’s leaders wants to assume. The “direct participation” test provides a legitimate legal hook and general guidance, but the political branches must make the hard policy call about where and how to draw the line. This policy choice will also, of course, be informed by the procedural safeguards associated with each substantive determination. Tighter safeguards may warrant broader detention criteria, and vice versa. It is to those procedures that I now turn.

Procedural Issues

Courts have been developing procedural rules for the review of terrorist detentions on their own under the guise of some combination of due process and pragmatic justice. The following are the most important procedural questions that Congress should address:

Evidentiary and Informational Issues

There are a variety of different approaches to deciding what evidence the national security court should consider in reviewing terrorist detentions. The best approach is hard to state in the abstract; the devil is in the details. But it is clear that some deviation from ordinary criminal trial rules will be necessary. This is especially so in four areas.

First, it will be necessary to permit introduction of hearsay and related evidence. The best approach here would be to follow the rule in international criminal courts, which have permitted evidence so long as it is relevant and “necessary for the determination of the truth.”³⁹ The International Criminal Tribunal for the Former Yugoslavia, for example, permits the admission of hearsay and related evidence that is “is relevant and has probative value, focusing on its reliability.”⁴⁰

Second, a decision will need to be made about evidence that is tainted because it was extracted in illegal or morally problematic ways. Here again international criminal tribunals might provide guidance. The International Criminal Court, for example, permits the introduction of evidence “obtained by means of a violation of this Statute or internationally recognized human rights” unless “(a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.”⁴¹

Third, there is the question of classified information, and in particular the question of whether the government should be able to establish the factual predicate for detention by presenting evidence on an *ex parte* basis. The *ex parte* approach serves the compelling government interest in preserving the secrecy of sensitive intelligence information, but it seems illegitimate to detain someone without letting him or at least his representative know about and contest the evidence. If Congress provides counsel to a detainee (as I suggest it should, below), it can mediate these conflicting principles by allowing the counsel to remain during presentation of classified evidence.

The fourth and final issue concerns the government’s disclosure obligations. The issue has both a substantive component (i.e., which agencies have an obligation to disclose information, and what should be the nature of that obligation) and a procedural component (i.e., who should have responsibility for enforcing disclosure obligations, and what mechanism should there be—if any—for seeking to compel disclosure when necessary). It is possible that, as with classified information, creative approaches to the use of counsel may help to finesse the tensions inherent in this issue. At a substantive minimum, however, the government should have a duty to disclose all exculpatory information, and perhaps all material information, reasonably within its possession.⁴²

Publicity

The national security court should operate with a strong presumption of maximum public disclosure of its processes and decisions. Particularly with a novel procedure, public knowledge of how the system operates in practice will be essential to building both domestic and international credibility. The system will need to close its proceedings when considering classified material, just as Article III courts and courts martial do. But the default option should be openness, and the government should face a burden if it wishes to change that option in a given case.

Regularized Review

One could argue that there should be no outside limit on the time period available for detention orders. England limits non-criminal detention to 28 days,⁴³ and France limits it to 6 days unless someone is charged with a crime. But these limited detention periods assume that war powers are not in play.⁴⁴ Moreover, if someone poses a very serious threat to the United States and cannot practically be tried, a single period of detention is unlikely to mitigate the threat. So there exists a legitimate need for a longer term period of detention.

At the same time, Congress should not lightly countenance indefinite detention, especially under some of the looser standards articulated above. The appropriate compromise is for a detention order to be limited to some period of time, say six months, and then be subject to renewal using the same processes as governed the initial order. In each instance, the government will have to convince the national security court that the individual remains a threat and satisfies other detention criteria. The fact that the government will have to repeatedly come back to court to justify its detention will also be a natural constraint on the expansion of preventative detention. Many prosecutors will dislike the continued need to justify detention and will favor prosecution where possible instead.

At some point, moreover, the periods of semi-annual detention will begin to look more criminal in their nature than civil. As detention continues for years, it may be appropriate to require an escalating burden of proof on the government—perhaps from a “preponderance of the evidence” standard to something more akin to “clear and convincing evidence” or “beyond a reasonable doubt.” In the alternative, it may be appropriate to insist on specialized procedures that are triggered when an individual is detained for more than a certain number of years.

