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Al Qaeda, Military Commissions, and American Self-Defense

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The toppling of the World Trade Center towers on September 11 broadcast live to the world that radical Islam must be taken seriously. This was a holocaust, forcing us to witness the planned deaths of 3,000 people and to imagine their anguish and suffering. Anyone could have been there. The rampage struck at the financial center of the world, at a city that symbolizes cultural diversity and inclusion, and perhaps not by chance, at the city that became home to so many European Jews fleeing from fascism.

This has been a decade in coming. After abandoning his family's construction empire in Saudi Arabia and fighting the Soviets in Afghanistan, Osama bin Laden had the foul imagination to conceive of a holding company for globalized terror. His ease with corporate forms has allowed him to provide financing, training, and materiel to Islamic insurgents around the world, and to escalate the destructive range of their work. In most political confrontations, there is an unspoken norm of proportionality, a customary law of violence, even an expected pattern of terrorist tactics. The techniques of terrorism are a way to get on television, to drain the good feeling out of life and demoralize resistance, to undermine the credibility of a regime that cannot offer protection. But at the hands of ordinary insurgents, the deaths of innocents usually are sought in numbers of five, ten, or one hundred. Al Qaeda's jihad against Judaism, Christianity, and the West has chosen to move the decimal point and increase the scale of destruction by several orders of magnitude with no apparent hesitation. Though one must speak with reticence and care about the past, bin Laden's imagination resembles that of Hitler, scaling up from pogrom to extermination.

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When George W. Bush spoke of bin Laden as the “evil one,” even a sophisticate could accept the reference.

Al Qaeda’s heedlessness poses an unprecedented threat, because the usual rules of deterrence have no evident application. In military defense, as in criminal law, we ordinarily assume that an adversary can be dissuaded by increasing the cost of his action. The stability of the nuclear era, dangerous as it was, depended on deterrence—the notorious “mutually assured destructive capability” of two state adversaries who wished to have their people and polity survive. A nonstate actor such as al Qaeda has no population or territory held in thrall, and its cult of martyrdom sees death as unimportant. Thus, the daunting task is to anticipate and intercept specific operations, aided perhaps by disruption of al Qaeda’s infrastructure. Al Qaeda’s interest in weapons of mass destruction makes this a high stakes game.

AL QAEDA IN THE 1990s

Bin Laden and al Qaeda were viewed as an escalating threat in American policy circles over the last decade. The United States was occupied with other problems, to be sure, and these were more than enough to tax the limited attention of a president who never warmed to foreign policy. It was worthwhile trying to quell the civil wars in Bosnia and Rwanda, and important to counter North Korea’s bellicose gestures toward Seoul and Tokyo. The United States was tending the confrontation between the Chinese and Taiwanese in their hot standoff across the straits. It had to think through the post-cold war evolution of Europe and to craft a new relationship with Russia after communism. Terror by non-state actors was nothing new. The 1984 attack on the Marine barracks in Lebanon killed over 200 personnel.

But there was the nagging sense in some parts of Washington that bin Laden and al Qaeda were different and dangerous. Their program of activity has been steady, paced, and increasingly effective in its destruction. American soldiers on their way to Somalia were killed in Aden by al Qaeda in 1992. In the famous episode of “Black Hawk Down,” eighteen army rangers were killed in a shoot-out in 1993 on the streets of Mogadishu by Somali fighters trained by al Qaeda. The loss of two Black Hawk helicopters and mistreatment of the corpse of an American soldier, dragged through the alleys of the Somali capital, brought about the abrupt withdrawal of American forces, on the mistaken ground that “peacekeeping” was the culprit. Bin Laden may have been emboldened to suppose that the United States would leave the region altogether.

Jihad on American soil began in early 1993 with the truck bombing of the World Trade Center in New York City. The explosion shattered the lower levels of the complex and knocked out its utility systems. Thousands of civilians evacuated the building down smoky stairwells. Six office workers died. But several conspirators were quickly traced and arrested, and this good fortune and

good police work may have added to the dangerous conceit that the United States could thwart terror networks by criminal law enforcement alone.

World Trade Center conspirator Ramsey Ahmad Youssef returned to the Philippines to stage-manage the plans of al Qaeda's growing regional network. Al Qaeda's southeast Asian division, in cooperation with the radical Filipino terror group, Abu Sayyaf, hoped to assassinate President Bill Clinton on a visit to Manila in 1994, to assassinate the pope, and to bomb two United Airlines jets en route to Hong Kong. The midair bombings were to be simultaneous, a marked feature of al Qaeda's aesthetics of violence. Other ongoing plans included a diabolical version of a Busbee Berklee water ballet, staging the destruction of eleven American jetliners crossing the Pacific as they prepared to land at American airports. The bombing operation was near launch when a fire broke out in Youssef's Manila apartment; authorities responded and stumbled on the plans. Ramsey Youssef was later arrested by American agents in Karachi. The Asian group carried out the successful bombing of a Philippines airliner bound for Tokyo. Throughout, bin Laden and al Qaeda continued to show a talent for friendly takeovers, contacting local Islamic groups and offering the money and plans to multiply their capabilities. Nor did the network abandon ambitions for attacks in the United States. A plan was hatched to fly a small aircraft laden with explosives into the Central Intelligence Agency headquarters. Another plan was underway to bomb the Holland and Lincoln Tunnels in New York City and to blow up the United Nations. This was interrupted only when an informant was infiltrated into the group.

