

RESPONSES TO THE TEN QUESTIONS

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1. HOW SHOULD THE NEW DNI ADDRESS DECENTRALIZED TERRORISM?

Decentralized terrorism represents a complex challenge for any intelligence organization. In the aftermath of 9/11, military and law enforcement agencies have made marked inroads at destabilizing the more traditional formulations of terrorist groups. This destabilization has caused these groups to morph often into smaller, less-visible operational cells that are more loosely related to—or even virtually independent from—any centralized command-and-control entity.¹

Within that realm, the most problematic appears to be that practiced by lone-wolf actors. As Robert S. Litt, the General Counsel of the Office of the Director of National Intelligence (DNI) testified,

[T]he growing threat from individuals, both at home and abroad, whose affiliation with foreign terrorist organizations, if any, is often vague. Although such violent extremists come in many forms, they often operate independent of one another and largely independent of any organized terrorist group overseas such as al-Qa'ida.²

Exactly how the DNI might address this issue requires some explanation of his statutory role. Though a position like the DNI had been discussed for decades, it did not actually come into being until 2005 in an effort to address one of the key criticisms of the 9/11 Commission, namely, the lack of a coordinated intelligence-gathering effort.³ The idea emerged that there needed to be an intelligence czar to make certain that the often-segmented intelligence community worked together collegially and shared

1. See generally JOHN ROLLINS, CONG. RESEARCH SERV., R41070, AL QAEDA AND AFFILIATES: HISTORICAL PERSPECTIVE, GLOBAL PRESENCE, AND IMPLICATIONS FOR U.S. POLICY (2011), available at <http://www.fas.org/sgp/crs/terror/R41070.pdf> (describing how al Qaeda has responded to “pressures from the security community” and evolved into a “diffuse global network”).

2. *Reauthorizing the Patriot Act: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Sec of the H. Comm. on the Judiciary.*, 112th Cong. (2011) (statement of Hon. Robert S. Litt, Gen. Couns., Office of the Director of National Intelligence), available at http://www.dni.gov/testimonies/20110309_testimony.pdf.

3. See RICHARD A. BEST, JR., CONG. RESEARCH SERV., R41295, INTELLIGENCE REFORM AFTER FIVE YEARS: THE ROLE OF THE DIRECTOR OF NATIONAL INTELLIGENCE (DNI) (2010), available at <http://www.fas.org/sgp/crs/intel/R41295.pdf>; *History of the Office of the Director of National Intelligence*, OFFICE OF THE DIRECTOR OF NAT'L INTELLIGENCE, <http://www.dni.gov/aboutODNI/history.htm> (last visited Apr. 10, 2011).

information on a timely basis to prevent another tragedy.⁴

According to the Intelligence Reform and Terrorism Prevention Act of 2004,⁵ the DNI is supposed to ensure that the President and other senior government officials receive intelligence that is “timely, objective, independent of political considerations, and based upon all sources available to the intelligence community and other appropriate entities.”⁶ That said, the DNI is perhaps more of a coordinator as opposed to the one responsible for the design of intelligence methodologies or the actual gathering of intelligence.

The DNI does have—at least theoretically—influence over how intelligence community resources will be spent. Today that community is very well funded, with spending having tripled in little more than a decade to more than \$80 billion.⁷ The Office of the DNI itself now has a staff of more than 1,600 plus additional contract personnel.⁸ Furthermore, statutory tools such as the USA PATRIOT Act and the Foreign Intelligence and Surveillance Act (FISA) give significant power to intelligence agencies to track terrorists, although key FISA provisions are set to expire in May 2011.⁹

One must wonder, however, just how well the DNI concept is working in practice. In a widely-reported incident in late 2010, a television journalist caught DNI James Clapper off guard while questioning him during a broadcast interview about the “widely-covered arrest of 12 men in an alleged terror plot in London.”¹⁰

4. See generally Thomas Fingar, *Office of the Director of National Intelligence: Promising Start Despite Ambiguity, Ambivalence, and Animosity*, in *THE NATIONAL SECURITY ENTERPRISE: NAVIGATING THE LABYRINTH* 139–40 (Roger Z. George & Harvey Rishikof eds., 2011) (detailing that post-9/11 assessments revealed the inadequate information sharing among intelligence institutions).

5. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638.

6. § 102A(2), 118 Stat. at 3644.

7. Ken Dilanian, *Overall U.S. Intelligence Budget Tops \$80 Billion*, L.A. TIMES, Oct. 28, 2010, <http://articles.latimes.com/2010/oct/28/nation/la-na-intel-budget-20101029>.

8. BEST, *supra* note 3, at Summary.

9. See generally EDWARD C. LIU, CONG. RESEARCH SERV., R40138, AMENDMENTS TO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA) SET TO EXPIRE MAY 27, 2011 (2011), available at <http://www.fas.org/sgp/crs/intel/R40138.pdf> (detailing amendments that increased the ability of agencies to gather intelligence).

10. Bradley Blackburn, *Director of National Intelligence James Clapper Not Briefed on London Arrests Before TV Interview*, ABC NEWS, Dec. 22, 2010, <http://abcnews.go.com/US/director-national-intelligence-james-clapper-briefed-london-arrests/story?id=12458010>.

Clapper was forced to admit he was unaware of the incident.¹¹ The intelligence community also came under fire in early 2011 for seemingly failing to anticipate the seismic political events in the Arab world, including the collapse of Hosni Mubarak's regime in Egypt.¹²

Thomas Fingar argues that the substantial resources focused on Iraq and Afghanistan has "inevitable consequences" for the intelligence community's ability to monitor "developments germane to other national security issues."¹³ Yet there is also evidence of real effectiveness. In fact, one could argue, as researchers John Mueller and Mark G. Stewart do, that—given the relative paucity of incidents since 9/11 involving Americans—the risk of terrorism today is actually "so low that spending to further reduce its likelihood or consequences is scarcely justified."¹⁴ Clearly something must be working right since the inclination of terrorist adversaries to harm Americans appears undiminished.

In any event, it would be a mistake to assume that the DNI can solve the problem of decentralized terrorism by himself. A major limitation on his authority is his obligation not to "abrogate the statutory or other responsibilities of the heads of departments of the United States Government or the Director of the Central Intelligence Agency."¹⁵ Almost by definition, the DNI is confined to managing and advocating. But advocacy may be what is most needed. Consider this aspect of the decentralized terrorism problem:

Techniques for acquiring and analyzing information on small groups of plotters differ significantly from those used to evaluate the military capabilities of other countries, with a much higher need for situational awareness of third world societies. U.S. intelligence efforts are complicated by unfilled requirements for foreign language expertise.¹⁶

11. *Id.*

12. See, e.g., Kimberly Dozier, *Spy Chiefs Defend Intelligence Community's Performance, But Get It Wrong on Egypt Again*, ASSOCIATED PRESS, Feb. 11, 2011, <http://www.cnn.com/news/article/spy-chiefs-defend-intelligence-community>.

