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Howard H. Baker Jr.

Jesse O. Hale Jr.

Bruce Tonn

Amy Gibson

Stephanie Smith

*See next page for additional authors*

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**Authors**

Howard H. Baker Jr., Jesse O. Hale Jr., Bruce Tonn, Amy Gibson, Stephanie Smith, Rachel Tuck, David M. Mirvis, Natalie Manayeva, Dzmitry Yuran, Michael R. Fitzgerald, and Glenn Harlan Reynolds

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## SELECTED ARTICLES

<b>INTRODUCTION</b> .....	1
<i>Senator Howard H. Baker, Jr.</i>	
<b>REINING IN RENEGADE PRESIDENTIAL ELECTORS: A Uniform State Approach</b> .....	2
<i>Jesse O. Hale Jr.</i>	
<b>U.S. ATTITUDES AND PERSPECTIVES ON NATIONAL ENERGY POLICY</b> .....	11
<i>Bruce Tonn Amy Gibson Stephanie Smith Rachel Tuck</i>	
<b>HEALTH AS AN ECONOMIC ENGINE: Public Policy Implications</b> .....	30
<i>David M. Mirvis</i>	
<b>RESEARCH NOTE: A Comparative Study of Images Created by Press Coverage of the United States and the Republic of Belarus</b> .....	46
<i>Natalie Manayeva Dzmitry Yuran Michael R. Fitzgerald</i>	
<b>BOOK REVIEW: <i>The Terrorized Presidency</i></b> .....	55
<i>Glenn Harlan Reynolds</i>	
<b>STUDENT SYMPOSIUM on National Security</b> .....	59
<b>POLICY CONFERENCE-WORKSHOP REPORTS</b>	
<b>FORMULATION OF A BIPARTISAN ENERGY AND CLIMATE POLICY: Toward an Open and Transparent Process</b> .....	168
<b>FIVE PUBLIC POLICY IDEAS FOR BUILDING OBAMA'S NEW ECONOMY</b> .....	192

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**INTRODUCTION TO THE  
BAKER CENTER JOURNAL FOR APPLIED PUBLIC POLICY,  
VOLUME 3**

**W**elcome to the third issue of the Baker Center Journal for Applied Public Policy. I am pleased that this issue, as its predecessors, evidences the vibrancy of the Baker Center's governance and public policy programs and makes a contribution to our collective understanding about a variety of policy issues currently being discussed in America. Relating to our system of governance, Jess Hale Jr. examines a proposal for a uniform state approach to reining in renegade presidential electors and Professor Glenn Reynolds reviews Jack Goldsmith's book *The Terror Presidency: Law and Judgment Inside the Bush Administration*. Relating to media and foreign affairs and the role of the media in political life, Dr. Mike Fitzgerald and two of his students provide us with "A Comparative Study of Images Created by Press Coverage of the United States and the Republic of Belarus."

Relating to health policy, Dr. David Mirvis, recently appointed as a Senior Fellow for Health Policy at the Center, explores the public policy implications of viewing health as an engine of economic growth.

Relating to energy and environmental policy, Drs. Bruce Tonn and Amy Gibson and Baker Scholars Stephanie Smith and Rachel Tuck explore U.S. Attitudes and Perspectives on National Energy Policy. I am also very pleased that this issue includes a report of an excellent conference – "Formulation of a Bipartisan Energy and Climate Policy: Toward and Open and Transparent Process" - that was co-sponsored by the Baker Center and the Woodrow Wilson International Center for Scholars. This issue also includes the result of another successful collaboration between the Baker and Wilson Centers that focused on "Five Public Policy Ideas for Building Obama's New Economy." I look forward to further productive collaborations between the Baker and Wilson Centers.

Relating to global security policy, this issue includes a Student Symposium on National Security. Although the Baker Center Journal has provided an outlet for publication of student scholarship since its inception, I am particularly pleased that the student co-editors - Baker Scholars Elizabeth Wilson Vaughan and Bradford A. Vaughan - took the initiative to expand upon the efforts of their predecessors and to provide us with an expanded set of excellent students essays each of which addresses an important national security policy issue. It is an important part of the Baker Center's mission to engage UTK students in the political and public policy process, and I applaud our student authors for their contributions to this symposium.

I hope you find this issue of the Baker Center Journal for Applied Public Policy to be both interesting and thought-provoking and that it will encourage you to participate in America's unique and wonderful political and policy processes.



Howard H. Baker Jr.



# REINING IN RENEGADE PRESIDENTIAL ELECTORS: *A Uniform State Approach*

*Jesse O. Hale Jr.*

## INTRODUCTION

As we begin our meditation on one specific aspect of how U. S. citizens govern themselves in electing the President of the United States, let us gaze into the future.<sup>1</sup> It is just after Election Day in November 2016 and the nation has just held a contentious presidential election. In the popular vote the candidate of one party has a comfortable margin of 53% to 46% over her challenger from the other party. The challenger, however, has a narrow lead of 271 to 267 in the media's estimate of votes in the Electoral College. In the contentious partisan atmosphere of the past two decades, the media are looking to see whether the popular vote winner will concede or wait until the final tally of the Electoral College. The cable networks are almost nonstop reminding their viewers that it is the Electoral College not the popular vote, which determines the election of a U. S. President. Half the blogosphere is attempting to whip up a frenzy over the prospect that the will of the people will be overturned by an anachronistic and elitist institution such as the Electoral College. All it would take for the popular vote winner to have a real chance to assume the presidency in January 2017 would be for three renegade electors to switch their votes to that candidate when the Electoral College meets in state capitols in December. Only two renegade electors would throw the election into Congress. Journalists are desperately attempting to interview various talking heads as Al Gore and George W. Bush maintain media silence. This is not quite the 2000 election and no one wants to lose. If the three renegade electors violate the almost universal unit rule of "winner-take-all" for a state's electoral votes, will Congress accept those votes when it counts them? Who is going to be President of the United States? The protests are getting ugly. Are we heading to a constitutional crisis?

In 2000, 2004, and even 2008,<sup>2</sup> there were discussions of the Electoral College in the mass media. We were told that the Democratic and Republican parties put party loyalists in these positions so the votes would be safe partisan votes. Party loyalty is almost like a wedding vow. It is sacred, not to be violated. Yet people are capable of betrayal or disloyalty. Could a Democrat elector be a Judas to his party and vote for a Republican and switch parties afterwards with expectations of a reward? Could a Republican elector commit political adultery and vote for a Democrat on the principled belief that the nation is better served by electing the clear popular vote winner or that upon deliberation on the matter that the other party's candidate was just the best person for the job?

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1 The author's views do not represent the views of the Office of Legal Services or of the Tennessee General Assembly. The author would like to thank Susan Nichols, Robert Bennett, James Bopp, Jack Davies, Doug Himes, Paige Seals, Emily Urban, and Carl Pierce for their comments on the lecture or the text. Of course, the author alone is responsible for any errors in the final product. This article was originally delivered as a lecture at the Howard H. Baker Jr. Center for Public Policy at the University of Tennessee-Knoxville, on October 20, 2009

2 Michael Cooper, "A Blowout? No, But a Clear-Cut Win for a Change," *New York Times*, 7 November 2008.

In the 2000 contest between Al Gore and George W. Bush, when the expected outcome was for Bush to win the popular vote and Gore to prevail in the Electoral College, it was reported that the Bush campaign explored the possibility of encouraging some Democratic electors to defect to Bush---of course that was not the way it turned out as we went down the road of hanging chads in Florida.<sup>3</sup> There were also rumors that Gore had looked into the possibility of Republican defectors.<sup>4</sup> Similarly, in 1977 Bob Dole acknowledged that after the 1976 election the Republican ticket had looked around for electors to defect.<sup>5</sup> With approximately nine electors having been faithless over the course of presidential elections since 1948, a faithless elector is not an unheard of occurrence.<sup>6</sup>

### *The Electoral College and Other Faithless Electors*

Yet the possibilities for problems associated with the Electoral College are real ones even if the College has not produced a full-blown crisis of electoral legitimacy in the last two elections. While some question the continued desirability of retaining the Electoral College, for the foreseeable future retention appears likely as the American people continue to respect its place in the Constitution,<sup>7</sup> though the National Popular Vote Initiative or scholars such as Stanford Levinson might dissent on that point.<sup>8</sup> Given its continuing place in American presidential elections, those committed to making American democracy work with a degree of legitimacy need to address genuine practical problems with the Electoral College before a political train wreck finally occurs. The two most significant practical issues are (1) what happens if an election is thrown into Congress for resolution and (2) the problem of the faithless elector. Former Northwestern law school dean Robert Bennett's *Taming the Electoral College* provides an excellent treatment of the range of issues relating to the College, including the College's history and options for solutions.<sup>9</sup> Some solutions are more practical than others, but there are options to deal with these issues. However, in this paper, we only address the problem of renegade or rogue electors.

One problem that has occurred over our nation's history is that of the strange case of the renegade elector or the "faithless elector" as those souls are more commonly known. A faithless elector is an elector who refuses to cast his or her ballot for the presidential ticket that wins the popular vote in that elector's state, or district in some cases. The average voter

3 Robert Bennett, *Taming the Electoral College* (Palo Alto: Stanford, 2006): 100-101.

4 Ibid.

5 Ibid, n31, 231.

6 Eight such electors are identified by L. Paige Whitaker and Thomas H. Neale, "The Electoral College: An Overview and Analysis of Reform Proposals," *CRS Reports for Congress*, 5 November 2004: 12. Bennett, *Taming the Electoral College*: 96, identifies one such elector in the 2004 election.

7 For a survey of the periodic reform proposals concerning the Electoral College, see Whitaker and Neale, "The Electoral College: An Overview and Analysis of Reform Proposals," *CRS Reports for Congress*, 5 November 2004.

8 See, <http://www.nationalpopularvote.com/> and Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (New York: Oxford, 2006).

9 See Robert W. Bennett, *Taming the Electoral College* (Palo Alto: Stanford, 2006). Bennett served as the official reporter for the Uniform Law Commission's Drafting Committee on Faithful Presidential Electors. Bennett also has supported the National Popular Vote Initiative. For a perspective that is both supportive of the Electoral College and more aligned with the approach of the Federalist Society, see Tara Ross, *Enlightened Democracy: The Case for the Electoral College* (Dallas: Colonial Press, 2004).

probably does not realize that he or she is only voting for a slate of electors who in turn will vote for the president and vice-president. In the 2000 election, two or three faithless electors could have reversed the outcome of the election or put the election into the House of Representatives. The problem has infrequently arisen in elections and really causes a problem only in razor-close elections. As I have noted, however, we do have such elections.

Relatively little law exists regarding the Electoral College and the voting of electors. In the U. S. Constitution there are requirements for each state to appoint electors as its legislature directs (Article II, Section 1, Clause 2); for Congress to determine a time for both choosing electors and for the electors to vote (Article II, Section 1, Clause 4), and for the meeting of the electors to vote by ballot for President and Vice-President. The Constitution directs that those votes will be transmitted to the President of the Senate who in the presence of both houses of Congress presides over the count of the electoral votes. If one person obtains a majority of the electors, then that person is elected President. If one person does not receive a majority, then the House of Representatives elect the President under a special voting arrangement required by the 12th Amendment.<sup>10</sup> After difficulties arose with the 1876 election, Congress enacted the Electoral Count Act in order to provide procedures to govern the appointment, voting, certification and counting of the votes of electors.<sup>11</sup> Finally, in *Ray v. Blair* the U.S. Supreme Court offered the only decision that arguably addresses the issue of the elector selection and voting in the Electoral College. The case concerned an elector voting under the unit rule approach produced by the ascent of political parties. The opinion arose out of a case where an Alabama primary candidate for elector refused the pledge requirement of the Democratic Party in that state. The Court held that the pledge requirement in the primary was not unconstitutional.<sup>12</sup> The Court did not address the issue of a properly chosen elector who violated the pledge in his or her vote for a candidate.

In our federal system, some issues are entrusted to the states and the election of presidents is one of those issues---at least initially. Congress has a limited and secondary role in this critical endeavor. The current discussions of federalism<sup>13</sup> can be seen to revolve around the separate state and federal spheres approach envisioned by the Supreme Courts led by Rehnquist and Roberts Supreme Courts.<sup>14</sup> As compared to the more cooperative approach to state and federal relations envisioned by the so-called "blue federalism."<sup>15</sup> Both

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10 The 12<sup>th</sup> Amendment supersedes Article II, Section 1, Clause 3 of the Constitution. It corrected a difficulty arising from the original arrangement when the person with the most votes became President and the one with the second highest total became Vice-President. The 12<sup>th</sup> Amendment adopted the current arrangement of separate votes for President and Vice-President. The 23<sup>rd</sup> Amendment also provides for electors for the District of Columbia.

11 3 U.S.C. Sections 1-18.

12 *Ray v. Blair*, 343 U.S. 214 (1952).

13 For two general discussions representing "liberal" and "conservative" viewpoints in the context of constitutional law generally see Richard Fallon, *The Dynamic Constitution* (New York: Cambridge, 2004), 157-172), and Charles Fried, *Saying What the Law Is: The Constitution in the Supreme Court* (Cambridge: Harvard, 2004), 13-48.

14 Dan Schweitzer, "Federalism and Separation of Powers: The Different Approaches of Chief Justice Roberts and Justice Alito on the Scope of State Power," *Engage*, 9/1:52-58 (February 2008).

15 See David J. Barron, "Foreword: Blue State Federalism at the Crossroads," *Harvard Law and Policy Review*, 3/1: 1-8 (2009); Robert Schapiro, "Not Old or Borrowed: The Truly New Blue Federalism," *Harvard Law and Policy Review*, 3/1: 33-57 (2009), and Judith Resnick, "What's Federalism For?" in Jack M. Balkin and Reva B. Siegel, eds. *The Constitution in 2020* (New York: Oxford, 2009), 269-284.

approaches, however, may find a constitutional common ground in addressing the issue of faithless electors. The College is clearly a state activity and Congress' cooperative role enters in the counting of electoral votes in accordance with the Electoral Count Act, so there are both separate spheres and cooperation. Further, specific constitutional provisions rather than the 10th Amendment govern the problem of faithless electors, so federalism debates associated with that amendment are not relevant.

Under the Constitution, each state has a number of electors set as equal to the state's number of representatives in the House of Representatives and the Senate. Although electors were originally selected by state legislatures as a general practice, the method of selection has varied over the years. States now select electors through election of slates of electors nominated by political parties. Because the names of the presidential electors do not appear on the Election Day ballots in November, the ordinary American voter often unwittingly casts a ballot for a slate of electors rather than directly for the candidate. Because most states allocate their votes based on the principle of winner-take-all,<sup>16</sup> where the popular vote winner in a state receives all of that state's electoral votes, elections tend not to be close in the Electoral College. However, they can be. Originally, before political parties, the electors were to deliberate and had discretion in casting their ballots. With the development of political parties, states have sought to remove elector discretion and tie the votes of their electors to the winners in the political party system by selecting party loyalists for each party's slate of electors. Instances of renegade or faithless electors who vote against their party are rare, but they happen as one renegade vote in both the 2000 and 2004 elections demonstrate. In 2000 one Gore elector from the District of Columbia abstained and in 2004 a Minnesota elector voted for John Edwards instead of John Kerry.<sup>17</sup> In addition to those relatively recent elections the list of examples includes a 1948 Truman elector in Tennessee who voted for Strom Thurmond, a 1960 Nixon elector in Oklahoma who voted for Harry Byrd of Virginia, and a 1968 Nixon elector from North Carolina who voted for George Wallace.<sup>18</sup>

The problem of the faithless elector is one difficulty to which there is a fairly practical resolution. A faithless elector violates the common trust of the voters by "faithlessly" not voting for the candidate who won the particular state's popular vote. In our party dominated system, as Robert Bennett notes, "faithless electors" are "electors who vote for presidential or vice-presidential candidates other than the candidates for those offices of the political party that nominated the electors."<sup>19</sup> Several states have recognized this problem and have tried to address it in a variety of ways. Pledges to vote according to party and the results of the election, with and without penalty, and criminal statutes are among the ways that states have sought a solution. However, lying in the background is the historical intention for the electors to exercise independent deliberation, which our 200-year old system of developed political parties has turned on its head by requiring electors chosen from the party faithful to vote as robots. Also it is the object of some concern that this hodgepodge of statutes in place in

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16 See Matthew J. Fiesta, "The Origins and Constitutionality of State Unit Voting in the Electoral College," *Vanderbilt Law Review* 54: 2009-2155 (2001).

17 Bennett, *Taming the Electoral College*, 96.

18 Whitaker and Neale, "The Electoral College: An Overview and Analysis of Reform Proposals," 12.

19 Robert Bennett, "Background Memorandum, Uniform Faithful Presidential Electors Act," 1.

about thirty states<sup>20</sup> may not actually address the problem.<sup>21</sup> Even if an elector is penalized for voting faithlessly, the faithless vote may still be counted. A number of faithless votes have been counted, though what was counted at the counting sessions were the votes forwarded by the state “presumably with the governor’s imprimatur.”<sup>22</sup>

So what is needed is a workable solution that comes out of the states that actually is faithful to the Constitution even as it makes contemporary election machinery work in the changed environment occasioned by political parties. But how might states make a workable solution? Enter the possibility of a unified approach by states to faithless electors in the form of a uniform state law.<sup>23</sup> A statute enacted by the individual states that is constitutionally defensible and workable would be faithful to the federalism underlying the constitutional structure of the Electoral College.

### *The Uniform Law Conference*

The National Conference of Commissioners on Uniform State Laws, also known as the Uniform Law Commission (ULC)<sup>24</sup> is a group that for over a century has brought states together to respond to many issues through consensus on state legislation. The ULC now has taken on the task of devising a uniform state law concerning faithless electors. Since 1892, the ULC has sought to improve state law by providing well-drafted and nonpartisan legislation to states for each state to enact. The ULC consists of more than 300 practicing lawyers, law professors, legislators, judges and government attorneys who come together without compensation to craft legislation. Such legal luminaries as Karl Llewellyn and Roscoe Pound, and future U.S. Supreme Court justices, such as William Rehnquist and David Souter, have been members. While lawyers know the Uniform Commercial Code as probably the organization’s most famous work product, the ULC crafts a variety of uniform and model legislation for states,<sup>25</sup> including: the Uniform Anatomical Gift Act and the Uniform Interstate Family Support Act. The ULC produces draft legislation pertaining to a wide spectrum of the law, including family law, corporate law, estate law, international law, property law, and health care. The ULC’s legislation seeks to reduce federal preemption brought about by inconsistent state laws while sustaining state independence. For legislation to be adopted by the ULC, the “subject matter must be appropriate for state legislation in view of the powers granted by the Constitution of the United States to the Congress. . . . [and] . . . the subject . . . shall be such that uniformity of law among States will produce significant benefits

20 See National Conference of State Legislatures, “The Electoral College,” <http://www.ncsl.org/default.aspx?tabid=16555>.

21 See Beverly J. Ross and William Josephson, “The Electoral College and the Popular Vote,” *Journal of Law and Politics*, 12: 665-747 (1996) and Vasan Kesevan, “The Very Faithless Elector?” *West Virginia Law Review* 104: 123-141 (2001).

22 Bennett, “Background Memorandum,” 8.

23 Bennett recognized this possibility before the drafting committee was appointed. See *Taming the Electoral College*, 117-118.

24 See National Conference of State Legislatures, <http://www.ncsl.org/default.aspx?tabid=16082>.

25 As a general matter, “uniform” is used for legislation, which anticipates a large number of enactments, and uniformity of the proposed provisions is a principal objective of the legislation. On the other hand, “model” describes legislation that has uniformity only as a desirable objective and its desired objectives can be attained even if a significant number of jurisdictions do not adopt the legislation in its entirety. See Uniform Law Commission, “Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts,” [1/13/2001], ULC Reference Book 2008-2009, 120-121.

to the public through improvements in the law . . . or will avoid significant disadvantages likely to arise from diversity of state law . . .”<sup>26</sup>

The ULC works through its annual meeting where the commissioners gather for a week to read and debate line by line the legislation under consideration. Throughout the year, the ULC also works through its drafting committees, which generally produce a model or uniform act for approval by the entire Conference over a two-year (or longer) period. The Committee on Faithful Presidential Electors is one of those committees.<sup>27</sup>

Through its Drafting Committee on Faithful Presidential Electors Act,<sup>28</sup> the ULC is in the process of crafting a legislative proposal that would require an elector to pledge to vote for the popular vote winner in the elector’s state, provide for alternate electors and certification of slates of electors, and establish a procedure for counting votes that would disqualify faithless votes and substitute faithful votes for casting. The current draft of the act<sup>29</sup> still has one more year of consideration by the ULC before the Conference votes on whether to send it out to the states with its recommendation that the act be adopted as either a uniform or model act. The drafting committee and the ULC are striving for a workable consensus proposal. This proposal seeks to make the existing system avoid a significant potential problem and it takes no position on the question of whether the existing Electoral College should continue or be abolished.

### ***The Santa Fe Draft***

In 2009, the Drafting Committee presented a proposal to the ULC’s annual meeting in Santa Fe, New Mexico.<sup>30</sup> The only significant opposition to the proposed act came from the National Popular Vote initiative. The group opposed the act because it did not view the proposal as neutral with respect to the enactment of National Popular Vote legislation, and considered it harmful to its efforts.<sup>31</sup> The proposed Act hopefully will be finalized and approved by the whole Conference at its July 2010 annual meeting in Chicago.

In essence, the committee proposed an Act that requires each of a state’s electors to pledge to cast his or her ballots for the winning presidential and vice-presidential candidates. The pledge requirement is augmented with a specific procedure for counting ballots at the December meeting of the electors in each state that refuses to count a ballot marked in violation of the pledge as cast, deems the offering elector’s position as resigned, substitutes an alternate elector until the ballot is marked for a candidate in accord with the pledge, and only then accepts the ballot as cast. By this mechanism, a correctly voted set of votes are

26 Uniform Law Commission, “Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts,” [1/13/2001] *ULC Reference Book 2008-2009*, 119.

27 The drafting committee is in part the fruit of efforts to address this issue with a uniform state law over a period of years by long-time ULC Commissioner Jack Davies.

28 The author is a member of the drafting committee.

29 [http://www.law.upenn.edu/bll/archives/ulc/fpe/2009am\\_draft.htm](http://www.law.upenn.edu/bll/archives/ulc/fpe/2009am_draft.htm)

30 For both the draft and the “Background Memorandum,” the Committee owes a tremendous debt of gratitude to the Committee’s Reporter, Robert W. Bennett, who brought his wealth of scholarship to our task with kind grace and hard work. I am fortunate to have had Bennett’s admirable products to draw on in developing this paper.

31 See, Letter of Dr. John R. Koza, Chair, National Popular Vote to Mrs. Susan Kelly Nichols (Chair of the ULC Drafting Committee on Faithful Presidential Electors), “Comments on ‘Draft Uniform Act on Faithful Presidential Electors,’” 16 June 2009.

forwarded to Washington, D.C. under the Electoral Count Act and the problem of a faithless elector is avoided. One significant motivation for states to adopt this act is to avoid the political havoc that would ensue from more deeply embroiling the courts in a controversial election where a candidate might attempt to swing an election with the defection of a faithless elector.

Walking through the proposed act, after a set of introductory definitions,<sup>32</sup> the Act requires the submission of a list of electors and alternate electors to the Secretary of State of every state for each slate of presidential and vice-presidential candidates on the state's ballot under the state's applicable election statutes.<sup>33 34</sup> Each individual on the list of electors and alternates is required to sign a pledge to vote for the winning presidential and vice-presidential candidate in that state. The signed pledge is attached to the list submitted to the Secretary of State. The Governor of the state includes these electors and alternates on the certificate of ascertainment required under 3 U.S.C. Section 6. If a vacancy occurs, the Governor is to submit an amended certificate.<sup>35</sup> At the meeting of the electors in December, the Secretary of State presides and fills any vacancy created by absent electors from the alternate electors, by a specified procedure.<sup>36</sup> All electors must sign the pledge. The Secretary of State provides each elector with presidential and vice-presidential ballots. Each elector completes the ballot and presents the completed ballot to the Secretary of State who examines the ballots and records as cast only those ballots that comply with the pledge. If an elector presents a ballot that does not comply with the pledge, then the elector is deemed to have resigned. A vacancy is thus created and filled by a substitute from the alternate electors. The substitute elector then votes in accordance with the pledge or another vacancy is created. A ballot is not counted as cast by an elector unless it conforms with the elector's pledge---by this mechanism a renegade or faithless elector is prevented from casting his or her ballot.<sup>37</sup> After all votes are cast, the Governor submits to the appropriate officials an amended certificate of ascertainment if it is required do to vacancies.<sup>38</sup> The Secretary of State also prepares a certificate of vote for the electors to sign for transmittal in accord with the Electoral Count Act.<sup>39</sup> The properly cast votes are counted in January by the President of the Senate and faithless votes are avoided.

One of the controversial matters that the Santa Fe draft did not address was whether to bind electors to their pledge if the popular vote winner in the vote for President dies or becomes disabled between election day in November and the meeting of the Electoral Col-

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32 Section 2.

33 Section 3.

34 In states such as Mississippi, or in Maine and Nebraska where electors are selected in districts, this approach would have to be modified.

35 Section 4.

36 Section 5.

37 Section 6.

38 Section 7.

39 Ibid.

lege in December.<sup>40</sup> Should an elector be bound to vote for a dead person? Should political parties be authorized to select a substitute candidate for whom electors would be bound to vote? In Tennessee, an elector is bound to vote, without a stated penalty, for the candidate of the political party that selected the elector if the candidates are alive. But, if that is not the case, then “the electors may cast their ballots in the Electoral College as they see fit.”<sup>41</sup> Not everyone agrees that Tennessee’s approach is the right one. In Santa Fe several felt that the draft needs to address that issue—even if it raises practical difficulties for enacting the legislation in state legislatures. The pragmatic concern for enactability often arises in developing uniform acts.

A significant issue lurking behind this proposed act is its constitutionality.<sup>42</sup> Would it survive a constitutional challenge? Given that at the beginning, electors had discretion in their voting, could a pledge to vote a certain way be upheld? In terms of earlier law, *Ray v. Blair* upheld a pledge requirement in the primary selection context, but did not address the issue of whether the pledge itself would be enforceable on a faithless elector when the Electoral College actually votes. From a pragmatic assessment of consequences, in order for our current mechanism built around political parties to work with legitimacy, a pledge would have to be enforceable. A return to unfettered elector discretion is not contemplated even by many members of the Federalist Society and may call for application of Justice Scalia’s invocation of “faint-hearted originalism.”<sup>43</sup> If the courts were to overturn a pledge statute on originalist grounds, or on other grounds, political havoc would ensue beyond that havoc already present in an election debacle that had become embroiled in the courts. Since *Ray v. Blair* does not mandate elector discretion and upholds some form of a pledge and since the practical consequences of invalidating a pledge statute could be significant, there is a fair, but not certain, argument that the pledge approach used by the draft act could survive a constitutional challenge.

## Conclusion

By attending to the reality of political parties in elections and the constitutional structure that has electors cast ballots,<sup>44</sup> the Faithful Presidential Electors Act seeks the “consti-

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40 The Constitution does make provision for what happens when a candidate dies after there is a President or Vic-President elect, but not before. See the 20<sup>th</sup> Amendment, Sections 3 & 4.

41 Tennessee Code Annotated, Section 2-15-104(c).

42 For Bennett’s assessment of the constitutionality of this approach, on which I significantly rely, see Bennett, “Background Memorandum,” 5-8.

43 See the use of the notion in Antonin Scalia, “Originalism: The Lesser Evil,” *University of Cincinnati Law Review*, 57: 849 at 864 (1989). The quote is “I hasten to confess that in a crunch I may prove a faint-hearted originalist.”

44 Despite his dissent in *Ray v. Blair*, Justice Jackson’s words in his famous concurring opinion in the *Youngstown Steel* decision, though arising out of questions about executive power in wartime, may also have application in attending to the reality of political parties in American elections:

The Constitution . . . must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is. . . . Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.

*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), at 653 (Jackson concurring).



tutional fidelity”<sup>45</sup> to an Electoral College mechanism that remains faithful to the federalism in its operation. By means of a balloting mechanism that binds electors with a pledge to vote for specified candidates, the problem of faithless or renegade electors can be solved. By remaining faithful to the Constitution in American democracy as it has evolved, the Act still takes seriously the original intent of electors who vote even if it has moved beyond the originalism of independent deliberation by electors. The approach taken in the Faithful Presidential Electors Act in some sense represents common ground between liberals and conservatives, between the American Constitution Society and the Federalist Society,<sup>46</sup> and between those committed to originalism and constitutional fidelity. Many interested parties genuinely seem to want our party-based system to work without an unnecessary constitutional crisis occasioned by a faithless or renegade elector. In an age of sometimes bitter partisan politics, both judicial and otherwise, workable common ground is something to be valued. And, if we can avoid a constitutional crisis in the process that may well be priceless.

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45 See, e.g., Goodwin Liu, Pamela S. Karlan, and Christopher H. Schroeder, *Keeping Faith with the Constitution* (Washington D.C.: American Constitution Society for Law and Policy, 2009).

46 The drafting committee included members of both organizations.

# U.S. ATTITUDES AND PERSPECTIVES ON NATIONAL ENERGY POLICY

*Bruce Tonn, The University of Tennessee*  
*Amy Gibson, The University of Tennessee*  
*Stephanie Smith, Maryville College*  
*Rachel Tuck, University of Tennessee*

## INTRODUCTION

The United States is facing a number of significant challenges to its energy supply. Rising and highly volatile energy costs, energy supply uncertainties, and increasing concerns about the environmental impacts of energy production (Gilman 2006, IPCC 2007) and use have created the growing realization that cheap, plentiful energy is something that can no longer be taken for granted. International relations concerning energy are strained, as worldwide demand for energy in countries like China and India is surging and distress about the Middle East is high.

Controversies plague many energy options open to the United States (Pew 2008). For example, nuclear energy policy and use has been shaped by negative public perceptions and attitudes about safety and reliability that are a result of the events at Three Mile Island, Chernobyl and in Japan (MIT 2003; Rosa and Rice 2004). Public awareness of global warming issues has brought unfavorable attention to carbon-based energy sources such as coal – long regarded as safe and politically acceptable. In a relatively short period of time, the biofuels industry has gone from basking in wide public acceptance to public excoriation in the food versus fuel debate. Similarly, the rise and fall of energy supply and demand since the oil crisis during the 1970s has contributed to public perception that energy supply may not be a “real” issue, making it difficult to gain public acceptance of certain policies regarding the management of supply or reduction of demand. Building new transmission lines (Gerlach 2004) and drilling for oil offshore (Freudenburg and Gramling 2004) have also proven to be controversial. Even relatively benign sources of energy such as wind face negative public scrutiny in the form of NIMBYism and concerns over aesthetics and bird strike (Johansso and Kaike 2007).

This paper presents the results of a national survey of Americans about their attitudes and perspectives on U.S. energy policy. Previous research explored U.S. energy policy from seven perspectives (see Appendix I for descriptions of these perspectives) and found that despite significant differences in values and goals represented by the perspectives, many commonalities exist among the perspectives around which national energy policy could be developed (Tonn et al. 2009).<sup>1</sup> The seven perspectives were designed to represent influential voices in the national energy policy debate. This survey was designed, in part, to provide insights to what extent the American public holds views similar or dissimilar to these seven perspectives.

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1 The previous Perspectives research was supported by collaboration between the Howard Baker Center for Public Policy and Deloitte Touche. We wish to thank KC Healy, Deloitte Touche, and the Howard H. Baker Jr. Center for Public Policy for providing financial support for this research.

This research contributes to the literature because the survey addressed national energy policy from a portfolio perspective. As noted above, many previous surveys and polls have focused on one or just a few particular aspects of national energy policy (e.g., nuclear power or off-shore oil drilling) (Greenberg 2009; Polling Report 2008; Bolsen and Cook 2008). Other social science research has focused on classifying types of energy consumers (Lutzenhiser 1993; Stern and Aronson 1984) and how different people perceive energy (Sovacool 2008).

The next section presents the survey methodology used in this research. The results section is broken into four sub-sections that address perceived seriousness of the energy problem, who is responsible for national energy problems, attitudes and perspectives towards a range of energy policy issues, and personal responsibilities for helping to contribute to solutions of national energy problems, respectively.

### ***Survey Methodology***

A web-survey firm, MarketTools, was contracted to administer the survey to a representative sample of Americans. This firm has access to a sample of 2.5 million Americans, known as TrueSample, which has undergone rigorous quality control. The survey was administered to a random sub-sample of TrueSample respondents that are representative of Americans throughout the United States. MarketTools estimated that 384 respondents from the TrueSample would meet our stipulation for a 95% confidence interval around the means of the questions responses. At the end of the survey period, which was conducted during summer 2009, a total of 402 respondents completed the entire survey. The sample of respondents is diverse over the important variables of age, gender, ethnicity, number of children and grandchildren, domestic status, education, employment status, and income. We believe that this sample is representative of the U.S. population.<sup>2</sup>

### ***Results***

As mentioned above, this section is broken into four sections that address: perceived seriousness of the energy problem; who is responsible for national energy problems; attitudes and perspectives towards a range of energy policy issues; and personal responsibilities for helping to contribute to solutions of national energy problems, respectively.

#### ***Seriousness of Energy Problem***

To begin the survey, respondents were asked about their perceptions as to the degree of severity of the energy problem for the United States. As indicated in Table 1, 80% of the respondents believe that the energy problem is at least a very large problem. Less than 3% dismiss energy as a problem requiring national attention. Thus, a first firm conclusion is that Americans believe that energy is a serious problem. This is not a surprising finding as polls since the 1970's have shown Americans consistently concerned about energy (Bolsen and Cook 2009).

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<sup>2</sup> The detailed demographics for these respondents are described in Appendix Table A1.

**Table 1**  
Size of U.S. Energy Problem  
(% Respondents)

Not a problem at all	1.7
A small problem	1
A moderate problem	17.2
A large problem	24.9
A very large problem	32.1
An extremely large problem	23.1

Respondents next were asked a general question about important issues that may be linked to energy production in the United States. Table 2 shows that long standing environmental problems, air and water pollution, were judged by 74% and 73% of the respondents to be at least large problems linked to energy production, respectively. The survey results support other recently administered surveys that significant portions of the American public do not perceive climate change to be a problem, much less caused by energy production (Nisbet and Myers 2007). It was expected that many Americans would be unfamiliar with the regional issue of mountain top removal, which is an important issue in the environmental community. The most surprising finding in Table 2 is the last result: over 80% of the respondents believe that increasing food prices is a large to extremely large problem linked to energy (presumably corn ethanol) production. That energy is a pocketbook issue surfaces frequently throughout the rest of the survey.

The respondents were asked how optimistic or pessimistic they are about the world's energy problems for eight different time periods, from one year from now to over one hundred years from now. The results presented in Table 3 suggest that the American public is almost equally split between being pessimistic, optimistic or neither. The large number of those unable to express their opinions may reflect the high level of uncertainty that they have about energy futures. Many paths could turn out well; many paths could be disastrous. It all depends upon a bewildering array of factors. Extreme pessimism is somewhat higher than extreme optimism in the very near-term. Interestingly, those who are just pessimistic seem to become extremely pessimistic as the time frame extends into the future and those who are optimistic also become more so as the time frame is extended.

**Table 2**  
 Size of Problems Linked to Energy Production  
 (% Respondents)

Statements	An extremely large problem	A very large problem	A large problem	A moderate problem	A small problem	Not a problem at all	Don't Know
Global Climate Change	23.4	19.9	17.9	19.9	9.2	8.7	1.0
Air Pollution	25.9	23.4	24.9	18.2	6.7	0.7	0.2
Water Pollution	23.1	23.6	26.6	17.7	7.7	1.0	0.2
Mountain Top Removal for Coal	13.7	15.4	17.7	23.1	14.2	4.2	11.7
Increasing Food Prices	27.9	28.4	25.6	14.7	1.5	1.0	1.0

**Table 3**  
 Optimism-Pessimism About World Energy Future by Timeframe  
 (% Respondents)

Statements	Up to 1 year	1 to 2 years	2 to 5 years	5 to 10 years	10 to 20 years	20 to 50 years	50 to 100 years	Over 100 years
Very Pessimistic	13.7	13.7	9.7	9.5	11.5	13.5	15.9	18.2
Somewhat pessimistic	21.4	19.7	21.1	17.4	15.4	14.2	13.7	11.9
Neither optimistic nor pessimistic	34.1	33.6	34.1	36.6	35.8	39.3	38.6	38.8
Somewhat optimistic	23.9	27.1	26.6	26.6	25.6	21.1	15.9	12.7
Very Optimistic	7.0	6.0	8.5	10.0	11.7	11.9	15.9	18.4

*Who is responsible?*

The results presented above indicate that Americans think that energy is a serious problem and has serious consequences. Who is responsible for the nation's energy problems? Table 4 addresses this question. The results indicate that many are to blame. Congress receives the most blame (decades of polling data consistently support this finding, Bolsen and Cook 2008), followed by lobbyists, industry and the executive branch. Educators are least responsible, although over 80% of the respondents ascribed some blame to this group in any case. Citizens, the media, and even scientists and technologists are all seen by the overwhelming majority of the respondents as being at least somewhat responsible for energy problems. Thus, it can be concluded that Americans view their energy problems as being extensively systemic.

**Table 4**  
Responsibility for Contributing to Energy Problems  
(% Respondents)

Statements	Not at all responsible	Not very responsible	Somewhat Responsible	Responsible	Very responsible
Congress	2.0	2.7	14.9	26.6	53.7
The Administration	2.2	4.2	18.4	29.6	45.5
Industry	1.7	3.5	15.9	32.6	46.3
Citizens	3.2	6.7	24.4	33.6	32.1
Educators	5.7	13.4	30.8	26.4	23.6
Scientists and Technologists	2.2	11.7	28.6	28.6	28.9
Media	6.2	10.0	21.6	24.9	37.3
Lobbyists	5.5	7.2	15.4	21.9	50.0

Consistent with this logic, as is apparent in Table 5, the public views almost every sector of society as sharing responsibility for solving the nation's energy problems. Responsibility is lead by Congress, the executive branch, industry, citizens, educators, and scientists and technologists, the latter shouldering maybe the most responsibility.

**Table 5**  
 Social Sector Responsibility for Solving Energy Problems  
 (% Respondents)

Statements	Not at all responsible	Not very responsible	Somewhat Responsible	Responsible	Very responsible
Congress	5.2	5.5	13.9	23.4	52.0
The Administration	5.0	5.2	12.9	27.1	49.8
Industry	3.0	5.0	12.7	28.4	51.0
Citizens	3.0	5.5	25.6	31.3	40.5
Educators	5.5	7.7	25.6	29.1	32.1
Scientists and Technologists	2.2	2.7	17.4	29.4	48.3
Media	14.4	13.4	19.4	21.9	30.8
Lobbyists	16.9	10.7	16.9	22.1	33.3

***Policy Attitudes and Perspectives***

A series of questions were posed to respondents to further explore the importance of various goals linked to U.S. national energy policy, attitudes towards a portfolio of energy sources, and opinions about a set of frequently discussed national energy policies. With respect to the first point, energy policy is often linked to various national and strategic goals, such as increasing energy independence and energy security and reducing greenhouse gas emissions. Table 6 reports the responses to a question about how important these types of goals are to the respondents.

The most important issue with respect to national energy policy is the cost of energy for consumers (less than 5% of respondents place low or no importance on this issue). This is another confirmation that energy is a pocketbook issue. Another personal issue, safety, is also seen as very important, along with energy independence and energy security. Other issues of importance are greenhouse gas emissions, other environmental issues, energy infrastructure costs, job creation, and technological feasibility. Of least importance are foreign relations.

**Table 6**  
**Importance of Aspects of U.S. Energy Policy**  
 (% Respondents)

Statements	Don't Care/ Indifferent	Low Importance	Medium Importance	High Importance
Energy independence	2.2	5.5	25.4	66.9
Energy security	1.5	7.5	27.6	63.4
Greenhouse gas emissions	4.7	18.7	36.8	39.8
Other Environmental Impacts	4.0	18.4	40.8	36.8
Cost of investment for energy infrastructure	3.5	12.2	49.8	34.6
Cost of energy for consumers	0.2	3.0	27.6	69.2
Technological feasibility	3.5	13.9	45.3	37.3
Convenience to consumers	1.7	13.7	42.5	42.0
Social acceptance of energy technology risks	7.2	19.7	43.5	29.6
Job creation	1.7	9.5	30.3	58.5
Time to deploy new technologies	3.2	12.2	38.8	45.8
Foreign relations	7.2	24.6	40.0	28.1
Safety	0.2	7.7	26.6	65.4

These results are interesting from a couple of viewpoints. First, almost all respondents seem to believe that almost all of the issues are important. There may be some who favor the environment, some who favor pocketbook issues, others who favor everything, and others who do not care about energy as an issue. However, the general public may not possess highly distinctive Perspectives as hypothesized by previous research. Second, because of this, many attitudes held by the public may seem contradictory, at least at first blush. For example, one could argue that increasing energy independence (presumably by importing less low cost oil) would necessarily increase costs of energy for consumers. How respondents are dealing with this situation is illustrated in Table 7. Respondents were asked how much they support a range of energy sources.



**Table 7**  
**Support for Energy Sources**  
 (% Respondents)

Statements	Unfamiliar with	Greatly opposed	Opposed	Neither Support nor Oppose	Support	Greatly Support
Conventional Oil	3.2	4.7	10.4	31.8	38.1	11.7
Unconventional Oil	10.0	4.5	8.2	37.1	28.4	11.9
Coal	3.2	8.0	11.4	37.3	30.3	9.7
Conventional hydroelectric power	4.7	1.0	1.0	18.2	48.5	26.6
Nuclear	3.7	9.7	9.5	26.4	28.1	22.6
Biomass	17.7	2.0	5.5	33.1	27.1	14.7
Corn Ethanol	5.7	9.7	13.9	24.9	31.3	14.4
Cellulosic ethanol	21.6	6.0	8.5	31.8	20.4	11.7
Wind	1.2	0.5	2.0	11.4	29.4	55.5
Biodiesel	9.2	2.0	6.2	31.1	32.8	18.7
Concentrated solar plants	7.5	0.5	2.0	18.7	32.8	38.6
Roof Top Photovoltaics	16.9	1.0	2.5	21.1	24.6	33.8
Municipal waste	13.9	1.5	5.7	31.3	27.4	20.1
Unconventional hydropower	8.5	1.0	4.0	22.9	33.1	30.6
Deep geothermal energy	14.7	1.5	3.5	27.4	28.9	24.1
Energy efficiency	2	0.5	1.3	8.5	30.1	57.6

First, the two most favored energy sources are wind and energy efficiency.<sup>3</sup> These two energy sources, if cost effective, can help to increase both energy independence and energy security, and create new jobs. Technology needs to be in place, however, to make these solutions cost effective, although as seen below, respondents are much more willing to pay more for electricity (which is produced by wind turbines and is frequently the target of new efficiency technologies) than for gasoline. The respondents do not greatly support coal or any type of oil. Their concerns about food prices are reflected in a lack of support for corn ethanol, but this lack of support

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3 Greenberg (2009) and Bolsen and Cook (2008) summarize recent polling data that support many of the findings in Table 8: that Americans support wind and solar; conventional hydropower; and energy efficiency. Polling data also indicate split opinions about nuclear power and drilling for more oil on U.S. territory, whereas the results from Table 8 suggest there is not a great deal of opposition to these energy sources. Farhar (1996) found that Americans consistently support renewable and energy efficiency.

seems to have also produced negative attitudes towards cellulosic ethanol, bio-diesel, and biomass in general. Even with these differences of opinion among the list of energy sources, most of the respondents do not oppose any energy source. Thus, in addition to casting a wide net for placing responsibility for solving our energy problems, almost all options for solving our energy problems must be considered as well.

Americans are fairly knowledgeable about a wide range of energy sources and policies, which is reflected in Tables 8 and 9. There are, however, some areas where additional educational efforts are needed. Biomass is one area. The results also suggest that Americans could increase their familiarity with the ins and outs of important potential national energy policies, including a carbon tax, cap & trade, and a national renewable electricity portfolio standard. Relationships between energy use and existing environmental laws, such as the Clean Water Act and the Clean Air Act, need to be better explained to the public as well.

Respondents were asked about how much they would support various energy policies that could help achieve national energy goals and promote favored energy sources. The results presented in Table 8 demonstrate that one substantial area of opinion that still separates Americans is related to the environment. Policies that could have direct environmental impacts have a wider range of opinion than those that do not. Flashpoints among the respondents include drilling in ANWR, opening Yucca Mountain, loosening federal coal surface mining regulations, and expanding offshore drilling for oil. The split is also seen with respect to a potential carbon tax and potential cap & trade legislation. Almost all the respondents support policies that could support new efficiency and renewable technologies, such as increases in federal energy technology R&D, federal energy efficiency standards, and renewable energy tax credits. In general, these results are consistent with recent polling results (Bolsen and Cook 2008).

**Table 8**  
**Support for Different Energy Policy Options**  
 (% Respondents)

Statements	Unfamiliar with	Greatly opposed	Opposed	Neither Support nor Oppose	Support	Greatly Support
Drilling in ANWR	9.0	22.4	12.9	19.4	19.2	17.2
Oil shale production	17.7	4.0	8.5	26.9	27.9	15.2
Expanded Offshore Drilling	6.2	10.0	10.9	20.1	30.6	22.1
Increase federal R&D for new energy technologies	4.5	1.2	3.0	17.7	37.3	36.3
Loosen federal coal surface mining regulations	10.4	12.2	19.4	33.6	14.4	10.0
National tax on carbon consumption	13.4	17.7	19.4	27.1	15	7.2
National cap and trade for greenhouse gas emissions	16.2	13.4	8.2	31.1	22.4	8.7
National renewable electricity portfolio standards	20.9	3.5	5.5	25.9	28.1	16.2
Tax credits for renewable energy technologies	7.5	2.5	4.7	14.7	40.0	30.6
Accelerated nuclear power plant approval processes	11.4	6.7	7.2	31.6	20.9	22.1
OPEN Yucca Mountain nuclear waste repository without state approval	17.9	19.9	17.2	23.4	9.2	12.4
Amend Clean Air Act to force plants to remove carbon emissions	11.2	7.2	6.0	25.6	31.3	18.7
Amend Clean Water Act to allow increase hot water discharges into water	16.4	14.7	15.4	24.9	15.7	12.9
Federal appliance energy efficiency standards	9.0	3.7	5.2	25.4	32.6	24.1
Federal requirements to allow new vehicles to run on gasoline and ethanol	9.2	9.7	7.7	26.9	29.6	16.9
Increase funding of transfer programs to offset increases in energy prices from above policies	17.7	8.7	9.0	29.1	22.4	13.2

As mentioned earlier, this survey is the first to explore attitudes and perspectives about energy from a portfolio approach. In addition to asking respondents about their opinions about energy policy goals, energy sources, and specific energy policies, respondents were also asked to construct their preferred energy source portfolios to produce electricity and to fuel the nation's transportation sector. With respect to the electricity portfolio, respondents were given twelve different sources to produce electricity and asked to check cells in a matrix so that the mix of sources they chose to produce electricity would add up to approximately 100%. Table 9 presents these results. In some sense, the respondents' portfolios are all over the board, suggesting that many did not understand the question's guidelines, but a few important observations can be made. First, wind and energy efficiency are highly favored, along with concentrated solar and other renewables such as ocean energy, hydropower, and roof-top photovoltaics. Coal's portion of the portfolio is low to non-existent, belying its mainstay status currently. There is little support for shale oil & tar sands and support for nuclear power is diverse, as could be expected. The results also suggest additional educational challenges, as it is technically impossible to meet all electricity needs with wind or roof-top photovoltaics or energy efficiency, for example.

**Table 9**  
Future Energy Source Preferences (% Respondents)

Statements	None	Under 10%	10% to 20%	20% to 30%	30% to 40%	40% to 50%	50% to 60%	60% to 70%	70% to 80%	80% to 90%	Above 90%
Coal	14.8	21.3	17.5	12.8	6.3	9	5.8	4	1.5	2.8	4.3
Nuclear	15.3	12.5	11	11	6.3	10.8	8.8	5.5	4.8	4.5	9.5
Natural gas	4.8	12.3	13.3	14	9	10.8	8.3	5.5	7.8	5.5	8.8
Conventional hydropower	5	8.3	10.3	10.8	10.8	11.3	9.3	7.8	9.5	6	11
Geothermal	12.3	12.5	10	7.8	7.5	9.3	12	7.3	7.8	6	7.5
Waste/biomass	15.5	12.5	10	8.5	7	10.3	8.8	7.8	6.8	4.5	8.3
Wind farms	2.3	5.8	9	8.5	5	11	8.8	10.5	9	10.3	19.8
Concentrated Solar	4	6.8	9	10.5	4.8	9.5	7.3	9.5	10	8.8	19.8
Shale oil & tar sands	22.1	17	13	8.5	7.5	9	4.5	6.3	4	3.3	4.8
Roof top Photovoltaics	12	13.5	9.3	8.3	6.8	10.8	6.5	7.3	8.8	5	11.8
Ocean	9.3	12.5	10	7.8	6.5	10	8.8	7.3	8.3	7.8	11.8
Energy efficiency	3.5	7.3	4.8	6.8	4.5	9.8	6.3	4.8	9	13.5	29.8

The results with respect to the transportation fuel portfolio are more straightforward. Respondents would like to see a drastic reduction in imported oil to be off-set by major increases in fuel efficiency and reductions in the demand for transportation. Bio-fuels are much less heavily weighted, although substantial fractions of the respondents see a significant role for these fuels. Many also see a growing place for new electric vehicles.

**Table 10**  
Future Energy Transportation Source Preferences (% Respondents)

Statements	None	Under 10%	10% to 20%	20% to 30%	30% to 40%	40% to 50%	50% to 60%	60% to 70%	70% to 80%	80% to 90%	Above 90%
Domestic oil	8	7	10.8	10.8	9	12.8	7	8	6	7.3	13.3
Imported oil	33.3	24.1	12.8	11.5	5	5.8	1.8	1.3	2	0.5	2
Corn ethanol	14.3	13.8	11.8	10.3	10	11.3	4.5	5.3	7.5	4	7.3
Cellulosic ethanol	17.5	14	14.3	10.5	6.3	11.8	4.8	6.5	6	3.8	4.5
Electricity	4.8	7.8	10.8	10.3	9.3	13.8	9	8.5	8.3	7.5	10
Natural gas	10.3	9	16.3	9.5	8.8	10.3	7.3	6.3	7.3	7.8	7.3
Hydrogen fuel cells	10	7	11.8	10.8	8.8	9.8	8.8	7.8	9.8	6.5	9
Biodiesel	12	7.8	15.5	11	10.5	8.3	7.5	7.5	6	7	6.8
Fuel efficiency	3.5	3.5	9.8	5	5.8	8	5.5	9	10	10.8	29.1
Reduce transportation demand	10.3	6.8	9	6	8	10	5.3	7	8.8	8.8	20.1

**Personal Responsibilities**

Respondents indicated that citizens, presumably including themselves, should shoulder a good deal of responsibility for solving the nation’s energy problems. The respondents also indicated their support for renewable and energy efficiency technologies and for major reductions in transportation demand. This section explores to how respondents might be meeting their responsibilities.

Table 11 presents a list of actions that Americans could be taking to reduce their energy use. The majority of respondents have already taken most of these actions. The most widely taken action is turning lights off when not in a room. Other popular actions include turning down the heater thermostat in the winter and up the AC thermostat in the summer, buying compact fluorescent lights, buying energy efficient appliances, and driving less. Americans are much less likely to take, and indeed more likely will not take, these actions: car pooling, walking or riding bikes more often, and

living in smaller homes.<sup>4</sup> These three actions can be seen as tying together with their desire for suburban living in detached single family homes and the resultant urban sprawl that makes one very reliant upon personal automobiles. Significant changes in home preferences, land uses, and mass transit availabilities and quality would be needed to help reduce transportation demand by the levels suggested in Table 10.

**Table 11**  
Actions in Response to Energy Issue Concerns (% Respondents)

Statements	Have not heard of before	Will not take	May consider taking		Planning on taking	Have already taken
Drive Less	0.0	12.7	10.0	12.7	5.5	59.2
Buy more fuel efficient vehicles	0.0	9.5	20.6	22.4	23.6	23.9
Car pool	0.7	32.1	23.1	14.9	5.0	24.1
Walk or ride bike more often	0.5	25.4	25.6	13.9	5.7	28.9
Buy compact fluorescent lights	1.0	5.7	11.4	8.5	8.0	65.4
Buy energy efficient appliances	1.0	2.2	7.5	10.4	14.9	63.9
Turn lights off when not in room	0.0	1.2	3.0	3.2	5.0	87.6
Live in a smaller home	2.0	26.6	16.4	11.2	7.2	36.6
Turn Thermostat down in winter	1.0	4.2	7.0	9.5	7.5	70.9
Turn thermostat up in summer	3.7	5.7	6.5	9.0	8.7	66.4

Increasing prices for electricity and gasoline can also work to reduce demand for both. Table 12 suggests that many respondents are willing to pay more for electricity per month to help them achieve the renewable dominated portfolio expressed in Table 10. This is not the case, however, with respect to gasoline as Table 13 shows. Over half of the respondents are not willing to pay any more for gasoline to help achieve their transportation portfolios. There is virtually no support for increasing gasoline prices beyond two dollars per gallon. Thus, the price of gasoline is a very important pocketbook issue for Americans, with electricity much less so.

<sup>4</sup> Recent polling data support the findings in Table 11 with respect to driving less, buying more fuel efficient vehicles, carpooling, and in-home temperature control (Bolsen and Cook 2008).

**Table 12**  
Amount Per Month to Achieve Preferred Energy Source of Electricity  
(% Respondents)

\$0	19.9
\$1 - -\$5	20.4
\$6 - \$10	17.4
\$11 - \$15	10.4
\$16 - \$20	10.2
More than \$20	11.9
This question is not applicable to me	9.7

**Table 13**  
Amount Per Gallon of Gasoline to Achieve Preferred Energy Transportation Source  
(% Respondents)

\$0	54.7
\$1	17.9
\$2	16.2
\$3	2.0
\$4	0.5
More than \$4	1.7
This question is not applicable to me	7.0

Finally, respondents were asked three questions dealing with relationships between energy sources and residential issues. First, respondents were asked if they would be willing to have a new nuclear power plant located within 10 miles of their homes. Forty-two percent reported yes, fifty-eight percent said no. Along these lines, respondents were asked if they would be willing to have a tall wind turbine located in their neighborhoods. Seventy-eight percent said yes and only nine percent said no (the reminder suggested that wind turbines could not be installed where they

live).<sup>5</sup> Finally, respondents were asked if they would be willing to let homes in their neighborhoods have solar panels on their roofs. Ninety-six percent said yes. These are good results for renewables but suggest that siting new nuclear power plants in populated regions is still a politically charged issue.

## CONCLUSIONS

This paper reports the results of a nationally representative survey of Americans on their attitudes and perspectives on national energy policy. The respondents agree that energy is an important problem and place blame throughout society. They also expect almost all sectors of society to shoulder responsibilities for solving the nation's energy problems.

Most respondents believe that energy policies should achieve a wide range of goals. Some may favor environmental goals, some may favor economic issues, and a very few may not believe that energy is an issue worth worrying about. One can tentatively conclude, however, that there may not exist in substantial numbers within public the seven clearly defined Perspectives identified in previous research (and described in Appendix B).

Americans are placing great hope on wind and other renewable technologies and energy efficiency. These solutions do not engender the political disputes seen with oil, coal, and nuclear power. The exception is biomass, which does not receive much support amongst the respondents. Corn ethanol in particular is seen as leading to increasing energy prices and the respondents will not support any increases in prices at the pump or in the grocery store to achieve any national energy goals.

Educational issues abound. Many respondents reported a lack of knowledge about biomass technologies and important potential national energy policies, such as cap & trade and carbon taxes. Also, when asked about their preferred portfolios, many respondents envision meeting electricity and transportation fuel needs with technically infeasible solutions.

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5 These results are consistent with other recent research and polling results which shows a diversity of opinion about the siting of nuclear power plants (Greenberg 2009; Ansolabehere and Konisky 2009; Bolsen and Cook 2008) and support for wind turbines (Firestone et al. 2009).



