



NATIONAL SECURITY LAW REPORT

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MILITARY COMMISSIONS, THE GOLDEN RULE AND THE LAWS OF WAR: A COMMENT ON THE DETENTION POLICY TASK FORCE'S PRELIMINARY REPORT OF JULY 20, 2009 AND THE NDAA AMENDMENTS TO THE MILITARY COMMISSIONS ACT

By Gabor Rona, Human Rights First

Editor's Note: *As The Report was going to print we received this timely contribution from Gabor Rona, Human Rights First. Our policy in The Report is to offer a diverse set of views, especially when discussing complex and controversial legal policy matters. As such, we debated the propriety of publishing this essay without also publishing an alternative viewpoint. Given our tight publication deadline and the timeliness of this essay we decided to publish the essay and will provide an alternative viewpoint in our next issue.*

There's a scene in the movie *Catch-22* in which a soldier comforts a comrade who appears to have suffered a none-too-life-threatening battle wound. He does not see the real injury that has blown his comrade's guts wide open.

On July 20, 2009, the President's Detention Policy Task Force issued a Preliminary Report on its activities in the form of a Memorandum for the Attorney General and Secretary of Defense. See Detention Policy Task Force Preliminary Report, July 20, 2009, <http://politics.theatlantic.com> (search "Preliminary Report"). With the passage of a new Military Commissions Act, it is only fitting to scratch below the surface of the Task Force's recommendations, which fail to address the real problems that military commissions represent. See National Defense Authorization Act (NDAA), S. 1390, §§ 1031-33 (2009).

The Preliminary Report addresses two issues on which the Task Force purports that "significant policy decisions" have been made: that military commissions should continue to be available and a process for determination of prosecution forum (as between military commissions and federal courts). In doing so, the Task Force reaches wrong conclusions about when and where military commissions are appropriate because it fails to thoroughly consider the facts and applicable legal history. In addition, the protocol articulated by the Task Force for considering which forum is most appropriate for a particular case is illusory and provides no real guidance.

The Task Force is wrong, as a matter of international and domestic law, as well as of sound policy, to endorse military commissions while our federal criminal courts are open, operating, and entirely capable of handling terrorism cases.

Before explaining why, it is important to acknowledge what this is not about. It's not about whether terrorism is better treated as 'crime or war' any more than it makes sense to debate whether a dog is either brown or large. That debate generally occurs at the level of policy preferences rather than legal dictates but the choice of applicable legal frameworks is not a popularity contest. When facts on the ground (namely, degree of organization and frequency and severity of violence) trigger application of the laws of war, they must be applied. Otherwise, the laws of war have no bearing. But the 'crime vs. war' debate provides little guidance on the question of federal courts vs. military commissions even when it does focus on application of facts to law rather than on policy preferences. This is simply because war and crime are not inapposite. Targeting civilians - the quintessential act of terrorism - can occur both within and beyond the context of war. In either case, it is criminal.

So if the context is armed conflict, as I believe is the case for some, but not all, of so-called jihadist criminality, then what's wrong with using military commissions? The answer lies in the underlying architecture of the laws of war: application of the golden rule.

When considering, “Why should we have to treat people humanely who chop off our heads?” it’s noteworthy that the laws of armed conflict are not predicated on principles of reciprocity, but rather on ones of humanity – that we should do unto others not as they do unto us, but as we would have them do unto us. Were it otherwise, any violation by a party to the conflict could justify abandonment of all the rules.

Elevation of the principle of humanity over that of reciprocity has a long-standing pedigree in American history. “Treat them with humanity, and let them have no reason to complain of our copying the brutal example of the British Army in their treatment of our unfortunate brethren. . .,” wrote General George Washington in an order concerning captured British soldiers. His admonition does not merely reflect the Founders’ gentlemanly upbringing, but rather, a utilitarian strategy consistent with principles that the Revolution stood for. “I know of no policy, God is my witness, but this — Piety, Humanity and Honesty are the best Policy. Blasphemy, Cruelty and Villainy have prevailed and may again. But they won’t prevail against America, in this Contest, because I find the more of them are employed, the less they succeed,” wrote John Adams in a 1777 letter to his wife. “In 1776,” wrote historian David Hackett Fischer “American leaders believed it was not enough to win the war. They also had to win in a way that was consistent with the values of their society and the principles of their cause. One of their greatest achievements . . . was to manage the war in a manner that was true to the expanding humanitarian ideals of the American Revolution.” David Hackett Fischer, *Washington’s Crossing* 375 (2004).

A good yardstick for application of the golden rule in a rights-respecting society is to do unto others as you do to your own. The rules for trials of prisoners of war, for example, require that the accused may only be sentenced by the same courts, using the same procedures, as the detaining authorities apply to their own armed forces. Art. 102, Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135. While prisoners of war, in the classic legal sense, exist only in wars between states, a similar rule exists in Common Article 3 of the Geneva Conventions (so-called because it appears in all four Geneva Conventions) applicable to armed conflict involving non-state armed groups.

Common Article 3 is well known for requiring trials of detainees to be conducted with respect for “all the judicial guarantees which are recognized as indispensable by civilized peoples.” A less often quoted, but more relevant, requirement of Common Article 3 is that such trials be conducted by “a regularly constituted court.”

In the 2006 Hamdan case, the Supreme Court rejected the Bush administration’s denial of application of Common Article 3 to Guantanamo detainees, and in particular, with reference to the president’s military commissions. See Hamdan v. Rumsfeld, 548 U.S. 557 (2006). The court correctly interpreted Common Article 3’s “regularly constituted court” requirement for trial of non-state armed group members to mean essentially the same as the Prisoner of War Convention’s “same courts/same procedures” requirement for members of enemy armed forces captured in a State-to-State war. 548 U.S. at 629-630. Specifically, the Hamdan court cites with approval the International Committee of the Red Cross’ understanding of the term “regularly constituted court” to mean “established and organized in accordance with the laws and procedures already in force in a country.” 548 U.S. at 632-33. In other words, the “regularly constituted court” provision of Common Article 3 is the embodiment of the golden rule and has been endorsed as such by the U.S. Supreme Court. And if the obligation is that military commissions should essentially mirror pre-existing judicial processes, then what sense does it make to have military commissions when those pre-existing processes are up and running? None.

Military necessity, not violation of the laws of war, is the proper trigger for military commissions

The Preliminary Report correctly notes the proven capability of our federal courts to try “enemy terrorists (who) have violated our criminal laws.” It also correctly relates President Obama’s unfortunate conclusion that “military commissions can and should continue to be available as a forum for the prosecution of our enemies for violations of the laws of war.”

Military commissions can, under certain circumstances, be a proper venue for prosecution of war crimes. But those circumstances do not now exist. Also, the implication that federal courts are any less equipped than military commissions to handle either war crimes or other criminal prosecutions for unlawful conduct in armed conflict is wrong.

