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**APOCALYPTIC WAR RHETORIC:
DRUGS, NARCO-TERRORISM, AND A FEDERAL COURT NIGHTMARE FROM
HERE TO GUANTANAMO**

*Thomas A. Durkin**

INTRODUCTION

Civil liberties in this country have changed over the last decade—a point made and repeated by commentators on the tenth anniversary of 9/11 and its ensuing “War on Terror.”¹ Few would say this change is for the better.² It is hardly the purpose of this paper to add more to that scholarly debate, save to add another vote on the side that things are worse—quite worse. Nor, for a criminal trial lawyer, would it be prudent to attempt to wade too deep into academia and too far afield from one’s area of expertise. Nevertheless, having been an active participant in the “War on Terror,” and its ugly older sister, the “War on Drugs,” it is the hope that a trial lawyer’s hands-on personal experience with federal criminal cases born of this poorly chosen war rhetoric and reactive Congressional legislation, such as the Comprehensive Crime Control and Bail Reform Acts of 1984, the 2006 Military Commissions Act, and the 2012 National Defense Authorization Act—suggests that both wars, on drugs and on terror, are not only philosophically and politically related, but are

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¹ See, e.g., Vincent Warren, *The 9/11 Decade and the Decline of U.S. Democracy*, CENTER FOR CONSTITUTIONAL RIGHTS (Sept. 8, 2011), <http://ccrjustice.org/the911decade/declineofdemocracy>; Lois Beckett, Braden Goyette & Marian Wang, *The Best, Most Damning Reporting of the 9/11 Era*, THE PROPUBLICA BLOG (last updated Sept. 12, 2011, 11:16AM), <http://www.propublica.org/blog/item/the-best-most-damning-reporting-of-the-9-11-era> (last visited Feb. 28, 2012); *After 9/11: An E-Book Anthology*, THE NEW YORKER, Aug. 20, 2011, <http://www.newyorker.com/online/blogs/newsdesk/2011/08/after-911-an-e-book-anthology.html> (last visited Feb. 28, 2012).

² See, Tawia Ansah, *War: Rhetoric & Norm Creation In Response To Terror*, 43 VA. J. INT’L L. 797, 859 (2003).

actually becoming inextricably intertwined in both letter and spirit to form a single global war.

The conflation of these wars and the ramifications of mixing the separate priorities of national security and domestic law enforcement (as well as the government branches and agencies responsible for each), into a single *de facto* militarized world police/spy force presents significant detrimental consequences both to civil liberties,³ everyday federal criminal practice, and even the relationship between domestic crime policy and international and foreign policy.⁴ Jonathan Hafetz explains, “[a]s the Bush presidency neared its end, approximately 250 prisoners were still being held in Guantanamo, hundreds more in Bagram, thousands in Iraq, and an undefined number in secret or proxy detention. One person [Ali al-Marri] was still being detained as an “enemy combatant” inside the United States.”⁵ As we have come to find out, the situation remains relatively unchanged today, notwithstanding President Obama’s widely publicized National Archives speech on May 21, 2009, in which he called for the closing of the detention facility at Guantanamo and the use of Article III Courts to try most terrorism cases except those involving the collection of “battlefield evidence.” Presently, 171 detainees are

³ An excellent discussion of the various complex issues surrounding terrorism detention and prosecution issues is set forth in a recent article by Professor Jonathan Hafetz of Seton Hall Law School, entitled *Terrorism as Crime: Toward a Lawful and Sustainable Detention Policy*. This article, excerpted from Professor Hafetz’s forthcoming book on the right of habeas corpus after 9/11, cogently details the various policy issues surrounding terrorism detention issues and the related problem involving choice of forums to bring terrorism prosecutions: federal criminal courts; military commissions; or yet a third hybrid alternative that Professor Hafetz points out is gaining traction in academic and policymaking circles—that of a separate national security court. Jonathan Hafetz, *Terrorism as Crime: Toward a Lawful and Sustainable Detention Policy*, in *HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA’S NEW GLOBAL DETENTION SYSTEM* 205 (2011). For a detailed and mind-numbing analysis of the political firestorm over Attorney General Holder’s decision to bring this case in New York, see Jane Mayer, *The Trial: Eric Holder and the Battle Over Khalid Sheikh Mohammed*, *THE NEW YORKER*, Feb. 15, 2010, available at http://www.newyorker.com/reporting/2010/02/15/100215fa_fact_mayer [hereinafter *The Trial*].

⁴ See JOHN HAGAN, *WHO ARE THE CRIMINALS?: THE POLITICS OF CRIME POLICY FROM THE AGE OF ROOSEVELT TO THE AGE OF REAGAN* 3 (2010). Hagan presents an informative insider’s view of the shaping of crime policy under Ronald Reagan, and points out the always politicized nature of crime policy, with particular emphasis on what he calls the “street-and suite-linked” patterns of over-and-under control attributable to Reagan and the collapse of the U.S. economy. *Id.* As Hagan points out, “the massive growth and overpopulation of U.S. prisons has *combined* with the deregulation and collapse of the U.S. economy in the age of Reagan to impose unsustainable costs.” *Id.* at 2. On the international level, interestingly enough for our purposes, Hagan issues the following warning: “[o]ur politicized *domestic crime wars feed into our policies on war crimes and state crimes in international conflict zones as far removed as Darfur and Iraq, adding global dimensions to our national crime politics.*” *Id.* at 3 (emphasis added). See also Melvyn P. Leffler, *9/11 in Retrospect: George W. Bush’s Grand Strategy, Reconsidered*, 90 *FOREIGN AFF.* 33, 33 (2011).

⁵ Hafetz, *supra* note 3, at 205.

still at Guantanamo.⁶ Caving in to tremendous political and Congressional opposition to the 9/11 Conspiracy case being tried in the federal court in Manhattan, Obama has ordered that case returned to the Military Commissions in Guantanamo.

Despite this seeming stagnation of civil liberties, some commentators even suggest the “War on Terror” may, at a certain level, be on its way out. A recent article in *The Atlantic* posits that the very federal agencies responsible for implementing the Bush Administration’s War on Terror in fact abandoned the war itself quite some time ago, well before the election of President Obama, or, at a minimum, left behind, the most contentious tactics that had come to define the war under the Bush/Cheney watch; *i.e.*, preventative detentions, pain-based interrogation, ethnic and religious profiling, and widely expanded domestic surveillance powers. At least that is the premise of Nick Adams, Ted Nordhaus, and Michael Shellenberger, in their interesting and detailed analysis entitled *Who Killed the War on Terror*.⁷ They suggest that, similar to shifts in military policy in both Afghanistan and Iraq to a more discerning counterinsurgency strategy, the same kind of discerning shift in policies has been implemented in the United States’s non-military security and counterterrorism tactics.⁸ Interestingly enough, however, and quite to the point for our purposes insofar as civil liberties are concerned, the authors poignantly say that while the security establishment has moved on, “the political class remains stuck in the past.” Wanting to avoid the label “soft on terror,” they point out that policy-makers from President Obama to the Congress “continue to describe contemporary counterterrorism efforts in *martial terms*.”⁹

This insightful observation, that the political class remains trapped by the fear of being thought of as soft on either terror or crime, is quite apropos to the federal court as well, as anyone with even a passing familiarity with everyday federal criminal proceedings involving the wars on drugs and terror can attest. No one in law enforcement today can seriously contend that the War on Drugs has succeeded. Its failure is proven, if by nothing else, than by the steady or decreasing price of a kilogram of cocaine on the West Side of Chicago and the never ending supply of people willing to risk draconian prison

⁶ See Press Release, Ctr. for Constitutional Rights, On the Tenth Anniversary of Guantánamo, the Center for Constitutional Rights Demands that President Obama Close Guantánamo (Jan. 11, 2012) (on file with author), available at <http://ccrjustice.org/newsroom/press-releases/tenth-anniversary-of-guant%C3%A1namo%2C-center-constitutional-rights-demands-president-obama-close-guant%C3%A1na>.

⁷ See Nick Adams, Ted Nordhaus & Michael Shellenberger, *Who Killed the War on Terror?*, THE ATLANTIC, Aug. 29, 2011, available at <http://www.theatlantic.com/national/archive/2011/08/who-killed-the-war-on-terror/244273/>.

⁸ For some reasoning that may explain the wisdom of this decision it is worth reviewing the comment of fellow symposium panel member, Prof. John Mueller of Ohio State University. See generally John Mueller, *Is There Still a Terrorist Threat?: The Myth of the Omnipresent Enemy*, 85 FOREIGN AFFS. 2 (2006).

⁹ Adams, *supra* note 7 (emphasis added).

sentences for the lucrative and enormous profits of the drug trade.¹⁰ If that is not enough, one need only look south of the border to the horrible and absurd violence plaguing Mexico as a result of the Calderone Administration's attempt to assist the U.S. Drug Enforcement Administration's attempt to prosecute and extradite leaders of the major drug cartels.¹¹ And yet, after forty frustrating years, the War on Drugs remains a cornerstone of the domestic law enforcement political agenda.