APPENDIX A

**Table A1**  
**Demographics**  
 (% respondents, N=402)

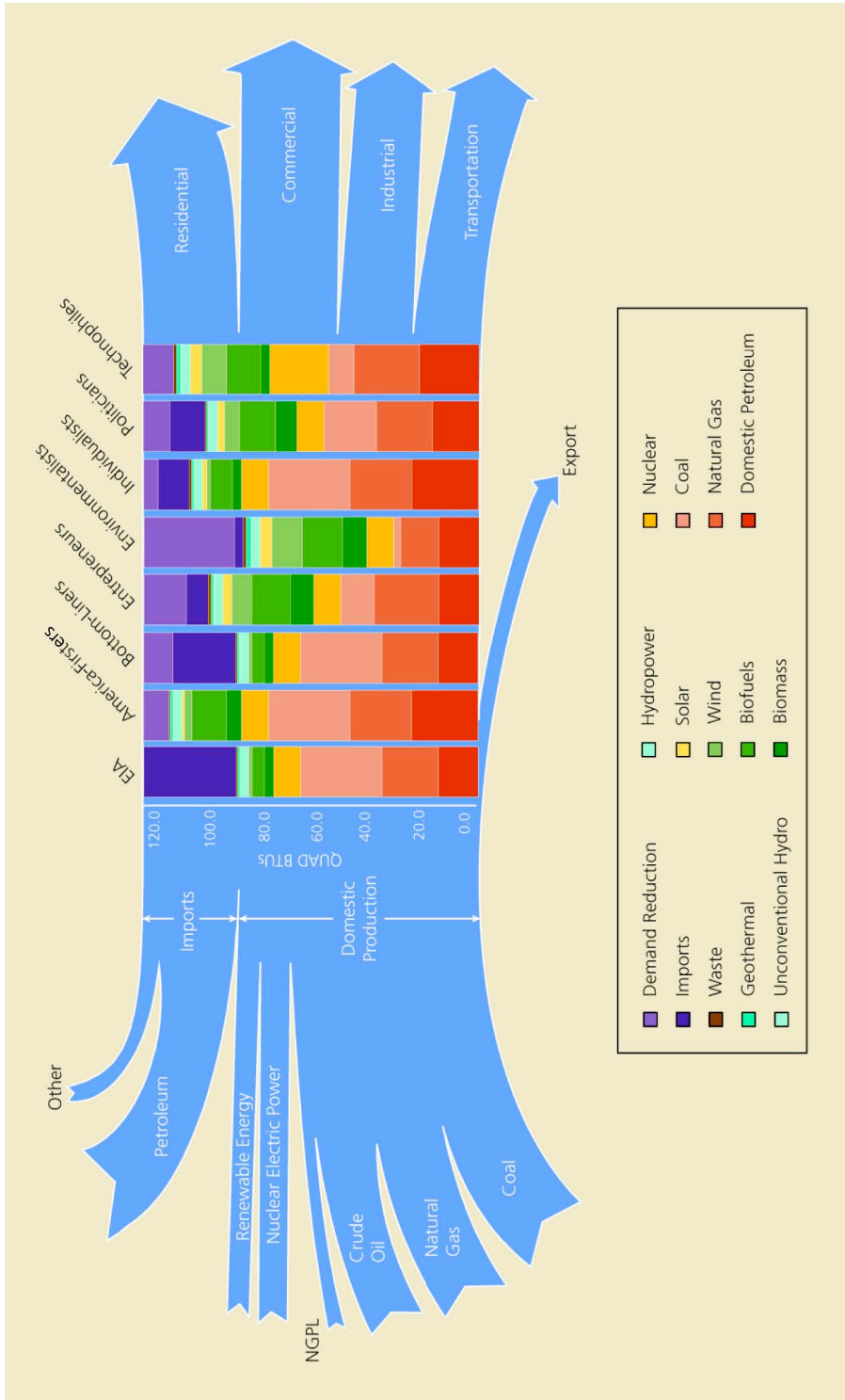
Age	Less than 31	Between 31 and 50	Greater than 51				
	16.9	37.4	45.5				
Gender	Female	Male					
	53.5	46.6					
Ethnicity Race	Indian	Asian	African American	Pacific Islander	White	Hispanic	Other
	0.5	1.5	5.2	.5	85.8	5.0	1.5
Number of Children	0	1 to 2	3 to 4	5 to 6	7 or more		
	32.3	43.3	18.6	4.2	1.4		
Number of grandchildren	0	1 to 2	3 to 4	5 to 6	7 or more		
	66.2	15.4	7.4	5.5	5.0		
Domestic Status	Single	Married	Co-habiting	Divorced	Widowed	Other	
	16.9	57.5	8.5	11.4	4.5	0.7	
Education	Less than High School	High School	Associate Degree	Some college	College degree	Some post college	Post college degree
	2	19.2	10.7	29.9	19.9	6.5	11.9
Employment Status	Student	Work full-time	Work part-time	Disabled	Unemployed	Retired	Other
	6.2	42.0	12.2	4.2	10.9	19.2	5.2
Household Income	Under \$20,000	\$20,000 to \$35,000	\$35,000 to \$58,000	\$58,000 to \$95,000	\$95,000 and above		
	14.4	20.6	25.9	25.1	13.9		

## APPENDIX B

The seven Perspectives included in the previous research (Tonn et al. 2009) are these:

- America-Firsters – The primary goal of this Perspective is energy independence;
- Bottom-Liners – This Perspective is composed of industrialists who prefer a secure and low-cost national energy portfolio, regardless of its GHG emissions or energy import profile;
- Entrepreneurs – This Perspective represents American marketplace ingenuity in solving our energy problems;
- Environmentalists – The primary goal of this Perspective is to reduce GHG emissions;
- Individualists – The primary goal of this Perspective is to maintain the high quality of life in the United States;
- Politicians – The dominant theme of this Perspective is to be as accommodating to as many interests as possible in the implementation of national energy policies;
- Technophiles – This Perspective advocates a ‘big engineering’ approach to achieving energy independence and GHG emissions.

National energy portfolios for the year 2030 were developed for each Perspective, as illustrated in Figure A.1. Notice that there are commonalities across perspectives in the areas of biomass and nuclear energy. The first column represents a baseline forecast prepared by the U.S. Energy Information Administration.



**Figure B1**  
Summary of the Seven Perspectives' Energy Portfolios (Year 2030)

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# HEALTH AS AN ECONOMIC ENGINE:

## *Public Policy Implications*

*David M. Mirvis, MD*

*“... It is still not unusual to find that those who make financial decisions about allocation to health think about health in general terms only as a good thing, but not grasping the importance of investing in a healthy population as a mechanism for stimulating or promoting economic growth.”*

*-- UN Commission on Macroeconomics and Health, 2001*

Health and wealth are profoundly interconnected. Countries and individuals with higher average incomes have better overall health conditions than do poorer ones (Preston 1975). For example, overall infant mortality, life expectancy, and general health improve as per capita income in a nation rises. A 1% increase in per capita income in developing countries may result in as many as 33,000 fewer childhood deaths each year (Commission on Macroeconomics and Health 2001). Within nations, including the United States, people with higher incomes and better overall socioeconomic conditions have, on average, better health outcomes than do less affluent persons. Men in the United States with family incomes in the top 5% of the income distribution have life expectancies that are 25% longer than do those in the bottom 5% (Sorlie, Backlund, & Keller 1995).

This relation is commonly considered only in the direction from wealth to health. That is, better personal or national economic conditions will lead to better personal or population health. More recently, the impact of the reverse direction of this health-economics relationship has gained attention. In this newer model, health is an ‘economic engine.’ That is, better health leads to and may, in certain cases, be a necessary prerequisite for economic development (Bloom & Canning 2000; Commission on Macroeconomics and Health 2001; Mirvis & Bloom 2008).

These bidirectional relationships between health and wealth have been recognized and incorporated into policy by numerous international organizations. The World Health Organization (WHO) through its Commission on Macroeconomics and Health (CMH) (CMH 2001), the International Monetary Fund, the European Investment Bank, and the World Bank have all included health promotion as a specific policy objective in meeting their goals of poverty reduction. Most recently, the European Region of WHO (2008a) stated that “beyond its intrinsic value, improved health contributes to social well-being through its impact on economic development, competitiveness, and productivity” and that “high-performing health systems contribute to economic development and wealth.”

Much of the interest in this model has been directed toward developing nations. The implications of this model of ‘health as an economic engine’ for public policy in developed nations, including the United States, are commonly underestimated, and health is generally not included in their economic development plans. In this re-

view<sup>1</sup>, we will examine the evidence that supports the 'health as an economic engine' paradigm and argue for the importance of these concepts to public policy within the U.S.

## **IMPACT OF HEALTH ON PERSONAL AND FAMILY FINANCES**

The impact of health on wealth can be examined from two broad economic perspectives. First, the relation can be evaluated on the microeconomic level, that is, the relation between personal and family health status and personal, household, and business income. Second, the macroeconomic view evaluates the relationship between country or regional population health status and income levels or economic growth rates. Both have public policy implications, and the evidence for each will be reviewed.

Poor health has substantial microeconomic effects. The costs of poor health include the direct costs to the health care system of prevention, diagnosis and treatment; the costs of loss of labor productivity; and the intangible costs of, for example, the psychological impacts of illness on patients and their families. These occur through numerous channels, including the direct impacts on wages and earnings and the indirect effects of reduced educational attainment and skills. Additional impacts include the special effects on children.

### *Health Care Costs*

High health care costs, including the costs of insurance and out-of-pocket costs, represent major drags on the microeconomy. According to the Millman Index (Millman 2009), the total health care cost to a typical American family of four in 2009 was \$16,771, representing 32% of the median U.S. income. Increases in insurance premiums and out-of-pocket costs for health care have outstripped increases in wages (Kaiser Family Foundation 2009a), and increases in employer costs for employer sponsored coverage may reduce future wage increases. A December 2009 poll (Kaiser Family Foundation 2009b) indicated that 30% of Americans had problems paying medical bills and that 16% had problems paying other bills because of medical care bills. These health care costs are a major, if not the major cause of personal bankruptcies in the United States (Himmelstein, Warren, Thorne, & Woolhandler 2005).

### *Wages and Earnings*

The quality and duration of life directly impact a person's ability to generate income. Better health with better quality of life may increase income by raising the economic output of each year of life, that is, by increasing productivity by increasing "vigor, strength, attentiveness, stamina, creativity and so forth" (Howitt 2005). Improved health that prolongs working years promotes income growth by extending the duration of economic productivity. Indeed, illness or death is the main cause of

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1 The review is intended to include representative studies and not to provide an exhaustive, critical review of the literature. For a more complete literature review, the reader is referred to Suhrcke et al. (2005).

new or increasing poverty in the world (World Bank 2006).

Numerous studies in the United States and other developed nations have quantified the impact of illness on wages. U.S. studies suggest that poor health reduces wages by as much as 48%, with the greatest impact among those who are continuously in poor health and when chronic diseases emerge among those under 50 years of age (Suhrccke et al. 2005).

### *Labor Market Participation and Retirement*

Poor health impacts both entry into and participation in the labor market. National surveys have reported that one-fourth of workers have at least one workday per month in which they are either absent from work or exhibit reduced productivity at work because of a health condition (Burton et al. 2004). One study reported that, in the United States in 2003, workers took 407 million sick days and that absenteeism because of health issues accounts for the equivalent of approximately two million full-time equivalent employees per year (Davis et al. 2005). Diabetics, for example, have absenteeism rates 1.9 workdays per diabetic worker per year greater than nondiabetics (American Diabetes Association 2008).

Poor employee health has an even greater impact by increasing presenteeism, that is, reducing productivity when at work. Over three-fourths of the business losses due to pain (Stewart et al 2003a) and depression (Stewart et al 2003a) are due to presenteeism. The overall economic impact of absenteeism and presenteeism from common chronic diseases exceeded \$1 trillion in 2003 (DeVol & Bedroussian 2007).

In addition, poor health and premature death increases employee turnover, with high replacement costs and loss of the benefits of long-term experience. A pre-employment history of a single hospitalization due to a chronic illness correlates with a 20% increase in early job turnover (Kolstad & Olsen 1999). Unhealthy workers also tend to retire early, before they are eligible for full pensions (Suhrccke et al. 2005), reducing personal income and increasing the loss of trained and experienced workers.

A sudden change in health status, or a 'health shock', can have severe implications for workforce participation. In one report from West Germany (Suhrccke et al. 2005), a health shock increased the probability of converting from full-time employment to part-time employment by 60% and of leaving the workforce by 200%.

Businesses are also impacted as illness increases employee benefit costs. Health benefits are the most rapidly growing segment of employee benefits, with a rate of growth exceeding the rate of growth of wages by almost than 3 to 1 (28% vs. 10%) since 1991 (United States General Accounting Office 2006). Poor employee health may be expected to increase these costs, by increasing direct outlays for care and by increasing risk ratings for insurance coverage.

### *Impacts on Children*

Poor childhood health may limit a child's future economic productivity by direct effects of health and indirectly through the relation between poor health and low

educational attainment. In addition, poor health reduces the incentive for pursuing education by reducing the number of years over which the investment in education provides economic returns. One additional chronic disease at age 16 is associated with a five percentage point reduction in the probability of employment at age 42 (Case, Fertig, & Paxson 2005).

Inhibited growth *in utero* and early-life are associated with a range of negative adult outcomes, including high blood pressure, reduced respiratory function, schizophrenia, and other chronic diseases (Heckman 2007), all of which reduce labor market productivity in adults. Raising the average birth weight of low birth weight babies to the mean birth weight of all U.S. babies would increase their lifetime earnings by 26% (Behrman & Rosenzweig 2004).

Poor child health also impacts education (Low et al. 2005). Lower educational attainment is linked to both lower adult economic productivity and lower adult health status which, in turn, also reduces wages, etc. Unhealthy children are not prepared for school, miss more days of school, and learn less when in school. Children in poor health have a 25% lower likelihood of being enrolled compared to healthy children (Suhrcke et al. 2005) and a 1% increase in average longevity is associated with a 1% increase in length of schooling (Kalemi-Ozcan, Ryder, & Weil 2000). Low birth weight children have a 79% lower probability of graduating from high school in a timely manner and are less likely to have managerial jobs than are others (Strully & Conley 2004).

The impact of ill health also spans generations. The health of the children impacts the productivity of parents. Parents commonly miss work to care for sick children. In 2001, approximately 20% of the workforce reported missing work because of an illness in the family, with an average loss of 4.5 days per person per year (Rhoades 2004).

On the other hand, parental illness may decrease emotional as well as fiscal support for children. Children commonly miss school or drop out of school to enter the job market, reducing later economic productivity. In one study in the United Kingdom, for example, death of a parent before the age of 8 years was correlated with a significant reduction in cognitive ability through the age of 15 years and a lower probability of obtaining advanced educational degrees (Richards & Wadsworth 2004). In addition, poor parental health commonly results in childhood malnutrition as family income and ability to obtain food fall (Steinberg, Johnson, Schierhout, & Nagawa 2002).

## **IMPACTS OF POPULATION HEALTH ON ECONOMIC GROWTH**

Poor health of the community may also limit macroeconomic growth through many paths (Mirvis & Bloom 2008). At a basic level, better population health reflects the improved health and, hence, the economic productivity of many individuals. The aggregation of these individual effects to the community level translates into better macroeconomic performance.

However, the overall impact exceeds the simple sum of the effects on individu-



als. Poor overall population health also impairs the economic well-being of the entire community or nation beyond the cumulative impacts on individuals and specific businesses. The aggregate or macroeconomic effects of improved health are large in magnitude, and they impact everyone in a community - not just those who are ill.

Expanding health systems directly promotes local economic growth through the production of goods and services and through capital investment. Indeed, currently almost 16% of all goods and services produced in the United States, that is, the gross domestic product (GDP), is linked to health care.

This direct impact is dwarfed by the size and implications of the indirect macroeconomic impacts of health conditions. Poor health reduces the personal savings that provides capital for investment. Citizens in poor health spend more of their available funds for current health care needs and are concerned less with future needs. A ten-year increase in average population life span is associated with a 4.5 percentage point increase in national savings rates (Bloom, Canning, & Graham 2003).

Poorer population health also discourages outside investment largely by predicting the absence of a capable and productive workforce. One additional year of average life expectancy is associated with a 7% increase in foreign investment (Alsan, Bloom, & Canning 2005). The fall in foreign investment reduces capital, technology transfer, and access to global markets. In addition, poor population health limits the likelihood of successful implementation of new technology if it became available.

Poor population health may also disrupt various social structures and functions, leading to lower economic growth. Governmental funds are reduced as tax collections fall, and the remaining communal funds are diverted to health-related services and away from other needed community and infrastructure projects. Community cohesion and social capital are also lost as illness disrupts family and societal structures. In developing countries, health shocks have led to general dissatisfaction with government resulting in political instability and even to civil war (Haacker 2004).

A final powerful long-term macroeconomic effect of health on economic development is mediated through the association between poor health conditions and high birth rates (Bloom, Canning, & Sevilla 2003a). Less healthy societies have higher birth rates than do healthier ones, possibly as a means to compensate for high infant mortality rates. This, in turn, reduces parental investment per child in, for example, education, and reduces per capita economic development. Improved health, in contrast, leads to lower birth weights that increases per child support and may also allow greater participation of women in education and in labor force. A 1 percentage point growth in the population under age 15 years is associated with a 0.4% reduction in per capita GDP, and as much of one-third of the rapid economic growth of east Asia during the late twentieth century can be attributed to this 'demographic dividend' (Bloom, Canning, & Sevilla 2003a).

### *Quantifying the Economic Impacts of Population Health*

Numerous studies have estimated the economic value of improved population health. While the absolute amounts and the proportion of economic growth attrib-

utable to health vary widely from study to study, they demonstrate that health is a robust and substantial predictor of future economic growth.

Several types of studies have reported estimates of the role of population health. Historic studies have documented the contribution of health improvements on national economies over time. In one classic study, Nobel laureate Robert Fogel (1997) estimated that improvements in nutrition accounted for 30% of Britain's income growth in the 200 years from 1790 to 1979, as result of both a fall in population that was too malnourished to work and an increase in productivity of those who were working. More recently, similar studies have estimated that the value of the increase in longevity from 1965 to 1995 to be the equivalent of 28% of the overall growth in per capita income in the U.S. over that period (Becker, Philipson, & Soares 2003).

Cross-national studies have shown that differences in health conditions among nations contribute substantially to the differences in their economic conditions. Based on estimates from several sources, the WHO (CMH 2001) estimated that the 28 year difference in the life expectancy between a typical low-income and a typical high-income country is responsible for 1.6 percentage points per year in annual economic growth rates. These impacts become very large, especially when compared to the average rate of increase in GDP among all nations of 2.3% between 2004 and 2005 and when compounded over many years.

Other cross national studies have estimated the relative potency of health and other factors that promote economic development. Most notably, the impact of health on economic development may be as great as the impact of education. For example, the predicted return on investment for childhood immunization is 18% by 2020, a value exceeding the 11-13% return for higher education (Bloom, Canning, & Weston 2005).

Others have used labor market data to assess the impact of improved health on labor market productivity. Results have estimated that a one-year increase in a population's average life expectancy leads to a 4% increase in overall economic output (Bloom, Canning, & Sevilla 2003b), and that health improvements from 1970 through 1999 increased the net annual total labor market value of human capital by \$1.48 trillion (Battacharya & Lakdawalla 2005).

Finally, many economic studies have estimated the value of improving population health to national economies using 'willingness to pay' models. These are based on the concept that the economic value of a product can be measured by the amount a consumer is willing to pay for it or to avoid it. Thus, the economic value of improved health may be estimated by the amount that people would pay to avoid ill health. This approach includes the important intrinsic value of health to people and to society, in addition to its role in producing goods and services as measured by GDP.

The results document the large economic value of improved health to society. The Institute of Medicine has suggested that each additional quality adjusted year of life in the United States has an economic value of \$160,000 (Institute of Medicine 2003). Using these methods, "the total lifetime value (willingness to pay) of these

gains [in life expectancy] for an individual born in 1995 correspond to more than 3 times the value of GDP per capita” and “correspond to permanent increases of more than 10% in annual income in the US...” (Becker, Philipson, & Soares 2003).

The economic gains from new health care interventions are also substantial. They are multiplied as current health advances impact future as well as current populations. Estimates suggest that health improvements from all sources and at all ages over the 20<sup>th</sup> century yielded additional life years to newborns that have a present discounted value of \$2 million per person (Murphy & Topol 2005).

### **IMPLICATIONS OF THE HEALTH AS AN ECONOMIC ENGINE MODEL**

The ‘health as an economic engine’ model differs substantially from the classical model in which economic growth drives health improvement. The classical model argues that primary and direct investment in financial and business infrastructure will improve health, while the newer paradigm argues for direct investment in health and that economic improvements may follow. Health is not simply a valued output or a consumption good resulting from health care expenditures; it is an important input or an investment in economic development. And whereas the classical model suggests, as summarized Bloom and Canning (2000), that “health is a luxury only rich countries can afford,” the newer model suggests that health is what helps make countries rich.

#### *Health as Human Capital*

The appreciation that health is a major contributor to economic growth represents an extension of the concept of human capital (Becker 1993). Human capital includes, as summarized by Adam Smith (1776), “all of the useful abilities of people” that lead to “real income”. According to Nobel laureate Theodore Schultz (1961), its magnitude, although more difficult to measure than physical capital and not included in most measures of overall economic power, is “vastly larger than all other forms of wealth taken together”.

Economist Michael Grossman (1972) suggested that health is a long-lasting and durable form of human capital which produces, as its product, “healthy time” that increases productivity to stimulate economic growth. People are born with a certain level of health capital that declines with age and with disease; it can be increased, as with other forms of capital, with “purposive investment”, that is, through interventions that increase the length and quality of life.

Traditional studies have focused on education as the primary measure of human capital. The impact of health on productivity at the individual and at the communal levels, as described above, places health as an equivalent determinant of human capital. The WHO (CMH 2001) concluded that “health is the basis for job productivity, the capacity to learn in school, and the capability to grow intellectually, physically, and emotionally. In economic terms, health and education are the two cornerstones of human capital....” Health is thus “an asset”.

### *Health Care as an Investment*

If health is a form of capital, expenditures to increase the stock of health capital are investments. This is then analogous to investments aimed at increasing other forms of capital, including physical and financial capital, required for economic growth.

Investing in health may have a substantial economic return and are thus good investments. DeVol and Bedrossian (2007) estimated that realistic improvements in prevention and treatment for common chronic conditions would add \$905 billion to the U.S. economy annually. The costs of new technology for treating myocardial infarction, low birth weight infants, depression, and cataracts, while high, are much smaller than the economic gains resulting from the resulting improvement in health status (Cutler & McClellan 2001). One study (Goetzal, Hawkins, Ozminkowski, & Wang 2003) estimated that outpatient treatment costs for 10 common health conditions were only 11% of the productivity costs of these conditions; that is, treatment results in a return on investment of 9:1, a substantial 'treatment dividend'. In contrast, activities that impair health reduce health capital and have negative economic returns; cigarette smoking has an economic cost of up to \$222 per pack (Viscusi & Hersch 2007).

### *Virtuous Cycles and Traps*

This role of health as an economic engine extends rather than supplants the conventional role of economic development as a precursor to improved health. The two models interact to result in either a 'health-poverty trap' or a 'virtuous cycle' (Bloom & Canning 2000). On one hand, poor health limits economic growth that, in turn, prevents improvements in health. A health shock to a family or a community may result in an economic 'trap' that is difficult to escape. On the other hand, improved health contributes to greater economic development, with the resulting increase in wealth contributing to a further increase in health that leads, *parri passu*, to more economic development, etc., to produce a virtuous cycle. These cycles were described by Gunnar Myrdal (1952) as "if any one of the composite factors in the plane of living, say, the health conditions of the population, is induced to change, this will cause a change in all other factors, too, and will start a process of interaction, where the change in one factor will continuously be supported by the reactions of all the other factors, and so forth. The whole system will be moving in the direction of the primary change, but much farther."

While one could, based on this virtuous cycle model, intervene in a region with both health and economic poverty with either a primary economic or a primary health intervention, a health intervention may be more beneficial. An unhealthy workforce may be unable to support the needs of an economic industrial stimulus. As described by Schultz (1961), when investment in infrastructure is not balanced by investment in human capital, "human capabilities do not stay abreast of physical capital, and they become limiting factors in economic growth."

***Health as an Intrinsic Goal***

The above arguments make a compelling case that improving health is an instrumental goal, that is, it leads to another, intrinsic goal – economic development. Improving health remains a critically important intrinsic goal in itself. As stated in the Alma Ata declaration of the World Health Organization (WHO, 1976), “the Conference strongly reaffirms that health ... is a fundamental human right....” Nobel laureate Amartya Sen summarized this role (Sen 1987) by stating that “value of the living standard lies in the living, and not in the possession of commodities.”

**APPLICATIONS TO THE UNITED STATES**

As described above, much of the research underpinning these concepts and conclusions are based on conditions in developing nations with poor health outcomes and low economic productivity. To be relevant to the United States (and other developed nations), several conditions must be met.

***Unhealthy and Poor Regions and Populations in the United States***

Bringing this knowledge to bear on health and wealth within the U.S. depends, in some large degree, on the similarities between regions in the United States and the underdeveloped nations. Various studies have shown that segments of the United States population have health statistics that are comparable to those in underdeveloped nations. Rural African Americans, especially those in the southern states (including Tennessee) have higher young and middle age mortality rates than do people in the worst OECD nations (Murray, Kulkarni, Michaud, & Ezzati 2005). The range in life expectancy among groups within the U.S. exceeds the difference between healthy and unhealthy nations, making results of international studies relevant.

In addition, mapping studies have shown that unhealthy places tend to cluster into regional patterns within the United States that correlate with poor economic conditions (Cossman, Cossman, Jackson-Belli, & Cosby 2003). For example, of the 240 counties of the Mississippi River Delta, 63% have life expectancies that are among the lowest 20% of all counties in the United States, and 55% have poverty rates that are among the highest 20% in the nation (Cosby & Bowser 2008). Hence, the relation between health and economics in underdeveloped nations is relevant in the U.S.

***Determinants of Health and Economic Growth in the U.S.***

Although the concepts underlying the role of health in economic development appear to apply to any region, there are reasons to be cautious. Health and wealth dynamics may differ in a poor region of a relatively wealthy nation than in a poor nation as a whole. The poor in a wealthy nation may be better off than even more relatively affluent people in a poor nation. In addition, the relative wealth and health of much of the remainder of the nation may buffer the impact of health on economic development in any one region, so that the characteristics of the nation as a whole

may dominate over the features of the region alone. For example, the flows of resources, information, and technology from richer to poorer regions within a nation may be substantially better than flows between nations.

In addition, the mechanisms that link health to economic growth may be different. Much of the improvement in health in developing nations has been related to expanding the basic public health infrastructure that is already present in many of the poorest regions of an otherwise wealthy nation; in richer nations the role of social deprivation may be more potent than material ones (Marmot 2002). Whereas the health challenges in developing nations center on infectious diseases, maternal and perinatal disease and nutritional deficiency, those of developed nations center on chronic diseases.

Studies have demonstrated the relation to remain among industrialized nations. For example, in a sample of 26 developed nations, a 10% reduction in cardiovascular disease mortality between 1960 and 2000 was associated with a 1% greater increase in GDP (Suhrcke et al. 2005). And, among developed nations, international differences in health spending account for more of the difference in economic development than do education (16-27% vs. 3%) (Beraldo, Montolio, & Turati 2005).

## **IMPLICATIONS FOR PUBLIC POLICY**

These findings demonstrate that improved individual and population health is a powerful engine of individual and national economic development. The large potential impact of health improvement on economic conditions and growth have substantial implications for both business and government.

### ***Role of Businesses***

For businesses, incentives for employers to provide health insurance to employees are commonly based on the desire to promote recruitment and retention, to take advantage of certain tax advantages of providing benefits rather than direct wages, and, perhaps, to advance the ethical value of promoting well-being (Fronstin & Wernitz 2004).

The 'health as an economic engine' model extends the rationale with a business investment case. Providing health care to employees is an investment in human capital that creates added value for the firm as increased productivity, analogous to developing other forms of capital and infrastructure, rather than being simply or solely a benefit expense. Examples of successful interventions by employers to improve productivity by improving employee health have been described (Burton & Conti 2000). In addition, businesses may gain from the community-wide increase in economic development that may result from investments in population health.

However, the role of businesses in promoting population health has been limited (Easterlin 2006) by several features. These include the delay between health interventions and the economic gain, the uncertainty of a positive return, and externalities. A specific company, for example, can gain from the investment of others as a 'free rider' even if it does not contribute.

### *Role of Public Policy*

Public policy interventions then become critical in taking advantage of the role of health in economic development. Indeed, the positive relation between GDP and health is linked to effective governance. The WHO Commission on Social Determinants of Health (WHO 2008c) has emphasized that “nations that have high life expectancies and low infant mortality rates are also those where ... government leaders and policies address the key social determinants of health.”

Government intervention in health has been promoted or justified by several compelling although, at times, contentious arguments. WHO has promulgated the case that health care is a basic human right with primary responsibility falling largely on the government. A constitutional right to health care has been argued to exist in the U.S. (Daniels 2002; Gosten 2000a), although this has not been accepted by the U.S. Supreme Court except in certain special circumstances (Curran 1998).

Governments also intervene to protect the rights of others and of those not competent to act on their own behalf, to protect people from harming themselves (Gosten 2000b), to promote social justice and equity (Gosten & Powers, 2006; Geier 2008), and to correct for market failures related to health care (Cutler 2002). Some argue that interventions that improve population health, such as clean air, are “public goods” that cannot be denied to some in a society; government intervention is needed because, as in the case of all public goods, there may be little incentive for individuals to act on their own rather than benefit as free riders (Shaeffer et al. 2009). Others (Ryan et al. 2008) raise the role of government to an affirmative obligation – not just an authority – on governments to act to improve public health.

Public policies aimed at promoting health have been more widely developed in other Western countries than in the United States. This relative lack of attention may reflect basic differences in the attitudes of governments toward health. Such differences, as noted by ethicist Daniel Callahan (Callahan & Wasunna 2008), reflect differences in a “way of life”, “are deeply embedded”, and express “different ways of looking at health care and the relationship between the individual and society”.

The macroeconomic impacts of health outlined above provide another compelling reason for public policy support of health. Societal support of health care is warranted not only because of the communal and humanitarian responsibilities to promote well-being, etc., but because the economic consequences of health improvement are reaped by the community as a whole. Governmental support of health care becomes directly analogous to governmental support and subsidy of other forms of infrastructure development that promote community business and economic development. This argument may be most potent among nations, such as the United States, that have an entrepreneurial rather than a social rights basis for their health care systems. Indeed, the economic argument for health improvement has been identified as a potent force for policy makers in developed nations (WHO 2008b).

The public policy approach is particularly important for children and the poor. Deaths in childhood or young adulthood, before individuals enter the economic market as productive workers, represent large, long-term economic losses as the

gains from investments in education, training, and development are forgone. This impact has been recognized as far back as 1842 when Edwin Chadwick (1842) argued for more spending on sanitation because it would reduce the economic loss created by the death of poor children.

The poor are a second population of special public policy interest. They have the highest disease burden, are less likely to have the resources to participate in voluntary interventions to improve health, and exhibit greater impacts of poor health because of their greater reliance on physical labor. As noted by Angus Deaton (2002), "when low income and poor health go together, the poor are doubly deprived and thus have a greater claim on our attention than is warranted from their incomes alone." Studies suggest that if life expectancy in 31 poor counties had been 10% higher in 1990 and if this difference continued to 2025, there would be 30 million fewer people living in poverty (Bloom, Canning, Graham, & Sevilla 2006). Based on these arguments, international organizations including the OECD, WHO, and the World Bank have adopted a 'pro-poor' approach to reducing poverty in developing nations.

Several broad categories of public policies to enhance health have been suggested (Lurie 2002; McGinnis et al. 2002). These include policies that alter the scope and emphasis of the overall policy program (including promoting intersectoral policies to improve health with the involvement of multiple government); policies that promote broad sociocultural improvement; policies that focus on the disadvantaged such as the poor, mothers, young children; and policies that directly impact health care services.

Examples of successful public policy interventions have been described (Kohn 2009). These include bans on cigarette smoking in public places; free screening programs to detect and treat sexually transmitted diseases; promoting healthy nutrition by requiring disclosure of nutritional information in restaurants, banning of harmful food contents (e.g., trans fats), and providing incentives for neighborhood stores to carry fresh fruits and vegetables; and building safe, health-promoting physical environments. It has also been shown that a 10% increase in public health spending leads to a 7% reduction in infant mortality and a 4% reduction in cardiovascular mortality, both major causes of reduced economic productivity in the U.S. (Mays & Smith 2009). Enrollment in the Low Income Home Energy Assistance Program that subsidizes energy costs for the poor is associated with improved child nutrition and growth (Frank et al. 2006). And interventions such as extended early childhood programs may result in higher rates of full-time employment and lower rates of being on public assistance as adults (Reynolds et al. 2007).

The application of this model of economic development, however, is not without challenges. The economic impact of on health intervention may not be realized for many years; when health improves, income adjusts slowly. For example, improving child health may not produce economic gains until the child reaches adulthood.

Also, clearly, increasing financial support for health-related interventions is not the sole solution to poor health, and health gains are not an inevitable solution for poverty. Many other barriers to health improvement must also be overcome, and



other nonhealth problems must be addressed for the health effects to translate into economic gain. For example, introducing changes that expand a healthy workforce will be meaningless if there are no jobs available. The outcome depends on the political commitment for improving health, the political and policy decisions that are made, and the prioritization of needs and deployment of resources within a society.

What is important is that primary efforts to improve health be part of national or regional economic development plans. As summarized by Schultz (1961), "Granted that (the elements of human capital) seem amorphous compared to brick and mortar, and hard to get at compared to the investment accounts of corporations, they are assuredly not a fragment; rather they are rather like the contents of Pandora's box, full of difficulties and hope."

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# RESEARCH NOTE: *A Comparative Study of Images Created by Press Coverage of the United States and the Republic of Belarus*

Natalie Manayeva, *The University of Tennessee*

Dzmitry Yuran, *The University of Tennessee*

Michael R. Fitzgerald, *The University of Tennessee*

## INTRODUCTION

Over the past ten years relations between the United States and the Republic of Belarus have been tense, distant, and deteriorated considerably as the decade proceeded. The Bush administration called Belarus “the last dictatorship of Europe,” (Dapkus, 2005) and the Belarusian leadership called the U.S. “the most alienated state in the world” (Ioffe, 2008). To gain support both inside and outside their countries, each side formed and promoted negative images of the other. The main instrument of this process was mass media. This research note explores how the tensions between the U.S. and Belarus were reflected in the print media of both nations. We are concerned with the images of each country as these emerged from the mass media and how these images might impact future relations.<sup>1</sup>

The Republic of Belarus is by no means the international equal of the United States and is not ordinarily considered a major player in U.S.-European relations. Nonetheless, due to geopolitical circumstances, Belarus serves as a sort of “testing ground” (Ioffe, 2008) for clarification of U.S. relations with global players such as Russia, China and others dreaming about reinstating a “multi-polar world.” (Manaev, 2005; Ioffe, 2008). Thus, by studying U.S.–Belarus relations we may to some extent better understand, and perhaps anticipate the further development of U.S. relations with these major global players.

Belarus today is a typical 21<sup>st</sup> Century authoritarian regime. The way the Belarusian press portrays the United States helps understand how authoritarian regimes around the world portray the U.S. to their citizens. Similarly, the image of Belarus projected through the American press, helps understand how such regimes are viewed by the public and establish the channels within which U.S. foreign policy must operate.

In Belarus most of the mass media are state-owned, especially the broadcast media (IREX, 2009). In effect there are only a dozen independent newspapers to offer alternative viewpoints. State-run media tend to assume only one perspective, which is pro-Lukashenko and pro-regime. Similarly, the government maintains an unwavering grip on the press distribution channels and telecom infrastructure. The circulation numbers of independent and state-run press are nowhere near parity. The major state-run newspaper *Sovetskaya Belarussiya* has a weekly circulation of approximately 2.5 million. The top independent newspaper *Narodnaya Volya* has an estimated weekly circulation of only 30,000.

Already tense, relations between Belarus and the United States spiraled downward in 2006. In June the Bush administration imposed sanctions on the state-controlled oil processing and chemicals company, Belneftekhim, which accounted for approximately one-third of Belarus’ foreign currency earnings (U.S. Treasury/Office of Foreign Assets Control, 2006; Scollon, 2008). President Bush’s executive order froze the property and financial

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assets in the U.S. of numerous Belarusian citizens and government officials—including President Alexander Lukashenko. American companies and individuals, under the order, were barred from engaging in transactions with the targeted persons. The sanctions were designed to punish government for its heavy-handed treatment of critics and intolerance of dissent. Relations failed to improve leading to additional U.S. sanctions in 2007. In response, Belarus removed its ambassador from Washington, and the U.S. Ambassador Karen Stuart left Minsk soon thereafter. The U.S. State Department eventually ordered Belarus to close its embassy in Washington and its consulate in New York (Lee, 2008; Ria Novosti, 2010).

In September 2008, after the release of a number of political prisoners and following Belarus' mild support of the Russian invasion of Georgia, the Bush administration removed sanctions against two Belarusian companies (Scollon; 2008;). Since 2009, both governments have expressed a desire to improve relations, although this has proven easier said than done (Ria Novosti, 2010).

## DATA AND METHODS

The method used to study the image of Belarus in the American press and the image of the U.S. in Belarusian press is content analysis. To obtain data about the American press, we analyzed the top ten newspapers in the United States by daily circulation: *USA Today*, *The Wall Street Journal*, *The New York Times*, *Los Angeles Times*, *Daily News*, *New York Post*, *The Washington Post*, *Chicago Tribune*, *Houston Chronicle* & *The Arizona Republic* (Burrelles-Luce, 2009). The Factiva Data Base<sup>3</sup> was used to find articles with key words “Belarus”, “Belarusian”, “Minsk”, “Lukashenko” & “Lukashenka” (different spelling variation).

To obtain data from the Belarusian press, we analyzed the two state-run newspapers with the largest circulation *Sovetskaya Belorussiya* and *Respublika*, and the two independent newspapers with the largest circulation *BelGazeta* and *Narodnaya Volya* (IREX, 2009). Google Advanced search on newspapers web sites was used to find articles with key words “USA”, “United States”, “America”, “American”, “Washington” & “Bush” in both Russian and Belarusian languages. The research period for the study was October 2007 through March 2008, a time period between Presidential elections in Belarus and during which relations remained tense.<sup>2</sup>

## FINDINGS

### *The Image of Belarus in the American Press*

During the period under study, we found 75 articles about Belarus containing key words in ten American newspapers. More than half of the articles described Belarus in very negative terms, describing its regime with words such as “dictatorship”, “authoritarian,” and “tyranny.” Most of the articles covered violations of human rights in Belarus and the diplomatic controversy<sup>7</sup> between Belarus and the U.S. More than half of the articles in the last quarter of 2007 were concentrated on Russia, mentioning Belarus only in the context of Russia. As for the beginning of 2008, more articles were dedicated directly to Belarus with attention to the Belarus–U.S. diplomatic meltdown that led both nations to withdraw their

2 This is a preliminary research effort that is designed as a pilot study eventually to be extended in time and to other countries.

ambassadors. The average length of the articles was 761 words. In 21% of the articles, Belarus was the main topic; in 33% it was a subtopic, and in 46% of the articles there was only a short reference to Belarus.

Table 1 presents U.S. newspaper coverage in which Belarus was mentioned according topic.<sup>3</sup> Belarus was the most likely to be mentioned in the context of its relations with other countries, including the U.S., with nearly one-half of stories (45%) focusing on this topic. It was the least likely to be mentioned in stories devoted to U.S. domestic affairs (12%). Including international relations, four out of five articles focus mainly on political and economic affairs, with the rest focusing on culture and sports. The primary focus of U.S. press coverage rarely focused on the domestic affairs of Belarus (12%).

**Table 1**  
U.S. Newspaper Coverage of Belarus by Topic (N=75)

Topic	% Articles
Belarus relations with other nations and the U.S.	45
Culture and sports	20
U.S.-Belarus political and economic relations	17
Belarus domestic political and economic affairs	12
U.S. domestic political and economic affairs	6

As shown in Table 2, Belarus was mentioned with regard to some kind of problem in nearly half (49%) of the articles. Only about one-in-five (22%) articles discussed achievements and just under one-in-three were neutral (22%) as to focus. Press coverage tended to focus on problems involving Belarus, which created the frame for a negative image. The frame was filled by the tone of the articles, which is summarized in Table 2.

**Table 2**  
U.S. Newspaper Coverage of Belarus by Focus (N=75)

Focus	% Articles
Problem	49
Neutral	30
Achievement	22

*Equals 101% due to rounding*

<sup>3</sup> The category “topic of the article” means the main topic (or theme) of the article. In some articles Belarus is the main topic (for example, U.S.-Belarus or Russia-Belarus relations). In other articles Belarus is mentioned briefly, while the main topic is something different, like sports, culture or domestic US politics.

Table 3 shows that news stories mentioning Belarus, while most likely to be neutral or balanced in tone (55%), were far more likely to be negative (35%) than positive (10%). This suggests that although U.S. press coverage offered the American public a negative image of Belarus it was not overwhelming so during the period.

**Table 3**  
U.S. Newspaper Coverage of Belarus by Tone (N=75)

Tone	% Articles
Negative	35
Positive	10
Neutral or balanced	55

*Image of the U.S. in the Belarusian Press*

During the period under study, 172 articles mentioning the U.S. appeared in the Belarusian press. Of these, 63 appeared in state-run newspapers, and 109 in independent newspapers. The ratio of 1-to-2 (state-run-independent newspapers) indicates an important discrepancy between state-run and independent press coverage of the U.S.; the independent press was almost twice as likely to cover the U.S. as its state-run counterpart. Important features of authoritarian regimes include ignoring and deemphasizing everything that does not fit into official ideology or is not advantageous to the regime. The official press used the principle of looking through the “reversed binocular” and ignored in particular the fact that the United States frequently criticized Lukashenko’s authoritarian regime. On the other hand, a large number of the articles covering the U.S. in the Belarusian independent press provided a more pro-West and pro-American attitude.

**State-run Newspapers**

Coverage of the U.S. by the Belarusian state-run proved limited; there were only 63 articles during the period under study. As is shown in Table 4, the U.S. was mentioned most frequently in the context of America’s relationship with other nations (37%) or the international economy (9%), with nearly half of stories mentioning these topics (46%). The state-run press was more likely to cover U.S. domestic affairs (24%) than the U.S. press was to cover Belarusian domestic affairs (12%).

**Table 4**  
Belarusian State Newspaper Coverage of U.S. by Topic (N=63)

Topic	% Articles
U.S. relations with other nations with Belarus mentioned	37
Culture, science, and sports	13
Belarus-U.S. political and economic relations	13
U.S. domestic political and economic affairs	24
International economic affairs	9
Belarus domestic political and economic affairs	4



State-run newspapers infrequently discussed the U.S. but when they did the focus was primarily on problems as can be seen in Table 5. Over half (54%) of the articles focused on problems in the U.S. economy, domestic affairs, and foreign policy. Only one-in-ten stories referred to U.S. achievements in these areas. Thus, in emphasizing problems, the image of the U.S. in the Belarusian state-run press tended toward a negative image. In most stories the U.S. was characterized as facing constant political and economic crises and as behaving aggressively on the international scene.

**Table 5**  
Belarusian State Newspaper Coverage of U.S. by Focus (N=63)

Focus	% Articles
Problem	54
Neutral	37
Achievement	10

*Equals 101% due to rounding*

The tone of coverage reported in Table 6 shows that the majority of stories assumed a neutral or balanced tone. Still, the projection of an unfavorable U.S. image in state-run newspapers is apparent since one-third of the stories were negative and only five percent were positive. It is striking that the proportion of negative stories in the Belarusian state-run press (37%) essentially matches those found in the U.S. press about Belarus (35%).

**Table 6**  
Belarusian State Newspaper Coverage of U.S. by Tone (N=63)

Tone	% Articles
Neutral or balanced	59
Negative	37
Positive	5

*Equals 101% due to rounding*

**Independent Press**

A different picture emerges from articles in the Belarusian independent press, as shown in Tables 7 and 8. Not only were articles about the U.S. almost twice as likely to appear in independent newspapers than the state press (109 compared to 63), but also the coverage was more evenly distributed across the spectrum of topics. Independent newspapers produced stories about U.S. domestic affairs at about the same rate as did the state-run papers, but paid more attention to the political and economic relations (21% as compared to 13%) between the two countries. More revealing, articles in the independent press were far more likely to be neutral in focus than those that appeared in the state-run press.

**Table 7**  
Belarusian Independent Newspaper Coverage of U.S. by Topic (N=109)

Topic	% Articles
U.S. relations with other nations	30
Culture, science, and sports	12
Belarus-U.S. political and economic relations	21
U.S. domestic political and economic affairs	22
International economic affairs	8
Belarus domestic political and economic affairs	8

*Equals 101% due to rounding*

As Table 8 shows, the articles appearing in the independent press were remarkably balanced in focus as compared to the newspapers sponsored by the government. The stories that covered U.S. domestic affairs were mostly about achievements in both economics and politics. It was the articles that covered Belarus domestic politics or U.S.-Belarus relations, which dealt mostly with problems.

**Table 8**  
Belarusian Independent Newspaper Coverage of U.S. by Focus (N=109)

Focus	% Articles
Problem	36
Neutral	37
Achievement	27

Table 9 presents the tone of the independent press coverage and the results are striking, especially in comparison to the government-sponsored newspapers. The overwhelming majority of stories in these outlets were neutral or balanced in tone. Although a third (37%) of the state newspapers were negative in tone, none of the independent newspaper stories were so. To be sure, the tone of stories reported in both venues was equally unlikely to be positive in tone (5%). The key difference between them was the highly balanced tone set in the independent press and its tendency to be less negative than its state-sponsored counterpart.

**Table 9**  
Belarusian Independent Newspaper Coverage of U.S. by Tone (N=109)

Neutral or balanced	85
Negative	0
Positive	5

## DISCUSSION

Despite the importance of Belarus being a “testing ground,” American press coverage proved very limited during the period under study and most of the articles (67%) appeared in only three newspapers.<sup>4</sup>) In most cases, Belarus was a subtopic of the article or a small reference. Most of the articles covering politics described the actions of the Belarusian government with a neutral evaluation, but the majority of the articles covered violations of human rights in Belarus, the diplomatic scandal between Belarus and the U.S., or mentioned Belarus in the context of Russia. Thus, even though the tone of these articles was not overwhelmingly negative, the stories described Belarus in a negative context by focusing on problems and offering words such as “dictatorship” and “authoritarian” to characterize the regime. The results of this study show that the image of Belarus presented to the American people through the U.S. press lacks depth and detail. The image is vaguely negative and seems largely set in the context of international affairs and U.S.-Russian relations.

As for the Belarusian press, there are significant differences in the U.S. image depending upon whether independent or state-run newspapers project it. In the state-run newspapers *Sovetskaya Belarussiya* and *Respublika*, the majority of articles covered U.S. economic and political problems and than a third offered negative evaluations of the United States. In those articles, the U.S. consistently was presented as the enemy of Belarus, as an aggressive country that constantly sought to promote its interest and way of life all around the world, and as a meddler in the affairs of other countries.

The independent newspapers *Narodnya Volya* and *BelGazeta* more extensively covered the United States. The most popular topics of the articles about the U.S. were relations with countries other than Belarus; U.S.-Belarus relations; and U.S. domestic politics, culture, and science. The independent press either tried to cover the U.S. impartially, or provided readers with a balanced evaluation by giving both sides of an argument. Independent newspapers covered different aspects of life in the U.S. as well as its actions for promoting democracy all over the world, including American criticism towards Lukashenko’s authoritarian regime. Although limited in its circulation and therefore limited in its overall impact as compared to the state-run press, the independent press presented a positive image of the United States to the Belarusian people. Taking into consideration the huge circulation advantage enjoyed by government-sponsored newspapers, however, that the image of the United States presented to the Belarusian people remains one-sided and incomplete.

## CONCLUSION

Generally speaking, the image of Belarus presented in the American press was appropriate for the situation of “cold peace” between the United States and Belarus during the Bush administration (Manaev, 2000, 2008; Ioffe, 2008). Today, however, despite the oft-expressed desire of the Obama administration to rethink and restructure its foreign policy toward regimes such as Belarus and Russia, the old images and hard realities are difficult to change. Popular support for better relations between Belarus and the U.S. surely will require the formulation of more complete and positive images of both nations that better reflect the desired new political reality. For example, the revision of Belarusian policy towards the U.S. will require the projection of a better image of the U.S. by the Belarusian state press; one more akin to that produced in the nation’s independent press. Presumably

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4 The newspapers are the *New York Times*, the *Washington Post*, and the *Wall Street Journal*.

the state-run press coverage of the United States and the images thereby projected to the Belarussian people will reflect this attitude in the future.

From the Belarusian side, recent statements by President Lukashenko indicate that Belarus is ready to reconsider its relations with the United States. In his interview with Reuters on May 5, 2009, President Lukashenko said: "I think we will have good relations with Americans in the future. God clearly wants us to stop fighting, it is enough. He [God] wants us to have better relations in the name of peace and our people." Lukashenko also announced that he was ready to restore diplomatic relations with the United States once the sanctions originally imposed by the Bush administration was lifted (Centre for Research on Globalization, 2010).

On the American side, however, President Obama in June 2010 extended the sanctions on Belarus for another year. In his message to Congress the President observed that:

The actions and policies of certain members of the Government of Belarus and other persons to undermined Belarus democratic processes or institutions, to commit human rights abuses related to political repression, and to engage in public corruption pose a continuing unusual and extraordinary threat to the national security and foreign policy of the United States (Centre for Research on Globalization 2010).

In response, a spokesman for the Belarusian Foreign Ministry characterized the American action as "confrontational" and "useless," indicating "the U.S.'s lack of political will to develop cooperation in the interests of peace and partnership" (Ria Novosti, 2010).

Given the continuing sanctions imposed by the American government, it seems unlikely that American press coverage will produce more favorable images of the Belarusian regime in the foreseeable future. The prospect of Belarusian state-sponsored newspapers producing more balanced and positive coverage of the United States seem dim as well. One can hope, nonetheless, that the news coverage within both nations becomes more frequent and complete so as better to inform their respective publics and to produce images more conducive to effective and mutually beneficial relations.

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## BOOK REVIEW:

### *The Terrorized Presidency*

Glenn Harlan Reynolds<sup>1</sup>

Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside The Bush Administration*

(New York: W.W. Norton, 2009) 256 pp. \$16.95

No President has fought a war under constraints as severe as those faced by President George W. Bush. In his legal memoir, Office of Legal Counsel veteran and Harvard Law Professor Jack Goldsmith recounts the extent of those constraints, and the problems created by efforts to overcome them. His memoir provides a troubling snapshot of the state of national security law and politics in the early days of the War on Terror, and a cautionary note for those who seek to end-run these problems. It is a memoir that could profitably be read by many Bush critics and defenders, and in particular by those now filling similar slots in the Obama Administration.

Native-born Tennessean Jack Goldsmith was a Yale and Oxford Alumnus and a professor at the University of Chicago Law School when he was asked to work for the Department of Defense's top legal officer. After just over a year in that position, Goldsmith moved to the Justice Department's Office of Legal Counsel, taking that position in place of the White House's favored candidate, John Yoo, whom Attorney General John Ashcroft did not favor.

With Yoo blackballed by Ashcroft, Goldsmith took the job as head of the OLC, a (usually) obscure office of fewer than two dozen attorneys whose job is to serve as the main source of legal advice for the Attorney General and President. Traditionally, OLC lawyers have viewed themselves as being *in* the Executive Branch but not fully *of* it. Given that many decisions taken by Presidents aren't reviewable by courts, the OLC has developed "powerful cultural norms about the importance of providing the President with detached, apolitical legal advice, as if OLC were an independent court inside the executive branch."<sup>2</sup>

Once in office, Goldsmith discovered that things didn't always work that way. In the aftermath of the September 11, 2001 attacks, members of the executive branch, namely those in the White House, the Department of Justice, and the intelligence community, felt powerful pressure to prevent future attacks, and to err, even substantially, on the side of caution. These pressures had been present even before the 9/11 attacks, and, indeed, even before George W. Bush took office:

The Clinton OLC tended to invoke aggressive presidential military powers primarily for humanitarian rather than security ends, and its arguments for presidential power were more cautious than those in the Bush II OLC and relied more on congressional authorization. But these differences do not

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<sup>1</sup> Glenn Reynolds is the Beauchamp Brogan Distinguished Professor of Law at the University of Tennessee College of Law

<sup>2</sup> P. 33.

mask the fact that the Clinton lawyers -- like all OLC lawyers and Attorneys General over many decades -- were driven by the outlook and exigencies of the presidency to assert more robust presidential powers, especially during a war or crisis, than had been officially approved by the Supreme Court or than is generally accepted in the legal academy or by Congress.<sup>3</sup>

Nonetheless, after holding office for a while, Goldsmith found that he was unable to support many of the positions taken by the OLC (often authored by Yoo) and eventually tendered his resignation. Much of the book consists of an interesting tale of an academic's gradual realization that things are much less tidy, and much less pleasant, in the working precincts of government than in the more cheerful world of academe.

Goldsmith offers a number of cautionary notes that the current administration -- and its critics, now and in the future -- may wish to bear in mind. One is the image of a presidency "ensnared by law" in the fashion of Gulliver among the Lilliputians. Modern Presidents operate in a legal culture, and a "CYA" culture, very different from that enjoyed by such wartime leaders as FDR or Lincoln. As Goldsmith notes, when confronted with the prospect of judicial review for captured Nazi saboteurs, FDR announced that he would not hand the saboteurs over to a U.S. Marshal armed with a writ of habeas corpus, and threatened to execute them on his own authority no matter what the Supreme Court said. Chastened, the Court gave way.

It's difficult to imagine a similar set of events today, and much of Goldsmith's discussion of this topic reminds me of Grant Gilmore's famous statement: "In Heaven there will be no law, and the lion will lie down with the lamb. . . . In Hell, there will be nothing but law, -- and due process will be meticulously observed." Modern war-fighters have to cope with what's known as "lawfare," the use of legal tools in order to obstruct war efforts and shield the enemy. "Lawfare works because it manipulates something Americans value: respect for law."<sup>4</sup> In particular, government employees in defense and law enforcement worry that they themselves may wind up in legal trouble for their efforts:

It may be hard to believe that executive branch officials, many of whom risk their lives to protect the nation, really care much about criminal law, investigation, and, possibly, jail. But they do care—a lot. In my two years in the government, I witnessed top officials and bureaucrats in the White House and throughout the administration openly worrying that investigators operating with the benefit of hindsight in a different political environment would impose criminal penalties on heat-of-battle judgment calls. These men and women didn't believe they were breaking the law, and indeed they took extraordinary steps to ensure that they didn't. But they worried nonetheless because they would be judged in an atmosphere different from

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3 P. 37

4 P. 59.

when they acted, because the criminal investigative process is mysterious and scary, because lawyers' fees can cause devastating financial losses, and because an investigation can produce reputation-ruining dishonor and possibly end one's career, even if you emerge "innocent."

Why, then, do they even come close to the legal line? Why risk reputation, fortune, and perhaps liberty? Why not play it safe? Many counterterrorism officials did play it safe before 9/11, when the criminalization of war and intelligence contributed to the paralyzing risk aversion that pervaded the White House and the intelligence community. The 9/11 attacks, however, made playing it safe no longer feasible.<sup>5</sup>

Goldsmith also explains the other fear that pervades the Executive Branch:

Every morning the President sees a "threat matrix" that . . . lists "every threat directed at the United States in the past 24 hours. The matrix can be many dozens of pages long. . . . It is hard to overstate the impact that the incessant waves of threat reports have on the judgment of people inside the executive branch who are responsible for protecting American lives.<sup>6</sup> . . . The President and everyone else responsible for national security after 9/11 understand that this attitude will lead them to do things that, in hindsight, will seem to be overreactions or errors. National security officials do not have the luxury of hindsight when deciding how to act. But they do understand the potential consequences of not taking threats seriously enough. That is why the obsessively focus on how a genuine threat might look *before the fact*. They know that most of the 9/11 plotters, if arrested in the summer of 2001, would have seemed like unimportant malcontents who lacked the weapons or skills needed to kill three thousand people and cause tens of billions of dollars of damage in a single morning. And so when national security officials learn about groups that seem like Al Qaeda cells or copycats, they believe they cannot afford not to act. Nor do they think they can be patient with traditional investigative techniques when they have in custody someone like Abu Zubaydah, a close associate of Bin Laden who was involved in many prior terrorist attacks on Americans, and who likely had knowledge of future (and possibly near-term) attacks.<sup>7</sup>

Despite this fear, though, Goldsmith ultimately resigned over a difference regarding interrogation practices, where he felt that the OLC had bowed to pressure to endorse practices that were highly questionable as a matter of law. He then went on to a professorship at Harvard Law School where -- his reasons for resignation still kept confidential -- he was pilloried by critics for being "pro-torture."

Yet it is this dual character that makes Goldsmith's book so valuable. Unlike some critics on the outside, Goldsmith understands why people in the executive

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5 Pp. 69-70.

6 Pp. 71-72

7 P. 190.



branch worry as they do, and feel compelled to -- as FDR did -- give the law short shrift at times. But he also understands that, as a long-term strategy, that is simply not a viable approach.

Goldsmith believes that the Bush Administration -- despite a degree of political pressure almost unprecedented in wartime -- should nonetheless have reached out to Congress more, and tried to obtain more “buy in” from those who later became its critics. He also stresses the importance of trust and credibility, and the damage that those can suffer from too-clever lawyering of the sort that is often a phenomenon in offices – like the Bush OLC – that are heavily populated by smart young Harvard and Yale graduates. And he suggests that Bush Administration officials were too attached to notions of the importance of Presidential power in the abstract, and not willing enough to do things that might have enhanced it in concrete terms even if they did not expand executive prerogatives in a formal sense. “Presidential power is primarily about persuasion and consent, rather than unilateral executive action.”<sup>8</sup>

It is now the Obama Administration that must keep us safe, or face the political and moral consequences of allowing another major terror attack, even as it faces political pressure to wind down the war on terror. So far -- perhaps influenced by the threat matrix -- it has taken a number of steps that have angered its former supporters, as it boosts the “state secrets” defense<sup>9</sup> and defends warrantless wiretaps aimed at American citizens.<sup>10</sup> This has angered some former Bush critics,<sup>11</sup> but it is probably inevitable. It will certainly produce tensions as the Obama OLC faces the same pressures as its predecessors. One hopes that the new crowd has read, and internalized, the lessons of Goldsmith’s book already.

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8 Pp. 211-12

9 Dan Froomkin, *Obama’s State Secrets Overreach*, Washington Post, April 08, 2009, available at [http://voices.washingtonpost.com/white-house-watch/obamas-state-secrets-overreach040909.html?wprss=rss\\_blog](http://voices.washingtonpost.com/white-house-watch/obamas-state-secrets-overreach040909.html?wprss=rss_blog)

10 Bob Egelko, *Government Opts for Secrecy in Wiretap Suit*, San Francisco Chronicle, April 7, 2009, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/04/06/BARP16TJOQ.DTL&ts=1>

11 See, e.g. Glenn Greenwald, *New and Worse Secrecy and Immunity Claims from the Obama DOJ*, Salon, April 6, 2009, available at <http://www.salon.com/opinion/greenwald/2009/04/06/obama/index.html>.

# INTRODUCTION:

## Student Symposium on National Security

*Elizabeth Wilson Vaughan*  
*Bradford A. Vaughan*

As part of this edition of the *Baker Center Journal of Applied Public Policy*, we are pleased to present a Student Symposium focusing on topics relating to national security issues. This Student Symposium is born out of the Baker Center's continued commitment to promoting student engagement in public policy and directed research.

In *Undermining the National Security and Civil Liberties Debate: The Recurrence of Politically-Motivated Actions*, Amber Patel analyzes the delicate balance between civil liberties and the politics of wartime. Ms. Patel considers critical instances in the past when American civil liberties were suspended or curtailed, in the context of promoting national security or a political agenda during times of war.

Bahar Azhdari critiques the weakening bargaining position of the United States as an international powerhouse in her article, *Defining Enemy Combatants: Is the United States Unwittingly Sabotaging Itself?* Ms. Azhdari discusses the need to balance the United States' international legal commitments against its interest in ensuring the security of its citizens at home and abroad. Through her sharp analysis of international law, Ms. Azhdari charts the possible impact of actions undertaken during the War on Terror.