13. Fingar, *supra* note 4, at 150.

14. John Mueller & Mark G. Stewart, *Hardly Existential: Thinking Rationally About Terrorism*, FOREIGN AFF., Apr. 2, 2010, <http://www.foreignaffairs.com/articles/66186/john-mueller-and-mark-g-stewart/hardly-existential>.

15. Exec. Order No. 13470, 73 Fed. Reg. 45325, 45329 (July 30, 2008).

16. RICHARD A. BEST, JR., CONG. RESEARCH SERV., RL33539, INTELLIGENCE

Accordingly, the DNI could, for example, advocate for the means to help fill needed foreign-language positions, even if the heads of departments may choose to not give them the requisite priority. Additionally, although not explicitly in the DNI's charter, he could advocate for greater protection of civil liberties and oversight.¹⁷ As the horror of 9/11 fades in the public mind, we are beginning to see the first inklings of public opposition to intrusive government activity in the name of counterterrorism.¹⁸ The DNI's overt support for civil liberties and privacy protections could help ensure the public support that a campaign against decentralized terrorism demands.

Perhaps the best way to address this problem is to broaden the number of actors concerned beyond the intelligence community. Retired Army Brigadier General David Grange recently addressed the issue of the decentralized nature of modern terrorist organizations.¹⁹ His solution looks well beyond the intelligence agencies; in fact, he recommends the "incorporation and synchronization of America's economic and private sectors into government efforts, referred to as a 'Whole of Nation' approach."²⁰ His belief that "private sector mobilization . . . on a scale not yet seen in the Global War on Terror" to address this threat is one well worth serious consideration.²¹

2. HOW SHOULD AMERICA ADDRESS THE THREAT OF HOMEGROWN TERRORISTS?

How America should address the threat of homegrown terrorism, and how states might work to prevent radicalization of certain ethnic groups, are rather different questions. Historically, terrorism in this country has, in fact, often been homegrown. The

ISSUES FOR CONGRESS at Summary (2011), available at <http://www.fas.org/sgp/crs/intel/RL33539.pdf>.

17. See, e.g., Elizabeth Rindskopf Parker, *Civil Liberties in the Struggle Against Terror*, in LEGAL ISSUES IN THE STRUGGLE AGAINST TERROR 141 (John Norton Moore & Robert F. Turner, eds., 2010).

18. See, e.g., Fareed Zakaria, *What America Has Lost: It's Clear We Overreacted to 9/11*, NEWSWEEK, Sept. 4, 2010, at 18, available at <http://www.newsweek.com/2010/09/04/zakaria-why-america-overreacted-to-9-11.html> (discussing the emergence of the "national security state").

19. David Grange, *Defeating Decentralized Terrorism*, J. INT'L SEC. AFF., Fall/Winter 2010, <http://www.securityaffairs.org/issues/2010/19/grange.php>.

20. *Id.*

21. *Id.*

classic recent example is Timothy McVeigh who was executed for his role in the 1995 bombing of the federal building in Oklahoma City that killed 168 people. Today, however, the most serious threat is principally externally sourced in the extremist ideology expressed by Osama bin Laden, his adherents, and other copycats. A few homegrown terrorists have been dangerously radicalized by it.

It is not surprising that extremists would welcome such radicalization. As already suggested, it appears that terrorist groups have come to realize that security measures taken since 9/11 have made replicating the horrific events of 9/11 difficult. Organizing terrorists overseas and deploying them to the United States involves a number of steps that expose them to compromise. Thus, an ever-greater effort has been made to recruit Americans and other persons with ready access to the United States. Persons holding valid American passports are of immense value to terrorist organizations because they can travel more freely and with less scrutiny.

Consequently, law enforcement has stepped up efforts to identify potential homegrown threats. Doing so has led to investigations focused on particular groups, including cases where informants have infiltrated mosques and posed as Islamic extremists in an effort to draw out radicals.²² This effort has not been without controversy as Attorney General Eric Holder learned when he found himself answering charges of discrimination after several FBI stings involving Muslims.²³ Holder insisted that without such strategies “government simply could not meet its most critical responsibility of protecting American lives.”²⁴

Notwithstanding such techniques, some still criticize the failure to focus more explicitly on *Islamic* extremism. For example, after the tragic killings at Fort Hood, Texas, Senators Joseph Lieberman and Susan Collins held hearings on the issue and produced a February 2011 report castigating the Department of Defense.²⁵ Specifically, they blasted the DOD for not specifically

22. Jerry Markon, *Attorney General Eric Holder Defends Legality of FBI Stings Against Muslim Groups*, WASH. POST, Dec. 11, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/10/AR2010121007733.html>.

23. *Id.*

24. *Id.*

25. See SENS. JOSEPH I. LIEBERMAN & SUSAN M. COLLINS, U.S. SENATE COMM. ON HOMELAND SEC. AND GOV. AFFAIRS, A TICKING TIME BOMB: COUNTERTERRORISM

naming the threat represented by the Fort Hood attack for what they believe it was, that is, “violent Islamist extremism.”²⁶ Shortly thereafter, Representative Peter T. King held controversial hearings focused on Muslims entitled “The Extent of Radicalization in the American Muslim Community and that Community’s Response.”²⁷

It is important, however, to put this issue in context. As a new report from the Triangle Center on Terrorism and Homeland Security points out, the number of terrorism cases involving Muslim Americans actually declined in 2010.²⁸ But more importantly, the report shows that only 161 incidents of any kind have occurred since 9/11. This figure is contrasted with the more than 150,000 murders committed during the same time frame in the United States.²⁹

Part of the effort to counter radicalization must be at the national level. For example, the Congressional Research Service concludes that the Internet is used by extremists as a tool “for radicalization and recruitment, a method of propaganda distribution, a means of communication, and ground for training.”³⁰ Countering such web-based activities is best conducted on a national level. Nevertheless, there is an important role for local communities.

Brian Jenkins, one of America’s foremost experts on terrorism, testified before Congress that homegrown terrorism is best deterred on the local level.³¹ Due to the individualistic quality of

LESSONS FROM THE U.S. GOVERNMENT’S FAILURES TO PREVENT THE FORT HOOD ATTACK (2011), available at <http://www.investigativeproject.org/documents/testimony/377.pdf>.