Likewise, considerable attention and skepticism is beginning to be paid to the utility and effectiveness of many of the domestic terrorism-related cases being brought in the federal courts under the expansive federal statutes for providing material support to Foreign Terrorist Organizations or Specially Designated Terrorist Organizations, 18 USC § 2339A, et seq.¹²

For that matter, some legal scholars, writers and policy makers have pointed out, that Bush's, and now Obama's, "War on Terror" may well be nothing more than "an extension—sometimes a grotesque one—of what we do in the name of the war on crime."¹³ To get the full picture of the dangerousness of this war rhetoric insofar as civil liberties are concerned, though, "we must reach back well beyond George W. Bush to Richard Nixon,

¹⁰ See, e.g., James P. Gray, *The Hopelessness of Drug Prohibition*, 13 CHAP. L. REV. 521, 532 (2010). James P. Gray is a retired judge of the Superior Court in Orange County, California. See also Mark Kleiman, *Surgical Strikes in the Drug Wars: Smarter Policies for Both Sides of the Border*, 90 FOREIGN AFFS. 89, 92 (2011). ("The market forces of replacement and adaptation make the drug-dealing industry resilient even in the face of heavy enforcement: the United States sends five times as many drug dealers to prison today as it did 30 years ago, but this has not prevented the 80-90 percent reductions in the prices of cocaine and heroin over that time, which came as a result of falling dealers' wages and increased efficiency in trafficking. Thus, conventional drug enforcement represents a dead end.")

¹¹ See, e.g., Alma Guillermoprieto, *The Murderers of Mexico*, THE NEW YORK REVIEW OF BOOKS, October 28, 2010; JUAN CARLOS GARZON, *MAFIA & CO.: THE CRIMINAL NETWORKS IN MEXICO, BRAZIL AND COLOMBIA* (2008); HOWARD CAMPBELL, *DRUG WAR ZONE: FRONTLINE DISPATCHES FROM THE STREETS OF EL PASO AND JUAREZ* (2009).

¹² See, e.g., *U.S. v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011) (discussing the widely publicized case involving the Islamic Charity known as The Holy Land Foundation for Relief and Development); see also the controversial Supreme Court decision in *Holder v. Humanitarian Law Project*, et al., 130 S. Ct. 2705 (2010).

¹³ James Forman, Jr., *Exporting Harshness: How The War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331, 332–33 (2009). Forman credits this point to John T. Parry, who "review[s] America's historic and current uses of torture domestically and internationally and conclud[es] that torture may be compatible with American values in practice and with the legal system we have constructed to serve those values." *Id.* at 333; see also Aziz Z. Huq & Christopher Muller, *The War on Crime as Precursor to the War on Terror*, 36 INT'L J.L., CRIME & JUST. 215 (2008); Dorothy Roberts, *Torture and the Biopolitics of Race*, 62 U. MIAMI L. REV. 229 (2008). For Obama's adoption and continuation of much of Bush's counterterrorism policies, see Glenn Greenwald, *Obama's Embrace of Bush Terrorism Policies is Celebrated as "Centrism,"* SALON.COM (May 19, 2009), http://www.salon.com/news/opinion/glenn_greenwald/2009/05/19/obama. To his credit, however, Obama was quick to tone down the war rhetoric. See *Obama's Remarks on Iraq and Afghanistan*, N.Y. TIMES, July 15, 2008, <http://www.nytimes.com/2008/07/15/us/politics/15text-obama.html>.

Ronald Reagan and the beginnings of the now infamous and perpetual War on Drugs that was already over forty years and counting when the airplanes struck the Twin Towers and Pentagon on 9/11.”¹⁴ In the 1960s, street crime was perceived as the ultimate villain, particularly in light of the inner-city riots of Detroit and Chicago. In response, the Omnibus Crime Control and Safe Streets Act was passed in 1968. By then, the War on Crime was ripe for congressional action.¹⁵ Three years later, when Richard Nixon declared “war on drugs” on June 17, 1971, he called drug abuse “public enemy number one in the United States.” President Bill Clinton would use that same language to describe Osama bin Laden twenty-seven years later, following the East African embassy bombings.

The justification of national security concerns overriding civil liberties is nothing new, and much commentary has been dedicated to explaining its necessity—the most popular example being that of a fulcrum-like balancing obligation. Judge Richard Posner of the Seventh Circuit Court of Appeals, for one, has put it this way: “In times of danger, the weight of concerns for public safety increases relative to that of liberty concerns, and civil liberties are narrowed. In safer times, the balance shifts the other way and civil liberties are broadened.”¹⁶ This justification seems to underlie the general observation that, if given a choice between security and civil liberties, more often than not people will opt for security. Legal and political philosopher Ronald Dworkin agrees that the fulcrum-like “image of striking a new balance is popular,” but

¹⁴ Nor is this to say, that all this apocalyptic fear-mongering can be laid at the feet of Richard Nixon and Ronald Reagan, tempting as it is for one of college age in the late 1960s. Increasing scholarship seems to present compelling evidence of far deeper roots stretching as far back as Woodrow Wilson and Franklin D. Roosevelt, and the “great” world wars over which they presided. For a daunting and chilling look at the nationalistic practice of exploiting fear under the auspices of national security see the recent work of Jay Feldman entitled *MANUFACTURING HYSTERIA: A HISTORY OF SCAPEGOATING, SURVEILLANCE, AND SECRECY IN MODERN AMERICA* xviii (Pantheon Books, 2011) (“[T]he recent excesses of the George W. Bush administration in attempting to put a stranglehold on civil liberties after 9/11 were not an anomaly . . . those extremes were a difference of degree, not kind. It [the ‘seizing upon crises to incite emotional and irrational fears] has been happening in one form or another for over a century.”). For a more broadly focused and excellent analysis of the use of war powers, war rhetoric and national security emergencies to expand executive authority and the scope of the federal government, see the recent work of the University of Chicago historian, JAMES T. SPARROW, *WARFARE STATE: WORLD WAR II AMERICANS AND THE AGE OF BIG GOVERNMENT* (2011); see also GARRY WILLS, *BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE* (2010).

¹⁵ The term “War on Crime” is considered to have been coined by Arizona senator and presidential candidate Barry Goldwater in 1961, who noted the supposed breakdown of “law and order.” However, the phrase itself can be traced to a comic strip called “The War on Crime” started by legendary FBI Director, J. Edgar Hoover in the 1930s. Huq & Muller, *supra* note 13, at 216.

¹⁶ RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 1 (2006).

considers it “also particularly inapt.”¹⁷ Dworkin frames the question regarding this choice between liberty and security as a moral one, not simply a legal one. The issues involved in national security and detention policy extend far beyond normal governmental policy decisions such as inner-city roads and their impact on the environment. Instead, with national security and civil liberties in question, the balancing metaphor obscures the underlying human rights issue, an argument surely not favored by Judge Posner and devotees of what has become known as the law-and-economics movement credited to the University of Chicago.¹⁸ Dworkin correctly insists that “[w]e must decide not where our own interest lies on balance but the very different question of what morality requires, *even at the expense of our own interests*.”¹⁹ As Dworkin goes on to say, “we cannot answer that [moral] question by asking whether the benefits of our policy outweigh its costs to us.”²⁰

While much has been written about counterterrorism policy in the intervening years since Dworkin posed this question, far too little serious public debate has been had in this regard—not unlike, it is submitted, the same hand-wringing discourse in the equally thoughtless moral evaluation of the War on Drugs and the carceral society it has wrought.²¹ Sound-bite political rhetoricians may find it expedient to use apocalyptic language to describe these post-9/11 times, just as they found it useful to dictate our approach to the scourge of crack cocaine years ago, but Dworkin’s question, and its moral focus, remains the correct one—particularly, one hopes, for a symposium at the nation’s premier Catholic University.²²

¹⁷ RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE* 27 (2006).

¹⁸ Insofar as the war on drugs and the “tough on crime” massive U.S. prison population is concerned, it is well worth looking at the thoughtful analysis of the correlation between market deregulation and our ever increasing “carceral society,” presented oddly enough by another current University of Chicago Law professor, Bernard E. Harcourt, in a recent book. BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* (2011). Harcourt takes on his colleagues in the Chicago law-and-economic school, and rather convincingly demonstrates both what he calls the illusion of “free markets” and the “illusion of freedom.” It may well be less than a coincidence, therefore, that many of George W. Bush’s economic advisors in the fall of 2001 were also devotees of The Chicago School of Economics going back to Friedrich Hayek’s influence on Chicago economists Milton Friedman and George Stigler, and the lawyer Richard Epstein. For a concise history of both Chicago Schools, see *id.* at 121–50.