In *The Fourth Amendment and Domestic National Security Surveillance: Challenging the Need for Traditional Warrants*, Stephen Hargraves traces the history of the protections of the Fourth Amendment and the birth of the constitutional right to privacy. Mr. Hargraves concludes his article by considering whether the protections of the Fourth Amendment can still be adequately provided to citizens after the government is able to fulfill its obligations to domestic national security.

In *Walking the Tightrope: A New Approach to Balancing Concerns over the "Significant Purpose" Amendment to the Foreign Intelligence Surveillance Act*, Charles Jarboe weighs the impact of the terrorist attacks of September 11, 2001 and the subsequent amendments to FISA. Mr. Jarboe considers the delicate balance between the government's need to preserve national security in exigent circumstances and the courts' role in protecting civil liberties through various procedural safeguards.

Karen Manning makes a thorough consideration of the nexus of national security concerns and constitutional rights in her article, *A Critical Analysis of the Military Commissions Act of 2006*. Ms. Manning discusses the genesis of the MCA and analyzes provisions that may not comport with international law. She also analyzes the suspension of habeas corpus for alien unlawful enemy combatants and ends with a discussion of the United States Supreme Court decision in *Boumediene v. Bush*.

Drawing on her expertise in Spanish language and culture, Emily Stulce compares how Spain and the United States have attempted to combat terrorism in her article, *The United States and Spain: Changes and Development in Anti-Terrorism Law and Policy*. Ms. Stulce explores the historical backdrop of legislation and policies targeting terrorism in both countries and vigorously questions the purported successes and failures of each country in anti-terrorism activities.

These articles, written by students engaged in graduate studies, represent a diverse and intriguing snapshot of how students discuss and analyze the impacts of public policy on key issues affecting the national security. The Baker Center is proud to promote the work of students and provides these works as examples of how graduate students can impact public policy through study and focused analysis.

# DEFINING ENEMY COMBATANTS: *Is the United States Unwittingly Sabotaging Itself?*

Bahar Azhdari

## INTRODUCTION

The continuing threat of terrorist acts on home soil is a constant topic of public discourse between policymakers and opinion leaders in the United States. With the increased attention given to transnational terrorist organizations like al Qaeda, the push to give its membership legal definitions has caused both domestic and international problems for U.S. leaders. Under the banner of domestic law, terrorists might be analogous to criminals and subject to United States criminal law. Widening the scope internationally, terrorists might be compared to enemy soldiers fighting on the field of battle. While domestic law is sufficient to handle terrorists acting within the United States or threatening its citizens abroad,<sup>1</sup> the law has had to change to accommodate a new breed of fighter encountered in the war on terrorism and the Iraq conflict: one without national or state affiliation.

President Bush declared the terrorist attacks of September 11, 2001 acts of war—a declaration that brought with it considerable legal consequences.<sup>2</sup> Treating acts of terrorism as opening shots of an armed conflict allows the United States to “exercise fundamental incident[s] of waging war.”<sup>3</sup> Among those “fundamental incidents” are the broad powers “to detain [enemies] for the duration of hostilities, to subject war violators to trials in military tribunals, and to exercise subject matter jurisdiction over the full scope of the law of war,”<sup>4</sup> rather than only those defined in the United States’ criminal code. By thus invoking the law of war, however, the government’s “[a]ctions justified by that law are bound by it as well.”<sup>5</sup>

One of the main problems with former President Bush’s declaration—and the actions taken subsequent to it—is determining what part of the law of war is applicable to the “war on terror.” The law of war is the body of international law governing warfare. Traditionally, international law has divided armed conflict into two categories: international and non-international. Each camp has its own separate rules for conduct and participant treatment. Unfortunately, the current “war on terror” does not fall neatly into either category. As a result, the Bush Administration

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1 The main impediment to application of American law internationally is extraterritoriality. In most cases, however, extraterritorial jurisdiction is available. See *United States v. Yousef*, 327 F.3d 56, 86 (2d Cir. 2003) (“It is beyond doubt that, as a general proposition, Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.” (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991))). While a presumption exists that Congress intended a statute to be applied only in the United States, that presumption can be overcome when Congress manifests an extraterritorial intent. *Id.*

2 David Glazier, *Full and Fair by What Measure?: Identifying the International Law Regulating Military Commission Procedure*, 24 B.U. INT’L L.J. 55, 56 (2006).

3 *Id.* (Internal quotations omitted.)

4 *Id.*

5 *Id.*

took advantage of this misfit by “re-characterizing terrorism as armed conflict and attempting to avoid the application of international standards to its treatment of detainees.”<sup>6</sup> Historically, the use of international law in domestic affairs has been a long-standing tradition. The United States Constitution explicitly states that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land . . . .”<sup>7</sup> In reconciling this provision with Congressional power, “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>8</sup> The deference to international treaties does not always apply, however, due to domestic security concerns.<sup>9</sup>

With the invasions of Afghanistan and Iraq, the United States began fighting a war but not against an enemy state. These new enemies belong to no state or political organization. Instead, they are an amorphous group of fighters with the unifying goal of ousting the perceived invaders of their holy lands. This lack of affiliation has led to a problem defining where those fighters and (later) detainees fall in both domestic and international law.

The law of war, or international humanitarian law, is mostly codified in the Geneva Conventions of 1949.<sup>10</sup> The Conventions apply “in time of war, ‘armed conflict,’ or military occupation”<sup>11</sup> regardless of whether the powers involved have formally declared war.<sup>12</sup> Unfortunately, the Conventions do not give a precise definition of “armed conflict.” In addition to the difficulty of discerning when the Conventions apply, determining who exactly is a prisoner of war or a protected person under the Conventions has proved a complex task in the current conflict. Recognizing this definitional gap, the United States has created the designation of “enemy combatant” to avoid the restrictions and protections of the Conventions. In doing so, the United States has carved out for itself an exception to customary international law wherein it can treat its prisoners however it wishes without international ramifications.

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6 *Id.* at 57.

7 U.S. CONST. art. VI, § 1, cl. 2.

8 *Yousef*, 327 F.3d at 86 (quoting *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963)).

9 In fact, courts have held that Congress may legislate with respect to acts outside the United States, beyond the limits of international law. See *Yousef*, 327 F.3d at 86; *United States v. Quemener*, 789 F.2d 145, 146 (2d Cir. 1986).

10 The 1949 Geneva Conventions are comprised of four treaties. The First and Second address the treatment of the sick and wounded members of the military, respectively. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 74 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85. The Third and Fourth Conventions are relevant here. The Third Geneva Convention concerns the treatment of prisoners of war, and the Fourth deals with the treatment of civilians and other protected persons. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GPW]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter GPC]. Two Protocols to the Conventions were concluded in 1977, but the United States did not sign on to them. See Derek Jinks, *The Applicability of the Geneva Conventions to the “Global War on Terrorism,”* 46 VA. J. INT’L L. 165, 165-66 n.1 (2005).

11 Jinks, *supra* note 10, at 165.

12 *Id.* at 166.

Unfortunately, the plan might have a small snag. The point of designating fighters as enemy combatants is that those combatants then no longer have to be treated by certain recognized standards. The hope is that by depriving the fighters of minimum comfort and causing them to endure rigorous interrogation with no hope of habeas corpus relief, valuable information will be retrieved and future attacks thwarted. Instead, it seems rather likely that by avoiding the strictures of the Geneva Conventions, the United States might be inadvertently fomenting more hostility towards itself internationally. Rather than abiding by international rules, the United States has flaunted its actions while demanding that other countries get in line and obey international accords. This seeming duplicity is then used by fundamentalist leaders in the Islamic world to gather more recruits and strengthen their objectives. Additionally, and perhaps even worse, the United States may later be unable to protect its own personnel from violations of foreign domestic law augmented to end-run around the Conventions' protections.

The United States is weakening—rather than strengthening—its position internationally. It is the end of the “American era”<sup>13</sup> in the Middle East. The United States must find a way to abide by its international agreements without sacrificing national security. By presenting the ideas of publicists and commentators on the evolution of international humanitarian law in the realm of national security, this article concludes that the United States must recognize the validity and strength of international treaties by conforming its will to international dictates. Part II discusses the Geneva Conventions, focusing on Common Article 3 which provides minimum standards of protection to those involved in conflicts not of an international nature. Part III then covers the Military Commissions Act of 2006, which is Congress's reaction to the Supreme Court decision of *Hamdan v. Rumsfeld*. It analyzes the lead up to the Act and its interaction with international law. Part IV deals with domestic and international reactions to the Bush Administration's actions, focusing on the possible consequences of the United States' decision to circumvent international treaties for its own benefit. Part V concludes.

## THE GENEVA CONVENTIONS

In the abstract, the Geneva Conventions deal with laws of war or international humanitarian law.<sup>14</sup> The four Conventions are “undoubtedly the best known components of the overall *corpus juris* of the law of war, comprising . . . the core of

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13 Richard N. Haass, *The New Middle East*, FOREIGN AFFAIRS (November/December 2006).

14 The phrase “laws of war” is no longer often used to refer to the conduct of hostilities. It has been overtaken by its modern counterpart *jus in bello* or international humanitarian law, which “addresses the treatment that states and their armed forces must accord to combatants, civilians, and prisoners in times of armed conflict.” MARK W. JANIS & JOHN E. NOYES, CASES AND COMMENTARY ON INTERNATIONAL LAW 513 (3d ed. 2006). “International humanitarian law” and “laws of war,” however, will be used interchangeably in this paper.

international humanitarian law.”<sup>15</sup> To their credit, the Conventions are universal compared to other treaties: they have been ratified or acceded to by 194 nations,<sup>16</sup> two more than the number of United Nations members.<sup>17</sup> It is important to note that as laws of war or international humanitarian law, the Geneva Conventions differ significantly from international human rights law. Unlike the latter, the “law of war allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage.”<sup>18</sup> Also, the Conventions permit certain deprivations of personal freedom without fear of criminal reprisal.<sup>19</sup> An occupying power is allowed to resort to internment and may limit the rights of appeal of detained individuals.<sup>20</sup> Basically, “[a]s long as the rules of the game are observed, it is permissible to cause suffering, deprivation of freedom, and death.”<sup>21</sup>

According to Professor Derek Jinks, the codification of the Conventions crystallized two changes in international humanitarian law. First, the laws governed “*de facto* as well as *de jure* warfare,”<sup>22</sup> meaning that the Conventions apply to any armed conflict between powers regardless of whether a formal declaration of war exists.<sup>23</sup> Historically, a state of war meant “the complete rupture of legal relations between the belligerent states . . . the ‘laws of war’ completely displaced the ‘laws of peace’ (normal law).”<sup>24</sup> Many types of conflict even “organized hostilities” did not “trigger” the laws of war, and formal declarations of war were required.<sup>25</sup> Now, the treaties apply in all armed conflicts, and international conflicts are easy to discern. The difficulty, however, lies in determining when “an internal disturbance” or non-international disturbance becomes an “armed conflict” under international law.<sup>26</sup>

Second, Common Article 3<sup>27</sup> regulates noninternational armed conflicts, which are conflicts between states and nonstate armed groups.<sup>28</sup> Prior to the Conventions,

15 Glazier, *supra* note 2, at 70 (citing Int’l Comm. of the Red Cross, *The Geneva Conventions: The Core of International Humanitarian Law* (Mar. 6, 2004)).

16 Int’l Comm. of the Red Cross, *The Geneva Conventions: The Core of International Humanitarian Law*, <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions> (last visited Apr. 27, 2008). This near-universal acceptance has led many commentators to argue that the Conventions’ provisions have risen to the status of customary international law.

17 United Nations, Press Release: United Nations Member States, <http://www.un.org/News/Press/docs/2006/org1469.doc.htm> (last visited Apr. 27, 2008). The two non-United Nations members who are signatories to the Geneva Conventions are the Cook Islands and the Holy See. Glazier, *supra* note 2, at 71 n.92.

18 Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 240 (2000).

19 Meron, *supra* note 18, at 240.

20 *Id.*

21 *Id.*

22 Jinks, *The Applicability of the Geneva Conventions*, *supra* note 10, at 166.

23 *Id.*

24 *Id.* at 167.

25 *Id.*

26 Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 10 (2003).

27 In terms of the Geneva Conventions, “Common Article 3” is identical in all four treaties, making it “common” to all of them. Jinks, *The Applicability of the Geneva Conventions*, *supra* note 10, at 167 n.4.

28 See GPW art. 3. The provision applies to conflicts involving only one state or two nonstate armed groups. *Id.*

these types of conflicts were governed solely by domestic law.<sup>29</sup> In fact, if another state were to interfere, it would be viewed as “an unlawful intrusion into the international affairs of the state” and could have been deemed an act of war.<sup>30</sup> After the atrocities of World War II, the international community realized that the “recognition of belligerency doctrine inadequately regulated noninternational armed conflicts.”<sup>31</sup> As a result, the Conventions “enacted a limited scheme that made some elementary humanitarian principles applicable in noninternational armed conflicts.”<sup>32</sup>

The main argument against the applicability of the Geneva Conventions in the current conflict is that the Conventions do not explicitly protect terrorists.<sup>33</sup> Professor Jinks asserts that this idea may be read in two ways: either “the Conventions do not apply at all to military operations directed against terrorist organizations or that individual terrorists do not fall into one of the categories of protected persons.”<sup>34</sup> The main point of departure, then, is whether an armed conflict exists.<sup>35</sup> After that, the basic questions are then when do the Conventions apply and to whom do they apply. If the Conventions do not apply to the current hostilities, then detainees resulting from them are afforded no minimum standards of treatment in the eyes of the international community.<sup>36</sup> If they do apply, the United States, as signer and ratifier, must conform to their standards.

### *When Do the Conventions Apply?*

The crux of the Geneva Conventions deals with international armed conflicts, which are armed conflicts between two or more states.<sup>37</sup> The Conventions do, however, consider armed conflict that is not international in nature under Common Article 3.<sup>38</sup> The Article, “a stand-alone provision, or ‘Convention in miniature,’”<sup>39</sup> sets forth certain minimum standards to be applied “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”<sup>40</sup> Persons no longer taking active part in hostilities must be

29 Jinks, *The Applicability of the Geneva Conventions*, supra note 10, at 167.

30 *Id.* at 167. See generally U.N. Charter art. 2, paras. 4, 7.

31 Jinks, *The Applicability of the Geneva Conventions*, supra note 10, at 167.

32 *Id.* at 168.

33 *Id.*

34 *Id.*

35 Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 3 (2004).

36 A result that would be somewhat anomalous since the purpose of international humanitarian law is to afford protections to all.

37 “[T]he Convention’s several hundred articles are built around the paradigm of two opposing states, operating normally through the use of their regular armies, though perhaps assisted by militias or volunteer corps.” Sean D. Murphy, *Evolving Geneva Convention Paradigms in the “War on Terrorism”: Applying the Core Rules to the Release of Persons Deemed “Unprivileged Combatants”*, 75 Geo. Wash. L. Rev. 1105, 1113 (2007).

38 A noninternational conflict differs from an international conflict because of the legal status of those opposing each other. *Hamdan*, 126 S.Ct. at 2796.

39 Glazier, supra note 2, at 91.

40 Geneva Conventions I-IV, supra note 10, art. 3 [hereinafter Common Article 3].



treated humanely, and the particular acts proscribed against them are:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment; and
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.<sup>41</sup>

Common Article 3 contains the “lowest threshold of both application and protective standards. It is intended to provide a minimum basis of protection” for those not participating in internal armed conflicts.<sup>42</sup> The crux of the Article is to protect those most vulnerable during conflicts. It neither addresses the status of combatants, nor does it even mention them. Historically, states rarely invoke Common Article 3 and “consistently avoid applying it to situations within their territory or even with respect to conflicts taking place in the territory of other states.”<sup>43</sup> The main reason for this lack of application is that if applied to internal conflicts, Common Article 3 would constrain a state’s “ability to respond to threats undermining [its] legitimacy without external interference and oversight.”<sup>44</sup> Additionally, domestic courts remain wary of applying the Article to conflicts because invocation would be “a *de facto*, if not a *de jure*, recognition of belligerency—giving ‘status’ to persons whom states generally wanted to call ‘terrorists’ or ‘criminals’ and not combatants.”<sup>45</sup>

The precise time at which Common Article 3 activates is somewhat ambiguous. To begin, an armed conflict must exist.<sup>46</sup> Next, the conflict must not be of an international nature, a designation which “is capable of meaning between any state and a non-state actor.”<sup>47</sup> While the *travaux préparatoires* show a lack of consensus at the “minimum trigger of applicability,” the drafting history shows a basis from which to conclude that the “threshold applicability” is lower than previously thought.<sup>48</sup> The leading commentary to the drafting of the First and Second Conventions suggests that “a conflict must be similar in many respects to an international war, but take place

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41 Common Article 3(1).

42 Fionnuala Ní Aoláin, Hamdan and Common Article 3: Did the Supreme Court Get It Right?, 91 MINN. L. REV. 1523, 1527 (2007). Although enumerated for noninternational conflicts, “[t]he norms stated in Common Article 3 may be viewed as applicable to all conflicts, even those of an international character.” *Id.* at n.16. See also Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554, 560-61 (1995).

43 Ní Aoláin, *supra* note 42, at 1528.

44 *Id.* at 1528. “[S]tates may be extremely sensitive to any attempt to limit their sovereign rights of response when faced with internal crisis.” *Id.* at n.23 (internal quotations omitted).

45 *Id.* at 1528.

46 *Id.*

47 Murphy, *supra* note 37, at 1137.

48 Ní Aoláin, *supra* note 42, at 1529.

within the geographical confines of a single country, in order to trigger the article.”<sup>49</sup> The purpose of the Article is to protect the widest range of persons possible, so a narrow interpretation would fly against the inherent meaning of the text.

Al Qaeda is not a state. At its core, it is “an armed Sunni Islamist organization that is seeking to eliminate foreign influence in Muslim countries.”<sup>50</sup> It is, however an armed group operating in several countries, one of which is Iraq, a “High Contracting Party” to the Geneva Conventions.<sup>51</sup> Common Article 3 applies “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” While the United States’ argument that the conflict is not international in nature is credible, the argument against application of the Article because the conflict is not international is less so. Either a conflict is international or non-international; the reference to a “transnational conflict” is mired in semantics. In this case, Common Article 3 could apply because a state (the United States) is fighting an armed group (al Qaeda) within the territory of a High Contracting Party (Iraq). While commentators argue that Common Article 3 refers only to civil wars, nothing in the text makes that distinction. A narrow reading of it as such without authoritative amendment of such meaning would be incorrect.

Despite this, the primary problem encountered in applying the Conventions is that the conflict is not a war in the common usage of the term. Generally, the three reasons given for this lack of applicability are:

- (1) adverse legal and policy consequences might follow from characterizing the [war on terror] as a ‘war’ in the legal sense;
- (2) terrorist organizations like al Qaeda are not states and conflicts with such entities are materially different from inter-state wars and civil wars;
- and (3) terrorist organizations enjoy no protection under the rules of war because they do not accept or observe these rules themselves.<sup>52</sup>

First, the Conventions define the treatment accorded vulnerable individuals during armed hostilities. To that end, the Conventions require a level of “humane treatment” be afforded to captured enemy soldiers and civilians, all of which is limited by military necessity.<sup>53</sup> As a result, the Conventions “establish minimum rules that apply even when arguably no other law does, shining the light of law, however dim, into the darkness of war.”<sup>54</sup> With these “limited ambitions, the Conventions should

49 *Id.* at 1530 (referring to the commentaries of Jean S. Pictet).

50 Murphy, *supra* note 37, at 1135. Though the inner workings of the organization are unknown, analysts describe it as numerous independent and collaborative cells operating across several countries. It is not an entity “temporally or geographically tied to the prior de facto government of Afghanistan, but rather an independent force engaged in a private war.” *Id.*

51 Iraq ratified the Geneva Conventions on 14 February 1956 without reservations. Int’l Comm. of the Red Cross, State Parties/Signatories to the Geneva Conventions, <http://www.cicr.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>.

52 Jinks, *The Applicability of the Geneva Conventions*, *supra* note 10, at 169.

53 *Id.* at 173.

54 *Id.*

apply *whenever* fighting erupts between organized enemies.”<sup>55</sup>

Additionally, if applicable, the Conventions do not “displace or trigger the application of any other body of rules.”<sup>56</sup> No part of the Conventions requires the parties to “abrogate any rights-protecting scheme otherwise recognized in its law.”<sup>57</sup> Basically, if it chose to do so, the United States could give the captured combatants the full gamut of statutory and constitutional law, in addition to the Convention protections.<sup>58</sup> On the other hand, “states cannot render the Conventions inapplicable simply by deciding to apply some other body of rules.”<sup>59</sup>

Second, the applicability of the Conventions does not depend on whether any of the conflict’s parties are non-state actors.<sup>60</sup> In fact, the Bush Administration grants that the Conventions regulate some conflicts involving nonstate actors.<sup>61</sup> Its argument against application, though, is that the current conflict is not a defined armed international conflict because the United States is not fighting a state.<sup>62</sup>

The third argument to except applicability is that the enemy does not obey so the rules so no other country has to either. Depriving one group of certain minimal rights because they do not reciprocate those rights seems petty in the international context. Arguably, the United States is waging both a physical and a moral war. It is hard to stand on the moral high ground while ignoring historical standards of detainee treatment to meet the opposition. While al Qaeda does not follow the laws of war, as a non-state actor, it need not do so. Al Qaeda’s failure to follow the rules, however, does not grant the United States license to also disobey them. By abiding by the laws of war, the United States gives itself credibility in the international arena and proves its commitment to international treaties. Furthermore, “the fundamental principle of equality of belligerents in the eyes of *jus in bello* means that the combatants’ privilege would be granted not only to arguably worthy forces such as armed pro-democracy militants, but also to those on the other side as well, such as armed anti-democracy forces.”<sup>63</sup>

### *To Whom Do the Conventions Apply?*

According to Professor Fionnula Ní Aoláin, Common Article 3 does not refer to combatants or civilians specifically, so it does not require a status determination to be applicable.<sup>64</sup> Its drafting history shows that “states intended the provisions to apply regardless of status” because reference to combatants “only appear[s] in the article by

55 *Id.* (emphasis in original).

56 *Id.* at 174.

57 Jinks, *The Applicability of the Geneva Conventions*, *supra* note 10, at 174.

58 *Id.* at 175.

59 *Id.* at 175. *But see* *Yousef*, 327 F.3d at 86; The Military Commissions Act of 2006, 10 U.S.C. § 948 (2006).

60 Jinks, *The Applicability of the Geneva Conventions*, *supra* note 10, at 177.

61 *Id.*

62 *Id.*

63 Nathaniel Berman, *Privileging Combat?: Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT’L L. 1, 28 (2004).

64 Ní Aoláin, *supra* note 42, at 1538.

negative inference.”<sup>65</sup> The explicit reference to “*hors de combat*” in the Article’s text acknowledges that some people remain active in the violence.<sup>66</sup> As a result, states have failed to invoke Common Article 3 based on that negative inference because “application might create an inference that the state recognized the fighters in that conflict to be combatants.”<sup>67</sup>

On the most basic level, the Conventions “protect civilians by encouraging combatants to distinguish themselves from noncombatants.”<sup>68</sup> Specifically, the Third Geneva Convention outlines the protections afforded prisoners of war, and the Fourth Geneva Convention details the protection of civilians. Since war often (sometimes deliberately) confuses the distinction between civilians and armies, states must have a clear way to distinguish between the two.<sup>69</sup> According to one commentator, “[a] condition precedent for attaining combatant status is the existence of a responsible command and a disciplinary system that enforces compliance with the rules of international law in hostilities.”<sup>70</sup> Specifically, Common Article 3 does not provide the “combatants’ privilege or POW status for prisoners captured during” non-international armed conflicts.<sup>71</sup> Therefore, states are free to prosecute “rebels” in noninternational armed conflicts for mere participation, subject, of course, to the minimum requirements of the Article.

While contemporary laws of war were contemplated with state actors and their armies in mind, “the historical trend is one that has favored development of certain core protections for all persons engaged in armed conflict.”<sup>72</sup> Customary international law contains some unambiguous core protections for individuals detained in war time, and such protections “should be applied in situations where the status of persons is uncertain or contested.”<sup>73</sup> Professor Sean D. Murphy states that “application of the core principles is legally compelled, is consistent with sound policy choices, and suggests possibilities for similar application of the core protections to other aspects of the ‘war on terrorism.’”<sup>74</sup> Though the human conscience finds certain acts repugnant, “contemporary global society regards even individuals who appear to have committed genocide, crimes against humanity, and grave war crimes to be entitled to certain core standards of treatment.”<sup>75</sup>

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65 *Id.*

66 *Id.* at 1538-39. See also CPW, *supra* note 10, art. 3; CPC, *supra* note 10, art. 3.

67 *Id.* at 1539.

68 Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT’L L. 1025, 1063 (2004).

69 *Id.*

70 Watkin, *supra* note 35, at 22.

71 Berman, *supra* note 63, at 20.

72 Murphy, *supra* note 37, at 1140.

73 *Id.* at 1140-41. “The core protections establish specific rules concerning termination of captivity, imply a process for determining whether continued detention is merited, and suggest outcomes for different categories of detainees.” *Id.* at 1141.

74 *Id.* at 1141.

75 *Id.* at 1141.

## THE MILITARY COMMISSIONS ACT OF 2006

In an attempt to fill in the ambiguities left by the Conventions and to address the judiciary's concern about military commissions expressed in *Hamdan*, Congress enacted the Military Commissions Act of 2006 ("MCA").<sup>76</sup> Before the Supreme Court decision in *Hamdan*, the President had determined that the conflict with al Qaeda was not a non-international armed conflict under the scope of Common Article 3.<sup>77</sup> Coupled with the previous decision that the conflict was also not of an international character, the United States was free to fill in the treaty gap with its own rules. The President's Military Order of November 13, 2001 proceeded to do just that by establishing military commissions to try captured al Qaeda combatants.<sup>78</sup>

### *Background to the MCA: Hamdan v. Rumsfeld*

Hamdan, a Yemeni national, was in custody at Guantanamo Bay, Cuba.<sup>79</sup> In November 2001, during the hostilities between the United States and the then-Taliban government of Afghanistan, Hamdan was captured.<sup>80</sup> In June 2002, he was transported to Guantanamo Bay, where he remained for a year until President Bush determined him eligible for trial by military commission.<sup>81</sup> The following year he was charged with one count of conspiracy "to commit . . . offenses triable by military commission."<sup>82</sup> As a result of being charged, Hamdan filed writs of habeas corpus and mandamus to challenge the military commission that would have been convened to try him.<sup>83</sup> The District Court granted his habeas request,<sup>84</sup> but the Court of Appeals for the D.C. Circuit reversed.<sup>85</sup> The Supreme Court granted certiorari and held that the military commission convened to try Hamdan lacked power to proceed because it violated both the Uniform Code of Military Justice and the Geneva Conventions.<sup>86</sup> Four Justices went on to decide that the conspiracy offense of which Hamdan was accused was not an "offens[e] that by . . . the law of war may be tried by military commissions."<sup>87</sup>

Though the decision did not overtly overrule prior precedent, it "substantially narrowed the scope of three World War II-era cases on which the Bush Administration had repeatedly relied as authority for its approach to detainees" captured in the

76 Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of 10 U.S.C.).

77 Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT'L L. 73, 73 (2007).

78 Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 FED. REG. 57,833 (Nov. 16, 2001).

79 *Hamdan*, 126 S.Ct. at 2759.

80 *Id.*

81 *Id.*

82 *Id.* (Internal quotation marks omitted.)

83 *Id.*

84 *See Hamdan v. Rumsfeld*, 344 F.Supp.2d 152 (D.D.C. 2004) ("*Hamdan I*").

85 *Hamdan*, 126 S.Ct. at 2759. *See Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005) ("*Hamdan II*").

86 *Hamdan*, 126 S.Ct. at 2759.

87 *Id.* at 2759-60 (citing 10 U.S.C. § 821).

conflict.<sup>88</sup> The decision also implied that harsh treatment of detainees would be a violation of Common Article 3.<sup>89</sup> According to Justice Kennedy, Common Article 3 “is part of a treaty the United States has ratified and thus accepted as binding law . . . By Act of Congress, moreover, violations of [the provision] are considered ‘war crimes,’ punishable as federal offenses, when committed by or against United States nationals and military personnel.”<sup>90</sup> The decision of the Court, however, left it up to the President to ask Congress for the authority he desired to convene military commissions.<sup>91</sup> He did just that.

The President did not reject the court outright. Rather, the President “sought to ensure that the Court would not again have occasion to interpret [the Article], or any of the other articles of the Geneva Conventions.”<sup>92</sup> The initial bill, S. 3861, proposed barring “any invocation” of the Conventions in court, providing that “[n]o person in any habeas action or any other action may invoke the Geneva Conventions or any protocols thereto as a source of rights; whether directly or indirectly, for any purpose in any court of the United States or its States or territories.”<sup>93</sup> Luckily, Congress exercised restraint, but provisions of the subsequent MCA “arguably curtail the courts’ ability to enforce [the] Conventions or international law more generally.”<sup>94</sup> Nevertheless, sponsors of the bill emphasized that it was meant to “preserve intact the U.S. obligations under the Geneva Conventions.”<sup>95</sup>

### The MCA

Congress responded to President Bush’s call by enacting the MCA. The first order of business for the MCA was to give the President distinct statutory authority to establish military commissions.<sup>96</sup> The *Hamdan* Court held that Article 21 of the statutory Articles of War<sup>97</sup> made compliance with such laws a condition precedent to the President’s authority to establish military commissions.<sup>98</sup> The MCA bypasses this statutory requirement and gives the President separate statutory authority “to

88 Michael C. Dorf, *The Orwellian Military Commissions Act of 2006*, 5 J. Int’l Crim. Just. 10, 11 (2007). In the cases of *Ex Parte Quirin*, 317 U.S. 1 (1942), *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and *In re Yamashita*, 327 U.S. 1 (1946), the Supreme Court had rejected various challenges to the outcomes of military tribunals. *Id.* at 12. The Supreme Court found that the previous cases had either been narrowed or superseded, and instead, the Court relied on the Civil War-era case of *Ex Parte Milligan*, 71 U.S. 2 (1866). *Id.* In *Milligan*, the Court held that “where no military emergency prevents the civilian courts from operating, military courts are unconstitutional.” *Id.*

89 Dorf, *supra* note 88, at 11.

90 *Hamdan*, 126 S.Ct. 2802 (Kennedy, J., concurring) (citing 18 U.S.C. § 2441).

91 Dorf, *supra* note 88, at 12.

92 Vázquez, *supra* note 74, at 74.

93 *Id.* Strangely enough, the strong language of the text would even have barred United States citizens from invoking the protections of the Conventions in their own courts.

94 *Id.*

95 *Id.*; Statement of Sen. John McCain, 152 CONG. REC. S10,354, S10,413-14 (Sept. 28, 2006) (“[The proposed Act] does not amend, redefine, or modify the Geneva Conventions in any way. The Conventions are preserved intact . . . [T]his bill makes clear that the United States will fulfill all of its obligations under those Conventions.”).

96 Vázquez, *supra* note 74, at 76.

97 See 10 U.S.C. § 821 (2000).

98 *Hamdan*, 126 S.Ct. at 2795. The laws of war include the Geneva Conventions.

establish military commissions to try alien unlawful enemy combatants for specified offenses.”<sup>99</sup>

The MCA contains the basic rules for military commissions, and “it authorizes the Secretary of Defense to enact additional pretrial and trial procedures,” which may diverge from courts-martial procedures if deemed “impracticable or inconsistent with military or intelligence operations.”<sup>100</sup> Nevertheless, under section 948b(f), “[a] military commission established under this chapter is a regularly constituted court, affording all necessary judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.”<sup>101</sup> This MCA provision quotes directly from the text of Common Article 3, thereby adopting it. As a result, the MCA cannot be said to repeal or supersede the Conventions.

The basic strictures of the MCA itself are not controversial. The creation of a new status of combatant—the “unlawful combatant”—was. The United States created the term “unlawful combatant” to ensure that regardless of to whomsoever Common Article 3 applies, it cannot apply to this designation of fighter. The term “unite[s] crime and combat in a manner that short-circuit[s] the alternative” between international and domestic law.<sup>102</sup> In effect, the United States declared that certain detainees, these “unlawful combatants,” did not merit the protection of domestic law due to their activities, while simultaneously declaring that these same detainees did not merit the protections of the laws of war due to the unlawful nature of their combat.<sup>103</sup> What results is a term which “seemed designed to establish a crude, general dichotomy between law and war.”<sup>104</sup> In the way it has been used, the term creates a category of individuals without rights—“neither criminal suspects nor prisoners of war, committed to the caprice of unreviewable state power.”<sup>105</sup> The international powers most likely did not have such a situation in mind when drafting the Conventions.

### ***Conflicts With International Law***

If, as many commentators have argued, Common Article 3 has risen to the status of customary international law, its circumvention by the United States would be a breach of the Geneva Conventions. Former Department of Defense Associate Deputy General Counsel (International Affairs) Jack M. Beard finds that the MCA contradicts the Geneva Conventions and the law of war in at least five ways<sup>106</sup>: (1) trial standards and detainee treatment; (2) new definition of combatancy; (3) the

99 Vázquez, *supra* note 74, at 77. See also 10 U.S.C. § 948b(a) (2006).

100 Vázquez, *supra* note 74, at 77; 10 U.S.C. § 949a(a) (2006).

101 10 U.S.C. § 948b(f) (2006).

102 Berman, *supra* note 63, at 13.

103 *Id.*

104 *Id.*

105 *Id.*

106 Jack M. Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterrorism Operations*, 101 AM. J. INT’L L. 56, 56 (2007).

addition of offenses to the law of war; (4) the omission of “vague” obligations and the rejection non-domestic sources of law; and (5) the confusion of laws governing international and noninternational armed conflict.<sup>107</sup>

First, under the Geneva Conventions, “the passing of sentences and the carrying out of executions without previous judgment pronounced by a *regularly constituted court* affording all the judicial guarantees . . . recognized as indispensable by civilized peoples” are prohibited.<sup>108</sup> According to the Supreme Court in *Hamdan*, military commissions can be “regularly constituted courts” only if they display consistency with regular courts-martial practice or there is a “practical need” for any deviation.<sup>109</sup> A regularly constituted court “must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law.”<sup>110</sup> Customary international law is described as “evidence of a general practice accepted as law.”<sup>111</sup> For a rule to be established as customary, the practice of it need not be “in rigorous conformity with the rule.”<sup>112</sup>

Unfortunately, despite attempts to add or to clarify additional rights, the MCA still allows for “significant deviations”<sup>113</sup> from regular courts-martial: hearsay evidence not normally admissible may be used;<sup>114</sup> the defendant may be excluded from the courtroom under certain circumstances;<sup>115</sup> certain portions of the Uniform Code of Military Justice relating to a speedy trial, compulsory self-incrimination, and pretrial investigation are inapplicable;<sup>116</sup> the pool of people from which a defendant may choose as counsel is limited;<sup>117</sup> and classified information may be used against a defendant while the defendant’s ability to challenge how the government acquired the evidence is restricted.<sup>118</sup>

Second, the failure of military commissions to try a single case since their inception in 2001 has led many of its supporters to call for coverage of more “off-the-shelf” war crimes in the MCA.<sup>119</sup> In response, Congress cast a wide net to include not just those committing terrorist acts but also those accused of giving support to terrorists.<sup>120</sup> An “unlawful enemy combatant” is defined, therefore, not only as

107 *Id.* at 57-64.

108 Geneva Conventions, Common Article 3, *supra* note 10. (Emphasis added.)

109 *Hamdan*, 126 S.Ct. at 2797.

110 *Id.*

111 Statute of the International Court of Justice, art. 38(1)(b).

112 *Military and Paramilitary Activities (Nicaragua v. United States)*, 1986 I.C.J. 14, 98 (1986). The I.C.J. continues stating that “instances of State conduct inconsistent with a given rule should generally [be] treated as breaches of that rule, not as indications of the recognition of a new rule.” *Id.*

113 Beard, *supra* note 106, at 58.

114 10 U.S.C. § 949a(b)(2)(E) (2006).

115 *Id.* at § 949a(b)(1)(B).

116 *Id.* at §§ 948b(d)(1)(A)-(C).

117 *Id.* at §§ 949c(b) & 948k.

118 *Id.* at § 949j(c).

119 Beard, *supra* note 106, at 59.

120 *Id.*



a person engaged in hostilities but also one who has “purposefully and materially supported hostilities against the United States . . . who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).”<sup>121</sup> Many were concerned that this expansion in the definition of combatancy would blur the distinction between combatant and civilian—a cardinal principle of the law of war.<sup>122</sup> Although the distinction has not always been easy, Common Article 3 protects persons not actively taking part in hostilities. By expanding the definition of “taking part” to include “material support,” the United States has made the distinction ever more difficult.<sup>123</sup>

Third, the MCA adds new war crimes to its definitions, most of which are taken from domestic law. Since the United States could have punished unlawful combatants in its domestic system but chose not to do so, its establishment of military commissions must comply with the law of war. One such domestic crime incorporated into the MCA is that of conspiracy, a crime which four justices in *Hamdan* felt did not constitute an independent war crime.<sup>124</sup> The law of war as codified in the MCA, the “hybrid version” of the law of war, “fundamentally undermines the integrity of that body of law by importing into it ordinary domestic crimes that have no basis as war crimes.”<sup>125</sup> Another problem with the additional war crimes is the possibility of *ex post facto* application.<sup>126</sup> In an attempt to sidestep this foreseeable problem, Congress announced that the provisions of the MCA “codify offenses that have traditionally been triable by military commissions.”<sup>127</sup> Furthermore, the MCA “does not establish new crimes that did not exist before its enactment but rather codifies those crimes for trial by military commission.”<sup>128</sup>

Fourth, the MCA amended the U.S. War Crimes Act to prohibit violations of Common Article 3 from being war crimes.<sup>129</sup> As a result, only violations of Common Article 3 that are grave breaches may be prohibited, although “it has usually been assumed that the grave breaches regime applies only to armed conflicts of an international character.”<sup>130</sup> Additionally, the MCA omitted two Article 3 prohibitions: the prohibition in Common Article 3 of the passing of sentences and the carrying out of executions without the previous judgments of regularly

121 10 U.S.C. § 948a(1)(A)(i).

122 Beard, *supra* note 106, at 60.

123 *See id.*

124 *Id.* at 61; *Hamdan*, 126 S.Ct. at 2785.

125 Beard, *supra* note 106, at 61.

126 *Id.*

127 10 U.S.C. § 950p(a).

128 *Id.* at § 950p(a). Additionally, since the provisions are declarative of existing law, crimes that occurred before enactment of the MCA are not precluded from trial. *Id.* at § 950p(b).

129 Beard, *supra* note 106, at 62.

130 *Id.* This is especially interesting given the insistence of the United States that the current conflict is noninternational. If the “grave breaches” regime only applied to international armed conflicts, the United States need not worry of committing such a breach in the present case. Several commentators have claimed, however, that the need to treat those involved in internal conflicts more leniently than those in international conflicts is absurd. Moreover, the United States itself argued that the regime should be applied to internal as well as international conflicts in *Prosecutor v. Tadić*, Case No. IT-94-a-A, 38 ILM 1518 (1999). *Id.* at n.40.

constituted courts and the prohibition against “outrages upon personal dignity,” including “humiliating and degrading treatment.”<sup>131</sup> The only reason given for the second omission is that its wording is “vague.”<sup>132</sup>

Finally, the Geneva Conventions do not define what constitutes a “conflict not of an international character,” and no majority can agree on a single definition.<sup>133</sup> The Bush Administration adamantly argued that the conflict with al Qaeda does not fall into either the category of international armed conflict or noninternational armed conflict, leaving the conflict to be the orphan child of the laws of war disallowing protection for detainees. The purpose of international humanitarian law, however, is to afford a minimum standard of protection for peoples in conflict. In an attempt to prevent the detainees from slipping through the cracks, the Supreme Court found that the minimal protections of Common Article 3 applied to the conflict.<sup>134</sup> Congress responded in the MCA by listing offenses not only included in Common Article 3 (of which there are few) but also those crimes “generally understood” to be violations of international armed conflict.<sup>135</sup> Congress did this despite the fact that the Bush Administration had argued in *Hamdan* that the conflict was not international, disallowing the application of the full power of the Conventions.<sup>136</sup> In the final product, detainees may be tried both for violations of international armed conflict *and* noninternational armed conflict despite the Administration’s constant insistence that the conflict is not of an international nature.

## RESPONSES TO AMERICAN ACTIONS

The current administration’s post-September 11 legal and political responses to the threat of al Qaeda “generated an evident and growing rift domestically and internationally.”<sup>137</sup> While there was immense support for the American position directly after the events, the constant failure to abide by international agreements ultimately led to dissatisfaction with the Administration both home and abroad. Moreover, the staunch position the United States has taken will cause it problems in future conflicts and dealings with foreign nations.

### *Domestic Reactions*

According to several Gallup polls, domestic views of the United States’ position internationally have undergone a complete reversal.<sup>138</sup> Since February 2001, the dissatisfaction with the United States’ global position has more than doubled to

131 Beard, *supra* note 106, at 62; Geneva Conventions, Common Article 3, *supra* note 10.

132 Beard, *supra* note 106, at 62.

133 *Id.* at 63.

134 *Id.*

135 *Id.*

136 *Id.*

137 Ní Aoláin, *supra* note 42, at 1535.

138 Lydia Saad, *Discontent With U.S. Global Position Hits Record High*, GALLUP, Mar. 5, 2008, <http://www.gallup.com/poll/104782/Discontent-US-Global-Position-Hits-Record-High.aspx>. The results are based on telephone interviews with 1,007 adults conduct 11-14 February 2008. The maximum margin for error is estimated at  $\pm 3$  percentage points. *Id.*

68%.<sup>139</sup> This dissatisfaction rating is the highest Gallup has ever recorded on the question.<sup>140</sup> The American public's perception of how the rest of the world views the United States is equally dismal. In February 2001, 75% of Americans said the United States rates favorably in the eyes of the rest of the world.<sup>141</sup> As of January 2008, that confidence is only at 43%.<sup>142</sup> Furthermore, in April 2008, the percentage of Americans satisfied with the ways things were going in the United States was at a low of 15%, the third lowest since 1979.<sup>143</sup> It was this trend, coupled with an ailing economy and the public's general dissatisfaction with the leadership of the Bush Administration and congressional Republicans that largely led to the party's overwhelming defeat in the 2006 and 2008 elections.

### *International Reactions*

American intelligence agencies have found that American actions regarding Iraq have "helped spawn a new generation of Islamic radicalism and that the overall terrorist threat has grown since the September 11 attacks."<sup>144</sup> The National Intelligence Estimate is the first formal appraisal of global terrorism since the beginning of the Iraq war.<sup>145</sup> Previous drafts of the Estimate described government actions "that were determined to have stoked the jihad movement, like the indefinite detention of prisoners at Guantanamo Bay."<sup>146</sup> Since most of the Estimate is classified, it is unclear whether the specific policy criticisms remained. Regardless, every sign points to the spreading, not shrinking, of radicalization in the Muslim world.<sup>147</sup>

Regarding the MCA, foreign countries, including allies, "are likely to view the new military commissions in the context of the widely recognized and fundamental judicial guarantees referenced in Common Article 3."<sup>148</sup> As such, they may disagree "that the MCA successfully provides the 'barest' of these required trial provisions."<sup>149</sup>

### *The Future of U.S. Counterterrorism Operations in the Wake of the MCA*

As a result of the actions taken despite its obligations under the law of the war, the United States may have inadvertently caused a "negative or 'boomerang' effect" on its own interests.<sup>150</sup> Though containing repeated invocations of the Geneva Conventions, the MCA "authorizes the United States to *breach* those

139 *Id.* As of January 2008, only 30% of Americans polled were satisfied with the position of the United States in the world—a decline from a high of 71% in January 2002. *Id.*

140 *Id.*

141 *Id.*

142 *Id.*

143 Frank Newport, *U.S. Satisfaction at 15%, Lowest since 1992*, GALLUP, Apr. 14, 2008, <http://www.gallup.com/poll/106498/US-Satisfaction-15-Lowest-Since-1992.aspx>.

144 Mark Mazzetti, *Spy Agencies Say Iraq War Worsens Terrorism Threat*, N.Y. TIMES, Sept. 24, 2006, at A1.

145 *Id.*

146 *Id.*

147 *Id.*

148 Beard, *supra* note 106, at 58.

149 *Id.* at 58.

150 *Id.* at 56.

Conventions because it authorizes the opening of a gap between the U.S.-sourced only interpretation of the Conventions and the consensus view of the international community.”<sup>151</sup> Accordingly, the negative impact can fall into two categories: legal and political.

Legally, one or two small violations of the laws of war by a state might not lead to immediate reciprocal action; an attempt, however, to rewrite specific obligations can lead to trouble.<sup>152</sup> Based on its position and strength in the world, the United States had significant incentive to participate in the creation and the continued support of the Geneva Conventions. Overlooking the purely humanitarian reasons for such participation, “encouraging the proper treatment of captured U.S. personnel, and . . . the observance of obligations under the law of war is viewed by the U.S. military as fundamentally advancing U.S. military objectives.”<sup>153</sup> As in most cases, the United States has been reluctant to take steps which would undermine long-term interests in preserving the status quo of the laws of war. Prior to the MCA, the Bush Administration had to retreat from “aggressive” interpretations of the Conventions “in light of their potential long-term negative impact on U.S. operations.”<sup>154</sup> More importantly, “issuance of sweeping pronouncements about the inapplicability of the Geneva Conventions to foreign countries . . . would undermine the overall U.S. commitment to the Conventions and serve as a dangerous precedent in future conflicts.”<sup>155</sup> This is especially important in the international context where there is no real mechanism for enforcement. By allowing easy violation of treaties, the commitment of the United States to the international community is severely discredited. This, in turn, could lead other countries to decrease their desire to strictly uphold their international agreements.<sup>156</sup>

As for the future, the revisions of the Conventions by the MCA “may impede or estop the United States from taking legal positions that it has previously relied on to support its operations and protect its personnel from violators of the laws of war.”<sup>157</sup> Even worse, Congress may have given future enemies a model by which to bypass Convention obligations which could prove hazardous to United States personnel engaged in overseas conflicts. Specifically, the blurring of the designation between combatants and civilians has erased the previous interpretation that simply contributing to a war effort generally did not make a civilian a combatant. In an over-simplified example, foreign countries could find United States’ taxpayers guilty of contributing to the United States’ war effort, thus committing a war crime.

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151 Dorf, *supra* note 88, at 17-18 (emphasis in original).

152 Beard, *supra* note 106, at 64.

153 *Id.*

154 *Id.* For example, while the Department of Justice claimed that the Taliban was “nothing more than a militant group of terrorists” and that the President had authority to suspend the Third Geneva Conventions between the United States and Afghanistan, the President decided against such suspension in lieu of the negative impact such actions would have on future American interests. *Id.*

155 *Id.* at 65.

156 *See id.* at 66.

157 Beard, *supra* note 106, at 66.

The incorporation of domestic crimes into United States laws of war should prove more frightening. The inclusion of the new war crimes will “pose serious challenges to U.S. military commanders and their forces if they find themselves subject to the *ex post facto* application of new war crimes that originate in other countries’ domestic legal systems.”<sup>158</sup> Moreover, it is not unimaginable for some states involved in future armed conflict with the United States, to copy the legal approach taken by Congress and to fashion new “‘war crimes’ for captured U.S. personnel that reflect those states’ very different political or religious beliefs.”<sup>159</sup> To sum it up, “Congress [has] endorsed an approach to war crimes that could permit a future adversary to reject the same international legal norms and rules that the United States has supported and relied upon for over a century.”<sup>160</sup> If this is the case, the United States might be estopped from making arguments counter to its current position, or at the very least find its protestations falling upon deaf ears.

Politically, the United States is alienating the foreign countries it needs to fight the war on terror. To be successful in its pursuit of terrorists, the United States needs enormous amounts of international cooperation. In the beginning, the United States enjoyed wide support for its efforts, but its current decisions to circumvent international law have not fared well, even among its closest traditional allies. Public support in Europe and other states for cooperative activities with the United States is dwindling.<sup>161</sup> Additionally, European audiences are skeptical of United States detention policies, leading some countries to threaten refusal of extradition unless the United States promises the detainees would be tried in civilian courts.<sup>162</sup> Furthermore, European officials have come under fire in their home countries for clandestine activities related to the detention and the transfer of suspected terrorists, which suggests that the United States might have a harder time using European soil to conduct such activities in the future.<sup>163</sup> Finally, the operation of United States military bases overseas involves the cooperation of foreign states, and even some military operations occurring outside the bases need foreign assent and authorization. Further cooperation by the foreign states might be foreclosed due to the United States’ flaunting of international norms.

## CONCLUSION

The Bush Administration engaged in “‘hyper-technical legal analysis’ to exploit ambiguities in existing treaties and thus deny their applicability[,] . . . [an] approach . . . wholly at odds with America’s long history of faithful application of the law of war,

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158 *Id.* at 67.

159 *Id.*

160 *Id.* at 68.

161 *Id.* at 70. “[R]ecent remarks of the legal adviser of the U.S. Department of State [conceded] that trying to explain U.S. detention policies to foreign audiences was ‘clearly an uphill battle.’” *Id.*

162 Beard, *supra* note 106, at 70.

163 *Id.* at 72.

whether formally required or not.”<sup>164</sup> The United States is fighting in uncharted waters, but it does not need to end-run around international treaties to protect its sovereignty. Common Article 3 provides *minimum* standards of detainee treatment which would neither inconvenience the United States nor hamper its ability to find the war on terror. The Obama Administration’s decision to abide by these minimal standards would return the United States to its position as world leader while maintaining its ability to protect its personnel in future conflicts. As a global leader, the United States must return to its roots and faithfully apply the laws of war.

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164 Glazier, *supra* note 2, at 119.

# THE FOURTH AMENDMENT AND DOMESTIC NATIONAL SECURITY SURVEILLANCE:

## *Challenging the Need for Traditional Warrants*

Stephen D. Hargraves

### INTRODUCTION

Large-scale domestic terrorist attacks beginning with the 1993 World Trade Center bombing and the 1995 Oklahoma City bombing, and culminating in the World Trade Center devastation incurred on September 11, 2001, have brought the need for effective national security investigations to the political forefront. Traditionally, to gather information regarding national security threats, government officials have used many tools, such as wiretapping, which also have applications in ordinary criminal investigations.<sup>1</sup> Such tools have succeeded in preventing attacks on the American public.<sup>2</sup> However, past government wiretapping abuses, implicating First Amendment freedom of expression and Fourth Amendment privacy violations, have created an atmosphere of mistrust and a general “Big Brother” fear by the American people.<sup>3</sup> As a result of past civil rights violations, as well as the cross-over effect of national security investigations and ordinary criminal investigations risking an individual’s exposure to criminal liability, a tug-of-war exists between individual civil rights and effective national security efforts.

Much attention has been given to Foreign Intelligence Surveillance Act of 1978 (“FISA”) as it relates to national security investigations, including wiretapping, of foreign nationals.<sup>4</sup> This paper, however, focused on the balancing act between individual rights under the Fourth Amendment and domestic national security wiretapping, with specific attention given to whether a post hoc retroactive judicial validation and legislative wiretapping review process, related to national security investigations, can take the traditional warrant role in satisfying due process under the Fourth Amendment.

First, this paper will briefly review the history surrounding the drafting of the Fourth Amendment to provide a framework for discussing how the Framers’ goals may be satisfied in today’s terrorism landscape. An examination of the genesis of the modern right to privacy will further illustrate the underlying goals and rights

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1     STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 477 (4th ed. 2007).

2     *Id.*

3     J. Edgar Hoover’s secret electronic surveillance in the 1930’s; President Roosevelt’s secret surveillance approval in the 1940’s, and the related executive claim that “the authority to conduct warrantless surveillance derived from the President’s inherent powers in the realm of foreign affairs;” the FBI’s self-authorized use of electronic surveillance in the 1950’s and 60’s against war protestors and civil rights leaders; and the Watergate scandal involving secret executive surveillance of political enemies. Elizabeth Gillingham Dailey, Comment, *Beyond “Persons, Houses, Papers, and Effects”: Rewriting the Fourth Amendment for National Security Surveillance*, 10 LEWIS & CLARK L. REV. 641, 644-45 (2006).

4     See, e.g., Dailey, *supra* note 3; Dara Jebrook, Comment, *Securing Liberty: Terrorizing Fourth Amendment Protections in a Post 9/11 World*, 30 NOVA L. REV. 279 (2006); Jennifer L. Sullivan, *From “The Purpose” to “A Significant Purpose”: Assessing the Constitutionality of the Foreign Intelligence Surveillance Act Under the Fourth Amendment*, 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 379, 403 (2005).

of the Fourth Amendment. Next, this paper will address United States Supreme Court jurisprudence affecting national security investigations, as well as possible FISA applications to domestic investigations. Lastly, this critique will conclude by demonstrating legal parallels to the wiretapping issue, such as the Fourth Amendment's open field exception, the administrative subpoena function, and national security letter Fourth Amendment implications. The paper will articulate how parallels can be instructive in the determination that post hoc review is consistent with Fourth Amendment principles.

This paper will resolve the following general questions: 1) how does the history surrounding the Fourth Amendment's drafting, and the modern right to privacy's genesis, illustrate the Fourth Amendment's underlying goals and rights; and 2) whatever the Fourth Amendment's underlying goals and rights, how can those goals be sufficiently satisfied while balancing the government's obligations related to domestic national security. Focusing on the foregoing questions will illustrate that a post hoc retroactive judicial validation process, coupled with legislative oversight, should be implemented in the domestic national security landscape.

## HISTORY SURROUNDING THE FOURTH AMENDMENT'S DRAFTING

A brief historical review surrounding the Fourth Amendment's drafting provides a framework for achieving the Framers' goals in today's terrorism landscape. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>5</sup>

The well known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers, and his effects, and to prevent a seizure against his will.<sup>6</sup> In the late 1700s, "[t]he British general warrant was a search tool employed without limitation on location, and without any necessity to precisely describe the object or person sought."<sup>7</sup> Given its broad function, the British government used general warrants as a tool to intimidate citizens.<sup>8</sup> In 1766, after many abuses by the English government, general warrants were declared illegal in England.<sup>9</sup>

5 U.S. CONST. amend. IV.

6 See e.g., *Boyd v. U.S.*, 116 U.S. 616 (1886).

7 *DYCUS*, *supra* note 1, at 481.

8 *Id.*

9 General warrants employed by Charles I intended to "intimidate dissidents, authors, and printers of seditious material by ransacking homes and seizing personal papers." *Id.*



While general warrant use subsided in England, “[t]he practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods.”<sup>10</sup> Additionally, the Secretary of State would issue general warrants to search private houses “for the discovery and seizures of books and papers that might be used to convict their owner of the charge of libel.”<sup>11</sup> For example, from 1762 to 1766, a publication called “North Briton” published anti-government messages.<sup>12</sup> As a result, based on the paper’s exercise of speech, the North Briton’s owner was served a general warrant, his home was searched, and his personal papers were seized by the government.<sup>13</sup>

After the Revolutionary War, the Framers of the Constitution drafted the Fourth Amendment in response to the crescendo of complaints against royal officials’ abuses regarding privacy violations via writs of assistance.<sup>14</sup> Accordingly, “[t]he Fourth Amendment was designed to protect against overreaching in investigations of criminal enterprises.”<sup>15</sup> Moreover, the Fourth Amendment’s historical framework reveals that the Framers’ primary concern in drafting the amendment was to limit governmental abuse of freedom of assembly and speech.<sup>16</sup> As such, any proposed judicial review system which effectively curtails national security investigation abuses will substantively satisfy the Fourth Amendment.

## THE REASONABLE EXPECTATION OF PRIVACY: A MODERN VIEW’S GENESIS

After the invention of wire communications in 1844, wiretapping closely followed as a method to intercept such communications.<sup>17</sup> In essence, “[w]iretaps allow a person to intercept private conversations by placing a listening device on the communication wires.”<sup>18</sup> At the beginning of the twentieth century, law enforcement agents quickly learned of wiretapping’s value, and turned the method into an investigatory tool.<sup>19</sup>

### *1920’s Fourth Amendment Concept*

Prior to the United States Supreme Court *Katz v. United States* decision in 1967, wiretapping and electronic eavesdropping had been governed for forty years by *Olmstead v. United States*.<sup>20</sup> In *Olmstead*, the Court found that the Fourth Amendment only protected against the seizure of tangible objects.<sup>21</sup> Thus, the police

10 Boyd, 116 U.S. at 625.

11 *Id.* at 625-26.

12 *Id.*

13 *Id.*

14 DYCUS, *supra* note 1, at 482.

15 *Id.*

16 *Id.*

17 Dailey, *supra* note 3, at 644.

18 *Id.*

19 *Id.*

20 *Olmstead v. United States*, 277 U.S. 438 (1928).

21 *Id.* at 466.

wiretapping interception of a private telephone conversation, where there was no physical trespass of the house, did not violate the Fourth Amendment.<sup>22</sup> However, Justice Brandeis, in his dissenting opinion, anticipated the upcoming technological horizon and disparaged the majority's property/trespass requirement when he stated:

'Time works changes, brings into existence new conditions and purposes.' Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.... The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.<sup>23</sup>

The Court's holding in *Olmstead* laid the foundation for the Fourth Amendment's property/trespass concept.

An example of the absurdity of the Fourth Amendment property/trespass concept, when applied against modern technology, is evident in *Goldman v. United States*.<sup>24</sup> In the *Goldman* case, federal agents initially attempted to extend earphones into an office to overhear a conference involving the defendant.<sup>25</sup> When the initial attempt to eavesdrop did not work, the agents placed a sensitive listening device, a detectaphone, against the wall, successfully intercepting the defendant's conversations.<sup>26</sup> In its holding, the Court found that while the earphones' use constituted a trespass, the detectaphone's use was not a trespass.<sup>27</sup> Therefore, the Court held that because the conversation was recorded using the detectaphone, the defendant's Fourth Amendment rights had not been violated.<sup>28</sup>

Allowing a defendant's Fourth Amendment protections to turn on "trivialities of the local law of trespass" did not seem to fit the Amendment's substantive goals.<sup>29</sup> As noted above, the Fourth Amendment focused on government abuses of a citizen's right to free speech, and in effect the privacy of one's home.<sup>30</sup> Binding constitutional rights to trespass laws, as illustrated in *Goldman*, did nothing to keep the government's

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22 *Id.*

23 *Id.* at 473-74.

24 *Goldman v. United States*, 316 U.S. 129 (1942).

25 *Id.* at 131.

26 *Id.* at 131-32.

27 *Id.* at 135.

