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Ronald J. Sievert

ARTICLES

WAR ON TERRORISM OR GLOBAL LAW ENFORCEMENT OPERATION?

*Ronald J. Sievert**

* Visiting Professor, University of Texas School of Law, U.S. Law and National Security and Federal Criminal Law, J.D., University of Texas School of Law, 1977; B.A., St. Bonaventure University, 1970. The following Article represents the opinions of the author and does not necessarily reflect the position of any U.S. government department or agency.

INTRODUCTION

It is a strange conflict that we have found ourselves engaged in since September 11th. We are not sure whether we are at war, as that term is generally understood, or if we are involved in a giant law enforcement roundup that is just an expanded version of our previously labeled "war" on organized crime and "war" on drugs. It is sometimes unclear whether suspected terrorists whose existence we happen to discover in the United States, Afghanistan, or elsewhere should be targeted for destruction in a military operation or captured, convicted, and sentenced to a term of years; whether they should be interrogated for military intelligence, or Mirandized, advised of their right to remain silent and questioned to obtain evidence that may be admissible in court against them; whether they should be tried before a military commission or a civilian jury; whether they are, in the end, prisoners of war (POWs), detainees, or defendants. There is even some question, from a purely legal standpoint, whether we should be seeking out all "terrorists of global reach"[1] or only those who have violated U.S. criminal laws by planning attacks against the United States and its interests overseas.

Of course, we have long been uncertain about whether terrorism is, in essence, a law-enforcement or a military problem. As President Reagan stated when he signed the Omnibus Diplomatic Security and Terrorism Act of 1986, "We can never legislate an end to terrorism. . . . However, we must remain resolute in our commitment to confront this criminal behavior in every way—diplomatically, economically, legally and, when necessary, militarily."[2] One noted commentator at the time suggested that government officials should work to encourage the development of an international, non-military system to combat terrorism with effective institutions for impartially adjudicating claims and punishing unjust or unlawful conduct. Until that system was in place, nation-states could use the military to act as "judges and avengers."[3]

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1 In his September 20, 2001 speech to a joint session of Congress, President George W. Bush pledged that the American effort would not stop "until every terrorist of global reach has been found, stopped and defeated." *See* R.W. Apple, *A Clear Message: 'I Will Not Relent'*, N.Y. TIMES, Sept. 21, 2001, at A1.

2 LOU CANNON, PRESIDENT REAGAN: THE ROLE OF A LIFETIME 654 (1991) (quoting President Reagan's remarks on signing an anti-terrorism bill on August 27, 1986).

3 Alberto Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 AM. SOC'Y INT'L L. PROC. 297, 300 (1987), *quoted in* Jami Melissa Jackson, Comment,

But the conflict in these two approaches to combating terrorism has become dramatically evident since September 11th. Originally, President Bush was prone to label al Qaeda members as criminal "thugs" like the "Mafia."[4] But he soon told his senior advisors, "We're at war. There's been an act of war declared upon America by terrorists, and we will respond accordingly."[5] He followed by stating that he wanted Osama bin Laden "dead or alive,"[6] and directing the Department of Defense (DOD) to set up procedures to try captured terrorists before military commissions.[7] As *Time* stated, "Legally, at least, the terrorists have their wish. They are soldiers after all."[8]

This dichotomy was also reflected by our subsequent actions. In Afghanistan, "FBI [i.e., law enforcement] agents accompany . . . soldiers on nearly every mission to interrogate detainees."[9] Prisoners "are interrogated by FBI agents and military intelligence officials [both] seeking clues to al-Qaeda terror plots and the whereabouts of Osama bin Laden and his top lieutenants. . . ."[10] Some are singled out for transport to the U.S. base at Guantanamo Bay, Cuba, where the Geneva Convention on prisoners of war may or may not apply and where a few may eventually be tried before a military commission.[11] Meanwhile, Zacarias Moussaoui and John Walker Lindh, who have been indicted by the government as al Qaeda terrorists,[12] are to be tried in civilian courts before civilian judges and juries.

The Legality of Assassination of Independent Terrorist Leaders: An Examination of National and International Implications, 24 N.C. J. INT'L L. & COM. REG. 669, 695 (1999).