¹⁹ DWORKIN, *supra* note 17, at 27 (emphasis added).

²⁰ *Id.*

²¹ *But see, e.g.*, CHARLES FRIED AND GREGORY FRIED, *BECAUSE IT IS WRONG: TORTURE, PRIVACY AND PRESIDENTIAL POWER IN THE AGE OF TERROR* (W.W. Norton & Co., 2010); BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010).

²² It might be particularly helpful in this regard to pay close attention to John Patrick Diggins’ latest book, *Why Niebuhr Now?* (2011). As Diggins points out discussing the revival of Niebuhr’s reputation these days, but not necessarily his ideas: “[a]lone among modern thinkers, Niebuhr turned to religion for instruction on how to think about power. Unlike those who now celebrate American ‘Unipower’ in a post-Cold War world, where it is thought that American military might can achieve moral ends for liberal democracy’s sake, Niebuhr

THE BAIL REFORM ACT OF 1984: FROM PRE-TRIAL DOMESTIC DETENTION TO GUANTANAMO & INDEFINITE INTERNATIONAL DETENTION

Thirty-seven years of practicing criminal law in the federal courts have resulted in witnessing changes in criminal procedural rights and constitutional protections that a law student educated in the early 1970s during the Warren Supreme Court would have thought mind-bogglingly impossible to have taken place in a single lifetime. But taken place they have, and then some!

Professor Gerald G. Ashdown may have summed it up it best: “The reaction to the Vietnam War protest years, the presidency of Richard Nixon, and ultimately that of Ronald Reagan, ushered in a conservative revolution in the United States that still endures. Republican Presidents during this period have appointed eleven Justices to the United States Supreme Court, seven of whom serve on the Court today.”²³ Ashdown straightforwardly contends, quite consistently with this author’s experience in the federal courts, that well before 9/11 and the declaration of the War on Terror, “the country and Supreme Court already had been fighting another war for thirty years—the so-called ‘War on Drugs’ [and this war] was every bit as devastating to civil liberties, although slower and more methodical, than our new ‘War on Terror’ promises to be.”²⁴ This too is quite consistent with this author’s experience, although equal, if not more, blame should be focused on the political litmus testing used to vet District Court appointees. These judges make most of the routine decisions in the trial courts on motions to suppress evidence based upon Fourth Amendment violations. These decisions have the potential to put defendants away for absurd amounts of time, particularly considering the draconian effects of the Federal Sentencing Guidelines and mandatory minimum statutory sentencing. Ashdown also provides a very good history of the gradual erosion in Fourth Amendment jurisprudence facilitated by the War on Drugs.²⁵

It cannot go unmentioned that these judicially created exceptions incentivize the police to create false reports and outright lie in court. Bold-faced lying to justify the seizure of huge quantities of drugs, something once reserved for the province of the state courts, became silently accepted by many prosecutors and judges in the federal courts sadly permitting many deserving drug dealers a basis to go off to prison with a legitimate complaint about the system. Over time, however, another curious and inexplicable phenomenon began to take place in the opposite direction. Elected judges in state courts have now become far more likely to grant motions to suppress based upon

cautioned against identifying power with virtue. It is a conceit of pride, Christianity’s fatal sin.” *Id.* at 116. Niebuhr’s popularity these days has been enhanced, in part, by President Obama’s endorsement of him as the most influential philosopher he has encountered. Diggins would be worth the President’s attention.

²³ Gerald G. Ashdown, *The Blueing of America: The Bridge Between the War on Drugs and the War on Terrorism*, 67 U. PITT. L. REV. 753, 753 (2006).

²⁴ *Id.* at 755.

²⁵ *Id.* at 757–73.

lying police testimony than life-time appointed federal judges, regardless of the quantity of the drug seizure.

In hindsight, a good case can be made that war rhetoric was, perhaps, the single most important ingredient in the formula for this change. Seizing upon the well worn fear-mongering trope, Congress reacted with a series of “tough on crime” pieces of legislation, beginning with the controversial Comprehensive Crime Control Act of 1984. All of a sudden, federal judges were compelled to take a tougher stance, both at sentencing and—for the very first time—in detaining defendants prior to trial, pursuant to the Bail Reform Act of 1984.²⁶

In 1985, in the middle of a thirteen-week narcotics conspiracy jury trial in the federal court in Chicago, the government suddenly filed a motion to revoke our client’s bond.²⁷ The Bail Reform Act had just gone into effect and, for the very first time, pre-trial detention was authorized in the federal courts. Our case was one of the very first attempts to impose pre-trial detention under the Act at the Dirksen Federal Building in Chicago. Defense lawyers were aghast, as it had generally been presumed that the Eighth Amendment guaranteed bail in all but some rare exceptions, primarily in capital cases. Even prosecutors were leery of the constitutionality of the Act and, to mollify judges reviewing early challenges to the Act, Attorney General William French Smith went so far as to issue a memorandum to U.S. Attorneys across the country narrowly prescribing the government’s intended use of pre-trial detention to only the most serious cases involving the most dangerous offenders.²⁸ 18 U.S.C. § 3142(e)(3)(A) provides for a rebuttable presumption that any defendant charged in a narcotics offense with a maximum sentence of ten years is both a danger to the community and a risk of flight. Virtually every federal narcotics offense carries a penalty of ten years or more. While this rebuttable presumption can be overcome by the presentation of defense evidence, the statute also provides for a minimum three-day detention upon motion of the government. Such a rebuttable presumption also applies to defendants charged in various other federal crimes— primarily those of a violent nature. However, pre-trial detention can also be sought under the Act for any defendant charged in federal court upon a showing by the government by clear and convincing evidence that there are no conditions of bail that will

²⁶ 18 U.S.C. § 3141 (2006), *et seq.*

²⁷ *United States v. Napue*, 834 F.2d 1311 (7th Cir. 1987). Napue had been a long-time West Side narcotics dealer whose relatively lengthy criminal history “rap sheet” demonstrated convincingly that he always showed up for court. The government argued, notwithstanding the rap sheet’s lack of any history of violence, that he was a “danger to the community” based upon an incident with a girlfriend where he supposedly told her to be careful while he had his arm on the console of his automobile where she knew he sometimes kept a gun. *See id.*

²⁸ For a more extensive explanation of the operation of the detention/release provisions of the statute, see Ann M. Overbeck, *Detention for the Dangerous: The Bail Reform Act of 1984*, 55 U. CIN. L. REV. 153, 160–65 (1986).

assure either the safety of the community or that the defendant is not a risk of flight.

In response to our argument that this statute was both absurd and unconstitutional because it would only be a matter of time before the government began seeking the pre-trial detention of white-collar defendants, government prosecutors accused us of hyperbole and pointed to Attorney General Smith's memorandum as assurance that the government could most certainly be trusted not to abuse its authority. The trial judge denied the government's motion, as much for not wanting to disrupt an ongoing trial and jeopardizing the appellate record, as for anything else, it seemed.

It did not take long for our prediction that the government would seek to detain white-collar defendants while they awaited trial to become a reality—less than two years, if memory serves. William Stoecker, a young businessman from Chicago's south suburbs, had been charged in 1987 with bankruptcy fraud for allegedly providing false schedules in a widely-publicized involuntary bankruptcy filed against his business empire, the Grabill Corporation. Grabill and its demise was said to have been the cause of the downfall of the Bank of New England in the days when lending money to the "rust belt" was popular with investment bankers. Stoecker had no criminal history whatsoever and had longstanding ties to the Chicago area, two factors under § 3142 of the criminal code that weighed heavily in favor of his release. Nor could anyone suggest that bankruptcy fraud endangered the community. Instead, the government argued that since the Bankruptcy Trustee and the FBI had not been able to trace what happened to the millions loaned to Grabill, Stoecker might have placed it offshore, and was, thus, a potential risk of flight. This argument fell on very deaf ears, perhaps because federal Judges and Magistrates were still too unaccustomed to the idea of locking people up pre-trial. It was fortunate for Stoecker that this was the case, as about a year and a half later a federal jury acquitted him of the bankruptcy fraud charges on all counts.

Time, however, gradually eroded this judicial resistance to pre-trial detention, which by now has led to an entirely new judicial approach that some legal commentators have described as the "new normal."²⁹ And new and normal it indeed is, at least from the perspective of 1987. Today, pre-trial detention is the norm, not the exception. In the latest Department of Justice figures available, those for the fiscal year 2009, only 30.7 percent of the 98,748 defendants charged in the federal courts nationwide were released on bond.³⁰

²⁹ See LAWYERS COMM. FOR HUMAN RIGHTS, *introduction to ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES*, i (2003), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/AssessingtheNewNormal.pdf>.

