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Responses to the Ten Questions

Timothy Lynch

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RESPONSES TO THE TEN QUESTIONS

Timothy Lynch†

1. WOULD PRESIDENT OBAMA HAVE THE AUTHORITY TO HOLD A U.S. CITIZEN WITHOUT CHARGE IN A MILITARY BRIG FOR SIX MONTHS IF THAT CITIZEN—WHO LIVES IN MINNESOTA—IS SUSPECTED OF LINKS TO AL QAEDA FOLLOWING A ONE-MONTH TRIP TO SOMALIA? 5074

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1. WOULD PRESIDENT OBAMA HAVE THE AUTHORITY TO HOLD A U.S. CITIZEN WITHOUT CHARGE IN A MILITARY BRIG FOR SIX MONTHS IF THAT CITIZEN—WHO LIVES IN MINNESOTA—IS SUSPECTED OF LINKS TO AL QAEDA FOLLOWING A ONE-MONTH TRIP TO SOMALIA?

The legality of the proposed action should be analyzed in the context of a habeas corpus proceeding in federal court. That is, one should assume that the prisoner would, through counsel, challenge the lawfulness of the military detention by filing a writ of habeas corpus. The judiciary would then proceed to examine the parameters of the President's power as commander in chief to apprehend and detain citizens who may be aiding and abetting al Qaeda on U.S. soil.

The Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[1] By way of background, the writ of habeas corpus is a venerable legal procedure that allows a prisoner to get a hearing before an impartial judge. If the jailor is able to supply a valid basis for the arrest and imprisonment at the hearing, the judge will simply order the prisoner to be returned to jail. But if the judge discovers that the imprisonment is illegal, he has the power to set the prisoner free. For that reason, the Founders routinely referred to this legal device as the "Great Writ" because it was considered a fundamental safeguard of individual liberty.

The most relevant Supreme Court case is *Hamdi v. Rumsfeld*.[2] Yaser Hamdi was initially captured by the American military in Afghanistan and was then transferred to the prison facility at Guantanamo Bay in Cuba. When the military authorities discovered that Hamdi was an American citizen, he was moved to a military brig in South Carolina. Because Hamdi was denied access to family and legal counsel, his father filed a writ of habeas corpus on his behalf in federal court. The Bush administration could have simply explained to the court its reasons for jailing Hamdi—that Hamdi was captured on an overseas battlefield—but it chose to respond to that petition by urging the district court to summarily dismiss the petition because, it argued, the court could not "second-guess" the President's "enemy combatant" determination.[3] That assertion struck at the heart of habeas corpus. If the judiciary could not "second-guess" the execu-

1. U.S. CONST. art. I, § 9, cl. 2.
2. 542 U.S. 507 (2004).
3. Brief for Respondents-Appellants at 28, Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002) (No. 02-6895).

tive's initial decision to imprison a citizen, the writ never would have acquired its longstanding reputation in the law as the Great Writ.

If Congress has not suspended the writ of habeas corpus, the law is clear. The prisoner must be able to meet with his attorney in order to adequately prepare for their day in court. That day is significant because it may be the prisoner's only opportunity to persuade a judge that a mistake has been made or that an abuse has occurred. President Bush's attorneys tried to advance the astonishing notion that habeas corpus petitions could be filed—as long as they were all immediately thrown out of court. President Bush's attorneys failed to persuade the Supreme Court that his enemy combatant policy was lawful.[4] Writing for the Court, Justice Sandra Day O'Connor noted, "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[5] The plurality opinion said Hamdi could contest his detention before a neutral decision maker. Strictly speaking, however, the *Hamdi* ruling only applies to citizens supporting forces hostile to the United States *in Afghanistan.*