Bin Laden's terror bombings continued in the Middle East. In 1995, the U.S. training center for the Saudi National Guard near Riyadh was truck-bombed, killing five Americans. In June 1996 (five weeks after bin Laden was expelled from Sudan and was forced to regroup in Afghanistan) he sent another TNT-packed truck to the Khobar Towers military barracks in Saudi Arabia. American sentries lacked an adequate alarm system to empty the dormitory in time. Ten American soldiers were killed and many were wounded. The Saudis awarded the contract for reconstruction to a firm owned by bin Laden's brothers. The Saudis beheaded four prime suspects without allowing the FBI to debrief them.

In 1998, with practiced logistics and coordination, bin Laden commissioned catastrophic attacks on American embassies in East Africa. Truck bomb explosions toppled the embassy buildings in Nairobi and Dar es Salaam, killing 224 people, including fourteen Americans, and wounding 4,500. In a sense, at this moment bin Laden crossed an escalatory threshold. FBI agents were again dispatched to look for usable evidence, but Washington finally resorted to the use of military force. Two volleys of Tomahawk land attack missiles were launched from American naval vessels against sites in Afghanistan and Sudan. One target was al Qaeda's training camp near Khost, Afghanistan. The second was the al Shifa pharmaceutical factory in Khartoum, Sudan, serving as an alleged transfer point for chemical weapons. The press scoffed that this was a wag-the-

dog diversion from the Monica Lewinsky-Bill Clinton scandal and assumed the al Shifa plant was an ill chosen target.¹

FBI director Louis Freeh also chipped away at the decision, complaining in a unique account of the national chain of command that he was not consulted on targeting. Some critics argued that any response should wait until the end of the criminal investigation, even when other American embassies were under threat from the al Qaeda network. Others suggested that Washington should share its available intelligence with the UN Security Council. The UN role was further complicated by the decision of senior staff of the Hague chemical weapons monitoring secretariat to publicly air their skepticism about U.S. methodology in target assessment, perhaps in an attempt to distance their own inspection activities from the American use of force.

The White House lacked the courage of its own convictions in the execution of the air strikes. The prime target was a scheduled meeting of bin Laden's senior lieutenants (and perhaps bin Laden himself) in a camp near Khost. But the Tomahawk launch was delayed for several hours, until 7:30 p.m. Sudan time and 10 p.m. Afghan time, in order to avoid any chance of collateral damage in the strike against the secondary target in Khartoum. By then, the meeting of bin Laden's lieutenants in Khost was over. Military value must be weighed against collateral danger to civilians. But the White House could not have supposed the military mission was worth much except as symbolism with this fatal delay in execution. One could have abandoned the Khartoum target altogether, in favor of decapitating al Qaeda's command and control.²

In October 2000, bin Laden struck again, using a skiff loaded with explosives to blow a hole in an American destroyer at harbor in Aden, nearly sinking the ship. The Federal Bureau of Investigation was again dispatched to investigate—perhaps because the United States doubted the authorship, perhaps because criminal investigation allows it to do something. But the Yemeni government quickly put the lid on what the agents could ask, and they were withdrawn. The United States passed through the millennium celebrations without incident, but an Algerian caught at the Canadian border confessed that the explosives in his car were designed for an attack at the Los Angeles airport.

THE ATTACKS OF SEPTEMBER 11, 2001

On September 11, 2001, everything changed. A country of 250 million people, returning from its summer vacation, was turned upside down by the inconceiv-

¹ The rationale for the al Shifa target was further obscured when senior members of Clinton's cabinet boggled background facts in their public statements. The administration belatedly pointed to intercepted telephone links between the al Shifa owner and the director of the Iraqi chemical weapons program, but the press cycle had passed. Washington attempted to freeze the assets of the al Shifa plant owner but later abandoned the suit, and this was read by the press as an admission of mistaken targeting. It did not occur to any reporters that pretrial discovery in the civil suit might compromise ongoing surveillance activities. See Ruth Wedgwood, "Responding to Terrorism: The Strikes Against bin Laden," *Yale Journal of International Law* 24 (Summer 1999): 599.

² Ibid.

able destruction of two of the nation's tallest buildings. As many as 28,000 people are employed in the World Trade Center at the beginning of the workday, and the surprise is that more were not killed. Some law enforcement veterans remembered the warning issued by Ramsey Youssef when he was captured after the 1993 bombing: it had been their intention, he said, to topple the buildings entirely.

Like many other travelers, I was on a plane to Washington at the time. It was diverted to the Baltimore airport amid reports that one hijacked plane had hit the Pentagon and that another plane was still circling near Washington. (This was the plane that crashed in Pennsylvania.) The hijackers' plan to hit the White House or the Capitol as a fourth target has been corroborated by debriefings of personnel captured in Afghanistan.