³⁰ MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, *FEDERAL JUSTICE STATISTICS 2009 – STATISTICAL TABLES 12* (2011) [hereinafter *JUSTICE STATISTICS 2009*], available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2374>. In the preceding fiscal year, 2008, 28.5% of the 91,017 were released. MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS,

This is the case, notwithstanding our cherished belief that our system affords every defendant the presumption of innocence, unless and until guilt is proven beyond a reasonable doubt. Tell this to the 68,472 pre-trial detainees in fiscal year 2009, or the 65,109 detainees from the previous year and you may get a different opinion of this long cherished tradition that, frankly, is respected more in the breach than anything else. In that the Department of Justice detention figures do not specifically categorize terrorism-related cases, the release rate for “Violent Offenses,” which would include terrorism related offenses, is lower than average, or only 23 percent.³¹ However, based on the author’s experience, very few terrorism-related defendants are ever released on bail.

The very fact of pre-trial detention in terrorism related cases also produces even greater challenges regarding representation than are encountered in the normal pre-trial detainee case. Most often, if not always, pre-trial detainees in terrorism related cases are placed arbitrarily by the Warden of the Bureau of Prisons facility in solitary confinement or “the SHU,” an acronym for Segregated Housing Unit. Not only does this create the enormous psychological problems associated with twenty-three-hours-a-day solitary confinement,³² it also greatly restricts access to counsel and discovery materials. At most Bureau of Prisons facilities, inmates in the general population are afforded email access that permits email contact with lawyers and certain approved family members. In addition, since federal criminal discovery has gone the way of big-firm civil litigation digital discovery these days, access to computers is essential for inmates to review their case. Inmates in solitary at the SHU have far less access to computers and, thus, far less access to the discovery.³³

FEDERAL JUSTICE STATISTICS 2008 – STATISTICAL TABLES, Table 3.1 (2010), *available at* <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1745>. In 2007, 36.1% of defendants were released. MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS 2007 – STATISTICAL TABLES, (2010), *available at* <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2196>. These figures are based upon the Administrative Office of the U.S. Courts Pretrial Services Act Information System.

³¹ See JUSTICE STATISTICS 2009, *supra* note 30, at 12.

³² For the effects of twenty-three-hours-a-day solitary confinement, *see generally*, Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325 (2006).

³³ There is little question that U.S. Attorneys Offices in large metropolitan areas are now “big firms,” in every sense of the word. Likewise, there is a growing tendency and preference towards career prosecutors these days. If it were in the private world of Chicago law firms, the Chicago U.S. Attorneys Office with its 170 attorneys would currently rank eighteenth in the number of local lawyers. *See Crain’s List Largest Law Firms*, CRAIN’S CHICAGO BUSINESS, Feb. 21, 2011 at 35, *available at* <http://www.chicagobusiness.com/section/lists> (detailing how the 17th largest firm has 172 local attorneys whereas the 18th largest firm has 159 local attorneys). In addition to career prosecutors, in another rather odd twist from days gone-by, Assistant U.S. Attorneys are now being recruited from big law firms which also seems to be creating an interesting revolving door with some attendant consequences, intended or not. Young big-firm associates become Assistant U.S. Attorneys and then leave for partnerships, often in the same firm from which they came. Whether the onset of digital discovery in federal criminal cases can be directly attributed to this revolving door is anyone’s guess, but it is worth

The conditions of such pre-trial solitary confinement are all the more exacerbated by the fact that discovery in terrorism-related cases is always greatly prolonged by the declassification problems related to classified evidence and its use in the federal courts pursuant to Classified Information Procedures Act (“CIPA”).³⁴ As has been suggested by one commentator with extensive terrorism-related defense experience, “the government’s exclusive control over critical aspects of the litigation and proceedings conducted pursuant to CIPA often undermines the statute’s legislative intent.”³⁵ Dratel goes on to suggest—correctly, this author believes—that the government “achieves this control by determining whether and what classified material to declassify in preparation for a criminal prosecution and trial, including a defendant’s own communications intercepted pursuant to the Foreign Intelligence Surveillance Act (“FISA”).” In that virtually every federal terrorism-related prosecution involves classified information covered by CIPA, as well as evidence obtained under FISA, the impact of the use of this “sword,” intentional or not on the part of the government agencies or prosecutors, as it impacts the ability of a pre-trial detainee to put up with the conditions of solitary confinement, prepare his defense, and go through the rigors of an arduous trial becomes very, very real.

Not surprisingly, most terrorism-related cases end up in guilty pleas. Aside from the draconian sentencing options called for under the Federal Sentencing Guidelines, sheer exhaustion and hopelessness encouraged by the conditions of confinement takes a large toll as well. For the calendar year ending December 31, 2010, the same Department of Justice Statistics relating to detention and release reflect that there were only forty-five “terrorism” defendants that year. The cases of eight defendants were dismissed, leaving only thirty-seven defendants to proceed to judgment. Of those thirty-seven defendants, thirty-two plead guilty and the remaining five were found guilty after jury trials.

THE JOINT TASK FORCE OPERATION AT GUANTANAMO BAY

In a country that accepts the pre-trial detention of 71.5 percent of its criminal defendants in its federal courts, it probably should not be a surprise why the summary detention of over 700 foreign Muslim nationals at a Gulag in the Caribbean has gained enough popular political support to override a campaign promise of an incoming President, a promise that was supported not only by his opponent, Senator John McCain, but also by his predecessor, George W. Bush and his predecessor’s Secretary of State, Colin Powell.

While the history of the quick decision that led to the choice of Guantanamo and its early growing pains is already the subject of a number of

thinking about. The pros and cons on the issue of career prosecutors can also be framed in terms very similar to that of a conscripted versus a volunteer/mercenary army.

³⁴ 18 U.S.C. app. 3 §§ 1–16 (2006).

³⁵ Joshua L. Dratel, *Sword or Shield? The Government’s Selective Use of Its Declassification Authority for Tactical Advantage in Criminal Prosecutions*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 171, 171 (2006).

books,³⁶ more important for our purposes is the legal basis behind the detention policy. It is a bit less complicated and sophisticated than the Bail Reform Act of 1984, to put it mildly. On November 13, 2001, President Bush issued a Military Order entitled *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*. This order, interestingly enough, was modeled after and made reference to President Franklin D. Roosevelt's Proclamation 2561 issued in July of 1942 in the early stages of World War II.³⁷ Roosevelt's order denied certain enemies access to the courts, namely any residents of a nation with whom we were at war and who, at the direction of that nation, entered the country and were charged with committing or attempting to commit sabotage, espionage, hostile or warlike acts, or other violations of the laws of war.³⁸ In contrast to Roosevelt's order, Bush's order broke new ground in its breadth and ambiguity. As has been pointed out, Bush's order "recognized no legal or procedural checks on the president's proclaimed powers." Nor did it take into account significant changes in international law since FDR's order, including the 1949 Geneva Conventions and a new U.S. Code of Military Justice.³⁹ Further, Bush's order, in addition to detention authority, gave the Secretary of Defense the ability to "wield authority over the [very] tribunals under which [the detainees] [] would be tried."⁴⁰ Put another way, this empowered the Department of Defense to

³⁶ See, e.g., JOSEPH MARGULIES, *GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER* (2006); CLIVE STAFFORD-SMITH, *EIGHT O'CLOCK FERRY TO THE WINDWARD SIDE: SEEKING JUSTICE IN GUANTANAMO BAY* (2007); MOAZZAM BEGG & VICTORIA BRITAIN, *ENEMY COMBATANT: MY IMPRISONMENT AT GUANTANAMO, BAGRAM, AND KANDAHAR* (2006). For a more detailed explanation of the decision making, or lack thereof, on Guantanamo, extraterritorial rendition, torture and the variety of related problems that this detention policy spawned, see JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008).

³⁷ See KAREN GREENBERG, *THE LEAST WORST PLACE: GUANTANAMO'S FIRST 100 DAYS* 3 (2009). Greenberg's book provides a very insightful history of how Guantanamo came to be chosen as the place to take General Tommy Franks' early detainees in the Afghan war in the first place, and the growing pains it went through in its early days. Based in large part upon very candid interviews of the military personnel involved in the decision making processes, it is both very informative and consistent with conversations this author has had in Guantanamo with those officers who were there at the beginning. One overriding factor mentioned by Greenberg, and confirmed in the local pub where everyone congregates in the evenings on the island, was that Guantanamo got the detainees out of the cold Afghan winter and avoided the potential scandal that would have resulted in large numbers of detainees freezing to death. As Greenberg also points out, Guantanamo had been used in the 1990s as a detention facility for Cuban and Haitian refugees and it had an operational hospital to treat the wounded. See *id.* at 2-16.

³⁸ See Proclamation No. 2561, 7 Fed. Reg. 5101 (July 2, 1942) [hereinafter Proclamation 2561].

³⁹ GREENBERG, *supra* note 36, at 3.