In *Padilla v. Hanft*, the Fourth Circuit Court of Appeals considered a habeas corpus petition filed by an American citizen imprisoned in a military brig after having been designated an "enemy combatant" by President Bush.[6] This is the most pertinent legal authority. In this case, the prisoner associated with al Qaeda terrorists in Afghanistan and then traveled to the United States for the purpose of plotting attacks on American soil.[7] Padilla was arrested upon his arrival at O'Hare International Airport in Chicago.[8] He was subsequently moved to a military brig in South Carolina.[9]

During habeas proceedings, Padilla's attorneys argued that the President did not have the authority to detain citizens, without charge, in a military brig—even if there was undeniable proof that the citizen associated with al Qaeda.[10] The district court agreed and held that Padilla either had to be criminally charged or released.[11] The

4. *See generally* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); *see also* Timothy Lynch, *Hamdi and Habeas Corpus*, WALL ST. J., Apr. 23, 2004, at A14.
5. *Hamdi*, 542 U.S. at 536.
6. 423 F.3d 386 (4th Cir. 2005).
7. *Id.* at 390.
8. *Id.*
9. *Id.*
10. Padilla v. Hanft, 389 F. Supp. 2d 678, 683-84 (D.S.C. 2005).
11. *Id.* at 692.

court of appeals rejected that holding.[12] Finding an enemy combatant's locus of capture irrelevant to the President's power to detain, the court of appeals ruled that Padilla's military detention was lawful.[13] Specifically, the court held that "the President does possess such authority pursuant to the Authorization for Use of Military Force Joint Resolution."[14]

Of course, one could try to distinguish the *Padilla* case on the ground that the prisoner under consideration here associated with al Qaeda in Somalia, not Afghanistan—and that this prisoner was never in a combat zone during an armed conflict between al Qaeda forces and the armed forces of the United States.[15] Although impossible to predict, it is extremely doubtful that the court of appeals would find that distinction legally significant. Instead, the court would likely reiterate its opinion that the AUMF must be "read in light of its purpose clause (in order to prevent any future acts of *international* terrorism against the United States) and its preamble (stating that the acts of 9/11 render it both necessary and appropriate . . . to protect United States citizens both at home and abroad)."[16] The AUMF places emphasis on those responsible for the September 11 attacks—the al Qaeda organization—and is not concerned with geography. According to the rationale of *Padilla v. Hanft*, it makes no difference whether al Qaeda terrorists are training and planning in Afghanistan, Somalia, or Minnesota.

For the forgoing reasons, I conclude that President Obama does have the authority, *under current law*, to detain the prisoner in question, at least if the military brig is located within the Fourth Circuit.[17]

I hasten to add that the President is unlikely to prevail in the Supreme Court in the long term. Even though the Supreme Court has

12. *Padilla*, 423 F.3d at 397.

13. *Id.* at 389.

14. *Id.* The Authorization for Use of Military Force Joint Resolution is commonly referred to as the AUMF.

15. The question says the prisoner is suspected of "links" to al Qaeda. It is unclear what evidence the Government is relying upon here. When challenged, the Government will be accorded *some* deference with respect to its decision to incarcerate. The judiciary will not uphold the incarceration of a citizen on a hunch, rumor, or merely on the president's say-so.

16. *Padilla*, 423 F.3d at 396 (emphasis added) (internal quotation marks omitted).

17. The U.S. Supreme Court denied certiorari on April 3, 2006. Padilla v. Hanft, 547 U.S. 1062 (2006). The President could fortify his action by declaring the prisoner in question an "enemy combatant."

not addressed the issue squarely, there seems to be a majority of justices who have indicated that, with respect to American citizens who are on American soil, the President does *not* have the authority to detain citizens in military brigs.[18] In sum, if the President's objective is solely to detain this particular prisoner in a brig for six months, he has a legal basis to do so, as already noted. However, if the President's objective is to establish a precedent for detaining other citizens who may be suspected of abetting al Qaeda on American soil, he will very likely fail.[19]

2. WOULD IT BE LEGAL FOR THE OBAMA ADMINISTRATION TO LAUNCH A PREDATOR STRIKE ON OSAMA BIN LADEN IF HE HAS BEEN TRACKED TO A HOUSE ON THE OUTSKIRTS OF KARACHI, PAKISTAN?