26. *Id.* at 1.

27. See *The Extent of Radicalization in the American Muslim Community and that Community’s Response: Hearing Before the H. Comm. on Homeland Sec.*, 112th Cong. (2011) (statement of Peter T. King, Chairman, H. Comm. on Homeland Sec.), available at <http://homeland.house.gov/hearing/hearing-%E2%80%9Cextent-radicalization-american-muslim-community-and-communitys-response%E2%80%9D>.

28. CHARLES KURZMAN, TRIANGLE CTR. ON TERRORISM AND HOMELAND SEC., MUSLIM-AMERICAN TERRORISM SINCE 9/11: AN ACCOUNTING (2011), available at http://sanford.duke.edu/centers/tcths/about/documents/Kurzman_Muslim-American_Terrorism_Since_911_An_Accounting.pdf.

29. *Id.* at 4.

30. CATHERINE A. THEOHARY, CONG. RESEARCH SERV., R14674, TERRORIST USE OF THE INTERNET: INFORMATION OPERATIONS IN CYBERSPACE AT SUMMARY (2011), available at <http://www.fas.org/sgp/crs/terror/R41674.pdf>.

31. *Internet Terror Recruitment and Tradecraft: How Can We Address an Evolving Tool While Protecting Free Speech?: Hearing Before the Subcomm. on Intelligence, Information Sharing, and Terrorism Risk Assessment of the H. Comm. on Homeland Sec.* 111th Cong. (2010) (statement of Brian Jenkins, Senior Adviser, RAND Corp.),

radicalization in the United States, Jenkins suggests the government counter it “not through ideological or theological debate with al Qaeda’s online communicators, but by deterrence through arrests, by treating terrorists and would-be terrorists as ordinary criminals, [and] by stripping them of political pretensions.”³²

Jenkins also believes, as do other experts, that gathering intelligence is vital and that local police departments are best placed to do so. While law enforcement, according to Jenkins, needs to coordinate better at all levels, real progress requires a close relationship with the communities where radicalization may occur. This relationship creates an environment wherein tips and warnings are provided to authorities. It may also result in the “quiet discouragement” of radicalization and increased “interventions by family members and friends.”³³

Analysts Jerome Bjelopera and Mark Randol note that American Muslim, Arab, and Sikh communities need to “define themselves as distinctly American communities who, like other Americans, desire to help prevent another attack.”³⁴ Doing so, however, also requires leaders outside such communities to strike a fair and just balance between security and liberty. It is essential that trust be built within the framework of preserving the freedom of community members.

As the U.S. Attorney General rightly points out, “We don’t want to stigmatize, we don’t want to alienate entire communities.”³⁵ Few things could be more counterproductive than for that to happen. Cooperative community projects with all existing immigrant populations can help build bridges and encourage leaders of those communities to stand strong against terrorists that might emerge from their groups.

available at <http://chsdemocrats.house.gov/SiteDocuments/20100526101532-91592.pdf>.

32. *Id.* at 5.

33. *Id.* at 6.

34. JEROME P. BJELOPERA & MARK A. RANDOL, CONG. RESEARCH SERV., R41416, AMERICAN JIHADIST TERRORISM: COMBATting A COMPLEX THREAT 4 (2010), *available at* <http://www.fas.org/sgp/crs/terror/R41416.pdf>.

35. Jeremy Pelofsky, *Attorney General Warns against Alienating Muslims*, REUTERS, Mar. 9, 2011, <http://www.reuters.com/article/2011/03/10/us-usa-muslims-holder-idUSTRE72907V20110310>.

3. IS PRESIDENT OBAMA'S USE OF PREDATOR STRIKES IN AFGHANISTAN AND PAKISTAN CONSISTENT WITH INTERNATIONAL LAW AND INTERNATIONAL STANDARDS?

Debates about strikes by remotely piloted vehicles (RPVs)³⁶ have generated a virtual cottage industry in academia and elsewhere that continues unabated. The controversial report of the UN Special Rapporteur Phillip Alston typifies the hostility of many towards this weaponry.³⁷ While grudgingly conceding that the weapons are in fact legal, Alston nevertheless conjectures that “commanders will be tempted to interpret the legal limitations on who can be killed, and under what circumstances, too expansively.”³⁸

All of this is pure speculation; indeed, there is utterly no evidence that the commanders and operators concerned take anything but a thoroughly professional approach to their responsibilities. The evidence that does exist militates to the contrary. For example, in January 2011, it was reported that although the frequency of RPV strikes has increased in Pakistan, the number of civilian casualties has actually decreased.³⁹ This parallels a March 2011 UN report concerning civilian casualties in Afghanistan that found that “although the number of air strikes increased exponentially, the number of civilian casualties from air strikes decreased in 2010.”⁴⁰

As to the program's legal basis, Harold Koh, the Legal Adviser

36. For a description of an RPV, see *MQ-1B Predator Unmanned Aerial Vehicle*, U.S. AIR FORCE (July 20, 2010), <http://www.af.mil/information/factsheets/factsheet.asp?fsID=122>. See generally Christopher J. Bowie & Michael W. Isherwood, *The Unmanned Tipping Point*, AIRFORCE-MAGAZINE.COM (Sept. 2010), <http://www.airforce-magazine.com/MagazineArchive/Pages/2010/September%202010/0910rpa.aspx>.

37. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, *Study on Targeted Killings*, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) (by Philip Alston), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

38. *Id.* at 24.

39. Tony Capaccio & Jeff Bliss, *U.S. Said to Reduce Civilian Deaths After Increasing CIA Pakistan Strikes*, BLOOMBERG, Jan. 31, 2011, <http://www.bloomberg.com/news/2011-01-31/u-s-said-to-reduce-civilian-deaths-after-increasing-cia-pakistan-strikes.html>.