⁴⁰ *Id.* In hindsight, this was a harbinger of the controversy that arose after the President's National Archives speech ordering the closing of Guantanamo and Attorney General Holder's later decision to bring the 9/11 Conspiracy Case to the federal court in Manhattan. For the tortured history and galvanized Republican reaction to this decision, see *The Trial*, *supra* note 3.

override the Department of Justice and to push “domestic courts as well as international [courts] [] out of the picture.”⁴¹

Bush’s Military Order authorizing the Department of Defense to detain “individuals subject to the order” and try them by military commissions relied directly upon the now well-known congressional *Authorization for Use of Military Force Act* (“AUMF”).⁴² That statute has served, for all intents and purposes, as the legal footing for much of the War on Terror, at least insofar as Guantanamo detention policy and the use of military commissions is concerned.

Bush’s Presidential Military Order declaring that “an extraordinary emergency exists for national defense purposes” is well worth reading in its entirety. The apocalyptic language contemplates nothing less than the very continuation of the government hanging in the balance:

Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, *and may place at risk the continuity of the operations of the United States government.*⁴³

“REGULAR DETAINEES” (“ISNs”) vs. “HIGH VALUE DETAINEES” (“HVDs”)

In order to understand the mess that Guantanamo detention policy has become, both domestically and internationally, it is important to distinguish between two very different types of detainees at Guantanamo. The Bush administration’s early claim that it had captured “the worst of the worst” and sent them to Guantanamo⁴⁴ led to all kinds of distortions in the ensuing policy debates on both sides. In reality, only a small handful of detainees come close

⁴¹ GREENBERG, *supra* note 36, at 3. Roosevelt’s order specifically provided that the Attorney General could, with the approval of the Secretary of War, provide regulations for providing remedies or proceedings in U.S. Courts. See Proclamation 2561, *supra* note 38.

⁴² *Id.*

⁴³ Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 § c (2001), available at http://avalon.law.yale.edu/sept11/mil_ord_001.asp (emphasis added). For an interesting examination of the Islamic apocalyptic movement and its similarities with Christian movements, see generally JEAN-PIERRE FILIU, *APOCALYPSE IN ISLAM* (2011). As an aside, the accuracy of this fear of Al Qaeda’s capabilities has been repeatedly questioned. See, e.g., Scott Shane, *Al Qaeda’s Outsize Shadow*, N.Y. TIMES, Sept. 8, 2011, available at <http://www.nytimes.com/2011/09/08/us/sept-11-reckoning/qaeda.html>.

⁴⁴ Former Defense Secretary Donald H. Rumsfeld first used that label in early 2002. See Katharine Q. Seelye, *Some Guantanamo Prisoners Will Be Freed Rumsfeld Says*, N.Y. TIMES, Oct. 23, 2002, <http://www.nytimes.com/2002/10/23/international/americas/23GUAN.html>. The label was again used by Vice-President Richard Cheney as late as 2009, notwithstanding considerable evidence to the contrary by that time. See *Cheney: Gitmo holds ‘worst of the worst,’* ASSOCIATED PRESS, June 6, 2009, http://www.msnbc.msn.com/id/31052241/ns/world_news-terrorism/t/cheney-gitmo-holds-worst-worst.

to being the “worst of the worst” by anyone’s definition, and all in that small handful are the “High Value Detainees.” Most of the HVDs are ones the government believes are responsible for actual terrorist acts, and many of them will be prosecuted and afforded considerable due process in either Article III federal courts or the Military Commissions under the revised Military Commissions Act.⁴⁵ Ironically, virtually all of the much larger subset of “regular” detainees languished, or continue to languish, for years on end with virtually no due process, except for limited habeas corpus review in the U.S. District Court for the District of Columbia.⁴⁶ Nevertheless, in the public and congressional hysteria over the detainees, it is always the “worst of the worst” that dictate the course of the detainee debate.

Almost ten years after the arrival of the first planeloads of detainees in January of 2002, and nearly three years after President Obama’s National Archives Speech in May 2009 announcing his intention to close Guantanamo, the numbers may well say it all insofar as the wrongheadedness of the debate—a debate that is deliberately obfuscated by the refusal to distinguish between the “high value” and “regular” detainees. Or, to borrow comparative terminology from the War on Drugs, the ongoing debate in opposition to closing Guantanamo is being dominated by concerns over what to do with the few “kingpins,” while hundreds more “mopes” languish without any meaningful resolution.

According to statistics compiled by the Center for Constitutional Rights in New York City (“CCR”), as of September 7, 2011, 600 men have already been released from Guantanamo. One hundred seventy-one men, from twenty-three countries, remain imprisoned—many now going on ten years. Ninety-two percent of the men ever held in Guantanamo are not Al-Qaeda fighters by the U.S. government’s own records. Eighty-nine men have been cleared for release from Guantanamo but remain in detention. Fifty-eight Yemeni men are cleared to be sent back home, but remain indefinitely detained based solely on their nationality. *Forty-six men are slated for indefinite detention without charge or trial, as the government claims these men can be neither released nor prosecuted.* Twenty-two or more prisoners were under eighteen when captured. Eight men have died in the prison. Seven men have been charged with a crime, and two of those men are now free.⁴⁷ In short, it is only the

⁴⁵ See, e.g., HAFETZ, *supra* note 3, at 205; BRUCE A. ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM (2006); Diane F. Orentlicher & Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J.L. & PUB. POLY. 653, 653 (2002).

⁴⁶ See *infra* note 46, for the procedural history of these habeas claims and Detainee Treatment Act cases.

⁴⁷ *Guantanamo by the Numbers: What You Should Know & Do About Guantanamo*, CTR. FOR CONSTITUTIONAL RIGHTS (January 18, 2012), http://ccrjustice.org/files/Guantanamo_Numbers_18Jan2012.pdf (emphasis added). These figures are based in large part on several exhaustive studies conducted by Prof. Mark Denbeaux of the Seton Hall Law School. See, e.g., MARK DENBEAUX & JOSHUA DENBEAUX, REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF

forty-six detainees who supposedly can be neither released nor prosecuted who are driving the debate.⁴⁸

A significant number of the remaining detainees have continued to pursue habeas litigation in the U.S. District Court for the District of Columbia, largely with the help of pro bono lawyers throughout the country, including many from large prestigious law firms. The numbers in these cases also tell a shocking tale. As of September 2, 2011, based upon a running survey being maintained by Guantanamo habeas lawyers, of the sixty-one habeas decisions so far on the merits, thirty-eight detainees have prevailed on the merits, while only twenty-three habeas petitions have been denied. This is a shocking, if not scandalous, statistic considering the very extraordinary nature of a writ of habeas corpus and the rarity in which one is usually granted in the federal courts. In another context, for example, the granting of a far smaller number of post-conviction petitions in Illinois capital convictions led to a moratorium and ultimately to the repeal of the death penalty in Illinois.

High Value Detainees (“HVDs”) are truly horses of a different color. If anyone fits Rumsfeld’s and Cheney’s label of “the worst of the worst,” some of these detainees could no doubt be said to qualify. This is certainly the case with the most notorious HVD, Khalid Sheikh Mohammed, who boastfully admitted his role as the mastermind of the 9/11 attacks throughout the earlier proceedings in the Military Commissions at Guantanamo.⁴⁹ These and most HVD detainees, however, were not first sent to Guantanamo. Instead they were only brought to Guantanamo in October of 2006, after having first been sent to the infamous “ghost prisons” as part of the CIA’s now infamous “extraordinary rendition” program.⁵⁰ The length of these CIA renditions, the locations of the black sites, and what occurred at the sites continues to remain mostly classified, but has become the subject of considerable public controversy in what is now known as the “Torture Debate.”⁵¹ This debate,

DEPARTMENT OF DEFENSE DATA (Feb. 8, 2006), http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf.

⁴⁸ This is, of course, the price regularly paid in our criminal justice system as the price of the presumption of innocence and requirement of proof of guilt beyond a reasonable doubt as was widely evidenced in the recent New York case involving IMF Director and French presidential candidate, Dominique Strauss-Kahn. *See Dominique Strauss-Kahn, Times Topics*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/s/dominique_strausskahn/index.html (last visited Sept. 11, 2011).

⁴⁹ *See* Mark Mazzetti & Margot Williams, *In Tribunal Statement, Confessed 9/11 Plotter Burnishes His Image as a Solider*, N.Y. TIMES, March 16, 2007, available at <http://www.nytimes.com/2007/03/16/washington/16khalid.html>.

⁵⁰ For an excellent history of the origin of this program, see MAYER, *supra* note 35, at p. 102–15, 128–29, 225; *see also*, Stephen Braun et al., *Secret CIA Terrorist Prisoner Flights to ‘Black Site’ Prisons Detailed in Lawsuits*, ASSOCIATED PRESS, Sept. 1, 2011, available at http://blog.al.com/wire/2011/09/secret_cia_terrorist_prisoner.html.