28 *Id.*

29 *Silverman v. United States*, 365 U.S. 505 (1961) (Douglas, J., concurring).

30 *Dycus*, *supra* note 1, at 482.

eavesdropping in check. It would take twenty five years after the *Goldman* court's use of the detectaphone loophole before the Supreme Court would drastically change the Fourth Amendment's landscape.

*Right to Privacy: From Protecting Places to Protecting People*

The United States Supreme Court decisively put to rest the Fourth Amendment's property/trespass concept in *Katz v. United States*.<sup>31</sup> In *Katz*, the government was permitted to use evidence of the petitioner's telephone conversations, conducted from a public telephone booth, which had been gathered using an electronic listening and recording device attached to the outside of the booth.<sup>32</sup> As a result of this evidence, the petitioner was convicted of transmitting gambling information in violation of a federal statute.<sup>33</sup> On appeal, the Court of Appeals affirmed the lower court's decision to allow the electronic surveillance evidence.<sup>34</sup>

The Supreme Court noted that "once it is recognized that the Fourth Amendment protects people -- and not simply 'areas' -- against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."<sup>35</sup> Instead, the Court turned its attention to whether the defendant "justifiably relied" on the privacy supplied by the phone booth.<sup>36</sup> Indeed, the Court found that:

[o]ne who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call *is surely entitled* to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.<sup>37</sup>

Given the petitioner's justifiable reliance on his privacy within the public telephone booth, the Court held that the government agents fatally "ignored 'the procedure of antecedent justification . . . that is central to the Fourth Amendment,' a procedure that [the Court] hold[s] to be a constitutional precondition of the kind of electronic surveillance involved in this case . . . because it led to the petitioner's conviction . . ."<sup>38</sup>

Although, in *Katz*, the Court sought to protect the petitioner's privacy, the Fourth Amendment cannot be read to stand as a general constitutional right to privacy.<sup>39</sup> The Court specifically noted that the Amendment "protects individual privacy against certain kinds of governmental intrusion . . . the protection of a person's general right to privacy -- his right to be let alone by other people -- is, like the protection of

31 *Katz v. United States*, 389 U.S. 347 (1967).

32 *Id.* at 348.

33 *Id.*

34 "[T]he Court of Appeals rejected the contention that the recordings had been obtained in violation of the Fourth Amendment, because [t]here was no physical entrance into the area occupied by [the petitioner]." *Id.* at 348-49.

35 *Id.* at 353.

36 *Id.*

37 *Id.* at 352 (emphasis added).

38 *Id.* at 359.

39 *Id.* at 350.

his property and of his very life, left largely to the law of the individual States.”<sup>40</sup> Therefore, while the outcome of the *Katz* case provided the petitioner with a right to privacy, the Court’s focus, as it related to the Fourth Amendment, remained on the prevention of government electronic surveillance abuses.

Specifically, the Court noted that the government agents’ electronic wiretapping “was so narrowly circumscribed that a duly authorized magistrate [pursuant to conventional warrant requirements and procedures] . . . could constitutionally have authorized . . . the very limited search and seizure that the Government assert[ed] in fact took place.”<sup>41</sup> Nonetheless, the Court refused to validate the agents’ conduct retroactively.<sup>42</sup> While the Court’s refusal appears to shut the door to a retroactive judicial validation process,<sup>43</sup> the Court held that the fact that the defendant was criminally convicted was paramount to the lack of antecedent justification rising to the level of a Fourth Amendment violation.<sup>44</sup> The decision is silent as to whether the Fourth Amendment is implicated when a defendant is not criminally charged, and specifically notes that “[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.”<sup>45</sup> Therefore, in a national security investigation setting, eliminating the ability to criminally charge the target, or at least subjecting criminal charges to a “secondary purpose” rule, through retroactive judicial validation would appear to substantively satisfy both the Fourth Amendment’s goal to prevent government abuse and the Court’s interests in *Katz*.

## THE BALANCING ACT

A tug-of-war exists between the government’s duty to protect domestic security and the individual citizen’s right to privacy and free expression. As such, any solution must weigh the national security benefits against the risk of governmental civil rights abuses. On balance, a retroactive judicial validation scheme for domestic national security electronic surveillance, coupled with legislative oversight, can serve to mitigate unfettered governmental civil rights abuses, while providing government agents with the flexibility to effectively fight the war against Islamic fundamental extremists. When faced with compelling exigent circumstances, agents will have the ability to react quickly with electronic investigation tools, while they are still subject to judicial process and the watchful eye of elected officials in Congress.

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40 *Id.* at 350-51.

41 *Id.* at 354.

42 *Id.* at 356, 358 (quoting *Beck v. State of Ohio*, 379 U.S. 89, 96 (1964)).

43 The Court argues that the “omission of [prior judicial] authorization ‘bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.’” *Id.* at 358 (quoting *Beck v. State of Ohio*, 379 U.S. 89, 96 (1964)).

44 *Id.* at 359.

45 *Id.* at 358.

***Applying Keith to the Domestic Security Landscape: Leaving the Door Cracked***

Shortly after the Supreme Court in *Katz* extended the Fourth Amendment to apply to electronic surveillance, Congress enacted the Omnibus Crime Control and Safe Streets Act (“OCCSSA”).<sup>46</sup> Title III of the Act provided for a procedure to gain judicial authorization for electronic surveillance.<sup>47</sup> However, Title III explicitly excluded national security surveillance from its purview:

Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.<sup>48</sup>

While the *Katz* case addressed criminal investigation electronic surveillance, the Court directly took up the issue of domestic national security surveillance in *United States v. United States District Court* (known as *Keith* after the presiding District Judge).<sup>49</sup>

In *Keith*, “[t]he United States charged three defendants with conspiracy to destroy, and one of them with destroying, Government property.”<sup>50</sup> In charging the defendants, the government used electronic surveillance evidence of the defendants’ plan to dynamite bomb a Central Intelligence Agency office in Ann Arbor, Michigan.<sup>51</sup> The Attorney General authorized the wiretap used by the government, which was not subject to any antecedent judicial justification.<sup>52</sup> Although the wiretap was conducted without prior judicial review, the government asserted that the electronic surveillance was lawful as a “reasonable exercise of presidential power [exercised through the Attorney General] to protect the national security.”<sup>53</sup> Specifically, in light of 18 U.S.C. § 2511(3), the government argued “that ‘in excepting national security surveillances from the Act’s warrant requirement Congress recognized the President’s authority to conduct such surveillances without prior judicial approval’ . . . thus [the section] is viewed as a recognition or affirmance of a constitutional

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46 Dycus, *supra* note 1, at 484.

47 *Id.*

48 Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2511 (3) (2000).

49 *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972).

50 *Id.* at 297.

51 *Id.* at 299.

52 *Id.*

53 *Id.* at 297.

authority in the President to conduct warrantless domestic security surveillance ...”<sup>54</sup> However, the Court found that § 2511(3) merely served “as a congressional disclaimer and expression of neutrality,” and “that the statute is not the measure of the executive authority asserted [by the government].”<sup>55</sup>

Moving past its Title III interpretation, the Court focused its efforts on the question left open by *Katz*: “Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security ...”<sup>56</sup> Although the government claimed an inherent presidential authority to conduct warrantless electronic surveillance in domestic security investigations,<sup>57</sup> the Court noted that Article II, Section 1 of the Constitution could not serve as the sole authority for unfettered executive power.<sup>58</sup> In fact, the judicial role in antecedent justification of Title III warrants “accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government.”<sup>59</sup> As such, the Court held that prior judicial approval is required for the type of domestic security surveillance involved in *Keith*.<sup>60</sup>

At first glance, the Court’s holding in *Keith* appears to prevent a post hoc judicial review process for domestic national security surveillance. Yet, the Court provided that its opinion “does not ... attempt to guide the congressional judgment but rather to delineate the present scope of [its holding].”<sup>61</sup> In addition, the Court announced that it did “not attempt to detail the precise standards for domestic security warrants any more than [its] decision in *Katz* sought to set the refined requirements for the specified criminal surveillances which now constitute Title III.”<sup>62</sup> Indeed, the Court recognized that a new judicial process involving searches and seizures in the domestic national security landscape is likely necessary given the different policy and practical considerations from the surveillance of ordinary and typical crimes.<sup>63</sup>

#### *Title III and Domestic National Security Surveillance: Round Peg in Square Hole*

As previously noted, Title III of the OCCSSA created a procedural framework for government agents to obtain judicial authorization to conduct electronic surveillance.<sup>64</sup> Indeed, the requirements of Title III “closely track the traditional Fourth Amendment warrant requirements.”<sup>65</sup> The requirements to issue such a warrant are: 1) a neutral judge or magistrate must receive a written application upon oath or affirmation of a law enforcement officer; 2) the judge must find probable

54 *Id.* at 303.

55 *Id.* at 308.

56 *Id.* at 309.

57 DYCUS, *supra* note 1, at 477.

58 *Keith*, 407 U.S. at 316-18.

59 *Id.* at 317.

60 *Id.* at 324.

61 *Id.* at 323.

62 *Id.*

63 *Id.* at 322.

64 DYCUS, *supra* note 1, at 484.

65 Dailey, *supra* note 3, at 647.

cause to believe that an individual is committing, has committed, or is about to commit a particular crime, that particular communications about the crime will be obtained, and that the facility targeted for surveillance is being used, or is about to be used in connection with the crime or by the person suspected of the crime; and 3) the judge must determine that “normal investigative procedures” other than electronic surveillance have failed or are unreasonable for some reason.<sup>66</sup> Title III also provides a thirty day time limitation for electronic surveillance, as well as a notification requirement for the intended target of the surveillance.<sup>67</sup>

However, applying the traditional Title III warrant requirements to the domestic national security landscape is an inherently difficult task, because national security investigations often lack information regarding the exact nature of terrorist threats. As with a FISA application,<sup>68</sup> the first Title III requirement can be easily met in the domestic security environment, through the provision of an affidavit accompanying a written request for an electronic surveillance warrant by various members of the intelligence community. Either a special domestic intelligence surveillance court could sit as a neutral magistrate, or the current FISA court could hear domestic electronic surveillance applications.<sup>69</sup> In addition, the third Title III requirement may easily be met, because the need for a clandestine approach to investigate the secretive and sensitive national security threats obviates any normal investigative procedure.<sup>70</sup>

The problematic issue with Title III warrants, as the process relates to domestic national security surveillance, lies with the second requirement of procuring the necessary authorization. With national security threats, the investigation’s primary purpose is to thwart a national disaster, not to build a criminal case against a perpetrator. As such, the probable cause requirement in and of itself does not fit, because the particular target may not be committing a crime at all. Rather, the target may be a link in the chain to ascertain more useful information surrounding a perceived threat.

Another difference between national security and ordinary criminal investigations noted in *Keith*, is that “the gathering of security intelligence is often long range and involves the interrelation of various sources and types of information.”<sup>71</sup> Furthermore, the “exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III.”<sup>72</sup>

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66 *Id.* at 648.

67 *Id.*

68 FISA court orders satisfy the first requirement for the constitutionality of search warrants, because under § 1803, all applications are written and then received and reviewed by neutral members of the Foreign Intelligence Surveillance Court (“FISC”). Sullivan, *supra* note 4, at 403.

69 *Id.*

70 The Court in *Keith* noted that “[t]he covertness and complexity of potential unlawful conduct against the [g]overnment and the necessary dependency of many conspirators upon the telephone make electronic surveillance an effective investigatory instrument in certain circumstances.” *Keith*, 407 U.S. at 311-12. Furthermore, “[i]t would be contrary to the public interest for Government to deny to itself the prudent and lawful employment of those very techniques which are employed against the [g]overnment and its law-abiding citizens . . .” *Id.* at 312.

71 *Id.*

72 *Id.*

Additionally, the “emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government’s preparedness for some possible future crisis or emergency . . . . Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.”<sup>73</sup> Lastly, the national security investigation process often involves a lack of information regarding the exact nature of terrorist threats. Taking into account the distinctions between domestic national security and ordinary criminal investigations, the Supreme Court in *Keith* conceded that a different legislative standard could be compatible with the Fourth Amendment if “[it is] reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens.”<sup>74</sup>

*What Legislation Would Satisfy the Fourth Amendment: Striking the Keith Balance*

The natural starting point for a legislative solution to the difficulties in applying Title III to the domestic national security landscape is to look at the FISA framework. Similar to 18 U.S.C. § 1803, a special domestic intelligence surveillance court (“DISC”) could be established to allow for neutral judges or magistrates to receive and review written domestic surveillance applications. Or, the current FISC could hear domestic electronic surveillance applications. Either option would satisfy the first Title III requirement for the constitutionality of search warrants.

Additionally, a domestic intelligence surveillance application should contain a description of the target of the surveillance, and a statement of facts justifying the government’s belief that the target is directly or indirectly a clear and present threat against the United States of America. Such a verification would speak to both the Fourth Amendment’s requirement to designate the specific target of an investigation, and the constitutional powers granted to the executive branch in Article II, Section 1 of the Constitution, to “preserve, protect and defend the Constitution of the United States.”<sup>75</sup> In addition, the application must contain a statement justifying the government’s belief that the target facility is being used or is about to be used by the target of the investigation.

Although the venue and written requirements for a domestic intelligence surveillance application have important constitutional implications in how closely Title III requirements are tracked, the most important issue surrounding such applications is the timing of the application. While the traditional warrant, as noted in *Katz*, requires antecedent justification,<sup>76</sup> the unique and exigent circumstances present in national security threats require a post hoc retroactive judicial validation process to grant the government the flexibility to successfully maintain the national security.

In the FISA arena, the statutes provide that the “President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for periods of up to one

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73 *Id.*

74 *Id.* at 322-23.

75 U.S. CONST. art. II, § 1, cl. 7.

76 *Katz*, 389 U.S. at 359.



year if the Attorney General [makes certain certifications] in writing under oath.”<sup>77</sup> Specifically, the Attorney General must certify that the electronic surveillance is directed solely at a foreign power, or its agents, and not a United States citizen.<sup>78</sup>

The executive power to conduct foreign intelligence surveillance, without a prior court order, was affirmed by the 4th Circuit in *United States v. Truong Dinh Hung*.<sup>79</sup> In *Truong*, the defendants were convicted of espionage, conspiracy to commit espionage, and several espionage-related offenses for transmitting classified United States government information to representatives of the government of the Socialist Republic of Vietnam.<sup>80</sup> In convicting the defendant, the government used recorded conversations obtained from warrantless wiretaps of the defendant’s phone, and electronic surveillance equipment (“bugs”) in the defendant’s apartment.<sup>81</sup>

The court in *Truong* held that in the area of foreign intelligence, a “uniform warrant requirement would, following *Keith*, ‘unduly frustrate’ the President in carrying out his foreign affairs responsibilities.”<sup>82</sup> The court also reasoned that “attempts to counter foreign threats to the national security require the utmost stealth, speed, and secrecy.”<sup>83</sup> Indeed, a “warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations.”<sup>84</sup> Moreover, “[f]ew, if any, district courts would be truly competent to judge the importance of particular information to the security of the United States or the ‘probable cause’ to demonstrate that the government in fact needs to recover that information from one particular source.”<sup>85</sup>

However, the court incorrectly found that when there is “no foreign connection, the executive’s needs become less compelling; and the surveillance more closely resembles the surveillance of suspected criminals, which must be authorized by warrant.”<sup>86</sup> The constitutional question of whether antecedent justification is necessary for domestic electronic surveillance, in order to prevent a catastrophic national security disaster, should not turn on whether the investigation’s target is a U.S. citizen or foreign national, or whether that target is connected to a foreign power.<sup>87</sup> As seen in the political debate over what constitutes torture, and the applicability of the Geneva Conventions, it is not easy to define and identify a traditional “foreign power” in a terrorism environment. In *Keith*, the Court noted that it used “the term ‘domestic organization’ in [its] opinion to mean a group or organization ... composed of citizens

77 50 U.S.C. § 1802 (2000).

78 *Id.*

79 *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1982).

80 *Id.* at 911.

81 *Id.* at 912.

82 *Id.* at 913.

83 *Id.*

84 *Id.*

85 *Id.* at 914.

86 *Id.* at 915.

87 *Truong* was a Vietnamese citizen, therefore the court did not have to address how the legal analysis would change if he was a U.S. citizen working with a foreign power. *Id.* at 911.

of the United States and which has no significant connection with a foreign power, its agents or agencies,” and the Court recognized that there would be cases “where it will be difficult to distinguish between “domestic” and “foreign” unlawful activities directed against the government of the United States where there is collaboration in varying degrees between domestic groups or organizations and agents or agencies of foreign powers.”<sup>88</sup>

FISA authorization to conduct warrantless wiretaps for up to a year is only available where a U.S. citizen is not involved.<sup>89</sup> However, if the only change in a fact pattern before the DISC is that a U.S. citizen is involved, does the need for “stealth, speed, and secrecy” outlined in *Truong* necessarily change? Does the “interrelation of various sources and types of information,” as noted in *Keith*, necessarily change? Does the preventative emphasis of domestic intelligence gathering efforts necessarily change?

The answer, most clearly, is no, but the concern for civil rights abuses enters the picture with the introduction of U.S. citizens into the domestic surveillance landscape. However, if the only weight on the balancing scale against the government’s interests in conducting electronic surveillance is a concern for protection against government abuses, then a post hoc retroactive judicial validation process would serve to mitigate those concerns. The Court, in *Keith*, was concerned that “post-surveillance review would never reach the surveillances which failed to result in prosecutions.”<sup>90</sup> Therefore, post hoc judicial review must be mandatory for all electronic surveillance activities not subjected to antecedent justification, without regard to whether criminal prosecutions were allowed or pursued. Mandatory review would ensure that government agents employing electronic surveillance would be subject to judicial oversight, satisfying the separation of powers reasoning in *Keith*, and, consequently, the agents would naturally self-regulate the reasonableness and degree of impact involved in any domestic electronic surveillance.

Another solution to offset the concerns of government civil rights abuses lies with the “Primary Purpose Test” treatment in the context of domestic national security. *Truong* is “widely credited with establishing the primary purpose test.”<sup>91</sup> The test mandates that “the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons.”<sup>92</sup> In conjunction with post 9/11 congressional changes, “section 218 of the Patriot Act changed section 1804(a)(7)(b) to require a designated member of the executive branch to certify that ‘a significant purpose of the surveillance is to obtain foreign intelligence information.’”<sup>93</sup>

Whether the government must show that the surveillance’s primary purpose, or significant purpose, is for national security reasons, the government’s ability to

88 Keith, 407 U.S. at 309.

89 50 U.S.C. § 1802 (2000).

90 Keith, 407 U.S. at 318.

91 Dailey, *supra* note 3, at 654.

92 *Truong*, 629 F.2d at 915.

93 Sullivan, *supra* note 4, at 400.

use the investigation's findings in criminal proceedings has created a concern that an end-around approach to Title III will become prevalent. As such, where the government seeks to avail itself of a post hoc retroactive judicial validation process, the government must be prohibited from using any fruit from the domestic intelligence surveillance in criminal prosecutions. This approach would obviously create tension in the executive branch, between moving ahead with electronic surveillance without antecedent justification and the peril of the executive branch losing its prosecutorial ability. However, in situations involving compelling exigent circumstances, the government would have the flexibility to effectively move against domestic national security threats.

Lastly, any legislative solution to the unique issues involving domestic national security intelligence surveillance must involve legislative oversight. To provide adequate legislative oversight, a designated committee in the House of Representatives and the Senate to review a minimum number of post hoc applications to the DISC is necessary. The respective committees would have the power to review all applications, but a mandatory review requirement would ensure that at some level the government agents' surveillance activities, and the DISC treatment of those activities, have the chance of further legislative review. This additional level of review would further mitigate the any perceived concerns about Fourth Amendment abuses.

*Areas of the Law Supporting a Post Hoc Retroactive Judicial Validation Process*

The Fourth Amendment's application to searches and seizures, including domestic intelligence surveillance, has evolved since the invention of wire communication in 1844. The very language of the Amendment, "against unreasonable searches and seizures," allows for modern interpretations of reasonableness to expand the Amendment's protection and provide for specifically tailored exceptions. Indeed, in *Katz*, the Court found "first that a person ha[s] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"<sup>94</sup> As such, creating a post hoc retroactive judicial review process and related legislative oversight, is consist with the United States' history of balancing the framers' goals against the government's unique modern day searches and seizures requirements.

One example of the Court providing an exception to the Fourth Amendment, in light of unique circumstances, can be found in the "open fields" doctrine. The doctrine, as first announced in *Hester v. United States*, permits police officers to enter and search a field without a warrant.<sup>95</sup> While the Court couched its reasoning under an interpretation that the Fourth Amendment did not extend from "persons, houses, papers, and effects" to open fields,<sup>96</sup> the impetus behind the new exception stemmed from the government's need to quickly conduct searches and seizures related to alcohol manufacturers who were in violation of the Prohibition Act. Unlike illegal

94 *Katz*, 389 U.S. at 361.

95 JOSEPH G. COOK & PAUL MARCUS, *CRIMINAL PROCEDURE* 319 (6th ed. 2005).

96 *Hester v. United States*, 466 U.S. 57, 59 (1924).

alcohol manufacturing, the differences between ordinary criminal and domestic national security investigations create an even more compelling justification for creating an exception to the traditional warrant requirement in a domestic national security investigation.

Another exception to the traditional warrant requirement can be found in the treatment of administrative subpoenas and national security letters (“NSLs”). Ordinary administrative subpoenas, which may include requests for books, papers, documents, data, or other objects, are issued by federal agencies.<sup>97</sup> Such subpoenas are enforced pursuant to minimum requirements that do not rise to the level of Title III warrant requirements.<sup>98</sup> Specifically, as noted in *Doe v. Ashcroft*, courts will enforce a subpoena as long as: “(1) the agency’s investigation is being conducted pursuant to a legitimate purpose, (2) the inquiry is relevant to that purpose, (3) the information is not already within the agency’s possession, and (4) the proper procedures have been followed.”<sup>99</sup>

In addition to these minimal enforceability requirements, subpoenas – even though they are issued by a court clerk – are issued “pro forma” and “in blank” upon request.<sup>100</sup> More importantly, the “court exercises *no prior control* whatsoever upon their use.”<sup>101</sup> In fact, “the court becomes involved in the subpoena process only if the subpoenaed party moves to quash the request . . .”<sup>102</sup> In contrast to traditional searches and seizures, “an administrative subpoena ‘is regulated by, and its justification derives from, [judicial] process’ available *after* the subpoena is issued.”<sup>103</sup> As such, given the administrative subpoena’s minimal reasonableness requirements, the subpoena’s post hoc Fourth Amendment judicial justification, and the lack of mandatory review, a mandatory post hoc retroactive judicial validation process for domestic national security surveillance should be recognized as an acceptable Fourth Amendment exception.

Similar to the administrative subpoena’s after-the-fact judicial justification, the court, in *Doe I*, held that fundamental rights to free speech and associational activity are implicated in cases “in which the Government may employ § 2709 broadly to gather information, thus requiring that the process incorporate the safeguards of some judicial review to ensure that if an infringement of those rights is asserted, they are adequately protected through fair process in an independent neutral tribunal.”<sup>104</sup> As a result, the court found that “[b]ecause the necessary procedural protections [were] wholly absent [in the instant case],” § 2709 was invalid when dealing with NSLs.<sup>105</sup> While the *Doe I*’s appeal was pending, Congress enacted the Patriot

97 *Dycus*, *supra* note 1, at 565.

98 *Id.*

99 *Doe v. Ashcroft (Doe I)*, 334 F. Supp. 2d 471, 485 (S.D.N.Y. 2004).

100 *Id.* at 486.

101 *Id.* (quoting *In re Grand Jury Proceedings*, 486 F.2d 85, 90 (3d Cir. 1973) (emphasis added)).

102 *Id.* at 486.

103 *Id.* at 495 (quoting *United States v. Bailey*, 228 F.3d 341 (4th Cir. 2000) (emphasis in original)).

104 *Id.* at 511.

105 *Id.*

Improvement Act § 115, which authorized the recipient of an NSL to petition for judicial review.<sup>106</sup> Consequently, the plaintiffs abandoned their Fourth Amendment claims, making the issue pending on appeal moot.<sup>107</sup> Again, the post hoc judicial review in the NSL context only occurs if either the recipient petitions for review, under the Patriot Improvement Act § 115, or the government seeks to compel compliance with an NSL. Therefore, a mandatory post hoc retroactive judicial validation process for domestic national security surveillance should be recognized as an acceptable Fourth Amendment exception.

## CONCLUSION

While there have been exceptions to the warrant requirement related to the legitimate needs of law enforcement officers,<sup>108</sup> the Supreme Court has expounded the principle that “the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure.”<sup>109</sup> Similarly, the government’s use of a retroactive judicial validation process related to domestic national security surveillance should be avoided whenever practicable, in favor of procuring a conventional Title III warrant. However, the existence of a post hoc retroactive judicial validation exception to the prior warrant requirement, coupled with prescribed legislative oversight, would provide the government the flexibility to effectively maintain national security, in instances where either the speed required or the secrecy necessary for electronic surveillance would preclude antecedent justification.

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106 Dycus, *supra* note 1, at 579.

107 *Id.* (citing *Doe v. Gonzales*, 449 F.3d 415, 419 (2d. Cir. 2006)).

108 See, e.g., Dycus, *supra* note 1, at 482-83.

109 *Keith*, 407 U.S. at 318 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

# WALKING THE TIGHTROPE: A New Approach to Balancing Concerns over the “Significant Purpose” Amendment to the Foreign Intelligence Surveillance Act

Charles Jarboe

Arguably, most Americans experience two powerful, competing forces upon hearing the term “national security”: a desire for safety against future terrorist attacks and a desire to retain their privacy and civil liberties. Unfortunately, balancing these forces requires the United States government to walk a proverbial tightrope, with the American public quick to remonstrate every decision the government makes. During the past decade, one of the most judicially accepted, yet equally controversial, attempts to balance these forces emerged as perhaps the greatest unresolved issue facing the United States today. The issue evokes the basic fears of many Americans: possible future terrorist attacks, unfettered government investigations, the erosion of constitutional protections, and potentially missing the clues necessary to prevent future attacks.

After September 11, 2001, Congress amended the Foreign Intelligence Surveillance Act<sup>1</sup> (“FISA”) by relaxing the standards whereby the government could execute electronic surveillance against foreign powers, or agents of foreign powers, in the United States.<sup>2</sup> The amended law requires that the government demonstrate only that a “significant purpose” of the investigation is for foreign intelligence purposes, rather than for the purpose of a criminal investigation.<sup>3</sup> This annulled FISA’s previous “primary purpose” test.<sup>4</sup> Theoretically, FISA allows the government to initiate surveillance without a traditional warrant and then use the garnered evidence in prosecuting the target for any criminal act, with the target unable to review or challenge the basis for conducting the original surveillance.<sup>5</sup>

Undoubtedly, this FISA amendment is emerging as a critical topic in national security law. First, the Supreme Court has not considered the constitutionality of FISA.<sup>6</sup> Second, although lower courts that have addressed the issue have uniformly upheld the amendment’s constitutionality,<sup>7</sup> dissention amongst the federal courts

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1 50 U.S.C. §§ 1801-1862 (2003 & Supp. 2005).

2 See generally *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act)*, Pub. L. No. 107-56, § 218, 115 Stat. 272, 291 (2001) (amending 50 U.S.C. §§ 1804, 1823 (1982)).

3 50 U.S.C. § 1804(a)(7)(B).

4 50 U.S.C. §§ 1804, 1823 (1982) (amended 2001).

5 See William E. Ringel, *Searches and Seizures, Arrests and Confessions* § 8:34 (2d. 2008) (discussing *Mayfield v. United States*, 504 F. Supp. 2d 1023 (D. Or. 2007) (FISA evidence is admissible against defendants in criminal cases but the basis and substance for the FISA warrant is generally kept from the defendant via *ex parte* / *in camera* proceedings)).

6 Stephen Dycus et al., *National Security Law* 531 (4<sup>th</sup> ed. 2007).

7 See, e.g., *United States v. Abu-Jihaad*, 532 F. Supp. 2d 299 (D. Conn. 2008) (FISA as amended is constitutional); *United States v. Mubayyid*, 521 F. Supp. 2d 125 (D. Mass. 2007) (same); *In re Sealed Case* No. 02-001, 02-002, 310 F.3d 717 (FISA Ct. Rev. 2002) (same).

has begun.<sup>8</sup> In 2007, the United States District Court for the District of Oregon, in *Mayfield v. United States*, held that the “significant purpose” amendment is unconstitutional.<sup>9</sup> Furthermore, FISA’s self-created judicial court of review, the Foreign Intelligence Surveillance Court of Review (“FISCR”), in the court’s only opinion to date, held that the amended FISA is constitutional, but conceded that the issue “has no definitive jurisprudential answer.”<sup>10</sup>

However, FISA’s constitutionality impacts more than just lawyers, judges, and academics. A former FBI official, when asked what current legal issue most affects their work, unequivocally identified FISA’s continued constitutional validity as the paramount issue.<sup>11</sup> Clearly, Congress and the judiciary must strike a balance that is constitutional and that acknowledges the concerns of law enforcement, the legal community, and the general public. The current system does not satisfy this standard. Most judges and law enforcement officials surmise that FISA, as currently amended, is indeed a constitutional balance of security interests with constitutional rights.<sup>12</sup> Conversely, many academics argue that FISA’s “significant purpose” test is unconstitutional and that the former test, or something of similar effect, should replace the current language to prevent government abuse.<sup>13</sup> The purpose of this article is to propose a modification to the “significant purpose” test that satisfies the concerns of practitioners and academics.

First, judicial interpretation of the “significant purpose” amendment must change to better conform with FISA’s original purpose—the availability of special warrants when law enforcement officials need to collect foreign intelligence information, and not simply evidence of general, criminal activity.<sup>14</sup> Second, Congress should amend FISA to allow criminal defendants access to FISA-derived information, if the government uses FISA evidence to prosecute the defendant under general criminal statutes. However, if the government elects to prosecute under anti-terrorism statutes,<sup>15</sup> the government may protect the FISA information *vis-à-vis* an *ex parte*, *in camera* review, as provided in FISA’s current version.<sup>16</sup> This proposed resolution will restore FISA to its original purpose, continue to provide law enforcement with the flexibility to fight terrorism, restore defendants’ rights, and prevent the government

8 See *Mayfield*, 504 F. Supp. 2d at 1042-43 (holding the FISA amendment unconstitutional).

9 *Id.*

10 *In re Sealed Case*, 310 F.3d at 743.

11 Email from Jay Koerner, Former Supervisory Special Agent, Federal Bureau of Investigation (Feb. 17, 2008) (on file with author).

12 See cases cited *supra* note 7.

13 See generally William Funk, *Electronic Surveillance of Terrorism: The Intelligence/Law Enforcement Dilemma—A History*, 11 Lewis & Clark L. Rev. 1099 (2007); Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 Geo. Wash. L. Rev. 1306 (2004); Joshua H. Pike, Note, *The Impact of a Knee-Jerk Reaction: The Patriot Act Amendments to the Foreign Intelligence Surveillance Act and the Ability of One Word to Erase Established Constitutional Requirements*, 36 Hofstra L. Rev. 185 (2007).

14 See Richard Henry Seamon & William Dylan Gardner, *The PATRIOT Act and the Wall Between Foreign Intelligence and Law Enforcement*, 28 Harv. J.L. & Pub. Pol’y 319, 331 (2005).

15 See *infra* notes 112-14.

16 50 U.S.C. § 1806(f) (giving the attorney general power to pervert the defendant’s access to FISA information by filing an affidavit against disclosure for national security reasons).

from using FISA as a pretext to circumvent traditional warrant requirements.

## THE CREATION AND EVOLUTION OF FISA

In 1979, Congress enacted FISA in the wake of Watergate, new revelations about domestic intelligence security abuses, and a Supreme Court opinion that invited Congress to legislate in the arena of foreign security surveillance.<sup>17</sup> FISA attempted to balance the government's national security interests with constitutional protections, as contemplated by the Supreme Court.<sup>18</sup> In *Keith*, the Supreme Court acknowledged that surveillance for foreign intelligence purposes might necessitate a different warrant requirement than the traditional requirements used in criminal investigations.<sup>19</sup>

Accordingly, FISA allows federal officers to obtain an order from the judge of a specially-created FISA court<sup>20</sup> ("FISC") which authorizes electronic surveillance of a foreign power or the agent of a foreign power for the purpose of obtaining foreign intelligence information.<sup>21</sup> A high ranking executive must certify that the purpose of the investigation is to obtain foreign intelligence information, that the information sought is foreign intelligence information, and that such information cannot reasonably be obtained through normal means of investigation.<sup>22</sup> Additionally, an officer must include the identity, if known, and description of the target, and certify that the target is a foreign power or agent, and that the place under surveillance is being used, or is about to be used, by the foreign power or agent.<sup>23</sup> FISA authorizes surveillance for up to 120 days.<sup>24</sup> Moreover, if the government prosecutes the target under FISA, and the Attorney General submits to the FISC an affidavit stating that disclosure of the FISA information will harm national security, the FISC judge can keep the information from the target, and review it *ex parte* and *in camera*.<sup>25</sup>

The FISC judge must grant the order if there is probable cause that: (1) the target is a foreign power or agent of a foreign power; (2) the place under surveillance is being used, or is about to be used, by a foreign power or agent; and (3) the application meets the necessary requirements.<sup>26</sup> The FISA's probable cause standard is less stringent than the standard required by the analogous statute authorizing electronic surveillance for criminal investigations.<sup>27</sup> Title III of the Omnibus

17 Swire, *supra* note 13, at 314-15.

18 *United States v. United States Dist. Ct. (Keith)*, 407 U.S. 297, 314-15 (1972) (imploing legislatures to balance national security interests with constitutional rights in the area of foreign security surveillance).

19 *Id.* at 321-22.

20 50 U.S.C. § 1803.

21 *Id.* § 1802(b); Funk, *supra* note 13, at 1113-14.

22 50 U.S.C. § 1804(a)(7).

23 *Id.* § 1804(a)(1)-(4).

24 *Id.* § 1805(e)(1)(B).

25 50 U.S.C. § 1806(f).

26 *Id.* § 1805(a)(3).

27 *United States v. Duggan*, 743 F.2d 59, 72 (2d. Cir. 1984); John J. Dvorske, Annotation, *Validity, Construction, and Application of Foreign Intelligence Surveillance Act of 1978* (50 U.S.C.A. § 1801 et seq.) *Authorizing Electronic Surveillance of Foreign Powers and Their Agents*, 190 A.L.R. Fed. 385, at § 3b (2003).



Crime Control and Safe Streets Act<sup>28</sup> (“Title III”) authorizes electronic surveillance if probable cause exists to believe an individual is committing, has committed, or is about to commit a specific offense.<sup>29</sup> Conversely, the FISA standard does not require the government to demonstrate a connection between the target and any criminal activity.<sup>30</sup> However, FISA’s probable cause standard is generally deemed constitutional.<sup>31</sup>

After FISA’s passage, courts have interpreted the “purpose” requirement in §1804(a)(7)(B) to mean that the “primary purpose” of the investigation must be foreign intelligence.<sup>32</sup> Accordingly, the government could use evidence garnered from a FISA order in a criminal prosecution only if the original, primary purpose of the surveillance was to obtain foreign intelligence information.<sup>33</sup> After September 11, 2001, critics argued that the “primary purpose” requirement perverted the government’s ability to share information between the intelligence and criminal divisions of the executive branch, creating the metaphorical “wall” discussed later in this article, thereby hindering the government’s ability to stop the hijackers beforehand.<sup>34</sup>

Shortly after the September 11 tragedy, Congress passed the USA PATRIOT Act, which amended the “primary purpose” language with “a significant purpose.”<sup>35</sup> The amendment allowed law enforcement officials to arrest and subsequently prosecute many targets by sharing FISA-derived evidence with criminal investigators, which was previously impermissible.<sup>36</sup> In *In re Sealed Case*,<sup>37</sup> the quintessential FISA amendment decision, the FISC interpreted “significant purpose” as follows:

So long as the government entertains a realistic option of dealing with the agent other than through criminal prosecution, it satisfies the significant purpose test . . . the Patriot Act amendment, by using the word “significant,” eliminated any justification for the FISA court to balance the relative weight the government places on criminal prosecution as compared to other counterintelligence responses.<sup>38</sup>

Moreover, courts have only minimal scrutiny over the government’s certification of

28 18 U.S.C. §§ 2510-20 (2002).

29 18 U.S.C. § 2518(3)(a) (2000 & Supp. III. 2003).

30 *Mayfield*, 504 F. Supp. 2d at 1039.

31 See *Duggan*, 743 F.2d at 74 (holding that the FISA’s probable cause standard satisfies the Fourth Amendment); *Mubayyid*, 521 F. Supp. 2d at 137 (holding the probable cause standard constitutional). But see *Mayfield*, 504 F. Supp. 2d at 1038-39 (holding that FISA probable cause standard violates Fourth Amendment).

32 Funk, *supra* note 13, at 1123 (citing *United States v. Johnson*, 952 F.2d 565, 572 (1<sup>st</sup> Cir. 1992); *Duggan*, 743 F.2d at 77)).

33 *Johnson*, 952 F.2d at 572.

34 Stephen Dycus et al., *supra* note 6, at 533 (citing David Johnston & Philip Shenon, *F.B.I. Curbed Scrutiny of Man Now a Suspect in Attacks*, N.Y. Times, Oct. 6, 2001, at A1).

35 USA PATRIOT Act, at § 218.

36 Telephone Interview with James Jarboe, Former Section Chief Domestic Counterterrorism, Federal Bureau of Investigation (Mar. 26, 2008).

37 *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002).

38 *Id.* at 735.

what constitutes a foreign intelligence purpose, and must rely on the government's certification of a foreign intelligence purpose.<sup>39</sup>

*In re Sealed Case* and other federal decisions have consistently upheld the constitutionality of the FISA's "significant purpose" language.<sup>40</sup> The courts have found that the new language is reasonable under the Fourth Amendment because the amendment adequately balances national security interests with individual rights, and because FISA contains additional safeguards against abuse.<sup>41</sup> While *In re Sealed Case* "has been cited in nine reported cases, its precedential value has not been adjudicated and may be open to challenge."<sup>42</sup>

In 2007, Judge Ann Aiken entered a declaratory judgment holding that FISA, as amended by the USA PATRIOT Act, was facially unconstitutional.<sup>43</sup> In *Mayfield*, the government executed FISA surveillance on Brandon Mayfield, an attorney, after a latent-fingerprint analysis erroneously connected him to a terrorist bombing in Madrid, Spain.<sup>44</sup> Agents arrested Mayfield, and the media subsequently announced his guilt.<sup>45</sup> Officials eventually discovered the identification error, and the government settled with Mayfield for \$2,000,000.00 and the right to challenge 50 U.S.C. §§ 1804 and 1823 on its face.<sup>46</sup>

The *Mayfield* court remonstrated *In re Sealed Case's* justification for upholding the "significant purpose" amendment, holding that the FISCRC incorrectly attributed the "wall" to the primary purpose requirement,<sup>47</sup> incorrectly analogized the problem with the Supreme Court's "special needs" cases,<sup>48</sup> and ignored congressional intent to distinguish intelligence gathering and criminal law enforcement.<sup>49</sup> Essentially, the *Mayfield* court held the amendment unconstitutional because FISA's amended version allows the executive to collect evidence for a criminal prosecution, without first securing a warrant predicated upon a showing of probable cause that the defendant is, or was, engaged in any criminal activity, as required by the Fourth Amendment.<sup>50</sup>

Federal courts addressing *Mayfield's* concerns chose not to follow in Judge Aiken's footsteps.<sup>51</sup> In *Abu-Jihaad*, the District Court of Connecticut denied the petitioner's FISA challenge, which relied heavily upon the *Mayfield* decision.<sup>52</sup> The

39 *United States v. Sattar*, No. 02 Cr. 395 (JGK), 2003 U.S. Dist. LEXIS 16164, at \*41-42 (S.D.N.Y. Sept. 15, 2003).

40 See cases cited *supra* note 7.

41 *Id.*

42 Steve C. Posner, 1 Privacy Law and the USA PATRIOT Act § 4.30 (2007).

43 *Mayfield*, 504 F. Supp. 2d at 1042-43.

44 *Id.* at 1026-30.

45 *Id.* at 1029.

46 *Id.* at 1026.

47 *Id.* at 1041 (noting that other PATRIOT Act amendments effectively eliminated the "wall").

48 *Id.* at 1041-42 (arguing that prior to the 2001 amendments FISA's programmatic purpose was fighting terrorism but after the amendments the purpose can be generating evidence for criminal prosecutions without probable cause).

49 *Id.* at 1042 (invoking the founding fathers' desires to balance in favor of the Bill of Rights).

50 *Id.* at 1036-37.

51 See *Abu-Jihaad*, 531 F. Supp. 2d at 304 (declining to follow *Mayfield*); *Mubayyid*, 521 F. Supp. 2d at 140 (same).

52 *Abu-Jihaad*, 531 F. Supp. 2d at 304.

court expressed concern that *Mayfield* declared FISA facially unconstitutional, given the court's factual findings that the government's primary purpose in watching Mr. Mayfield was for criminal prosecution, rather than to gather foreign intelligence.<sup>53</sup> However, the court's concern is mistaken. The crux of the *Mayfield* court's argument is that under the "significant purpose" standard, as interpreted by *In re Sealed Case*, the government can conduct FISA surveillance *even if* the primary purpose is for a criminal prosecution, as long as criminal prosecution is not the *only* reason.<sup>54</sup> This is what the *In re Sealed Case* court held.<sup>55</sup> Thus, despite the *Mayfield* court's finding that the government used FISA for criminal purposes, the warrant would have been upheld, under the current law, had the *Mayfield* court not chosen to defy the norm.

Nevertheless, *Abu-Jihaad* reflects the current state of the law—that the "significant purpose" standard is constitutional. Yet, the *Mayfield* court's concerns with the standard might be legitimate. The legitimacy of the court's concerns is better understood after examining how FISA operates in practice, including the application process and the approval frequency.

## FISA IN ACTION

As previously illustrated, many fear that the government will use FISA to circumvent the Fourth Amendment's probable cause requirements and pursue investigations under FISA, rather than Title III. In fact, one scholar pejoratively opined that "[o]ne cannot tell from publicly available information how far the government is already moving toward using FISA orders for narcotics and organized crime investigations with the United States. It is possible that many such cases already use FISA orders."<sup>56</sup>

Indeed, FISA applications increased after 2001, although the approval rating of FISA applications remained consistently high, to wit: 1998 (all 796 applications approved);<sup>57</sup> 1999 (all 886 applications approved);<sup>58</sup> 2000 (all 1012 approved, one modified by the court);<sup>59</sup> 2001 (all 934 applications approved);<sup>60</sup> 2002 (all 1228 applications approved);<sup>61</sup> 2003 (1724 approved, four denied, 79 modified);<sup>62</sup> 2004 (1754 approved, three withdrawn by government, 94 modified);<sup>63</sup> 2005 (2072 approved, two withdrawn, 61 modified);<sup>64</sup> and 2006 (2176 approved, five withdrawn,

53 *Id.* at n.5.

54 *Mayfield*, 504 F. Supp. 2d at 1032 (citing *In re All Matters Submitted to the Foreign Intelligence Surveillance Court* ("*In re FISC*"), 218 F. Supp. 2d 611, 615 n.2 (FISA Ct. 2002)).

55 *In re Sealed Case*, 310 F.3d at 735.

56 Swire, *supra* note 13, at 1355.

57 1998 Att'y Gen. Ann. Rep., available at [http://www.usdoj.gov/nsd/foia/reading\\_room/1998\\_fisa-ltr.pdf](http://www.usdoj.gov/nsd/foia/reading_room/1998_fisa-ltr.pdf).

58 1999 Att'y Gen. Ann. Rep., available at [http://www.usdoj.gov/nsd/foia/reading\\_room/1999\\_fisa-ltr.pdf](http://www.usdoj.gov/nsd/foia/reading_room/1999_fisa-ltr.pdf).

59 2000 Att'y Gen. Ann. Rep., available at [http://www.usdoj.gov/nsd/foia/reading\\_room/2000\\_fisa-ltr.pdf](http://www.usdoj.gov/nsd/foia/reading_room/2000_fisa-ltr.pdf).

60 2001 Att'y Gen. Ann. Rep., available at [http://www.usdoj.gov/nsd/foia/reading\\_room/2001\\_fisa-ltr.pdf](http://www.usdoj.gov/nsd/foia/reading_room/2001_fisa-ltr.pdf).

61 2002 Att'y Gen. Ann. Rep., available at [http://www.usdoj.gov/nsd/foia/reading\\_room/2002\\_fisa-ltr.pdf](http://www.usdoj.gov/nsd/foia/reading_room/2002_fisa-ltr.pdf).

62 2003 Att'y Gen. Ann. Rep., available at [http://www.usdoj.gov/nsd/foia/reading\\_room/2003\\_fisa-ltr.pdf](http://www.usdoj.gov/nsd/foia/reading_room/2003_fisa-ltr.pdf).

63 2004 Att'y Gen. Ann. Rep., available at [http://www.usdoj.gov/nsd/foia/reading\\_room/2004\\_fisa-ltr.pdf](http://www.usdoj.gov/nsd/foia/reading_room/2004_fisa-ltr.pdf).

64 2005 Att'y Gen. Ann. Rep., available at [http://www.usdoj.gov/nsd/foia/reading\\_room/2005\\_fisa-ltr.pdf](http://www.usdoj.gov/nsd/foia/reading_room/2005_fisa-ltr.pdf).

one denied, 73 modified).<sup>65</sup>

Alternatively, the Title III warrants secured by the federal government over the same period are as follows: 1998 (566 authorized); 1999 (601 authorized); 2000 (479 authorized), 2001 (486 authorized); 2002 (497 authorized); 2003 (578 authorized); 2004 (730 authorized); 2005 (625 authorized); and 2006 (461 authorized).<sup>66</sup> Similar to FISA applications, the courts approve nearly all Title III requests.<sup>67</sup>

These statistics clearly reveal that FISA orders for electronic surveillance are more prevalent than the criminal counterpart under Title III. Do these statistics indicate that federal agents chose FISA over Title III because of the lesser probable cause standard? Or, do these statistics merely illustrate the FBI's post-2001 restructuring away from focusing on criminal activities toward focusing primarily on counterintelligence? When presented with this question, former FBI Supervisory Special Agent Jay Koerner, whose primary responsibility was foreign intelligence, responded that the latter deduction was accurate.<sup>68</sup>

After 2001, the FBI reorganized and shifted investigative priorities to three primary areas: counter-terrorism, counterintelligence, and cyber crimes, with the former two receiving the most attention.<sup>69</sup> Accordingly, the number of agents working traditional criminal matters is now drastically lower.<sup>70</sup> Agents in the counter-terrorism and counterintelligence divisions use FISA almost exclusively, thus reducing the need for Title III warrants.

Contrary to many assumptions, FISA warrants are more difficult and time-consuming to secure than Title III warrants.<sup>71</sup> Title III applications require the review and approval of the local FBI Special Agent in Charge ("SAC"), the Assistant United States Attorney, and an official from the Department of Justice ("DOJ") before the federal judge reviews the application.<sup>72</sup> Alternatively, FISA applications require the review and signed approval of the SAC, the Section Chief, the Deputy Assistant Director, the Assistant Director, the FBI Director, the DOJ Office of Intelligence and Policy Review ("OIPR"), and the Attorney General, prior to submitting the application to the FISA judge.<sup>73</sup> Many FISA applications never survive the process.<sup>74</sup> Furthermore, agents at several field offices have expressed frustration with FISA's bevy of requirements, and have instead chosen to pursue

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65 2006 Att'y Gen. Ann. Rep., available at [http://www.usdoj.gov/nsd/foia/reading\\_room/2006\\_fisa-ltr.pdf](http://www.usdoj.gov/nsd/foia/reading_room/2006_fisa-ltr.pdf).

66 2006 Admin. Office of the U.S. Courts, 2006 Wiretap Report, at 34 tbl.7, available at <http://www.uscourts.gov/wiretap06/Table72006.pdf>.

67 See *Id.*

68 Email from Jay Koerner, Former Supervisory Special Agent, Federal Bureau of Investigation (Mar. 31, 2008) (on file with author).

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

Title III warrants as the quicker alternative.<sup>75</sup> Thus, the fear of agents using FISA as an end-run around Title III's traditional warrant requirement is likely exaggerated.

Common to many legal issues, the theoretical fears outweigh the practical ones. Nevertheless, as previously illustrated, a *potential* for abuse exists under the current version of FISA. Legal academics often focus on the "potentials" and the "hypotheticals." Many of today's fundamental legal protections would not exist without individuals first expressing concern about potential abuses. While it is naive to think that the government will always behave properly, it is equally inappropriate to believe that government agents will abuse the system, if able. Thus, both sides have legitimate concerns, and FISA must change to better address these concerns. The remainder of this article explores one potential resolution.

### ADDING SUBSTANCE TO THE "SIGNIFICANT PURPOSE" STANDARD

First, judicial interpretations of the "significant purpose" standard must change to accord the term "significant" its proper meaning. Unfortunately, after the PATRIOT Act amendments, courts have diluted the "significant purpose" standard by according little weight to the term "significant."<sup>76</sup> Congress clearly intended a lesser standard by amending FISA, thus appeasing those concerned about America's security after September 11. However, courts have subsequently lessened the standard to a degree that prompted great concerns from those who are fearful that FISA will function as an end-run around the Constitution. Thus, assuming that the "significant purpose" standard continues to be the law, the judiciary must give the term "significant" its literal meaning. The change will strike a balance that helps address both concerns.

#### *Primary Purpose or Significant Purpose?*

Many legal academics, and those concerned about FISA's impact on civil liberties, advocate for the return of the "primary purpose" standard, arguing that any lesser standard violates the rule against warrantless searches.<sup>77</sup> While this position is logically sound, *Keith* correctly indicates that the answer lies in striking a balance between national security concerns and the Fourth Amendment.<sup>78</sup> Presently, Congress has chosen to strike this balance by amending FISA's purpose requirement. By amending FISA, Congress intended that the intelligence purpose "could be less than the main or dominant purpose, but nevertheless important and not de minimis."<sup>79</sup> Furthermore, "gathering criminal evidence could be the primary purpose as long as gathering foreign intelligence was a significant purpose in the investigation."<sup>80</sup> Congress wanted to change the previous standard to address the nation's national security concerns. Section 218 of the PATRIOT Act remains the

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75 *Id.*

76 Swire, *supra* note 13, at 1338.

77 See sources cited *supra* note 5.

78 See *Keith*, 407 U.S. at 314-15.

79 148 Cong. Rec. S9109, S9110 (daily ed. Sept. 24, 2002) (joint statement of Senators Hatch, Thurmond, Kyl, DeWine, Sessions, and McConnell).

80 *Id.*

law until Congress elects to amend the “significant purpose” standard.<sup>81</sup> Therefore, the most practical approach is to work within the framework delineated by Congress.

### *Redefining the Standard*

Assuming, *arguendo*, the “significant purpose” standard’s legitimacy, the judiciary’s subsequent interpretations of the standard clearly demonstrate a need to give these words a different interpretation. As previously discussed, *In re Sealed Case* severely diluted the standard by requiring the government to demonstrate only a minimal foreign intelligence purpose and by eliminating the need to balance the government’s intelligence and criminal prosecution objectives.<sup>82</sup> Furthermore, the *Abu-Jihaad* court found that “the statutory change from ‘purpose’ . . . to ‘significant purpose’ is [not] constitutionally significant.”<sup>83</sup> The *Abu-Jihaad* court also adopted *In re Sealed Case*’s position that the change eliminates the FISC’s need to weigh the intelligence and criminal prosecution justifications.<sup>84</sup>

These interpretations virtually eliminate the word “significant” from the statute and disregard the potential for abuse inherent in such a lax interpretation. First, the courts ignore Congress’s decision to raise the standard from “a purpose,” as originally proposed by the Bush administration, to the higher “significant purpose” standard.<sup>85</sup> No meaningful, coherent difference exists between the courts’ current interpretation of the term “significant purpose” and the “purpose” standard rejected by Congress. Second, the interpretations do not reflect the original purpose of the amendment. According to Senator Leahy, one of the primary architects of Section 218, such interpretations are improper, to wit:

The Department contends that changing the FISA test from requiring “the purpose” of collecting foreign intelligence to a “significant purpose” allows the use of FISA by prosecutors as a tool for a case even when they know from the outset that the case will be criminally prosecuted. They claim that criminal prosecutors can now initiate and direct secret FISA wiretaps, without normal probable cause requirements and discovery protections, as another tool in criminal investigations, even though they know that the strictures of Title III of [sic] the Fourth Amendment cannot be met. . . . But it was not the intent of these amendments to fundamentally change FISA from a foreign intelligence tool into a criminal law enforcement tool . . . we did not intend to obliterate the distinction between the two, and we did not do so. Indeed, if we wanted to make a sweeping change in FISA, it

81 See USA Patriot Improvement and Reauthorization Act of 2005, Pub.L. No. 109-177, 120 Stat. 192 (2006) (making the significant purpose requirement permanent).

82 *In re Sealed Case*, 310 F.3d at 735.

83 *Abu-Jihaad*, 531 F. Supp. 2d at 307.

84 *Id.* at 308, n.9.

85 *Legislative Measures to Improve America’s Counter-Terrorism Programs Before the S. Select Comm. on Intelligence*, 107th Cong. (2001) (statement of Jerry Berman, Exec. Director, Center for Democracy & Technology).

would have required changes in far more parts of the statute than were affected by the USA PATRIOT Act.<sup>86</sup>

Third, the interpretation is alarming because the government can gather evidence for a criminal prosecution simply by asserting that criminal prosecution is not the sole reason for the warrant. Regardless of whether abuse actually occurs, the courts' interpretation undeniably creates the potential for abuse. The courts, and to some extent Congress, skew the balance too far away from valid constitutional concerns and towards national security concerns.

The judiciary's power to strike a better balance by redefining the term "significant purpose" is incontrovertible. The judiciary, rather than Congress, originally created the "primary purpose" standard, although the statute literally said "the purpose."<sup>87</sup> Moreover, during the PATRIOT Act debates, Congress admitted that "it will be up to the courts to determine how far law enforcement agencies may use FISA for criminal investigation and prosecution beyond the scope of the statutory definition of 'foreign intelligence information.'"<sup>88</sup> Therefore, the courts should give "significant purpose" its literal meaning. "Significant" is defined as "a noticeably or measurably large amount,"<sup>89</sup> or "fairly large in amount or quantity."<sup>90</sup> Synonymous words include: considerable, critical, substantial, and vital.<sup>91</sup> Rather than interpreting "significant purpose" to mean simply more than a "de minimis" purpose,<sup>92</sup> or more than "a purpose," the term should, at a minimum, require the government to demonstrate that the foreign intelligence purpose is more than an "important" one. Despite the term's vagueness, any reasonable interpretation of the word "significant" would require the government to show a greater foreign intelligence purpose than the remarkably low standard articulated in *In re Sealed Case*.

A more literal interpretation of the "significant purpose" standard will restore the term to its logical, original purpose under the PATRIOT Act. This change in interpretation should reduce the potential for governmental abuse, thus satiating some critics. However, by retaining the "significant purpose" language, the proposed resolution also addresses concerns in Congress and the law enforcement community that the old "primary purpose" standard was too restrictive to successfully combat terrorism. Thus, a new judicial interpretation is justified both legally and as a matter of public policy.

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86 *The USA PATRIOT Act in Practice: Shedding Light on the FISA Process: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 7-8 (2002).

87 See generally *United States v. Truong Dinh Hung*, 629 F.2d 908 (4<sup>th</sup> Cir. 1980).

88 147 Cong. Rec. S11,990, 11,004 (daily ed. Oct. 25, 2001) (statement of Senator Leahy).

89 Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/cgi-bin/dictionary?book=Dictionary&va=significant> (last visited Apr. 5, 2008).

90 American Heritage Online Dictionary, <http://dictionary.reference.com/browse/significant> (last visited Apr. 5, 2008).

91 Roger's New Millennium Thesaurus Online, <http://thesaurus.reference.com/browse/significant> (last visited Apr. 5, 2008).

92 See source cited *supra* note 76.

### *Impact on the Wall*

A stricter “significant purpose” standard will not recreate a metaphorical wall within the executive branch, because the wall was largely a bureaucratic, rather than a statutory, creation. Moreover, the wall will not reemerge because the PATRIOT Act amendments and current DOJ guidelines encourage communication within the executive branch.

Commentators popularized the term “wall” to describe information-sharing barriers between intelligence officials and law enforcement officers within the executive branch.<sup>93</sup> After September 11, many argued that FISA’s primary purpose requirement created the wall, which prevented FBI criminal investigators from arresting the hijackers.<sup>94</sup> Thereafter, the Bush administration sought to amend the purpose requirement through the PATRIOT Act.<sup>95</sup> Indeed, many applauded the new “significant purpose” requirement for destroying the wall.<sup>96</sup>

FISA’s purpose requirement neither created, nor required, the wall.<sup>97</sup> Rather, the head of OIPR unjustifiably misconstrued FISA and subsequently instituted procedures which severed all communications between the FBI’s intelligence personnel and the Criminal Division without prior OIPR approval.<sup>98</sup> Also, former Attorney General Janet Reno, in 1995, solidified the wall through internal DOJ procedures.<sup>99</sup> These bureaucratic actions effectively prevented intelligence agents and criminal investigators from talking to one another concerning on-going investigations.<sup>100</sup> After the PATRIOT Act, the DOJ drafted new guidelines which allowed intelligence and law enforcement officers to freely exchange information.<sup>101</sup> While the FISC rejected the guidelines as antithetical to the text of FISA,<sup>102</sup> the FISC overruled the FISC and affirmed the legality of the guidelines.<sup>103</sup>

If bureaucrats, rather than FISA’s purpose requirement, created the wall, then any change to the current “significant purpose” interpretation would not re-erect the wall as long as the DOJ and OIPR do not resurrect the 1995 procedures.

93 *In re Sealed Case*, 310 F.3d at 721.

94 See Nat’l Comm’n on Terrorist Attacks Upon the U.S., *The 9/11 Comm. Report* 339-60 (2004), available at <http://www.gpoaccess.gov/911/pdf/fullreport.pdf>.

95 Funk, *supra* note 13, at 1100-01 (by amending the “significant purpose” standard).

96 *Oversight of the USA PATRIOT Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 10 (2005) (testimony of Robert S. Mueller, III, Director, FBI) (“Section 218 of the Patriot Act was the first step in dismantling the wall between criminal and intelligence investigators. It eliminates the primary purpose requirement under FISA and replaces it with a significant purpose test. FBI agents working on intelligence and counterintelligence matters now have greater latitude to consult criminal investigators or prosecutors without putting their investigations at risk.”).