It is surprising, for example, that the Preliminary Report makes no mention of the U.S. War Crimes Act – the premiere law that not only defines war crimes, including those committed in armed conflict between the U.S. and non-state armed groups, but that creates jurisdiction over them in our normal, federal criminal courts. See 18 U.S.C. § 2441 (2008). The omission is particularly surprising in light of the fact that Sec. 6(b) of the Military Commissions Act of 2006 – the very law that the Task Force was writing about - recently amended the War Crimes Act to create a schedule of “grave breaches” prosecutable by federal courts and committed in precisely the kind of conflict in which the U.S. finds itself today. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2632. To the extent the Preliminary Report means to suggest that federal courts are the proper venue for prosecution of “our criminal laws” while military commissions are the proper venue for prosecution of “war crimes,” the Report is incorrect.

Indeed, the proper relationship between these two methods of criminal accountability is alluded to in the Preliminary Report, which cites the observation of the U.S. Supreme Court in Hamdan that military commissions were “born of military necessity.” 548 U.S. at 590.

But the Preliminary Report fails to draw the proper lesson from Hamdan and its corollary Civil War era predecessor, Ex Parte Milligan, in which the Supreme Court rejected use of military commissions while the ordinary courts were functioning without obstruction. See 71 U.S. 2 (1866). Simply put, where the ordinary courts are functioning and capable of exercising jurisdiction, there is no “military necessity” for alternatives. This, and not the distinction between “our criminal laws” and “laws of war,” is the touchstone of a proper military commission. And where such “military necessity” does exist, it does not automatically justify establishing alternatives that are not “in accordance with the laws and procedures already in force” in the United States.

Ask not what military commissions can do before asking what federal courts cannot do

In light of the troubled post-9/11 history of U.S. military commissions, it would seem reasonable to acknowledge the full spectrum of challenges that have successfully been met by our regular federal courts in international terrorism prosecutions before considering, let alone settling upon, the need for alternatives. The Preliminary Report cites three considerations leading to its conclusion that military commissions are the more appropriate venue in some cases: 1) the need to protect sensitive intelligence information, 2) the need to protect participants, and 3) the challenge of gathering evidence in military operations overseas. The Preliminary Report, however, fails to provide evidence that these considerations actually pose a challenge to the use of federal courts that can be better met in a military commission that respects minimum standards of due process. Human Rights First, on the other hand, has published two

comprehensive reports authored by former federal prosecutors, analyzing these and other challenges that federal courts have successfully met in the more than 100 international terrorism cases of the last decade. See In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts (2008); In Pursuit of Justice 2009 Update and Recent Developments (2009) available at http://www.humanrightsfirst.org/us_law/publications/index.aspx.

The five reforms and other proposed changes to the MCA

Reforms announced by the Administration on May 15 for military commission rule changes are, indeed, improvements. Action Memorandum from Jeh Johnson, General Counsel of the Department of Defense to the Secretary of Defense (May 13, 2009), *available at* http://media.miamiherald.com/smedia/2009/05/22/10/mcchanges.source.prod_affiliate.56.pdf. Additional suggestions have been made to import requirements of the Classified Information Procedures Act (CIPA, which provides judges in federal court with a process for protecting sensitive government information from disclosure while respecting the right of the accused to a fair trial) and other reforms into military commissions. NDAA, *supra*; CIPA, Pub.L. 96-456, 94 Stat. 2025 (1980). But none of these reforms cures the underlying flaws of military commissions:

- discrimination by virtue of the fact that the commissions only apply to aliens and exclude Americans (doing unto others differently than we do to our own);
- over-broad exercise of personal jurisdiction against people who are not combatants and may, indeed, have no connection to an “enemy” with whom the US is at war;
- inclusion of crimes that are designated as war crimes but have no basis in the laws of war;
- the continued admissibility of involuntary statements; and
- the potential use of rank hearsay in violation of the accused’s right to confront the evidence and his accusers.

Where federal courts and courts martial are operational, the more that “reformed” military commissions look like federal court trials or courts martial, the less justification there is for having them. On the other hand, the more they depart from federal court and court martial rules, the less legitimate they are. This truism highlights the fact that the only legitimate use for military commissions is, as the Supreme Court has noted, in cases of “military necessity.”

Prosecution forum decisions: The Protocol

The Departments of Justice and Defense have developed purported guidance for determining when a case should be prosecuted by military commission rather than in federal court. The so-called “protocol” is an attachment to the Detention Task Forces’ Memorandum. See Determination of Guantanamo Cases Referred for Prosecution, July 20, 2009. It begins with a presumption that, “where feasible,” cases will be prosecuted in a federal (Article III) court. This is a rule that can be followed, since “feasibility” is objectively determinable. But the protocol then goes on, immediately, to state that “where other compelling factors make it more appropriate to prosecute a case in a reformed military commission, it may be prosecuted there.” The protocol then attempts to refine this alternative by noting three factors upon which the choice depends: a) strength of interest, b) efficiency, and c) other factors, including the ability of the chosen forum to provide for a “full presentation of the wrongful conduct” and an appropriate sentence.

There are several flaws in this process. First, while the presumption in favor of Article III courts “where feasible” comports with international and U.S. jurisprudence authorizing military commissions on the basis of “military necessity,” the “other compelling factors” cited in justification of the choice of military

commissions all but negates the proper breadth of the presumption. Second, several of the “other compelling factors” cited provide no actual guidance on which forum is indicated by greater or lesser presence of those factors (e.g., nature of offense, gravity of conduct, identity of victim, multiple defendant trials, efficiency and resource concerns). Third, some of the “factors” appear to permit the choice of military commission merely to circumvent the due process protections of federal courts and, thereby, make for easier prosecutions and conviction (e.g., “the manner in which the case was investigated and evidence gathered” and “legal or evidentiary problems that might attend prosecution in the other jurisdiction”).

Conclusion

The Preliminary Report concludes with the accurate observation that “(j)ustice for the many victims of the ruthless attacks of al Qaeda and its affiliates has been too long delayed.” The delay is due, in no small part, to the misguided attempt to shift the locus of prosecution of such crimes from the tried and true federal criminal justice system to an ad hoc, untried system that confers an unwarranted “enemy in war” status upon individuals, many of whom wish nothing more than to be martyred as victims of an unjust system. In addition, the flawed military commission system will continue to be the rightful focal point of judicial challenge for a long time to come. While the Preliminary Report’s conclusion declines to note the equal entitlement of the accused to justice (although it is noted elsewhere in the report) there will be no closure for anyone whose interests are determined by a discredited military commission and no honor for those who tend to mortal wounds with band aids.

Covert Action Policy and Procedure

*By, Jonathan M. Fredman, Assistant Deputy Director of National Intelligence for Special Programs.**

Covert action is often viewed in a fundamentally different manner from more mainstream exercises of national power. Neither a military nor a law enforcement activity, covert action is cloaked in an aura of secrecy that endows any discussion with the allure of things concealed. But in many ways the similarities are stronger than the differences: all encompass both persuasive and coercive methods; all prefer to rely upon cooperation much more than compulsion; and all are designed to provide the American people with the means to preserve their liberty as well as the security upon which that liberty depends. As such, some core facts about covert action should be understood.