40. U.N. ASSISTANCE MISSION IN AFG., AFGHANISTAN: ANNUAL REPORT 2010 PROTECTION OF CIVILIANS IN ARMED CONFLICT, 24 (Mar. 2011), available at <http://unama.unmissions.org/Portals/UNAMA/human%20rights/March%20PoC%20Annual%20Report%20Final.pdf>.

to the State Department, outlined the administration's position in an address to the American Society of International Law in March of 2010.⁴¹ This speech made it apparent that RPV strikes by all U.S. entities are subject to a careful legal analysis and that targeting is based upon established principles of international law. Essentially, he contends that "[A]s a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law."⁴²

Professor Mary Ellen O'Connell is the leading proponent of the view that RPV strikes in Pakistan violate international law.⁴³ Much of her position is based on disputed facts such as the notion that Pakistani sovereignty is being violated, or whether or not an armed conflict exists outside of Iraq and Afghanistan. Recent reports undermine at least her first contention. For example, a *New York Times* story published in March 2011 said that "publicly, the Pakistani government and the powerful military condemn the drone strikes, though privately they acknowledge their utility."⁴⁴ What was unusual, the *Times* said, was that "[A] top Pakistani general leading troops in the volatile North Waziristan region has acknowledged the effectiveness of the American drone strikes against foreign militants"⁴⁵

Still, occasional complaints about civilian casualties emerge.⁴⁶

In short, the international law rationale for the RPV strikes that have occurred outside of Iraq and Afghanistan appears to be supportable.⁴⁷ More problematic is the propriety of RPs being

41. Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Keynote Address at the Annual Meeting of the American Society of International Law, The Obama Administration and International Law (Mar. 25, 2010), available at <http://www.state.gov/s/1/releases/remarks/139119.htm>.

42. *Id.*

43. See, e.g., Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt, ed., forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144.

44. Salman Masood, *Pakistani General, in Twist, Credits Drone Strikes*, N.Y. TIMES, Mar. 9, 2011, <http://www.nytimes.com/2011/03/10/world/asia/10drones.html>.

45. *Id.*

46. See, e.g., Alex Rodriguez, *Pakistan Denounces U.S. Drone Strike*, L.A. TIMES, Mar. 18, 2011, <http://articles.latimes.com/2011/mar/18/world/la-fg-pakistan-drone-attack-20110318>.

47. See, e.g., Norman G. Printer, Jr., *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J.

operated by persons other than uniformed members of the armed forces. Although one respected scholar calls them America's own unlawful combatants and insists that they are acting "contrary to the laws and customs of war,"⁴⁸ the better view seems to be that civilian operation of the RPV systems is not itself a war crime. Instead, they merely lose the immunity that uniformed combatants enjoy in wartime and therefore may be subject to domestic prosecution by a hostile state.

4. IS *CURTISS-WRIGHT*'S CHARACTERIZATION OF EXECUTIVE POWER CORRECT?

The 1936 case of *U.S. v. Curtiss-Wright Export Corp.*⁴⁹ remains a mainstay of the analysis of executive power in foreign affairs. It is famous—perhaps *infamous*—for Justice Sutherland's quoting of John Marshall's assertion (while a member of the House of Representatives) that the "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."⁵⁰

As Louis Fisher and others have pointed out, this interpretation has been subject to considerable scholarly debate.⁵¹ This debate has not, in any event, deterred the Supreme Court from recognizing its own authority and role—and that of Congress. According to Fisher, the "Court itself has not denied to Congress its constitutional authority to enter the field and reverse or modify presidential decisions in the area of national security and foreign affairs."⁵² Nevertheless, after 9/11, *Curtiss-Wright* became a principle pillar of the unitary theory of presidential power that marked the thinking of the Bush administration's expansive view of

INT'L L. & FOREIGN AFF. 331, 381 (2003) (concluding that a recent Predator strike in Yemen was "an appropriate exercise of self-defense in the continuing war with al-Qaeda that comported with the laws and customs of war"); Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT. L. & POL'Y 101,137-38 (2010) (noting that "properly conducted drone attacks . . . do not violate the law of armed conflict").

48. Gary Solis, *CIA Drone Attacks Produce America's Own Unlawful Combatants*, WASH. POST, Mar. 12, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/11/AR2010031103653.html>.

49. 299 U.S. 304 (1936).

50. *Id.* at 319 (internal quotation marks omitted).

51. LOUIS FISHER, *THE "SOLE ORGAN" DOCTRINE, STUDIES ON PRESIDENTIAL POWER IN FOREIGN RELATIONS* 28 (2006).

52. *Id.*

the unilateral and exclusive nature of presidential authority.⁵³

Harold Koh, while an academic, argued in his 1990 book, *The National Security Constitution: Sharing Power After the Iran-Contra Affair*, that the Supreme Court's 1952 decision in *Youngstown Sheet & Tube Co. v. Sawyer*⁵⁴ definitively rejected the interpretation of *Curtiss-Wright* that seemed to authorize unfettered presidential power.⁵⁵ Justice Jackson's concurring opinion in *Youngstown*⁵⁶ (often referred to as the Steel Seizure case) set forth his three-stage model of presidential power, which argued that its highest expression necessarily involved approval of Congress and its lowest ebb was when the President acts contrary to the express or implied will of Congress.⁵⁷

Though Koh's endorsement of the *Youngstown* approach was attacked by Bush lawyer John Yoo⁵⁸ and, more recently, by Professor Robert Turner,⁵⁹ it nevertheless appeared that Koh's rejection of unfettered presidential authority would prevail under the Obama administration. Indeed, as a candidate Senator Obama insisted that "The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation."⁶⁰

53. See Sue Burum, *Constitutional Theories of Executive Power: Effects on Current and Future Decision Making in the Executive Branch and the U.S. Supreme Court*, 33-2 NAT'L SOC. SCI. J. 28 (2010).

54. 343 U.S. 579 (1952).

55. HAROLD KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 211-12 (1990).

56. *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring).

57. *Id.* at 636-37. Justice Jackson's model contends:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

Id.

58. See generally John Yoo, *THE POWERS OF WAR AND PEACE* (2005) (pointing to three major flaws in the traditional analysis of American foreign relations power).

59. See Robert F. Turner, *U.S. Constitutional Issues in the Struggle Against Terror*, in *LEGAL ISSUES IN THE STRUGGLE AGAINST TERROR* 81, 96-102 (John Norton Moore and Robert F. Turner, eds., 2010).

60. Charlie Savage, *Barack Obama's Q&A*, BOS. GLOBE, Dec. 20, 2007,

Initially, the Obama administration seemed wedded to the Koh/*Youngstown* formulation of presidential authority as to national security issues. For example, in 2009 when the Justice Department withdrew the Bush administration's definition of "enemy combatant" for Guantanamo detainees, it crowed about the fact that the revised definition does "not rely on the President's authority as Commander-in-Chief."⁶¹ Instead, it drew authority from the AUMF as "informed by principles of the laws of war."⁶² Fast forward to 2011, and President Obama's exclusive reliance on congressional authority fades. For example, when announcing changes to the process of periodic review of detainees, the President cited his own constitutional authority along with the authority delegated to him under the AUMF.⁶³

Perhaps the most graphic example of the Obama administration's reversion to more traditional presidential conceptions of executive power, à la *Curtiss-Wright*, is reflected in his report to Congress about the initiation of hostilities in Libya in March of 2011. Specifically, President Obama stated that he took the action—without a declaration of war or other, explicit congressional authorization—pursuant to what he described as his "constitutional authority to conduct U.S. foreign relations and as commander in chief and Chief Executive."⁶⁴ Thus, the *Curtiss-Wright* approach to executive power seems to retain a strong measure of vitality; indeed, we may see it ever more frequently relied upon by the Obama administration even as it disavows formal adherence to the Bush administration's *Curtiss-Wright* exultation of the sole-organ conceptualization of presidential power.

