



# National Security Law Report

*Editor's Note: In this issue we present an exchange of views between **Gabor Rona** (Human Rights First) and **David B. Rivkin, Jr. and Lee A. Casey** (Baker & Hostetler LLP) concerning the U.S. government's approach to the "enemy combatant" concept. With the permission of the Council on Foreign Relations, we also reprint a recent debate between the **Hon. Richard Posner** (Seventh Circuit Court of Appeals) and **Juliette Kayyem** (Kennedy School of Government) as to whether the U.S. should adopt the "MI-5" model of domestic intelligence agency.*

## Enemy Combatants in the "War on Terror?" A Case Study of How Myopic Lawyering Makes Bad Law

Gabor Rona

### I. Scope of application of the term "enemy combatant"

"Never in the history of armed conflict have enemy combatants been accorded as many rights as the U.S. grants them today," goes the administration's mantra. One would assume, then, that the "enemy combatant" tag applies only to persons detained in conjunction with armed conflict, or war. But the U.S. does not limit its definition of enemy combatant, or for that matter, its assertion of the laws of war, to persons detained in war, such as the hostilities in Afghanistan and Iraq. Rather, it claims that the laws of war, also known as the laws of armed conflict and international humanitarian law (IHL), and thus, the right to detain so-called "combatants," apply to all of the "global war on terror" (or "long war," or war against Al Qaeda and its supporters), whether or not manifested in armed conflict. The U.S. claims that it may avail itself of the prerogatives of the laws of war anywhere and everywhere until this "war" is won, despite the fact that hostilities may not rise to the level of armed conflict and that neither the enemy, nor the locus of the conflict, nor the components of victory can be defined.

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## Combatant Status Under the Laws of War

David B. Rivkin, Jr. & Lee A. Casey

Distinguishing combatants from non-combatants has always been one of the law of armed conflict's most essential aspects. Combatants who, because of their association with a sovereign state and compliance with certain basic rules of organization and conduct, are privileged to use military force, are also proper and lawful targets of attack by other combatants. Non-combatants or "civilians," on the other hand, may not engage in hostilities and, as a consequence, may not be targeted for attack. This rule is reflected in the principle of "distinction."

Although the basic legal architecture associated with the principle of distinction remains the same across an entire range of war-fighting scenarios, its implementation is far more challenging in conflicts between state and non-state actors, especially those who employ irregular war-fighting techniques and often deliberately target civilians for attack—as do the enemies of the United States in the war on terror.

Nevertheless, individuals who take up arms against the United States—even if their actions are punishable as crimes—cross the line from civilian or non-combatant and take on the status of combatant, even if only of an illegitimate or unlawful character. Such individuals are subject to armed

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Many commentators argue that the post-9/11 congressional Authorization for the Use of Military Force (AUMF), the like-minded NATO invocation of its mutual assistance provisions, and Osama Bin Laden's various declarations of enmity toward the U.S. amount to proof of an armed conflict. But neither the right to use force (determined by the *jus ad bellum*), nor even a declaration of war, establishes the existence of war and the commensurate application of the laws of war (the *jus in bello*). Facts on the ground do. And IHL does not apply, and there are no "enemy combatants," outside of war.

### II. International law definition and consequences of being an "enemy combatant" vs. civilian in armed conflict

Only once the fact of armed conflict is established can and should one ask: "Who is an enemy combatant?" IHL provides the answer: a combatant is someone who, by virtue of membership in the armed forces or associated militia, possesses a "combatant's privilege," or, something akin to a license-to-kill in war. A combatant is immune from criminal responsibility for lawful acts of belligerency, but may be prosecuted for war crimes such as targeting civilians or using prohibited means of combat, such as biological weapons or rape. In turn, a combatant may be targeted and detained without charge or trial for the duration of the armed conflict.

Civilians who take part in hostilities in an armed conflict do not thereby become combatants. These "unprivileged belligerents" do not qualify for prisoner of war status upon capture. They may be targeted, and in wars between states, otherwise known as international armed conflict, civilians may be detained without charge or trial so long as they pose a serious security risk to the detaining authority. In other armed conflicts (non-international ones, be they civil wars or conflicts such as the U.S. vs.

Al Qaeda) civilians may be detained and tried in accordance with national law, as tempered by international human rights obligations.

Because a combatant, by definition, enjoys a "privilege of belligerency," the term "lawful combatant," is redundant, and thus, the term "unlawful combatant" is an oxymoron.

The term "enemy combatant" appears nowhere in U.S. criminal law prior to 9/11 or in IHL. Administration supporters cite the World War II era *Quirin* case to buttress the claim that an unprivileged belligerent is a form of enemy combatant - an unlawful combatant - but they are mistaken. That case involved combatants/privileged belligerents (members of the German armed forces) who entered the United States in civilian garb to commit acts of war. This is the war crime of perfidy. It was their specific conduct that rendered their belligerency unlawful, but they were not unprivileged belligerents. The case simply does not address, let alone decide, that an unprivileged belligerent is an unlawful combatant.

### III. The U.S. definition of "enemy combatant"

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The President's Military Order of November 13, 2001 authorized detention of any non-citizen who he determines:

“(1) . . . (i) is or was a member of the organization known as al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harbored one or more individuals described in (other parts of) this order;”

This precursor to the U.S. definition of “enemy combatant” is tethered neither to any concept of armed conflict, nor to the meaning of “combatant” under the laws of war, nor to any semblance of due process required by the laws of war and applicable international human rights law. Subsequent efforts to pin the administration down on a reasonable and workable definition of “enemy combatant” have resembled a game of whack-a-mole and three-card-Monty combined. Thus, Justice O’Connor noted in the *Hamdi* case that “the Government has never provided any court with the full criteria that it uses in classifying individuals as such.” Coincident to the Supreme Court’s consideration of detention challenges in *Hamdi* and the *Rasul* case in 2004, the administration arranged for Combatant Status Review Tribunals (CSRTs) at Guantanamo to determine whether a detainee is an “enemy combatant,” which the CSRT rules defined as:

“an individual who was part of or supporting the 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 committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”

Sounds better than the President’s 2001 Military Order “definition,” but how has it been applied?