97 Funk, *supra* note 13, at 1126.

98 *Id.* at 1126-27.

99 See Office of Inspector Gen., *A Review of the FBI’s Handling of Intelligence Information Related to the September 11 Attacks* 27-30 (2004).

100 Telephone Interview with James Jarboe, Former Section Chief Domestic Counterterrorism, Federal Bureau of Investigation (Apr. 4, 2008).

101 Memorandum from John Ashcroft, Att’y Gen., to the Dir., FBI; Assistant Att’y Gen., Criminal Div.; Counsel for Intelligence Policy; U.S. Att’y (March 6, 2002), available at <http://www.fas.org/irp/agency/doj/fisa/ag030602.html>.

102 *In re FISC*, 218 F. Supp. 2d at 624-25.

103 *In re Sealed Case*, 310 F.3d at 719-20, 746.



Furthermore, the PATRIOT Act amendments affirmatively dismantled the wall by amending 50 U.S.C. § 1806 to allow coordination and consultation between intelligence and criminal investigators.<sup>104</sup> While a wall certainly existed prior to 2001, once the September 11 tragedy illuminated the information-sharing problem, the later bureaucratic and statutory changes dismantled the wall. Thus, regardless of any subsequent changes to FISA's "significant purpose" standard, the wall will not return.

### ALLOWING GREATER TRANSPARENCY IN CRIMINAL, ADVERSARIAL PROCEEDINGS

Second, Congress must amend FISA so that criminal defendants may review the FISA-derived evidence used to prosecute them when the defendant is charged under ordinary criminal statutes. If the government prosecutes a defendant under anti-terrorism laws, no change is necessary, and the government may choose to disclose the evidence only to a FISC judge, as currently allowed by the statute. The proposed amendment more adeptly balances security interests with constitutional rights. The government may use FISA to detect, defeat, and prosecute terrorist activity with the vigor currently allowed under FISA. However, if the government uses FISA, uncovers ordinary criminal activity, and elects to prosecute the target for violations thereof, the defendant will be able to review and challenge the FISA-derived evidence. The change will produce two benefits, to wit: the transparency will restore defendants' rights in the adversarial process and will prevent the government from using FISA as a pretext around traditional warrant requirements.

#### *The Problem with FISA's Disclosure Procedures*

Currently, if the government demonstrates a "significant [foreign intelligence] purpose," FISA allows information gathered from the surveillance to be used in later criminal proceedings against the target and other defendants.<sup>105</sup> Defendants who challenge the FISA application *might* be allowed to review the order if, in the judge's discretion, it is necessary to determining the application's legality.<sup>106</sup> However, all the government must do to prevent disclosure is file an affidavit stating that "disclosure or an adversary hearing would harm the national security of the United States," and thereafter the court must consider the application and order *ex parte* and *in camera*.<sup>107</sup> FISA discovery rules are more restrictive and protective than other rules governing disclosure of sensitive, confidential information in adversarial proceedings.<sup>108</sup> Paradoxically, defendants cannot successfully attack the sufficiency of the FISA motion without reviewing the motion. However, no defense counsel,

104 See 50 U.S.C. § 1806(k)(1)(A)-(C); *Mayfield*, 504 F. Supp. 2d at 1031,1041.

105 *In Re Sealed Case*, 310 F.3d at 727.

106 50 U.S.C. § 1806(f).

107 *Id.*

108 Beryl A. Howell and Dana J. Lesemann, *FISA's Fruits in Criminal Cases: An Opportunity for Improved Accountability* 12 *UCLA J. Int'l L. & Foreign Aff.* 145, 156-60 (Spring 2007).

to date, has convinced a judge to order the unsealing of a motion.<sup>109</sup> Clearly, the government has a legitimate interest in protecting sensitive information. But, in ordinary criminal prosecutions, the defendant's inability to access the evidence used against him, coupled with the already lax "significant purpose" requirement, greatly increases the potential for government abuse and constitutional violations. A balance will never exist if FISA does not sufficiently account for these concerns.

### ***Greater Transparency is a Constitutional Approach to Remediating Potential Abuses***

The proposed amendment to FISA's current disclosure procedures is constitutional. The amendment also acknowledges concerns that FISA could be used to circumvent Title III and the traditional warrant requirements.

First, courts unanimously uphold FISA's disclosure procedures, although the system currently contemplates *ex parte*, *in camera* reviews of FISA documents.<sup>110</sup> The proposed reform imparts greater deference to the rights of defendants by allowing defendants access to the underlying FISA documents in ordinary criminal cases. Accordingly, if the current system is constitutional, *a fortiori*, any system that grants defendants greater protections is constitutional.

Second, the amendment better addresses FISA's potential for abuse. Under the proposed reform, defendants can challenge the FISA order for both violations of the "significant purpose" requirement and for misrepresentations in the application. After reviewing the application, the defendant can better argue that the government's FISA application contained insufficient, objective evidence that a significant purpose of the surveillance was for foreign intelligence. Necessarily, the government would have to comply with the heightened "significant purpose" standard proposed in this article.

Furthermore, greater transparency will enable defendants to challenge the veracity of the government's submissions in support of the FISA application *vis-à-vis* a *Franks* hearing.<sup>111</sup> Under the amended FISA, courts have rejected defendants' requests for a *Franks* hearing, even though the hearing applies to all search warrants.<sup>112</sup> In *United States v. Damrah*, the Sixth Circuit Court of Appeals held that *Franks* hearings are not applicable to FISA applications and then found that, assuming *Franks* was applicable, the defendant failed to meet the burden of proving governmental misrepresentation.<sup>113</sup> *Damrah* begs the question: how can a defendant

109 *Id.* at 160.

110 See Dvorske, *supra* note 26, at § 4 (citing *United States v. Isa*, 923 F.2d 1300 (8<sup>th</sup> Cir. 1991) (no violation of right to confrontation); *United States v. Ott*, 827 F.2d 473 (9<sup>th</sup> Cir. 1987) (no due process violation); *Global Relief Foundation, Inc. v. O'Neil*, 207 F. Supp. 2d 779 (N.D. Ill. 2002) (same); *United States v. Spanjol*, 720 F. Supp. 55 (E.D. Pa. 1989) (courts generally uphold FISA disclosure as constitutional); *United States v. Falvey*, 540 F. Supp. 1306 (E.D. N.Y. 1982) (FISA constitutional)).

111 See *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978) (a search warrant is subject to attack if the defendant demonstrates it is based on an affidavit containing material false statements, and/or omissions, knowingly and intentionally made, or made with a reckless disregard for the truth).

112 See *United States v. Damrah*, 412 F.3d 618, 624-25 (6<sup>th</sup> Cir. 2005) (denying applicability of *Franks* hearing to FISA and the defendant's *Franks* argument); *Abu-Jihaad*, 531 F. Supp. 2d at 311-12 (rejecting defendant's *Franks* argument); *Mubayyid*, 521 F. Supp. 2d at 130 (same).

113 *Damrah*, 412 F.3d at 624-25.

satisfy the *Franks* burden of proof if the defendant never sees the application? Clearly, defendants cannot successfully challenge FISA search warrants through methods traditionally available in criminal trials without access to the applications.

Currently, judges decide *in camera* whether the application meets the purpose requirement and whether submissions in support of the application contain any misrepresentations.<sup>114</sup> The potential for misuse multiplies in a closed-door system, particularly when the ultimate consequence is a criminal conviction. Thus, it is of paramount importance to amend FISA.

### *Distinguishing Between Ordinary Criminal Laws and Anti-Terrorism Laws*

Terrorism prosecutions, or prosecutions arising under “anti-terrorism laws,” include charges brought under Title 18 Chapter 113B,<sup>115</sup> espionage statutes,<sup>116</sup> and statutes aimed at international terrorism.<sup>117</sup> Ordinary, criminal prosecutions include all non-terrorism related crimes.<sup>118</sup> Why distinguish the two? Essentially, the dichotomy helps rectify the current dilemma: the public wants the government to vigorously prosecute terrorists, and FISA often provides the evidence to do so. However, people do not want the government to use FISA in ordinary criminal prosecutions because of the potential for abuse. Under the proposed amendment, the government can still prosecute terrorists vigorously, while simultaneously, ordinary criminal defendants gain additional rights in criminal, adversarial proceedings.

The proposed amendment also focuses on *both* the objective of the surveillance and the nature and subsequent use of the obtained information. One difficulty with FISA is that investigators never know what information the warrant will uncover when making the application.<sup>119</sup> The surveillance could yield intelligence information, or criminal information, and both could be used in a later prosecution.<sup>120</sup> Under the proposed reform, the focus is first on the use of the information: use in a prosecution for violating anti-terrorism laws or use in an ordinary criminal prosecution. If the former, the inquiry ends and the government need not disclose the information; if the latter, focus then shifts towards the government’s original purpose for obtaining the FISA order. The proper inquiry becomes whether the government’s original purpose meets the heightened statutory “significant purpose” requirement.<sup>121</sup> Thus, the proposed reform scrutinizes the entire FISA process.

114 See 50 U.S.C. §1806(f).

115 18 U.S.C. § 2331, *et seq.*

116 18 U.S.C. § 791, *et seq.*

117 *Id.* §§ 31-32 (2000) (hijacking or sabotaging aircraft); *Id.* §§175-78 (developing or possessing biological or toxin weapons); 49 U.S.C. §§ 46501-07 (2000 & Supp. III 2003) (committing air piracy).

118 For the purposes of this article, conspiracy charges are considered ordinary criminal activity, although conspiracy charges are commonly used to prosecute terrorists.

119 Swire, *supra* note 13, at 1362.

120 See *Id.*

121 Inquiry into the government’s purpose is an objective one based on the entire application. A subjective inquiry into the agent’s purpose is inappropriate because of the obvious difficulty in proving intent and because the Supreme Court in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) held that an officer’s subjective intentions are irrelevant.

Additionally, distinguishing between ordinary criminal prosecutions and terrorism prosecutions supports the government's principal anti-terrorism objectives. After September 11, Attorney General John Ashcroft declared a shift in focus from prosecution to prevention.<sup>122</sup> Moreover, the FBI's 2003 field directive encouraged further dismantling of the wall by deemphasizing criminal prosecutions in favor of longer-term intelligence surveillance.<sup>123</sup> The proposed reforms will encourage prosecutors and agents to use FISA for foreign intelligence purposes, rather than for prosecutions of ordinary criminal violations. Prosecutors will likely not risk divulging FISA information, and therefore, will forego ordinary criminal charges for long-term intelligence gathering. Not only does the amendment give defendants more rights, it also deters the government from ever initiating ordinary criminal charges. Concurrently, the amendment has the added benefit of being consistent with the government's purported anti-terrorism goals.

Finally, requiring disclosure in ordinary criminal prosecutions appropriately balances privacy interests with national security interests. When FISA surveillance uncovers primarily criminal activity, which forms the basis for a criminal prosecution, individual privacy interests escalate and the government's foreign intelligence concerns recede.<sup>124</sup> In that scenario, courts are competent to make the usual probable cause determination,<sup>125</sup> as in Title III. Conversely, when FISA surveillance uncovers foreign intelligence and terrorist activity, FISA's standards are appropriate, and the government can vigorously prosecute the target for violation of anti-terrorism laws without sacrificing the sensitivity of the intelligence gathered.

### *Applying the Rule*

Three scenarios arise that require application of this article's proposed amendment: prosecutions for only ordinary criminal activity, prosecutions under anti-terrorism statutes, and mixed prosecutions. The proposed disclosure procedures will help curtail the first scenario, or at least provide the defendants additional rights. In *Damrah*, the prosecution used FISA-derived evidence to convict the target for filing false statements in a citizenship application.<sup>126</sup> In *Mubayyid*, the defendant was convicted of tax fraud.<sup>127</sup> Neither court granted the defendants access to the FISA information.<sup>128</sup> *Damrah* and *Mubayyid* represent the concern of using FISA as an end-run around Title III. As previously addressed, the proposed amendment should diminish such occurrences.

In the second scenario, the government can prosecute terrorists without jeopardizing sensitive intelligence information.

122 John Ashcroft, *Never Again: Securing America and Restoring Justice* 130 (2006).

123 Dan Eggen, *FBI Applies New Rules to Surveillance*, Wash. Post, Dec. 13, 2003, at A1.

124 *Truong*, 629 F.2d at 915.

125 *See Id.*

126 *Damrah*, 412 F.3d at 624-25.

127 *Mubayyid*, 521 F. Supp. 2d at 129-31.

128 *Damrah*, at 623-25; *Mubayyid*, at 129-31.

The last scenario will inevitably require prosecutors to balance the government's interest in prosecuting criminals with the interest in maintaining secrecy over the details of FISA surveillance. If the latter interest wins, the government can prosecute, but the defendant gains greater rights with which to challenge the FISA evidence. If the former interest wins, the government will forego using FISA to convict the defendant for ordinary criminal violations.

#### *Impact on Law Enforcement*

Disclosing FISA information to criminal defendants could reduce the number of foreign intelligence informants, known as "assets," willing to provide information.<sup>129</sup> Friendly international and domestic intelligence agencies might also be more reluctant to share intelligence information with the FBI.<sup>130</sup> Nevertheless, any resolution will require compromise from both national security and civil liberties advocates. However, the fundamental constitutional implications of FISA's use in ordinary criminal trials are sufficiently compelling to warrant greater transparency.

Moreover, the proposed amendment does not require disclosure and the subsequent loss of assets or other intelligence sources. Prosecutors can bring terrorist-related charges against targets without disclosing FISA information. Additionally, when FISA surveillance clearly evidences only ordinary criminal behavior, FBI agents can open a parallel criminal investigation and thereafter utilize Title III to gather evidence necessary for a conviction.<sup>131</sup>

#### CONCLUSION

Most people, including federal law enforcement officers,<sup>132</sup> rightfully acknowledge that FISA's present use should match the statute's original purpose—as a tool for collecting foreign intelligence information. However, FISA, as currently written and interpreted, contains three problems that create a potential for abuse. First, courts interpret FISA's "significant purpose" requirement far too loosely, thereby creating an opportunity for the government to use FISA as an end-run around Title III. Second, when FISA investigations reveal ordinary criminal activity, FISA's disclosure procedures deny the targets access to the FISA-derived information at trial. Third, FISA's differing probable cause standard, compared to Title III warrants, creates another fundamental problem when FISA evidence is used in prosecutions for ordinary criminal offenses.

Given the potential for abuse, this article argues that: (1) courts must interpret the "significant purpose" requirement more literally, and (2) Congress must amend FISA's disclosure procedures to allow defendants access to FISA information when prosecuted for ordinary criminal violations. The proffered judicial and statutory reforms should restore the amendment to its original purpose, continue

129 Telephone Interview with James Jarboe, Former Section Chief Domestic Counterterrorism, Federal Bureau of Investigation (Mar. 28, 2008).

130 Email from Jay Koerner, Former Supervisory Special Agent, Federal Bureau of Investigation (Apr. 8, 2008) (on file with author).

131 *Id.*

132 *Id.*

to provide law enforcement with the flexibility to fight terrorism, restore defendants' rights, and prevent the government from using FISA as a pretext around traditional warrant requirements. Additionally, these reforms should satiate the concerns of those emphasizing the need for strong national security and those emphasizing a continued commitment to civil liberties.

Striking a balance between national security and civil liberties is one of the most salient issues of our time. The government must walk a tightrope to achieve this goal. Perhaps successfully accomplishing this objective is as difficult metaphorically, as it is literally. National security law is mostly reactionary, behaving like a pendulum. When our nation is safe and secure, the pendulum swings in favor of greater constitutional protections. When disaster strikes, such as September 11, national security concerns come to the forefront. Thus, the future of FISA, as currently written, may depend on events beyond our control. Only time will tell.

# A CRITICAL ANALYSIS OF THE MILITARY COMMISSIONS ACT OF 2006

*Karen G. Manning*

“Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply.”

*Boumediene v. Bush*, slip op. at 35 (2008).

<sup>1</sup>The Military Commissions Act of 2006 (“MCA”)<sup>2</sup> is the most recent legislation in the series of constitutional struggles between the Executive, Legislative, and Judicial branches of the federal government over executive detentions in the “war on terror.”

In *Rasul v. Bush*,<sup>3</sup> the Supreme Court of the United States held that any person claiming to be held in violation of U.S. law could seek redress for the illegal detention using the statutory writ of habeas corpus.<sup>4</sup> Although the Supreme Court had found in *Hamdi v. Rumsfeld*<sup>5</sup> that Congress had authorized the President to detain prisoners determined to be “unlawful enemy combatants,” the Court in *Rasul* ruled that U.S. citizens so detained must be given “a meaningful opportunity to contest” their classification and detention before a neutral decision-maker.<sup>6</sup>

Intending to strip the federal courts of jurisdiction over these unlawful enemy combatants’ habeas corpus petitions, Congress then passed the Detainee Treatment Act of 2005 (“DTA.”)<sup>7</sup> In *Hamdan v. Rumsfeld*,<sup>8</sup> the Court ruled first that the Detainee Treatment Act did not strip the courts of jurisdiction over pending claims. Additionally, the military commissions created to try these detainees violated both the Uniform Code of Military Justice (“UCMJ”) and the Geneva Convention relative to the Treatment of Prisoners of War (“3<sup>rd</sup> Geneva Convention.”)<sup>9</sup>

Undeterred, the President then asked Congress for legislation specifically excluding alien unlawful enemy combatants from being tried in courts-martial, from filing habeas corpus petitions, and from claiming the protections of the Geneva conventions. (As the U.S. has signed and ratified<sup>10</sup> each of the four 1949 Conventions, it is legally bound to assure the standards set out in each.) The President got his wish with the MCA.

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1 An alumna of Smith College, the author obtained her Doctor of Jurisprudence, *cum laude*, from the University of Tennessee College of Law in 2008. She is licensed to practice in Tennessee. After clerking for a judge on the Tennessee Court of Criminal Appeals, she now works as a contract attorney in Knoxville, Tennessee.

2 10 U.S.C. §§ 948a–950w (2007).

3 *Rasul v. Bush*, 542 U.S. 466, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004).

4 22 U.S.C. § 2241(c)(3).

5 *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004).

6 542 U.S. at 509, 124 S. Ct. at 2635, 159 L. Ed. 2d at 586.

7 Detainee Treatment Act of 2005, 119 Stat. 2739-44.

8 *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006).

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

10 Ratified by the U.S. February 2, 1956.

Although it reflects congressional approval of the Commander-in-Chief's prosecution<sup>11</sup> of the "war on terror," the MCA violates domestic law, particularly the Uniform Code of Military Justice and habeas corpus law, as well as international humanitarian law as codified in the 3rd Geneva Convention.<sup>12</sup> Even more significant, however, is the Act's removal of the Federal courts' jurisdiction of habeas corpus claims filed by enemy combatants.<sup>13</sup> The MCA specifically precludes detainees from challenging their detention in a habeas proceeding.

This article will outline, first, the salient features of the Military Commissions Act of 2006. Second, it will contrast the procedures of the MCA with those provided by the statutory courts-martial. Third, it will discuss, in brief, the provisions of the MCA that many commentators believe violate the United States' multilateral treaty obligations, specifically the 3rd Geneva Convention. Fourth, it will question the Act's suspension of habeas corpus rights for alien unlawful enemy combatants, and will recommend the Court take into account recent legal developments, as well as concerns about the rule of law domestically and internationally, to hold that the MCA provides an unconstitutional substitute for habeas corpus review available in areas under exclusive U.S. control (i.e., military bases, particularly the U.S. Naval Base at Guantanamo Bay, Cuba, which continues to house detainees captured abroad in the war on terror.) It will also recount the 2008 Supreme Court decision in *Boumediene v. Bush*<sup>14</sup> invalidating a section of the Military Commissions Act.

### SALIENT FEATURES OF THE MILITARY COMMISSIONS

The MCA was enacted to "authorize trial by military commission" of alien enemy unlawful combatants "for violations of the law of war and other purposes."<sup>15</sup> "Alien unlawful enemy combatants" are those foreign fighters who have engaged in hostilities against the United States, and who do not *per se* fit into the framework of Article 4 of the 3rd Geneva Convention—they are neither in the military of a state, nor are they a visibly identifiable militia group respecting the laws of war.<sup>16</sup> These alien enemy unlawful combatants are adjudicated as such either by predecessors to the MCA's military commissions (e.g., the Combatant Status Review Tribunals invalidated in *Hamdan*) or by any other tribunal convened by the President or by the Secretary of Defense.<sup>17</sup> Again, the military commissions have jurisdiction to try "any offense made punishable by [the Act] or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001."<sup>18</sup> Also, Congress provided the President congressional authority to create the military

11 U.S. CONST. art. II, § 2, cl. 1.

12 Ratified by the U.S. February 2, 1956.

13 10 U.S.C. § 950j(b).

14 553 U.S. \_\_\_\_, 128 S. Ct. 2229 (2008).

15 10 U.S.C. §§ 948a–950w.

16 Geneva Convention Relative to the Treatment of Prisoners of War arts. 3 and 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

17 10 U.S.C. §§ 948(a)(1)(i-ii), 948d(c) (2006).

18 *Id.* § 948d(a).



commissions envisioned by this Act.<sup>19</sup>

The MCA provides requirements for its composition and procedures, yet also allows the Secretary of Defense great discretion in fashioning procedures for the military commission. The MCA stipulates that a military commission shall be comprised of at least five members;<sup>20</sup> shall have a judge and attorneys detailed to it,<sup>21</sup> and lists the qualifications of each;<sup>22</sup> and the commission shall have court reporters and may use interpreters.<sup>23</sup> (In cases where the death penalty is sought, the commission must be composed of at least twelve members.<sup>24</sup>) The military commissions conduct open proceedings (except for deliberations) with the accused present,<sup>25</sup> and counsel must be present.<sup>26</sup> For hearings, the commission members do not have to be present.<sup>27</sup> The commissions are independent, and cannot be “censur[ed], reprimand[ed], or admonish[ed]”<sup>28</sup> by the “convening authority” (either the Secretary of Defense or his designee,<sup>29</sup> now the Honorable Susan J. Crawford). Charges against an accused must be signed by someone subject to the UCMJ and before another person able to administer an oath, usually a commissioned officer.<sup>30</sup> The affidavit must state that the affiant either has personal knowledge of her or his claim or has reason to believe what she or he is claiming. Notice of the charges must be given to the accused “as soon as possible,”<sup>31</sup> and must be served on both the accused and military defense counsel in English and in a language the accused understands, at a time “sufficiently in advance of trial to prepare a defense.”<sup>32</sup>

The Secretary of Defense “may” promulgate rules for “pretrial, trial, and post-trial procedures, including elements and modes of proof.”<sup>33</sup> Although these rules “shall apply the principles of law and the rules of evidence in trial by general courts-martial,”<sup>34</sup> the Secretary of Defense has considerable discretion here. Under the MCA, he can, “so far as [he] considers practicable or consistent with military or intelligence activities,”<sup>35</sup> issue rules inconsistent with rules of courts-martial, merely by stating that it is “impractical” for the military commission to apply rules of courts-

19 *Id.* § 948b(b).

20 *Id.* § 948m.

21 *Id.* § 948i, j, k.

22 *Id.* § 948j, k.

23 *Id.* § 948l.

24 *Id.* § 948m(a)(2) and § 949m(c)(1-2), where a military commission may, in cases of hardship or emergency, be composed of only nine members.

25 *Id.* § 949d(d).

26 *Id.* § 949d(d).

27 *Id.* § 949d(a).

28 *Id.* § 949b(a)(1).

29 *Id.* § 948h.

30 *Id.* § 948q(a).

31 *Id.* § 948q(b).

32 *Id.*

33 *Id.* § 949a(a).

34 *Id.* § 949a(a).

35 *Id.* § 949a(a).

martial in the context of the “war on terror.” Additionally, the Secretary of Defense can “consult” with the Attorney General in issuing these rules and regulations.

Nonetheless, the accused “shall be permitted” to present a defense, to cross-examine witnesses, to be represented by an attorney during the proceedings, and to discover evidence. The accused is not “required to testify against himself.”<sup>36</sup> Additionally, the accused may retain civilian counsel instead of using the appointed military counsel. In this case, the appointed counsel becomes associate counsel.<sup>37</sup> The accused can also represent himself.<sup>38</sup> The accused, like the prosecution, may challenge the composition of the military commission for cause, one person at a time.<sup>39</sup> Each side also has one peremptory challenge.<sup>40</sup> The judge, however, may be challenged only for cause.<sup>41</sup> If the commission’s composition changes during the proceedings, each side may peremptorily challenge a member not previously so challenged.<sup>42</sup>

However, evidence against the accused is not subject to exclusion if it has been illegally obtained.<sup>43</sup> Also, coerced statements are admissible<sup>44</sup> in military commissions as long as they were not obtained via torture or “cruel, inhuman, or degrading treatment.”<sup>45</sup> Additionally, hearsay that would be inadmissible in a court-martial may be admitted<sup>46</sup> if the proponent gives notice and if the information is reliable and probative.<sup>47</sup> The MCA does, though, contain a provision similar to the Rule 403 of the Federal Rules of Evidence excluding evidence either whose probative value is substantially outweighed by dangers to the accused’s case or that wastes the commission’s time.<sup>48</sup> Additionally, the accused may have to face a national security privilege,<sup>49</sup> for which the Secretary of Defense may issue regulations.<sup>50</sup> The military commission judge has discretion on how to proceed, however.<sup>51</sup> These national security privilege regulations must be presented to the Congressional Armed Services Committees sixty days before they go into effect.<sup>52</sup> The Secretary may also delegate his rule-prescribing authority.<sup>53</sup>

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36 *Id.* § 948r(a).

37 *Id.* §§ 949a, 949c(a)(3).

38 *Id.* § 949a(b)(1)(D).

39 *Id.* § 949f(a).

40 *Id.* § 949f(b).

41 *Id.* § 949f(b).

42 *Id.* § 949f(c).

43 *Id.* § 949a(b)(2)(B).

44 *Id.* § 949a(b)(2)(C).

45 *Id.* § 948r(b)–(d).

46 *Id.* § 949a(b)(2)(E)(i)–(ii).

47 *Id.* § 949a(b)(2)(E)(ii).

48 *Id.* § 949a(b)(2)(F)(i)–(ii).

49 *Id.* § 949d(f).

50 *Id.* § 949(e)–(f).

51 *Id.* § 949d(f)(1)–(2).

52 *Id.* § 949d(f)(4).

53 *Id.* § 949a(c).

To convict the accused of violations of international humanitarian law or acts proscribed by the MCA,<sup>54</sup> the military commission must find the accused guilty beyond a reasonable doubt.<sup>55</sup> Alternatively, the Act provides for the acceptance of a guilty plea, and in December 2008, Khalid Shaikh Mohammed and four other detainees announced their intention to plead guilty.<sup>56</sup> Additionally, Australian David Hicks pleaded guilty in March 2007 to providing material support for terrorism and served the remainder of his sentence in Australia, where he was released in December 2007.<sup>57</sup> The accused is deemed innocent until proven guilty.<sup>58</sup> The gravity of the punishment determines the vote necessary for conviction and sentencing. For example, a conviction requires the votes of two-thirds of the commission's five members.<sup>59</sup> Life imprisonment or a sentence of ten or more years requires the vote of three-fourths of the members.<sup>60</sup> A death penalty sentence must be unanimous among the commission's twelve or nine members, as the case may be.<sup>61</sup> All other sentences require a two-thirds vote.<sup>62</sup> The commission must announce its verdicts,<sup>63</sup> and must provide defense counsel with an unredacted trial transcript, subject to the national security privilege.<sup>64</sup> The accused receives a redacted transcript.<sup>65</sup>

Should the defendant wish to appeal, he must submit documents to the convening authority, who will evaluate the proceedings.<sup>66</sup> The convening authority may order a rehearing,<sup>67</sup> alter the commission's findings, or refer the case to the Court of Military Commission Review ("CMCR").<sup>68</sup> (The prosecution cannot appeal a "not guilty" verdict,<sup>69</sup> nor can it appeal a ruling tantamount to "not guilty."<sup>70</sup>) Any finding of "guilty" is automatically referred to the CMCR,<sup>71</sup> a panel of three appellate military judges.<sup>72</sup> The MCA sets out their qualifications, and further states that the CMCR can only act on matters of law.<sup>73</sup> Additionally, while the prosecution has the ability to file an interlocutory appeal, the accused does not.<sup>74</sup> The accused and the prosecution are also appointed appellate counsel pursuant to section 950h of the MCA.

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54 See *id.* §§ 950q, t, v, and w for the list of offenses.

55 *Id.* § 949l(c)(1).

56 *Id.* § 949(i)(b).

57 <http://projects.nytimes.com/guantanamo/detainees/2-david-hicks/documents/5/pages/1#2>; <http://news.bbc.co.uk/2/hi/americas/6510899.stm>; see <http://projects.nytimes.com/guantanamo> for information on the disposition of detainees. (December 29, 2008).

58 *Id.* § 949l(c)(1).

59 *Id.* §§ 949m(a) and 949m(b)(3).

60 *Id.* § 949m(b)(2).

61 *Id.* § 949m(c).

62 *Id.* § 949m(b)(3).

63 *Id.* § 949n.

64 *Id.* § 949o(c).

65 *Id.*

66 *Id.* § 950b(c).

67 *Id.* § 950d.

68 *Id.* § 950f.

69 See *id.* § 950c(a).

70 *Id.* § 950d.

71 *Id.* § 950c(a).

72 *Id.* § 950f.

73 *Id.* § 950f(d).

74 See *id.* § 950d(a).

The defendant may pursue further review by submitting the case to the U.S. Court of Appeals for the District of Columbia Circuit.<sup>75</sup> According to the MCA, this court has “exclusive jurisdiction”<sup>76</sup> over whether the final decision of the military commission or CMCR was consistent with the MCA and whether the case conformed to constitutional, statutory, and common law standards.<sup>77</sup> The appellate courts, however, are only able to act on matters of law.<sup>78</sup> After the court of appeals has resolved the matter, the defendant may also petition for certiorari to the Supreme Court.<sup>79</sup>

Should the Court deny the petition for certiorari, the defendant has no further recourse. The MCA both explicitly prohibits an accused from invoking the protections of the Geneva Conventions<sup>80</sup> and deprives the domestic courts of jurisdiction over habeas corpus petitions.<sup>81</sup> Each of these provisions will be discussed below.

After a judgment is final, the Secretary of Defense has the authority to execute the sentence.<sup>82</sup> The accused may be incarcerated in a U.S. military or civilian prison or a foreign jail that the U.S. has permission to use.<sup>83</sup> In cases where the death penalty is imposed, the President has the discretion to approve or alter the sentence,<sup>84</sup> and the defendant cannot be executed without the President’s approval.<sup>85</sup> Each year, the Secretary of Defense must submit a report to the Congressional Armed Services Committees of “any” trials by military commission.<sup>86</sup>

### THE MCA AND UCMJ ARE DISCRETE ENTITIES

The Military Commissions Act contains explicit language stating these military commissions are entities discrete from courts-martial, and that the MCA specifically differs from the Uniform Code of Military Justice. Although the MCA says the military commissions are “based upon the procedures for trial by general courts-martial” listed in title 10, chapter 47 of the U.S. Code,<sup>87</sup> the MCA explicitly states that certain provisions used in courts-martial<sup>88</sup> are inapplicable to military commissions. Furthermore, the UCMJ is inapplicable to chapter 47A (the Military Commissions Act as codified in 10 U.S.C. § 948 *et seq.*) except as provided.<sup>89</sup> The MCA goes on to say that the UCMJ and the military commissions of the MCA neither are binding precedent on each other,<sup>90</sup> nor can information from either proceeding be introduced

75 *Id.* § 950g.

76 *Id.* § 950g(a).

77 *Id.* § 950g(c)(1)–(2).

78 *Id.* § 950h(b).

79 *Id.* § 950g(d).

80 *Id.* § 948b(g).

81 *Id.* § 950j(b).

82 *Id.* § 950i.

83 *Id.* § 949u(a).

84 *Id.* § 950i.

85 *Id.* § 950i(b).

86 *Id.* § 948e(a).

87 *Id.* § 948b(c).

88 *Id.* § 948b(d)(A)–(C) (regarding speedy trial, compulsory self-incrimination, and pretrial investigation).

89 *Id.* § 948b(c).

90 *Id.* § 948b(c).

in a proceeding subject to another part of title 10 of the U.S. Code (i.e., evidence of a court-martial proceeding cannot be introduced in a military commission and vice versa.)<sup>91</sup>

This discreteness of procedures seems to revive issues presented in *Hamdan*,<sup>92</sup> where the Supreme Court invalidated the military commissions created by the President. In that case, the Court construed 10 U.S.C. §§ 836(a) and (b), and found that the Executive's power to promulgate rules of procedure for military commissions and courts-martial were restricted in two ways.<sup>93</sup> First, "no procedural rule ... may be 'contrary to or inconsistent with' the UCMJ—however practical it may seem."<sup>94</sup> This addresses 10 U.S.C. § 836(a). Second, pursuant to 10 U.S.C. § 836(b), "the rules adopted must be 'uniform insofar as practical.'"<sup>95</sup>

In the MCA, again, the President has run afoul of constitutional powers. First, the military commissions specifically operate under rules "contrary to or inconsistent" with the UCMJ.<sup>96</sup> Additionally, in the UCMJ, the President must promulgate rules of courts-martial consistent with those used in federal district courts in criminal trials.<sup>97</sup> The provisions of the military commissions do not comply with these rules. Take, e.g., the admissions of coerced statements; the admission of inadmissible, illegally obtained evidence; the exception of the accused from Geneva Convention protections; and the stripping of habeas jurisdiction from the federal courts. As in *Hamdan*, although the President's claim of the impracticability of using federal criminal court rules and procedures in the military commissions is entitled to deference,<sup>98</sup> the President again has not justified the claimed impracticability of the laws of courts-martial in a military commission.<sup>99</sup> The threat of "international terrorism" does not, by itself, justify a claim that the rules of courts-martial cannot feasibly be applied to the detainees in military commissions.<sup>100</sup>

Second, the rules for military commissions and courts-martial are not "uniform insofar as practical."<sup>101</sup> In *Hamdan*, the Court stated that the rules [of courts-martial] must apply to military commissions unless impractical.<sup>102</sup> In obtaining congressional approval to exclude protections of the UCMJ from the military commissions,<sup>103</sup> the President has again claimed that the threat of international terrorism requires "a

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91 *Id.* § 948b(e).

92 *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006).

93 126 S. Ct. at 2790, 165 L. Ed. 2d at 771.

94 *Id.*

95 *Id.*

96 See 948b(c)-(g) (the commissions apply rules inconsistent with and contrary to those employed in courts-martial).

97 10 U.S.C. § 836.

98 *Hamdan*, 126 S. Ct. at 2791, 165 L. Ed. 2d at 772.

99 126 S. Ct. 2792, 165 L. Ed. 2d at 773.

100 See *id.*

101 126 S. Ct. at 2790, 165 L. Ed. 2d at 771.

102 126 S. Ct. at 2991, 165 L. Ed. 2d at 772.

103 10 U.S.C. § 948b(d), (e).

more summary form of justice than is afforded by courts-martial.”<sup>104</sup> The Supreme Court has rebuffed this argument before.<sup>105</sup> It should do so again.

### THE MCA VIOLATES THE THIRD GENEVA CONVENTION

The MCA also places the U.S. at odds with its multilateral treaty obligations. Although the Bush administration classes alien unlawful enemy combatants outside the scope of the Geneva Conventions, the Supreme Court has held that this is a fallacious interpretation of the language of the Geneva Conventions’ Common Articles.<sup>106</sup> The prisoners of war captured in the “war on terror” are indeed protected by the 3rd Geneva Convention’s Article 3.<sup>107</sup>

The MCA purports to strip detainees captured during the war on terror of any rights protected by the 1949 Geneva Conventions.<sup>108</sup> In essence, the government claims the MCA is equivalent to any obligations the U.S. owes its prisoners of war through the Geneva Conventions. The Act specifically states that military commissions established under the MCA are regularly established courts complying with 3rd Geneva Convention’s Article 3.<sup>109</sup> This convention, addressing prisoners of war, prohibits trying and sentencing detainees in tribunals not qualifying as “regularly constituted court[s] affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>110</sup> In *Hamdan*, the Supreme Court ruled that the President’s military commissions were not “regularly constituted court[s]” (and thus did not satisfy the Geneva Convention’s requirements,) as the regularly constituted military courts for the U.S. were the statutory courts-martial,<sup>111</sup> and not “special courts”<sup>112</sup> such as the military commissions.

Additionally, the 3rd Geneva Convention requires all High Contracting Parties (including the United States) to bring all persons “alleged to have committed, or to have ordered to be committed, [war crimes] regardless of their nationality, before its own courts.”<sup>113</sup> As a signatory to the Geneva Conventions of 1949, the U.S. must bring prisoners of war to U.S. courts-martial and follow their procedures. Also, the 3rd Geneva Convention prohibits “moral or physical coercion” of prisoners to compel incriminating statements.<sup>114</sup> While barring statements obtained through

104 Reiterating *Hamdan*, 126 S. Ct. at 2792, 165 L. Ed. 2d at 773.

105 *Id.*

106 Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

107 See *Hamdan*, 126 S. Ct. at 2795, 165 L. Ed. 2d at 778.

108 10 U.S.C. § 948d(g).

109 *Id.* § 948b(f).

110 Geneva Convention Relative to the Treatment of Prisoners of War art. 3, 1(d).

111 *Hamdan*, 126 S. Ct. at 2797, 165 L. Ed. 2d at 778, referring to Justice Kennedy’s concurrence at 2803 and 785.

112 Justice Stevens refers to the commentary to the 4<sup>th</sup> Geneva Convention, cited in *Hamdan*, 126 S. Ct. at 2796-97, 165 L. Ed. 2d at 778.

113 Geneva Convention Relative to the Treatment of Prisoners of War art. 129.

114 *Id.* art. 99.

torture,<sup>115</sup> the MCA allows coerced statements if: 1) these statements are reliable, 2) the admittance of these statements would serve “the interests of justice,” and 3) the treatment is not “cruel, inhuman, or degrading.”<sup>116</sup> Additionally, the period of pre-trial confinement for offenses meriting it cannot exceed three months. The U.S. has detained people since 2001 at various locations worldwide, including Guantanamo Bay, and continues to detain untried prisoners, although some have been released.

The U.S. has not denounced its participation in the Geneva Conventions’ obligations.<sup>117</sup> On the contrary, the U.S. has asserted its willingness to fulfill its treaty obligations,<sup>118</sup> namely by its 2005 ratification of an additional protocol to the Geneva Conventions.<sup>119</sup> Thus, the U.S. is still bound by its multilateral treaty obligations toward prisoners of war, be they soldiers of a foreign state or “alien unlawful enemy combatants.”

### THE MCA DEPRIVES ALIEN UNLAWFUL ENEMY COMBATANTS OF THE RIGHT TO CONTEST DETENTION THROUGH A HABEAS POSITION

The most salient feature of the MCA is that it strips the federal courts of habeas corpus jurisdiction for alien unlawful combatants<sup>120</sup>—i.e., people detained in the “war on terror” who are not citizens or legal residents of the United States. The United States’ Constitution states: “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.”<sup>121</sup> In *Rasul v. Bush*,<sup>122</sup> the Supreme Court interpreted 22 U.S.C. § 2241 (the statute granting federal courts jurisdiction for habeas petitions) and found that the federal courts did, in fact, have jurisdiction over the habeas petitions of Guantanamo detainees, both American and foreign.<sup>123</sup> Later, Congress attempted to limit the jurisdiction of the federal courts over habeas petitions.<sup>124</sup> The Supreme Court rebuffed this effort, holding the Detainee Treatment Act did not deprive the federal courts of habeas jurisdiction.<sup>125</sup>

After this third defeat,<sup>126</sup> the Bush Administration obtained legislation (the MCA) purporting to suspend the courts’ jurisdiction of habeas claims.<sup>127</sup> The

115 10 U.S.C. § 948r(b).

116 *Id.* § 948r(c)-(d).

117 pursuant to Geneva Convention Relative to the Treatment of Prisoners of War art. 129.

118 See the briefing by the Department of State’s Legal Advisor on September 7, 2006, at <http://www.state.gov/s/l/rls/71939.htm> (July 10, 2007).

119 Protocol Additional to the Geneva Conventions of 19 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005, ratified by the U.S. on March 8, 2007.

120 10 U.S.C. § 950j(b).

121 U.S. CONST. art. I, § 9, cl. 2.

122 542 U.S. 466, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004).

123 542 U.S. at 481, 124 S. Ct. at 2696, 159 L. Ed. 2d at 561.

124 Detainee Treatment Act of 2005, 119 Stat. 2742 (2006) at (e)(1).

125 *Hamdan*, 126 S. Ct. at 2753, 165 L. Ed. 2d at 732.

126 The Court had ruled against the government in *Hamdi*.

127 10 U.S.C. § 950j(b).

MCA strips the courts of their jurisdiction not only for future habeas petitions by detainees, but, more alarmingly, of pending habeas petitions, as well. Although there is precedent for such a statute,<sup>128</sup> such a summary dismissal of pending claims is troubling, particularly as the Court determined the DTA did not limit the jurisdiction of federal courts to hear detainees' habeas claims. Indeed, the Supreme Court announced it would review the constitutionality of the MCA's removal of jurisdiction over detainees' habeas claims.<sup>129</sup>

Although federal habeas corpus review for anyone detained in violation of U.S. law is thought to be a matter of course, review of actual habeas case law and statutes proves otherwise. In fact, federal habeas corpus jurisdiction has been successively narrowed both by the Burger and Rehnquist Courts and Congress<sup>130</sup> to such a degree that the odds of a *pro se* petitioner (there is no right to counsel on collateral review, so the vast majority of petitioners have no assistance of counsel) receiving relief from unlawful detention are almost non-existent.<sup>131</sup> The ability of a court to have jurisdiction over executive detainees must be viewed in this context.

On the final day of its October 2006 term, the Supreme Court accepted habeas petitions on behalf of two detainees, after initially denying the petitions for certiorari.<sup>132</sup> At the Court of Appeals for the District of Columbia, the government successfully invoked a procedural bar and a two-part substantive-law bar to the court's jurisdiction of a habeas claim. The government argued in *Boumediene* that: 1) the petitioners had not yet exhausted all their remedies before seeking habeas review, so the petitions for review must be denied; and 2) the plain language of the MCA eliminates a federal court's jurisdiction of a detainee's habeas petition<sup>133</sup> and is consistent with the suspension clause, as the writ of habeas corpus in 1789 would not be available to foreign nationals neither present in the U.S. nor having property interests in the U.S.<sup>134</sup>

The government also claimed in its March 21, 2007 brief several times, without citations to any authority, that the DTA gives 9/11 detainees "greater rights of

128 *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 19 L. Ed. 264 (1869).

129 *Boumediene v. Bush*, 476 F.3d 961 (D.C. Cir. 2007), cert. granted, 2007 WL 1854132 (June 29, 2007) (No. 06-1195) and *Al Odah v. U.S.*, 476 F.3d 981, 375 U.S. App. D.C. 48, cert granted, 2007 WL 681992, 75 U.S.L.W. 3483 (June 29, 2007) (No. 06-1196).

130 *E.g., Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed.2d 334 (1989) (imposing procedural bar to invoking constitutional rights declared by the Supreme Court of the U.S. on collateral review after the date on which a state's highest court had affirmed petitioner's conviction on direct review); Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as codified, for example, under 28 U.S.C. §§ 2244(b)(1-2), (d) and § 2254(d)(1)-(2) (imposing rigid procedural bars to reject the bulk of petitions for habeas corpus relief on procedural grounds without evaluating the merits of the constitutional claims).

131 John H. Blume, *AEDPA: the "Hype" and the "Bite,"* 91 Cornell L. R. 259, 284-285 (2006) (showing comparisons of success rates for non-capital and capital petitioners).

132 *Boumediene v. Bush*, 476 F.3d 961 (D.C. Cir. 2007), cert. granted, 2007 WL 1854132 (June 29, 2007) (No. 06-1195) and *al Odah v. U.S.*, 476 F.3d 981, 375 U.S. App. D.C. 48, cert granted, 2007 WL 681992, 75 U.S.L.W. 3483 (June 29, 2007) (No. 06-1196).

133 Brief for the Respondents in Opposition, *Boumediene v. Bush*, 2007 WL 868965 (March 21, 2007) (Nos. 06-1195 and 06-1196).

134 *Id.*



judicial review than traditionally provided to those held for punishment pursuant to the judgment of a military tribunal.”<sup>135</sup>

The government based most of its substantive law argument on one case: *Johnson v. Eisentrager*.<sup>136</sup> This is the famous World-War-II era case declining to extend the constitutional privilege to seek habeas review in U.S. courts to German nationals captured in a war theater (China), but who neither were present in the U.S. nor had property interests in the U.S.<sup>137</sup> These men were, however, transported to a U.S. military prison in occupied Germany—an area under the control of the U.S. military. The *Eisentrager* Court ignores this aspect. Instead, the Court chooses to ridicule the idea that the Constitution should be respected by U.S. officials, and discusses the nonsensical idea of the extra-territoriality of constitutional rights. For the Court, the problem is that captured foreign military agents would be able to invoke all the protections of the U.S. Constitution,<sup>138</sup> while U.S. citizens held abroad would not be able to assert similar protections against their foreign jailers.

The *Eisentrager* Court invoked a traditionalist approach when confidently asserting there is no constitutional right to habeas review for foreign nationals.<sup>139</sup> The Court adopted the common law distinction between alien nationals in the U.S. from a country with which the U.S. is at war, other foreign nationals from “peaceful” countries, and U.S. citizens.<sup>140</sup> Aliens not from countries assisting in the war effort must be considered as enemies, according to the Court.<sup>141</sup>

Much has changed since the Supreme Court issued the *Eisentrager* opinion—so much, in fact, that the denial of statutory habeas corpus review to foreign nationals and upholding the constitutionality of the MCA, as drafted and enacted, is today precluded.

First, the U.S. signed and ratified<sup>142</sup> the August 12, 1949 Geneva Conventions, including the 3rd Geneva Convention,<sup>143</sup> on August 2, 1955. As a state party to the conventions, the U.S. has renounced any common law tradition of distinguishing

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135 *Id.* at \*13, echoing statement at \*8-9.

136 *Johnson v. Eisentrager*, 339 U.S. 763, 70 S. Ct. 936, 94 L.Ed. 1255 (1950).

137 For other examples where this approach has been applied, see also *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 182 F.3d 17 (D.C. Cir. 1999) and *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990).

138 *Eisentrager*, 339 U.S. at 781-82.

139 The government’s use of *Eisentrager* to bolster its argument is curious, as the case does not strengthen its position. Justice Kennedy, in fact, cited *Eisentrager* and a totality-of-the-circumstances approach in his *Rasul* concurrence to find that *Eisentrager* was in stark contrast to the position of the *Rasul* petitioners, who were able to petition for habeas relief as they were detained in a U.S. military base. In *Rasul*, the petitioners were held indefinitely, without being able to determine their status as terrorists associated with al-Qaeda, and were detained on a U.S. military base. *Eisentrager*, on the other hand, involved petitioners who had been tried and convicted for having engaged in military activity against the U.S. in China after Germany’s surrender.

140 *Id.* at 769-773.

141 *Id.* at 769.

142 <http://www.cicr.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (Dec. 13, 2007).

143 Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

alien combatants from U.S. military actors.<sup>144</sup> The U.S. must bring alien enemy combatants before its own “regularly constituted courts.” The *Eisentrager* logic is no longer applicable to deny petitioners the ability to contest their detention pursuant to U.S. law—the statutory habeas provision codified at 28 U.S.C. § 2241 *et seq.*

Second, the *Eisentrager* Court relies in part on the Alien Enemy Act of 1798, codified at 50 U.S.C. § 21, to justify the exclusion of alien, non-resident combatants from U.S. courts. This section renders “the resident alien enemy...constitutionally subject to summary arrest, internment, and deportation whenever a declared war exists.”<sup>145</sup> (As the legal rights of resident aliens in time of war were subject to a type of rescission, non-resident aliens had no constitutional rights at all.) Although this statute is still in force, actions based on it surely would be subject to the due process and equal protection concerns of the Fifth and Fourteenth Amendments to the U.S. Constitution. Although not the case during World War II, racism and nationalism are not powerful enough in the U.S. today to justify the abridgment of the rights of those detained, whether citizen, legal resident, or other, in contravention of the Constitution.

Third, invoking rights that existed in 1789, as the government does in its brief,<sup>146</sup> is not an effective strategy. In 1789, only British and U.S. citizens could challenge their detention respectively in lands subject to the British crown or in the U.S. In the intervening 200 years, the citizenry of each country has been extended from exclusively white, propertied men to both women and members of other ethnic and racial groups. Although an examination of law in 1789 might be determinative for evaluating whether cases are jury-eligible, it is not a meaningful aid in determining the ability of those detained in violation of U.S. law to contest their detention—particularly when the case supporting the government’s position, *Eisentrager*, has been effectively minimized, if not overruled, by *Rasul*.

Fourth, the tone of *Eisentrager* is an anachronism incompatible with the modern conception of the rule of law. In that decision, the Court ridicules the idea that foreign nationals in U.S. military custody should be able to invoke the writ of habeas corpus to challenge their detention in U.S. courts. Granting foreign soldiers constitutional protections, the *Eisentrager* Court insists, would make soldiers and combatants immune from prosecution.<sup>147</sup> More plausibly, allowing foreign nationals to challenge their detention in U.S. courts would force the administration to prosecute its case against each detainee more fully, and in compliance with domestic law. If the detention is found to be lawful, then that strengthens the administration’s hand in its “war on terror.”

Additionally, subjecting detentions to habeas evaluation demonstrates respect for the rule of law. The U.S. is founded on, among other principles, respect for the

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144 See article 106 (stating that a State Party must accord to a foreign soldier the same rights to appellate review as it would to one of its own soldiers).

145 *Eisentrager* at 775.

146 Brief for the Respondents in Opposition at \*6.

147 *Eisentrager* at 785.

rule of law. As one of the world's largest democracies, the U.S. is a world leader, and its foreign policy is informed by policies furthering the rule of law. The U.S. even evaluates other countries for their democratic credentials, as well as their commitment to human rights and to the rule of law.<sup>148</sup> In their respective briefs,<sup>149</sup> the American Bar Association and a group of former U.S. diplomats urge the Court to consider both the centrality of the writ of habeas corpus in our system and our role in the international community.<sup>150</sup> The Bush administration's zeal to place detainees outside the jurisdiction of the U.S. violates our domestic law, of which international law (i.e., the 1949 Geneva Conventions and other treaties) is a part under the Supremacy Clause, and it significantly damages the worldwide opinion of the U.S. How can a democratic government obliged to protect the Constitution deny those it imprisons the ability to contest their detention, a writ listed in the Constitution?

Fifth, the Supreme Court has viewed whether U.S. courts have habeas jurisdiction for foreign combatants detained by U.S. officials and the military differently in the "war on terror" than in the World-War-II era. To withdraw habeas jurisdiction, Congress must provide an adequate alternative remedy.<sup>151</sup> In the "war on terror" cases, habeas remains available, as no other adequate alternative remedy has been created.<sup>152</sup>

In *Rasul*, the Court held any person claiming to be held in violation of U.S. law could seek redress for the illegal detention using habeas corpus. The Court determined in *Rasul* that the "statutory predicate" to the *Eisentrager* holding (i.e., that the petitioner had to be within the court's jurisdiction to have a proper habeas claim) had been overruled in *Braden*<sup>153</sup>, where the Court held that the jailer's location, not the detainee's location, was the material issue for determining a court's jurisdiction of a habeas claim.<sup>154</sup> Additionally, there could be no claim of extraterritoriality barring application of U.S. law in *Rasul*.<sup>155</sup> There, the petitioners were incarcerated in a U.S. naval prison at the U.S. Naval Base in Guantanamo Bay, Cuba—land over which the U.S. "exercise[d] complete jurisdiction and control" and which had been nominally leased for an indeterminate duration.<sup>156</sup>

Next, in *Hamdi*, the Court ruled that military commissions indeed could be

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148 See the U.S. Dept. of State's listings of reports on human rights practices for the past ten years. <http://www.state.gov/g/drl/rls/index.htm> (Oct.18, 2009).

149 Brief for the American Bar Association as Amicus Curiae Supporting Petitioners, *Boumediene v. Bush*, 2007 WL 2456942 (2007) (Nos. 06-1194, 06-1196) and Brief for Former United States Diplomats as Amicus Curiae Supporting Petitioners, *Boumediene v. Bush*, 2007 WL 2414900 (2007) (Nos. 06-1195 and 06-1196).

150 American Bar Association Amicus Brief.

151 *Swain v. Pressley*, 430 U.S. 372, 97 S. Ct. 1224, 51 L. Ed. 2d 411 (1977).

152 This will be discussed below using the Court's June 2008 *Boumediene v. Bush* decision.

153 *Rasul*, 542 U.S. at 479 (construing *Braden v. 30<sup>th</sup> Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 93 S. Ct. 1123, 35 L.Ed.2d 443 (1973)).

154 *Id.*

155 *Rasul* at 480.

156 *Rasul* at 471 (discussing the lease agreement between the U.S. and Cuba).

used to determine a detainee's enemy combatant status.<sup>157</sup> However, in the absence of a tribunal determining the citizen-detainee's legal status of "enemy combatant," a federal court has habeas jurisdiction to evaluate the detention for compliance with constitutional rights (e.g., access to counsel, notice of the charges against a detainee, notice of the basis for classification as an enemy combatant, and the opportunity to rebut evidence against a detainee before a neutral decision-maker.<sup>158</sup>) The writ of habeas corpus was available to anyone detained in violation of the U.S. Constitution unless Congress had suspended the writ. The Court found that it had not.

The following year, in *Hamdan*, the Court invalidated the tribunal convened to try the petitioners, as it did not meet jurisdictional prerequisites and because it violated the UCMJ and Geneva Convention.<sup>159</sup> In its decision, the Court discussed the jurisdictional prerequisites for the three types of military commissions, including the model used by the Bush administration: the "law-of-war" military commission.<sup>160</sup> The tribunal used to try Hamdan did not meet the four preconditions for jurisdiction.<sup>161</sup> First, for a law-of-war military commission to have jurisdiction over enemy combatants, the commission can only try offenses committed within the theater of war. Second, the charged offense must have been committed during the duration of the war (and not before). Third, persons triable by the commission can be only members of the commission's own military forces or members of enemy armed forces engaged in violations of the law of war. Fourth, only two branches of offenses are possible: 1) violations of the law of war, including general principles of law (i.e., what individual states consider to be violations of the law of war), and 2) breaches of military orders and regulations that are not legally triable by statutory courts-martial.<sup>162</sup> As these criteria were not satisfied by the military commission claiming to have jurisdiction over Hamdan, the military commission could not legally try him.

## CONCLUSION

Each recent detainee decision has resulted in a corresponding legislative change to bring executive detention more into line with the Supreme Court's rulings. On June 29, 2007, the Supreme Court granted petitions for rehearing that it had earlier denied.<sup>163</sup> In doing so, it granted petitions for certiorari from Lakhdar Boumediene and Khaled Al Odah<sup>164</sup> to review their habeas claims. The Court reviewed the constitutionality of section 7 of the Act in these consolidated cases and announced

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157 *Hamdi* at 509.

158 *Id.* at 537.

159 *Hamdan* at 2749.

160 *Id.* at 2777.

161 *Id.* at 2749.

162 *Id.*

163 Order, Nos. 06-1195, 06-1196, *denying petition for cert.* Apr. 2, 2007.

164 *Boumediene v. Bush*, 476 F.3d 961 (D.C. Cir. 2007), *cert. granted*, 2007 WL 1854132 (June 29, 2007) (No. 06-1195) and *al Odah v. U.S.*, 476 F.3d 981, 375 U.S. App. D.C. 48, *cert granted*, 2007 WL 681992, 75 U.S.L.W. 3483 (June 29, 2007) (No. 06-1196).

in June 2008 that section 7 of the MCA was an “unconstitutional suspension” of the writ of habeas corpus.<sup>165</sup> The Court ruled the scope of review afforded a detainee through the CSRT and the Court of Appeals for the District of Columbia, as codified in the MCA,<sup>166</sup> was an insufficient substitute for habeas corpus review in a federal district court.<sup>167</sup> The court stated that construing section 7 to avoid finding the statute unconstitutional “would come close to reinstating the §2241 language Congress sought to deny” the detainees by enacting the MCA.<sup>168</sup> (The dissenters, however, rebuke the majority for claiming section 7 violates the detainees’ rights, without ever enumerating what rights the detainees actually would have.<sup>169</sup>) Among the deficiencies of the MCA’s language, including the failure to state explicitly that a detainee could be released if the Court of Appeals for the District of Columbia Circuit determined that detention was not warranted pursuant to the Secretary of Defense’s own “standards and procedures”<sup>170</sup>—i.e., the failure to provide language allowing a court to “correct” the status determination,<sup>171</sup> the most egregious was the failure to provide a meaningful way for the detainee to introduce (exculpatory) evidence that had not been not presented at the time of his status determination by the CSRT.<sup>172</sup>

In striking down section 7, the Court emphasized that the writ of habeas corpus was a central element of the separation of powers as set out in the original Constitution.<sup>173</sup> It stated the Government’s claim, that *de jure* sovereignty informed the scope of constitutional rights available to those outside U.S. territory, was unsupported by history and the common law, which favored a more fact-specific, case-by-case determination.<sup>174</sup> The court recognized that common law habeas corpus is “an adaptable remedy”<sup>175</sup> for the courts to inquire into executive detentions, and it allowed the judicial scrutiny required in a proceeding challenging detention to vary inversely with the procedural protections afforded the detainee.<sup>176</sup> The Court stated that in view of the length of the Guantanamo inmates’ detention, the detainees were not required to exhaust all remedies under the DTA by challenging the constitutionality of the CSRT under DTA section 1005(e)(2)(C)(ii) before filing a petition for habeas corpus.<sup>177</sup> However, the Court cautioned that the

165 *Boumediene v. Bush*, 553 U.S. \_\_\_, slip op. at 64; 128 S. Ct. 2229 (2008).

166 DTA section 1005(e)(2)(C), as specified in section 7 of the MCA, codified in 22 U.S.C. § 2241(e)(1)-(2).

167 *Boumediene*, slip op. at 62.

168 *Boumediene*, slip op. at 63.