4 *See* Josh Tyrangiel, *And Justice For . . .*, TIME, Nov. 26, 2001, at 66, 66 (quoting President Bush's statement from his September 20, 2001 speech before Congress that "Al-Qaeda is to terror . . . what the Mafia is to crime").

5 Elaine Sciolino, *Long Battle Seen: "We're at War," He Says*, N.Y. TIMES, Sept. 16, 2001, at A1 (quoting an address given by President Bush to national security officials shortly after the September 11th attacks).

6 David E. Sanger, *Bin Laden Is Wanted in Attacks, "Dead or Alive," President Says*, N.Y. TIMES, Sept. 18, 2001, at A1 (quoting President Bush in a speech delivered to Pentagon officials on September 17, 2001).

7 *See* Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, at 57,834–35 (Nov. 16, 2001) [hereinafter Military Order].

8 Tyrangiel, *supra* note 4, at 66.

9 Mark Mazzetti, *On the Ground*, U.S. NEWS & WORLD REP., Mar. 4, 2002, at 13, 16.

10 Romesh Ratnesar, *What's Become of Al-Qaeda?*, TIME, Jan. 21, 2002, at 39, 39.

11 *Id.* at 42.

12 *See* Dan Eggen & Brooke A. Masters, *U.S. Indicts Suspect in Sept. 11 Attacks*, WASH. POST, Dec. 12, 2001, at A1 (describing the Moussaoui indictment); Brooke A. Masters & Dan Eggen, *Lindh Indicted on Conspiracy, Gun Charges*, WASH. POST, Feb. 6, 2002, at A1 (describing the Lindh indictment).

All of this presents numerous legal issues which will have to be addressed by government, military, and civilian lawyers as well as the courts in the years to come. The rules governing the approaches of the military to war and of law enforcement officials to crime are of course greatly different. Exactly where can and should we legally exercise power? What should be our intent when we identify the location of suspected terrorists? What procedures must we follow to gather intelligence or obtain evidence? What rules should apply to their interrogation when they are captured? How should their individual cases be adjudicated, and, if suspects are found responsible, should they be simply detained and removed from action or punished for their conduct?

All major national operations, such as our effort against terrorism, necessarily have military, intelligence, and law enforcement components. But to avoid confusion or action at cross purposes, it is important to analyze potential issues and to determine what approach should predominate when there is inherent philosophical disagreement between the relevant organizations. The eventual adoption of a unified, coherent plan would be of great assistance to government officials as they seek to deal successfully with the problems raised by the rapid growth of world-wide terrorism.

I. PRIOR TO SEPTEMBER 11TH: DEFINING ALL ATTACKS AS CRIMINAL ACTS OF TERRORISM

The United States has suffered a variety of attacks against our facilities and personnel in the last ten years from apparently stateless assailants opposed to both our policies and presence in the Middle East. Our response has been to identify each attack as a criminal act of terrorism whose perpetrators should be punished as civilians under U.S. criminal law. Thus, we initiated civilian criminal prosecution against those who bombed the World Trade Center and planned to destroy New York bridges and tunnels in 1993;[13] against Ramsey Yousef for attempting to blow up airliners in the Pacific in 1994;[14] against those who blew up the U.S. military barracks in Saudi Arabia in 1996;[15] and against those who seriously damaged our embassies in

13 *See* United States v. Salameh, 152 F.3d. 88, 107–08 (2d Cir. 1998); United States v. Rahman, 854 F. Supp. 254, 258 (S.D.N.Y. 1994).

14 *See* United States v. Yousef, 927 F. Supp. 673, 675–76 (S.D.N.Y. 1996).

15 *See* Dan Eggen, *U.S. Trials Unlikely for Khobar Suspects*, WASH. POST, June 23, 2001, at A22 (noting that few suspects in the bombing would likely face trial in the United States despite a 43-count indictment).

Africa in 1998.[16] At the time of the second World Trade Center attack, we were in the midst of a criminal investigation to find those responsible for bombing the *U.S.S. Cole* in Yemen in 2000.[17]

Civilian criminal prosecution could be initiated in each of these cases because under U.S. law all such attacks on U.S. interests are considered acts of terrorism and not acts of war, even if the target is purely military. Section 2331(1) of 18 U.S. Code defines terrorism as violent acts that "appear to be intended to . . . coerce a civilian population [or] influence the policy of a government by intimidation or coercion."[18] Although "acts of war" are referenced in the anti-terrorism statutes, the phrase is only utilized to prohibit civil suits in connection with such acts.[19] They are not singled out for exclusion from punishment under the criminal code.