Covert action does not take place within the United States. Defined by the National Security Act as activities intended to influence events abroad without attribution to the United States, covert action may include paramilitary activities, dissemination of information, or the provision of financial support to nongovernmental organizations. All covert action must be approved in advance by the President, in writing, and no covert action may be directed at the American public, policymakers, or news media.

The National Security Act provides that traditional law enforcement, diplomatic, and military activities are excluded from the definition of covert action. As a practical matter, therefore, covert action refers to clandestine activities conducted by the Central Intelligence Agency to influence events abroad pursuant to the direction of the President and the National Security Council.

Covert action may not violate U.S. law. Pursuant to the Constitution, all Federal statutes, treaties, and the Constitution itself are the supreme law of the land, and nothing in the National Security Act or any other law provides any exemption for covert action. Accordingly, for a covert action to proceed there must be no U.S. Constitutional or other legal prohibition, and the means of its implementation must comply fully with U.S. law, including those provisions of customary international law that are binding

upon the United States, as well as treaty provisions that either are self-executing or have been legislatively implemented by the Congress.

But just as the clandestine collection of intelligence on a foreign nation's nuclear activities may violate that country's own law, as the conduct of espionage against the former Soviet Union violated Soviet law, the conduct of covert action may well violate the law of some foreign countries. Because the contours of U.S. law, including our obligations pursuant to treaties and customary international law, are complex and compliance with their requirements is essential, extensive legal review is incorporated into the design and implementation of covert action as well as military and law enforcement operations.

Covert action must be approved by the President. The President must sign a written Finding before any covert action may be initiated. Any significant change to a previously authorized covert action, as well as any significant new undertaking pursuant to an existing Finding, must be similarly approved in advance by the President in a written Memorandum of Notification.

Covert action is reviewed by the Congress. Pursuant to law, the President provides timely notification of all new covert action authorizations to the House and Senate intelligence oversight committees. The subcommittees on defense of the House and Senate appropriations committees also are briefed, as is the House Select Intelligence Operations Panel. The Director of National Intelligence and the Director of the Central Intelligence Agency keep the Congressional committees fully and currently informed of all significant intelligence activities, including significant anticipated intelligence activities.

The CIA does not advocate for covert action. CIA conducts covert action as directed by the President, advised by the National Security Council including the Director of National Intelligence, the Secretaries of State and Defense, and the Attorney General, and depends upon Congress for the necessary funds. As the executive agent of the President for covert action, CIA implements but does not make covert action policy decisions, and does not have an equal voice when discussing the policymaking aspects at the NSC. At the same time, by design the policy agencies remain detached from the design and conduct of actual operations.

Covert action activities must be consistent with U.S. policy. Paramilitary covert action complemented U.S. special forces in paving the way for U.S. operations against al-Qa'ida and the Taliban in Afghanistan. Covert action provided crucial financial support to Radio Free Europe and Radio Liberty during the Cold War, enabling non-violent opposition to Communist rule in Central and Eastern Europe. Even so, covert action is rarely either the first or the optimal option available, and both Executive and Legislative review, as well as advocacy from within the policy agencies and CIA itself, ensures that covert action proposals are consistent with U.S. policy objectives and complemented to the greatest extent possible by openly acknowledged U.S. activities.

Covert action practitioners are dedicated professionals. Applications to the CIA, and to the rest of the intelligence community, are at a record high. Upon arrival, new recruits are met by more senior officers who have dedicated their lives to protecting this country through changes in Administration and Congressional leadership, mindful of their responsibilities and the values they are sworn to defend. Reflecting this country's heritage, they display a wide variety of political views and diverse backgrounds. And they share a common commitment to excellence -- not as a catch phrase or a slogan, but as a necessary condition for the success of their work and the defense of the nation.

Covert action has saved lives and protected America. At the end of the day, none of this makes any

difference unless it is of value -- and it is. The historical record is replete with examples of covert action successes and failures, as it is with military and law enforcement activities. But with covert action necessarily cloaked in secrecy, subject to selective accurate and inaccurate disclosure and reporting, criticized -- or commended -- by an ever-expanding set of real or claimed experts, and dependent upon trust in an era of widespread skepticism, neither negatives nor positives can readily be proven.

* * *

What can be done? First, we can tone down the rhetoric and find common ground where it does exist:

We share common values. Most Americans, whether serving in the Executive Branch or Congress, working in the news media, or writing in the blogosphere, as well as the American people at large, share certain core values such as love of country, commitment to the Constitution and the rule of law, and protection of our homeland and our friends and allies abroad. No subset of Americans, regardless of their opinions about national policy matters, has a monopoly on these views.

We must comply with the law. People will differ, often vehemently, about the requirements of the law and the boundaries of lawful behavior. But we all agree that we must comply with the law and conduct our national affairs in a legal and proper manner. Controversy over legal requirements is a part of the democratic process and one reason we have an independent Legislature and Judiciary.

We must defend our country against attack. In a world of nuclear proliferation and decentralized threats, we cannot wish our problems away. There are those who would do us harm, and some of that harm would be catastrophic. But in meeting and countering the dangers, we must remember that the world is neither a completely hostile nor completely friendly place. There is a great reservoir of goodwill abroad for our country and our values, and we should keep that in mind as we consider our options.

Employed carefully, covert action can complement overt U.S. initiatives. The delivery of extensive U.S. assistance to the tsunami-ravaged areas of Asia produced a surge in favorable opinion abroad about the United States. So did the provision of emergency relief shortly thereafter to earthquake victims in Pakistan. The delivery of medical and educational supplies to rural Afghan villages has encouraged cooperation with the central Afghan government, and many militant organizations have relied significantly upon the provision of social services in developing support among local populations. And in an effort to influence American opinion, even Venezuela has provided low-cost energy to selected U.S. consumers.

Just as the delivery of assistance through openly acknowledged U.S. channels can produce positive perceptions of the United States, the delivery of assistance through third parties without apparent U.S. sponsorship may contribute to U.S. interests by enhancing the stature of those viewed as responsible. The covert provision of financial support to a foreign democratic opposition group can complement open U.S. diplomatic activity; the selective provision of covert paramilitary training to foreign security services where overt cooperation is not feasible can mean the difference between the rescue of U.S. hostages by indigenous forces and their continued detention by insurgents.

Congressional and Executive Branch oversight is critical. As with law enforcement and military operations, covert action requires review to ensure that its unique capabilities are employed only where necessary and in an appropriate and effective manner. This is not to suggest that those engaged in the implementation of covert action are not responsible or dedicated professionals -- they are. Rather, the use by the United States of clandestine means to affect events overseas is at least as important a subject of examination as the use of lethal force by domestic law enforcement agencies or the conduct of U.S. military operations.