‘Could a little old lady in Switzerland who sent a check to an orphanage in Afghanistan be taken into custody if unbeknownst to her some of her donation was passed to al-Qaida terrorists?’ asked U.S. District Judge Joyce Hens Green in the *In Re: Guantanamo* cases in 2005. “She could,” replied Deputy Associate Attorney General Brian Boyle. “Someone’s intention is clearly not a factor that would disable detention.” Judge Green objected to such an expansive definition of enemy combatant which includes “individuals who never committed a belligerent act or who never directly supported hostilities against the U.S. or its allies.”

Judge Green highlighted another problem with the CSRTs. Detainees are given no meaningful opportunity to contest their designation, which is potentially based on coerced evidence and often based on secret evidence unavailable to the detainee, such as that the detainee “associated with” an alleged, but unnamed, member of Al Qaeda. Administration supporters respond that under the Detainee Treatment Act (DTA), judicial review of the “enemy combatant” designation is available. They neglect to mention that the DTA limits review of CSRT decisions to whether or not they conform to the rules for CSRTs and to U.S. laws and the Constitution. No mention is made of U.S. treaty obligations such as the Geneva Conventions or the prohibitions against arbitrary detention contained in the International Covenant on Civil and Political Rights (ICCPR). In the *Bismullah* case, the government even objected to the reviewing court’s access to information available to the CSRT in making an “enemy combatant” determination. In the *Boumediene* case the government argued to the Supreme Court that the CSRTs do comply with all applicable law and rules.

Another flaw of the CSRTs is the failure to provide that persons who are, indeed, combatants as that term is understood in the laws of war, are granted the PoW status to which they are entitled under the

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Third Geneva Convention and long-standing U.S. Army regulations. Likewise, the CSRTs leave no room for establishment of civilian status under the Fourth Geneva Convention.

The administration uses the “enemy combatant” label to justify detention of persons for interrogation, regardless of their innocence. That this is an improper basis for detention has been recognized in several of the opinions in Hamdi, as well as by the dissenters in the Padilla case. It uses the “unlawful enemy combatant” label to obscure and deny the rights of detainees to challenge detention and to receive humane treatment and fair trials under the Geneva Conventions, where applicable, and under international human rights law.

### IV. Why wise men fear to tread on time-honored legal distinctions

Shoehorning non-fighters, let alone innocents and criminals who have no connection to armed conflict, into the definition of “enemy combatant” wreaks havoc with important, time-honored distinctions in international law. The US-manufactured definition of “unlawful enemy combatant” not only obscures important distinctions between war and its absence, between international and non-international armed conflict and between combatants and civilians. It also seeks to deprive those to whom the label is attached of their rights under any framework of applicable international law.

In the first of a one-two punch, administrative determinations, such as the president’s Military Order of November 13, 2001 and legislation such as the MCA, bring within the laws of war persons whose conduct has no nexus to armed conflict, while denying them their rights under that body of law. The second punch is the equally ill-advised U.S. position that human rights law does not apply in armed conflict, and in any case, does not apply to U.S. conduct abroad, including Guantanamo. The end result, absent correction by Congress or the courts, is to allow the U.S. a barely-limited defini-

tion of who it may detain without charge or trial in a virtually rights-free zone.

The Rule of Law Handbook accompanying the Army’s new Counterinsurgency Manual, drafted under the authority of General Petraeus, states:

“In light of the need to establish legitimacy of the rule of law among the host nation’s populace, conduct by U.S. forces that would be questionable under any mainstream interpretation of international human rights law is unlikely to have a place in rule of law operations.”

To combat terrorism, to re-establish America’s status as a standard-bearer for human rights and the rule of law, and to uphold the bedrock principles served by international humanitarian and human rights law, the U.S. must return to a mainstream concept of “combatant.” Here are three things that the U.S. can do to that end:

- For people detained outside of armed conflict: stop using the term “combatant” and stop asserting application of IHL. Reform legal procedures so that the power to detain, the right to challenge detention and trial procedures comport with the requirements of international human rights law.
- For people detained in international armed conflict: reform legal procedures so that entitlement to PoW status and civilian status might be determined in appropriate cases and so that trial procedures are consistent with applicable requirements of IHL. Restrict the use of the term “combatant” to persons entitled to PoW status.
- For people detained in non-international armed conflict: reform legal procedures so that the power to detain, the right to challenge detention and trial procedures comport with the requirements of applicable IHL and international human rights law.

Stop using the term “combatant” to describe persons in these categories.

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attack in accordance with the laws and customs of war, and they emphatically are not entitled to be tried for their offenses in the civilian justice system. Combatants, whether lawful or unlawful, are properly subject to military jurisdiction.

### Who Are the Real Civilians?

The laws of war have long protected civilians, *provided* that they do not engage in hostile actions. For example, the British Military Manual of 1914 declared it a “universally recognized rule . . . that hostilities are restricted to the armed forces of the belligerents, and that the ordinary citizens of the contending States, who do not take up arms and who abstain from hostile acts, must be treated leniently.” This rule has been the touchstone of the immunity from attack enjoyed by civilians—at least in principle—since the Middle Ages. Civilians who crossed this all-important line, and who did engage in hostile actions, were subject to prosecution and punishment, under military law, as war criminals.