The next several days were extraordinarily tense. Bin Laden had boasted to his circle of a Hiroshima-style event, and September 11 raised the fear that the metaphor might be literal. The evacuation of the President from Washington was not unreasonable under the circumstances. Bin Laden's keen interest in acquiring a nuclear device had been reported for years, and his escalation of violence lessened any confidence that he would step back from its use. The documents captured in Afghanistan have given no greater comfort about his ambition, although it appears that he still lacks a working bomb. On the supply side, there is limited cause for confidence. Roald Sagdeev, the famed Russian physicist, says it is unlikely that Moscow would have shared control of any so-called suitcase bombs with regional commands. Encrypted decoupling links could defeat any attempt to excavate the arming code with modern computing capability. But other observers, including former CIA Director James Woolsey and former UN weapons inspector Richard Butler, as well as Russian sources, have estimated that there are a dozen or more suitcase bombs unaccounted for. Russia also had hundreds of nuclear artillery shells prepared for a war in Europe. With the Russian economy in tatters, an unemployed scientist, technician, or guard might be tempted by the unspeakable. In addition, Saddam Hussein was thought to be six months away from atomic weapons capability at the time UN inspectors withdrew from Iraq in December 1998.

Al Qaeda's interest in developing chemical and biological weapons has also been corroborated in the aftermath of the American campaign in Afghanistan. Documents found on hard drives and schematics drawn on blackboards in al Qaeda's Afghan offices suggest that the network remains actively interested in developing weapons of mass destruction. During the 1990s, Iraq began to explore a policy of subcontracting abroad for the production of forbidden weapons to avoid the UN inspectors. A representative of Saddam Hussein's son Qusayy reportedly met with al Qaeda representatives in 1998 to explore a joint interest in chemical weapons.³

³ "Sudanese Factory Was Working with Iraq on VX Nerve Agent, U.S. Intelligence Says; Assessment Based in Part on Intercepted Phone Calls," *Baltimore Sun*, 26 August 1998.

Finally, little comfort can be taken from new discoveries about the structure of al Qaeda's compartmentalized network. Arrests and searches conducted by foreign authorities have revealed that al Qaeda cells are placed throughout Europe and Asia in cities such as Milan and Hamburg, Singapore and Manila with plans to attack American embassies and other targets in locations as farflung as Singapore and Sarajevo. The al Qaeda training manual found in a London apartment carefully instructs new recruits in the skills of terrorism. The manual, placed in the court record at the East African embassy bombings trial (as government exhibit 1677-T), decries Islam's "wasted generation that pursued everything that is western and produced rulers, ministers, leaders, physicians, engineers, businessmen, politicians, journalists, and information specialists." It celebrates "missions" such as "assassinating enemy personnel as well as foreign tourists," and "blasting and destroying the embassies and attacking vital economic centers" and "the bridges leading into and out of the cities." It notes the need in such special operations for "tranquility and calm personality that allows coping with psychological traumas such as those of the operation of bloodshed, mass murder."

At length, the manual instructs new members in countersurveillance, encryption, the preparation of safe houses, and the choice of escape routes after an assassination. The jihad's "undercover members" are to avoid any outward appearance of "Islamic orientation." The jihadist should not frequent mosques. He should avoid open devotions to the prophet, shave his beard, wear gold, and even listen to music in order to blend into the secular society of the West. The hijackers of September 11 who passed through security in the Boston airport looked like ordinary travelers.

September 11 is evident proof that attacks on civilians are within al Qaeda's theory of conflict. Bin Laden's 1998 fatwa declared that members of al Qaeda should target Americans and Jews, and his interviews since then have stated that even "taxpayers" are fair targets. What then should one do?

U.S. MILITARY RESPONSE AND LEGISLATIVE MEASURES

The Bush administration's first strategy was to disrupt al Qaeda by military means, using air power and limited ground forces to attack the network's logistics and training centers in Afghanistan. Overthrowing the Taliban faction was also a signal lesson to complicit Muslim regimes that might be tempted to shelter al Qaeda. The response was approved by the United Nations Security Council⁴ and NATO,⁵ as a campaign of self-defense against armed attack. The flight of al Qaeda leadership over the mountains into neighboring territories in Pakistan and Iran has been a disappointment. But the military action has also provided a portfolio of documentary evidence to assist in the tracking of al Qaeda

⁴ UN S.C. Res. 1368, 12 September 2001; S.C. Res. 1373, 28 September 2001.

⁵ Statement by the North Atlantic Council, 12 September 2001, in Press Release 124.

network members in other countries, and corroborates beyond doubt the terror group's troublesome interest in weapons of mass destruction.