The national debate over covert action will continue. The American people may determine that certain tools should be off the table, or that they should remain available for use should lesser options fail. But the debate should be grounded on a set of common understandings about the nature and scope of covert action, its design, and its implementation, as well as the shared desire of all Americans to protect and defend this nation, its people, and the liberty with which we have been entrusted. ***The views expressed here are solely those of the author.**

A Review of Louis Fisher's "The Constitution and 9/11"

By, Ryan Lockman

In the wake of 9/11, many contended that President Bush attempted to expand executive power beyond its legal limits. Louis Fisher, the constitutional scholar who authored *The Constitution and 9/11*, was not surprised. In his book, he argues that basic American tenets such as procedural safeguards, checks and balances, and openness are often pushed aside by Presidents in time of war. Arguing that President Bush's actions after 9/11 exhibited the same traits as several presidents before him, Fisher provides the reader with a detailed account of the historical significance of certain American rights, the problems with the "unitary executive", and a continuing history of Presidential attempts to improperly expand their power.

Drawing from Justice Frankfurter, who once stated, "History of liberty has largely been the history of observance of procedural safeguards," Fisher argues persuasively for strong procedural safeguards, which protect individuals against the exercise of arbitrary power by the government, specifically the executive branch. Devoting the first third of the book to U.S. history, Fisher maintains that the history of Presidential action is littered with improper exercises of power. Bush, he points out, was no exception.

Using constitutional law, case law, legislative intent, and history, Fisher points to five areas in which he believes President Bush acted improperly: military detention and tribunals, the Guantanamo Bay prison, the State Secrets Privilege, NSA Surveillance, and "extraordinary" rendition.

First, the Bush Administration established military tribunals for Guantanamo Bay detainees without congressional authority, citing the president's Article II power to do so. In rejecting Bush's assertions, the author contends that historically, military tribunals have only been acceptable if authorized by Congress. For example, in the Mexican and Civil Wars, Congress authorized the establishment of those specific tribunals. Further, when President Jackson established military tribunals without Congressional authority, Congress investigated him.

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Bush's rationale for tribunals was rejected in *Hamdan*, which stated that the President did *not* have the constitutional power to establish military tribunals absent congressional authority. Ironically, the Bush Administration retracted its original position in the January 15, 2009 OLC Memo, which repudiated many of the long-time Bush administration policies just five days before President Bush left office. The memo bluntly stated that their initial argument for tribunals without congressional authority "does not reflect the current views of OLC and has been overtaken by subsequent decisions of the Supreme Court and by legislation passed by Congress and supported by the President."

Further, Fisher makes a strong case against the current form of the State Secrets Privilege, which bars evidence from trial without allowing the court to verify that the evidence would risk national security. Quoting the Supreme Court in *Evans v. United States*, which stated, "It is not the exclusive right of any agency of the government to decide for itself the Privileged nature of any such documents," the book demonstrates that the Privilege as applied now has led to government cover-ups of embarrassing and illegal activities, such as illegal rendition and surveillance. Rather, Fisher believes that the original court procedure for the State Secrets Privilege, conducting in camera proceedings to examine the confidential evidence, more properly balanced the rights of individuals with the government's national security interests. He points out that in camera proceedings are successfully used today in FISA courts, CIPA proceedings, Ex Parte proceedings, and other areas where national security is potentially at risk.

However, Fisher also makes arguments repeatedly rejected by the Supreme Court. For example, he believes that the holding in *Ex Parte Quirin* should not be applied to modern enemy combatants. While Fisher persuasively illustrates the vast differences between the facts in *Quirin* and those applicable to modern enemy combatants, the Supreme Court in *Hamdi*, *Rasul*, and, most recently, *Boumediene*, has ruled to apply *Quirin*, meaning that modern enemy combatants can be held until the end of hostilities.

Further, Fisher stretches the truth to make some points. In arguing that the court has supported procedural safeguards, he claims the *Hamdi* court stated, "**An enemy combatant** 'must receive notice of factual basis for his classification, and a fair opportunity... before a neutral decision maker.'" In reality, the case states that a "citizen-detainee" must receive those procedures, *not* an "enemy combatant". By using the term "enemy combatant", Fisher implies that all combatant prisoners are afforded procedural safeguards. However, the court provided such rights only to prisoners classified as U.S. citizens.

Similarly, in attempting to illustrate the State Secrets Privilege's potential for abuse, Fisher claims that the government invoked the Privilege to block evidence of illegal wiretapping and thus purposely prevent the plaintiffs from establishing standing in *ACLU v. NSA*. However, the lack of standing in this case was not caused by the 6th Circuit's refusal to acknowledge government abuse but rather by the plaintiffs themselves, who failed to even raise the argument that the State Secrets Privilege was dishonestly being used to bar standing. Footnote 3 of the 6th Circuit decision clearly states, "The plaintiffs have not challenged on appeal either the invocation or the grant of the State Secrets Privilege and that issue is not before the court."

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Lastly, Fisher criticizes presidents such as Washington, Lincoln, and FDR for unacceptably exceeding executive power. This suggests that Fisher's perception of proper presidential action stands in contrast with that of some of our greatest presidents and subsequently the American public as well.

However, these sporadic problems are outweighed by Fisher's thorough historical analysis and the support of his arguments by the court, the public, and even the Bush Administration in 2009. For example, after publication of his book, the Supreme Court in *Boumediene* supported Fisher's argument for habeas rights in Guantanamo, President Obama closed CIA black sites, and the Bush Administration reversed multiple policies to which Fisher objected.

Overall, *The Constitution and 9/11* provides an in-depth historical perspective of how presidents have consistently ignored our basic constitutional protections and values. Several Bush Administration actions, according to Fisher, were simply further examples of a President exceeding executive power, favoring secrecy over openness, and disregarding procedural safeguards. Quite frankly, Fisher would expect nothing else.

Be Careful What You Wish For: A Review of Ibrahim Warde's *The Price of Fear*

*By Jeff Breinholt, U.S. Department of Justice**

Here is something you do not often hear: countries that have joined the U.N. Convention for the Suppression of Terrorist Financing (sponsored by France) have an obligation under international law to prosecute terrorist financing they uncover in their territories. That means that every U.S. terrorist financing prosecution is compelled by our multilateral commitments. In other words, these cases cannot be explained as a function of an ideological Executive Branch or wrong-headed American unilateralism. Terrorist financing prosecutions will occur irrespective of which party is in the White House, assuming the incumbent takes international commitments seriously. Currently, in terms of terrorist financing-related international obligations, we are the most compliant country in the world. If you are a multilateralist, you should not complain.

There's also this little fact: enforcing the legal consequences of economic sanctions is an example of "soft power." It is an excellent alternative to military action, since it does not result in body bags. Why should targeted economic sanctions not be considered an option of first resort? Relatively speaking, they are humane. It seems strange that some of the most outspoken critics of American terrorist financing efforts are people who most aggressively oppose the U.S. military. These critics should be careful about what they wish for. If we scrap economic sanctions, military operations will be *more* likely, for the U.S. would be deprived of tools that are soft and non-lethal in nature. Imagine if the opponents of the U.S. invasion of Iraq did not have sanctions to promote as an alternative.