There were two exceptions to this rule. First, civilians could lawfully engage in hostilities (and merit treatment of “prisoners of war” upon defeat or capture) as part of the *levée en masse*. The *levée en masse* was the traditional mustering of the inhabitants of a territory under threat of invasion who take up arms to resist without time to organize into a proper military force. Nevertheless, to obtain combatant rights under the laws and customs of war, such individuals were (and are) required “to carry arms openly and to conduct their operations in accordance with the laws and customs of war.

Significantly, the civilian population of an area already occupied by a foreign military forces does not have the right to armed resistance, and cannot achieve combatant rights as the *levée en masse*.

Second, civilians who take up arms in support of their national cause, acting as auxiliaries to their own national forces, also could earn a lawful combatant status if they complied with all of the four critical criteria that characterized the lawful armed forces of states. These include a recognizable command structure, wearing some type of uniform (again, to mark the fighter out from the civilian population) carrying arms openly, and complying with the laws and customs of war in operations.

Otherwise, anyone not enlisted in the regular armed force of a state could not engage in hostile actions. Moreover, and significantly, although civilians could achieve the status of lawful combatancy by complying with these rules, they could not then slip back into the civilian population, reclaiming their rights as non-combatants. As explained in the British Manual, “It is necessary to remember that inhabitants who have legitimately taken up arms cannot afterwards change their status back to that of peaceful inhabitants.” In other words, the character of a combatant was fundamentally inconsistent with that of a non-combatant—no one could enjoy the rights of both combatants and non-combatants at the same time, and once the decision to cross the line was made, there was no going back.

### Who Are the Unlawful Combatants?

Those who did engage in hostile actions, but who did not qualify for lawful combatant status in one of the above categories, were classified as “unlawful combatants” or “unprivileged belligerents.” Although governments often themselves utilized such fighters, such individuals were universally condemned because of the dangers they posed both to lawful armed forces (because they did not follow the rules of war) and to the civilian population. They were subject to the harshest punishment, which could be summarily imposed by military authorities. As explained by a leading

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American military law treatise: “Irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders, are not in general recognized as legitimate troops or entitled, when taken, to be treated as prisoners of war, but may upon capture be summarily punished even with death.”

As in the case of spies and saboteurs (who were also once subject to summary justice), this rule has ameliorated over time and unlawful or unprivileged combatants cannot now be punished without a trial. They are not, however, entitled to trial in the civilian courts. They remain on the combatant side of the all important divide between civilians and combatants, and are fully subject to military jurisdiction. On this point, the leading American case remains the Supreme Court’s decision in *Ex Parte Quirin*, 317 U.S. 1 (1942). In *Quirin*, the Court classified eight German saboteurs as “unlawful combatants,” who were not entitled to civilian trials but could be tried by a military commission convened under the laws of war.

More recently, President Bush based his original executive order authorizing the trial of individuals involved in acts of international terrorism against the United States before military commissions on this precedent. The Supreme Court invalidated this order in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), because the military commissions established did not meet the requirements of the Uniform Code of Military Justice. Subsequently, Congress enacted the Military Commissions Act, specifically authorizing the use of military commissions in these cases.

Despite this venerable pedigree of the unlawful combatant classification, the critics of United States detainee policies have asserted that the category was invented by the Bush Administration (demonstrably false), or that the category is no longer legally valid. In this regard, for example, some critics argue that al Qaeda agents captured or

held in the United States are civilians, who can only be processed as criminal defendants or released.

This view was regrettably adopted by the Fourth Circuit in *al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007) which concluded that Ali Saleh Kahlal al-Marri, an al Qaeda operative captured in the United States, was actually a civilian – on the extraordinary theory that the legal category of “combatant” can only exist in conflicts between states. The *al-Marri* court based this view on a 2005 internet posting by the International Committee of the Red Cross (“ICRC”) which stated that “[i]n non-international armed conflict . . . combatant status does not exist.”

This is incorrect. The regular armed forces of states, so long as they themselves comply with the criteria for lawful combatancy, always enjoy “combatant status” regardless of whether they are engaged in an international or non-international armed conflict. The question is whether irregular fighters who fail to follow those rules are also combatants, of an unlawful or unprivileged variety – or whether they maintain a civilian status that protects them from military jurisdiction.

The 1949 Geneva Conventions, certainly, do not suggest that this is the case. These treaties were designed to supplement, not to displace, the laws and customs of armed conflict, and nowhere do these treaties purport to eliminate the well established category of unlawful enemy combatant. Indeed, the ICRC’s own commentaries on the conventions recognize that irregular or partisan fighters can obtain the rights of prisoners of war only by compliance with the four criteria: “if resistance movements are to benefit by the Convention, they must respect the four special conditions . . . which are identical to those stated in Article 1 of the Hague Regulations.”

Only in the 1977 Protocol I Additional to the Geneva Conventions is provision made for the granting of lawful combatant rights to otherwise unprivileged forces who do not comply with all four of these criteria. In particular, that instrument would allow POW rights and privileges to irregular forces

who conceal themselves amidst the civilian population, except at the time of attack. The United States, of course, rejected Protocol I on just this ground, and is not bound by its provisions. With respect to American military operations, the traditional rule remains applicable.

Nevertheless, the *al-Marri* Court concluded that al Qaeda members must be treated as civilians exempt from “seizure and confinement by military authorities.” Civilians, of course, also are not subject to attack by military authorities. The court never explained how, consistent with its decision, the United States could ever use military force against al Qaeda (as opposed to seeking international judicial assistance), noting merely that the government had proffered no evidence of al-Marri’s taking a “direct part in hostilities.”