⁵¹ *See, e.g.*, PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD’S MEMO AND THE BETRAYAL OF AMERICAN VALUES* (2008); Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT’L L. 309, 312–13

which is far beyond the confines of this paper other than perhaps as it relates to Dworkin's moral question, includes the very question as to whether the torture even worked in the first place.⁵² To date, in addition to the five HVD defendants charged in the military commissions in the 9/11 Conspiracy Case, nineteen other cases have been brought in the Commissions against individual HVD defendants.⁵³

What will happen to the remaining HVDs or those other detainees whom the government claims can neither be prosecuted nor released, is anyone's guess at this point. The only thing that can be said with any certainty is that resistance to closing Guantanamo and bringing the detainees to U.S soil has gained so much political traction that Guantanamo and the Military Commissions are likely to become permanent fixtures for the foreseeable future. Whether this opposition is simply out of spite against President Obama, or has large political support beyond hard right Republicans is difficult to say as well. The recently enacted National Defense Authorization Act (NDAA) for Fiscal Year 2012 is relentless in its use of the military to handle as many terrorists as possible. The bill's passage by both houses of Congress does suggest that, either because of an actual belief in Guantanamo's necessity, or because of an aversion to being perceived as weak on terror, much of Congress is comfortable with the status quo, just as it was comfortable with the castration of the Fourth Amendment when it came to drug kingpins.

While the Obama Administration may be criticized for failing to act on its promises with the required courage and decisiveness, it is clear that the Administration's efforts have been continuously hampered by congressional action that contrasted with the deferential reign given to President Bush on detainee matters. The signing statement to the 2012 NDAA issued by President Obama reinforces this chasm of support: no less than seven times in under 2000 words, he clarifies that his administration will interpret the statute to allow for the necessary "flexibility" to address America's national security

(2006); Jeannine Bell, "Behind This Mortal Bone": *The (In)Effectiveness of Torture*, 83 IND. L.J. 339, 353 (2008); Lisa Hajjar, *Does Torture Work? A Sociolegal Assessment of the Practice in Historical and Global Perspective*, 5 ANN. REV. L. & SOC. SCI. 311, 332-35 (2009); Kenneth J. Levit, *The CIA and the Torture Controversy: Interrogation Authorities and Practices in the War on Terror*, 1 J. NAT'L SEC. L. & POL'Y 341, 341 (2005).

⁵² See, e.g., Scott Shane, *Ex-FBI Agent Cites High-Level Dysfunction over 9/11*, N.Y. TIMES, September 11, 2011, available at <http://www.nytimes.com/2011/09/12/us/12agent.html> (detailing the comments of Ali H. Soufan, concerning interrogation of the first HVD, Abu Zabaydah); see also ALI H. SOUFAN, *THE BLACK BANNERS: THE INSIDE STORY OF 9/11 AND THE WAR AGAINST AL-QAEDA* (2011).

⁵³ United States Department of Defense, *Military Commissions*, THE PENTAGON, <http://www.defense.gov/Utility/printitem.aspx?print=http://www.defense.gov/news/commissions.html>, last visited Sept. 12, 2011. This website, in addition to providing links to the actual case files of these proceedings, also provides links to the Military Commissions Act, as well as the Military Commissions Manual, Regulation, Trial Judiciary Rules of Court, and the United States Court of Military Commission Review.

concerns.⁵⁴ A decade ago, executive discretion on this matter was readily granted, leaving the rest of us to wonder whether Congress's restrictive language is part of the expanding and contracting circle of executive overreaching and congressional correction, or if congressional preference for the military, and the President's aversion to that single path, in fact suggests something far more sinister about the direction of individual rights and the flow of information.

By invoking military detention and prosecution for such a large portion of terror cases, Congress is controlling the perception of this threat, suggesting that the dangers to national security are simply too great and unique to be handled by traditional civilian or even military courts. This is yet another example of incendiary apocalyptic language used to achieve a political objective. The demand for military detention, at the expense of civil rights, not only intrudes "into the functions and prerogatives of the Department of Justice,"⁵⁵ with regard to prosecutorial discretion, but also removes any civilian DOJ determination of the appropriate parameters for detention. These parameters involve not only treatment and location, but also duration and the means of challenging one's detention. The NDAA debate has touched very raw nerves in this country, and goes to the heart of the issue with respect to war terminology, fear and apocalyptic rhetoric.⁵⁶ A look at this oppositional history is telling and ominous.

In November 2009, Republican Representative Louie Gohmert (R-TX) introduced House Resolution 4127, which would have required trial by Military Commission for unprivileged enemy belligerents being tried for conduct for which a term of incarceration or the death penalty may be sought. More worryingly still, on March 4, 2010, Senator John McCain introduced the Enemy Belligerent, Interrogation, Detention, and Prosecution Act, which would have allowed the President to imprison an unlimited number of American citizens (as well as foreigners) indefinitely without trial, simply by designating that person an "enemy belligerent."⁵⁷ The bill explicitly contemplated that indefinite detention could be imposed on American citizens:

⁵⁴ See Statement by the President on H.R. 1540, THE WHITE HOUSE (Dec. 31, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>.

⁵⁵ *Id.*

⁵⁶ See, e.g., Michael McAuliff, *Guantanamo Bay 10th Anniversary: Obama's Detention Law Could Fill Prison Obama Tried to Close*, HUFFINGTON POST, Jan. 11, 2012, http://www.huffingtonpost.com/2012/01/11/guantanamo-bay-10th-anniversary-indefinite-detention-american-citizens_n_1197547.html; Joshua Dratel, *A Loaded Gun*, GUERNICA MAGAZINE, Jan. 12, 2012, http://www.guernicamag.com/blog/3396/joshua_dratel_tbd/; Kate Martin, *A Peculiar and Pernicious Myth: Domestic Military Detentions*, HUFFINGTON POST, Jan. 12, 2012, http://www.huffingtonpost.com/kate-martin/defense-authorization-act_b_1201668.html.

⁵⁷ See Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010, S. 3081, 111th Cong. (2010).

An individual, including a citizen of the United States, determined to be an unprivileged enemy belligerent . . . may be detained without criminal charges and without trial for the duration of hostilities against the United States or its coalition partners in which the individual has engaged, or which the individual has purposely and materially supported, consistent with the law of war and any authorization for the use of military force provided by Congress pertaining to such hostilities.⁵⁸

After neither of these bills became laws, the Republican-controlled House adopted a new tactic to limit presidential decision-making power over the future of Guantanamo detainees. In December 2010, the House added Guantanamo provisions to a military spending bill, banning the use of federal money to bring Guantanamo detainees into the country for any purpose, including trials, whether military or civilian. The provisions also made it difficult to transfer the detainees to foreign countries, even if they were deemed safe to release. In response, Attorney General Holder sent a sharply-worded letter to Senate leaders, urging them not to pass the spending bill, which he characterized as “an extreme and risky encroachment on the authority of the Executive branch to determine when and where to prosecute terrorist suspects.”⁵⁹

While President Obama could have vetoed the spending bill, his administration claimed it was reluctant to block legislation primarily aimed at authorizing military pay and benefits. Obama finally chose to go the route of ratifying the bill while issuing “signing statements” stating his strong opposition to the Guantanamo provisions and expressing his intention to work with Congress to seek their repeal.⁶⁰ The same pattern, however, repeated itself in 2011. In June of that year, the Obama administration criticized the 2012 fiscal year military spending bill, to which were similarly annexed Guantanamo provisions, suggesting this time that the President would consider a veto if the bill “undermine[d] his ability as commander-in-chief or include[d] ideological or political policy riders.”⁶¹ In late December of 2011, the White House was still threatening to veto the bill, a stance which lasted until

⁵⁸ *Id.*

⁵⁹ Dafna Linzer, *Obama Administration Plans Guantanamo Showdown with Congress*, HUFFINGTON POST, Jan. 3, 2011, http://www.huffingtonpost.com/2011/01/03/obama-administration-guantanamo-congress_n_803752.html; Charlie Savage, *Holder Denounces a Bill to Ban Detainee Transfers*, N.Y. TIMES, Dec. 9, 2010, available at <http://www.nytimes.com/2010/12/10/us/politics/10gitmo.html>.

⁶⁰ SEE Z. BYRON WOLF, *PRESIDENT OBAMA SIGNS PENTAGON SPENDING BILL, ISSUES “SIGNING STATEMENT” OPPOSING PROVISIONS BANNING GITMO DETAINEE TRANSFER TO US*, ABC News, JAN. 7, 2011, <HTTP://ABCNEWS.GO.COM/BLOGS/POLITICS/2011/01/PRESIDENT-OBAMA-SIGNS-PENTAGON-SPENDING-BILL-ISSUES-SIGNING-STATEMENT-OPPOSING-PROVISIONS-BANNING-GI/>.