169 See *id.*, Roberts, C.J., dissenting at 1 (slip op.).

170 *Boumediene* at 59 (construing DTA section 1005(e)(2)(C)(i)).

171 *Id.* at 57.

172 *Id.* at 60-61.

173 See *Boumediene* at 8, 35-36, 43.

174 *Boumediene* at 25-34.

175 *Boumediene* at 50.

176 See *id.* at 53 (“The idea that necessary scope of habeas review in part depends on the rigor of any earlier proceedings accords with our [*Mathews*] test for procedural adequacy in the due process context.”).

177 *Boumediene* at 65-66.

remainder of the DTA and the MCA remain in force.<sup>178</sup> In a final reminder of the balancing of interests required in the constitutional interplay between the three branches of government regarding executive detentions, the Court admonished that a federal court should not involve itself in the detention before the Executive has had a “reasonable period of time to determine a detainee’s status.”<sup>179</sup>

After the cases were remanded, the district court ordered the release of Lakhdar Boumediene and four other detainees in November 2008 after finding the government’s hearsay evidence was insufficient to detain and (eventually) to prosecute the men.<sup>180</sup> The Supreme Court announced it would hear habeas arguments in another case,<sup>181</sup> involving the detention of an uncharged legal U.S. resident based on the government’s assertion the detainee conspired with al Qaeda.<sup>182</sup> The interplay between the branches of government regarding the “war on terror” continues.

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178 *Boumediene* at 66.

179 *Boumediene* at 66.

180 Boumediene was not immediately released; he was transferred in 2009 to France, which had agreed to receive the Guantanamo inmate. <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/25/AR2009052502263.html> (Oct. 21, 2009).

181 *Ali Saleh Kahlah al-Marri v. John Pucciarelli*, No. 08-368, cert. granted Dec. 5, 2008.

182 <http://origin.www.supremecourtus.gov/qp/08-00368qp.pdf> (Dec. 29, 2008). The Obama Administration transferred al-Marri into the criminal justice system in early 2009, and al-Marri was negotiating a plea agreement in which he would plead guilty to one count of providing material support or resources to al Qaeda in violation of 18 U.S.C. § 2339(B) (a)(1). <http://www.ilcd.uscourts.gov/media/pdf/22.pdf> (Oct. 18, 2009).

# UNDERMINING THE NATIONAL SECURITY AND CIVIL LIBERTIES DEBATE:

## *The Recurrence of Politically-Motivated Actions*

*Amber Patel*

### INTRODUCTION

The addition of the Bill of Rights to the Constitution in 1791 was a hard-fought victory for the Anti-Federalists. The attitude of the Federalists, who were reluctant to incorporate the Bill of Rights, was famously embodied in Alexander Hamilton's Federalist Number 84. Hamilton believed that bills of rights had "no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants."<sup>1</sup> That is, the government proposed under such constitutions is subordinate to the people, through which "the people surrender nothing, and as they retain everything, they have no need of particular reservations."<sup>2</sup> He felt that including a bill of rights that addressed only certain liberties would be dangerous because it would imply that the federal government had the power to regulate those liberties which were not specifically enumerated. This perspective is telling; even the Federalists who sought a strong national government initially understood the inherent need for limitations of government power.

While Hamilton's arguments were persuasive, the Anti-Federalists were not willing to accept silence as a guarantee of liberties. Aware of mankind's inherent attraction to power, the Anti-Federalists campaigned to undermine the ratification of any constitution that they viewed as a poor guarantor of liberties. For this reason, George Mason, author of the Virginia Declaration of Rights, a major influence on the drafting of the Declaration of Independence and the Bill of Rights, refused to sign the Constitution.<sup>3</sup> The passions attached to the inclusion of rights are hardly surprising given the political atmosphere of the time. With the dust of the American Revolution settling, and the seeds of the French Revolution sprouting, the Founding Fathers had grave concerns that a newly-established government without a well-defined constitutional role could default into the equivalent of a tyrannical monarchy. While James Madison deemed the inclusion of liberties as a waste of congressional time, he finally penned the Bill of Rights in an effort to assuage the ardent Anti-Federalists, conceding that their inclusion was "neither improper nor altogether useless."<sup>4</sup>

The Bill of Rights was borne from the distrust of a government's ability to respect its established boundaries. Moreover, while the legislative and executive branches have gained power through expansive interpretations of Congress's Commerce

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1 THE FEDERALIST No. 84 (Alexander Hamilton).

2 *Id.*

3 Problems with state ratification began with the Massachusetts Convention. The Massachusetts Compromise allowed for the ratification of the Constitution if certain amendments were considered in the first Congress. This compromise became a model to ratification of the Constitution for the remaining states, with the sole exception of Maryland.

4 Register, I, 423-37 and Gazette of the United States, 10 and 13 June 1789.

Clause and the President's war powers respectively, the Bill of Rights, strengthened by long-term patterns of judicial decision-making, remains the bulwark against government intrusion into the private lives of its citizens.

The relation between the liberties enumerated in the Bill of Rights and national security deserves careful attention. Can liberties and national security measures amiably co-exist? Historically, the two have operated on a sliding scale in which prevailing national security concerns determine the prevalence and extent of civil liberties. Civil liberties are most vulnerable when the President is afforded wide discretion in exercising his authority as Commander-in-Chief.<sup>5</sup>

Beyond the historical pattern of executive aggrandizement, the basic structure of our government itself contributes to the vulnerability of civil liberties. The Constitution essentially acts as a contract between the people and the government, and it carves out a role for all three branches. The legislative branch represents the people, the judicial branch represents the contract, and the executive branch represents the government. When the executive branch is allowed (or even expected) to determine the policies affecting civil liberties, those liberties will tend to diminish whenever the interests of the government are deemed to be at risk.

The struggle between national security and civil liberty is an unfortunate yet inevitable byproduct of the Constitution and its apportionment of significant police power to the majoritarian political branches. However, allowing politically-motivated factors to undermine the legitimacy of this debate is deleterious to the integrity of the debate and the image of the governing administration.

Governments are a composite of the political ideologies they portray to the public. Can a government objectively compare the importance of its own political philosophy with the importance of individual liberties, particularly when the two come into conflict? People are, by nature, self-interested, and the interests of those who work under the protective cloak of the government are biased from the outset. Recognizing the juxtaposition of these competing interests leads to an understanding of how civil liberty violations which are purely politically-motivated can occur under the pretext of preserving national security. The goal is clear: partisan politics must be taken out of the equation. The difficulty, then, lies in devising a method of removing a seemingly inherent characteristic of the institutional structure.

The problem is two-fold: first, to distinguish between decision-making based on political motivation and genuine national security motivation (without the benefit of hindsight), and second, to inadvertently avoid undermining national security when attempting to remove the political motivations that drive executive decision-making. The first obstacle is particularly problematic when a national security measure violates the First Amendment's protection of free speech or the Fourth Amendment's protection against unreasonable search and seizure by suppressing opposition to governmental policies, as the political opponents of a governmental

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<sup>5</sup> An analysis of the rise of executive power during war is beyond the scope of this article, but it is generally accepted that the President in his capacity as Commander-in-Chief leads the nation subject to certain constitutional checks.



action are best suited to bring any political motivations to light. If citizens are unable to voice their concerns because doing so would ostensibly undermine national security, government policies can no longer be openly questioned. This situation often creates unscrutinized policies that have the false appearance of public approval.

Sometimes, self-interest motivates executive action. But it does not have to, legitimate security concerns motivate many actions. While politically-motivated actions are rare, their importance and effect are not diminished, and the overall impact upon society is no less relevant. In reality, anyone can be a victim of politically-motivated measures: an entire region (Southerners during the Civil War); political groups and their affiliates (Federalists during the Quasi-War, Socialists during World War I, and 'Pro-Communists' during the Cold War); races (Japanese during World War II); and religious groups (Muslims during the War on Terrorism). Actions which result in the suspension of individual liberties must be taken in adherence with the rule of law and in a manner that does not conflict with the Constitution.

The importance and awareness of civil liberties appears to increase after each war. After the brazen actions taken by the Wilson administration during World War I,<sup>6</sup> later administrations tried to curtail abuse of First Amendment rights. If it is the glow of success that determines whether certain suspensions of liberties are too harsh, it should only be the shadow of failure that justifies the greater suspension of civil liberties. Perhaps it is that administrations change their *modus operandi*, clamping down on dissent by suspending liberties that have gained little attention and have not been heavily litigated. After violations of the First Amendment were exhausted, the government turned to the Fourth Amendment. Just as the Supreme Court was reluctant to decide against the Executive in *Schenck*, *Frohwerk*, *Debs*, and *Abrams*,<sup>7</sup> a time when executive violations of the First Amendment were in their infancy, so too is the Supreme Court currently reluctant to decide against the Executive when the Fourth Amendment is concerned.<sup>8</sup> Some have argued that such systemic oppression has a place in a society facing a national security crisis. Such oppression does not, however, have any place in a society *led to believe* that they are facing a national security crisis.

Often, the true motivations behind executive actions are shielded from the public; such is the nature of our government. That there can conceivably be any politically-motivated civil liberty violations suggests that liberties are neither as esteemed nor as secure as they should be. Civil liberties are at the mercy of the Executive during times of war, and it is not until after the smoke has cleared that the necessity of violating those liberties can be determined. This is not to say that there

6 The Wilson administration exerted great influence over speech by heightened law enforcement efforts against those who felt America's role in the War was more strategic than necessary. Under the 1917 Espionage Act and the 1918 Sedition Act, dissenters effectively indicted themselves by exercising their First Amendment rights.

7 *Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616 (1919).

8 *ACLU*, 493 F.3d 644 (6th Cir. 2007), *cert. denied* by Supreme Court (U.S. Feb 18, 2008) (No. 07-468).

can never be a situation in which the proper procedure would require civil liberties to be suspended, but rather that they should never be suspended for the wrong reason. We have only hindsight of past civil liberty transgressions from which to learn, and the lessons are first, that the Executive is granted unfettered authority during war, and second, that the tendency during war is to overreact.<sup>9</sup> Suspension of liberties should only be a result of a legitimate national security crisis, and stronger efforts should be made to test the proffered justification for their suspension against the true intentions of those in power.

## STATUS QUO

The idea that citizens can abandon skepticism of the government during war straddles a line between unwise and foolish. War provides an opportunity to an Executive seeking to consolidate power. The interaction between all three branches of government, suffering from the lack of a well-defined war role, produces inconsistent action.

### *Executive Role*

Many historical examples suggest that the Executive cannot be trusted to enact policies in good faith during times of war. A new dimension is added when delegated authority is factored into the equation. Delegating authority affords the Executive the necessary efficiency to implement a successful and uniform policy, which is particularly important when trying to promote a unified image during war. This arrangement, however, also produces unfortunate consequences.

During the Civil War, General Burnside issued General Order Number 38, which sought to suppress support for the Confederacy in the Department of Ohio. Aided by this order, Burnside arrested prominent Democrat and former Ohio congressman, Clement Vallandigham. Burnside's misuse of President Lincoln's broad authorization left the President "embarrassed by [the] arrest of Vallandigham, about which [he] learned from the newspapers . . . [but felt] that more damage would be done by repudiating Burnside than by upholding him."<sup>10</sup> Civil wars are unique because there are no covert politically-motivated actions—the underlying reasons for civil wars are openly political. The American Civil War was no different. The goal of the Civil War was to suppress the insurgency growing in the South in order to maintain the existence of the Union. Toward this end, President Lincoln suspended the writ of habeas corpus in the South at various times during the war. However, Lincoln's usurpation of the legislative authority in suspending the writ and allowing General Ambrose Burnside to issue an order which called for punishment of those that sympathized with the enemy, did not go unchallenged. A few days before former Congressman Vallandigham was arrested under this order, he urged a

9 For a general overview of liberties during wartime, see GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (W.W. Norton, 2005).

10 JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 597 (OUP 2003).

crowd to “hurl ‘King Lincoln’ from his throne.”<sup>11</sup>

Who, then, is accountable? A concept such as employer liability gives the consumer compensation for acts of an employee, but there is no equal concept that gives the citizen direct compensation for abuses suffered at the hands of the government. Executive officials are shielded by absolute immunity or qualified immunity from claims. In *Harlow v. Fitzgerald*,<sup>12</sup> the companion case to *Nixon v. Fitzgerald*,<sup>13</sup> the Supreme Court held that certain executive officials have at least qualified immunity against an action for damages. Though less protection than absolute immunity, the qualified immunity defense remains controversial because citizens are unable to obtain a remedy for past liberty violations for “reasonable” actions. To enable those who suffer liberty violations during war to seek reparations from executive officials enacting war policy would not only bankrupt the treasury, but would give executive officials pause before carrying out their duties, undermining attempts to secure the nation. On the other hand, this immunity gives executive officials “reasonable” unfettered authority.

What constitutes a “reasonable” action during war when executive power is at its greatest is certain to be interpreted more broadly than at any other time. Although the Supreme Court, in the seminal decision of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, held that damages could be awarded against a federal officer who had violated the liberties of a plaintiff, the damages award was, and is often, blocked by the application of good faith immunity.<sup>14</sup> In addition, the Court noted that “special factors counseling hesitation” would provide an exception to the *Bivens* rule. With the subsequent retreat from *Bivens*, the vague nature of its exception, and the applicability of immunities it will be rare to find a court awarding damages to those whose constitutional rights have been violated by a federal official during war. Indeed, as recently as 2007, in *In re Iraq and Afghanistan Detainees Litigation*, the D.C. District Court held that decisions executed by the executive branch during war were ‘special factors counseling hesitation’ under *Bivens*, and that military personnel, allegedly violating the Fifth and Eighth Amendments, were also

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11 Mount Vernon Speech (May 1, 1863) in REHNQUIST, *supra* note 18, at 66. It should be noted that Lincoln deferred to Congress after he decided to suspend the writ, and was granted retroactive approval. Acknowledging that the ongoing conflict left him little choice, Lincoln addressed Congress saying:

It was with the deepest regret that the Executive found the duty of employing the war power, in defense of the government, forced upon him. He could but perform this duty, or surrender the existence of the government...He felt that he had no moral right to shrink; nor even to count the chances of his own life, in what might follow. In full view of his great responsibility, he has, so far, done what he has deemed his duty. You will now, according to your own judgment, perform yours.

Abraham Lincoln, President of the United States, Special Message to Congress (July 4, 1861), in *Lincoln: Speeches and Writings 1859 – 1865* 246, 261 (Don E. Fehrenbacher ed., 1989).

12 457 U.S. 800 (1982).

13 457 U.S. 731 (1982).

14 403 U.S. 388 (1971); remand to 456 F.2d 1339 (2nd Cir. 1972)(holding that government agents are protected from personal liability when acting in good faith to carry out their duties).

covered by the qualified immunity defense.<sup>15</sup> The result of these decisions is that there is no legally responsible party. Why should a national security crisis absolve a group of politicians from their actions *in toto*? There should be some mechanism by which the Executive is brought back into a legal framework during war.

It is plausible that the political process was meant to take care of an executive's abuses of power, and when danger is imminent, the Executive is meant to have complete discretion to balance national security against civil liberties or override them completely. If a citizen disagrees with the Executive's determinations, then he or she can choose not to reelect the Executive.<sup>16</sup> The political process argument is powerful, but it rests on two fundamental flaws. First, the Constitution does not envision the political process as the main guarantor of civil liberties. The Federalists' and Anti-Federalists' debate over the inclusion of liberties in the Constitution supports this conclusion. Neither viewed the government as having the authority to intrude upon liberties, except in specified circumstances involving specified liberties (e.g. the Suspension Clause), despite the existence of the political process. Second, policies favoring national security cannot be viewed in a vacuum; the human psyche must be taken into account. Fear brings out an instinct that does not lend itself to rational human behavior. Stone proposed the formula: "A time-honored strategy for consolidating power is to inflate the public's fears, inflame its patriotism, and then condemn political opponents as 'disloyal.' A national crisis (real, fabricated, or imagined) invites this strategy."<sup>17</sup> Use of this method has been evident during every major conflict since the turn of the 20<sup>th</sup> century.

The power of the Executive has reached new heights in the last decade. In past wartime situations, the Executive has generally acted in line with Congress' wishes or, as Lincoln had done, sought retroactive approval by Congress. The Bush administration marked a new era in executive audacity by ignoring the warrant requirements established by Congress through FISA and claiming authority for warrantless wiretaps under Congress' AUMF and inherent Commander-in-Chief power. Congress passed the Foreign Intelligence Surveillance Act (FISA) in an effort to provide a balance between potential executive abuse and swift executive action when dealing with potential security crises.<sup>18</sup> The FISC allows the Executive to obtain a fast-tracked warrant for "all electronic surveillance conducted within the

15 479 F.Supp.2d 85 (D.D.C. 2007).

16 Indeed, the political process has flushed our administrations in which the electorate had lost faith. For example, the Federalists' desperate attempts to maintain power during the Quasi-War by weakening the Democratic-Republican voter base resulted in their removal from office. Also, in 1946, the Republicans gained control of Congress for the first time since 1928, and passed the Twenty-Second Amendment setting Presidential term limits—a direct attack on Roosevelt's four terms in office. Midterm elections also make the political process effective. As the 1946 midterm elections illustrate, a change in Congress can greatly affect an administration's ability to enact certain policies. In 1954, the situation was repeated in the midterm elections when the Democrats took control in the Senate, albeit by one seat, after the McCarthy era.

17 STONE, *supra* note 9, at 74.

18 Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§1801-1871 (2000 & Supp. IV 2004), amended by Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552.

United States for foreign intelligence purposes.”<sup>19</sup> From 1978 through 2007, the FISC rejected only nine of 25,000 applications for surveillance.<sup>20</sup>

If the Executive refuses to follow legislation, and the courts refuse to sufficiently check executive power, there is no adherence to the rule of law. If there is one principle upon which democratic governments are founded, it is the rule of law—that no one is above the law. When there are insufficient checks on a branch of government, the risk of abusing power is too high. History provides a litany of examples of rulers, decidedly above the law, who abused their powers for their own advantage. The rule of law is meant to be constant; the founding fathers envisioned no situation in which the suspension of the rule of law could be justified.<sup>21</sup>

With the War on Terrorism, the check on executive power has fallen into the hands of the Judiciary. In *Hamdi v. Rumsfeld*, Justice O’Connor noted that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens ... whatever power the United States Constitution envisions for the Executive ... it most assuredly envisions a role for all three branches when individual liberties are at stake.”<sup>22</sup> This is a promising statement from a court that has historically played a subservient role to the Executive during times of war (it is worth noting that there was no majority in *Hamdi*). In 2008, the Supreme Court made another bold decision in *Boumediene v. Bush*, allowing Fifth Amendment habeas review of Guantanamo Bay detainees by federal courts.<sup>23</sup> If the Court maintains this trend, an important check which had been lost in previous administrations may be placed back on the Executive.

### **Legislative Role**

Although Congress acts as a mouthpiece for the people, it does not necessarily double as a guarantor of the people’s liberties. The expected response to any attack is fear, while the appropriate response to an initiation of arms is skepticism. How is it possible for a society to be duped into allowing the suspension of its own liberties by supporting a war where there is no threat of imminent danger? Robert Briffault

19 S. Rep. No. 95-701, at 9 (1978).

20 Statistics available from Electronic Privacy Information Center at: [http://epic.org/privacy/wiretap/stats/fisa\\_stats.html](http://epic.org/privacy/wiretap/stats/fisa_stats.html). Despite the ease with which warrants are obtained, the Bush administration danced around the lax FISA requirements arguing that its NSA Terrorist Surveillance Program was authorized by the congressional AUMF and the Executive’s inherent powers as Commander-in-Chief under Article II of the Constitution. The erosion of Fourth Amendment rights under the Bush administration has been seen before under the Nixon administration. Whether history will repeat itself and Congress will again establish a new procedure more formal and onerous than FISA remains to be seen, but it is clear that Fourth Amendment rights require greater protection from politically-motivated actions. \*NB: This article was written prior to the change in administration from President Bush to President Obama.

21 See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional*, 112 Y.L.J. 1011-1134 (2003) for the idea that emergency measures should be viewed outside the realm of the rule of law; See CARL SCMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., University of Chicago Press 2006) (1922) illustrating more than the incompatibility of emergency measures and the rule of law; See William E. Scheuerman, *Survey Article: Emergency Powers and the Rule of Law After 9/11*, 14 J. Pol. Phil. 61-84 (2006) for an overview.

22 542 U.S. 507, 536 (2004).

23 *Boumediene*, 128 S. Ct. 2229 (2008).

once wrote (as was later famously summarized in 1947 by Winston Churchill):  
 Democracy is the worst form of government. It is the most inefficient, the most clumsy, the most unpractical . . . it reduces wisdom to impotence and secures the triumph of folly, ignorance, clap-trap, and demagoguery . . . yet democracy is the only form of social order that is admissible, because it is the only one consistent with justice.<sup>24</sup>

Democracy boiled down to its element is mob rule; whoever controls the mob, controls the nation.

Although a democracy is a better safeguard to individual freedoms than other forms of government, there is a serious hidden danger—the presumption that actions taken by a democratic government are legitimate actions because they theoretically conform to public desire. The ease with which the public can be manipulated, particularly when safety is at risk, combined with the greater legitimacy attributed to democratic governments, makes for an extremely vulnerable situation in which an abuse of power is effortless. A cunning politician is able to manipulate public opinion during war to advance their political agenda. Allowing the Executive to violate civil liberties in order to suppress opposition and keep the public uninformed, or worse, misinformed, is a perversion of the Constitution.

Once fear has been incited in the public, it can be a slippery slope from democracy to what is essentially a police state shielded by a democracy. During the Cold War, when anti-Communism fever took hold of the country, Michigan Senator Arthur Vandenberg told President Truman to “make a personal appearance before Congress and scare the hell out of the country” in order to unite America under the banner of anti-Communism.<sup>25</sup> Congress passed the McCarran Internal Security Act 1950, hugely anti-Communist in nature, over Truman’s veto.<sup>26</sup> Truman decried that “‘instead of striking blows at Communism,’ the Act would ‘strike blows at our liberties.’”<sup>27</sup> Congress, responding to public fear, had gone farther than the Executive intended in taking away liberties.

Recently, Congress has come to the aid of the Executive’s suspension of habeas review, despite Supreme Court rulings protecting habeas jurisdiction. In *Hamdi v. Rumsfeld*, Justice O’Connor stated that “unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial

24 ROBERT BRIFFAULT, *RATIONAL EVOLUTION (THE MAKING OF HUMANITY)* Ch. 15 (Macmillan 1930), quoted in FRED R. SHAPIRO & JOSEPH EPSTEIN, *THE YALE BOOK OF QUOTATIONS* 103 (Yale University Press 2006). Although the United States is not technically a true democracy, I do not believe the distinction between a democracy (particularly a representative democracy) and the United States’ constitutional republic has any merit as applied to this article.

25 ERIC F. GOLDMAN, *THE CRUCIAL DECADE* 59 (Vintage 1960) as cited in NELSON W. POLSBY, *POLITICAL INNOVATION IN AMERICA: THE POLITICS OF POLICY INITIATION* 86 (Yale University Press 1984).

26 Internal Security Act of 1950, 64 Stat 987.

27 STONE, *supra* note 9, at 335, quoting Veto Message from the President of the United States, 81<sup>st</sup> Cong, 2d Sess, in 96 Cong Rec H 15629-32 (Sept. 22, 1950).

check on the Executive's discretion in the realm of detentions."<sup>28</sup> Congress responded by enacting the Detainee Treatment Act ("DTA"), providing, *inter alia*, that federal courts (with the exception of the D.C. Circuit in limitation) could no longer entertain habeas petitions from aliens who were deemed 'enemy combatants' by the administration.<sup>29</sup> The DTA was passed while a related case, *Hamdan v. Rumsfeld*, was pending in the Supreme Court. The Court held that the Act was not meant to apply retroactively so that Hamdan's case was allowed determination by the Court. Again in response, Congress promulgated the Military Commissions Act of 2006 ("MCA") which clarified the intention to suspend federal court habeas review for all applicable cases.<sup>30</sup> Finally, in *Boumediene*, the Supreme Court was forced to put an end to this legislative and judicial back and forth by deciding whether these congressional statutes violated the Constitution—years after the rignarole began.<sup>31</sup>

Despite Congress' recent actions, past Congresses have tried to mitigate the Executive's war power by passing legislation such as the War Powers Resolution of 1973, National Emergencies Act of 1976, and Foreign Intelligence Surveillance Act of 1978. The spirit of each, if not the provisions themselves, has been largely ignored by the Executive.

The likelihood of the Executive's political party controlling Congress in the United States' two-party system is a factor that should also be taken into account. Under the American electoral system, Congress is often in the pocket of the Executive, making it easier for the Executive to enact policies that conform to his particular political ideology. The electoral system's role in safeguarding liberties is addressed below.

It is clear that although Congress is a possible check on executive power, it is not a reliable one. In fact, it could be argued that Congress is the least stable of all three branches, particularly during times of war. Congress has power in numbers and the support of the masses, but those masses are extremely susceptible to executive influence. During World War II, the public did not support the internment of the West Coast Japanese until many months after the attack on Pearl Harbor.<sup>32</sup> Congress' role in checking executive authority should clearly not be determinative.

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28 542 U.S. 507, 536 (2004).

29 Detainee Treatment Act of 2005, Pub.L. 109-148, div. A, tit. X, §§ 1001-1006, 119 Stat. 2680, 2739-44 (2005).

30 Pub.L. 109-366, 120 Stat. 2600 (2006).

31 *Boumediene*, 128 S. Ct. 2229 (2008). There are also instances in which Congress may not have access to full information, or may not have received complete disclosure of information in a war setting. Some claim that the Gulf of Tonkin Resolution, authorizing military action in Vietnam, rested on premises which "may have been exaggerated or invented by the Johnson administration in order to prompt Congress to support the war."

Curtis A. Bradley & Jack L. Goldsmith, *Foreign Relations Law: Cases and Materials* 209 (2d ed. 2006).

Despite Congress' actions today, past Congresses have tried to mitigate the Executive's war power by passing legislation such as the War Powers Resolution of 1973, National Emergencies Act of 1976, and Foreign Intelligence Surveillance Act of 1978. The spirit of each, if not the provisions themselves, has been largely ignored by the Executive.

32 Initially, Attorney General Francis Biddle diligently rooted out those deemed disloyal via individual hearings. But public angst about the Japanese threat rose and peaked in February 1942. Roosevelt appeased the masses by issuing Executive Order 9066 calling for internment.

### *Judicial Role*

Although the Constitution did not carve out a war role for the judiciary *per se*, the courts are meant to interpret and protect the Constitution, including individual liberties, at all times.<sup>33</sup> The separation of powers principle, however, is often used as a scapegoat for judicial deference to the Executive during war times. This notion concedes that the Judiciary has no role in wartime decisions, a role that is textually divided between the legislative and executive branches in the Constitution. As we have seen, it is dangerous to rely solely on Congress to curtail executive authority, especially when Congress and the presidency are controlled by the same political party. All that is being asked of the Judiciary is that they maintain, not go beyond, their role in defending the Constitution regardless of whether we are at war.

The Executive has claimed broad war authority under the Article II Commander-in-Chief power, although the basis for such extensive authority is questionable. During the Korean War, Justice Jackson, recognizing the vagueness in the allocation of war powers, attempted to make sense of executive power in *Youngstown Sheet & Tube v. Sawyer*.<sup>34</sup> Jackson identified three spheres under which certain executive actions are legitimate. The first, where the Executive acts in compliance with congressional authorization, places executive authority at its maximum. For actions falling under the third sphere, when the Executive acts contrary to congressional will, the action must be supported by explicit constitutional authorization. Jackson's reasoning in the second sphere is engulfed by ambiguity. He states that when the Executive takes an action on which Congress has been silent, the Executive relies on power that has been granted to him either under Article II of the Constitution or some congressional act. The problem is that the interpretation of what constitutes congressional silence and what is tantamount to tacit congressional authorization is often times ambiguous.<sup>35</sup>

Despite the holding in *Youngstown*, practice has dictated that both the legislative and judicial branches will yield to the Executive during war, and further, that any attempt to do otherwise would violate the separation of powers principle upon which the United States government so heavily rests (though the idea of checks and balances seems forgotten). Even the courageous action taken by the Supreme Court in the *Boumediene* case highlights the discord among the Court.<sup>36</sup> Four of the nine justices dissented because of their belief in the separation of powers argument, illustrating the depth of the ongoing divide.

The judicial branch was meant to be the "least dangerous" branch, exerting "neither force nor will, but judgment."<sup>37</sup> After Chief Justice Marshall established

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33 Recall Justice Davis' quote in *Ex parte Milligan*, p 3.

34 *Youngstown*, 343 U.S. 579 (1952).

35 For instance, when Congress issued the AUMF in response to the 9/11 attacks, the Bush administration viewed it as blanket authorization for all actions taken to achieve a specific end, whereas others, especially those wary of potential executive abuse, saw it as general authorization subject to other specific mandates (such as FISA requirements).

36 *Boumediene*, 128 S. Ct. 2229 (2008).

37 THE FEDERALIST NO. 78 (Alexander Hamilton).



judicial review in *Marbury v. Madison*, judges were given an important role in which they could wield their judicial review sword over legislative and executive actions.<sup>38</sup> The exercise of this judgment, however, has rarely extended to times of war. The courts are charged with upholding the Constitution and the liberties that emanate from it, and while they should not overemphasize those liberties to the detriment of public safety, the public should expect the judiciary to place the same importance on these essential liberties as was bestowed upon them by the founding fathers.

Any uneasiness in leaving fundamental liberties in the hands of a branch that is unelected is well-founded, but the independence bestowed upon the judicial branch by Article III of the Constitution offers protection from outside influence. Chief Justice Warren is an excellent example. Appointed by Republican President Eisenhower, Warren and his Supreme Court became synonymous with liberal ideals. Recently, Justice Stevens, also appointed by a Republican (President Gerald Ford) said “I don’t think of myself as a liberal *at all*...I think as part of my general politics, I’m pretty darn conservative.”<sup>39</sup> Again, he is seen as one of the Court’s more liberal justices when it comes to issues involving liberties. Potentially free from outside political influence, a judge has only his or her political convictions to remove from the decision-making process. This, of course, is easier said than done.

The Quasi-War between the United States and France from 1798 to 1800 concluded in time for the presidential election of 1800, and although political factions<sup>40</sup> were considered undesirable, those aligned with either the Federalists or Anti-Federalists comfortably settled into the Federalist and Democratic-Republican political parties, respectively. The tactics used by both parties leading up to the election of 1800 manifested the dangers of which *Federalist 10* warned—that the majority would be able “to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.”<sup>41</sup>

In an effort to keep the Democratic-Republicans out of office, the Federalists, under President John Adams, used inflated executive war powers to push through Congress a series of legislation “designed to cripple, if not destroy, the Republican party.”<sup>42</sup> The Naturalization Act, Alien Friends Act, Alien Enemies Act, and particularly the Sedition Act of 1798, which curtailed First Amendment rights, were passed to decrease Democratic-Republican support under the pretense of a war which never made landfall in either the United States or France.<sup>43</sup> These acts gave Adams full authority to evict from the United States any immigrant for any cause without due process of law. No aliens were deported though. Commenting on the

38 5 U.S. 137 (1803).

39 Jeffrey Rosen, *The Dissenter*, N.Y. TIMES, Sept. 23, 2007, at <http://www.nytimes.com/2007/09/23/magazine/23stevens-t.html>.

40 As referred to in THE FEDERALIST NO. 10 (James Madison).

41 THE FEDERALIST NO. 10 (James Madison). For a detailed and insightful account of the elections of 1800, see Charles O. Lerche, Jr., *Jefferson and the Election of 1800: A Case Study in the Political Smear*, 5 WM. & MARY Q. 467 (1948).

42 GEOFFREY R. STONE, WAR AND LIBERTY 5 (W.W. Norton, 2007).

43 New immigrants at this time, who were the subject of the Alien Acts, tended to favor the Democratic- Republican’s cause for decentralization of government power.

purpose of the Sedition Act of 1798, historian Norman Risjord noted, “The Sedition Act was thus intended to silence, or at least intimidate, the Jeffersonian press during the presidential election campaign of 1800. In all, twenty-five newspaper editors were arrested, seventeen indicted, and ten convicted.<sup>44</sup> Tellingly, of the twenty-five arrested, none were Federalists.

During this Quasi-War with France, Justice Samuel Chase fell into disrepute after a litany of trials highlighted his political partisanship with the Federalists. Alexander Hamilton said of Chase before his inappropriate handling of the Quasi-War cases, that he had “the peculiar privilege of being universally despised.”<sup>45</sup> Justice Chase ignored criminal law procedures and consistently undermined the defense of affluent Democratic-Republicans being tried under the Sedition Act of 1798.<sup>46</sup>

The debate concerning the relative merits of an independent Supreme Court and a democratically legitimate Supreme Court is a source of contention. Although there are pros and cons to each, for the purposes of counteracting politically-motivated actions during war, independence is essential. There can be no independence in a judiciary that relies on the electorate for its appointment. Perhaps this independence was also a means to guarantee that the courts would be a mouthpiece for the Constitution instead of a political party. Consistency, however, has not been a virtue of the Supreme Court when it comes to applying constitutional liberties during war. The *Hirabayashi* and *Korematsu* cases showed unjustified deference to Roosevelt’s policies during World War II, but the Court today has narrowly applied legislation affecting habeas review of enemy combatants.<sup>47</sup> And although *Boumediene* was decided, the Supreme Court avoided addressing the illegalities of the NSA Terrorist Surveillance Program presented in *ACLU v. NSA*.<sup>48</sup>

It is disconcerting that these issues have not been sufficiently addressed by the branch meant to uphold the Constitution and interpret its provisions. This means that at the outset of any national security and civil liberties debate, liberties begin at a disadvantage, particularly with an Executive with an agenda.

## REFORM

We revisit the two main problems presented above. First, how do decision-makers distinguish political motivation from genuine national security motivation?

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44 *Id.*

45 Paul D. Carrington, *Original Sin and Judicial Independence*, 15 DUKE L. SCH. LEGAL STUD PAPER No. 189 (February 2008), quoting RON CHERNOW, ALEXANDER HAMILTON 118 (Penguin Books 2004), at <http://ssrn.com/abstract=1099397>

46 *Id.* The potential for political abuse draws attention to the appointment of Supreme Court Justices. Senate confirmation of executive appointments provides a check on executive power, particularly when the administration and Congress are controlled by different political parties. Still, appointments are political in nature, and therefore controversial. After all, it is no coincidence that liberals were concerned when President Bush appointed Samuel Alito and John Roberts to the Supreme Court. On the one hand, the independence of the Supreme Court potentially counters political legislation and political policies, but on the other, the nominations themselves are hugely political.

47 *Boumediene*, 128 S. Ct. 2229 (2008).

48 *ACLU*, 493 F.3d 644 (6th Cir. 2007), *cert. denied* by Supreme Court (U.S. Feb 18, 2008) (No. 07-468).

Second, does an attempt to remove the political factor inadvertently undermine national security?

*Halperin* stands for the notion that politically-motivated actions may be acceptable if it is objectively reasonable to conclude the action was also taken for national security purposes. The accident of suspending liberties for the wrong purpose should not simply be a side-effect of war, especially when the debate is easily affected by politically-motivated actions. The risk of suspending individual liberties for an illegitimate purpose is too great. The telling fact is this: the United States government has never risked the security of the nation because it did not suspend civil liberties. This is not a call for a revolution, but rather, a simple reminder that it is the government, and not the people, that is limited by the Constitution.

Almost every generation in the United States has lived through a period of war; this is not a modern phenomenon. Yet the suspension of rights is a defining moment in the lives of those that are affected. Consider President Bush's decision to suspend habeas rights of detainees. Providing a detainee with a fair trial does not automatically mean that a detainee will be released. But the prolonged incarceration of detainees, including those who may be innocent, breeds resentment, anger, and mistrust of the entire nation. The message of the Bush administration was based on fear of another terrorist attack. Those who questioned its actions were branded as unpatriotic and were led to believe they were insulting the memory of those who died in the 9/11 attacks. It is the classic formula, as recited by Stone, of inciting fear and condemning opponents as disloyal in order to consolidate political power. The conflict between national security and civil liberties has presented itself under a variety of situations, and it is alarming that the political issue has yet to be resolved.

The most innovative post-9/11 proposal addressing the national security and civil liberties conflict is by Professor Bruce Ackerman.<sup>49</sup> Ackerman outlines plans for an emergency constitution to be put into effect after the United States has been attacked. The bite of the emergency constitution is in the following three elements: 1) that the continuance of the emergency constitution is conditional upon the increasing consent of Congress; 2) that compensation should be given to those whose rights are affected in the name of national security; and 3) that while criminal law procedures are suspended during the initial phase of the Emergency Constitution, a "rigorous respect for decency" should be exercised by the Judiciary. From the outset, Ackerman concedes that certain regrettable actions are the unfortunate consequence of attaining national security—what he calls the "tragic compromise." But, he argues that these actions should be monitored and tolerated only for a finite period. His plan strikes a fairer balance between securing the nation and ensuring that liberties are not trampled upon indefinitely than our current system does. Furthermore, the proposal provides compelling ideas that could aid in removing or at least marginalizing the

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49 Bruce Ackerman, *The Emergency Constitution*, 113 Y.L.J. 1029 (2004).

political factor from the national security and civil liberties debate.<sup>50</sup>

### *Legislative Role – The Supermajoritarian Escalator and Committees*

The first of Ackerman's proposals is the "supermajoritarian escalator" under which repeating and increasing approval by Congress is necessary for the Executive to sustain his actions. The underlying rationale for this requirement is the belief that the Executive should not have complete authority for as long as *he* deems appropriate. As Ackerman elucidates, "[T]he 'war on terrorism' will never end. There will always be disaffected groups scurrying about seeking terrible weapons from unscrupulous arms dealers and rogue states. There will always be fear-mongering politicians pointing with alarm to the storm clouds on the horizon."<sup>51</sup> Under our current system, the Executive determines risk. In Ackerman's proposal, after a predetermined amount of time for the Executive to secure the nation, this decision shifts to Congress. After the initial period, it is only with the approval of Congress that the Executive's policy can continue. Moreover, the approval percentage continues to escalate each time the Executive is forced to seek congressional approval.

The supermajoritarian escalator certainly places a check on executive power, but history has shown that putting faith in the hands of Congress does little to allay concern over political actions. Any good strategist will know how to manipulate people, and by extension, Congress. In response to Ackerman's supermajoritarian escalator, law professors Laurence Tribe and Patrick Gudridge recognize another inherent danger in relying on the legislative process. If the Executive was capable of genuinely, or through manipulation, capturing the supermajority requisites, the result would be at odds with the purpose of Ackerman's proposal; it would reinforce a result that may have been secured through manipulation. Perhaps it would be prudent to consider placing an additional criterion on the supermajorities required. The political composite of Congress could be taken into account and a mathematical equation used to determine a steeper percentage of approval required when the Executive's political party is dominant in both houses. The equation would be dependent on the number of seats allocated to the party represented by the President. Such an equation would counter a situation where Congress is essentially in the pocket of the President and would also dilute the importance of political parties.

Congressional committees, made up of all parties represented in Congress, can also play a key role as agents of the legislative branch. Such a committee could be set up with the goal of stamping out measures that are political in nature. Working in conjunction with other committees on national security, Congress could provide a potential bulwark against unjustified executive action. Such a committee would

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50 Regarding actual execution of the Emergency Constitution, law professors Laurence Tribe and Patrick Gudridge provide an excellent review of Ackerman's proposal in the aptly titled article, *The Anti-Emergency Constitution*. Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 Y.L.J. 1801 (2004); For purposes of this article, I comment on the idea and not execution of proposals to illustrate a few of the ways balance can be restored during war.

51 Ackerman, *supra* note 49, at 1070.

not infringe upon swift executive action, either, because, by nature, Congress and the Judiciary require time for their actions. These committees, to the extent possible or necessary, would call for greater transparency in executive action thereby decreasing the potential for politically-motivated actions.

### *Executive Role – Electoral Systems and Compensation*

Although the political structure of the United States is embedded in the Constitution, looking at how fellow democratic countries conduct and regulate elections is a worthwhile exercise. Much of the democratic world uses the proportional representation system, a model that has more democratic legitimacy than the majoritarian system used in the United States or United Kingdom. The United States' two-party majoritarian system lends itself to strong executive power with relatively weak opposition. The proportional representation system, which mirrors the overall desire of the population more accurately and follows the "one person one vote" motto more closely, tends to produce weaker governments with stronger oppositions. The result can be an ineffective government which needs to operate in coalition with other political parties, but one that is properly checked by other branches and its opposition. Germany provides a good example. The coalition government combined with a Constitution that tightly secures civil liberties must produce one of the least intrusive federal governments seen this century.<sup>52</sup> There are, however, provisions in such countries' constitutions enabling them to take swift action when appropriate. It is curious that as the preeminent model of democracy, the election system of the United States is, in fact, much less democratic than its proportional representation counterparts.

Another of Ackerman's proposals, which has been used in the past, calls for compensation to those citizens whose liberties have been erroneously violated. In 1988, Congress passed the Civil Liberties Act, formally apologizing to those interned during WWII and providing \$20,000 in compensation for survivors. Ackerman suggests that the compensation be more significant and that funding come directly from the ruling administration's budget.<sup>53</sup> This would require that the Executive seriously consider his policies in light of the cost to civil liberties. Particularly, it would seem that the Executive would be less likely to take politically-motivated actions if his government is financially responsible for the consequences of that decision. Of course, the greatest danger occurs when the Executive responds by doing too little to secure the nation; the goal is not to stifle executive action. Furthermore, a moratorium on claims for a specified amount of time (for example, one month after an attack) would enable the President to take the initial measures he deems necessary without financial repercussions.

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52 Some may say the government is nearly in a state of paralysis; see Von Gabor Steingart, *Say it Slowly – Zukunftsangst*, WALL ST. J., Sept 15, 2005.

53 Ackerman, *supra* note 49, at 1065.

### *Judicial Role – Active duty and secured liberties*

The judicial branch may be the most appropriate branch of government to protect civil liberties. The Supreme Court has assumed the role of upholding the Constitution during times of relative calm, but, as illustrated above, it feels under no obligation (and is at times downright reluctant) during times of war. How can the two competing views of the Court's role be reconciled; are they simply adjudicators who advocate judicial restraint or are they defenders of the Constitution who practice judicial activism? Both views fall squarely within the framework set forth under Article III.

Having detailed the failures of the current system in safeguarding against political influence, it is prudent to look at judicially-related mechanisms employed by other democratic countries to tackle the issues surrounding liberties and government power. Some countries go to great lengths to secure their liberties. The underlying premise is to protect the people against all conceivable internal powers—all aspects of government and even themselves. Certain rights are deemed so fundamental to the ideals promoted by these countries that they are unable to be overridden, and it is their courts' job to protect these rights.

Securing liberties is common in countries that have emerged from internal conflict; as the constitutions of Germany, South Africa, and Iraq all illustrate. Article 1 of the German Constitution is a positive obligation by the government to respect and protect human dignity.<sup>54</sup> In fact, the German Federal Constitutional Court considered a case which paralleled the 9/11 events and questioned whether the government would have authority to shoot down an aircraft if it were being used as a weapon.<sup>55</sup> The Court decided that such an act would violate the human dignity principle enshrined in Article I of the Basic Law.<sup>56</sup> The Court reasoned that no one can assess the value of one life over another, and it is only in cases where there is imminent danger to the free democratic basic order or the existence of this order is in jeopardy, that any such action can be contemplated.<sup>57</sup> The concept of human dignity is also shared by the 1996 South African Constitution. Unlike other South African constitutional provisions which can be amended only by approval of two-thirds of the National Assembly and 6 of 9 provinces, the provision that includes human dignity can only be amended by approval of three-fourths of the National

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54 See generally, DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 1-18 (Univ of Chicago Press 1994).

55 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb 15, 2006, 59 *Neue Juristische Wochenschrift* (NJW) 751 (2006) (F.R.G). For an overview of the case, see Oliver Lepsius, *Human Dignity and the Downing of an Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-Transport Security Act* 7 *German Law Journal* No. 9 (September 2006) at <http://www.germanlawjournal.com/article.php?id=756>. The Court actually said the statute in question was void because it violated federalism issues, but went on to discuss the relevance of human dignity.

56 Basic Law available in full at <http://www.iuscomp.org/gla/statutes/GG.htm#87>.

57 Art 87a(4) Basic Law. See p. 270 (T2).

Assembly and 6 of 9 provinces.<sup>58</sup> Similarly, the fundamental principles, rights, and liberties in the 2005 Iraqi Constitution can only be amended after two Council of Representative terms (8 years total) and then by 2/3 of Council *and* referendum.

Because the constitutions of Germany, South Africa, and Iraq were enacted relatively recently, and the countries have long histories of government abuse, it remains to be seen whether their constitutions will remain intact during times of war. The idea, however, remains relevant: certain liberties are so fundamental to the nature of the country that they need to be protected, even from a democratically elected government. Indeed, in his speech introducing the Bill of Rights, Madison noted that “The prescriptions in favor of liberty, ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power: But this [is] not found in either the executive or legislative departments of government, but in the body of the people, operating by the majority against the minority.”<sup>59</sup>

## CONCLUSION

The emerging idea in academic literature circulating in the wake of 9/11, is that the time for action is now. From the outset of this article, my main concern has not been how civil liberties can be better secured, but rather how politically-motivated actions, which are dangerous and unnecessary, can be removed from the Executive’s determination of how to respond to situations affecting national security. I have concluded that any solution adopted will inevitably have the effect of securing liberties as well. In order to achieve security, the Executive does not need to be as quick to suspend civil liberties as it has in the past. The *initial* actions taken by the Roosevelt administration surrounding the Pearl Harbor attack are a good example. There, the government rounded up those thought to be dangerous and swiftly and systematically, via individual hearings, released those deemed innocent. This response took into account both the nature of war and the importance of liberties.

The best way to make the debate more legitimate is by initially leveling the playing field between national security and civil liberties. Just as the Executive represents national security, so too can the Judiciary resume its role in representing civil liberties while Congress, the most impressionable, continues to monitor the democratic will. There is, unfortunately, no way to measure the true motivations of an executive action. If war, however, recurs with every generation, we need a consistent method of addressing national security that is more legitimate and less subject to the whims of a highly political branch.

The power of the Executive over the imposition of civil liberties came as no surprise to the Founding Fathers. In *Federalist 1*, Alexander Hamilton keenly noted:

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58 S. AFR. CONST. 1996 s. 74.

59 See *supra* note 4.

It will be forgotten, on the one hand, that jealousy is the usual concomitant of love, and that the noble enthusiasm of liberty is apt to be infected with a spirit of narrow and illiberal distrust. On the other hand, it will be equally forgotten that the vigor of government is essential to the security of liberty; that, in the contemplation of a sound and well-informed judgment, their interest can never be separated; and that a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidden appearance of zeal for the firmness and efficiency of government. History will teach us that the former has been found a much more certain road to the introduction of despotism than the latter, and that of those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues, and ending tyrants.<sup>60</sup>

Hamilton understood that although the relationship between the Executive and civil liberties could go awry, they are inseparable. We face the same dilemma over 200 years later. If the conflict had a concrete and easy resolution, our nation's collective energies would surely have reached it by now. The opportunities have been ample, but the desire has been merely cyclical dependent upon war.

In my view, there are three options for balancing national security and civil liberties during war. The first is to leave the system as it is and let the situation play out as determined on a case-by-case, or rather war-by-war basis, by the administration in power, the political composite of the sitting Supreme Court, and the zeal or complacency of the generation. The combinations of these three factors are too many to speculate on a certain future for the national security and civil liberty conflict. The second option is to create an atmosphere in which the debate is made more legitimate. Any action taken for this purpose inevitably emphasizes the importance of civil liberties, which is the goal of the third option—securing our civil liberties in a fashion similar to other countries' constitutions. This curious collision between the second and third option both placing greater importance on civil liberties illustrates to me what has been lacking for so long in our nation's history. Civil liberties during war in the United States have long been neglected; securing their rightful place in our society is the only way to ensure that the Executive stays within its boundaries.

This conclusion is also in line with an advanced democratic society. At some point, personal values need to be assessed. Liberties were important to the Founding Founders because the freedom of men from other men was an idea valued by them. The same spirit has been reflected many times over in various countries emerging from war. We see liberties being secured in the German 1949 Constitution (as later amended) which counteracts against sudden rises in power as demonstrated

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60 THE FEDERALIST No. 1 (Alexander Hamilton).



by Hitler; in the South Africa 1996 Constitution which counteracts democracy gone awry as demonstrated by the Apartheid era; and we see it in the Iraqi 2005 Constitution which counteracts power-hungry leaders like Saddam Hussein who sought to silence opposition. I have no doubt that had any of these situations occurred in the United States, we too would learn a valuable lesson and understand why liberties should be as important to us as they were to the Founding Fathers. I hope it is not an episode akin to the experience of one of these countries that forces us to realize the inclusion of the Bill of Rights was taken for a specific purpose, and that it is high time we heed its importance.

# THE UNITED STATES AND SPAIN:

## *Changes and Development in Anti-Terrorism Law and Policy*

*Emily Stulce*

The United States and Spain have very different histories that have led them to the political systems in place today. However, each has known the tragedy and devastation of being attacked on one's homeland. While both countries have had policies for combating terrorism in place for decades, the terror attacks of September 11, 2001 in the United States and March 11, 2004 have implicated significant changes in how both countries are attempting to combat terrorism both at home and abroad.

While 9/11 does stand out in the world's history as one of the most notable terrorist attacks that spawned a collaborative effort on the parts of many nations including Spain and the United States, Spain had long been accustomed to the threat and attacks of the Basque separatist group, Euskadi Ta Askatasuna (ETA)<sup>1</sup>. Spanish response to a 1973 ETA attack that killed a prominent military and government leader, Luis Carrero Blanco, ultimately led to the creation of the 1975 Ley Contra el Terrorismo, or Law Against Terrorism<sup>2</sup>. This law helped to lay the foundation for today's Spanish policy in the global effort to combat terror. Although the United States has not had to deal with a prominent separatist group within its own borders, its history is checkered with multiple attempts and perceived threats on national security that have helped to develop a more concrete policy towards fighting terrorism.

In beginning to understand how the United States and Spain have arrived at their current policies, it is of utmost importance to look back at each country's history in terms of attacks on national security and responsive legislation. Author James Beckman cites Bruce Maxwell in claiming that the first national security-type attack on United States soil occurred as early as 1607 on the Jamestown settlement in Virginia.<sup>3</sup> James Kennedy, one of the Jamestown colony leaders, was tried and hanged for somehow threatening the colony. Maxwell notes that the charges were unclear but that Kennedy was "executed because the jury believed that he threatened the security of the precarious 'homeland' established at Jamestown."<sup>4</sup> While this incident may seem far removed from today's preoccupations with terrorist attacks, it does demonstrate that the eventual United States was highly conscientious of securing its territory even while in its colonial stage.

The first significant set of laws that Congress passed dealing with national security was the Alien and Sedition Acts of 1798.<sup>5</sup> Although these laws were passed

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1 VICENTE CANTARINO, *CIVILIZACIÓN Y CULTURA DE ESPAÑA* 402 (1999)

2 *Id.* at 402.

3 JAMES BECKMAN, *COMPARATIVE LEGAL APPROACHES TO HOMELAND SECURITY AND ANTI-TERRORISM* 13 (2007). See also BRUCE MAXWELL, *HOMELAND SECURITY: A DOCUMENTARY HISTORY* (2004).

4 BECKMAN, *supra* note 3, at 13 (quoting BRUCE MAXWELL, *HOMELAND SECURITY: A DOCUMENTARY HISTORY* (2004)).

5 BECKMAN, *supra* note 3, at 13.

after the First Amendment, as Beckman suggests, they “very quickly undermined any notion of the First Amendment and free speech being absolute.”<sup>6</sup> The purpose of these laws was to contend with any potential for any domestic turmoil triggered by immigrants that were new to the United States and a main focus was to alter immigration and deportation proceedings.<sup>7</sup> Under the Alien Acts, the President had the authority “to detain and deport any alien deemed dangerous, both in war and peacetime” and “to detain and/or deport any alien who originated from a country in which the United States was engaged in hostilities.”<sup>8</sup> The Naturalization Act, passed at the same time as the Alien Acts, served to extend the waiting period for citizenship in the United States from five to fourteen years.<sup>9</sup> In essence, under the combination of these two acts, a non-citizen could be subject to detainment and/or deportation for up to fourteen years and could theoretically be expelled during that period if that person were to become involved in an activity considered to be dangerous by the executive.<sup>10</sup>

The Sedition Act of 1798 in effect considered criticisms of the government to be a crime that was punishable by a fine of up to two-thousand dollars and imprisonment of up to two years.<sup>11</sup> This act did not cover the Vice-President therefore allowing criticism of the Vice-President with impunity, but not the President.<sup>12</sup> In 1801, these laws expired pursuant to their own terms and Congress repealed the Naturalization Act in 1802.<sup>13</sup> A century would pass before more national security legislation was passed within the United States.

Beckman suggests that in the years leading up to the Espionage and Sedition Acts of 1917 and 1918, “the United States absorbed a huge influx of European immigrants, many of which came from the Eastern European countries of Russia and Italy” and “brought some of the novel political concepts blossoming in Europe – political philosophies such as socialism, communism and anarchy.”<sup>14</sup> While many of these immigrants assimilated into society without incident, there were others that held onto these newer ideas and suspicion of these immigrants and ideas was compounded by several other events at the time.<sup>15</sup> The assassination of President McKinley in 1901 by an avowed anarchist and the Bolshevik and Marxist revolutions that broke out in Russia, Italy, and Spain did nothing but fuel suspicion of these new ideas thus creating a sense of threat that the United States felt that it must respond to through legislation.<sup>16</sup>

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6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.* at 14.

10 *Id.* at 14.

11 BECKMAN, *supra* note 3, at 14.

12 *Id.* at 15.

13 *Id.* at 15.

14 *Id.* at 16.

15 *Id.* at 16.

16 BECKMAN, *supra* note 3, at 16.

In the meantime, the United States had entered World War I and had an interest in suppressing any opposition to the war effort.<sup>17</sup> The combination of the rising suspicion against immigrants and quashing opposition of the war effort culminated in the Espionage Act of 1917 and the Sedition Act of 1918.<sup>18</sup> The Espionage Act dealt with the disclosure and diffusion of sensitive information relating to the war and the military and “also outlawed all intentional attempts at causing insubordination, disloyalty, mutiny, or the refusal to serve among members of the United States Army.”<sup>19</sup> Many United States citizens were prosecuted under this Act and it gave rise to several notable United States Supreme Court cases including *Gitlow v. New York*, *Schenck v. United States*, and *Abrams v. United States*.<sup>20</sup> The Sedition Act, like its 1798 predecessor, made it a crime to speak out against the United States government.<sup>21</sup> Although these Acts most certainly had First Amendment implications, there was a strong majority in the United States that favored these laws along with the Supreme Court.<sup>22</sup>

The year 1940 saw the advent of the Alien Registration Act (also known as the Smith Act, named for the sedition portion’s author, Congressman Howard Smith) whose policy basis was in national security as well.<sup>23</sup> The Smith Act carried a potential incarceration of twenty years for violators and “made it criminal to publish, advocate, or teach with the intention to seek the overthrow or destruction of the United State, or any of its various governments (federally or on the state level).”<sup>24</sup> The Smith Act became the operative statute that was used during the McCarthyism Era to take legal action against many suspected communists in the 1950s and 1960s.<sup>25</sup> However, its most prominent use came during World War II with the Japanese Internment camps authorized by President Franklin D. Roosevelt in Executive Order 9066 (Authorizing Secretary of War to Prescribe Military Areas) in response to the Japanese attack on Pearl Harbor.<sup>26</sup> This order permitted the Secretary of War and subordinate military commanders to delineate certain areas from which “any and all persons may be excluded.”<sup>27</sup> Over 120,000 individuals of Japanese descent were ultimately re-located to these camps, guarded by military police, surrounded

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17 *Id.* at 16.

18 *Id.* at 16.

19 *Id.* at 16.

20 *Id.* at 16. See generally *Schenck v. United States* 249 U.S. 47 (1919) (allowing criminalization of words and finding no First Amendment violation if the utterance had a tendency to create harm or was intended to create harm), *Abrams v. United States*, 250 U.S. 616 (1919) (Justice Holmes’ dissent creating new test whereby Congress should only criminalize speech when words would “imminently and immediately” threaten the country), and *Gitlow v. New York*, 268 U.S. 652 (1925) (holding that New York sedition laws must comply with freedom of speech and press protections of the First Amendment, but that the bad tendency test applied in this case and that Gitlow’s words alone raised a “clear and present danger”).

21 BECKMAN, *supra* note 3, at 17.

22 *Id.* at 18.

23 *Id.* at 20.

24 *Id.* at 20.

25 *Id.* at 20.

26 BECKMAN, *supra* note 3, at 20.

27 *Id.* at 21.

by barbed wire, and remained there until the order was lifted in January of 1945.<sup>28</sup> While the executive order did not specifically state that persons of Asian, and more specifically, Japanese descent were of high suspicion, racial profiling of this ethnic group is what ultimately took place and President Ford later noted in 1976 that these camps were a “national mistake.”<sup>29</sup>

The “Red Scare” brought on even more national security legislation in an effort to combat the anxiety over terrorism, including the Internal Security Act of 1950 and the Communist Control Act of 1956.<sup>30</sup> However, the Smith Act continued to be the source of suspected communist prosecution until the Supreme Court decided the case of *Yates v. United States* in 1957 where it narrowed the requirements for prosecution.<sup>31</sup> The most significant case in terms of today’s policy is *Brandenburg v. Ohio* from 1969 where the Court determined that the uttering or publishing words hostile to the United States or its government “must be coupled with the likelihood of imminent/immediate lawless action in order for the words to be subject to criminal prosecution.”<sup>32</sup> According to Beckman, this decision remains the main test for the constitutionality of the “abridgement of freedom of expression in the name of protecting the homeland and preventing harm by those who are intent on causing damage to the United States.”<sup>33</sup>

As the United States moved further into the technological age, Congress responded with the Foreign Intelligence Surveillance Act of 1978.<sup>34</sup> Also known as FISA, this act created a secret court made up of a several federal district court judges whose role is to oversee requests to conduct electronic surveillance of telephone taps (now includes email and physical searches).<sup>35</sup> As many as 2,072 wiretaps were approved by the FISA court in 2005 thus raising some criticism over the frequency of FISA wiretapping, but the law continues to allow surveillance today.<sup>36</sup>

Although the United States had consistently feared terrorist attacks abroad prior to and during the 1990’s, there was still a misconception that these attacks were beyond United States borders.<sup>37</sup> The World Trade Center Attack in 1993 and the Alfred P. Murrah Building bombing in Oklahoma City in 1995 began to change American perspective on terrorism.<sup>38</sup> The Anti-Terrorism and Effective

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28 *Id.* at 21. See also Exec. Order No. 9066, 7 C.F.R. 1407 (1942). See also *Korematsu v. United States* 323 U.S. 214 (1944) (upholding Executive Order 9066 because of the “definite and close relationship to the prevention of espionage and sabotage”).