However, this issue cannot be so carelessly sidestepped. The United States cannot use armed force against al Qaeda if terrorist operatives are simply civilian, criminal defendants. But they are not civilians. In striving to force the government to treat captured al Qaeda members as criminal defendants, the *al-Marri* court ignored the combatant essence of al Qaeda’s organization. Al Qaeda’s fighters are taught to violate systematically the laws of war and then covertly sent to await the signal for attack. This, of course, was exactly the case with the nineteen men who carried out the September 11 attacks, as it was with the *Quirin* saboteurs.

### Conclusion

Ultimately, however much the opponents of the war on terror resist categorizing al Qaeda operatives as combatants, there is no other responsible choice. This is not about the shortage of compassion, or even military necessity. Ultimately, what is really at stake here is the integrity of the war’s legal architecture and its ability to protect civilians from harm. To create a new category of combatants, who may participate in hostilities and still retain their civilian status places genuine civilians in grave danger. Experience teaches that it is difficult to keep regular troops engaged in counter-insurgency warfare from viewing all members of the local population as enemies. Creating a type of civilian who can take part in hostilities but remains immune to attack or trial in military courts will exacerbate this dangerous tendency. This problem is particularly acute because so many fighters for non-state actors, in addition to pretending to be civilians, have deliberately chosen to engage in deliberate mass casualty-producing attacks against innocent civilians.

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### **Rona Replies**

Messrs. Rivkin and Casey correctly note the most fundamental principle informing the laws of war: the distinction between combatants and civilians. The

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distinction has ramifications in 4 realms of rules governing:

- who can be targeted,
- who can be detained and what rights do they have to challenge detention,
- treatment of detainees, and
- who can be tried (for what crimes and under which procedures).

Thus, the decision that someone is or is not a combatant has several consequences, some of which mean the difference between life and death.

Rivkin and Casey also correctly note that civilians who participate in hostilities lose their immunity from being targeted. But they then make three mistakes from which they never recover. First, they incorrectly assume that civilians who participate in hostilities also thereby lose their rights as civilians on matters of detention, treatment and trial. Second, and consequently, they incorrectly conclude that such persons, having failed to qualify for combatant status (e.g., the right to be treated as a PoW upon capture) and having, in their opinion, forfeited the rights of civilians, therefore constitute a third category, which they call “unlawful combatant.” Third, they incorrectly assume that participation in hostilities by a civilian is a war crime.

As to the first assumption, the 4<sup>th</sup> Geneva Convention makes absolutely clear that in international armed conflict (wars between States) enemy nationals who fail to qualify for PoW status under the 3<sup>rd</sup> Geneva Convention are civilians protected by the 4<sup>th</sup> Convention. There are combatants and there are civilians. Period. Civilians who participate in hostilities may or may not be committing war crimes or domestic crimes, and may be duly tried and punished, but they remain civilians. In wars waged by non-State armed groups, even ones of transnational scope, the non-State fighters are not “combatants” because that title only applies to privileged belligerents. Non-State fighters have no

privilege of belligerency. They can be militarily targeted, but they are still civilians.

Second, because there are only two categories in the law of armed conflict, combatant and civilian, and because civilians who participate in hostilities retain their civilian status, there is no such thing as a distinct status of “unlawful combatant.” Rivkin and Casey’s assertion that the U.S. Supreme Court has held otherwise in the *Quirin* case is wrong. The German saboteurs in that case were not civilians; they were members of the German military who were engaged in the war crime of perfidy: feigning civilian status while conducting military operations. More recently, the Israeli Supreme Court declined to follow U.S. practice in this regard, ruling that there is no such category as enemy combatant or unlawful combatant.

Third, there is simply no basis in the laws of war to conclude that unprivileged belligerency is a war crime. It is no doubt a crime against domestic law in situations of domestic armed conflict—a rebel who kills a soldier in a civil war is no less guilty of murder under national criminal law than is the killer of a convenience store clerk in a stick-up gone bad. But targeting a combatant in armed conflict, whether done by a combatant or a civilian, is not a war crime.

Finally, and perhaps most importantly, Rivkin and Casey jump the gun by confining their analysis to the laws-of-war framework. Before arguing about what distinctions the law of armed conflict does or does not permit to be drawn, there is the not-so-small question of whether that body of law applies in the first place. The laws of war apply to war. And only to war. While there is certainly terrorism in war, the laws of war do not apply to terrorism unless it occurs in the context of war. The vague and overly-broad definition of enemy combatant/unlawful enemy combatant used by the Guantanamo Combatant Status Review Tribunals and Military Commissions wrongly applies a law-of-war paradigm to many individuals whose conduct has no nexus to armed conflict.



Messrs. Rivkin and Casey put up more than one straw man in asserting that “there is no other responsible choice” than “categorizing al Qaeda operatives as combatants.” As civilians they can be shot while participating in armed hostilities; detained without charge where appropriate under the laws of war; interrogated and tried for their crimes under either civilian or military jurisdiction, as appropriate; and if convicted, imprisoned for a very long time or executed. What more do we want? Want more do we need?

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### **Rivkin & Casey Reply**

The question of how much involvement in combat by an ostensible civilian is sufficient to render him an unlawful combatant, as distinct from a mere sympathizer or supporter, is a legitimate one. Indeed, the proper resolution of this inquiry is not always easy and is heavily facts- and circumstances-specific, particularly in the context of warfare against shadowy belligerent groups, which go to great lengths to conceal the identity of their members. However, the fact that they have chosen – for their own illegitimate purposes – to ignore the laws of war which require them to clearly distinguish themselves and their organization from the civilian population cannot, and should not be permitted, to shield them from application of the legal regime governing armed conflicts.