⁶¹ David Alexander, *White House Criticizes House Defense Spending Bill*, REUTERS, June 23, 2011, <http://www.reuters.com/article/2011/06/23/usa-budget-defense-idUSN1E75M1T120110623>.

sufficient changes had been made that the President was confident “that the language does not challenge or constrain the President’s ability to collect intelligence, incapacitate dangerous terrorists, and protect the American people.”⁶² Among others, slight changes were made to maintain the Executive’s prerogative in selecting whether or not to place someone in military custody. In an incredibly revealing bit of history, much of the disagreement surrounding the 2012 NDAA involved citizen detention provisions highly similar to those at issue with Sen. McCain’s proposed 2010 amendment. As a concession to avoid the veto threat, Democrats and Republicans agreed on an evasive provision that “[n]othing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.”⁶³ President Obama signed the bill on December 31, 2011, again issuing a signing statement clarifying his administration’s interpretation of Executive war powers. However, the provisions restricting detainee transfer to the United States and preferring military detention for the vast majority of terror suspects remain in the Act, signing statement or not.

In this tug-of-war between the President and Congress, it is disappointing but hardly surprising to observe the Administration’s waffling on one of the most pressing and controversial issues concerning Guantanamo. In November 2009, Attorney General Eric Holder announced that five detainees allegedly responsible for the 9/11 attacks, including our client Ramzi Bin Al Shibh, would be tried in the lower Manhattan federal court for the Southern District of New York. This decision, which seemed a logical and appropriate “no-brainer” from a legal and policy standpoint, particularly in light of the careful analysis and conclusions set forth in the President’s 2009 National Archives Speech, was met with tremendous hostility. On February 2, 2010, Senator Lindsey Graham (R-SC) introduced a bill to prohibit the use of Department of Justice funds for the prosecution in Article III courts of any individuals involved in the September 11th attacks.⁶⁴ In March 2010, Obama’s advisors recommended reversing Holder’s plan. On March 7, 2011, the Obama administration created the first formal indefinite detention system in Guantanamo. At the same time, President Obama issued an Executive Order providing that continued detention was warranted if it was “necessary to protect against a significant threat to the security of the United States,” and

⁶² Statement by the White House Press Secretary, Dec. 14, 2011, *as quoted in* Charlie Savage, *Obama Drops Veto Threat Over Military Authorization Bill After Revisions*, N.Y. TIMES, December 14, 2011, <http://www.nytimes.com/2011/12/15/us/politics/obama-wont-veto-military-authorization-bill.html>

⁶³ See H.R. 1540, 112th Cong. § 1021(e) (2011).

⁶⁴ Bill to prohibit the use of Department of Justice funds for the prosecution in Article III courts of the United States of individuals involved in the September 11, 2001 terrorist attacks, S. 2977, 111th Cong. (2010).

creating a periodic detention review system.⁶⁵ On April 4, 2011, Attorney General Eric Holder and the Obama administration gave in to the political hostility against the decision to try the 9/11 case in New York and announced that it would be reinstated in military commissions at Guantanamo.⁶⁶ Finally, on May 27, 2011, Obama signed the Republican-backed extension of the PATRIOT Act, allowing intelligence agencies to continue conducting roving surveillance, collecting business documents and conducting surveillance of “lone wolf” operators, who are not acting against the U.S. as part of an established terrorist group, for another six years.⁶⁷

NARCO-TERRORISM PROSECUTIONS

From trying to detain the likes of Bill Stoecker pre-trial in 1987, to the staggering current pre-trial detention statistics, along with serious legislation for indefinite preventative detention and the myriad of problems created by the post 9/11 counterterrorism legislation, a new form of federal criminal prosecution and detention combining both the “War on Drugs” and the “War on Terror” is beginning to appear in the federal courts, with relatively little notice or fanfare. For one good example, it is worth looking at two recent indictments in the U.S. District Court for the Southern District of New York. In announcing on July 26, 2011, the unsealing of indictments against Taza Gul Alizai, Siavosh Henareh, Bachar Wehbe and Cetin Aksu, U.S. Attorney Preet Bharara took a page from the well-worn national security apocalyptic fear playbook: “[T]oday’s indictments provide fresh evidence of what many of us have been seeing for some time: the growing nexus between drug trafficking and terrorism, a nexus that threatens to become a clear and present danger to our national security.” Bharara went on to add, one assumes to defuse the obvious questions of jurisdiction over foreign nationals outside the U.S.: “[A]s crime goes global, the long arm of the law has to get even longer.”⁶⁸ Bold words indeed, and as one commentator mentioned, this arrest “shine[s] a light on an aspect of the war on terror that is less visible and rarely reported on. While the connection between drug trafficking and the funding of terrorists is well known, it is rare to see DEA operations such as this that expose the direct links between the two.”⁶⁹

Alizai, an Afghan national, is charged in a four-count indictment with violations of, among other things, Title 21, United States Code, Section 960a, which makes it a crime to “provide a thing of pecuniary value to a person

⁶⁵ *SEE EXEC. ORDER NO. 13567*, 76 FED. REG. 13277 (MAR. 7, 2011).

⁶⁶ *See Guantanamo Bay Timeline*, THE WASHINGTON POST, available at <http://projects.washingtonpost.com/guantanamo/timeline/> (last visited Sept. 11, 2011).

⁶⁷ *See Jim Abrams, Patriot Act Extension Signed by Obama*, HUFFINGTON POST, July 26, 2011, http://www.huffingtonpost.com/2011/05/27/patriot-act-extension-signed-obama-autopen_n_867851.html.

⁶⁸ *See Feds: Taliban Supporter Charged in Drug Sting*, ASSOCIATED PRESS, July 26, 2011, available at http://www.usatoday.com/news/world/2011-07-26-dea-drugs-taliban_n.htm.

⁶⁹ Wes Bruer, *4 Detained in Narco-Terror Case Abroad*, THREAT MATRIX: A BLOG OF THE LONG WAR JOURNAL, July 26, 2011, available at http://www.longwarjournal.org/threat-matrix/archives/2011/07/four_detained_in_narco-terror.php (last visited 2/29/2012).

engaging in terrorist activity.” The indictment alleges that Alizai, “who lives and operates in Afghanistan,” provided heroin [the thing of pecuniary value] to “the Taliban, and its members, operatives and associates, having knowledge that said persons and organization have engaged in and engage in terrorism and terrorist activity, which activity violates the criminal laws of the United States, occurs in and affects foreign commerce, and causes and is designed to cause death and serious bodily injury to nationals in the United States while the nationals are outside of the United States.”⁷⁰ Interestingly as well, the indictment alleges, as it must for jurisdictional purposes, that Alizai “will be first brought to and arrested in the Southern District of New York.”⁷¹ In order to effectuate Alizai’s arrest and transportation to the United States, Alizai was supposedly lured out of Afghanistan to Maldives. According to press reports, Alizai sold about five kilograms of heroin in May 2008 to a DEA source in Afghanistan. The source, two years later, posed as a Taliban representative wanting to arrange the sale of six AK-47 assault rifles and an additional ten kilograms of heroin.

In the second prosecution, it is alleged that Heareh, Aksu, and Wehbe arranged to import hundreds of kilograms of heroin into the United States, telling DEA informants that they would use the proceeds of the drug sales to buy weapons for Hezbollah. The men also allegedly signed a written agreement in Malaysia to buy, among other things, 48 American-made Stinger missiles, 5,000 AK-47 assault rifles, and 1,000 handguns for \$9.5 million. Needless to say, all four narco-terrorism defendants were detained pre-trial, which, in many ways, is the least of their problems; all four are facing potential sentences of life without parole.

The *Alizai* case, while the most recent and, perhaps, the most spectacular, is not the only example of the United States extending the reach of its long arm of the law beyond its own borders, in the commingling of both the war on drugs and war on terror. The authority for this type of “long-arm” arrest can be found in the aptly described “Narco-Terrorism” legislation enacted by Congress in 2006. 21 U.S.C. § 960a is extraordinary enough to cite substantially:

Whoever engages in [drug activity] that would be punishable . . . if committed within the jurisdiction of the United States . . . knowing or intending to provide, directly or indirectly, anything of pecuniary value to any person or organization that has engaged or engages in terrorist activity . . . shall be sentenced to a term of imprisonment of not less than twice the minimum punishment [otherwise required for

⁷⁰ Indictment, *United States v. Alizai*, No. 10-CR-799 at 6–7 (S.D.N.Y. filed Sept. 9, 2010), [available at](http://www.courthousenews.com/2011/07/26/Gul%20Alizai,%20Taza%20S1%20Indictment%20-%20signed.pdf) <http://www.courthousenews.com/2011/07/26/Gul%20Alizai,%20Taza%20S1%20Indictment%20-%20signed.pdf>.

⁷¹ *Id.* at 3.

the drug crime].