The use of a Predator strike to kill Osama bin Laden would be legal under the United States's interpretation of its burden under international law. The only party in a position to object is Pakistan, and it is not clear that the Pakistani government would do so.

I. LEGAL FRAMEWORK

The United States has long distinguished targeted killings against legitimate military targets[20] from those prohibited by an Executive Order[21] that bars the assassination of a foreign official in peacetime. The United States's position has been that targeted killings are legal if directed at (1) military commanders in a conventional armed conflict, (2) guerrilla leaders in a counterinsurgency, or (3) terrorist group leaders who pose a threat to U.S. citizens during peacetime.[22]

Legal analysis of the targeted killing of Osama bin Laden should proceed in the second of the three categories. The first category is not applicable because the conflict between the United States and al Qaeda is not a conventional international armed conflict between two

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18. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 554-79 (2004) (Scalia, J., and Stevens, J., dissenting); Rumsfeld v. Padilla, 542 U.S. 426, 455-65 (2004) (Stevens, J., Souter, J., Ginsburg, J., and Breyer J., dissenting).

19. For additional background, see Timothy Lynch, *Affront to Civil Liberties*, NAT. L.J., Oct. 3, 2005; Timothy Lynch, *Power and Liberty in Wartime*, 2003–2004 CATO SUP. CT. REV. 23.

20. *See* W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW. 4, Dec. 1989.

21. Exec. Order No. 12,333, § 2.11, 3 C.F.R. 200 (1981 Comp.), *reprinted in* 50 U.S.C. § 401 (Supp. V 1981).

22. Parks, *supra* note 20, at 4.

"High Contracting Parties" as defined by the Geneva Convention of 1949.[23]

While the third paradigm—that of killing a terrorist leader in peacetime—seems appropriate, it describes a legal situation different than the one the United States has defined in its ongoing use of military operations against al Qaeda and associated organizations. A true peacetime situation would be one where Congress has not authorized force against the terrorist organization, the United Nations has not recognized such a conflict, and the U.S. Supreme Court has not provided an interpretation of the legal standards for the conduct of the conflict. In this case, the President would unilaterally authorize the targeted killing as a measure taken in self-defense as described in Article 51 of the U.N. Charter.[24]

The ongoing conflict with al Qaeda is governed, somewhat counterintuitively, by the legal constraints of a domestic counterinsurgency. Congress approved the deployment of the military with its Authorization for the Use of Military Force (AUMF).[25] The United Nations recognized the September 11 attacks on the United States and the inherent right of nations to act in self-defense in response.[26] Though the Bush administration declared that military operations against al Qaeda and the Taliban were not governed by the Geneva Conventions,[27] the U.S. Supreme Court determined that military operations under the AUMF are governed by Common Article 3, the legal framework for an armed conflict between a High Contracting Party and a non-state actor within the High Contracting Party's territory.[28]

II. APPLICATION OF THE LEGAL FRAMEWORK

Osama bin Laden is not a uniformed officer in the armed forces of a High Contracting Party. He is a civilian. Thus, the question turns

23. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

24. U.N. Charter art. 51.

25. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. V 2005)).

26. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

27. Memorandum from John C. Yoo, Deputy Assistant Att'y General, and Robert J. Delahunty, Special Counsel, to Alberto R. Gonzalez, Counsel to the President, Treaties and Laws Applicable to the Conflict in Afghanistan and to the Treatment of Persons Captured by U.S. Armed Forces in that Conflict (Nov. 30, 2001), *available at* http://www.justice.gov/olc/docs/aclu-ii-113001.pdf.

28. Hamdan v. Rumsfeld, 548 U.S. 557, 629-30 (2006).

on what criteria ought to be used to determine whether bin Laden can lawfully be targeted.