Lawyers

The government should be represented in the national security court by lawyers in the Justice Department, perhaps by lawyers from the Criminal Division, including U.S. attorneys, and the National Security Division working together. Potential detainees should be represented by a standing pool of government-paid defense lawyers. The notion here would be to create a small cadre of elite lawyers for both sides. Following the

Judge Advocate General model, the lawyers might be expected to rotate among the government and defense every two or three years. The defense lawyers would possess security clearances, thus avoiding the problem of not providing lawyers for years to detainees. Detainees could supplement representation by these attorneys with counsel of their own choice as long as those lawyers could receive appropriate security clearances.

Greater Institutionalization

Perhaps the most controversial issue about a national security court is whether and how it should become more institutionalized. I used to believe that this issue was more important than I now believe it to be. Once one realizes that the federal courts of the District of Columbia are a *de facto* national security court for detention review, and that Congress can build on this *de facto* national security court structure as it deems appropriate, the institutionalization questions become somewhat less salient. Nonetheless, three issues still dominate the debate.

1. A Stand-Alone Institution?

The national security court could remain staffed by the federal judges of the District of Columbia, but it could also become a new, stand-alone institution modeled on the Foreign Intelligence Surveillance Court. The arguments for such an institution are diminished by the fact that we have one in operation now and that Congress can simply amplify or tweak the current system. Possible benefits of a stand-alone institution are (1) the judges of the national security court would be drawn from the hundreds of existing judges around the country, rather than from the relatively homogenous federal district court in the District of Columbia; (2) such a court, with special and discrete jurisdiction, could more readily receive novel and specialized evidentiary, procedural, and classified information rules; (3) such a court would minimize the problem of precedential spillover into the civilian justice system.

If Congress were to create such a stand-alone institution, it should not simply expand the current Foreign Intelligence Surveillance Court's jurisdiction to cover detention. FISA modeled the court it created to operate in secret. By contrast, many of the issues that a national security court will deal with are appropriately taken up in open court, as the proceedings in the current national security court of the District of Columbia have revealed. To bring the FISA court into the open, even in limited settings, may hamper the work and safety of the FISA jurists. And because FISA's strong default mode is to operate in secrecy, vesting that court with jurisdiction over detentions may lead to a greater amount of secrecy than is optimal in the detention context. In addition, expanding the FISA court's duties may very well interfere with that court's ability to carry out its current functions.

2. First-Order Detention Determinations

The current national security court reviews the legality of detentions made by military Combatant Status Review Tribunals, which make the first-order judgments as to the propriety of a given detention. The CSRTs could continue to serve this function, subject

to review in the national security court. Or Congress could transfer these first-order determinations to a non-military or judicial body under the supervision of the national security court, or to the federal judges on the national security court.

3. Trials

The national security court might also replace criminal trials by military commission, courts martial, or even ordinary criminal trials in civilian courts. It could serve either as a trial body or an appellate body or conceivably even both. The argument here is that a national security court might be able to achieve some of the legitimacy benefits of an Article III criminal trial while at the same time avoiding the costs of such trials. So, for example, Congress might be able to give a national security court somewhat more procedural flexibility in protecting classified information than it can an ordinary civilian criminal court. It might also be able to better protect judges and jurors in such a court. And Congress might be able to limit the court's precedents to ensure that any adjustments to substantive and procedural criminal law—as in *Moussawi* and *Padilla*—do not spill over into the ordinary criminal trial processes where the government should bear ordinary burdens.⁴⁵

The question of whether the new court should expand beyond detention to trials is a large and complicated one that is beyond the scope of the present project. But at a minimum, as Benjamin Wittes and I have explained elsewhere, Congress must consider the design of a national security court in conjunction with the design of the trial system, for each has profound effects on the other's effectiveness.⁴⁶

Sunset

Any legislation related to a national security court should employ a sunset provision. We still lack information about our enemies and the precise threats they pose. We also possess relatively little information on how any particular national security court design will work in practice, and what effect it will have on liberty and security. These points suggest that Congress would be wise to revisit the design and operations of the national security court in a few years, after more information becomes available. Forcing Congress to reconsider a legislative scheme is typically difficult and politically costly. Ordinary inertia problems are exacerbated by the President's veto power, which means that modifying or eliminating a poorly functioning national security court might take a supermajority rather than a simple majority.⁴⁷ Even when a majority of Congress's members want to change a law that is already on the books, it can require substantial effort, energy, and political capital to translate that majority wish into successful legislation. Often such efforts fail.