The public debate in North America and Europe has concerned what measures should supplement this initial campaign of military force—whether terrorism should still be countered through the ordinary means of criminal law or through some significant shift in enforcement methods. It is interesting to note that the modern international guarantees of human rights openly anticipate the possibility of social threats that are hard to meet. The International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the American Convention speak openly of possible emergencies, perhaps because these legal instruments were designed for countries that are more familiar with such hazards than is the continentally protected American republic. Each document is quite frank in asserting that in a situation of emergency, a state may be bound to take measures that would be inappropriate in peacetime. In an acknowledged emergency, a government can derogate from listed rights, so long as the modification is proportionate and necessary, excepting only a few fundamental norms guaranteeing physical integrity of the body and protection against racial discrimination. This is much more open-ended than the American Constitution, where any necessary latitude for wartime travails is to be read into the rights themselves or (if you are Abraham Lincoln) handled through the radical measure of suspending habeas corpus.

In the response to September 11, the first contentious measure was approved by Congress in the so-called Patriot Act, which allows a crucial sharing of information between the intelligence and criminal justice agencies.⁶ Over the last twenty-five years, in the aftermath of the Church and Pike congressional hearings, Washington created a wide firebreak between intelligence and law enforcement. This was to be a visible protection for the American ideal of privacy. Government scrutiny of ordinary citizens and resident aliens within the United States was limited to criminal acts established by demonstrable facts, where reasonable or probable cause was already in hand to indicate the law had been violated. This often meant the FBI was reactive, waiting for problems to present themselves, rather than going out searching. Any scrutiny based on acts of speech or political views was forbidden, even though incendiary advocacy of violence might sometimes give way to violent action. The FBI was largely unable to share grand jury information or criminal wiretap information with intelligence agencies as a matter of law and agency culture. Even foreign counterintelligence wiretaps conducted by the FBI often were not shared with the CIA. In turn, the intelligence agencies were reluctant to engage with the criminal justice agencies for fear that the linkage might appear to be a backdoor around the privacy rules of law enforcement.

This bureaucratic lobotomy had an obvious cost. Only the CIA can operate clandestinely offshore. FBI legates depend on the foreign host's say-so and per-

⁶ The Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), P.L. 107-05, 115 Stat. 2721, at section 203.

mission. Only the FBI can operate stateside. Yet al Qaeda moves onshore and offshore in real time, with operatives flying between Europe, Asia, and North America. The necessary synthesis of circumstantial evidence was profoundly difficult in the circumstances. Despite the cautions from the past, it may take a network to catch a network. For a limited term, the Patriot Act permits the FBI to share grand jury information and Title III wiretap information with intelligence agencies investigating catastrophic terrorism; it must keep a record for later court review. In addition, the FBI has been instructed to share data from its foreign counterintelligence wiretaps. The intelligence agencies are now mandated to share their offshore investigative findings with the FBI.

The second major change in overcoming the “two-brain” government is a liberalized test for foreign counterintelligence wiretaps. Under the president’s foreign affairs power, the constitutional right to monitor foreign adversaries (and even friends) has not depended on a showing of crime. Rather, the sleuthing of foreign intentions has only required the identification of a foreign government or agency relationship. Such surveillance within the United States is regulated by a judicial panel under the Foreign Intelligence Surveillance Act (FISA).⁷ But in the past, the Justice Department was fearful of seeking a FISA tap when there was a realistic chance of criminal prosecution as well. The statutory test required that the singular purpose of the wiretap must be intelligence alone. This has now been changed by statute to permit a FISA tap where intelligence is a “significant” purpose.⁸ Both criminal justice prosecutions and intelligence interception will be appropriate responses to a terrorist threat, and this statutory change avoids the unwonted pressure to pretend that one purpose is uppermost. It avoids the dilemma that would otherwise push agencies to forgo interdiction of a scheme because there was a felt interest in prosecution as well. To be sure, the limitations stemmed from the mishaps of the 1950s and 1960s—seeming to avoid any dilution of standards for government surveillance in a libertarian society. But if anything, the lesson was learned too well. We have been hobbled in gathering, pooling, and evaluating the necessary information on terrorist networks, cells, and their members—a task often requiring the examination of such minutiae as apartment leases, hotel registrations, check endorsements, wire transfers, travel itineraries, as well as intercepted electronic messages and conversations.

A third controverted measure was the Congress’s authorization for the arrest of noncitizens “reasonably believed” to be involved with terrorism and the power to hold them for a period of seven days, before they were charged with a crime or immigration violation. This was perhaps the most illiberal of the government’s measures. But it may count for something that Congress specifically delegated the authority in light of the emergency. As Justice Robert Jackson noted in the *Steel Seizure Case* in 1952,⁹ the President’s emergency power is at

⁷ 50 U.S.C. 1801 et. seq.

⁸ USA Patriot Act, section 218.

⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Jackson, J., concurring.

its height when he acts pursuant to Congress's instructions. Congress has the constitutional power to take far-reaching measures in wartime, including the suspension of habeas corpus (a measure widely indulged in during the Civil War when Lincoln was concerned that Confederate sympathizers in Maryland might cut off the nation's capital from the rest of the North). Another standard of comparison lies in the traditional prerogative of states in wartime to intern enemy aliens. This harsh power can reach even those enemy aliens who openly disdain their own foreign government. In Great Britain, shortly after September 11, Prime Minister Tony Blair successfully proposed to the Parliament that he should have the power to order the indefinite detention of aliens suspected of connection to the al Qaeda network.