Unfortunately, book-length attacks on soft power by multilateralists have apparently become an annual rite of passage. A few years ago, I wrote a review of R.T. Naylor's *Satanic Purses*, in which I argued that if his allegations were even partially accurate, my Department of Justice colleagues and I should almost certainly be disbarred. I welcomed this scrutiny, published my State Bar of California license number, and invited the misconduct inquiry. Naylor never responded to my challenge, which is probably not surprising. After all, he believes that al Qaeda was not responsible for 9/11, and is a figment of American prosecutors' imagination, just like the Italian Mafia was a fictitious creation of our professional predecessors. Naylor has apparently never watched *The Sopranos*. Perhaps the History Channel remains unavailable in Canada - Osama bin Laden and John Gotti, it seems, are Santa Claus.

Now comes Ibrahim Warde's *The Price of Fear: The Truth Behind The Financial War on Terror* (University of California Press, 2007). It is not as bizarre as Naylor's book, but that's small solace. It is rather disturbing that credible academic publishers are willing to roll out such error-laden analysis.

Warde is very proud of himself. In an "aha" moment early in *The Price of Fear*, he argues that money laundering is a different phenomenon from terrorist financing. He writes in the Introduction:

The mistake of financial warriors is to look at terrorist financing as a subfield of criminology – a self-contained, free-standing field insulated from politics. They like to consider the financial war as a technical matter, best left to experts, where official proclamations are taken at face value: frozen amounts are to be subtracted from the terrorists' stash of money, and the terrorist threat is assumed to be reduced accordingly. In their parallel universe, the principal building block is the money laundering template, which grew out of the law enforcement agencies' battle against organized crime and drug trafficking. Although money laundering is fundamentally different from terrorist financing, the two have become virtually indistinguishable following the September 11 attacks. Money laundering is about 'hiding and legitimizing proceeds derived from illegal activities.' Terrorist financing, in contrast, is not driven by a crime-for-profit logic and has seldom anything to do with dirty money.

Warde does not recognize that this is a classic distinction without a difference. Treating terrorist financing as a type of money laundering allows our banks to get into the game of ferreting out suspected terrorism-related crimes and reporting them to the government, which is the big advantage for everyone. Warde views this as a useless exercise, because terrorism is not based on greed and does not involve high dollar amounts like the proceeds of narcotics trafficking, and is therefore not subject to much Bank Secrecy Act reporting. Of course, Elliot Spitzer's conduct was uncovered by alert bank officials. Was it based on greed?

The Price of Fear is essentially a regurgitation of the 9/11 Commission *Monograph on Terrorist Financing*, while reaching the exact opposite of the Commission's bottom line. Warde does not credit the fact that this aspect of the U.S. counterterrorism was the only one the Commission awarded with an outstanding grade. He mentions it, only to argue it was wrong. He does accept the Commission's factual finding, however. Bin Laden, we now know, did not have access to his family wealth, and much of al Qaeda's pre-9/11 funding came from Persian Gulf charities. That means charities are worthy of scrutiny, rather than not, as Warde maintains.

This is exactly what has happened. Every U.S. charity that has been designated as terrorist-affiliated (like Holy Land Foundation, Benevolence International Foundation, Global Relief, Islamic American Relief Agency, al Haramain) have challenged their designations in American judicial proceedings. That means that they sort of had the right to challenge it, under a procedure we built into the law. How many have succeeded? Zero. In these cases, the United States is batting 1.000.

Of course, it is also true that some non-charitable entities, like those affiliated with the Al Barakat network, have managed to get de-designated. Which way does this cut? De-designations are fully expected, and why "asset freezes" are not the same as asset forfeitures. Our designation regime involves due process. Just as there are de-designations, we can expect some acquittals in terrorist financing prosecutions. It means that the system works, and is not stacked against the accused. So much for that unfairness argument. How many people have been convicted of terrorist financing-related crimes in the U.S. since 9/11? Over 100. How many have been acquitted? 16. No matter how you cut it, that's pretty damn good.

The problem may be that the U.S. has been too successful, which bugs people who think a certain amount of lawlessness should be part of the American experience. Here's Warde again:

Finance is subject to detailed and arcane regulations, and different rules of evidence make financial crimes easier to prosecute. From a law enforcement standpoint, 'fishing expeditions' hold the tantalizing prospects of nailing the bad guys for minor regulatory infractions – even better, of using such infractions as a way of hooking bigger fish. [Of] 'Al Caponing' a suspect ... The main problem with the use of the money weapon to 'frame the guilty' is that it hinges on the designation of public enemies.

Warde does not explain how "Al Caponing" terrorist financiers is such a bad thing. Instead, he counts on the reader to blithely conclude that there is something wrong with prosecuting someone for less than the full extent of what we know about their conduct if this decision to undercharge is based on a rational calculus of what would be discloseable during the litigation. Bobby Kennedy seemed to understand the value of this strategy when it came to Jimmy Hoffa. "Different rules of evidence"? I have no idea what Warde is talking about. Federal prosecutors are governed by only one set of principles. They are called the *Federal Rules of Evidence*. They are fully applicable to financial prosecutions. We would not have it any other way.

The Price of Fear makes some of the classic errors in his attacks. On the question of meaningful metrics, Warde notes that terrorism has continued despite our efforts to attack its financial underpinnings. Inexplicably, the illogic of this argument escapes him. Empirically, the proper question is not whether terrorism has been eliminated. Rather, the effectiveness of any counterterrorism tool requires us to compare how many terrorist attacks have occurred, compared to how many would have occurred but for the exercise of the tool.

Although this is tricky, it is not impossible. Dennis Lormel, the former head of the FBI Terrorist Financing Operations Sections, has publicly stated that American financial investigations uncovered six separate terrorist plots that were stopped. Is it possible that this is not true, that Dennis is lying? Warde makes much of the fact that American financial investigators working under my direction failed to uncover any foreknowledge of the 9/11 attacks by analyzing trading patterns in the capital markets. It means that we call a spade a spade, and are not about to fudge the data for the sake of our professional careers. We are not lying. Really, Ibrahim, we're not.

In the end, Warde's book is typical of so many critiques about American counterterrorism, arguing that

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we stand to lose by our soft power tools turning off the Muslim world. What is the evidence that terrorist financing measures are being abused? Warde acknowledges that it is virtually impossible to challenge the victories, which makes the financial front of the war on terrorism immune from criticism. He refers to the cases of Ptech and Arab Bank as if these were government set-backs (they most certainly were not). Amazingly, he bemoans the fact that most Middle Eastern Studies departments at American universities are too politicized (which is true), apparently without realizing that this politicization translates into the exact opposite problem of what he describes: mass apologetics for the Arab World and more people like him. He ridicules that fact that the private 9/11 plaintiffs' lawsuit seeks trillions of dollars in damages, without realizing that American civil actions customarily allege large damages and pursue more finite amounts through discovery. Warde's arguments do not look so good when you dig deeper.