<http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA> (quoting Sen. Barack Obama).

61. Press Release, U.S. Dep't of Justice, Department of Justice Withdraws "Enemy Combatant" Definition for Guantanamo Detainees (Mar. 13, 2009), available at <http://www.justice.gov/opa/pr/2009/March/09-ag-232.html>.

62. Respondent's Memorandum Regarding the Gov't's Detention Auth. Relative to Detainees Held at Guantanamo Bay at 1, *In re Guantanamo Bay Detainee Litigation*, No. 05-0763 (D.C. Cir. Mar. 13, 2009), available at <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf>.

63. Exec. Order No. 13567, 76 Fed. Reg. 13, 277 (Mar. 7, 2011) ("By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Authorization of Military Force of September 2001 . . . I hereby order as follows . . .")

64. Press Release, The White House, Letter from the President Regarding Commencement of Operations in Libya (Mar. 21, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya>.

5. HAS PRESIDENT OBAMA IMPROVED BUSH'S NATIONAL SECURITY POLICIES?

Many observers of all political stripes believe that the Obama administration's policies are remarkably consistent with those of President Bush's second term.⁶⁵ As Professors Jimmy Gurulé and Geoffrey Corn put it:

Contrary to the hopes of many of the supporters of candidate Obama, President Obama does not appear to be willing to abandon the wartime model for dealing with transnational terrorism. Instead, like his predecessor President Bush, he has continued to invoke all components of national power, including the military component, to deal with differing aspects of the struggle against transnational terrorism.⁶⁶

With some important exceptions,⁶⁷ there is little to dispute such assessments. It should be said, of course, that one of Obama's first acts as President was to forbid (via executive order) torture and revise other harsh interrogation practices.⁶⁸ In addition, as Harold Koh notes, the administration has taken what may be called a friendlier approach to such international institutions as the International Criminal Court and the UN's Human Rights Council.⁶⁹ Whether these are deemed improvements is obviously a matter of perspective.

What is particularly interesting is that for all its rhetoric about

65. See, e.g., John B. Bellinger III, Op-Ed, *More Continuity Than Change*, N.Y. TIMES, Feb. 14, 2010, <http://www.nytimes.com/2010/02/15/opinion/15iht-edbellinger.html> (“[T]he international community may find that there will be more continuity than change between the Bush administration's pragmatic second term and the Obama administration.”); Kenneth Roth, *Empty Promises? Obama's Hesitant Embrace of Human Rights*, FOREIGN AFF., Mar./Apr. 2010, <http://www.foreignaffairs.com/articles/66034/kenneth-roth/empty-promises> (discussing the Obama administration's shortcomings on human rights issues).

66. JIMMY GURULÉ & GEOFFREY S. CORN, PRINCIPLES OF COUNTER-TERRORISM LAW x (2011).

67. See e.g., HUMAN RIGHTS FIRST, ASSESSING THE OBAMA ADMINISTRATION'S RECORD OF COMPLIANCE WITH THE RULE OF LAW AND HUMAN RIGHTS IN NATIONAL SECURITY POLICY (2011), available at <http://www.humanrightsfirst.org/wp-content/uploads/HRF-Natl-Sec-Rep-Card.pdf> (giving President Obama high marks on “standing firm against” torture and secret detention but chastising him over his policy on detainee review, indefinite detention, and “accountability of torture”).

68. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

69. Koh, *supra* note 41.

open government,⁷⁰ the Obama administration's actions tend to demonstrate otherwise. The *Associated Press* reported that "[t]wo years after Obama pledged to reverse the Bush administration's penchant for secrecy . . . [requestors] grapple[] with many of the same frustrating roadblocks and head-scratching inconsistencies."⁷¹ Further, the Obama administration fought to prevent disclosures under the Freedom of Information Act about the Navy's storage of explosives at a base in Washington State by claiming an exemption designed for internal personnel rules, only to be handed a 8-1 defeat by the Supreme Court.⁷²

President Obama's administration is proving itself to be just as aggressive as Bush's in asserting the state secrets privilege.⁷³ The administration successfully invoked the privilege to block a lawsuit on behalf of five extraordinary-rendition victims.⁷⁴ Now the administration is not only battling to assert the privilege to block civil litigation in cases involving Boeing and General Dynamics before the Supreme Court,⁷⁵ it also raised state secrets to bar inquiry into allegations that a U.S. citizen accused of terrorism activities was marked for an unlawful extrajudicial targeted killing.⁷⁶

Furthermore, the Obama administration is proving to be just as uncompromising as the Bush administration with respect to domestic surveillance. It vigorously defended—and lost—a lawsuit arising out of a now-defunct Bush-era program that permitted the National Security Agency to "monitor phone calls . . . Internet activity and other electronic communications entering or leaving the U.S." without getting warrants.⁷⁷ In 2006, the Justice Department argued that what it described as a terrorist surveillance

70. See, e.g., Press Release, U.S. Dep't of Justice, Justice Department Increases Transparency with Launch of FOIA.gov Website, Commemorates Sunshine Week (Mar. 14, 2011), available at <http://www.justice.gov/opa/pr/2011/March/11-opa-321.html>.

71. *Familiar Barriers Slow Obama's Transparency Drive*, ASSOCIATED PRESS, Mar. 18, 2011, http://news.yahoo.com/s/ap/20110318/ap_on_re_us/us_sunshine_week_foia_files.

72. See *Milner v. Dep't of the Navy*, 131 S.Ct. 1259, 1259 (2011).

73. See generally *State Secrets Privilege*, N.Y. TIMES (Jan. 19, 2011), http://topics.nytimes.com/topics/reference/timestopics/subjects/s/state_secrets_privilege/index.html (describing the state secrets privilege).

74. See *Mohamed et al. v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc).

75. See *McDonnell Douglas Corp. et al. v. United States*, 567 F.3d 1340 (Fed. Cir. 2009), cert. granted, 131 S. Ct. 62 (2011).

76. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 52 (D.D.C. 2010).

77. William Mathews, *DoD to Protect Some Civilian Infrastructure*, DEFENSE NEWS, Oct. 18, 2010, at 6.

program could legally bypass FISA procedures because the President's authorization to do so was incident to his commander-in-chief authority.⁷⁸

Nevertheless, in late December of 2010 U.S. District Court Judge Vaughn Walker ordered the "government to pay more than \$2.5 million in lawyer fees and damages after he concluded investigators wiretapped the phones of a suspected terrorist organization."⁷⁹ In another development, a court for the first time granted standing to a variety of groups to challenge FISA surveillance.⁸⁰ The point is that the Obama administration is essentially fighting the same fights against civil libertarians as the Bush administration did, just less effectively.

Moreover, *Time Magazine* reports that the Obama administration is "rapidly establishing a record as the most aggressive prosecutor of alleged government leakers in U.S. history."⁸¹ Of particular concern to civil libertarians is the report that, in connection with one of the investigations, federal authorities obtained *New York Times* journalist James Risen's "credit reports, credit-card and bank statements and airline-travel itineraries."⁸² The application of such investigatory tactics against a bona fide journalist is very unusual and troubling.

Finally, the Obama administration's controversial decision to engage in hostilities in Libya without a declaration of war—or much in the way of consultation with Congress—is consistent with approach taken during the Bush administration. Again, on balance the policies of the Obama administration are in most respects indistinguishable from those of Bush's second term. To the extent their policies may differ, Obama's policies tend to be more aggressive.

78. See U.S. DEP'T OF JUSTICE, THE NSA PROGRAM TO DETECT AND PREVENT TERRORIST ATTACKS: MYTH V. REALITY (2006), available at http://www.justice.gov/opa/documents/nsa_myth_v_reality.pdf.

79. Paul Elias, *Judge Orders Feds to Pay \$2.5 million in Wiretapping Case*, WASH. TIMES, Dec. 22, 2010, <http://www.washingtontimes.com/news/2010/dec/22/judge-orders-feds-pay-25m-wiretapping-case/>.

80. See *Amnesty Int'l USA v. Clapper*, No. 09-4112-CV, 2011 WL 941524, at *25 (2d Cir. Mar. 21, 2011); see also Mark Hamblett, *2nd Circuit Grants Standing in Challenge to FISA*, N.Y. L. J., Mar. 25, 2011, http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202487847765&2nd_Circuit_Grants_Standing_in_Challenge_to_FISA&slreturn=1&hblogin=1.

81. See Mark Benjamin, *Wikileaks and Whistleblowers: Obama's Hard Line*, TIME, Mar. 11, 2011, <http://www.time.com/time/nation/article/0,8599,2058340,00.html>.

82. See *id.*

6. SHOULD KHALID SHEIKH MOHAMMED EVER BE BROUGHT TO TRIAL?

Of course Khalid Sheikh Mohammed (KSM) should be brought to trial. KSM is not just another insurgent picked up on the battlefield. He is the alleged architect of 9/11. It would be a disservice to the victims and, more generally, to accepted notions of justice not to try him. As Senator John Cornyn says, "The families of those who died have waited 10 years, and they deserve, at long last, the peace of mind and closure that [the trial of KSM and others] will bring."⁸³

The central question appears to be not so much about the wisdom of a trial per se but rather which forum should be utilized. The Obama administration's plan to try him and others in domestic civilian courts foundered under a storm of political opposition by an electorate concerned with the dangers of bringing alleged terrorists into the United States.⁸⁴ Further, there are evidentiary issues related to KSM having been waterboarded as many as 183 times. Such issues could thwart the admission of evidence as it did in the case of Ahmed Ghailani, who faced charges related to the bombings of U.S. embassies in Kenya and Tanzania in 1998.

Ghailani's trial was complicated by a ruling by Judge Lewis A. Kaplan that a major prosecution witness could not be called because his discovery was the fruit of a tree poisoned by coercive interrogation techniques.⁸⁵ Thereafter, Ghailani was acquitted on 279 of the 280 charges against him. This result does not bode well for such prosecutions, even though the White House insists that the Ghailani verdict does not undermine their intent to hold terrorists accountable in criminal forums.⁸⁶

83. Press Release, Sen. John Cornyn, Cornyn Applauds President for Reconsidering GITMO/Military Tribunals (Mar. 8, 2011), *available at* http://cornyn.senate.gov/public/index.cfm?p=NewsReleases&ContentRecord_id=cacd686f-7331-48a7-a27a-3dafccfb8470.

84. Peter Finn & Anne E. Kornblut, *Opposition to U.S. Trial Likely to Keep Mastermind of 9/11 in Detention*, WASH. POST, Nov. 12, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/12/AR2010111207508.html?hpid=moreheadlines>.

85. Benjamin Weiser, *Judge Bars Major Witness from Terrorism Trial*, N.Y. TIMES, Oct. 7, 2010, <http://www.nytimes.com/2010/10/07/nyregion/07ghailani.html>.

86. Anne E. Kornblut & Peter Finn, *White House Undeterred After Ghailani Terror Case Verdict*, WASH. POST, Nov. 18, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/17/AR2010111705663.html>.

When Congress put civilian trials out of reach by barring the use of DOD funds to transfer detainees to the United States, the President made it clear that the prohibition “represents a dangerous and unprecedented challenge to critical executive branch authority to determine when and where to prosecute Guantanamo detainees, based on the facts and the circumstances of each case and our national security interests.”⁸⁷ And indeed it does seem that such decision ought to be left to the executive branch.

Regardless, it certainly seems that, as the President said, the “prosecution of terrorists in Federal court is a powerful tool in our efforts to protect the Nation and must be among the options available to us.”⁸⁸ In any event, the March 2011 decision to restart military commissions at Guantanamo may represent the best near-term opportunity to put KSM before a tribunal capable of holding him accountable.⁸⁹

7. IS THE THREAT POSED BY A NUCLEAR-ARMED IRAN AS SERIOUS AS THE P5+1 (UNITED STATES, UNITED KINGDOM, RUSSIA, CHINA, FRANCE, AND GERMANY) REPRESENT IT TO BE?

The Iranian nuclear program is one of the most vexing national-security issues of our era.⁹⁰ It is impossible to know what governments really think about the threat posed by the possibility of a nuclear-armed Iran, but there is also no reason to discount their public statements. For its part, the United States has made it “clear that Iran must not develop nuclear weapons.”⁹¹ That said, American officials seem to be acquiescing to Israeli estimates that sanctions are working to delay Iran’s nuclear weapons program,

87. Press Release, The White House, Statement by the President on H.R. 6523 (Jan. 7, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/01/07/statement-president-hr-6523>.