Although the original Military Order of November 13, 2001, could have been broadly interpreted to encompass certain civilian sympathizers, the current definition established in the Military Commissions Act makes clear that the term unlawful enemy combatant refers to persons who have “engaged in hostilities or who ha[ve] purposefully and materially supported hostilities.” In this connection, it is important to note that the traditional laws of war applied the combatant category both to actual combat troops, and also to individuals in various support roles. These rules also apply to determining who may be an unlawful enemy combatant.

Thus, individuals who associate themselves with al Qaeda or the Taliban, and who take actual part in hostilities (or who stand ready and able to do so) are enemy combatants. Similarly, persons who function in support roles for those hostilities, transporting munitions for example, also are covered – as are individuals who effectively work for the organization on a regular basis.

By way of example, a document forger who works for all-comers as a part of his “profession” would not properly be classified as a combatant, even if he occasionally provides forged materials to al Qaeda agents. On the other hand, an individual who is associated with al Qaeda and whose role in the organization is to forge documents would be properly classified as a combatant, even though he may never see combat. Intelligence information, which includes captured membership and operational documents and results of interrogations of known enemy combatants, is indispensable in establishing which captured individuals are the true combatants; this is why, by the way, the Administration’s much-criticized Combatant Status Review Tribunals, which tackle these issues after a considerable period of time post-capture, provide suspected al Qaeda and Taliban members with an appropriate level of due process.

Restricting the definition of combatant to persons captured in a particular theater of war, e.g., Afghanistan, also has no basis in law or practice. There are, of course, also limitations on the right of any belligerent power to attack its enemy in the territory of a neutral state – without that state’s permission. As U.S. Attorney General Caleb Cushing wrote in 1855, “it is a principle of the law of nations that no belligerent can rightfully make use of the territory of a neutral state for belligerent purposes, without the consent of the neutral government.” However, with that permission, combatants in an armed conflict can be attacked (or captured) wherever and whenever they can be found, so long as the overarching principles of distinction and proportionality are respected.

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Civilians who take part in hostilities, unless they fall within the very narrow category reserved for the *levee en masse*, do indeed become combatants. Under the traditional rules of international law, which the United States has not abandoned, the very essence of being a civilian is that very abstention from hostilities. Only the 1977 Protocol I Additional – which the United States has properly rejected – would let terrorists and other irregulars have it both ways, claiming the rights of combatants when on the attack, but hiding behind a “civilian” classification at other times. Such individuals are not entitled to “POW” status unless they *earn* that status by obeying the rules – in particular, by distinguishing themselves from the surrounding civilian population by wearing uniforms and carrying their arms openly.

It is unclear why Gabor believes that civilians who participate in combat can be targeted with deadly force, but cannot be detained or otherwise treated as combatants if captured. We know of no legal principle that would permit the deliberate use of armed force against “civilians.” Civilians, including civilian criminal suspects, can never be deliberately targeted for attack. Only if they resist a genuine attempt at arrest could force be used, and then only in accordance with ordinary policing rules. Creating a category of “civilians” who can be attacked would only further endanger genuine civilians and effectively legitimize methods of warfare that have been considered unlawful for centuries.

## Intelligence Agency? Does the U.S. Need a Domestic Intelligence Agency? Judge Richard Posner and Juliette Kayyem Debate the Question

Richard A. Posner’s Opening Remarks

At present, the Federal Bureau of Intelligence (FBI) is the federal agency primarily responsible for domestic intelligence. Unlike all other countries (as far as I know), the United States does not have a domestic intelligence agency comparable to Britain’s MI5 or Canada’s CSIS (Canadian Security Intelligence Service), which is to say an agency that has no powers of arrest or criminal law enforcement, but is purely a national-security intelligence service dedicated to detecting terrorist and other plots to attack or undermine (as by espionage) the national homeland.

The reason for placing such an intelligence function outside a criminal-investigation agency, such as the FBI, Scotland Yard, or the Royal Canadian Mounted Police, is that criminal investigators investigate completed crimes, whereas intelligence officers try to prevent terrorism, which, while criminal, can do so much harm that prevention is an imperative and punishment after the fact (for any terrorists who survive the attack) is an inadequate response. Because the FBI is dominated by criminal investigators, it has proved unable to transform itself into an intelligence agency. Conceiving intelligence as merely an adjunct to arrest and prosecution, and measuring success by number of arrests, the Bureau repeatedly jumps the gun, arresting terrorist suspects as soon as it has enough evidence to convict them of “material support” of terrorism or some other preparatory crime, rather than continuing the investigation until the full scope of the terrorist plot is revealed. The Bureau notoriously has failed to develop a computer system adequate to intelligence needs, because criminal investigations

are normally handled by the Bureau's field offices and do not require a sharing of information throughout the Bureau. It has notoriously failed to knit the nation's 840,000 police into a nationwide network for information concerning potential terrorist threats because it fears having its cases stolen by local police. By requiring all Bureau intelligence operations officers to be trained as special agents (i.e. criminal investigators), the Bureau ensures that it will continue to be dominated by a culture of criminal investigation, not of intelligence. It is now a decade since the Bureau's directors (Louis Freeh, and now Robert Mueller) vowed to make the Bureau effective against terrorism. Progress has been glacial.

Resistance to the creation of a U.S. counterpart to MI5 and CSIS is fed by misunderstandings concerning the effect of such an agency on civil liberties. MI5 used to operate rather lawlessly by U.S. standards because the United Kingdom (UK) had no Bill of Rights, but no longer, now that the UK has subscribed to the European Convention on Human Rights. Yet MI5 remains highly effective. A domestic intelligence agency doesn't have to be lawless to be effective! A U.S. agency would operate within the attorney general's guidelines for terrorist investigations. It would have no powers that the FBI does not have, and it would lack the power of arrest, which the FBI does have. It would be less ham-handed than the FBI is in investigations in the Muslim community, because unlike the FBI, its sole function would be to prevent terrorism—and the biggest factor in prevention is maintaining the loyalty of American Muslims.