Initially, approximately 1,100 aliens were taken into custody under the powers of Section 236A of the Patriot Act.¹⁰ This was the only exercise of the emergency seven-day detention power, and was near in time to September 11. By late November 2001, 55 defendants were still held on criminal charges, and approximately 548 on immigration charges. Some material witnesses were also detained, but the number is not recorded because of grand jury secrecy.¹¹

The administration's mustered defense turns on the urgency of throwing al Qaeda off balance. One did not know whether other attacks were in the works. There was little sense of luxury in resorting to patient grand jury investigations when greater mass catastrophe seemed a real threat. Oddly, accurate judgment could be hobbled by success. No violent attacks have been mounted within the United States since September 11, other than the disputed post office mailing of anthrax letters and the attempt to down an airplane with a powerfully packed shoe-bomb.¹² A critic may suppose that this proves the measures were unnecessary. But the absence of attacks may also indicate the opposite.

A fourth deeply controverted measure is the Bureau of Prisons order that permits the rare monitoring of attorney-client conversations within federal prisons.¹³ Legal consultations between a lawyer and his client are sacrosanct under almost all circumstances. But statements that advance the commission of a crime are not protected under the Sixth Amendment or under the rules of

¹⁰ USA Patriot Act, *supra* note 6, at section 236A.

¹¹ See *Attorney General Ashcroft Provides Total Number of Federal Criminal Charges and INS Detainees*, 27 November 2001, available at www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_27.htm.

¹² Nonetheless, al Qaeda's activity has continued with the truck-bombing of a synagogue in Tunisia, plans to bomb the Duomo in Milan and the marketplace in Strasbourg, France (venue of the European Court of Human Rights). The unhappy youth of the French suburbs have been named as the source of attacks against synagogues and other Jewish facilities, but foreign collaboration is not improbable. The violence in Israel may give pause in light of bin Laden's October 2001 reiteration that "We are in a decisive battle with the Jews and those who support them. . . . The killing of Jews and Americans is one of the greatest duties." See transcript of bin Laden's October 2001 interview with Al-Jazeera television, posted on www.CNN.com, 5 February 2002, available at <http://www.cnn.com/2002/WORLD/asiapcf/south/02/05/binladen.transcript/index.html>, 5 July 2002.

¹³ *National Security: Prevention of Acts of Violence and Terrorism*, 28 Code of Federal Regulations, Parts 500 and 501, 66 Federal Register 55061, 31 October 2001.

legal ethics. An attorney is entitled to reveal a confidence where the disclosure is necessary to avoid the death of an innocent person. Attorneys are sometimes asked to carry messages for their clients, including convicted felons, who try to run their networks from jail. An attorney may not even realize the significance of what he is asked to transmit. This is a price we have been willing to pay for the sake of privacy and confidence in ordinary criminal schemes where only a handful of lives are at stake. Al Qaeda operations are aimed at massive casualties, and the moral and constitutional calculus becomes more perplexing. The view that all terrorism inquiries belong in the federal courts and the wish for full and free choice of defense lawyers ratchets up this dilemma.

The way that similar problems have been treated in the past is to have a strict segregation between an intelligence monitoring team and a trial team. This kind of firewall protection has been used before in cases where a defense attorney may have occasion to talk to officials of a foreign government office monitored under the Foreign Intelligence Surveillance Act. There is an attempt to “minimize” (not listen to or record) any privileged conversation. Any inadvertent knowledge of defense strategy is kept from the trial team. This has worked well and without scandal in past national security prosecutions, and it is perhaps the unfamiliarity of the arrangement that elicited such vehement initial comment by people who seemed unfamiliar with the judge’s role. If any information is ever to be turned over, it can be done only with the permission of a federal judge.

But the greatest attention has been directed to the President’s order on military commissions as mode of trial against the al Qaeda and Taliban leadership. Perhaps because the first implementing order was issued under the pressure of time and emergency,¹⁴ critics initially treated it as an occasion to express accumulated fears that catastrophic terrorism might lessen the commitment to American liberties. One may wish to see the commission proposal as a response instead to the evident limits of federal court prosecutions.

U.S. strategy throughout the 1990s was to conduct criminal investigations through the grand jury and attempt to gather the necessary evidence for trial before a petit jury. Criminal charges in the 1993 Trade Center bombing and the embassies bombings were brought in the federal district court in lower Manhattan, and prosecutors in the Southern District of New York (under the leadership of U.S. Attorney Mary Jo White) had an impressive record of obtaining convictions. But the limits of criminal inquiries were evident when the World Trade Center toppled five blocks from the courthouse in the September 11 ca-

¹⁴ Military Order Regarding Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, available at www.whitehouse.gov/news/releases/2001/11/20011113-27.html, 5 July 2002. But see *Procedures for Trials by Military Commissions of Non-United States Citizens in the War Against Terrorism*, Department of Defense Military Commission Order No. 1, 21 March 2002, available at www.defenselink.mil/news/Mar2002/d20020321ord.pdf, July 2002.

tastrophe.¹⁵ Every criminal case has in a sense represented an intelligence failure, for it means the United States failed to intercept an ongoing plan.