Any targeted killing of bin Laden would have to comply with accepted *jus in bello* principles: military objective, distinction, proportionality, and the prevention of unnecessary suffering.[29]

The United States has taken the position that an individual may be deemed a "military objective" in a counterinsurgency by their actions contributing to the hostilities. "A civilian who undertakes military activities assumes a risk of attack, and efforts by military forces to capture or kill that individual would not constitute assassination."[30]

Bin Laden meets the criteria of a civilian who has undertaken military activities. He has publicly claimed responsibility for the death of thousands of people in the attacks on September 11, 2001, and the terrorist group that he leads, al Qaeda, has claimed many innocent lives in the years since.

Additionally, any targeted killing would have to distinguish between the individual targeted and other civilians, and any foreseen collateral damage would have to be proportional to the military gain achieved. The prohibition on weapons that cause unnecessary suffering includes incendiary, chemical, and other exotic technologies, but there is no prohibition on a bomb or missile.

III. NON-APPLICATION OF ADDITIONAL PROTOCOL I

It should be noted that the country where bin Laden is located impacts the legal analysis with regard to using lethal force against him. Additional Protocol I (AP I) to the Geneva Conventions restricts the circumstances in which a civilian may be targeted with lethal force.

Article 51(3) of AP I says that civilians may only be targeted "for such time as they take a direct part in hostilities."[31] Many commentators have referred to this as a "revolving door" standard—whenever a civilian engages in hostilities they may be targeted, but as soon as they put down their weapon or cease their direct participation in hostilities, they lose their status as legitimate military targets and must be

29. Jonathan Ulrich, *The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism*, 45 VA. J. INT'L L. 1029, 1051 (2005).

30. Parks, *supra* note 20, at 7.

31. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(3), 1125 U.N.T.S. 3 (June 1977); *see also* THE LAWS OF ARMED CONFLICT 651 (Dietrich Schindler & Jiri Toman eds., 2d ed. 1981).

captured instead of killed. The International Committee for the Red Cross recently held a conference to define the limit of "direct participation in hostilities," and the final resolution was so narrow that a dozen nations withdrew rather than be associated with the legal conclusion that it reached.

The United States recognizes some portions of AP I as customary international law, but not Article 51(3). The United States is not a signatory to AP I, and withdrew from a recent conference to define what "direct participation in hostilities" means. The U.S. targeting criteria remains broader, and bin Laden's leadership position at the top of al Qaeda means that it will continue to claim him as a lawful target—whether or not he is giving orders (or firing a gun, making a propaganda video, etc.) at the time lethal force is employed against him.

Pakistan remains one of the other nations that has not signed AP I. Thus, it is unlikely that any objection on the part of the Pakistani government would be based on the "direct participation in hostilities" legal analysis, where Pakistan would claim that the United States was instead required to capture bin Laden instead of killing him.

Pakistan might still object to the targeted killing within its territory, but that would pit the U.N. Charter concepts of non-aggression and self-defense against one another. The United States could claim that the killing was lawful as an expression of self-defense under Article 51 of the Charter. Pakistan's response would likely be based on the Article 2(4) admonishment to refrain from the use of force in international relations. While such a legal dispute is possible, it seems unlikely that the Pakistani government would object too sternly, since it has been cooperating with the United States in a targeted killing campaign directed against internal insurgent leaders.

IV. CONCLUSION

The use of a Predator strike against any target is neither presumptively legal nor illegal. If used against a high-level and admitted terrorist leader such as bin Laden, particularly in a country (such as Pakistan) that has not adopted the more restrictive targeting regime of AP I, there are clear legal grounds for such an attack. Any targeted killing, even with a high-level target, must still conform to *jus in bello* principles, and the expected collateral damage cannot rise to such a level as to be disproportionate to the military gain expected.

4. DID MEMBERS OF THE JUSTICE DEPARTMENT'S OFFICE OF LEGAL COUNSEL COMMIT MALPRACTICE IN 2002 BY ITS WRITTEN GUIDANCE TO THE CENTRAL INTELLIGENCE AGENCY ON INTERROGATION STANDARDS?