#### Juliette Kayyem's Opening Remarks

I would agree with Judge Posner on the following remark: "A domestic intelligence agency doesn't have to be lawless to be effective!" Those, like me, who wonder at the enthusiasm for an MI5 equivalent in the United States are often categorized as concerned solely for civil liberties, sometimes at the peril of security. I'll reserve the liberties discourse for a later post.

From a security perspective, if one were to look at the record of post-9/11 terrorist activity, Britain isn't a terribly great model. There have been two serious homegrown terrorist attacks on their rail and bus lines that were not noticed by their domestic security agency. A third massive airline plot was disrupted, but its scope and imminence is now in question, even by our own counterterrorism officials, and it seems that even that evidence came from a human intelligence source who volunteered the information. This is a simple and obvious way to state that open democracies—whatever their intelligence architecture—will sometimes fail against internal threats, and the existence of a superagency along the lines of an MI5 is no guarantee against that.

So, I'm often left to wonder: What is the problem that proponents of MI5 want to fix?

First, like Posner, proponents of an MI5 are rightfully questioning of a Federal Bureau of Investigation (FBI) that has failed to deliver in many respects, though many local and state police departments—including, according to Chief Bratton, the Los Angeles Police Department—would argue with the representations regarding the sharing of information that Posner makes. But if the problem is often the sharing of information across agencies, it seems difficult to imagine that another agency—parallel yet distinct from the FBI—wouldn't muck it up even more.

Second, like Posner, proponents also argue that an MI5, freed from the duty to prosecute though with "no (more) powers" than the FBI already has, will be able to find and unearth homegrown terror more successfully. But the evidence that the post-9/11 FBI is actually missing lots of plots that an MI5 would uncover is not apparent. Surely the fact that we are not aware of the FBI having unearthed a truly serious major plot is no evidence the agency has missed one. Commentators like Posner and myself could wax eloquent about the nature of the homegrown threat, its makeup, size, and complexity. But it is just as possible that the failure to disrupt any serious cells in America (like Posner, I tend to

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think of most of the terror arrests [to date] as ranging from silly to small-fry) might be because we have been successful at integrating communities that are so clearly not integrated in Britain, Germany, and France.

In fact, from a security perspective, the push to create an MI5 has some real downsides. Even if we assume that the Brits' MI5 is "better" than our FBI at fighting terrorism, that may have little to do with its structure and much more to do with its methods of training, its long history of fighting a domestic terrorist threat, and the personnel it has attracted to an agency long been devoted to doing just that. Creating a whole new agency, then, may just be a way of ignoring the real task at hand—bringing about the transformation of our FBI. And there's another reason to worry about creating an MI5. This Friday, the head of MI5 announced that tens of thousands of British citizens were suspected of being threats to the homeland. It was, for many, a rather transparent ploy for more resources and support. Indeed, such a number suggests that a domestic intelligence agency may, like any good bureaucracy, find more enemies than actually exist. And, in so doing, create an atmosphere where their suspected threats become very real. It's not clear why that makes the MI5 an attractive model for us.

### Posner Replies

Professor Kayyem's response is rather unresponsive. (Her reference to Chief Bratton's puff piece about the LAPD [Los Angeles Police Department] is naive.) She does not discuss the systemic problem that bedevils the Federal Bureau of Investigation (FBI)—the conflict between criminal investigation and national security intelligence—or the empirical evidence: Ten years after Director Freeh first tried to reorient the Bureau to counterterrorism, the Bureau has taken only the first, halting steps (which is why its failure to uncover terrorist cells should not reassure us that there are no cells). Kayyem does not explain the anomaly that of all

countries, only the United States (as far as I know) thinks it sufficient to commit domestic intelligence to a criminal-investigation agency. What's special about us?

The fact that she takes MI5's lack of a perfect record to demonstrate its unsuitability as a model for us reflects a fundamental misunderstanding. *No* intelligence agency has a perfect record, or even a good record. An intelligence agency can no more bat 1.000 than a baseball player can. Intelligence is *inherently* a highly imperfect undertaking; that is perhaps the most important thing there is to know about intelligence. Its radical imperfection is one of the reasons to have multiple agencies; our lack of a domestic intelligence agency has created a yawning gap in our defenses.

Like many, Kayyem believes we are safe because our Muslim communities are well integrated with the general American culture. Better integrated than Britain's, yes, but there are two to three million American Muslims and it doesn't take more than a handful to wreak havoc. There is growing concern not only with homegrown terrorism in general, but with the "second generation" question. May not a few of the teenagers and young adults, offspring of well-integrated American Muslims, perhaps look abroad to events in the Middle East that are helping to promote Muslim extremism and decide to join the fray?

She says the "real task at hand" is "bringing about the transformation of our FBI." But how to do that? Director Mueller is trying, assisted by an able Central Intelligence Agency (CIA) transplant, Philip Mudd. It is not obvious what more can be done (maybe Kayyem has suggestions). It would be easier to create a new agency than to overcome the FBI culture, and a new agency might add the spur of competition to transformation endeavors within the Bureau.

MI5 undoubtedly owes its success to its longer history of fighting terrorism. We can learn from countries like Britain that have these longer histories. We can start now and hope that in five or ten

years we have an agency as effective as MI5 to meet what may well be the greater dangers to national security down the road in this era of terrorism and proliferation. And by the way, the number of British suspects to which the head of MI5 referred recently is not “tens of thousands;” it is 1,600—out of some 1.6 million British Muslims. I don’t think MI5 is “find[ing] more enemies than actually exist.”