A good example of how sunsets can respond to these structural, political, and human error variables can be found in the experience with the independent counsel law.⁴⁸ The institution of independent counsel was unfamiliar to our constitutional system, and because the policy implications were so severe, Congress decided to impose a sunset. This was a wise decision. It would have been extraordinarily difficult, given the political repercussions, for members of Congress to stand up and say that they are “against

independent investigations” and “against ethics in government.” Yet the independent counsel law produced a constitutional monster, accountable to no one. Because of the sunset mechanism, no independent counsel law is on the books today. It was simply too difficult, in the wake of Iran-Contra and the Whitewater-Lewinsky investigations, for members of Congress to stand up and affirmatively persuade their colleagues to vote for reauthorization of the act. But it might have been very difficult to affirmatively abrogate, had the default setting mandated its continued existence.

Similar considerations led to the sunset provision in the USA PATRIOT Act.⁴⁹ President Bush signed that Act into law on October 26, 2001.⁵⁰ The Act included December 31, 2005 sunset provisions for its most expansive and potentially controversial components.⁵¹ Attempts to reauthorize the Act began in late 2004, but Congress and the President could not agree on a single version for re-authorization, so Congress twice enacted short extensions of the soon-to-expire provisions.⁵² Congress ultimately adopted two pieces of legislation that, taken together, increased judicial review for surveillance activities, required additional executive branch reporting to Congress, enhanced mandatory procedures for employing some of the PATRIOT Act’s more controversial tools, and included further sunsets for two controversial provisions.⁵³ While the reauthorization made most of the provisions that were scheduled to expire permanent, it merely extended the sunset for two provisions, requiring them to seek reauthorization again in 2009.

Advocates on both sides of the aisle praised the original PATRIOT Act’s sunset provisions. Senator Patrick Leahy attributed both improved Congressional oversight and the opportunity to improve the Act to the sunset provisions.⁵⁴ Representative Martin Meehan stated, “[f]ortunately, the bill included sunset provisions, allowing Congress to revisit the law, reflect on its implementation, and fix those parts of the law that have clearly become overreaching.”⁵⁵ Following reauthorization, Viet Dinh—who had authored large sections of the PATRIOT Act while at the Department of Justice—wrote that, “[t]he reauthorization process provided a chance to fine tune, clarify, and improve upon the original provisions of the Act. It also provided an opportunity for debate about what tools law enforcement and intelligence officials need in the war on terror.”⁵⁶

Amplifications to the national security court are appropriate candidates for a legislative sunset. Time will tell whether the court meets the fate of the PATRIOT Act (renewal with some changes) or the independent counsel law (complete nonrenewal). But in the interim, the fact that the sunset exists can help forestall government abuse of the detention power, because the government will know that the entire system is up for renewal and must therefore operate responsibly and with the possibility of abrogation.

Conclusion

Almost five years ago, the 9/11 Commission stated that “Americans should not settle for incremental, ad hoc adjustments to a system designed generations ago for a world that no longer exists.”⁵⁷ And yet that is precisely what we have done since the Commission

published these words. It is time for the President and Congress to work together to address the terrorist detention problem in a comprehensive way. If a detention system is part of the solution, as I believe it should be, then a national security court will be part of the solution as well. It is far better to have well-designed national security court – a court designed in a systematic way by political leaders rather than by courts making ad hoc decisions in the rough-and-tumble of high-stakes litigation.

¹ See Jack Goldsmith & Neal Katyal, *The Terrorists' Court*, *New York Times*, July 11, 2007, at http://www.nytimes.com/2007/07/11/opinion/11katyal.html?_r=2&adxnnl=1&oref=slogin&adxnnlx=1184158966-zBttZkBJomgptivaDrg0eg.