REMAINING CONCERNS

There are several specific concerns with the capacities of federal courts. First is protecting intelligence information, especially in the middle of an ongoing conflict. Against an impenetrable network, a criminal conviction may well depend on the use of intelligence information obtained from exquisitely sensitive sources. The need for electronic intercepts and other delicate information will be especially acute in trials against the leadership and logicians, the organizers and entrepreneurs who dispatch the suicidal operatives to the bombing sites. A compartmentalized network schooled to avoid detection is not likely to generate many witnesses to its inner workings, hence requiring this broader availability of sources. Yet anything considered against the defendant must be put into the public trial record in a federal court, where it is available for review by al Qaeda as well as more benign court watchers. The Classified Information Procedures Act passed in 1980 permits some greater ability to gauge the extent of prejudice to ongoing intelligence work and compromise of classified information likely to occur in the course of a trial.¹⁶ It may permit the substitution of a generic description for a specific particle of intelligence. But ultimately, the particulars to be used against the defendant must be made known to him and to the world at large. In the case of electronic surveillance, this can be extremely troublesome for keeping track of a terrorist network's ongoing plans. Bin Laden and al Qaeda are sophisticates in avoiding ongoing surveillance by changing telephone systems on regular occasions and switching to emails and couriers. To lose track of an open wire even for a few weeks could have serious consequences.

The second problem is the tightly woven exclusion of probative evidence in traditional federal trials, limiting what can be placed before a jury for evaluation. There is an historical distrust of juries in the Anglo-American tradition with sharp limits on what they are permitted to consider, excluding many forms of evidence used in everyday life. One wants to be rigorous in estimating what is sufficient proof of a criminal act for purposes of punishment and sanction—the *weight* of proof, commonly thought of as proof beyond a reasonable doubt. But restrictions on the *admissibility* of evidence are another matter and are far less exclusionary in European trials, international courts, and civil courts. In an American criminal jury trial, only eyewitness testimony and first-hand speech by the defendant can be considered, with very few exceptions. Authentication

¹⁵ See Ruth Wedgwood, "Cause for Alarm: Legal Action Can Bring Victories, But Preventing Terrorism Calls for Tougher Tactics," *Washington Post*, 3 June 2001.

¹⁶ Classified Information Procedures Act, P.L. 96-456, 96th Cong., 94 Stat. 2025, 18 U.S.C. Appendix, as amended by P.L. 100-690, Title 7, sec. 7020(G), 18 November 1988, 102 Stat. 4396.

requirements are rigorous for physical evidence, and search and seizure law is enforced by keeping avowedly reliable evidence away from the view of the jury.

Hearsay can lack desirable indicia of reliability, since the speaker is not available for cross-examination on his accuracy of perception, his possible motive to lie, and his memory. But one can also imagine examples where the indicia of reliability seem strong. Take, for example, Osama bin Laden's reported call to his mother before September 11, warning her that he could not call for awhile. If, hypothetically, bin Laden's mother told her best friend, the friend would not be permitted to testify to the conversation, even where she was the only available witness. First-hand evidence is clearly to be preferred, but there may be instances where hearsay is probative, especially where corroborated by other sources of evidence.

So, too, in a federal district court trial, if evidence was obtained through a legally defective search, it must be excluded from evidence. This has nothing to do with its probative quality, but rather with maintaining a peacetime incentive system for appropriate police behavior. Yet in the case of extraordinary threat, with a group such as al Qaeda, admitting evidence based on its probative quality may seem more attractive.

There are also rather technical authentication requirements that surround the introduction of evidence in federal trials. This often involves proving chain of custody, producing a custodian of records to testify how records were kept, and showing that the condition of an object has not changed. In the harried circumstances of a cave search, it will not be possible to maintain crime scene standards. Indeed, one of the most interesting discoveries concerning al Qaeda would face high hurdles for admission in federal court. A *Wall Street Journal* reporter assigned to cover the Afghan war broke his computer and needed a new laptop hard drive. He ventured into the marketplace in Kabul and discovered two hard drives for sale that had apparently been looted from al Qaeda offices, replete with al Qaeda memos, including reports on scouting targets.¹⁷ One would hate to deprive a fact-finder of so rich a source of information.

In creating these limits on inquiry and probative power, we may have tied our hands beyond easy amendment except by constitutional change. Many restrictions on hearsay have been placed into the Sixth Amendment in its so-called confrontation clause. The open record of all portions of a criminal trial has been placed within the guarantee of an open and public trial in the Sixth Amendment. The exclusionary rule has been placed within the Fourth Amendment. The constitutionalizing of criminal procedure was designed to reform state criminal justice systems that could only be reached through the due process clause of the Fourteenth Amendment. But the upshot is that after September 11, there is little ability to change the modality of trial within the civilian court system except after serious conversation on the limits of constitutional change in wartime.

¹⁷ See Alan Cullison and Andrew Higgins, "How al Qaeda Agent Scouted Attack Sites in Israel and Egypt," *Wall Street Journal*, 16 January 2002.