The answer to this question will turn upon the definition of "misconduct" and the standard by which an alleged violation of professional responsibility will be adjudicated.

To begin, one must first distinguish "misconduct" from "malpractice." The latter, a failure to exercise an attorney's requisite standard of care, which further causes damage to the client, is grounds for an action in tort. The former is a violation of the ethical and competence standards that may provide grounds for professional discipline by the attorney's jurisdiction.

Prisoners impacted by the interrogation memoranda had no attorney-client relationship upon which to base a suit for malpractice. Litigation underway underscores this point. Jose Padilla, an American citizen who was held as a domestic enemy combatant and subsequently convicted for material support of terrorism, has filed suit against one of the attorneys responsible for the interrogation memoranda.[32] That suit is based on a claim that the attorney violated his rights under color of law, not malpractice stemming from an attorney-client relationship. Thus, "professional misconduct" is the appropriate inquiry for possible wrongdoing by lawyers working within the Office of Legal Counsel (OLC).

Attorneys working in the OLC authored written guidance to the CIA on the legal standards for the interrogation of detainees. The advice came primarily in the form of two written memoranda issued on August 1, 2002.

The first memorandum, *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*,[33] advised that the physical pain associated with an interrogation would have to be equivalent to that caused by organ failure or death to violate the federal statute implementing the United States's obligations under the Convention Against Torture. The memorandum also concluded that international standards allow treatment that is cruel, inhuman, or degrading, but does not amount to torture. The memorandum concluded with a finding that the

32. Padilla v. Yoo, 633 F. Supp. 2d 1005 (N.D. Cal. 2008).

33. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzalez, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), *available at* http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf.

torture statute may be an unconstitutional infringement of the President's commander in chief powers, and that common law defenses of necessity and self-defense may eliminate criminal liability for violations of the torture statute.

The second memorandum, *Interrogation of al Qaeda Operative*,[34] responded to a CIA inquiry on the legality of specific interrogation techniques. The techniques included stress positions, sleep deprivation, placing insects in a confinement box to exploit a prisoner's phobia, and waterboarding. The memorandum concluded that none of those techniques would violate the torture statute, and that the CIA's safety precautions would negate any claim that the interrogators' mental state met the requirements for a violation of the torture statute.

The Office of Professional Responsibility (OPR) conducted a review of these memoranda and other legal claims regarding the scope of the power of the Executive when military force has been authorized by Congress. The OPR Final Report found that the authors of the memoranda authorizing the use of coercive interrogation techniques committed professional misconduct.[35] However, the Department of Justice official responsible for resolving challenges to negative OPR findings subsequently issued a Memorandum of Decision vetoing the finding of misconduct.[36]

The OPR final report relied upon rules set forth in the District of Columbia Rules of Professional Conduct that require attorneys to provide competent representation to their clients (competence) and the duty to exercise independent legal judgment and to render candid legal advice (advisor). The Office of Professional Responsibility further said that intentional misconduct requires the provision of

34. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to John Rizzo, Acting Gen. Counsel for the Cent. Intelligence Agency, Interrogation of al Qaeda Operative (Aug. 1, 2002), *available at* http://www.justice.gov/olc/docs/memo-bybee2002.pdf.

35. *See* OFFICE OF PROFESSIONAL RESPONSIBILITY REPORT, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 251-54 (July 29, 2009), *available at* http://judiciary.house.gov/issues/issues_OPRReport.html.

36. *See* Memorandum from David Margolis, Associate Deputy Att'y Gen., to the Att'y Gen. & Deputy Att'y Gen., Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists, 67 (Jan. 5, 2010), *available at* http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf.

legal advice that reaches a desired conclusion in spite of an unambiguous obligation or standard that bars that result, and that reckless misconduct occurs where the attorney knows or should know that their conduct will violate an unambiguous obligation or standard.