Thus, any drug-related crime, committed anywhere in the world, by any person, no matter how remote or indeed non-existent the link with the United States, is now subject to being charged and tried in a U.S. federal court, after being transported, most often forcibly, to United States territory.⁷² Indeed, the Department of Justice readily acknowledges that it has brought a “number of cases under Section 960A of Title 21, the narco-terrorism statute, to disrupt individuals and networks attempting to use narcotics proceeds to finance terrorist organizations” including FARC, the Taliban, and al Qaeda.⁷³ The room for prosecutorial abuse in these instances seems virtually self-evident.

Another recent example is the Jamal Yousef case before the Southern District Court of New York. The government alleges that Yousef and unnamed co-conspirators agreed to provide military-grade weapons to an individual purporting to represent the FARC (Fuerzas Armadas Revolucionarias de Colombia), which is on the U.S. government designated terrorist organization list.⁷⁴ In July 2006, Yousef was arrested and convicted in Honduras of passport fraud and illegal firearm protection. According to the government, Yousef was transferred from a Honduran prison to a chartered plane that brought him to New York, following an extradition agreement.⁷⁵ According to the defendant in his motion to dismiss the indictment for outrageous government conduct, he was released from the Honduran prison, and after he exited the prison, abducted by men with automatic weapons, taken into a truck, forced to sit with his head down, driven with an escort to a helicopter, and then transferred to a jet. Once aboard the plane, he was informed that the other passengers were U.S. agents, including one DEA Special Agent. The agents read Yousef his rights, and presented him with a Miranda waiver form in Spanish, which he signed.⁷⁶

In denying Yousef’s motion to suppress the indictment based on outrageous government conduct, the Southern District Court of New York found that nothing in the U.S.-Honduras extradition treaty precluded either

⁷² 21 U.S.C. § 960a (2006).

Rumor has it, for example, that Alizai was convinced by undercover DEA agents to leave Afghanistan on a pretext. He was then flown to Dubai, then to the Maldives where he was arrested.

⁷³ *Countering Terrorist Financing: Progress and Priorities*, Statement of Lisa O. Monaco, Assistant Attorney General, National Security Division, Hearing Before the Subcommittee on Crime and Terrorism, Committee on the Judiciary, 112th Cong. (2011), available at <http://www.judiciary.senate.gov/pdf/11-9-21MonacoTestimony.pdf> (last visited Feb. 29, 2012).

⁷⁴ The FARC (Revolutionary Armed Forces of Colombia) is included in the list of Foreign Terrorist Organizations (FTOs) designated by the Secretary of State in accordance with section 219 of the Immigration and Nationality Act (INA). See Office of the Coordinator for Counterterrorism, *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE, May 19, 2011, available at <http://www.state.gov/s/ct/rls/other/des/123085.htm>.

⁷⁵ *United States v. Yousef*, 2011 WL 2899244 at *1 (S.D.N.Y. June 30, 2011).

⁷⁶ *Id.* at *2.

party from committing forcible abductions.⁷⁷ The court also examined the Supreme Court's jurisprudence establishing that "the use of unconventional methods to secure a defendant's appearance in the United States does not strip the Government of the power to prosecute the defendant."⁷⁸

Another example illustrates what narco-terrorism defendants can expect once they have arrived in the United States. Jose Maria Corredor-Ibague was the first person to be indicted under 21 U.S.C. § 960a, the narco-terrorism statute.⁷⁹ Corredor-Ibague, together with nine other defendants, is alleged to have controlled a clandestine airstrip in the jungles of Southern Colombia, from which small aircraft transported hundreds of kilograms of cocaine to the United States, Mexico, Brazil, and Europe.⁸⁰ The link between these activities and terrorism is that the defendant is alleged to have charged a "tax" on these shipments, which he remitted to the FARC. In addition, the airstrip was allegedly used by planes bringing weapons to the FARC. Corredor-Ibague was arrested in October 2008⁸¹ and he was, unsurprisingly, ordered detained without bond.⁸² In a separate indictment, Corredor-Ibague was also charged with two counts of material support to terrorist organizations.⁸³ In both of those cases, no action seems to have been taken either to resolve the case or bring it to trial since June 2009.

What these extraterritorial⁸⁴ narco-terrorism sting operations, investigations and arrests also point to is the obvious commingling of foreign intelligence information with domestic criminal investigators and vice-versa, a direct offshoot of the failure of both the law enforcement and intelligence communities to have detected 9/11 in advance. While this issue has been exhaustively discussed in counterterrorism and legal circles, and legislation enacted to permit the same,⁸⁵ its impact in domestic criminal prosecutions, as these narco-terrorism cases illustrate, is just beginning to be felt. It remains to be seen how extensive these kinds of investigations become. However, experience teaches that, like pre-trial detention statutes, more law enforcement tools and techniques usually result only in more investigations, prosecutions, and imprisonment. Whether these tools result in safer streets and a safer world

⁷⁷ *Id.* at *5.

⁷⁸ *Id.* at *6.

⁷⁹ Jim Kouri, *Colombian FARC Terrorists Extradited to US on Terrorism and Drug Charges*, CANADA FREE PRESS, Oct. 20, 2008, <http://www.canadafreepress.com/index.php/article/5689>.

⁸⁰ *Id.*

⁸¹ *United States v. Ibague*, No. 1:4-CR-212 (D.D.C. filed May 3, 2004), ECF No. 121.

⁸² *Id.* at ECF No. 129.

⁸³ *United States v. Ibague*, No. 1:6-CR-344 (D.D.C. filed Nov. 30, 2006).

⁸⁴ For a very interesting history of the evolving concept of "territoriality" in American law and foreign policy, see KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* (Oxford Univ. Press 2009).

⁸⁵ See, e.g., Jerome P. Bjelopera, *The Federal Bureau of Investigation and Terrorism Investigations*, 3 CONG. RES. SERV. (Dec. 28, 2011), available at <http://www.fas.org/sgp/crs/terror/R41780.pdf>. See also [Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801, *et seq.*

is but another question, but suspicions remain if the War on Drugs and the current day violence in Mexico is any indicator.

Seeping into the landscape beyond straightforward terrorism and/or narco-terrorism prosecutions, furthermore, is a more subtle but equally ominous hybrid of cases where foreign intelligence information is being used in the prosecution of ostensibly domestic crimes. It is not uncommon these days in routine federal court criminal prosecutions to encounter evidence obtained pursuant to searches or overhears conducted pursuant to the Foreign Intelligence Surveillance Act (“FISA”).⁸⁶ Whether this is all for better or worse, one supposes, depends upon your view of the world and your priorities. But the political and moral overtones and ultimate ramifications of this commingling of both foreign and domestic policy issues between the wars on drugs and terror need at least to be continually examined.

Ominously, in public comments last Fall, in a speech before the Council on Foreign Relations in Washington D.C., Secretary of State Hillary Clinton sparked tensions with Mexico when she compared the Mexican drug war to “an insurgency” akin to the situation in Colombia in the 1980s. Her specific comment is telling for our purposes: “[W]e face an increasing threat from a well-organized network, drug-trafficking threat that is, in some cases, morphing into or making common cause with what we would consider an insurgency, in Mexico and in Central America.” While Mexico rejected the comparison, the press raised speculation about whether Washington was pushing to increase its presence in Mexico.⁸⁷ In the same speech, Secretary Clinton was also quoted as saying that “preventing the violence from spreading [in Mexico] required improved institutional capacity, particularly in law enforcement, together with *military support* and the political will to fight the cartels.”⁸⁸ Secretary Clinton was also quoted in the same speech as saying that this was “a new American moment” in global politics and that the model of American leadership “offers our best hope in a dangerous world.”⁸⁹

Secretary Clinton was also quoted in this Council on Foreign Relations speech as saying: “The world is counting on us. When old adversaries need an honest broker or fundamental freedoms need a champion, people turn to us.”⁹⁰ With all due respect to Secretary Clinton, if what this truly means, as I suspect it does, is that this new American moment will have us exerting ourselves further into this dangerous world by exporting the War on Drugs and using our military, law enforcement, and intelligence agencies to fight that old war and

⁸⁶ See Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801–1885c (2008); see also David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT’L SECURITY L. & POL’Y 1, 4 (2011).

⁸⁷ See Tom A. Peter, *Mexico Denies Hillary Clinton’s ‘Insurgency’ Comparison*, CHRISTIAN SCIENCE MONITOR, Sept. 8, 2010, <http://www.csmonitor.com/layout/set/print/content/view/print/324566>.

⁸⁸ *Clinton Says Mexico Drug Crime Like an Insurgency*, BBC NEWS, Sept. 9, 2010, <http://www.bbc.co.uk/news/world-us-canada-11234058?> (emphasis added).

⁸⁹ *Id.*

⁹⁰ *Id.*

the increasingly aging War on Terror, please count me out. Thirty-seven years of participating in one such war and now over ten in the other hardly kindles any warm feelings of honest brokering or championing of freedoms.