Like so many commentators, Warde is not deterred. He pushes on, saying that the real problem is not reality but the "perception" that we are being too rough with the Muslim world. That is an easy out, since it makes facts irrelevant. The problem when commentators talk about "Muslim perceptions" as the basis to attack Western anti-terrorism measures: there is nothing we can do to avoid this problem. No soft power, it seems, is "non-hard" enough to avoid problems of Muslim perception. After all, what could be more soft than diplomacy and civilized demarches (ideally, if these critics had their way, without being backed up by the threat of military action or economic sanctions, which are too harsh)? How about something truly soft, like artistic expression? No one dies at the hand of art. Surely, no one can argue that abstract depictions of violent Islam should be off the table, right? Guess again. When the Danish cartoons were published, people like Bill Clinton and Kofi Annan were quick to express outrage. It seems that even art, the softest of all soft power tools, is too hard when dealing with radical Islam. *If art is off the table, what exactly is left?*

Here is my "aha" moment or, more precisely, my "yes, but" argument to *The Price of Fear*: even if Warde is absolutely right in his critique and his recommendations, his points suffer when you consider the impact of his analysis. Why should the U.S. not be involved in fighting terrorist financing? After all, it is an international obligation. Moreover, if we were to eliminate the soft power tools in our arsenal, it would make harder tools like military operations *more* likely, not less. This is the big problem with books like *The Price of Fear*. The purveyors of these views are generally the harshest critics of American military power. Warde is no exception:

Martial finance was perpetrated by the emergence of a powerful military-industrial complex, driven by unprecedented defense and homeland security spending, a growing militaristic culture, and last, but not least, the vested interests of many cheerleaders of omni-directional belligerence.

Sure, but if the U.S. internalizes the criticisms and ignores terrorist financing, there would be even fewer soft power options. The U.S. would fall out of compliance with its international commitments, and could be accused of greater unilateralism, not something you have heard advocated much from the Clinton or Obama campaigns. More ominously, American military actions will become more likely, rather than less.

Still, I do not expect books like this to slow down anytime soon, judging from what I increasingly hear as I travel to academic conferences at American law schools. That's fine, since they are good for business, and allow me to avoid boredom. I will continue to review them, pointing out their fallacies and unintended consequences.

About *The Price of Fear* and other books that take up the impossible challenge of showing that international terrorist financing regime is inhumane and the cause of too many externalities, I have this humble suggestion: these authors should be careful about what they ask for. If responsible people somehow start believing them, soft power itself will be the casualty. If I am wrong, and Warde is arguing that we should “mend it, not end it,” it is far from clear from *The Price of Fear*. He can talk about the need for more empirical work, but what is it worth if we cannot agree on empirical methods, and empirical conclusions are muted out by the fear of antagonizing the Muslim world? It really seems that, when it comes to economic sanctions and the law enforcement approach to terrorism, R.T. Naylor and Ibrahim Warde would rather end it. Keep it up. There are plenty of conservatives, both in uniform and not, who would like to do exactly what they suggest.

**The view in this article do not necessarily reflect those of the Department of Justice.*

**Speech to the ABA Committee on Law and National Security
September 10, 2009, University Club, Washington, DC**

Jeh C. Johnson, General Counsel of the Department of Defense

Thank you for the invitation to be with you today. I was a member of this Committee for several years and attended many of its conferences. I learn much every time I spend time with this Committee and have encouraged many of my colleagues in DoD to become more involved.

I received this invitation many months ago and spent considerable time thinking about what I would say today. I considered sharing with you the nuts and bolts of the legal issues surrounding one or two major litigations pending against the Defense Department right now, or my insights from my personal involvement – I testified four times before Congress in July alone -- on legislative reform of military commissions – Section 1031 of S. 1390, the Senate version of the 2010 National Defense Authorization Act.

Then I realized there is a much larger, overarching issue we face today– something that, in the day to day grind of my own job, I must recall for myself every once in a while. Tomorrow marks the eighth anniversary of the day that, along with December 7, 1941 and November 22, 1963, is one of the darkest single days in American history.

Many of us have vivid, very personal, first-hand connections with the tragic events of that day. I suspect some of you in this room were in the Pentagon that day and acted heroically to care for the lives of your colleagues. For me, there are certain vivid recollections of the day that I will never shake.

I had been back in private law practice in New York City for nine months, after serving 27 months as the General Counsel of the Air Force in the Clinton Administration. It was primary day in New York City -- the day voters in New York were going to vote for the Democratic and Republican nominees for Mayor and other city offices. I drove to work that day, from my home in Montclair, New Jersey to my law office in midtown Manhattan. Back then I was driving to work about 2-3 days a week, taking the bus or the train the other days. Depending on traffic in the Lincoln Tunnel, my door to desk commute when I drove was almost always one hour, ten minutes. I'd leave home around 6:30, before the tunnel got backed up, park at a garage on 53rd and 8th Avenue, and be in my office by 7:40.

Many here will remember that the weather that day in the Northeast was picture perfect, clear blue sky, temperature in the 70s, no humidity. I remember thinking then that September does not usually bring such great weather. I recall all this about that morning because September 11th is my birthday. That day I planned to leave work early, and celebrate my birthday the way I like to always spend it -- a quiet dinner at home, menu of my choice, with my wife and two kids.

My office at Paul Weiss was on the 28th floor of 1285 Avenue of the Americas, or, as we New Yorkers

know it, 6th and 51st. My office was on the east side of the building, near the southeast corner. Step out of my office, and from the associate's office a few feet away was a clear view down 6th Avenue at the World Trade Center.

I was an eyewitness to the flames and destruction caused by the first plane, the impact of the second plane at 9:03 am, the collapse of the first tower at 9:59 am, and the collapse of the second tower at 10:28 am. The images of smoke and destruction against the backdrop of a clear beautiful blue sky are burned in to my memory.

After the Pentagon was hit, many of you will recall, and should recall -- as a lesson in crisis management -- the number of false reports about attacks elsewhere that day.

I remember seeing the fighter jet over Manhattan, and I remember the drive home over the George Washington Bridge -- all the traffic on that great bridge was pointed one way, headed out of the city, while no traffic was allowed in. The City that day had been attacked, and did, indeed, feel like a war zone.

Politics aside, I recall feeling terrible that I had left federal service, powerless to do anything, that the position of General Counsel of the Department of Air Force was, nine months in to the new Administration, still vacant, and that I was not at the Pentagon that day with my career colleagues. I wanted to do something. I walked the streets looking for a hospital that would accept blood donations.

Like December 7, 1941 and November 22, 1963, September 11, 2001 is a single day that changed the direction of our country like no other. One major military operation in Afghanistan was launched as a direct result; and a second military operation in Iraq, some will argue, was launched as a direct result of the environment created post-9/11. We faced an ill-defined enemy that had penetrated our borders. We knew of Anthrax attacks, but we did not know when and where they would end. Our leaders warned us of a next terrorist attack that would be even bigger than the attack on 9/11.

The psyche of the American public changed; we were afraid, we feared for our safety and that of our children.

It was within the context of this environment that certain national security legal judgments were made, which conventional legal wisdom now says were plain wrong. We read now-declassified OLC legal opinions and are stunned that senior lawyers of our government would, in very detailed and graphic terms, approve waterboarding, confinement in cramped spaces, slapping a man in the face, or depriving him of sleep, all in the name of national security. Read these opinions from 2002 and 2005 and what you see is the thinking of an era. Suddenly, we faced a national security crisis that did not, and does not, fit neatly within either the law of war or law enforcement box.