29 *Id.* at 21 (internal quotation omitted).

30 *Id.* at 22.

31 BECKMAN, *supra* note 3, at 23. See generally *Yates v. United States* 354 U.S. 298 (1957) (overturning convictions of multiple people convicted of being communists because the Court stopped the prosecutions of individuals for communist party membership alone and mandated that the government must show that the “alleged communist had advocated illegal action”).

32 BECKMAN, *supra* note 3, at 23. See also *Brandenburg v. Ohio* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430, (1969).

33 *Id.* at 23.

34 *Id.* at 24.

35 *Id.* at 24.

36 *Id.* at 24.

37 BECKMAN, *supra* note 3, at 24.

38 *Id.* at 25.

Death Penalty Act of 1996, according to Beckman, was the first attempt to comprehensively deal with anti-terrorism.<sup>39</sup> Under this legislation, the Secretary of State gained the power to label groups as “terrorist organizations” if the activities of that particular group threatened the security and peace of the United States, or the United States itself, individuals are prohibited from financing terrorist organizations including humanitarian assistance, and financial institutions are obligated to notify the Secretary of State if they are holding terrorist funds or accounts.<sup>40</sup> In terms of immigration procedures, the Act allows the Immigration and Naturalization Services to deny asylum or citizenship requests from any member of a terrorist organization even if that individual could show that he never acted in furtherance of the group’s goals.<sup>41</sup> Perhaps most significantly, the legislation created a new special federal court that would rule on deportation proceedings and could employ secret evidence to do so.<sup>42</sup>

Beckman notes that the Anti-Terrorism and Effective Death Penalty Act of 1996 also restated the Congressional view that the President has the power to “use all necessary means, including covert action and military force, to destroy international infrastructure used by international terrorists.”<sup>43</sup> The President may also withhold aid and assistance to any governments that proclaim they are engaging in terrorism sponsored by the state.<sup>44</sup> The Act also served as an amendment to Foreign Sovereign Immunity Act now permitting “private litigants to sue a foreign government for monetary damages in the United States federal court when the government has engaged in state sponsored terrorism.”<sup>45</sup>

The terrorist attacks of September 11, 2001 evoked a major legislative response by expanding federal government powers with respect to terrorism. A little over one month after the attacks, Congress passed and President Bush signed into law the USA Patriot Act (“Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism”) which maintains as its objective providing federal law enforcement the ability to seek out and prevent terrorist attacks.<sup>46</sup> While the law does amend several laws dealing with intelligence gathering and the communications between intelligence agencies, conceivably of utmost importance is its amendment of 18 U.S. Code section 2331 to include acts that may be considered domestic terrorism.<sup>47</sup>

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39 *Id.* at 25.

40 *Id.* at 26.

41 *Id.* at 26.

42 BECKMAN, *supra* note 3, at 23. This federal court was to be made up of five district court judges selected from five different districts by the Chief Justice of the United States Supreme Court.

43 *Id.* at 26. See also Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

44 *Id.*

45 *Id.*

46 BECKMAN, *supra* note 3, at 27.

47 *Id.* at 27. Domestic Terrorism: (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – i. to intimidate or coerce a civilian population ii. to influence the policy of a government by intimidation or coercion iii. to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States.

The Patriot Act also expanded the definition of “terrorist organization” to include “any group of two or more people (organized or not) who commit a terrorist act with the intent to cause death or serious injury, or plans such terrorist activities” and created new political offenses dealing with the harboring and assisting of others who may want to commit terrorist acts.<sup>48</sup> The Department of Justice was given the power to investigate all powers relating to terrorism and the federal government’s power to conduct criminal investigations was significantly enlarged.<sup>49</sup> Federal law enforcement may now collect and review individuals’ records held by third parties through a process incorporating administrative subpoena without judicial oversight.<sup>50</sup> Criticism of the administrative subpoena process has resulted in a 2006 amendment to the Patriot Act that requires the frequency of these requests to be reported to Congress on a regular basis.<sup>51</sup>

In terms of Immigration law, the Patriot Act intensifies law enforcement power in deportation proceedings by restraining aliens from imploring funds for a terrorist organization or providing material support for those organizations.<sup>52</sup> Law enforcement may deny entry to aliens that participate in activities such as these, and they may be removed from the United States if they are participating in these activities and are already legally within the country.<sup>53</sup> The Attorney General also has the power to “order apprehension and physical custody of any alien the Attorney General has ‘reasonable grounds to believe was engaged in any set of activities deemed dangerous to national security.’”<sup>54</sup> While the Patriot Act has been highly criticized, it continues to survive as national security law in the United States.

Law enforcement structure in the United States has also undergone some changes since the 9/11 terrorist attacks. The Homeland Security Bill of 2002 merged the activities and jurisdictions of several federal agencies and provided for a significant reorganization of federal law enforcement.<sup>55</sup> Since 1878, the United States has largely rejected the idea of military soldiers in place as internal and local law enforcement, unlike Spain and several other countries.<sup>56</sup> Following post-Civil

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48 *Id.* at 28.

49 *Id.* at 28. Section 213 of the Patriot Act gave law enforcement the authority to conduct “sneak and peek” warrants, which consist in a search involving a delay delivering notice of the execution of a search warrant. This section grants federal law enforcement authority to enter the premises secretly without notifying the occupant until some “reasonable” time after the search if “providing immediate notice would have an adverse result in the investigation.”

50 *Id.* at 29. These records that the federal law enforcement may collect and review include medical records, library records, and bookstore purchases. Subpoenas are delivered via United States mail and the recipient is told that the information is sought pursuant to a security investigation. Additionally, this information must be provided to law enforcement and that this disclosure is secret. Recipients may not attempt to judicially quash the subpoena before turning over the requested information. No judicial warrant or involvement is necessary for law enforcement to issue one of these requests.

51 BECKMAN, *supra* note 3, at 29.

52 *Id.* at 30.

53 *Id.* at 30.

54 *Id.* at 30.

55 *Id.* at 34. The reorganized departments include, *inter alia*, Bureau of Alcohol, Tobacco and Firearms, Customs, Coast Guard, Justice, Treasury, Energy, and Agriculture.

56 BECKMAN, *supra* note 3, at 35. Other countries utilizing military law enforcement include Russia and Israel.

War Reconstruction, the Posse Comitatus Act was enacted which “prohibited use of military forces in domestic policy within the United States except as authorized by the Constitution or as a subsequent Congressional Act.”<sup>57</sup> The law is still in effect today and maintains a two-pronged policy: the prevention of overburdening troops and the maintenance of the view of the United States as “the land of the free” as opposed to a “police state.”<sup>58</sup>

The United States’ most recent response to terrorist attacks has thus far proven to be fairly effective. Since the 9/11 attacks in New York and Washington D.C., nearly seven years have passed without catastrophic damage to the United States and its people in its own territory. While the United States has continued to fight the so-called “War on Terror” in Iraq and Afghanistan, it has also had a great deal of help from other nations in terms of political and military support, most notably Great Britain and Spain. Although Spain is a much older nation, modern Spanish terrorism policy has a shorter history than that of the United States. Perhaps this is due to the fact that the Spanish have consistently dealt with the threat of invasion and conquest for much of documented history. Within the last hundred years, the Spanish political structure has overcome a dictatorship that effectively plunged the country into isolation and emerged with a constitutional monarchy that has become a valuable contributor to world affairs and collaborator in fighting against terrorism both on the Iberian Peninsula and abroad.

As previously noted, Spain has had to deal with invasions by outsiders for over two-thousand years, but it has been relatively recent that the Spanish government has formulated explicit laws, policies, and alliances with respect to combating terrorism both on Spanish soil and abroad. Anti-terrorism laws were promulgated as early as 1894, condemning attempts involving explosives against persons or things and, in 1896, also condemning underlying political motives.<sup>59</sup> Spain’s own political turmoil of the twentieth century made it somewhat difficult to establish solid policies in terms of national security and outside cooperation until toward the end of Francisco Franco’s dictatorship that ended at his death in 1975.<sup>60</sup> Franco’s dictatorship created a sense of seclusion for Spain that focused on its own economic reconstruction in the wake of its civil war rather than participation in World War II.<sup>61</sup> However, the Allies still condemned the Spanish government due to Franco’s shared ideology with Hitler and Mussolini.<sup>62</sup>

In 1945, at the Potsdam Conference, England, Russia, and the United States

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57 *Id.* at 35.

58 *Id.* at 35. There are three exceptions to the Posse Comitatus Act: the President may use troops in times of declared emergency, National Guard units under state governors’ command, and the use of military (Navy) in drug interventions off the U.S. coasts.

59 See *El Anarquismo y los Medios de Represion* [Anarchy and Methods of Repression] (L.E. CRIM. 1894), <http://fama2.us.es/fde/ocr/2006/anarquismo.pdf>. See *Represion de los Atentados Anarquistas* [Repression of Anarchist Attempts] (L.E.CRIM. 1896), <http://bib.us.es/derecho/servicios/common/Ley18960902RepresionAtentadosAnarquistas.pdf>.

60 CANTARINO, *supra* note 1, at 402.

61 *Id.* at 396.

62 *Id.* at 396.



declared their opposition to Spain's potential membership into the United Nations and, as a result of this, Spain was also excluded from the Marshall Plan.<sup>63</sup> Spain began to reconcile with Europe and the rest of the world in 1948 once the relations between the Allies and Russia began to deteriorate.<sup>64</sup> Due to the cold war with Russia and the recognition of western Germany by the Allies, the United States began to see the advantages of Franco's anti-communist regime.<sup>65</sup> As a result, the United States began lending funds to Spain and convinced the United Nations to lift the sanctions on the Spanish government.<sup>66</sup> Under President Dwight D. Eisenhower, the United States and Spain signed a pact dealing with military assistance in 1953.<sup>67</sup> Under the Madrid Pact, the United States was permitted to build and maintain military bases within Spain in exchange for monetary and military aid, however, these bases were subject to shared use, be under Spanish direction and to fly the Spanish flag.<sup>68</sup> Spain was admitted to the European national community and to the United Nations in 1955.<sup>69</sup>

Franco's regime strove for national unity and a desire to return to the Spanish Golden Age of Catholicism of the fifteenth century. As part of this plan for national unity, Franco sought to eliminate any language other than Castilian Spanish and to repress any outward expression of any nationality or ethnicity other than Spanish. In the face of this repression, the Basque separatist organization, ETA, grew out of a group of university students who first met as a discussion group in Bilbao in 1952.<sup>70</sup> Seven years later, the group officially became known as ETA and began to formulate its ideology based on establishing itself as an independent nation rather than simply a separate ethnicity.<sup>71</sup>

In the 1960s, ETA demonstrated its new strategy by rejecting the Francoist state by way of "lucha armada" (armed struggle) and "guerra revolucionaria" (revolutionary war).<sup>72</sup> ETA sought to achieve this strategy through the action-repression spiral theory whose:

fundamental principle...was that ETA could control the pace and the dynamic of the struggle against the Francoist state by intervening in popular causes, such as labor disturbances and, by means of carefully selected violent attacks, provoke the Spanish government into repressive acts that would land indiscriminately on ETA and non-ETA Basques alike. With

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63 *Id.* at 397.

64 *Id.* at 397.

65 CANTARINO, *supra* note 1, at 397.

66 *Id.* at 397.

67 *Id.* at 397.

68 *Id.* at 397. See also *U.S. Pact Makes Spain a Key to NATO Defense*, N.Y. Times, October 4, 1953, at E3.

69 *Id.* at 397.

70 ROBERT P. CLARK, *Negotiating with ETA, Obstacles to Peace in the Basque Country 1975-1988*, 8 (1990).

71 *Id.* at 8-9.

72 *Id.* at 8.

each attack and repressive response, the violence would spiral upward until finally the masses would rise spontaneously in an army of national liberation and, in the conflagration of a renewed civil war, the Basques would seize the opportunity to secede from Spain.<sup>73</sup>

This strategy's first realization occurred after the death of ETA activist Xabi Etxebarrieta at a police roadblock.<sup>74</sup> In retaliation, ETA assassinated police inspector Melitón Manzanás in 1968 which resulted in what may be considered one of the first manifestations of Franco's reaction to domestic terrorism.<sup>75</sup> While no formal decree or law was issued, Franco punished the Basque Country by putting the entire area under siege and then torturing, jailing, and exiling thousands of Basques.<sup>76</sup> Franco's strategy managed to repress the ETA movement for a few years, but ETA struck again in December 1973 with a car bomb attack that killed Admiral Luis Carrero Blanco who was to be Franco's successor and President of the government.<sup>77</sup> It was this attack that led to the *Ley sobre la prevención del terrorismo* or the Law for the Prevention of Terrorism promulgated on August 25, 1975.<sup>78</sup>

The Law for the Prevention of Terrorism is the first formal manifestation of an articulated attempt to combat terrorism in twentieth century Spain. A 1971 amendment to the *Ley de Orden Público* (Law of Public Order) and the 1973 *Código Penal* (Penal Code) acknowledge attacks by organized groups and express their illegality, but the 1975 law deals explicitly with the concept of terrorism that is maintained today.<sup>79</sup> While the law does not mention ETA outright, it does make clear that the Spain is reacting "energetically" to attacks by groups such as ETA and acknowledges global terrorism as a rising threat.<sup>80</sup> The law notes that it is a reaction to acts that put citizens' lives, public order, and social harmony at risk, and that its goal is to harmonize the efficacy of, the prevention of, and the judgment of terrorist attacks with minimal disturbance to citizens' rights.<sup>81</sup> Article I states that the law's purpose is to prevent and bring to justice acts of terrorism as defined in the Penal Code and the Code of Military Justice.<sup>82</sup> Article 294 of the Code of Military Justice,

73 *Id.* at 9.

74 *Id.* at 9.

75 CLARK, *supra* note 70, at 9.

76 *Id.* at 9. This period of punishment ended with the 1970 Burgos trial where 15 ETA leaders were sentenced to long prison terms.

77 *Id.* at 9.

78 See also *Sobre prevención del terrorismo* [Law for Prevention of Terrorism] (B.O.E. 1975, 18072).

79 See *Por la que se adicionan determinados artículos al Código de Justicia Militar* [Through which certain articles are added to the Code of Military Justice] (B.O.E. 1971, 01452). See also *Sobre Reforma del Código Penal* [On Reform of the Penal Code] (B.O.E. 1971, 01454).

80 See also *Law for Prevention of Terrorism* (B.O.E. 1975, 18072).

81 *Law for the Prevention of Terrorism supra* note 78.

82 *Id.* at Artículo Primero [Article I]. "Las disposiciones del presente Decreto-ley serán de aplicación a la prevención y enjuiciamiento de los delitos del terrorismo definidos en los artículos...del Código Penal y...del Código del Justicia Militar..."

signed into law in 1971, designates those who will be punished for terrorist acts as those who:

Perteneciendo o actuando al servicio de organizaciones o grupos cuya finalidad sea la de atentar contra la unidad de la Patria, la integridad de sus territorios o el orden institucional, alterasen la paz pública mediante la provocación de explosiones, incendios, naufragios, descarrilamientos, perturbación de comunicaciones, derrumbamientos, inundaciones o voladuras u otros hechos análogos o emplearan cualesquiera medios o artificios que puedan ocasionar graves estragos....<sup>83</sup>

Most significant in the variety of punishments that included fines and imprisonment for up to thirty years under the 1975 anti-terrorism law, was the death penalty for acts of terrorism that resulted in the death of any of the following persons: the Authority (presumably law enforcement authority), agents of the authority, members of the Armed Forces, and members of State Security.<sup>84</sup> The death penalty could also be applied to terrorist kidnappings that resulted in mutilation or death.<sup>85</sup>

As previously noted, ETA is not explicitly mentioned, however it is evident that the organization could be included in the fourth article of the law which states:

Declarados fuera de la Ley los grupos u organizaciones... separatistas y aquellos otros que preconicen o empleen la violencia como instrumento de acción política os social, los que organizaren o dirigieren estos grupos, los meros afiliados y los que, mediante su aportaciones en dinero, medios materiales, o de cualquier otra manera auxiliaren al grupo u organización, incurrirán respectivamente en el grado máximo de las penas previstas en el Código Penal para las asociaciones ilícitas de aquella naturaleza.<sup>86</sup>

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83 Código Justicia Militar [Code of Military Justice] Art. 294(a) (B.O.E. 1971, 274). "Those who, belong to or work for the service of organizations or groups whose objective is that of an attempt against the unity of the Country, the integrity of its territories or the institutional order, disturb the public peace by means of causing explosions, fires, shipwrecks, derailments, disturbances in communication, collapses, floods or blasts or other similar acts or use whatever methods or devices that can cause serious devastation, will be punished." (Author's translation).

84 Law for Prevention of Terrorism *supra* note 78 at Artículo Primero [Article I] (2), (3). "Dos. Cuando los delitos a que se refiere el párrafo anterior se cometieren contra la Autoridad, Agentes de la autoridad, miembros de las Fuerzas Armadas y de Seguridad del Estado y demás funcionarios públicos se aplicaran, en su grado máximo, las penas señaladas en sus respectivos casos. Tres. Si del atentado terrorista resultare muerte de alguna de las personas mencionadas, se impondrá la pena de muerte." See generally Law for the Prevention of Terrorism, *supra* note 78.

85 *Id.* at Artículo Segundo [Article II].

86 *Id.* at Artículo Cuarto [Article IV]. "Declared outside of the law, the...separatist groups or organizations and those others that preconceive or employ violence as an instrument of political or social action, those that organize or direct these groups, those merely affiliated and those that, by means of their support in money, material means or by any other means support the group or organization, will respectively incur the maximum grade of the foreseen penalties in the Penal Code for the illicit associations of that nature." (Author's translation).

ETA was (and still is) considered to be a separatist organization, but this provision purports to exclude separatist organizations and place their punishments under the provisions in the Penal Code which at that time included sentences ranging from thirty years' imprisonment to death.<sup>87</sup> Given Franco's previous manifestations of disdain for ETA and Basque separatism, it is somewhat surprising that this law does not include ETA as a terrorist organization. However, the fact that the ultimate punishment of death was available for members of the groups referred to in the Law for the Prevention of Terrorism under Law 42/1971 (additions to the Code of Military Justice) shows a serious attitude towards removing threats from separatist groups in the same way that the 1975 Law for the Prevention of Terrorism pledged to remove threats from terrorist groups.<sup>88</sup> Although there was no way for the Spanish state to have gauged the magnitude of the necessity for strong anti-terrorism policies in today's world, the codification of Spain's anti-terrorism policies under Franco demonstrates Spain's attentiveness to anti-terrorism action that has carried the nation forward into today's anti-terrorism policies.

After Franco's death in November of 1975, Spanish political life underwent a transitional phase that eventually led to the current constitutional monarchy. Under the Law of Succession, the Spanish Congress convened and named Juan Carlos de Borbón y Borbón as King of Spain to reign as Juan Carlos I.<sup>89</sup> Almost immediately, Spanish political life began to change and aim towards a democratic structure. Among one of King Juan Carlos' most significant reforms to the government was the 1976 legalization of the opposition parties that were banned during Franco's regime as well as the abrogation of the Law on the Prevention of Terrorism in February of that year.<sup>90</sup> A visit to the United States by the King in 1976 where he proclaimed the commitment of his regime to democracy also proved significant for Spain's future and for future relations with the United States.<sup>91</sup> Internal restructuring also occurred in that same year with the Reform Law of 1976, passed by national referendum, which provided for the existence of a bicameral legislature comprising a 350-member Congress and a 241-member Senate.<sup>92</sup>

Perhaps most significant in King Juan Carlos' tenure is the 1978 Spanish Constitution that was made into law on December 27, 1978 after having been approved by national referendum.<sup>93</sup> The Constitution itself maintains identical aims to those of the United States Constitution in that it seeks to incorporate fundamental rights and liberties of the Spanish people in a democratic system.<sup>94</sup> However, the most glaring difference from the United States is the set up of a parliamentary

87 See generally Código Justicia Militar [Code of Military Justice] (B.O.E. 1971, 274).

88 *Id.*

89 CANTARINO, *supra* note 1, at 430.

90 *Id.* at 431. Legalized parties included the Communist Party, the People's Socialist Party, the Socialist Alliance, and the Socialist Workers' Party (PSOE). CLARK, *supra* note 70, at 38.

91 *Id.* at 431.

92 *Id.* Of the 431 members of the Senate, 207 members were elected and 41 were designated by the King.

93 *Id.* at 434.

94 *Id.* at 433. See also generally Constitución Española [Spanish Constitution].

monarchy, how the Constitution provides for a President, elected every four years, responsible for a bicameral legislature representing the Spanish people made up of the Congress and the Senate.<sup>95</sup> The King is designated as the Head of State and takes on a role with responsibilities including: sanctioning and promulgating the laws, summoning and dissolving the legislature, calling for elections and referenda, proposing a candidate for President of the Government, appointing and dismissing members of the Government on the President's approval, issuing the decrees approved in the Council of Ministers, staying abreast of state affairs, and exercising supreme command of the military forces.<sup>96</sup> Also incumbent upon the King is the responsibility to express the State's assent to international commitments through treaties and, following authorization from the Congress, to declare war and make peace.<sup>97</sup> While the King's powers are quite strong, his acts must be counter-signed by the President of the Government and, when appropriate, by competent ministers, and the nomination of the President and dissolution of Congress are to be counter-signed by the speaker of Congress.<sup>98</sup>

The role of the Spanish President is somewhat ambiguous in the constitutional provisions with respect to responsibilities outside dissolving the Congress when necessary: "El Presidente dirige la acción del Gobierno y coordina las funciones de los demás miembros del mismo, sin perjuicio de la competencia y responsabilidad directa de éstos en su gestión."<sup>99</sup> The King nominates the President after each renewal of Congress and the Congress must approve the candidate by an overall majority after the candidate has submitted his/her platform to the Congress.<sup>100</sup> The Spanish King and President seem to share the role that has been combined in the United States Executive Branch with respect to dealing with legislation and policy for the Spanish state.

The Spanish law enforcement structure differs from that of the United States in that the Spanish system provides for a military element that the Posse Comitatus Act prohibits. Spanish law enforcement is made up of three entities: the Guardia Civil, the Cuerpo Nacional de Policía, and the Policía Municipal.<sup>101</sup> The Guardia Civil is considered to be a part of the army and its main responsibilities comprise: "policing the rural parts of Spain, patrolling the highways between cities, controlling firearms and explosives, guarding certain installations, and protecting such areas as

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95 C.E. Título Preliminar §1. C.E. Título III, Capítulo Primero, Art. 66 §1, 2. Section 68 provides that a minimum of 300 members and a maximum of 400 members are elected to the Cortes every four years through universal, free, equal, direct and secret suffrage under terms to be laid down by law.

96 *Id.* at Título II, Art. 62.

97 *Id.* at Título II, Art. 63.

98 *Id.* at Título II, Art. 64.

99 C.E. *supra* note 95, at Título IV, Art. 98. "The President shall direct the Governments' action and coordinate the functions of the other members thereof, without prejudice to the competence and direct responsibility of the latter in the discharge of their duties."

100 *Id.* at Título IV, Art. 99.

101 BECKMAN, *supra* note 3, at 115.

the coast, frontiers, ports, and airports.<sup>102</sup> The Cuerpo Nacional de Policía has the responsibility of monitoring urban areas with populations of over 20,000 and focuses on detective and investigatory work along with maintaining private security forces and enforcing drug and gambling laws.<sup>103</sup> Finally, the Policía Municipal oversees minor offenses in cities and take on roles such as guarding buildings and directing traffic.<sup>104</sup>

Perhaps the most notable section of the Spanish Constitution with respect to State response in the face of emergency, is Article 55 which deals with Emergency, Siege, and Terrorism and citizens' rights in these times.<sup>105</sup> This Article "provides for a process whereby fundamental rights and civil liberties may be suspended during a state of emergency, and also in terrorism cases."<sup>106</sup> The Spanish government would have to declare a state of emergency for this provision to become applicable, however, with the magnitude of terrorist attacks today, the possibility of the use of this provision is not too remote.<sup>107</sup> Article 55 provides for the suspension of the rights of personal liberty, rights to be secure in one's home from searches and intrusions, freedom of movement, freedom of expression, and the right of assembly.<sup>108</sup> The second paragraph of this Article declares that the government may pass reasonable laws to suspend the right of personal liberty, the right to be secure in one's home and free from searches, and permit the government to pass surveillance laws that agree to encroach upon these rights: "...para personas determinadas, en relación con las investigaciones correspondientes a la actuación de bandas armadas o elementos terroristas."<sup>109</sup> This provision allows the government to pass surveillance laws in order to keep a close watch on those who are under investigation for activities relating to armed gangs or terrorist groups. However, the final sentence of the Article serves as a warning to law enforcement officials that they should abstain from abusive or unwarranted use of these powers because they can be held criminally liable.<sup>110</sup>

Section 55 permits the Spanish government to create a law similar to the United States' Patriot Act where the Department of Justice's powers in criminal investigations with terrorist ties are significantly enlarged and citizens' rights under the US Constitution are abridged through provisions such as the "Sneak and Peek" warrants which allows for delayed notice in search proceedings during criminal

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102 BECKMAN, *supra* note 3, at 115 (citing PHILLIP REICHEL, *COMPARATIVE CRIMINAL JUSTICE SYSTEMS: A TOPICAL APPROACH* (2d ed. 2005)).

103 BECKMAN, *supra* note 3, at 115.

104 *Id.*

105 C.E., *supra* note 95, at Título I, Art. 55.

106 BECKMAN, *supra* note 3, at 114-15. The three law enforcement entities are: the Civil Guard, National Police Corps, and Municipal Police. (Author's translation).

107 *Id.* at 114.

108 *Id.* at 114. See also C.E., *supra* note 95, at Título I, Art. 55.

109 *Id.* at 114. See also C.E., *supra* note 95, at Título I, Art. 55. ("...for specific persons in connection with investigations of the activities of armed bands or terrorist groups.")

110 *Id.* at 114. See also C.E., *supra* note 95, at Título I, Art. 55.

investigations.<sup>111</sup> In the late 1970s and early 1980s, the Spanish parliament pushed through legislation in response to the terrorist threat from ETA that was most likely enabled by Section 55 of the Constitution.<sup>112</sup> A journalist from Bilbao, José María Portell, was assassinated on June 28, 1978, apparently by ETA members and by July 1 of that same year, Law 21/1978, Measures in Relation to Crimes Committed by Armed Groups or Gangs, took effect giving police new powers of arrest and detention for terror suspects.<sup>113</sup> Although the new Constitution had not yet been promulgated, the rights granted under that document almost certainly would have been abrogated under this law: terror suspects could be detained for more than seventy-two hours without any charges if the courts had been notified, judges could stop the detention (this almost never occurred), prisoners could not be released on bond before trial, and police had the right to intercept mail and telephone messages received by suspected terrorists.<sup>114</sup>

Law 56/1978 supplemented Law 21/1978 in December of 1978 and was known as Special Measures toward Crimes of Terrorism Committed by Armed Groups.<sup>115</sup> Under this law, suspects could be held for up to ten days with the court's permission and could be denied contact with family members or attorneys during the detention period.<sup>116</sup> The third decree-law was promulgated by King Juan Carlos on January 26, 1979 and was titled On the Protection of Citizen Security.<sup>117</sup> Its most notable provisions outlined criminal penalties for anything that could be construed as a defense of a terrorist group, increased the penalties for terrorist crimes, gave the national police charge of the security prisons, and limited the right of the accused to request and obtain provisional release from prison.<sup>118</sup> These three laws were combined to create Organic Law 11/1980 which was passed by an overwhelming majority on October 29, 1980 thereby creating an expansion of police power and suspending "fundamental constitutional rights for persons suspected of a wide range of terrorist acts, including apologia for terrorism or for those persons suspected of such crimes. Preventive detention and holding suspects incommunicado were authorized, as were telephone taps, mail interception, and police invasion of private homes without court order."<sup>119</sup> This new law allowed the Spanish government, through the efforts of the Guardia Civil, to attempt to severely limit ETA's power

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111 See also BECKMAN, *supra* note 49, at 28.

112 CLARK, *supra* note 70, at 40.

113 *Id.* at 41. See also *Sobre Medidas en relación con los delitos cometidos por grupos o bandas armadas* (B.O.E. 1978, 16969).

114 *Id.* at 41.

115 *Id.* at 41. See also *De Medidas especiales en relación con los delitos de terrorismo cometidos por grupos armados* (B.O.E. 1978, 29845).

116 *Id.* at 41.

117 CLARK, *supra* note 70, at 41. See also *Sobre la protección de seguridad ciudadana* [On the Protection of Citizens' Security] (B.O.E. 1979, 03062).

118 *Id.* at 41.

119 *Id.* at 42. See also *Ley Orgánica 11/1980: Sobre los supuestos previstos en el artículo 55, 2 de la Constitución* [Organic Law 11/1980: On the Supposed Provisions in Article 55, 2 of the Constitution] (B.O.E. 1980, 289).

within the peninsula and resulted in the creation of an anti-terrorist police unit comprised of approximately 50 men that sought to infiltrate ETA through spying and also compensated informants.<sup>120</sup>

A couple of months later, in February of 1980, Spain's first official counterterrorism police units entered into the effort including "the 120-man Special Operations Group (GEO), trained for dealing with urban terrorism; and the 450-man Guardia Civil detachment, called Rural Antiterrorist Groups (GAR)."<sup>121</sup> Joining these antiterrorism forces were 12,000 Guardia Civil and 6,000 Policía Nacional thereby creating an immense effort against ETA that resulted in double the arrests of the previous year.<sup>122</sup> The next several years passed continuing these strategies that increased arrests and the number of ETA members in prison, however, the Spanish government fell under strong criticism that torture was going on in prisons, and ETA retaliated with new waves of violence.<sup>123</sup> Kidnappings and murders of some higher profile individuals by ETA, along with an attempted coup by over 100 Guardia Civil troops in Madrid led to a revised version of the anti-terrorism legislation.<sup>124</sup>

The government's response to ETA's increased violence and the Guardia Civil coup was the May 4, 1981 law known as the Law for the Defense of the Constitution which defined terrorism as encompassing any attempt on "the integrity of the Spanish nation or any effort to secure the independence of any part of its territory, even if nonviolent" thereby allowing any type of separatism to be tried under this law.<sup>125</sup> This same law also condemned intelligence gathering in support of a terrorist organization and explicitly included ETA's "commandos de información."<sup>126</sup> For the first time since ETA's existence, the organization was explicitly included in an anti-terrorist provision rather than simply being referred to ambiguously.

Another law approved by the Parliament on May 20, 1981 allowed for the Council of Ministers to declare a state of alarm without parliamentary approval in the event of danger to public order and citizen security.<sup>127</sup> Known as the Law on the States of Alarm, Exception, and Siege, this measure provided for a three-level state of emergency and in the first stage permitted the government to control "movement of persons and vehicles, to ration essential consumer goods, and to inspect private property without prior approval."<sup>128</sup> If the "state of exception" was invoked under parliamentary approval, it could last only thirty days, but would allow the government to arrest and imprison almost anyone without showing cause.<sup>129</sup> Finally,

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120 CLARK, *supra* note 70, at 42.

121 *Id.* at 42.

122 *Id.*

123 *Id.* at 47.

124 *Id.* at 47. On February 23, 1981 Guardia Civil troops, under the leadership of a lieutenant colonel, stormed Parliament and took the entire Congreso de los Diputados hostage. Fortunately, the attempt was over within a matter of hours.

125 CLARK, *supra* note 70, at 47 (citation omitted).

126 *Id.* at 48.

127 *Id.*

128 *Id.*

129 *Id.*



the third level, “state of siege,” could come into play through government request and parliamentary approval when there was extreme danger, and would result in the country essentially being controlled by martial law with armed forces controlling the majority of government functions.<sup>130</sup> Although this law has never been invoked, given that law enforcement in Spain is largely controlled by the military through the Guardia Civil, aside from the relinquishment of rights, perhaps this step would not be as foreign a concept as it would be to a citizen in the United States. The military would exert control over other governmental entities, but it does not seem that a scenario such as this would be as far-fetched as it would be in the United States.

The post-9/11 era in Spain has seen some changes in the focus of anti-terrorist policy. While still having to maintain a watchful eye on ETA, the Al-Qaeda threat and presence in the region has forced Spain to look more outwardly in terms of protecting its people and nation.

Spain and the United States maintained fairly close relations in the post-Franco regime and through Spain’s membership in NATO, however, 9/11 did provoke changes for Spain within its borders and in its relationship with the United States.<sup>131</sup> Spain took a tremendous step against ETA in 2002 when it banned Batasuna, ETA’s political party through legislation that permitted the government to eliminate any political party that advocated “hatred, violence, and social confrontation” or challenged the legitimacy of democratic institutions...or promoted ‘a culture of civil confrontation.’<sup>132</sup> The validity of the law was upheld in a Tribunal Supremo decision on March 27, 2003 and thereby allowed for the freezing of Batasuna’s assets and the arrest and incarceration of those who refuse to disavow their loyalty to ETA.<sup>133</sup> Additionally, Spain’s Audiencia Nacional ordered the Basque newspaper *Euskaldunon Egunkaria* to close because the paper was being used to launder money to fund ETA.<sup>134</sup> According to Beckman, “efforts by Spanish authorities since 2003 have largely dismantled the organization and contributed to the overall evisceration of the organization’s abilities to conduct operations.”<sup>135</sup>

Unlike the United States, because Spain had already dealt with homeland terrorism and had incorporated punishments for terrorist acts into its criminal code, 9/11 did not create an enormous challenge in terms of responsive legislation, however, the event did result in expansion of the definitions and scope of terrorism offenses.<sup>136</sup> In particular, Article 572 of the Código Penal was amended to include as terrorists those who “perteneciendo, actuando al servicio o colaborando con bandas armadas, organizaciones o grupos cuya finalidad sea la de subvertir el orden

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130 CLARK, *supra* note 70, at 48.

131 *Id.* at 114.

132 BECKMAN, *supra* note 49, at 116, 117. See also Ley de los partidos políticos [Law of Political Parties] (B.O.E. 2002, 154).

133 BECKMAN, *supra* note 49, at 117. See J.T.S., Mar. 27, 2003 (E.D.J., No. 278). See also T.S., July 25, 2003 (B.J.C., No. 278).

134 *Id.* at 117.

135 *Id.* at 117.

136 *Id.* at 118.

constitucional o alterar gravemente la paz pública...”<sup>137</sup> Although no specific “terror court” is in place, Spain had already increased the punishment for a terrorist act to a sentence of twenty to thirty years in its penal code rather than the typical fifteen to twenty years for other crimes that resulted in death.<sup>138</sup> Both ETA and Al-Qaeda members have been prosecuted under these laws. However, Aznar and Zapatero’s tenures have affected how ETA has responded to potential peace agreements and how ETA has been factored into the nation’s anti-terrorism policy.

Since 2002, Spanish anti-terrorist policy has been heavily affected by the President of the government representing the majority in the Cortes. Jose Maria Aznar, of the Partido Popular from 1996 to 2004, and Jose Luis Rodriguez Zapatero, of the Partido Socialista Obrero Español, from 2004 to the present maintained different ideologies in terms of how Spain should contend with ETA and participate in the global effort against Al-Qaeda’s terrorism.<sup>139</sup>

Aznar’s final two years as President were 2002 until 2004, a critical time for post 9/11 reactions. Aznar’s strategy in the “War on Terror” was to hold fast to Washington’s position in supporting the war in Iraq.<sup>140</sup> Although Spanish popular opinion overwhelmingly opposed the United States attack in Iraq, Aznar and the Spanish government held onto the argument that U.N. Security Council 1441 sufficed to rationalize the use of force in Iraq, and Aznar strongly maintained that Iraq and Saddam Hussein had ties with Al Qaeda.<sup>141</sup> Aznar further affirmed his allegiance to United States policy by urging the Spanish equivalent to the United States’ 2002 National Security Strategy advocating precautionary actions in an effort to put down security threats which he mainly saw as the threat of weapons of mass destruction.<sup>142</sup> This approach was unpopular with the Spanish people because it favored the United States strategy over European security strategy as outlined in the Solana Document or A Secure Europe in a Better World.<sup>143</sup> While the United States’ approach is much more unilateral and focuses on the prevention of terrorism through action, the European strategy concentrates on a multilateral approach, a cooperative attitude with other nations, including the United States, in an effort to seek peace and cooperation.<sup>144</sup> While Spain had long been characterized as a

137 Delitos contra el orden público [Crimes Against Public Order] (C.P., 572) [“...belonging to, acting in the service of, or collaborating with armed gangs, organizations or groups whose objective is that of subverting constitutional order or seriously altering the public peace...” (Author’s translation)]. See also *id.* at 118, 119.

138 Delitos contra el orden público [Crimes Against Public Order] (C.P., 572(1)). See also Amos Guiora, *Legislative and Policy Responses to Terrorism, A Global Perspective*, 7 San Diego Int’l. L.J. 125, Fall 2005.

139 Manuel Iglesias-Cavicchioli, *A Period of Turbulent Change: Spanish-US Relations Since 2002*, The Whitehead Journal of Diplomacy and International Relations, Summer/Fall 2007, at 113.

140 IGLESIAS-CAVICCHIOLI, *supra* note 131, at 115.

141 *Id.* at 115, 117. See also G.A. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002), The Situation Between Iraq and Kuwait.

142 *Id.* at 117.

143 *Id.*

144 See IGLESIAS-CAVICCHIOLI, *supra* note 131, at 115. See also *A Secure Europe in a Better World*, (2003), <http://www.consilium.europa.eu/uedocs/cmsupload/78367.pdf>.

cooperative nation in terms of foreign affairs, Aznar's changes and strict adherence to unpopular United States policies damaged that reputation within the European Community.<sup>145</sup>

Al Qaeda's attacks on the Atocha train station in Madrid on March 11, 2004, while not causing any revisions to anti-terrorism legislation, set the stage for a change in Spain's political make-up and resulted in a PSOE victory in the days following the bombing with Zapatero later installed as President.<sup>146</sup> During his campaign, Zapatero had promised that he would withdraw troops from Iraq because of his disagreement with the war in Iraq, but he did so two months earlier than had been promised in an effort to avoid pressure from the United States that would come after the new UN Security Council resolution.<sup>147</sup> This action did nothing to better relations between Zapatero and President Bush that were already frosty due to Zapatero's widely publicized opposition to Aznar's government that had extensively courted the United States and its policies.<sup>148</sup> The United States – Spanish political relationship continued on a downward spiral as Zapatero publicly encouraged Tunisia to withdraw its troops following Spain's example and then publicly acknowledged his support for John Kerry in the 2004 Presidential elections.<sup>149</sup> Finally, increased Spanish relations with Venezuela and Cuba under Zapatero have further cemented the lack of collaborative effort that existed during Aznar's tenure.

Zapatero's tenure has been subject to heavy criticism in terms of the lack of a solid relationship with the United States and his dealings with ETA. A July 2007 report notes that although ETA had appeared to be under control as it announced a cease-fire in March of 2006 and the Spanish government had estimated that the organization only had about thirty active members, Zapatero acted too quickly in willing to have open peace talks without first setting preconditions.<sup>150</sup> This violated an agreement with the Partido Popular that he had actually proposed in 2000 whereby there would be no talks with ETA without demanding that they lay down their weapons as a precondition.<sup>151</sup> Unfortunately for Zapatero, this turned out to be a most unfortunate error as ETA violated the cease-fire in December of 2006 with a car-bomb detonated in the parking garage of terminal 4 at Madrid's Barajas Airport killing two people.<sup>152</sup>

While ETA's power seems to have shrunk since the 1960's, it is apparent that their presence not be eliminated any time soon. Now that Spain has had to expand its focus to the potential for Al-Qaeda attacks, perhaps not as much energy may be

145 *Id.* at 120.

146 See BECKMAN, *supra* note 49, at 117.

147 IGLESIAS-CAVICCHIOLI, *supra* note 13,1 at 121.

148 See IGLESIAS-CAVICCHIOLI, *supra* note 131, at 121.

149 IGLESIAS-CAVICCHIOLI, *supra* note 131, at 121.

150 Scott Kern, *Spain's Counter-Terrorism Policy Under Challenge by Al-Qaeda and ETA*, Power and Interest News Report (July 6, 2007), [http://www.pinr.com/report.php?ac=view\\_printable&report\\_id=664&language\\_id=1](http://www.pinr.com/report.php?ac=view_printable&report_id=664&language_id=1).

151 *Id.*

152 *Id.*

placed on rooting out ETA. The Spanish Secret Service sent out a warning in April of 2007 that Al-Qaeda most likely has established an active cell within Spain and that Spain is their prime target within Europe.<sup>153</sup> Al-Qaeda has repeatedly made statements that its goal is to recapture Al-Andalus or Moorish Spain that was under Islamic control from the years 711 until 1492.<sup>154</sup> Spain most certainly is facing a dual challenge with policies that have overall proven effective during the past fifty years.

On some levels, it is difficult to compare the challenges that the United States and Spain each face today. While both must deal with the Al-Qaeda threat, ETA's threat is exclusive to Spain. Although Spain has seen a significant amount of success in weeding out ETA and continues to have success doing so, their methods may not be as appropriate for the United States because of Constitutional limitations and the Posse Comitatus Act. Spain's usage of military power in law enforcement has been effective with its Guardia Civil, particularly in efforts against ETA, but the United States' system is unlikely to change in such a way as to create a national police force through the military because the current system has seen success. However, Spain has been relentless in its pursuit of ETA and this is an example that the United States should follow.

Although ETA and Al-Qaeda are not similar enemies by any means, Spain has punished members of both groups under the same provisions in its penal code. Al-Qaeda as an enemy for the United States seems to be a much more expansive and elusive challenge. ETA is concentrated within the Iberian Peninsula and maintains the Basque Country as a home base while it appears that Al-Qaeda cells may be found anywhere in the western world along with their base territories in Afghanistan, and now Iraq. It is fair to say that Spain has been so successful with ETA because of its relatively small numbers and localized attacks that occur on a smaller level, and while the United States has seen and continues to see some success with Al-Qaeda through surveillance as permitted by FISA and the Patriot Act, there is little if any chance that the United States would be willing to abridge its citizens rights in the way that the Spanish Constitution permits in terms of invasions of privacy. FISA and the Patriot Act seem to have stretched the potential for limitation of rights as far as the American public is willing to go, and further than some are willing to go.

However, it is also fair to say that the measures implemented by the United States in the wake of 9/11 have had success in preventing terrorist attacks on American soil. Spain has not been so fortunate, and this could be a result of minimal reform in terrorist legislation after 9/11. Because of the success that Spain had found with its policies on ETA, conceivably it was comfortable with its set of laws and provisions in the Penal Code pertaining to terrorist activity. The "newness" of a major terrorist attack on home soil could be seen as working to the United States'

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153 *Id.*

154 See also Kern, *supra* note 150.

advantage in terms of tailoring anti-terrorism policy to the enemy that was at hand. The Spanish were accustomed to smaller level attacks that typically took the form of assassinations against targeted persons or car bombs in relatively lowly populated areas. Al-Qaeda's threat took on much more massive levels of attack that sought mass casualties and had the overall objective of death to an entire population based in radical religious belief.

The enemies are different and therefore require different methods of preventing their attacks and effectively prosecuting offenders. Spain seems to have focused major efforts on putting down ETA, including eliminating threatening political parties and newspapers which would certainly have First Amendment implications in the United States. ETA is a much smaller enemy than Al-Qaeda, and Spain's success in reducing their numbers could be attributed to the size of the group and its geographical location. If the United States and its allies could mount an effort towards Al-Qaeda that was proportional to the Spanish effort against ETA then conceivably Al-Qaeda's numbers could be reduced down to a more manageable size. Unfortunately, these nations do not have the luxury of geographic concentration nor a pattern of attacks that is seen with ETA. However, Spain is an example to follow in that has stayed on ETA for the past fifty years and tailored its legislation as necessary to deal with newer developments in the group's tactics. The United States might look at this example and view the Patriot Act, National Security Strategy, and FISA as living documents that should be amended as necessary over time to be tailored to the ever-changing threats and attacks that come from Al-Qaeda and other extremist groups. Of utmost importance, however, is the maintenance of freedoms guaranteed in the United States Constitution when creating anti-terrorism legislation.

Spain's presidential change in 2004, while not beneficial for Spanish-United States relations, has allowed for a change in the nation's cooperative policy with other world powers. A return to a multilateral cooperative policy that fits within the European community strategy has reinstated Spain as a supportive entity and this is what the United States should seriously consider doing in order to have maximum success in the "War on Terror." While the United States is distinctive as having the most powerful military in the world, its anti-terrorism policy seems to have pulled the nation away from cooperative measures with allies that could contribute valuable resources to the effort. The "preventative strategy through action" could be better supported if other nations were collaborating as much as the United States government would like. However, in order to achieve this level of collaboration, the United States must also take a step towards the multilateral cooperative policy and place peace as a high priority. This is not to say that there should not be pre-emptive action with respect to Al-Qaeda, but both the United States and its allies could meet somewhere in the middle over their respective strategies to create a stronger force against the terrorist threat.

Spanish success with subduing ETA has been impressive, but it must be taken into account that ETA is a very different enemy than Al-Qaeda. Defeating Al-Qaeda will require a much more collaborative effort on behalf of the United States and

its allies, including Spain. However, both Spain and the United States have found success using their respective anti-terrorist measures given that no major attacks have occurred within United States borders since 2001 and 2004 in Spain. The United States should follow Spain's example in continuing to develop anti-terrorism legislation as the effort against Al-Qaeda persists, but without the sacrifice of American citizens' rights. Both nations should work to repair the relations between them and try to harmonize their anti-terrorism policies along with those of other allied nations. Ultimately, every effort must be made to stop attacks by Al-Qaeda, ETA, and other terrorist groups against civilized nations and this will only occur through cooperative efforts among these nations.

# WORKSHOP REPORT: Formulation of a Bipartisan Energy and Climate Policy—Toward an Open and Transparent Process<sup>1</sup>

## INTRODUCTION

### *Background*

In January 2009, the *Program on Presidential Policy-Making: Formulating a Bipartisan Energy and Climate Policy for America* was formed. Launched by the Howard H. Baker Jr. Center for Public Policy and the Woodrow Wilson International Center for Scholars, the program's purpose is to explore approaches to improve the process of decision making in the complex world of energy and climate policy. The principal goal of the initiative is to assist national policy-makers in achieving bipartisanship, transcending historic barriers, overcoming interagency rivalries, working with Congress and outside groups, and generating public support for sweeping new policies in a most divisive but critically important public policy arena.

In the months that followed, the Baker and Wilson Centers jointly sponsored two ground-breaking sessions that engaged key political leaders along with experts in policy, social sciences, energy and climate science, and systems thinking to examine new approaches that could fundamentally change the way America formulates energy and climate policy. What emerged was a clear understanding that the nation needs to improve its policy-making process along with an exciting sense of what is possible. The political leaders and experts endorsed the need to develop a new, open, transparent, and publicly accessible decision-making model. The experts also agreed that such a process, if implemented by our government, could, in President Obama's visionary terms, transform "business as usual" in Washington and dramatically improve national policy making.

### *Roundtable on White House Policy-Making*

The first of the sessions highlighted the need for government and congressional leaders to view energy and climate policy in the context of the entire system of policies, stakeholders, and outcomes. On May 18, 2009, the *Roundtable on White House Policy-Making* was held in Washington, D.C. Organized by former Senate Majority Leader, White House Chief of Staff, and U.S. Ambassador to Japan, Howard H. Baker, Jr., and former Indiana Congressman and 9/11 Commission Co-Chair Lee H. Hamilton, the Roundtable consisted of former high-ranking decision makers in the legislative and executive branches of government spanning the past 35 years. The Roundtable focused on the nature of various decision-making mechanisms and strategies available to White House and lawmakers in addressing

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1 The Workshop was held on June 18-19, 2009 at the Woodrow Wilson International Center for Scholars in Washington, D.C. It was organized jointly by the Wilson Center and the Howard H. Baker Jr. Center for Public Policy at the University of Tennessee. The partnering organizations for the Workshop included Sandia National Laboratory, the George Bush School of Government and Public Service at Texas A&M University, and Lawrence Livermore National Laboratory. The list of Workshop organizers is provided in Appendix A. The list of Workshop participants is provided in Appendix B.

such highly complex and long-standing problems as energy and climate. Among the key findings and conclusions reached by the Roundtable are:

- The need to consider the multiple viewpoints of all stakeholders and constituencies who have a stake in policy outcomes. Failing to account for all viewpoints can create unanticipated political conflict or unintended policy consequences;
- The critical importance of identifying and analyzing all of the facts associated with any given policy issue. Roundtable members echoed the late Senator Patrick Moynihan's famous observation that "we can each have our own opinions but cannot each have our own facts."
- The need to use a systems approach for better evaluating the facts and anticipating policy outcomes. In doing so, the nation should utilize the best methodologies and expertise from our academic, national laboratory, and private sector to develop and refine energy and climate policy options that are eventually presented to the Nation's elected officials. Roundtable participants noted the usefulness of such entities as the now defunct Office of Technology Assessment or the current Energy Information Administration of the U.S. Department of Energy as critical to compiling and objectively analyzing the evidentiary record used in the formulation of policy options presented to national decision makers.

### *The Workshop on Energy and Climate Policy*

Building on these recommendations, a workshop was convened in June 2009 to explore how a framework for design and implementation of such a national system of decision making might be developed, including an in-depth look at how "systems thinking" and "modeling approaches" can be used to create an open and transparent framework for formulating comprehensive energy and climate policy. This report summarizes the Workshop presentations, deliberations, and findings.

## **A SYSTEMS APPROACH TO ENERGY AND CLIMATE POLICY-MAKING**

In conceiving the June 18–19 Workshop, the Howard H. Baker Jr. Center for Public Policy and the Woodrow Wilson International Center for Scholars sought to address ways to improve the process by which national energy and climate policy had been addressed in recent years. Despite the publication of numerous well-received studies and reports on energy and climate strategies, little attention had been paid to the development of a well-defined framework for modeling and evaluating policies — a framework that goes far beyond what policy makers had used in the past. Indeed, the successful development and implementation of coherent energy/climate strategy based on multiple stakeholder input and a fully developed factual record will require knowledge and assessments that go far beyond any one technology or application.

The Wilson and Baker centers understood that a successful strategy must



assess the entire energy system, including power sources, distribution, end use, environmental impact, economics, and social behavior that reflect the broad range of stakeholder interests affected by the energy economy and global warming. Accordingly, the June 18–19 Workshop sought participation of leading experts from the top universities, national laboratories, and the private sector who have considerable knowledge of both energy and climate issues *and* the use of policy evaluation techniques, methodologies, and system models as they apply to contemporary public policy challenges. The workshop explored how new information tools and networking approaches can be used to increase transparency in the governmental decision making process; assure that decisions are informed by independent experts and a strong factual record; and that multiple stakeholder view points are understood, vetted, and incorporated into the policy making process. In this way, a fact-based, bipartisan, and thoroughly analyzed set of policy options could be crafted and put forth as a possible framework for a well-grounded and vigorous national energy and climate debate.

### *Key Findings*

Broadly speaking, the Workshop found that if used appropriately, a systems approach to the foreign energy dependence conundrum and the contentious climate-change debate can be extremely effective for national policy makers. Both energy and climate policy making requires decision makers to draw on a huge range of stakeholders and constituencies in the consideration of various policy options that will have a major socioeconomic, environmental, and national security impact on the public at large. To move society forward and to overcome traditional political and institutional barriers to political change, institutional leaders not only must commit to the process, but they must foster “buy in” from potentially skeptical stakeholders and the public. Hence, a decision making framework — such as the systems approach — that is based on inclusion, openness and transparency in the consideration and refinement of policy options will help secure the necessary stakeholder and public support for effective policy development and implementation. The eight key findings of the Workshop are as follows:

1. *The energy/climate conundrum is a “three-legged stool”*: A critical finding of the Workshop is that dependence on foreign sources of energy and the impact of global warming in an era of intense global economic competition for scarce energy resources go far beyond traditional concerns of economic prosperity and environmental protection. Indeed, the energy and climate conundrum that faces national policy makers today is, as former Virginia Senator John Warner told the Workshop, a “three legged stool.” That stool consists of not only major economic and environmental impacts but huge national security implications for the United States and large geopolitical ramifications for rest of the world. According to this finding, “systems thinking” and “modeling approaches” will be even more critical for decision makers because an effective energy/ climate policy framework must account not only for the

views of traditional economic, social, and environmental stakeholders, but those from the national security, homeland security, intelligence, diplomatic, and nongovernmental organization establishments as well. Such broadened participation reflects the interdependent relationship among the three legged stool on which the future of the Nation's prosperity depends and for which national policy makers will ultimately be held accountable — economic security, environmental stewardship, and national security.

2. *The need for systems thinking:* The Workshop established the critical need to integrate systems thinking into the energy and climate policy-making process in the United States. Woodrow Wilson Center President and former Indiana Congressman Lee Hamilton referred to systems thinking as an “essential but often neglected aspect of our policy-making process.” Lance Nobel, Independent Writer and Strategist, stated that integration of systems thinking could be very important to “advancing a much better policy process in Washington and even more broadly across the globe.”
3. *The way the nation thinks about energy and climate change must be transformed:* The scale, complexity, and urgency of the energy and climate challenge — as shown by the triangular relationship of the economic, environment, and security “three legged stool” — can be most effectively addressed by a systemic “transformation” in the way the Nation thinks about and approaches the debate about the issue. Reliance on traditional methods of policy analysis— that is, by simply addressing independent, seemingly autonomous pieces of the energy and climate policy puzzle — will not yield the systemic transformation needed to break down public misconceptions and historic impediments to stakeholder and public support for both energy/climate policy outcomes and the process used by decision makers to reach such outcomes.
4. *Systems thinking is best sited to the transformational process:* Because it demands broad input from a diverse set of stakeholders, systems thinking is considered the most effective means of achieving the systemic “transformation” in the way the Nation thinks about and approaches the energy and climate conundrum. Indeed, fundamental, systemic transformation of the Nation's approach will require use of a decision making process that accepts broad input, promotes dialogue, and develops “buy in” from a broad set of stakeholders, including the American public. Expanded stakeholder input and increased dialogue needed for such “buy in” are integral components of systems thinking approach to public policy challenges.
5. *Broadening the debate and improving the factual record:* The Workshop agreed that establishing a decision making framework founded on broad participation and a fully developed factual record are critical to fostering an effective process by which policy decisions are made. The energy and climate policy debate is fraught with sectional, socioeconomic, and producer group divisions and is often distorted by stakeholder and public misconceptions

about the nature of the problem and proposed solutions. As a result, the debate is also characterized by deep stakeholder and public mistrust of both the policy assumptions and decision making processes used in resolving conflict. A systems thinking-oriented decision making framework founded on inclusion, openness, and transparency in the formulation, consideration, and refinement of policy options is seen as the most effective way of securing strong stakeholder and public “buy in” for broad-based policy development and implementation.

6. *Systems thinking can simplify highly complex problems/relationships for decision makers:* The Workshop agreed that a popular aspect of systems thinking in government and the private sector is its ability to effectively communicate highly complex data and relationships among and between multiple policy variables in a simplified model. These simplified models identify and map out previously unknown stakeholders and constituencies as well as “unintended consequences” that can flow from “feedback loops” associated with particular policy choices. The variables that make up the complex, intricate web of a particular policy environment are not always self-evident under traditional models of policy analysis which evaluate individual pieces of the policy puzzle without reference to broader context.
7. *The Need to Test Application of Real-Time, Web-Based Virtual Townhall Meeting:* Creating a viable Decision Making Framework will depend largely upon the information technologies and capabilities offered by the 21st Century high tech global economy. As demonstrated by the process of globalization since the end of the Cold War, such technologies can help bring together divergent groups of stakeholders and cross-border constituencies required for understanding various points of view that come to bear on the energy and climate debate. The use of so-called “jams” have been used with success by large, decentralized global organizations in the private (e.g., IBM) and not-for-profit sector to facilitate stakeholder input to improve organizational efficiency and resolve conflict. To highlight the importance of stakeholder input and public “buy in” to the process of effective decision making — two key attributes of the systems thinking approach — the Workshop agreed that the successful application of IBM’s web-based “collaborative innovation” jam concept could be used to carry out a systems-based energy and climate decision making framework. In this case, stakeholders and members of the public with a stake in energy and climate policy outcomes would engage in “virtual brainstorming” as a way to educate and forge national consensus on outcomes
8. *The need for further work in this area:* To help foster a viable Decision Making Framework in the energy and climate arena, the organizing sponsors must expand the program to include additional universities, policy institutes, and members of the private sector to reflect the geographic, demographic and economic diversity of the Nation. By obtaining input from a broader range

of diverse groups, the Workshop can further refine how a systems approach can be best applied to the unique economic and geographic attributes of the United States at a time of economic uncertainty and global recession.

### **THE ENERGY AND CLIMATE CONUNDRUM: “THE THREE LEGGED STOOL”**

Workshop speakers emphasized that a “new approach” to energy and climate policy is critical because of its broad impact on a number of discrete but equally important policy sectors. In his keynote address, Daniel Poneman, Deputy Secretary of the U.S. Department of Energy, pointed to the complexity of the energy and climate challenges facing this nation: “*We have a problem now... of convergence of climatic threats, national security threats, energy security threats, and moving from where we are to a clean economy with sustainable sources of energy.*”

Similarly, former Virginia Republican Senator John Warner, one the Nation’s foremost leaders in national security as well as co-sponsor of the first climate legislation to ever reach the floor of the United States Senate, explained why it is so critical for the nation to address a combination of greater energy independence, global warming, and their impact on the Nation’s domestic and international security commitments. “*I say that it is a three legged stool [energy, climate, national security] and they are interdependent of one another.*”

Two general observations were made about the relationship among energy, climate, and security. First are the conflicting goals of the need by the U.S. and its economic competitors for access to viable sources of energy to power global economic growth while at the same time responding to public demand to limit carbon emissions. This is compounded by the fact of a limited availability of proven clean energy technologies, when compared to more plentiful carbon emitting, fossil-fuel energy technologies. Second, to demonstrate the magnitude of continuing global dependence on fossil fuels, Senator Warner said that as recently as 2005, the world’s population used energy at a rate of 16 terrawatts to meet its heating, cooking, power, and transportation needs, with over 80% of that energy coming from fossil fuels, which released 28 gigatons of carbon into the atmosphere. Indeed, a persistent theme of the Workshop was the international scientific consensus that identifies man-made carbon emissions as the likely cause of the observed change in our planet’s climate.