² See, e.g., Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364, 75 U.N.T.S. 135, art. 118, stating, "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities"; Hague Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, art. 20, available at <http://www.icrc.org/ihl.nsf/FULL/150?opendocument>, as soon as possible after "conclusion of peace."

³ *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion).

⁴ International Military Tribunal (Nuremberg), Judgment and Sentences, reprinted in *American Journal of International Law* 41 (1947): 172, 229.

⁵ For critical treatments, see Paul H. Robinson, "Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice," *Harvard Law Review* 114 (2001): 1429-32; Carol S. Steiker, "Foreword: The Limits of the Preventive State," *Journal of Criminal Law & Criminology* 88 (1998): 771, 777-781.

⁶ Geoff Morell, "Department of Defense News Briefing" (briefing, The Pentagon, Arlington, VA, January 13, 2009), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4340>; Associated Press, *Report: Guantanamo Detainees Return to Battlefield*, *International Herald Tribune*, Jan. 13, 2009, available at <http://www.iht.com/articles/ap/2009/01/13/america/NA-US-Guantanamo-Detainees.php>.

⁷ Robert F. Worth, "Freed by the U.S., Saudi Becomes al Qaeda Chief," *New York Times*, January 23, 2009, available at <http://www.nytimes.com/2009/01/23/world/middleeast/23yemen.html>.

⁸ Curtis A. Bradley and Jack L. Goldsmith, "Congressional Authorization and the War on Terrorism," *Harvard Law Review* 118 (2005): 2047, 2073-74.

⁹ See William E. Birkhimer, *Military Government and Martial Law*, revised 3rd ed. (Kansas City: Franklin Hudson, 1914): 123-24, 354-55; 1 William Winthrop, *Military Law and Precedents*, revised 2nd ed. (Boston: Little, Brown & Co., 1896), 783-84; 2 *ibid* at 832-34.

¹⁰ See generally Diana Preston, *Besieged in Peking: The Story of the 1900 Boxer Rising* (London: Constable, 1999), 25-30; Chester C. Tan, *The Boxer Catastrophe* (New York: Columbia University Press, 1955), 35-36.

¹¹ John S.D. Eisenhower, *Intervention! The United States and the Mexican Revolution 1913-1917*, (New York: W. W. Norton & Co., 1993), 231-60.

¹² See National Commission on Terrorist Attacks upon the U.S., *The 9/11 Commission Report* (Washington, D.C.: National Commission, 2004), <http://www.9-11commission.gov/report/911Report.pdf>, 117.

¹³ See Authorization to Use Military Force, Public Law No. 107-40, 115 Stat. 224 (2001); Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 10 U.S.C. § 948a)

¹⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006); *Boumediene v. Bush*, 128 S.Ct. 2229, 2240-41 (2008).

¹⁵ Robert Chesney and Jack Goldsmith, "Terrorism and the Convergence of Criminal and Military Detention Models," *Stanford Law Review* 60 (2008): 1079, 1104-08.

¹⁶ See generally Charles Weisselberg, "Terror in the Courts: Beginning to Assess the Impact of Terrorism-Related Prosecutions on Domestic Criminal Law and Procedure in the USA," *Crime, Law and Social Change* 50 (2008): 25.

¹⁷ This paragraph is drawn from Jack Goldsmith and Benjamin Wittes, "A Blueprint for the Closure of Guantanamo Bay," *Slate*, December 8, 2008, <http://www.slate.com/id/2206229/>.

¹⁸ The exception was political assassination, which could produce substantial turmoil. Today, assassination is just one of several modern threats that can be inflicted by small groups of individuals.

¹⁹ *Rasul v. Bush* 542 U.S. 466 (2004).

²⁰ After *Padilla* and *Rasul* were decided in summer of 2004, the Supreme Court remanded *Gherebi* (a habeas petition filed in California) to the Ninth Circuit, which then cited *Padilla* and *Rasul* en route to concluding that it would be appropriate to transfer that petition to DC. See *Gherebi v. Bush*, 374 F.3d 727, 739 (9th Cir. 2004). The court did not elaborate why transfer was appropriate except to say that “[i]t appears to us that the proper venue for this proceeding is in the District of Columbia.” *Ibid.* Since then all GTMO-related habeas petitions have been transferred to the federal district courts in Washington, D.C.