I raise all this not to criticize, accuse, or score political points. My job is to get it right now and for the future. But, out of the legal judgments that were made in the years that immediately followed 9/11, there are a few -- what our President has referred to in a very different context -- "teachable moments."

This morning I'd like to share with you my own observations in this regard. After only seven months on the job, I am still learning, and I hope to continue to learn.

First, as national security lawyers we must be cautious about the legal judgments we make during times of fear, uncertainty or national emergency. As Justice O'Connor wrote in *Hamdi v. Rumsfeld*: "It is during our most challenging and uncertain moments that our nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." One of my personal pledges in this job is to adhere to that principle.

As lawyers it is our job to be steadfast in our application of the rule of law regardless of the political climate or changing times. We must help shape policy to fit the law; we do not shape the law to fit policy.

One of my closest family friends is a retired ivy-league professor in his late 70s. He is one of the most

courteous, dignified and mild-mannered men you will meet, who, in the 1960s was considered by many to be one of the intellectual engines of the civil rights movement. He was considered by others to be a dangerous radical subversive. Our own government wire-tapped his home phones and sent informants to sit in on his classes, reflecting the fear and anxiety of the period. We must all be wary that, even with the knowledge and approval of its lawyers, our government can go too far.

Second, policymakers, lawyers, judges and lawmakers cannot claim a “zero tolerance” for torture but then try to render opinions that carve out exceptions for “enhanced interrogation techniques.” You simply cannot issue a rule or legal opinion that says you can hit a man, but don’t hit him too hard, and expect thousands of personnel in the field to know exactly where that line is. As our commanders in the field know, issue a rule of law like that and the exception will quickly eat up the rule, and the message to the interrogator in the field is that senior officials of our government are willing to tolerate a lot more.

Third, we were reminded in the political debates of the last few years that torture, cruel, inhuman, or degrading treatment of those we capture are contrary to American values. This is more than a legal judgment. It is a judgment about who we think we are as Americans. As American as George Washington is the value we place on the dignity and basic human rights of the individual. Indeed, in 1776, after the Battle of Trenton, George Washington wrote an order covering the treatment of Hessian prisoners that said: “Treat them with humanity, and let them have no reason to complain of our copying the brutal example of the British Army in their treatment of our unfortunate brethren.” That is our history as a nation, and others in the world community look to us to set this example.

In December 2005, I attended a meeting of retired generals and admirals gathered to sign a letter in support of the McCain Amendment. I recall one 85 year old retired two-star there who had seen the worst of human abuse in the battles of Iwo Jima. These were not politicians, and they were not well versed in the policy debates of Washington, but they were all unequivocal in declaring simply “Americans do not torture,” with no exceptions. “This is not about protecting the bad guys; it’s about who we say we are as Americans,” was the consensus that came out of that room.

This is why I am pleased that, in the area of military commissions reform, banning the admissibility in evidence of statements that are taken as a result of cruel, inhuman and degrading treatment was one of the very first things we did in this new Administration. I am also pleased that this was done with the unanimous support of the Judge Advocates General of the Army, Navy, Air Force and the Staff Judge Advocate to the Commandant of the Marines,

This potential for the use in evidence of such “CID” statements, as we call them, was the most controversial item about the Military Commissions Act of 2006, and, in my opinion, cost the commissions system more in credibility than it could ever benefit us by obtaining a few extra convictions. The ban on CID statements was a change we put forward in May among the five rules changes to military commissions procedure, and it is a change further codified in the pending Senate legislation.

Fourth, as I preached many times before, a collaborative and open working relationship between our excellent civilian attorneys and our JAGs produces better quality legal judgments and advice. The five rules changes I spoke of a moment ago were the joint work product of our JAG and civilian lawyers.

In July I testified before Congress and promoted one standard for the admission of a detainee’s statements on behalf of the Obama Administration. The Judge Advocates General of the services testified and proposed another. In early August I put us all in a conference room together in my office, lawyers from DoD, the White House and DOJ, JAG and civilian, and out of that meeting came an agreement on language which we then submitted to Congress. If all these lawyers in the Executive Branch can agree to it, it must be pretty good.

Fifth, and having said all I just said about the fantastic work we lawyers are doing, we must guard against

“overlawyering” national security. We are at war with Al Qaeda. This new president reiterated that in his speech at the National Archives on May 21. We must guard against viewing this war as a global law enforcement operation, and we must guard against devising legal guidance for the war-fighter that only a lawyer can comprehend.

I am pleased to be part of an Administration that has made the rule of law a cornerstone of its national security policy, and to have a central role in that policy. President Obama is a lawyer, and a smart one. He believes, and I agree, that by promoting our own country as a nation of laws, we promote national security, by occupying the moral high ground in communities in which Al Qaeda must recruit. Senator Obama campaigned on this idea, and I for one interpret 365 electoral votes and 69.5 million popular votes as a mandate to pursue this policy in office.

On a more immediate level, we must do this to restore our credibility in the courts. The courts are now into the business of national security to an extent no one could have imagined eight years ago. This is not because we invited them here; it’s because we drew a sharp line in the sand and dared them not to cross. Even judicial appointees of the prior Administration are showing an increasing impatience with our claims that there are areas of national security in to which the courts cannot intrude.

No person is above the law, and no area of government operations is beyond the reach of the law. This morning I have tried to describe the principles that guide me in office. But, there are no easy answers to the questions we face. Please be patient with us. Thank you for listening.

Standing Committee on Law and National Security Announcements:

Rishikof Appointed Chair; Harvey Appointed Advisory Committee Chair

ABA President Carolyn Lamm has appointed Harvey Rishikof as Chair of the Standing Committee. Rishikof is Professor of National Security Law at the National War College, and former Legal Counsel to the Deputy Director of the FBI. He also served as Administrative Assistant to the Chief Justice of the Supreme Court, where he served as chief of staff and liaison to the Executive Branch, Congress, the Federal Judicial Center and the Administrative Office of the US Court.

Other appointments to the Committee for a three-year term include: Judge James E. Baker, U.S. Court of Appeals for the Armed Forces; Ruth Wedgwood, Professor at Johns Hopkins University School of Advanced International Studies and Jessica Herrera-Flanigan, Partner at Monument Policy Group. They fill vacancies created by the departure of Vincent Polley, James Durant and Charles White, who have worked hard for the committee and we wish to thank them for their many contributions.

Other members of the Committee include Mary DeRosa, Deputy Counsel to the President for National Security Affairs and Legal Advisor, National Security Council; James McPherson, Executive Director, National Association of Attorneys General; Judith Miller, Senior Vice President and General Counsel, Bechtel Group, Inc.; Jill Rhodes, Deputy Chief for Community Action and Programs, Counterproliferation Division, CIA; Jonathan Scharfen, Vice President, International Operations, Northrop Grumman Corporation; Scott Silliman, Director, Center on Law, Ethics and National Security, Duke University School of Law; and Michael Smith, former Counsel, Congressional Joint 9/11 Inquiry Committee. Suzanne Spaulding, Principal, Bingham Consulting Group has been named Special Advisor to the Committee.