The Memorandum of Decision that vetoed the OPR finding of misconduct argued that OPR failed to properly identify an unambiguous standard by which "professional misconduct" could be judged. The Memorandum of Decision found that while the interrogation memoranda did not cite dissenting opinions in an international decision that found techniques parallel to the ones the CIA proposed were torture, there was no clear duty to do so. The Memorandum of Decision also found that, while the interrogation memoranda came to conclusions at the fringe of commonly accepted interpretations of executive power, those conclusions did not constitute professional misconduct if they were arrived at in good faith and without an intent to arrive at a pre-ordained result.

The ultimate conclusion of the Memorandum of Decision appears sound and persuasive. The conduct of war has historically been the province of the executive. In the wake of devastating attacks by a non-state entity, lawyers serving the executive answered questions about the limits of wartime powers in a frame of law that has since changed. The subsequent rescission of the interrogation memoranda[37] and the Supreme Court's application of Common Article 3 of the Geneva Conventions to the conflict with al Qaeda[38] irrevocably altered the legal framework for international counterterrorism such that the answers to those questions are now different. Without clear evidence that the attorneys who authored the interrogation memoranda intended to authorize illegal conduct, refutation of their conclusions is appropriate, but professional sanctions are not.

5. WHAT STATUTORY CHANGE IS MOST NECESSARY FOR AMERICAN NATIONAL SECURITY?

Too many people assume that more laws and more expenditures are the best ways to enhance American national security. Policymakers ought to consider existing policies that may be wrongheaded, wasteful, or counterproductive. The Federal Government's "war on

37. Memorandum from Daniel Levin, Acting Assistant Att'y Gen., to the Deputy Attorney General, Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004), *available at* http://www.justice.gov/olc/18usc23402340a2.htm.

38. Hamdan v. Rumsfeld, 548 U.S. 557, 629 (2006).

drugs" is an example of a policy that is actually creating more problems than it is solving. In fact, the drug war is so misguided that it has actually undermined American national security. Ending the war will thus enhance American national security.

I. TERRORISTS REAP BENEFITS FROM BLACK MARKETS

When the government bans a product that millions of people want, the market does not suddenly disappear. The policy merely drives that market "underground," and we refer to the millions of illegal transactions as a "black market." Drug prohibition channels more than $40 billion per year into a criminal underworld that is occupied by an assortment of criminals, corrupt politicians, and terrorists. Alcohol prohibition drove reputable companies into other industries or out of business altogether, which paved the way for mobsters to make millions in the black market. In the years immediately following September 11, the Bush administration tried to scapegoat drug users for helping to fund terrorism, but that reasoning is perverse. Beer drinkers did not want to enrich mobsters like Al Capone, but the policy of alcohol prohibition made that happen. In the same way, the drug war diverts a river of money to criminal and terrorist organizations.

There is also a blowback effect from foreign-aid packages. Though the money the United States sends to foreign governments to help combat the drug trade is given in good faith, research indicates that that money can actually bolster it. Ted Galen Carpenter argues that America's prohibitionist strategy fuels the massive black market that makes the cultivation of drug crops far more lucrative than legal ones.[39] This is because America's drug war aims to reduce the supply of drug crops which, in turn, pushes up their value as demand remains strong.

Indeed, this very dynamic has created security problems in Mexico. Carpenter writes, "An incident in Nuevo Laredo illustrates just how brazen the traffickers have become and how contemptuous they are of government authorities."[40] Carpenter is referring to a Mexican cartel's "help-wanted" advertisement that was posted in public for all

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39. TED GALEN CARPENTER, FOREIGN POLICY BRIEFING NO. 84, HOW THE DRUG WAR IN AFGHANISTAN UNDERMINES AMERICA'S WAR ON TERROR 5 (2004), *available at* http://www.cato.org/pubs/fpbriefs/fpb84.pdf.