²¹ *Boumediene v. Bush*, 128 S.Ct. at 2276, concluding that “If, in a future case, a detainee files a habeas petition in another judicial district in which a proper respondent can be served, the Government can move for change of venue to the court that will hear these petitioners’ cases, the United States District Court for the District of Columbia.” Citations eliminated.

²² See Resolution of the Executive Session of the United States District Court for the District of Columbia, July 1, 2008, available at <http://www.dcd.uscourts.gov/public-docs/system/files/Guantanamo-Resolution070108.pdf>.

²³ *Cf.* 128 S. Ct. at 2276-77, stating that, “[u]nlike the President and some designated members of Congress, neither the members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.”

²⁴ Sandra Day O’Connor, Remarks Upon Receiving the Sylvanus Thayer Award (speech, United States Military Academy, West Point, NY, October 20, 2005, available at <http://www.westpointaog.org/NetCommunity/Page.aspx?pid=514>).

²⁵ *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949), J. Jackson, concurring.

²⁶ Mark Mazetti, “Intelligence Chief Says Al Qaeda Improves Ability to Strike in U.S.,” *New York Times*, February 6, 2008, available at <http://query.nytimes.com/gst/fullpage.html?res=9F07E5D81F3DF935A35751C0A96E9C8B63&fta=y>.

²⁷ Alberto Gonzales, “Remarks On Stopping Terrorists Before They Strike: The Justice Department’s Power of Prevention” (speech, World Affairs Council of Pittsburgh, Pittsburgh, PA, August 16, 2006).

²⁸ Deputy Secretary of Defense, “Implementation of Combat Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba,” memorandum, July 14, 2006, <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>.

²⁹ *Cf.* Bradley & Goldsmith, *supra* note 8, at 2112-13.

³⁰ In the laws of war, a co-belligerent state is a “fully fledged belligerent fighting in association with one or more belligerent powers.” Morris Greenspan, *The Modern Law of Land Warfare* 531 (1959). As applied to non-state actor terrorist organizations, co-belligerents would include terrorist organizations that act as agents of Al Qaeda, participate with Al Qaeda in acts of war against the United States, systematically provide military resources to Al Qaeda, or serve as fundamental communication links in the war against the United States, and perhaps those that systematically permit their buildings and safehouses to be used by Al Qaeda in the war against the United States. These organizations are analogous to co-belligerents in a traditional war.

³¹ See *al-Marri v. Pucciarelli*, 534 F.3d 213, 325 (4th Cir. 2008) (Wilkinson, J., concurring and dissenting in part).

³² See Bradley & Goldsmith, *supra* note 8, at 2112-13. *Hamdi* held that the authorization to use force entails authorization to detain in an international armed conflict, and the plurality’s uncertainty about extending this rationale to the war against Al Qaeda concerned the indefiniteness of detention, and not whether “force” entailed detention authority in that context. See *Hamdi*, 542 U.S. at 521 (“we understand Congress’ grant of authority for the use of ‘necessary and appropriate force’ to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.”).

³³ See Chesney & Goldsmith, *supra* note 15, at 1121-23; *Hamdan v. Rumsfeld*, 548 U.S. 557, 629-31 (2006)

³⁴ The discussion in this paragraph and the next is drawn from Chesney & Goldsmith, *supra* note 15, at 1123-26.

³⁵ For a thorough overview of the direct participation concept, see the trio of reports following from expert meetings on the subject jointly convened by the International Committee of the Red Cross and the TMC Asser Institute: Third Expert Meeting on the Notion of Direct Participation in Hostilities (2005), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct_participation_in_hostilities_2005_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf); Second Expert Meeting: Direct Participation in Hostilities Under International Humanitarian Law (2004), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct_participation_in_hostilities_2004_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2004_eng.pdf); Direct Participation in Hostilities under International Humanitarian Law (2003), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct%20participation%20in%20hostilities-Sept%202003.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct%20participation%20in%20hostilities-Sept%202003.pdf).

³⁶ See ICRC Direct Participation studies, *supra* note 35.