The combination of climate change and world-wide competition for carbon emitting fossil fuels is driving the United States and many other nations to embark on what is perhaps the most significant transition mankind has ever faced — the transition from burning carbon emitting fossil fuels that powered the Industrial Revolution and current globalization to unproven clean energy technologies. The fact of the matter is that policy makers will have to consider the massive socioeconomic and demographic impact the transition to the brave, new, uncertain world of clean energy will have on every region of the country, every business, and every citizen. As noted by Bob Simon, the Staff Director of the Senate Committee on Energy and Natural Resources, reducing fossil-fuel dependence and carbon emissions will

require a revolutionary transformation of our energy systems. “The science relating to climate change is pretty well known as far as the scientists are concerned.[but] the public still hasn’t fully come to grips with the scale of the problem or the scale of the solution. That fact translates to a substantial challenge for public policy.”

### **THE OBAMA ADMINISTRATION’S DIRECTION FOR ENERGY AND CLIMATE POLICY**

Deputy Secretary Poneman affirmed the Obama Administration’s commitment to creating a new clean energy economy that it hopes will serve as the basis for the Nation’s long-term economic growth. Poneman also shared the President’s commitment to supporting a new way of thinking and approaching the issue. Poneman identified three key attributes that will be required for this new approach, all of which square nicely with the concept of systems thinking. First, is the “need [for] a decision making process that comes out of a much broader set of considerations. Second, is the “need to have an open process, a transparent process that allows all stakeholders to get their views out. Third, is the need to “base decisions not on preconceptions and biases but on facts and dispassionate analysis.” Poneman also called for modeling and analytical approaches that support the decision making process, stating that decision makers need “modeling and simulation that allows you to tweak the variables [thereby] providing the analytical base for wise decision making but also bring in all the stakeholder communities involved.”

### **WHAT IS SYSTEMS THINKING?**

Systems thinking is not new. A large number of private sector entities and government agencies both in the U. S. and elsewhere use systems models to help develop strategies, identify risks and vulnerabilities, and bridge divisions across diverse stakeholder interests. The methods of systems thinking are grounded in decades of academic study and are being continually improved and constantly subjected to “real world” empirical testing.

As a model of policy analysis, a good way of understanding the concept of systems thinking is to contrast what systems thinking is not. “Traditional” analysis exclusively approaches an issue by separating the individual pieces of any given policy phenomenon without taking into account the broader environment of which each piece is a part. (The word “analysis” actually comes from the root meaning, “to break into constituent parts.”)

By contrast, systems thinking focuses on how the thing being analyzed interacts with the other parts of the system to which it belongs. As one writer put it, “This means that instead of isolating smaller and smaller parts of the system being studied, systems thinking works by expanding its view to take into account larger and larger numbers of interactions as an issue is being studied. This results in sometimes strikingly different conclusions than those generated by traditional forms of analysis, especially when what is being studied is dynamically complex or has a great deal of feedback from other sources, internal or external.”

In short, according to Dr. John Sterman, Director of MIT Systems Dynamics Group and Professor at MIT's Sloan School of Management, a world-renowned expert in systems approaches who addressed the June 18–19 Workshop, "Systems thinking is an iterative learning process in which we replace the reductionist, narrow, short-run, static view of the world with a holistic, broad, long-term dynamic view, reinventing our policies and institutions accordingly."

In describing the nature of systems thinking, Dr. Sterman and Dr. Nick Mabey, Executive Director of E3G and formerly Special Advisor to the United Kingdom's Strategy Unit under former Prime Minister Tony Blair, identified the phenomenon of "feedback loops" in policy systems that decision makers often exclude from their analysis. The "feedback loop" produces the law of "unanticipated outcomes," where changes in one variable can indirectly impact seemingly unrelated phenomena, leading to unexpected or unanticipated outcomes. Such unanticipated outcomes could be avoided by adopting a holistic or systemic approach to public policy challenges—such as systems modeling—where a larger set of variables and the relationship between these variables is considered.

Dr. Sterman demonstrated to the Workshop how seemingly appropriate local actions can initiate a cascade of interdependent, collateral events, often resulting in unanticipated outcomes that often have an opposite or negative impact on key stakeholders in any given policy environment. These feedback loops are often characterized by cycles of actions and responses that can serve to amplify and compound a small change in the policy environment. Dr. Mabey added that feedback loops are important because behavior does not always follow a logical linear path of traditional cause and effect (e.g., A goes to B and B goes to C). Often, such behavior is circular in nature, where, for example, the response of B can "feedback" to modify the action of A, thus changing its behavior based on the reactions of B or C. Without the ability to identify and understand the nature of feedback loops, it becomes nearly impossible for stakeholders to fully assess the anticipated outcome of individual actions. The key to better anticipating such outcomes lies in the ability to identify and understand potential "feedback loops" in the overall policy system, something that would be available to decision makers when applying systems thinking.

Feedback loops are just one of several "learning failures" experienced by decision makers who adopt policy recommendations on the basis of traditional, narrow "reductionist" world-view thinking. Another such failure is what Dr. Sterman called "time delays," which are characterized by "the mismatch between the time frames [in which] people are evaluated and the time frame [in which] the actual events play out." In addition, Dr. Sterman noted that such learning failures are a product of an individual's mental model, which humans rely on to predict behavior in a complex system, whether it be complicated policy phenomenon faced by government decision makers or a child's behavior faced by concerned parents. Because human beings — which include policy analysts and decision makers — tend to rely on the "traditional" methods of inquiry and "fall back on rote procedures, habit, rules of thumb, and simple mental models," they are ill equipped for evaluating complex and dynamic

systems containing multiple feedback loops and time delays. Indeed, reflecting on the importance of systems thinking models, Dr. Sterman pointed out that “everybody uses models all the time for every single decision they ever make,” but the critical question is “how can you use the best model, best suited to your purpose.”

Dr. Sterman closed his remarks on the definition of systems thinking by sharing his key observations on the potential effectiveness of systems models in guiding policy-making. Systems thinking models must be

- Driven by policy maker needs;
- Developed interactively with policymakers;
- Sure to have the full engagement of relevant stakeholders;
- Built and run on a time cycle that is relevant to the policy process;
- Focused on implementation as well as policy development;
- Grounded in the best scientific and expert knowledge.

### **POLICY MAKERS NEED TOOLS THAT ARE “SIMPLE” BUT NOT “SIMPLISTIC”**

Nick Mabey, formerly of Prime Minister Blair’s UK Strategy Group and current President E3G, discussed his views, perspectives, and lessons in applying systems thinking to real-world policy making. A key principle according to Dr. Mabey is that systems thinking must add *clarity* to the policy discussion, not just more *information*. To make this point, Dr. Mabey cited John Maynard Keynes advice that “There is nothing a government hates more than to be well-informed; for it makes the process of arriving at decisions much more complicated and difficult.” In other words, according to Dr. Mabey, “The systems model must be simple but not simplistic — that is the key intellectual challenge.”

Dr. Mabey cited real-world applications of systems thinking to fisheries, prison systems, and political stability. In doing so, he attempted to demonstrate the impact that systems thinking can have by bringing into focus the bigger picture of any given policy environment while identifying the cycles of mistrust that occur between key stakeholders that ultimately lead to unproductive or counter-productive results. Systems thinking can assist policy makers in five key ways.

- Help policy-makers make better decisions;
- Map unintended consequences (e.g., the feedback loop);
- Counter the inherent tendency toward compartmentalized silo thinking;
- Communicate the underlying assumptions of policies that are presented to stakeholders, and if done correctly,
- Lead to reduced political conflict once political leaders decide on a particular course of action. “If the Prime Minister is taking heat on a particular that was recommended in the process, I did not do my job,” Mabey stated.

Mabey was emphatic in pointing out the desperate need to apply systems thinking to energy and climate policy, arguing that the “timeframe for making change is too short to wait for [entirely] new approaches to simply evolve.” He expressed optimism that systems thinking will play a critical role in driving intentional change

by engaging the stakeholders in structured discussions and creating new institutions between existing policy communities. Dr. Mabey concluded by saying that “We might not know the future, but if you don’t prepare for futures, you won’t know how to manage it.”

Similarly, Lance Knobel, an independent writer and strategist, built on Dr. Mabey’s advice regarding the tension between simplicity and complexity. Mr. Knobel implied that “the tension between the complexity of the issue and the need for simplicity in terms of providing a narrative that policy makers can understand and the public can understand to galvanize support for change” can be best served by the “power of systems thinking [and its ability] to provide a visual picture of what is going on.” Referring to Dr. Mabey’s relatively simple systems diagram for nation stability, Dr. Knobel noted that while a large amount of information went into the development of that systems model, “that simple visual reference.... becomes a very powerful tool for persuading policy makers that this is an effective approach.”

Consistent with Dr. Sterman’s notion of “reductionist” worldview thinking produced by “mental models,” Mr. Nobel noted that unlike “the simple visual systems maps” most policy discussions are framed around very complex pieces of legislation or lengthy reports. Many people think most effectively in a visual way and that the power of the systems approach is its ability capture the behavior of a complex system through a relatively simple visual representation.

## **SYSTEMS APPROACHES ARE EFFECTIVE IN REAL WORLD APPLICATIONS**

Dr. Kristine Poptanich, Chief Risk Integration and Analysis Branch, Department of Homeland Security (DHS) and Lopez, Director of the New Mexico Interstate Stream Commission, discussed the specific application of systems modeling in setting priorities and engaging key stakeholder groups.

### *High Consequence Systems*

Dr. Poptanich demonstrated to the Workshop the effectiveness of systems thinking when applied to DHS’s broad and diverse mission to protect the Nation’s homeland security. “We have a very big mission,... protecting everything from agriculture and food, banking and finance, commercial facilities, chemical facilities, energy, government facilities. . . . All of this is the nation’s infrastructure; it’s the backbone of our way of life.” She made two key points about the effectiveness of using systems thinking when applied to the homeland security policy environment. First is its ability to effectively communicate and educate leaders and key stakeholders about risks and vulnerabilities. “Helping people understand the interconnectedness of these systems [is critical].” Second is the effectiveness of taking a broad approach to identifying and understanding the relationship between the various elements and components within the domestic-security policy system. When DHS was first stood up, Poptanich stated, the focus was on the protection of individual infrastructure assets. “We weren’t thinking about systems, nobody was talking about systems, and we had to learn the hard way. . . . Looking at these issues from a systemic standpoint



we have really had a sea change in our understanding of infrastructure [risks and vulnerabilities].” Dr. Poptanich discussed three ways that the department uses systems analysis:

1. Setting Priorities: *“We use systems analysis to help set priorities—where should we in the federal government best spend our time and attention.”*
2. Developing Strategies: *“It’s not good to just identify the highest risks. . . . We need to push to what are the solutions to those problems.”*
3. Stakeholder Identification: Systems thinking has allowed DHS to *“identify stakeholders that we would not otherwise have thought of . . . that is important to help understand the impact of strategies and to help champion those strategies.”*

Dr. Poptanich concluded her discussion by pointing out three challenges/opportunities she sees for the application of systems approaches. First, the tools must meet the timeframe of the decision makers — sometimes this can be months, but often it is measured in hours. Second, the tools must be designed with the end user in mind. Third, system tools have an opportunity to play an important role in quantifying uncertainty.

### *Building Broad Stakeholder Communities*

Mr. Estevan Lopez, Director of the New Mexico Interstate Stream Commission addressed the importance of building broad stakeholder communities as part of effective systems modeling as it applied to Middle Rio Grande Collaborative Program. That program focused on potentially conflicting objectives of sustaining endangered species versus the management of a water resource critical to a broad set of stakeholders in the State of New Mexico and the surrounding territories. The stakeholders include:

- Native American pueblos who use water for agriculture and community needs;
- Nonnative American farmers who depend on water for crop production and their livelihoods;
- Environmentalists who are interested in the sustainability of the ecology, municipalities, and municipal utilities that supply water to all their users;
- The Middle Rio Grande Conservancy, which has local jurisdiction over water distribution and use;
- Multiple state and federal agencies including - the Interstate Stream Commission, - the New Mexico Department of Game and Fish, which strives to balance the needs of endangered as well as sports fish, - the New Mexico Department of Agriculture - the U.S. Bureau of Indian Affairs;
- Adjoining states and government of Mexico, which all share the waters of the Rio Grande.

The Middle Rio Grande Collaborative uses a wide range of systems models to educate and bring this stakeholder community together, according to Mr. Lopez, noting that “much of our success is specifically due to our ability to develop and use those models.” For example, this wide set of stakeholders “have been able to agree on

a minimum set of water flow targets” resulting in great success for the endangered species population since it was listed in 1995 while still meeting the needs of the communities and the farmers. Not all models have been successful due to the inability to “agree on assumptions” that go into the model and to the lack of the “maturity of the model itself.”

Building on Mr. Lopez’s argument about stakeholder engagement, Mr. Lance Knobel emphasized the importance of systems approaches to what are sometimes defined as “wicked problems,” which are characterized by being complex, open ended, and involving “multiple stakeholders who have different and often irreconcilable perspectives.” Pointing to the success of systems approaches in engaging multiple stakeholder systems, Dr. Knobel concluded that greater integration of such systems into traditional policy-making processes could contribute to a much better policy process both in the U.S. and globally.

## **KEY ENERGY AND CLIMATE STAKEHOLDERS EMBRACE A SYSTEMS APPROACH**

Energy touches nearly every aspect of our society and thus has an extremely broad set of stakeholders with strong vested interests in how the Nation approaches future energy and climate policy. The Workshop solicited a range of stakeholder perspectives in the field of energy and climate policy. Recognizing that we could not fully represent the huge number of stakeholder perspectives on the issue, we focused on the perspectives of the policy community, national security, green economy/job creation, the environment, and finally, and perhaps most importantly, the perspective of the individual citizens as key stakeholders in this process.

### *The Policy Perspective*

Bob Simon, the Staff Director of the U.S. Senate Committee on Energy and Natural Resources, expressed his views on systems support for energy and climate policy formulation. He began by reiterating the importance of scientific models for predicting climate change, but pointed out the importance of acknowledging that uncertainties remain both in the models and scientific understanding underpinning them. He emphasized the importance of recognizing that uncertainties go in both directions — “*It might not be as bad as you think but it might be a heck of a lot worse than you think.*” While Dr. Simon identified the need for better systems models that would allow greater understanding of the impact of climate change on the population, he made clear that “*we already know enough to get started.*” The reason the Nation must get started as soon as possible is two-fold. First, reducing carbon emissions will require a revolutionary transformation of our energy systems. Second, because energy infrastructure has a long lifetime, the investments being made now are “*creating the world of 2050.*” Dr. Simon ticked through a number of policy options that could be used to address carbon emissions:

- Voluntary measures (“*this simply isn’t working*”)

- A carbon tax (“*just passing a cost along may not necessarily contribute to lower emissions*”)
- Command and control (“*no one is smart enough to know how to control each facility*”)
- Cap and trade (the only alternative at this time) Regarding energy policy, a number of policy vehicles can be explored, including energy bills, annual appropriations bills, the farm bill, and tax codes.

In pointing to the need for taking a systems approach, Dr. Simon stated that, “To get our arms around the energy/climate continuum . . . we are trying to influence a whole host of activities [that cannot be achieved in] one big bill.”

### *The National Security Perspective*

Senator Warner and Sharon Burke, Vice President for Natural Security at The Center for a New American Security, emphasized the critical role of the national security establishment in the climate and energy debate. According to Dr. Burke, the Department of Defense is the Nation’s single largest user of energy and, as one of the nation’s most trusted institutions, has an enormous opportunity to help drive the Nation’s energy and climate transition. “*The real power of the national security community is the Department of Defense itself, as a consumer of energy and as a validator on those concerns.*”

Having served as Chairman of the Senate Armed Services Committee on three separate occasions, Senator Warner is intimately familiar with the impact of energy shortages and the effects of global warming on the stability of nations and the ability of the U.S. military to respond to these changes. Dr. Burke further addressed the concerns of the national security community associated with the geopolitical impact of energy and climate change, including the effects of competition for energy supplies, potential conflict between nations in securing the free flow of such supplies, physical vulnerabilities of the energy infrastructure (such as the electric grid), and the impact of climate change on geopolitical stability of nations. Ironically, however, Dr. Burke noted “*The national security community has made a strong distinction between energy security and climate change and has not seen them as coherently linked.*”

To prepare for the national security implications of increased energy competition and global warming, Senator Warner and Dr. Burke discussed a provision Senator Warner inserted into the FY 2008 Defense Authorization Act that instructed the Department of Defense to begin to immediately prepare for these contingencies. That preparation will be included in the upcoming 2010 Quadrennial Defense Review that will, among other things, “*look at the linkage between energy use and climate change and explicitly tie the two together,*” Dr. Burke stated.

### *The Green Jobs Perspective*

In discussing the implications for the green economy, Bracken Hendricks, a Senior Fellow at the Center for American Progress, identified the broad impact of the energy and climate debate on all aspects of society, not just on job creation.

*“Specifically from a systems perspective, this [energy and climate issue] is a question of markets . . . of geopolitical stability, of ecological systems, and ultimately . . . of cultural systems and [of] communication challenge[s]”* in which people are asked *“to take risks and make investments in things that haven’t been built,”* Hendricks noted. He went on to endorse systems thinking as an effective approach to the issue because the *“conversation about systems puts us back to a much more powerful place to take action because [of the] need to design a solution at the speed and the scale and the scope worthy of the problem.”*

But more than anything, Dr. Hendricks emphasized the critical importance of bringing broader systems thinking into context and perspective for individual citizens. Policy makers, he argued, must emphasize the importance of connecting to the individual’s sense of place; that is, how will this highly complex energy and climate system with multiple feedback loops affect me as an individual? Hence, *“when we are talking about global warming we are talking about people’s homes, their neighbors, and their communities . . . [and] we need to put a human face on the problem.”*

In addition, Dr. Hendricks argued that feedback loops must not only be evaluated on the “problem” side of the equation but on the “solution” side as well. Among the positive feedback loops in the transition to the green economy, Dr. Hendricks stated, are *“new skills, investment in competitiveness, new market exports, new industries, and a leading-edge approach in the domestic economy as well as more healthy and livable communities.”* Therefore, in addition to designing the systems solutions, policy makers must also become proficient at presenting the benefits of those solutions to the public. Indeed, according to Dr. Hendricks, if systems thinking can be used to design solutions and to demonstrate to individual members of the American public the resulting benefits, *“we can actually see a changed political will, which is the real barrier”* to comprehensively addressing the energy and climate conundrum.

### *The Environmental Perspective*

Anthony Janetos, Director of the Joint Global Change Research Institute, distinguished between two stakeholder perspectives: those interested in mitigating climate change effects on the one hand and those focused on developing solutions designed to adapt to those climate changes that can’t be mitigated. These distinctive perspectives are important to a large number of stakeholder communities. But what is most important, according to Janetos, is that both *“have sufficiently robust information so that they are comfortable in making decisions.”*

In order to illustrate the role of systems modeling in the environmental policy arena, Dr. Janetos focused on feedback loops that connect land use to energy and climate policy decisions. Here, he described the results of a recent systems study he conducted demonstrating the dramatic difference in outcome resulting from a simple change in how carbon is “valued” under two different approaches. Both approaches set the same atmospheric carbon outcome, but one approach addressed carbon emitted from fossil fuel sources while the other valued *all* sources of carbon in the system. Under the fossil fuel-only approach, it was projected that biofuels would develop to

a point where they crowded out forestland and competed intensely with food-based agricultural activities in the latter half of 21st century. In contrast, under the all carbon-approach, the system achieved a more balanced outcome for land use among food-based agriculture, forestland, and biofuel crops. Dr. Janetos concluded, “We have a need for a new national dialogue to understand what is happening now, what are the prospects for the future, and how should people think about this problem. Constructing a process that inspires both trust and participation on the part of all stakeholder communities has not yet been done successfully.”

### **ACHIEVING FUNDAMENTAL TRANSFORMATION IS A CHALLENGE UNTO ITSELF**

A persistent theme of the Workshop was the need for transformation. This was true whether it constituted transformation of energy technologies, energy markets, the approach to policy development and implementation, or public perspectives and views on energy and climate. However, the Workshop made clear that identifying the need for transformation as a condition for moving the energy and climate debate forward is quite different from the process of actually achieving real transformation.

Regarding the process of transformation, the Workshop benefited greatly from the remarks of Linda Sanford, IBM’s Senior Vice President for Enterprise Transformation & Information Technology, IBM Corporation. In her position, she is responsible in working with IBM CEO Sam Palmisano in leading corporate-wide transformation of IBM over the last decade. She cautioned that organizational transformation does not happen overnight, but rather requires time, patience, and commitment. In helping lead IBM’s organizational and cultural transformation, the critical challenge for her is “*how do you affect the change [and] get the “buy in” from your people and the culture?*”

Ms. Sanford applauded workshop participants for seizing the opportunity to transform the energy and climate debate, adding that focusing “on the process of policy formulation rather than debating the policy details themselves is a very important one.” She noted that the focus on “process and how you get input, feedback, and “buy in” from the constituencies will help ensure the ‘stickiness’ of the changes.” Drawing on her experience in leading IBM’s transformation efforts, Ms. Sanford outlined five principles for change.

- *Fundamental change is “democratic” in nature:* Soliciting and considering the view points of all individuals involved is perhaps the most important principle. She described IBM’s groundbreaking technology, the IBM “JAM” event, which allows thousands of individuals to simultaneously engage in a structured, real-time dialogue as way to attain diverse perspectives on organizational issues and their potential solution. IBM “JAM” events can be thought of as a sort of “21st Century town hall.”
- *Governance models must provide clear lines of responsibility and authority:* The governance model must be reassessed on a regular basis to ensure that it remains relevant to the task.

- *Turn information into insight:* Analytical models require and need “decisions that are based on facts.”
- *Collaboration is critical to achieving true innovation:* “Very few systems are the responsibility of a single entity or decision maker” because “to be a transformation leader you have to be an adept collaborator.” It is necessary to engage the end user in an iterative process in order to assure that the proposed solutions are meeting the needs of those closest to the problem.
- *Leadership commitment:* Leadership is needed “to establish a few high profile [leadership-led] initiatives . . . that have the potential of achieving game-changing goals. Without both tops down and bottoms up, no meaningful transformation will be possible.”

Ms. Sanford concluded by reiterating her belief that all successful transformations are participatory, rely on strong analytics, look beyond the four walls for new ideas, and are characterized by senior leadership that is fully committed to the cause of change.

## **SUMMARY AND CONCLUSION: THE WAY FORWARD**

The Workshop participants grappled with the challenge of transforming our nation’s approach to energy and explored the role of a deliberative process for achieving a comprehensive set of national energy security and climate policies. They concluded that our ability to achieve this unprecedented national and global transformation will be greatly aided if we learn to harness the potential of “systems thinking” models that are currently used by our leading universities, government laboratories and private sector institutions. They concluded that working together with leading systems thinkers and policy experts can consolidate the best that “systems thinking” has to offer and provide a framework for policy decision support that combines the vast resources of our leading public and private educational and research institutions. Such a collective effort could inform, guide and help equip the nation’s policy makers with a national systems model that is

- Interactive
- Transparent,
- Accessible and democratic,
- Real-time, collaborative
- Inclusive of disparate stakeholders, and
- Capable of fostering national consensus.

By developing such a systems approach, using the best technologies and know-how available today, the nation can effectively evaluate the costs and benefits, weigh the expected and unexpected outcomes of particular policy pathways and transform the policy-making process.

- In doing so the government can include and engage a wide range of stakeholders truly changing “the way we do business in Washington.”
- The national systems model for energy and climate policy can provide a fresh, new, neutral, perspective and help resolve the political “log jam” that

currently frustrates achieving a national energy and climate policy.

- It can provide open access to broad public and can engage and include stakeholders' views toward a workable national consensus on energy and climate policy so vital to the Nation's economic prosperity, natural resources, and long-term security.

Under the leadership of Howard H. Baker, Jr. and the Howard Baker Forum in Washington, D.C., and in collaboration with the Howard Baker Center for Public Policy at the University of Tennessee, the organizing partners of this timely initiative expect to build on the progress created thus far in fostering a new way of developing policy in the United States. The ultimate goal is to further the momentum needed for formal integration of systems modeling into the process by which the Nation and its elected leaders approach and deliberate on the monumental issue of energy and climate policy. Success will depend in large degree on the participation of a wide cross section of the nation's best thinkers and leading institutions focusing on the process (not the policy) and how the process can be dramatically improved, and even revolutionized.

Workshop participants agreed that it should be the first step in what many believe to be a major contribution to how the Nation confronts the monumental challenge posed by U.S. dependence on foreign energy supplies and the impact of climate change on the U.S. economy, environmental stewardship, national security, and society as a whole. By building a strong case for integrating systems modeling into the process by which the Nation and its elected leaders approach and deliberate on these issues, historical obstacles to policy-making in this contentious area can be largely addressed.

Accordingly, the Howard Baker Forum and the lead organizers plan to enlarge the Workshop to a wider cross section of the Nation's best thinkers and leading institutions in fostering greater understanding of the way systems thinking can effectively tackle public policy challenges at all levels of government. The organizers will be reaching out to the original participants and a host of other individuals from major national institutions and organizations who are leading experts in the systems thinking community as well as the energy and climate change policy area. These experts will be joined with national policy-making experts in government, think tanks, research institutions, and opinion-making organizations. Together, the Howard Baker Forum and lead organizers seek to continue our progress toward a new, systems-based, bipartisan, open, and transparent policy-making process.

**APPENDIX A: CONFERENCE ORGANIZERS**

Terry Michalske,  
Sandia National Laboratories – Chair

Arnie Vedlitz,  
The Bush School of Government and Public Service,  
Texas A&M University

Tim Anderson,  
University of Florida

Michael Natch,  
Goldman School of Public Policy  
University of California, Berkeley

Tim Valentine,  
Oak Ridge National Laboratory

Kent Hughes,  
Woodrow Wilson International Center for Scholars

Scott Campbell,  
Baker Donelson

Erik Webb,  
Sandia National Laboratories

Doug Rotman,  
Lawrence Livermore National Laboratory

Charles Kennel,  
University of California, San Diego

John Sterman,  
Massachusetts Institute of Technology



## **APPENDIX B: PARTICIPANTS**

**Wade Adams**, Rice University

**Massoud Amin**, University of Minnesota

**Timothy Anderson**, University of Florida

**Dennis Assanis**, University of Michigan

**David Bailey**, Climate Policy ExxonMobil

**Howard H. Baker, Jr.**, Former United States  
Senator, Tennessee

**Sam Baldwin**, DOE-EERE

**Jon Barnett**, University of Melbourne

**Ted Besmann**, Oak Ridge National Laboratory

**Linda Blevins**, DOE Office of Science

**Dawn Bonnell**, Nano/Bio Interface Center University of Pennsylvania

**Benjamin Brown**, DOE, Office of Science

**Anne Buckle**, Baker Center for Public Policy

**Sharon Burke**, Center for New American Security

**Scott Campbell**, Baker, Donelson, Bearman,  
Caldwell & Berkowitz

**Bob Carling**, Sandia National Laboratories

**Richard Cirillo**, Argonne National Laboratory

**Kathryn Clay**, Alliance of Automobile  
Manufacturers

**David Coen**, Member of the Vermont Public Service  
Board & NARUC

**Keith Cole**, General Motors

**Geoff Dabelko**, Woodrow Wilson International  
Center for Scholars

**Suzanne DeFelice**, American University

**Mac Destler**, University of Maryland

**Tomas Diaz de La Rubia**, Lawrence Livermore  
National Laboratory

**Karen Evans**, KE+T Partners

**Julio Friedmann**, Lawrence Livermore National  
Laboratory

**Robert Gee**, Gee Strategies

**Charlette Geffen**, Atmospheric Science and Global  
Change, Pacific Northwest National Laboratory

**Robert Glass**, Sandia National Laboratories

**Greg Golden**, IBM

**Charles Gray**, NARUC

**David Greene**, UC Davis/Institute for Transportation  
Studies

**Lee Hamilton**, Former Member, U.S. House of  
Representatives, Indiana

**William Heisey**, Programs & Technology, Lockheed  
Martin

**Bracken Hendricks**, Center on American Progress

**David Herring**, National Oceanic and Atmospheric  
Administration

**Tad Hirsch**, Intel

**Kent Hughes**, Woodrow Wilson International Center  
for Scholars

**Gary Jacobs**, Oak Ridge National Laboratory

**Hetal Jain**, National Oceanic and Atmospheric Administration

**Mark Jamison**, University of Florida

**Anthony Janetos**, Pacific Northwest National Laboratory

**Susan Julius**, EPA

**Dan Kammen**, Professor of Energy and Society &  
Director, RAEL, UC Berkeley

**John Kelly**, Technology Solutions, Endurant Energy  
LLC

**David King**, Energy Policy Unites States Air Force  
**Robert Kleinberg**, Schlumberger-Doll Research

**Lance Knobel**, Independent Writer and Strategist

**Rao Kotamarthi**, Argonne National Laboratory

**Michael Kuperberg**, DOE

**Joel Kurtzman**, Milken Institute

**Dimitri Kusnezov**, NNSA

**Rob Leland**, Sandia National Laboratories

**Nate Lewis**, **George L. Argyros**, California Institute of Technology

**Andrew Light**, Center for American Progress

**Estevan Lopez**, State of New Mexico

**Carolyn Lukensmeyer**, America Speaks

**Gavin Luter**, Howard H. Baker, Jr. Center for Public Policy, University of Tennessee

**Nick Mabey**, Founding Director & Chief Executive, UK Strategy Unit

**Kristie Maczko**, Natural Resources Research Center

**Dawn Manley**, Sandia National Laboratories

**Robert McGrath**, National Renewable Energy Laboratory

**Betsy Merck**, Merck Consulting

**Terry Michalske**, Energy Innovation Initiative, Sandia National Laboratories

**Jeryl Mumpower**, Texas A&M University

**Mary Neumayr**, Committee on Energy and Commerce, U.S. House of Representatives

**Robin Newmark**, Lawrence Livermore National Laboratory

**Carolyn Ordowich**, Consultant

**Al Paladino**, RF Micro Device

**Mark Petri**, Argonne National Laboratory

**Carl Pierce**, Howard H. Baker, Jr. Center for Public Policy, University of Tennessee

**Rekha Pillai**, Oak Ridge National Laboratory

**Daniel Ponemon**, U.S. Department of Energy

**Kristine Poptanich**, Risk Integration and Analysis  
Branch, Department of Homeland Security

**Michael Rader**, Solar Energy Industries Association

**Doug Racke**, Racke Strategies & Technologies

**Jeremy Richardson**, Pew Center on Global Climate  
Change

**Rush Robinett**, Director, Clean Energy Campus,  
Sandia National Laboratories

**Doug Rotman**, Lawrence Livermore National  
Laboratory

**Linda Sanford**, IBM

**Bob Shelton**, University of Tennessee

**Les Shephard**, Sandia National Laboratories

**A.J. Simon**, Lawrence Livermore National Laboratory

**Bob Simon**, Committee on Energy and Natural  
Resources, United States Senate

**Michael Slimak**, EPA

**John Sterman**, MIT

**Jon Strauss**, Texas Tech University  
**Ray Stults**, National Renewable Energy Laboratory

**Gerald E. Swiggett**, GIS Enterprises, Inc.

**Shuzaburo Takeda**, Takeda & Associates

**Margie Tatro**, Sandia National Laboratories

**John C. Tuck**, Baker, Donelson, Bearman, Caldwell  
& Berkowitz

**Tim Valentine**, Oak Ridge National Laboratory

**Arnold Vedlitz**, Texas A&M University

**Brandon Wales**, Department of Homeland Security

**Terry Wallace**, Los Alamos National Laboratory

**John Warner**, Former Senator, Commonwealth of Virginia

**Erik Webb**, Sandia National Laboratory

# CONFERENCE REPORT: Five Public Policy Ideas for Building Obama's New Economy—a report from the Conference on Partnering for American Competitiveness<sup>1</sup>

## INTRODUCTION

On December 11, 2008, a group of leading experts from government, academia and private industry met in Washington, D.C. for a forum called “Partnering for American Competitiveness.” It was an all-day workshop on government-university-industry research partnerships for innovation and workforce development, which addressed the status of the America Competes Act of 2007 (20 USC 9801) that had just celebrated its one-year anniversary. It also focused on the potential role that the federal government, academia, and industry can play in America's economic recovery and long-term economic prosperity through collaborative research partnerships. This report is based on the conference deliberations and offers five public policy ideas that can help rebuild the foundation on which President Obama's New Economy will rest.

In 2005, the groundbreaking report by the National Academies, *Rising Above the Gathering Storm: Energizing and Employing America for a Brighter Economic Future*, painted a bleak assessment of American competitiveness. The report called into question the ability of the United States to compete successfully in the global marketplace and provided recommendations on how to improve America's economic and technological competitiveness. These recommendations included better education and training for America's students in the core disciplines of science, technology, engineering and mathematics (STEM) and increased government investment in research and development to spur innovation and create “game changing” technologies. On August 9, 2007, Congress and the Bush Administration responded by enacting the America Competes Act, which authorized programs to improve STEM education and increase funding to help rebuild and regenerate the foundational tools for sustaining America's competitiveness.

Within the next year, the U.S. economy began its steep and sudden decline into recession. The length, severity and depth of this recession has not only called into question the ability of the United States to recover quickly but has led some to question the foundation on which the nation's economy is based. Indeed, President Obama has characterized the U.S. economy of the last two decades as one based on a shaky foundation -- of cheap credit and excess debt that fueled America's “voracious” consumption of foreign imports. As with the authors of *Gathering Storm*, President Bush's American Competitiveness Initiative, and the America Competes Act of 2007, the Obama Administration called for major reforms in education and increased public investment in research and development for the U.S. to develop cut-

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1 The Conference took place at the Woodrow Wilson International Center for Scholars in Washington, D.C. It was co-hosted by the Howard H. Baker Jr. Center for Public Policy, the Woodrow Wilson International Center for Scholars, Sandia National Laboratories, Oak Ridge National Laboratory, The Association of American Universities, National Association of State Universities and Land-Grant Colleges and the Task Force on the Future of American Innovation. The list of conference participants is provided in the Appendix.

ting-edge technologies needed to compete more effectively in the global marketplace.

Equally important for those with a stake in the debate over American competitiveness, President Obama has articulated a vision of a “new economic foundation” that is based on the economic production of goods and services for domestic and international markets. In a theme that resonates strongly with those of the Gathering Storm and the Competes Act, the President articulated a vision for our future where “some more scientists and some more engineers are building and making things that we can export to other countries” and where “our best and our brightest [people] commit themselves to making things -- engineers, scientists, innovators.”

Thus, in December 2008, amid the global financial crisis, experts from across the country convened for a “Conference on American Competitiveness” to consider strategies for achieving the goals of the America Competes Act, with particular focus on the role of collaborative partnerships in the research, development and commercialization of new and innovative “game changing” technologies. This report captures key policy ideas from the Conference that can help enable the nation’s economic recovery. Specifically, the Conference identified the need for full funding of America Competes Act and promoted greater integration among higher education, private industry and national labs in the formation of research partnerships and “innovation hubs.” Particular attention was given to those areas conducive to clean energy initiatives and targeted workforce development programs for skill and knowledge development.<sup>2</sup>

## **THE OBAMA VISION: RESTRUCTURING THE AMERICAN ECONOMY** *The Economic Downturn*

President Obama took office facing an economic slump that experts agree is far worse and may last far longer than normal downturns in the business cycle. The raw numbers tell a scary story:

- *Unemployment.* As of March 2009, the unemployment rate stood at 8.5 percent, the highest jobless rate since 1982. Over five million jobs have been lost since December 2007, with over 2 million of those jobs lost between January and March of 2009. That brings to 13.2 million the total number of American workers out of work. During the first three months of 2009, wages and salaries shrank at a 4 percent annual rate. Permanent job losses and a rise in the number of people out of work for six months or greater now constitute 1.9% of the labor force, nearing a post-World War II high.
- *Housing.* Housing foreclosures have reached record levels in the post-war era. There were 3.1 million foreclosure filings - default notices, auction sale notices and bank repossessions - in 2008, an increase of 81 percent from 2007 and of 225 percent from 2006. One in 54 homes received at least one foreclosure filing in 2008.

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<sup>2</sup> See [http://www.wilsoncenter.org/index.cfm?fuseaction=events.event\\_summary&event\\_id=491992](http://www.wilsoncenter.org/index.cfm?fuseaction=events.event_summary&event_id=491992).



- *Consumer Spending.* In March 2009, consumer retail spending declined by 3.5 percent from year ago and the producer price index had a year-over-year decline of 1.2 percent, suggesting that the nation remains in a vicious deflationary cycle.
- *Inventories.* According to March 2009 data, businesses continue to try to clear inventories and excess supplies. Industrial production fell 1.5 percent in March 2009 and during the first quarter, output dropped at an annual rate of 20 percent. Building permits fell to a record low in March while housing starts fell 10.8 percent, the second lowest rate since the 1940s.
- *Lending.* Credit markets remain locked up in several economic sectors, notably the housing and construction industries, which continue to suffer from frozen lines of credit.
- *Retirement.* Retirement savings for individuals and pension plans incurred huge losses during the run on the financial markets in 2008 and 2009.

As devastating as the numbers are, they fail to fully capture the economic dislocation and pain inflicted on businesses, workers, their families and communities. This recession has weakened industrial sectors as companies downsize, consolidate, restructure, or close. The severity of the recession means people will be out of work for a longer period of time than in previous downturns, with little hope of returning to their former places of employment or utilizing skills sets they have learned and harnessed for much of their working adult life. Tellingly, in key industries that paced America's economic growth in recent decades - construction, financial services and retail—layoffs have accelerated so quickly in such a short period of time that some companies are abandoning whole areas of business. "We have to seriously look at fundamentally rebuilding the economy," according to Andrew Stettner, deputy director of the National Employment Law Project in New York. "You've got to use this moment to retrain for jobs."

## **OBAMA'S ECONOMIC STRATEGY**

The Obama Administration has embarked on a two-fold economic plan. The first step is to stop the current economic bleeding. The second step is to lay the foundation for a new economy that will provide sustained, long-term economic growth. The underlying premise of the strategy is that the American economy be rebuilt on something other than easy credit, excess consumer debt, and mass consumption of cheap foreign imports. Critical to forming the foundation for a "New Economy" will be government investments in new technologies for clean energy, health care and communications, science and technology research and development, STEM education, and workforce training and skill development.

### *The Short-Term Fix*

To stem the immediate economic bleeding, the Administration has embarked on a multi-pronged short-term recovery plan that addresses: economic stimulus, bank stabilization, non-bank and small business lending, foreclosure mitigation, automo-

tive restructuring, and global stabilization and stimulus. In particular, the American Recovery and Reinvestment (ARRA) Act of 2009, the \$787 billion counter-cyclical spending package aimed at creating jobs and jump starting consumer spending, includes investment in clean energy technologies, health information technology, broadband deployment, “green collar” workforce skill development programs, and partial funding of several STEM and R&D programs authorized by the America Competes Act. In addition, the G-20 partners recently agreed to stabilize the financial system of the emerging market economies and revive global demand for goods and services.

### *The New Economy*

In a highly touted address to Georgetown University on April 14, 2009 titled, “The Economy: A New Foundation,” the President stated:

*Most of all, I want every American to know that each action we take and each policy we pursue is driven by a larger vision of America’s future—a future where sustained economic growth creates good jobs and rising incomes; a future where prosperity is fueled not by excessive debt or reckless speculation and fleeting profits, but is instead built by skilled, productive workers, by sound investments that will spread opportunity at home and allow this nation to lead the world in the technologies and the innovation and the discoveries that will shape the 21st century.*

President Obama outlined the five pillars of the New Economy:

1. *Financial Regulatory Reform.* The first pillar is modernization of the nation’s financial regulatory system to conform to prevailing financial practices and the use of new innovative financial instruments.
2. *Education Reform.* The President’s second pillar is “an education system that finally prepares our workers for a 21st-century economy.” He wants America to lead the world in the “production of scientists and engineers,” to “compete for the high-wage, high-tech jobs of the 21st century,” and “have the highest proportion of college graduates in the world” by 2020.
3. *Clean Energy & Carbon Emissions Limits.* The President’s third pillar is the harnessing of “renewable energy that can create millions of new jobs and new industries.” Important investments are being made to upgrade the electric grid, improve the energy efficiency of the transportation sector and reduce greenhouse gas emissions.
4. *Health Care Reform.* The President argues that the “cost of health care continues to strangle our economy”, since rising health care costs increasingly consume financial resources that would otherwise be available for research and development, capital improvements and other long-term investments.
5. *Deficit Reduction.* The fifth pillar is deficit reduction and “restoring fiscal discipline” after the economy has fully recovered.

### *Characteristics of the New Economy*

This report focuses on those key characteristics of the President's New Economy seen as consistent with the findings, observations, and recommendations reached by the authors of The Gathering Storm and the American Competes Act. They are:

1. The shift to clean energy technologies that can reduce the nation's dependence on foreign oil while fueling domestic prosperity in the development, production and sale of new goods and services.
2. New workforce training and skill development for temporary and permanently displaced workers who will need to adapt to the New Economy.
3. Renewed emphasis on STEM education that will provide the technological and scientific foundation for new product development, processes, and services.
4. Increased federal funding of research and development for technological and scientific innovation, including expanded basic research over ten years, new research initiatives at American colleges and universities, and making the research and development tax credit permanent to spur industrial investment.

The new Administration and Congress have embarked on an economic program that will help accelerate the transition to a New Economy based on clean energy technologies, the creation of new scientific and engineering talent and a newly trained workforce skilled to create the future economy.

## **FIVE PUBLIC POLICY IDEAS FOR THE NEW ECONOMY**

After careful deliberation of the status of the America Competes Act one year after its inception and the potential role that the federal government, academia, and industry can play in America's economic recovery and long-term economic prosperity through collaborative research partnerships, the conference participants produced five public policy ideas that can help rebuild the foundation on which President Obama's New Economy will rest.

### *Policy Idea One: Provide full funding for the America Competes Act of 2007.*

The Competes Act authorized increased federal investment in science, technology, engineering and mathematics (STEM) from K-12 through postdoctoral education and increased federal research and development in science, technology, and engineering through the U.S. Department of Energy, the National Science Foundation, the National Institute of Standards and Technology, and the national laboratories. As expressed by Congressman Bart Gordon (D-TN), the Chairman of the House Committee on Science and Technology, on the need to fully fund the America Competes Act of 2007: "We already have a blueprint; we just need to fund it."

### *Policy Idea Two: Encourage collaboration and integration among government, academia, national labs, and the private sector.*

By reducing stovepipes among leading players in the knowledge industry and promoting collaboration, academia, the private sector, and the national laborato-

ries can pool their collective talents and resources to explore, develop and potentially commercialize “game changing” products, processes, services and technologies that will help America compete in the global marketplace.

*“We need different more fruitful set of activities to occur within the government, national laboratories and universities by way or establishing partnering activities between the private sector and public institutions.”* Senator Jeff Bingaman on the need for greater collaboration and integration among the government, academia, the national labs and the private sector.

***Policy Idea Three: Support and expand research partnerships and innovation hubs aligned with the clean energy economy.***

Research partnerships and innovation hubs will become critical to developing the clean energy technologies and processes on which the New Economy will depend.

*“I am excited about the opportunities for breakthroughs in energy research that will allow us to reduced our foreign dependency and create a new green energy job bank.”* – Congressman Bart Gordon on encouraging research partnerships and innovation hubs that are aligned with the goals of the clean energy economy.

*“On the energy side, given the financial situation and the stimulus, we must target and think strategically about how R&D investments can be harnessed for big challenges, such as moving to a carbon free environment that our future prosperity depends on.”* Deborah Wince Smith on encouraging research partnerships and innovation hubs for the clean energy economy.

***Policy Idea Four: Establish incentives for making partnering easier.***

There exist multiple financial, legal, cultural and institutional barriers to collaboration and cooperation among leading players in the knowledge industry. To overcome these barriers, policies such as a permanent and expanded research and development tax credit or changes to technology transfer laws would induce greater collaboration between universities and the private sector. In addition, the lack of incentives and misalignment of priorities among leading players results in lack of commercialization of basic research critical to private sector success in the global economy.

*“We must fund a way to get basic science out of the labs and into the workplace.”* Congresswoman Judy Biggert on the need to establish incentives for making partnering easier and for commercializing basic research.

*“We should make the R&D tax credit permanent and tailor and expand it to boost investment.”* Congressman Chris Van Hollen on the lack of financial incentives to promote partnering and the need for a permanent and expanded research and development tax credit to do so.

*Policy Idea Five: Engage in workforce development required for providing America's workers the skills needed to compete in the New Economy.*

The America Competes Act correctly focuses on the need for developing the best and brightest for leading cutting-edge scientific and technological research. In addition, "middle skills" workforce development programs are equally important to the transition to the New Economy and resources should be dedicated to training workers in the new skills and knowledge they will need to succeed.

*"We need to rethink our STEM programs. Only about five to seven percent of Americans are scientists and engineers. Most people don't need to be Ph.D., Masters, or BA scientists. We should focus on getting kids who are inclined to be scientists on the right path. I am seeking an expansion of math and science academies."* Robert Atkinson, on the need to refine STEM and workforce development programs.

*"There is currently a deficit of middle skills workers. These are positions for which workers have to be highly trained, and they are high paid jobs. They can't be outsourced . . . There is a misalignment with where we spend dollars and the demands of industry."* Deborah Wince Smith.

## THE NEED FOR NEW APPROACHES

Conference participants emphasized that there is a changing global landscape and we must advance our ability to accelerate innovations through partnering to improve the competitiveness of the United States. As noted by Dr. William Kirwan:

*We spend \$20 billion a year on federally sponsored R&D in college and universities [and] spend the same amount of money on federal labs. [We have] no consistent federal policy regarding how to tap into R&D . . . Breaking down walls between government labs and universities is an important thing for us to do.*

A similar conclusion was reached in the recent report by the President Bush's Council of Advisors on Science and Technology, which stated that "PCAST believes enhancing engagement of the private sector, including companies and foundations, with researchers in academia and government laboratories is increasingly vital to the health of the U.S. R&D enterprise and our technology-based economy."

A major opportunity, especially during this economic downturn, is to accelerate the development of new products and creation of new jobs through public-private partnerships achieved by radically opening up the national laboratories to partner with business and universities. U.S. business has repeatedly derived advantage by having access to the more than 20,000 scientists and engineers in the national labs and their world-class computational and experimental facilities. One example is provided in the paper 'Where Do Innovations Come From?' by the Information Technology and Innovation Foundation, which concludes that award-winning innovations (e.g., R&D 100 awards) over the past few decades increasingly stem from collaborations between large firms and federal laboratories and/or university spin-offs. It also demonstrated the importance of federal funding in enabling partnerships and

their resulting innovations. This competitive advantage needs to be more fully exploited today.

In addition to enabling economic growth and addressing national challenges, public-private partnerships can enhance the development of talent for the future S&T workforce. Employers emphasize that their future scientists and engineers will need not only strong technical capabilities in their field, but will also require the breadth of knowledge and experience needed to work in and lead collaborative R&D teams. Providing students the opportunity to work in research teams, as part of government-university-industry partnerships, will provide a fast track for the team development and leadership desperately required by the new economic realities. In short, we can transform science and engineering education through partnership programs, markedly advancing the prospects for American competitiveness in the future.

## **FOREIGN COMPETITION AND INNOVATION HUBS**

There is a change in the global economy regarding innovations and we must think about what it means to the United States in terms of competitiveness. The idea of government sponsored public-private research partnerships is not new throughout the world. There are numerous examples of institutes in Europe and Asia that have been successful and new entries are being rapidly added to the scene. The rest of the world is developing powerful partnership models and is not sitting back waiting for us to get organized and moving.

- The Interuniversity MicroElectronics Center (IMEC) in Belgium has been highly successful in driving innovation in microelectronics. IMEC is founded on a tightly coupled partnership between academia, national labs, and industry. IMEC is a prolific developer of patents and its students are gobbled up by industry.
- MINATEC in Grenoble, France is a new campus for education, research, & industrial collaborations that brings together unique government facilities with university researchers and industrial needs to drive micro and nano technologies in France.
- The China Automotive Energy Research Center at Tsinghua University in Beijing was created to conduct multidisciplinary, systematic and in-depth research on automotive energy, and to provide comprehensive solutions to the transition to sustainable automotive energy systems for China and the world.
- Zhongguancun Haidian Science Park, known as China's Silicon Valley is China's first state-level high-tech development zone. (established in 1988) with a park size of 133 square kilometers. Over 10,000 high-tech enterprises, in IT, Biotech & New Medicine, New Materials, Energy Saving & Environmental Protection, have established their operations in Z-HSP already, 1,500 of them being foreign-invested.

- The Korean Institute of Science and Technology (KIST), a 10-year-old Korean program, drives the Korean economy. KIST is also a tightly coupled partnership between the government, academia and the commercial sector.
- Japanese institutes such as the National Institute for Materials Science in Tsukuba, help keep Japan on the leading edge of science and technology.
- The Innovation Centre in Singapore is a new effort by the Singapore government to develop a partnership between the public and private sector at the National Technical University.

The question is not whether it is a good idea to have government-sponsored centers that bring together students, faculty and industrial scientists and their problems. The rest of the world has shown that such centers are invaluable at driving innovation. The question is whether the U.S. will bring together our formidable resources in partnership to maintain its competitive edge.

The Competitiveness Conference heard from Dr. Jean-Charles Guibert, the Director of MINATEC located in Grenoble, France, on MINATEC's ability to coordinate and harness the resources of universities, the private sector and government in developing and commercializing technologies used for French companies to compete in the global marketplace, such as STMicroelectronics. Similarly, Dr. Johnsee Lee, the President of the Industrial Technology Research Institute (ITRI) in Taiwan noted that by bringing together government, industry and higher education, ITRI has employed 6,000 researchers that produce three to five patents every day, and work with 15,000 companies a year: "There are opportunities for national labs in the United States. They could play an important role in linking universities and industry. They have more capability to build teams."

## **PARTNERING IN THE U.S.**

Larry Sumney of the Semiconductor Research Center addressed the conference on a proven formula for utilizing collaborative university-industry research to extend semiconductor growth. He noted:

*Having a research consortium is a good idea now, because it improves the effectiveness and efficiency of federal investment. You get the most value for your money invested by focusing research, knowing what you're looking for, having deliverables under contract, delivering those deliverables, and including a user perspective on whether research is going in the right direction. We should fully utilize our growing research capability and capacity.*

There are many other good U.S. examples of public-private that provide important lessons learned for how to proceed.

- SEMATECH was established to reinvigorate the U.S. semiconductor industry by addressing the technical challenges required for U.S. semiconductor companies to remain competitive in the global market. It was successful in reducing the risk for individual companies by sharing the costs of moving semiconductor technology into the future.

- The University-Industry Demonstration Project (UIDP), a program under the National Academies' Government-University-Industry Research Roundtable, is trying to improve the ability for industry to more effectively collaborate with universities.
- The Combustion Research Facility (CRF) is a very successful DOE User Facility at Sandia National Laboratories (Livermore, CA) that has developed diagnostic techniques to understand engine combustion, enabling new engine designs with improved efficiency.
- Bioenergy Research Centers were established in 2007 by DOE as public-private partnerships to develop practical solutions to the challenge of producing renewable, carbon-neutral energy. The Bioenergy Research Centers are funded by DOE, although industry partners may provide research funding and in-kind donations
- The National Institute for Nano-Engineering (NINE) is a prototype national innovation institute established as a partnership between Sandia National Laboratories and a group of leading companies and universities. NINE is a research consortium designed to broaden student's experience by working on multi-disciplinary, multi-institutional research teams and providing these teams access to top national laboratory facilities. This type of Discovery Science & Engineering Innovation Institute was authorized as part of the America Competes Act.

A majority of panelists called for several measures to make it easier for private-government-university partnerships to form. These include:

1. *Permanent extension of the research and development tax credit, including a credit of up to 40 percent credit for private sector expenditures in university research for selected research projects.*

*"Any expansion of the R&D credit should be collaborative. It should be a 40 percent flat credit for collaboration with universities [and other partners]. Under the current framework, organizations are penalized for collaboration and get less funding." Dr. Robert Atkinson on the lack of financial incentives to promote partnering and the need for a permanent and expanded research and development tax credit to do so.*

2. *Establishing a mission for the national labs to provide access to enable innovation hubs.* This role can be an extension to the successful user facility model that currently makes access to unique national lab facilities available to universities and industry.

*"There is a fabulous opportunity to think about how we create a network of test beds around problems that bring together [the labs, industry and academia]. We need to think about the tools of science and industry and how we'll revolutionize the industry through modeling and simulations. This capacity resides in national labs and universities. The question is how to bring together partnerships to create a competitive advantage . . . We need to look*



*at how to incentivize and move forward more rapidly.” Deborah Wince Smith*

3. *Making partnering easier, including updating intellectual property statutes (e.g., Bayh-Doyle & Stevenson-Wydler).* In fostering better understanding of this issue, it is critical for universities to be better educated on the private sector’s need to bring technologies to market quickly to ensure the payoff of their investments, while the private sector must understand the need for universities to publish findings and results well before the patent and commercialization process is considered.

*“We spend \$20 billion a year on federally sponsored R&D in college and universities [and] spend the same amount of money on federal labs. [We have] no consistent federal policy regarding how to tap into R&D . . . Breaking down walls between government labs and universities is an important thing for us to do.”* Dr. William Kirwan, on the need for greater collaboration and integration among the government, academia, the national labs and the private sector.

*“[Universities] can be supported by legislation to get technology out of universities and into end products that can be used in industry.”* Dr. Robert Berdahl, on the need to establish incentives for making partnering easier and for commercializing basic research.

*“There is a state role in university and industry collaboration [as] an outgrowth of the recession of the late 70s and early 80s in rustbelt states. Our economy is changing, and we need to look at how we can take better advantage of higher education assets. We must marry higher education and industry.”* Daniel Berglund

## PROVIDING TODAY’S EDGE

Creating breakthrough innovations and preparing the U.S. workforce to out-compete the global community in high technology markets require new approaches for the long term. By taking maximum advantage of the existing in the nation’s research and development community, innovation can be accelerated in a time frame consistent with the current U.S. needs to impact markets, including:

- **Transportation:** increased energy efficiency, new fuels, increased vehicle electrification, automotive, rubber/tires, public transportation
- **Electric power generation and distribution:** renewable sources, energy storage to improve base load capability, flexible and reliable electric grid, lower-loss distribution
- **Information technology:** hardware, broadband, network and cyber security
- **Environment:** protection of greenhouse emissions, water and other natural resources
- **Electronics and semiconductors:** aerospace and defense, products to improve energy efficiency, next-generation microelectronics, consumer products

- Advanced materials and chemicals, including nanotechnologies
- Biotech, pharmaceuticals, and medical products
- Manufacturing and industrial processes

There is still a stovepiped approach to competitiveness that needs to be broken down, as noted by Dr. Robert Atkinson:

*We are missing incentives to have universities and their fellowships linked to the economic sector. We must have incentives from the government that glue together all the various pieces of [competitiveness] legislation. We have to expand R&D tax credits to tap into universities and industry in different ways. For labs, we should create incentives for energy frontier research centers. They should be modeled in ways that incentivize partnerships . . . For universities, fellowships should be tied to support of partnerships and consortia.*

The trick is to bring people together to solve problems that really matter. As Dr. Richard Stulen, Sandia National Laboratories, commented

*Successful partnerships are outcome focused. They have developed a clear picture of why they exist, and know the value they are bringing to the industrial sector. They typically will have roadmaps for where they are and where they are trying to go. An aspect of some partnerships is the combination of federal, state and local interests that tend to come together."*

## **SUMMARY**

The 'Partnering for American Competitiveness' conference addressed three key issues related to U.S. competitiveness: (1) the current state of American innovation at a time of economic turmoil in the United States resulting from the global financial crisis; (2) the status and implementation of the congressional legislative response to concerns about the nation's competitiveness outlined in a 2005 National Academies' report, *Rising Above the Gathering Storm: Energizing and Employing America for a Brighter Economic Future*; and (3) how public-private research partnerships and innovation hubs can help improve U.S. competitiveness. The workshop identified five policy areas that could move the U.S. forward by bringing together the best capabilities of academia, the private sector and government, including the national labs. New approaches will be a key to our success in an increasingly competitive world. Other nations are developing new approaches to accelerate innovation and the U.S. needs to be willing to explore new models and update legislative statutes that create barriers to partnering.

**APPENDIX**

*Conference Participants*

Jeff Bingaman

U.S. Senator, D-NM

Bart Gordon

U.S. Representative, D-TN

Judy Biggert

U.S. Representative, R-IL

Chris Van Hollen,

U.S. Representative, D-MD

Thom Mason

Director, Oak Ridge National Laboratory

William Wulf

University of Virginia

Deborah Wince-Smith

President, Council on Competitiveness

William Kirwan

Chancellor, University System of Maryland

Robert Berdahl

President, Association of American Universities

Josh Wilfe

Managing Partner, Lux Capital

Jeffrey Weedman

Vice President for External Business Development, The Proctor & Gamble Company

Jean-Charles Guibert

Director, MINATEC

Johnsee Lee  
President, Industrial Technology Research Institute

Patricia Dehmer  
Deputy Director, Science Program, DOE Office of Science

Robert Atkinson  
President, Information Technology and Innovation Foundation

Daniel Berglund  
President and CEO, SSTI

Richard Stulen  
Vice President and CRO, Sandia National Laboratory

Larry Sumney  
CEO, Semiconductor Research Corporation

Susan Butts  
Director of External Technology, Dow Chemical

Chris Hayter  
Director, Economic Development, National Governors Association

Keneth Galloway  
Dean of Engineering, Vanderbilt University

Christopher Hill  
Professor, George Mason University

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Howard H. Baker Jr. Center for Public Policy

The University of Tennessee • 1640 Cumberland Avenue • Knoxville, TN 37996-3340  
865-974-0931 • 865-974-8777 (fax) • [www.bakercenter.utk.edu](http://www.bakercenter.utk.edu) • e-mail: [bakercenter@utk.edu](mailto:bakercenter@utk.edu)