88. *Id.*

89. Press Release, The White House, Fact Sheet: New Actions on Guantanamo and Detainee Policy (Mar. 7, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>.

90. *See generally* *Iran’s Nuclear Program*, N.Y. TIMES (Jan. 18, 2011), http://topics.nytimes.com/top/news/international/countriesandterritories/iran/nuclear_program/index.html.

91. *U.S. Policy Towards the Islamic Republic of Iran: Hearing Before the S. Armed Serv. Comm.*, 110th Cong. (2010) (statement of Amb. William J. Burns, Under Sec’y of State for Political Affairs), *available at* <http://armed-services.senate.gov/statemnt/2010/04%20April/Burns%2004-14-10.pdf>.

possibly until 2015.⁹²

The more interesting question is to what degree the threat would justify acts of force. In his testimony last December, Under Secretary of State William J. Burns explained that the Obama administration was pursuing diplomatic avenues as well as sanctions in a bid to halt Iranian nuclear weapons development.⁹³ Nothing in his testimony explicitly ruled out force. Nor was force ruled out in January 2011 when President Obama described his meeting with French President Nicolas Sarkozy. He remarked that with respect to Iran's nuclear program they discussed sanctions, as well as their "hope that we can resolve this issue diplomatically."⁹⁴ Force, it appears, is on the table if the hoped-for diplomatic solution fails.

As most international lawyers appreciate, the UN Charter requires nations to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."⁹⁵ The only textual exceptions to that prohibition are acts authorized by the UN Security Council under Chapter VII of the Charter,⁹⁶ or actions in self-defense.⁹⁷ With respect to the latter, the concept of anticipatory self-defense is recognized by the United States, albeit not by all nations.⁹⁸ This permits the use of force prior to an actual armed attack but only when the threat is, among other things, imminent.⁹⁹ Factually, that does not appear to be the case with the Iranian nuclear weapons program.

What does imminent really mean today? Professor Ken Anderson argues that, at least since 1980, the United States has taken the position that "imminence can be shown by a pattern of activity and threat that show the intentions of actors."¹⁰⁰ This can

92. Stephen Kaufman, *Clinton: Iran Sanctions Working, Need to be Maintained*, AMERICA.GOV (Jan. 10, 2011), <http://www.america.gov/st/peacesec-english/2011/January/20110110120608nehpets4.630679e-02.html>.

93. William J. Burns, *Implementing Tougher Sanctions on Iran: A Progress Report, Statement Before the H. Foreign Affairs Comm.*, U.S. DEP'T OF STATE (Dec. 1, 2010), <http://www.state.gov/p/us/rm/2010/152222.htm>.

94. Press Release, The White House, Remarks by President Obama and President Sarkozy of France After Bilateral Meeting (Jan. 10, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/01/10/remarks-president-obama-and-president-sarkozy-france-after-bilateral-mee>.

95. U.N. Charter art. 2, para. 4.

96. *See* U.N. Charter ch. VII.

97. U.N. Charter art. 51.

98. *See* U.S. DEP'T OF THE ARMY, OPERATIONAL LAW 6 (2010).

99. *Id.*

100. Benjamin Wittes, *Kenneth Anderson on Baumann v. Wittes*, LAWFARE (Dec. 1,

satisfy imminence, he says, “whether or not those intentions are about to [be] acted upon.”¹⁰¹ Is such an approach appropriate to prevent the use of such a horrific device as a nuclear weapon? The 1991 Israeli raid on Iraq’s nuclear reactor was strongly condemned at the time, even as some scholars insist on its legality.¹⁰²

More recently, however, there have been reports of the use of a computer virus called Stuxnet that allegedly operated so as to destroy centrifuges essential to Iran’s nuclear program.¹⁰³ Many experts contend that the sheer sophistication of the virus suggests nation-state involvement and, therefore, given the destructive results, would seem to violate the UN Charter’s prohibition on the use of force.¹⁰⁴ Yet protestations about its illegality—while extant—are relatively muted, perhaps because of the significant international opprobrium that has already been heaped upon Iran for its failure to conform to various efforts aimed at ensuring it does not acquire nuclear weapons.

It may also be the case that this relatively muted response is reflective of something of a new norm arising vis-à-vis weapons of mass destruction. It is interesting that in the International Court of Justice advisory opinion on nuclear weapons, the devices were condemned as “generally . . . contrary to the rules of international law,” yet at the same time the court conceded that it could not conclude that they are “unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”¹⁰⁵

Thus, in an era when horrific weapons of mass destruction—nuclear, chemical, biological, and even cyber-based—seem to be becoming within the grasp of a variety of state and, perhaps

2010, 5:09 PM), <http://www.lawfareblog.com/2010/12/kenneth-anderson-on-baumann-v-wittes/>.

101. *Id.*

102. *See, e.g.,* Anthony D’Amato, *Israel’s Air Strike Against the Osiraq Reactor: A Retrospective*, 10 *TEMPLE INT’L & COMP. L.J.* 259, 259 (1996) (arguing that Israel “did the world a great service” by bombing Iraq’s Osiraq nuclear reactor and that it was done in accordance with international law).

103. Norman Friedman, *Virus Season*, *PROCEEDINGS*, Nov. 2010, at 88.

104. *See generally*, Michael N. Schmitt, *Cyber Operations in International Law: The Use of Force, Collective Security, Self-Defense, and Armed Conflict*, in *PROCEEDINGS OF WORKSHOP ON DETERRING CYBERATTACKS* 163–64 (2010), available at http://books.nap.edu/openbook.php?record_id=12997&page=151 (distinguishing the use of force and armed attack with respect to cyber attacks by a nation-state).

105. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 266 (July 8).

someday, *non state* actors, the international community may develop a new view of anticipatory self-defense. It is possible that a consensus could emerge (that includes nations who otherwise take a narrow view of self-defense) that tolerates a more aggressive approach but only in instances of the exceptional and extreme circumstances outlined by the ICJ, namely, those in which the survival of a state is at stake.¹⁰⁶

9. DOES THE UNITED STATES HAVE ADEQUATE SAFEGUARDS TO PROTECT CLASSIFIED INFORMATION USED IN DOMESTIC COURTS TO PROSECUTE TERRORISTS?