³⁷ See, e.g., Third Expert Meeting, *supra* note 35, at 59-68 (discussing the temporal component of the direct participation inquiry); HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel, para 35, [Dec. 11, 2005] (broadly construing the temporal element of direct participation in the context of members of terrorist organizations), available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.

³⁸ See, e.g., W. Hays Parks, *Air War and the Law of War*, 32 A. F. L. REV. 1, 119-20 (1990).

³⁹ Michael A. Newton, SYMPOSIUM, The Iraqi Special Tribunal: A Human Rights Perspective, 38 Cornell Int'l L.J. 863, 885 (2005).

⁴⁰ *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defense Motion on Hearsay, 5 Aug. 1996; see also Rome Statute of the International Criminal Court, art. 69(4), 2187 U.N.T.S. 90 ("The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness").

⁴¹ Rome Statute, *supra* note 40, art. 69(7).

⁴² Cf. *Parhat v. Gates*, 532 F. 3d 834 (D.C. Cir. 2008).

⁴³ The Counter-Terrorism Bill of 2008 would increase the limit to 42 days. As of 22 October, 2008, it was still under debate.

⁴⁴ In France, as well as in Spain, pre-trial detention can last for many years without a trial. But an indictment must be made within 6 days of detention, and the detention process is supervised by an independent judge of liberty. The French model thus offers a different alternative worth examining – pretrial detention where formal charges have been filed (as opposed to a preventive detention model without charge).

⁴⁵ Others might want a national security court to examine other areas of law, such as those civil cases in which the “state secrets” privilege is invoked to block litigation.

⁴⁶ See Goldsmith and Wittes, *supra* note 17.

⁴⁷ See U.S. Const. art. I, § 7.

⁴⁸ Independent Counsel Reauthorization Act of 1994, Public Law No. 103-270, § 2, 108 Stat. 732, 732.

⁴⁹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Public Law No. 107-56, 115 Stat. 272 (2001), codified as amended in scattered sections of 18, 47 and 50 U.S.C.

⁵⁰ Robert E. Pierre, “Wisconsin Senator Emerges as a Maverick; Feingold, Who Did Not Back Anti-Terrorism Bill, Says He Just Votes His Conscience,” *The Washington Post*, October 27, 2001, A08 section.

⁵¹ American Civil Liberties Union, *The Sun Also Sets: Understanding the Patriot Act “Sunsets,”* <http://action.aclu.org/reformthepatriotact/sunsets.html>.

⁵² Brian T. Yeh and Charles Doyle, *CRS Report for Congress, USA PATRIOT Improvement and Reauthorization Act of 2005: A Legal Analysis*, (Washington, D.C.: Congressional Research Service, 2006), <http://www.fas.org/sgp/crs/intel/RL33332.pdf>, 2.

⁵³ USA Patriot Improvement and Reauthorization Act of 2005, Public Law 109-177, 120 Stat. 177 (2006); USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Public Law 109-178, 120 Stat. 278 (2006). See generally Viet D. Dinh & Wendy J. Keefer, “FISA and the Patriot Act: A Look Back and a Look Forward,” *Georgetown Law Journal Annual Review of Criminal Procedure* 35 (2006): iii,

xxxii-iii (2006). On the two new sunsets, see Yeh and Doyle, *supra* note 52, at 3. The two provisions are “roving wiretaps” – those that follow a given targeted individual even as he changes his communications platform – and access to certain business records under FISA. *Ibid.*

⁵⁴ Patrick Leahy, “PATRIOT Bill: A Missed Opportunity to Protect Americans’ Security And Civil Liberties,” press release, December 8, 2005, <http://leahy.senate.gov/press/200512/120805.html>.

⁵⁵ 151 Cong. Rec. H11,509-10 (daily ed. December 14, 2005) (remarks of Martin Meehan on reauthorization of PATRIOT Act, United States House of Representatives, Washington, D.C.).

⁵⁶ Dinh & Keefer, *supra*, note 53, at xxx.

⁵⁷ National Commission on Terrorist Attacks upon the U.S., *The 9/11 Commission Report* (Washington, D.C.: National Commission, 2004), <http://www.9-11commission.gov/report/911Report.pdf>, 399.