40. Ted Galen Carpenter, *Drug Gangs Winning the War for Mexico*, HOUS. CHRON. (Feb. 7, 2009), *available at* http://www.chron.com/disp/story.mpl/editorial/outlook/6251540.html.

to see. It read, "The Zetas want you, soldier or ex-soldier. We offer a good salary, food and benefits for your family."[41]

Another unintended consequence of the drug war has been to sharpen the skills of drug smugglers. Steven Duke and Albert Gross write, "There is a cadre of experienced smugglers who *actually benefit* from more intense interdiction efforts."[42] This is because those who have survived as smugglers have learned how to stay ahead of the game. "More stringent control of the border," in other words, "merely knocks novices out of the trade, reducing competition and increasing profits for the survivors."[43] Given such circumstances, it is not difficult to imagine a terrorist organization soliciting the services of a drug cartel to smuggle operatives or weapons into the United States.

II. SETTING PRIORITIES

Since the calamity of the September 11 attacks, U.S. intelligence officials have warned of the danger of further attacks. Given that danger, it is a gross misallocation of law enforcement resources to have federal agents raiding marijuana clubs in California when they could be helping to follow up on leads concerning terrorists who may already be on American soil.

Former police chief Joseph McNamara argues that the "war against terrorism requires a reassessment of law enforcement and security priorities, especially in regard to the resources we now expend in the 'war on drugs.'"[44] He's right. There are only a limited number of federal agents and a limited number of hours in a day. The Government must learn how to prioritize. And first on the list of priorities is the fight against al Qaeda, not consumers of illegal drugs. We should not forget the example of the Phoenix FBI office that knew about al Qaeda activity in U.S. flight schools prior to the September 11 attacks, but who could not get the Bureau's main office in Washington D.C. to take action simply because members of that office were mandated to focus on arson cases, not potential instances of terrorism.

A similar point is made by Mark A. R. Kleiman who, in a report for Congress, lists five potential links between the drug trade and

41. *Id.*

42. STEVEN B. DUKE & ALBERT C. GROSS, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS 231 (G.P. Putnam's Sons 1993).

43. *Id.*

44. Joseph McNamara, *The Defensive Front Line*, REGULATION, Winter 2001, at 63.

terrorism, one of which is "competition for enforcement resources."[45] He writes, "The targeting of enforcement and intelligence resources sometimes involves choosing between counter-drug targets and counter-terror targets. Other things being equal, the larger the drug trafficking problem, the larger the resources required to combat it, and those resources may then be unavailable for use against terrorist targets."[46]

Kleiman notes that certain U.S. agencies appear to be cognizant of this, and thus are incrementally shifting priorities away from drug enforcement to focus more on countering terrorism.

> The events of September 11 have already taken a toll on drug enforcement. The Federal Bureau of Investigation has announced that a substantial fraction of the agents it had assigned to drug law enforcement will be reassigned to meet the threat of terrorism. The United States Customs Service has also redirected some of its investigative resources . . . [and] the share of the DEA in the total federal law enforcement budget is not fixed, [thus] it is possible that the agency's growth will be slowed by the budgetary demands of the anti-terror effort.[47]

Some of the language Kleiman uses, however, suggests that the United States is still not fully committed to substantially reducing the resources invested in its drug war.

The Drug Enforcement Administration has more than 10,000 agents, intelligence analysts, and support staff members. Their skills would be much better used if those people were redeployed to counterterrorism investigations. Congress can and should bring the misguided drug war to an end by repealing the federal criminal statute, the Controlled Substances Act.[48]

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45. MARK A. R. KLEIMAN, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, ILLICIT DRUGS AND THE TERRORIST THREAT: CAUSAL LINKS AND IMPLICATIONS FOR DOMESTIC DRUG CONTROL POLICY 7 (Apr. 20, 2004).

46. *Id.* at 7.

47. *Id.* at 7–8.

48. For additional background, see Ethan Nadelmann, *Legalize It: Why It's Time to Just Say No to Prohibition*, FOREIGN POL'Y, Sept–Oct. 2007.