The third felt concern has been trial security. In ordinary matters, the safety of the jury, judge, and witnesses is assumed. But in the trial of al Qaeda, there is cause for great caution. The federal judges who presided over al Qaeda cases are under round-the-clock protection by rotating teams of federal marshals after concerted threats to their safety. Jurors do not have similar teams of marshals for lifetime protection, and jury anonymity is a thin shield for a citizen summoned for mandatory service. The threats have not been all talk. German tourists killed at Luxor in 1997 were mistaken for Americans, and their bodies were found with a note railing at the trial judge in New York. The Pan Am 103 bombing trial was held at Camp Zeist, a mothballed American military base outside of The Hague. Even with Colonel Muammar el-Qaddafi's consent to the trial, the United Nations preferred to pick up the defendants in a UN transport plane that didn't need to linger in Tripoli for refueling. An al Qaeda embassy bombing defendant has used the occasion of his lawyer's visit to wield a filed-off pocket comb as a knife, stabbing and crippling a jailhouse guard in order to take over the floor of the detention facility.¹⁸ The willingness of al Qaeda to target innocent civilians gives no comfort that they would respect the etiquette of courtroom safety.

MILITARY COMMISSIONS AND TRIBUNALS

It was reasonable to consider other options for trying al Qaeda and Taliban fighters captured in Afghanistan. The President's decision to authorize military commissions follows the tradition of Nuremberg and the law of war itself.¹⁹ The trial of the Nazi leadership in 1945 was conducted in a mixed military tribunal, with rules of evidence and cross-examination quite different from what is familiar in federal court. In the aftermath of World War II, 2,500 commission trials were convened in Europe and the Far East to try people accused of atrocities, including the Tokyo trials. Military courts are so much the venue of international humanitarian law and the law of armed conflict that the 1949 Third Geneva Convention on Prisoners of War demands military trials in preference to civilian, unless the particular legal system also tries its own soldiers in civilian court.²⁰

¹⁸ See *United States v. Mamdouh Mahmud Salim*, 151 F. Supp. 2d 281 (S.D.N.Y. 2001).

¹⁹ On the early history of American military commissions, see William Winthrop, *Military Law and Precedents* (Washington, DC: W.H. Morrison, 1886); and William Birkhimer, *Military Government and Martial Law* (3rd ed., Kansas City, MO: F. Hudson, 1914). On the history of commissions generally, see also A. Wigfall Green, "The Military Commission," *American Journal of International Law* 832 (1948); and *Madsen v. Kinsella*, 343 U.S. 341 (1952).

²⁰ See Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Article 84, "A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war."

What has distracted us, perhaps, is that in the 1990s, the Security Council created two civilian tribunals of limited jurisdiction to try the atrocities of the civil wars in the former Yugoslavia and in Rwanda. These tribunals have had some successes but have not been able to handle any volume of cases. In addition, the protection of sensitive intelligence information in an international institution is daunting, to say the least; and only one American judge, at most, would sit in such a venue. These two ad hoc arrangements have not been the typical method of trial for a body of law that is created, after all, through the state practice of responsible militaries as well as through the views of humanitarian organizations. So, too, the treaty-based International Criminal Court, which the United States has declined to join, will have jurisdiction only over future offenses committed after it comes into force in July 2002 and is equally problematic as a place to deposit sensitive operational intelligence in an ongoing conflict against catastrophic terrorism.²¹

The claim that the president has violated the principle of separation of powers is hard to square with Congress's repeated endorsement of a "common law" jurisdiction for military commissions in time of war and armed conflict. Judge Advocate General Enoch Crowder addressed the point in 1912 testimony concerning military courts-martial and new "articles of war" (equivalent to the Uniform Code of Military Justice). General Crowder noted that "There will be more instances in the future than in the past when the jurisdiction of courts-martial will overlap that of the war courts." He went on, "the question would arise whether Congress having vested jurisdiction by statute [in courts-martial] the common law of war jurisdiction was not ousted. I wish to make it perfectly plain . . . that in such cases the jurisdiction of the war court is concurrent."²²

Congress's regulation of the court-martial system has been accompanied each time by acknowledgment that military commissions are still appropriate for prosecuting offenses against the law of war committed by adversaries. Article 15 of the 1920 Articles of War stated, for example, that "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that by statute *or by the law of war* may be triable by such military commissions. . . ."²³ Similar language was included in the more famous Uniform Code of Military Justice in 1950, replacing the Articles of War.²⁴ In the 1996 War Crimes Act, newly permitting concurrent jurisdiction over certain

²¹ See Ruth Wedgwood, "The International Criminal Court: An American View," *European Journal of International Law* 10 (1999): 93.

²² Statement of Major General Enoch H. Crowder, judge advocate general, on Revision of the Articles of War, Hearings before the Committee on Military Affairs, U.S. Senate, 62nd Cong., 2nd sess., 1912, 35.

²³ Article 15 of the Articles of War, in Chapter 227, P.L. No. 242, 66th Cong., 2nd sess., 1920.