### Kayyem Replies

The batting average of any intelligence agency is never perfect; that is as obvious as apple pie. We are debating whether a domestic intelligence agency in America would be better, for a variety of reasons, than not having one. The reason to point out MI5’s failures in predicting serious attacks in Britain is to highlight that no intelligence architecture is a perfect watchdog; thus, Posner’s faith in an MI5 to correct for the deficiencies of the Federal Bureau of Investigation (FBI) should be met with a skepticism about its likely effectiveness that he does not display. As for the threat posed by our communities of interest here in America, Posner makes a sweeping claim based on numbers—not facts, not history; that is a claim that may be convincing, but also may just be fearmongering. In any event, Posner seems to acknowledge that part of Britain’s problem arises from its failure to integrate its Muslim population as effectively as we have done. What is the likelihood that an MI5 would enable us to continue to be as successful as we have been on that score? Isn’t there a real risk that it might promote just the kind of alienation we see in Britain?

Posner now makes a new argument for why there ought to be a domestic intelligence agency—the competition it would spur in the FBI to finally make the changes that are necessary. Now, anyone who has seen the creation of the Department of Homeland Security, or indeed the Office of the Director of National Intelligence, knows that their birth, and even childhood, are difficult transformation periods. So the notion that we can’t wait for the FBI to change certainly can’t be defended on the grounds that an MI5 equivalent would be functioning imme-

diately. And Posner never addresses the key difference between our country and others—most of those with domestic intelligence agencies have long histories of responding to internal terrorist threats, resulting in a cadre of people trained in such operations. We can’t manufacture personnel with such backgrounds just by assigning them to work in a new building with a new name.

Maybe we should get beyond the abstract debate over names and structures, therefore, and start focusing on just what it is that this MI5 could actually do that the FBI can’t or won’t. After all, post 9/11 we’re a lot closer to having a domestic intelligence agency—in light of the Patriot Act and changes in the Attorney General’s Guidelines—than Posner acknowledges, including allowing a number of investigative techniques without any reasonable suspicion. Judge Posner said in his first post that such an MI5 would have no powers that the FBI does not already possess. If that is true, the only reason for having an MI5 is because our present agencies, in Posner’s opinion, can’t perform. I suspect, however, that part of the desire for an MI5 would be that it has powers beyond the FBI, though Posner explicitly forecloses that.

Finally, Judge Posner reads the MI5 statement as being less alarmist than I do. The head of MI5 didn’t say there were just 1,600 suspects; she said there were 1,600 actively plotting, but she also said there were another 100,000 people who believed the July 7 attacks to be justified, and it was difficult to get a fix on who among them posed a threat.

### Posner’s Final Contribution

Professor Kayyem continues to ignore the principal argument for creating a U.S. counterpart to MI5 or CSIS (the Canadian Security Intelligence Service, in some ways a better model for us because Canada is more like the United States than Britain is). That is the incompatibility of a culture of criminal investigation (backward looking, preoccupied with arrests and prosecution, information hugging, etc.) and one of intelligence (preventive in orientation, casting a wide net for clues to impending attacks,

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laser-beam focused on terrorism and therefore highly sensitive to the need to maintain the loyalty of the U.S. Muslim community). This incompatibility is something that every other major democratic nation recognizes and that ten years of unsuccessful efforts to refocus the FBI confirm.

The arguments in her most recent post are unpersuasive: That “no intelligence architecture is a perfect watchdog” is irrelevant to whether a new architecture would be an improvement. The suggestion that noting the potential threat of home-grown terrorism is “fearmongering” is baseless, as is the veiled suggestion that MI5 may have contributed to the alienation of the British Muslim community (in fact MI5 has been criticized for underestimating the threat posed by that community). Also baseless is Kayyem’s suspicion that “part of the desire for an MI5 would be that it has powers beyond the FBI.” It would not. As for the statement by the head of MI5 that 100,000 British Muslims “believe the July 7th [2005] attacks [on the London transit system] to be justified,” does Kayyem doubt the accuracy of the figure, or its implications? Am I the fearmonger, or is she the ostrich?

She is correct that a new agency would not be functioning optimally from the first day. But the organizational problems involved in creating an agency of perhaps two to three thousand employees (the size of MI5 or CSIS—we probably don’t need a larger agency because of our vast number of police, which a domestic intelligence agency could knit into the effective national information-gathering network that we do not have) are not to be compared to the problems of welding 184,000 employees scattered across twenty-two agencies into a single department (DHS). And yes, “a cadre of people trained in such operations” can’t be created overnight, though in fact scattered across the vast U.S. intelligence community (almost 100,000) are enough such people to staff a small agency.

## Kayyem’s Final Contribution

I want to first thank Judge Posner for a great series of discussions, as well as CFR.org for giving us the airspace.

In his final post, Posner provides a benign explanation for what the U.S. equivalent of an MI5 might be able to accomplish. Put that way, it seems like a no-brainer, the equivalent of a lean, mean, special operations-type force freed from the passiveness of prosecution.

That, of course, comes at a cost and the cost is something that Posner and I simply will disagree on. There is the cost of adding without subtracting, of overlaying a body over a system that, even at first blush, looks like no one is still in charge. There is the cost, though Posner does not mention it, of freeing a domestic intelligence agency from well-established rules regarding the kinds of “triggers” this democracy has chosen to put on the justification of such surveillance. Given Posner’s well-known ideas regarding the National Security Agency surveillance debate, those costs for him are outweighed by the threat we face. There is the cost of foiling a system that has, in many respects, begun to modify itself in light of 9/11, whether it be changes to investigations, or the law, or those involving the numerous local and state law enforcement officials who are invested in this challenge (Posner calls L.A. Police Chief Bratton’s anti-MI5 statements simple self-defense) and who are likely to know much more about local communities than any force the size of two- to three-thousand employees. (It is likely, given this nation’s size and geographic expanse, that our own MI5 would have to be much larger.)