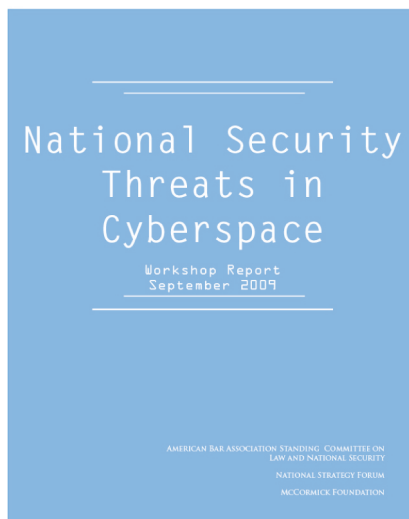
General Al Harvey has been named Chair of the Advisory Committee. Members of the Advisory Committee include: Stewart Baker, Joel Brenner, Angeline Chen, Robert Chesney, Joe Crosthwait, James Durant, Michael Greenberger, Tonya Hagmaier, Caroline Krass, Lori Kroll, Carrie Newton Lyons, Wyndee Parker, Deborah Pearlstein, Peter Raven-Hansen, Paul Rosenzweig, Nicholas Rostow, Cynthia Ryan, John Shenefield, Corin Stone, Jane Stromseth, and Edwin Williamson. M.E. “Spike” Bowman has been named Special Advisor to the Advisory Committee.

We wish to thank outgoing Advisory Committee members: General Thomas Hemingway, DNI General Counsel Robert Litt; Andrew McCarthy, Lee Middleditch, as well as Special Advisors Rodney Bullard and Professor Stephen Dycus for their many contributions. Counselors to the Committee include Richard Friedman, Ambassador Max Kampelman, Secretary John Marsh, Professor John Norton Moore, Dean Elizabeth Rindskopf Parker, Judge William Webster and James Woolsey.

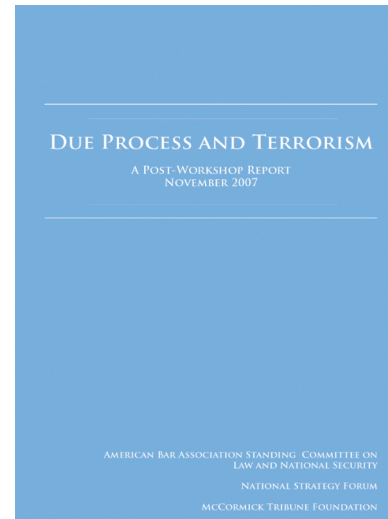
The committee is also aided by Young Lawyers Division Liaison Andrew Borene, Law Student Division Liaison Chris Heck, International Law Section Liaison Ruth Wedgwood, Administrative Law Section Liaison Joe Whitley, and Section of Business Law Liaison Dennis Lehr. Our ABA Board of Governors Liaison is Mary White.

The winner of this year's National Security Law Student Writing Competition was Adrian Snead, George Washington University Law School Class of 2011. Adrian's paper, *Redefining Fourth Amendment Rights in the Digital Age: Suspicionless Border Searches of Electronic Data Storage Devices* can be found on our website and will appear in a future issue of the Report. Congratulations Adrian!

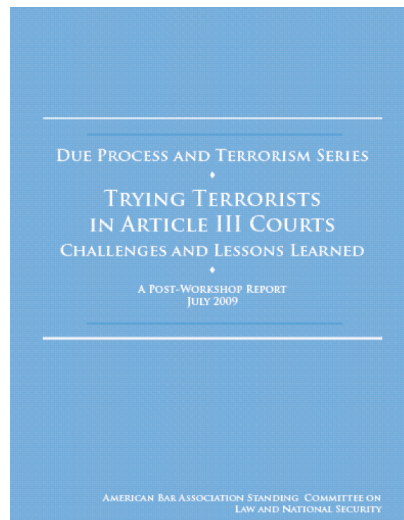
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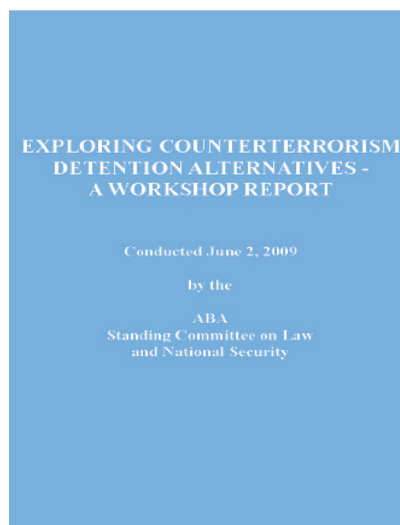
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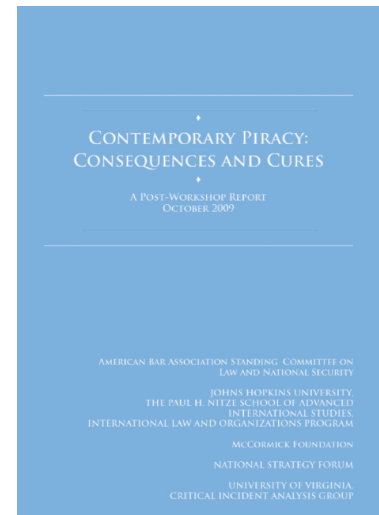
**Due Process
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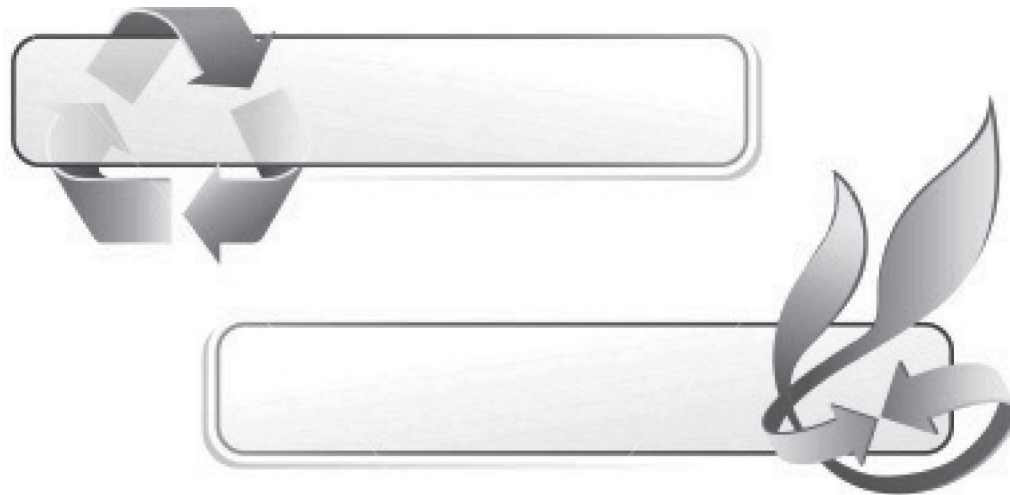
**Trying Terrorists
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