²⁴ See 10 U.S.C. 361, cited in the preambular language of President George W. Bush's 13 November 2001 order.

war crimes in the district courts, the legislative conference report again acknowledged the longstanding legitimacy of commissions.²⁵

The U.S. Supreme Court reviewed the role of military commissions in several cases arising in World War II: the prosecutions of German saboteurs who landed on Long Island and Florida,²⁶ Germans in China who had passed information to the Japanese even after Germany's surrender,²⁷ and Japanese General Yamashita, whose forces abused civilians and prisoners in the Philippines.²⁸ As Justice Robert H. Jackson recounted in *Johnson v. Eisentrager*, "[W]e have held . . . that the military commission is a lawful tribunal to adjudge enemy offenses against the laws of war."²⁹ The trials look more vulnerable now. For example, the defense counsel in the German saboteurs case had a conflict of interest that we would not now tolerate. But civil trials of that era also often appear deficient to our eyes, and the matter depends on the quality of the designed procedures.

The procedures announced by the Secretary of Defense Donald Rumsfeld on 21 March 2002 include most guarantees familiar to lay observers.³⁰ Defendants would be presumed innocent, guaranteed the right against self-incrimination, protected against adverse comment for their exercise of that right, and guaranteed timely notice of charges. Defendants could choose among military defense counsel and could hire their own civilian counsel. The trial would be open to the press except in discrete moments when classified or sensitive intelligence was to be presented. The burden of proof would remain on the government and defendants would be free to call any witnesses in their defense. Convictions would require proof beyond a reasonable doubt, and the death penalty could be imposed only by a unanimous verdict. Appeal could be taken to an independent appellate panel on which civilians could serve, with the power to reverse and remand a conviction. The concessions to circumstance are that the presiding panel could consider any evidence that would appear to be probative to a reasonable person. And for exquisitely sensitive intelligence particles, the defendant might have to rely on his military defense counsel for their rebuttal and challenge.

These are not the procedures of a railroad proceeding that some in the press and civil liberties community had feared. Upon publication of the procedures, the public conversation over the tribunals largely abated.³¹ The proof of fairness

²⁵ War Crimes Act of 1996, Report of the Committee on the Judiciary, U.S. House of Representatives, H.Rep. 104-698, 104th Cong., 2nd sess., 24 July 1996.

²⁶ *Ex parte Quirin*, 317 U.S. 1 (1942).

²⁷ *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

²⁸ *In re Yamashita*, 327 U.S. 1 (1945).

²⁹ *Johnson v. Eisentrager*, 339 U.S. at 786.

³⁰ See *Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism*, Department of Defense Military Commission Order No. 1, 21 March 2002, available at www.defenselink.mil/Mar2002/d2002032/ord.pdf, 5 July 2002.

³¹ Several Washington veterans were asked individually by Secretary Rumsfeld to advise him on the desirable form of the procedures. The statement endorsing the fairness of the procedures appears in the Appendix to my chapter in Demetrios James Caraley, ed., *September 11, Terrorist Attacks, and U.S. Foreign Policy* (New York: The Academy of Political Science, 2002), 176–178.

lies in the actual application, of course. The first prosecutions against alleged members of al Qaeda have proceeded in civilian courts. The so-called American Taliban, John Walker Lindh, was excluded from the reach of the President's order by virtue of his nationality. British citizen Richard Reid and French citizen Zaccarias Moussaoui were indicted before the military commission rules were available. The ambitious defense motions in those civilian cases may frame expectations of what a trial looks like; one lawyer has creatively argued there is a Second Amendment right to bear arms applicable in Afghanistan, a First Amendment right to associate with the Taliban, and a form of "combat immunity" for a "mere foot soldier" recruited to the Afghan front lines.³²

In real life, there may be little information about the individual actions of combatants captured in Afghanistan. If the evidence does not rise to the quality of criminal proof, it would be a mistake to convene a criminal proceeding of any kind. This will leave the United States and its allies with the dilemma of potentially detaining captured combatants *qua* combatants. Such internment is a traditional prerogative of wartime: a nation state can capture and continue to detain enemy combatants until a war's active hostilities are over to prevent the soldiers from returning to the fight. But in the paradoxical world of al Qaeda's terrorism, there are fewer legal guideposts. Neither al Qaeda nor the Taliban chooses to wear a military uniform, and no one has ever defined an alternative standard of proof of combatant status. In terrorism sponsored by nonstate actors, there is no government able to demobilize young men embarked on a violent jihad, and the conflict has no evident end. One may be put to drawing analogies from elsewhere in the law, including the emergency powers recognized in international human rights law and the peacetime law of civil commitment with periodic review of the status of battlefield combatants and the necessity for their detention.

The basic norms of the law remain the same—to preserve liberty except where there is a grave danger to others posed by violent behavior, and to limit measures to what is necessary and proportionate. In a world where terrorist action flirts with catastrophic weapons, the competing paradigms of crime and war may provide no more than analogies. Fitting the law to this unwanted new world thus will require tact, judgment, and the weight of a heavy heart.

³² See (E.D. Va. Crim. No. 02-37-A), Memorandum Opinion, 11 July 2002.