These are costs, as are the risks that a MI5, freed from the prosecution priority, will become something more than the lean, mean counterterrorism force we wish it would be. It seems to me incompatible to say that a domestic MI5 would have no greater powers than the Federal Bureau of Investigation (FBI), but be freed from the system of

accountability and oversight (however loose it is these days) that comes with a judicial presence in the system. In addition, in 2006, MI5 had files on 272,000 Brits — some serious, some not. Standing alone, that number means nothing. But, the British expectation of privacy is substantially different than our own, and that is a consequence that may alter, for readers, Posner's benign representations. Again, we simply disagree about the balance of this cost. But, in a recent survey of thirty-seven countries by Privacy International, for example, Britain was ranked among Russia and China as practicing "endemic" surveillance against individual citizens.

In any event, I think Posner and I can agree on this. If we are to model ourselves after the British, perhaps what we can best learn is that their single greatest strength is the exceptional degree of coordination that extends throughout their national security hierarchy, a hierarchy that includes a number of entities, as does ours. That is a lesson, domestic MI5 or not, that we would all want for our nation.

*The Honorable Richard Posner is a judge on the United State Court of Appeals for the Seventh Circuit, and a Senior Lecturer at the University of Chicago Law School. Juliette Kayyem is the Undersecretary for Homeland Security for the Commonwealth of Massachusetts. At the time of the debate Ms. Kayyem was a Lecturer in Public Policy at the Belfer Center for Science and International Affairs at the Kennedy School of Government.*

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## In Case You Missed It ...

*Staying current in the field of national security law is never easy. Every week there are significant new opinions, statutes, indictments, reports, articles, and any number of other developments. Many of these items prompt coverage in the major media outlets, but some fly beneath the radar. In an effort to assist practitioners and scholars in keeping up to date with these events – and in particular to provide ready access to primary sources in electronic format – Professor Robert Chesney of Wake Forest University School of Law maintains a listserv for professionals and academics working in this area. “In Case You Missed It...,” featuring selected posts from that listserv, will be a recurring item on the back page of the National Security Law Report. Those interested in subscribing to the listserv may do so by contacting Professor Chesney at [robert.chesney@wfu.edu](mailto:robert.chesney@wfu.edu).*

- *Moussaoui v. United States* - The National Association of Criminal Defense Lawyers has filed an amicus brief supporting Moussaoui’s appeal, contending that giving Moussaoui’s attorneys access to information that could not be shared with him constituted a violation of his rights. The brief is posted here: [http://www.nacdl.org/public.nsf/newsissues/amicus\\_attachments/\\$FILE/Moussaoui.pdf](http://www.nacdl.org/public.nsf/newsissues/amicus_attachments/$FILE/Moussaoui.pdf).
- *United States v. al Bahlul* - Charges have been referred for trial by military commission against Ali Hamza Ahmad Suliman al Bahlul, including allegations of involvement in the bombing of the *U.S.S. Cole*. The charge sheet is posted here: <http://www.defenselink.mil/news/Feb2008/d20080208bahlul.pdf>.
- *Boumediene v. Bush* - The detainees have filed a new supplemental brief in the *Boumediene* litigation in the Supreme Court, focused on the implications of the D.C. Circuit’s recent opinion in connection with the en banc petition in *Bismullah* (concerning the scope of review authority under the Detainee Treatment Act). The brief is posted here: <http://www.scotusblog.com/wp/wp-content/uploads/2008/02/boumediene-supp-bf-2-19-08.pdf>.
- “Detainee Operations,” Joint Publication JP 3-63, February 6, 2008, available at: [http://www.fas.org/irp/doddir/dod/jp3\\_63.pdf](http://www.fas.org/irp/doddir/dod/jp3_63.pdf).
- “*Bismullah v. Gates* (D.C. Cir. Feb. 1, 2008) - The D.C. Circuit has denied en banc review in *Bismullah*, the lead case with respect to DC Circuit review of CSRT determinations (the adequacy of which is a central issue before the Supreme Court in *Boumediene*, where the Court may address the question of whether the DTA’s review mechanism provides a sufficient substitute for habeas review). The Circuit split 5 to 5 on the question of whether to grant rehearing en banc, and thus denied the petition. Chief Judge Ginsburg issued an opinion concurring in the denial (joined by Rogers, Tatel, and Griffith). In brief, the Ginsburg opinion is a rebuttal to the Henderson and Randolph dissents. Ginsburg restates the position, articulated in the panel opinion at issue, that DTA review requires the Circuit to have access to all the information in government possession that counts as “Government Information” under the DTA in order to determine whether the CSRT Recorder discharged his duty to assemble such information. Judge Garland wrote a separate concurring opinion to express the view that en banc review should be denied in order to avoid delaying the Supreme Court’s ruling in *Boumediene*. Judges Henderson and Randolph each wrote dissenting opinions, joining each other and joined by Judges Sentelle and Kavanaugh. These opinions argue in substance that the DC Circuit’s review of a CSRT determination should not require production of information that was not part of the record before the CSRT itself, or at least that this question should be decided by the full circuit. These opinions also raise concerns about the panel’s determination that detainee attorneys shall be given access to at least some portions of the classified information presented to the CSRT originally on an ex parte basis. Judge Brown wrote a separate dissent. The order and opinions are posted here: <http://pacer.cadc.uscourts.gov/docs/common/opinions/200802/06-1197c.pdf>