The Classified Information Procedures Act (CIPA) does provide adequate safeguards to protect classified information in federal prosecutions.¹⁰⁷ Enacted in 1980, it was intended to:

provide a means for determining at an early stage whether a “disclose or dismiss” dilemma exists in a potential prosecution or whether a prosecution may proceed that both protects information the Executive regards as sensitive to security and assures the defendant a fair trial consistent with the mandates of the Constitution.¹⁰⁸

Federal prosecutors recently described CIPA as providing:

[P]retrial, trial, and appellate procedures for federal criminal cases in which the public disclosure of classified information potentially exists. Utilizing these procedures, typically through *ex parte* and/or *in camera* hearings, the court can address and resolve issues concerning the discoverability of classified information by the defendant, and the government can learn prior to trial whether or not classified information will have to be disclosed in open criminal proceedings. This allows the government to make an informed decision concerning the costs of going forward with the prosecution.¹⁰⁹

None of this is to suggest that cases involving classified

106. *Id.* at 266, 317.

107. Classified Information Procedures Act, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. III, §§ 1–16 (1988)).

108. LARRY M. EIG, CONG. RESEARCH SERV., 89-172A, CLASSIFIED INFORMATION PROCEDURES ACT (CIPA): AN OVERVIEW (1989), *available at* <http://www.fas.org/sgp/crs/secretcy/89-172.pdf>.

109. Gov’t’s Motion for Pretrial Conference Under Section 2 of the Classified Info. Procedures Act at 2–3, *United States v. Drake*, No. RDB 10 VR 1081, (D. Md. May 5, 2010), *available at* <http://www.fas.org/sgp/jud/drake/050510-cipa.pdf>.

information—virtually all terrorism cases—are easy to litigate, even with CIPA. Classified information typically requires judges, prosecutors, defense counsel, and court staff to obtain security clearances, and that process can involve significant time and resources. In addition, court facilities may require modification to accommodate securing classified material.

Moreover, some commentators like Professor Radsan argue that CIPA is “showing its age” and needs a “remodeling.”¹¹⁰ Radsan argues that CIPA should be revised to provide:

First, a prosecutor’s discovery obligations should apply to the intelligence community only when it has most actively participated in the investigation Second, the courts, Congress, or a combination of the two should allow the sensitivity of classified information to affect its use at trial. On a close call, the court should be less inclined to admit top-secret information than information at a lower level of classification Third, the courts, Congress, or a combination of the two should allow small portions of trials that involve classified information to be closed to the public.¹¹¹

Congressional action may be forthcoming, though perhaps not exactly along the lines Professor Radsan proposes. Senator Benjamin L. Cardin has introduced a bill to revise CIPA in ways that would take into account the case rulings and other developments since CIPA’s enactment.¹¹² Interestingly, he wants to model it much after the updated provisions found in the Military Commission Act of 2009.¹¹³ According to Senator Cardin, the legislation would “ensure that all classified information, not just documents, will be governed by CIPA, and that prosecutors and defense attorneys will be able to fully inform trial courts about classified information issues that may arise during the course of criminal proceedings.”¹¹⁴

110. Afsheen John Radsan, *Remodeling the Classified Information Procedures Act (CIPA)*, 32 CARDOZO L. REV. 437, 483 (2010).

111. *Id.* at 482–83.

112. Classified Information Procedures Reform and Improvement Act of 2010, S. 4050, 111th Cong. (2010), *available at* <http://www.lawfareblog.com/wp-content/uploads/2010/12/CRIA-FINAL.pdf>.

113. Military Commissions Act of 2009, Pub. L. 111-84, 123 Stat. 2190 (2009), *available at* <http://www.defenselink.mil/news/2009%20MCA%20Pub%20%20Law%20111-84.pdf>.

114. *See* Press Release, Sen. Benjamin L. Cardin, *Cardin Introduces Legislation to Improve How Classified Information is Used in Espionage, Terrorism and Narcotics Cases*

The fact that upgraded procedures are already incorporated into the military commission process might make greater utilization of that forum more enticing. In addition, while *Boumediene v. Bush*¹¹⁵ held that the constitutional right to habeas exists at Guantanamo, it is not clear what, if any, additional constitutional rights otherwise applicable to criminal trials are necessarily mandated for military commissions. Accordingly, it is possible some of the discovery and evidentiary concerns that Professor Radsan identifies as troubling in conventional civilian prosecutions may be eased by trial by military commission.

Still, it is possible that certain cases will be hobbled by the need to disclose classified information under either forum. In some instances, the government may be obliged to forego certain prosecutions if the necessary disclosure of classified information represents too great a risk to national security. This option may be less odious when applied to those potential defendants who are unlikely, in any event, to be released if acquitted because they are still subject to law-of-war detention.

Too aggressive risk taking in this regard may present serious problems. In his memoir, *Known and Unknown*, former Secretary of Defense Donald Rumsfeld contends that during the trial of Omar Abdel Rahman, the “Blind Sheikh,” who was convicted of seditious conspiracy in a scheme to blow up the World Trade Center in 1993, prosecutors were obliged to turn over a list of 200 possible

(Dec. 20, 2010). See also Senator Cardin’s floor statement introducing the bill:

This legislation . . . will codify, clarify, and unify Federal case law interpreting CIPA; ensure that all classified information, not just documents, will be governed by CIPA; ensure that prosecutors and defense attorneys will be able to fully inform trial courts about classified information issues; and will clarify that the civil state secrets privilege does not apply in criminal cases. [This legislation] will also ensure high-level DOJ approval before the government invokes its classified information privilege in criminal cases and will ensure that the Federal courts will order the disclosure and use of classified information when the disclosure and use meets the applicable legal standards. This legislation will also ensure timely appellate review of lower court CIPA decisions before the commencement of a trial, explicitly permit trial courts to adopt alternative procedures for the admission of classified information in accordance with a defendant’s fair trial and due process rights, and make technical fixes to ensure consistent use of terms throughout the statute.

171 CONG. REC. S10816 (daily ed. Dec. 20, 2010) (statement of Sen. Cardin), available at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=S10816&dbname=2010_record.

115. 553 U.S. 723 (2008).

coconspirators. According to Rumsfeld,

This told al-Qaida which of its members had been compromised and indicated where U.S. intelligence had gleaned its information. Bin Laden reportedly was reading the list several weeks later in Sudan. He must have been shaking his head in contemptuous wonder at how effectively the United States was assisting him in his deadly jihad.¹¹⁶

Thus, while the procedures are generally workable, there will always be a tension between what should—or must—be disclosed, and the potential consequences for doing so. As frustrating as it may be at times, this is the price one must pay in a democratic society that honors the rule of law.

116. DONALD RUMSFELD, *KNOWN AND UNKNOWN: A MEMOIR* 587 (2011).