It is in the context of this definition of terrorism that President Clinton could publicly denounce the perpetrators of the Khobar Towers and *U.S.S. Cole* attacks as nothing but "cowardly terrorists."[20] It could be argued, of course, that the bombers in these cases were neither cowards nor terrorists, but misguided enemy soldiers fighting our armed forces establishment in the Middle East. Attacks initiated by al Qaeda against these targets, and possibly even against U.S. forces in Somalia, have been labeled as part of what has been increasingly called "asymmetrical" or "Class C" warfare[21]—that is, isolated, violent raids against a nation-state's interests by identifiable, but often stateless, organizations—as opposed to Class B (Persian Gulf War) or Class A (World War II) warfare.[22] As stated by Judge Reinhardt in *Quinn v. Robinson*:

> Neither wars nor revolutions are conducted in as clear-cut or mannerly a fashion as they once were. . . . In contrast to the organized, clearly identifiable, armed forces of past revolutions, today's strug-

16 *See* United States v. Bin Laden, 132 F. Supp. 2d 168, 172 (S.D.N.Y. 2001); United States v. Bin Laden, 126 F. Supp. 2d 264, 268–69 (S.D.N.Y. 2000).

17 *See* John F. Burns & Stephen Lee Myers, *Destroyer Damaged*, N.Y. TIMES, Oct. 13, 2000, at A1.

18 18 U.S.C. § 2331(1)(B)(i)–(ii) (2000).

19 Although federal law allows victims of terrorism to sue for their injuries, *see id.* § 2333, no action may be maintained under § 2333 for injury stemming from "acts of war," *id.* § 2336(a). "Acts of war" are defined as occurring only in a declared war, *id.* § 2331(4)(A), an armed conflict between two or more nations, *id.* § 2331(4)(B), or "military forces of any origin." *Id.* § 2331(4)(C).

20 *See* Burns & Myers, *supra* note 17; *see also* President William Clinton, Remarks About the Saudi Arabia Explosion (June 25, 1996), *at* http://www.cnn.com/WORLD/9606/25/clinton.remarks/index.html (full-text of speech).

21 Philip Bobbitt, *The Indian Summer*, U.T. LAW, Spring 2002, at 14, 14–15.

22 *Id.* at 15.

> gles are often carried out by networks of individuals joined only by a common interest in opposing those in power. [We are naturally offended by the tactics] used by many of those whose view of the nature, importance, or relevance of individual human life differ radically from ours [but they are acting in different] circumstances that we have not experienced . . . .[23]

Whether members of al Qaeda should be considered warriors or terrorists is of course a reflection of the age-old problem of defining terrorism. By one calculation, "over 100 definitions have been proposed"[24] for the term. Daniel Pickard states that the common meaning which consistently reflects the essence of the various definitions is "violence . . . used for a political/religious objective, in order to affect an intended audience, and thereby to alter an issue of public policy."[25] This fits squarely within the U.S. criminal law definition noted above. But Donna Arzt, Director of the Center for Global Law and Practice at Syracuse University, states that the first of the "four or five fundamental elements" of terrorism is that its victims are identified as civilian "non-combatants, in order to differentiate terrorism from attacks on military targets, which are outright acts of war."[26]

It is not necessary for purposes of this Article to finally resolve the debate as to the proper definition of terrorism. As with other pejorative words and phrases such as "racism," "fascism," and "aggressive war," the definition depends on the circumstances and perspective of the one defining the term. What is important is to note that in deciding whether we are truly at war or are pursuing a law enforcement operation, part of the problem we are facing today stems from the fact that, with rare exception,[27] before September 11, 2001, we had developed the habit of classifying all attacks, regardless of target, as criminal acts of terrorism to be dealt with by civilian courts under U.S. criminal law. The use of what amounts to weapons of mass destruction against the World Trade Center and the Pentagon and action against our military in Somalia, Saudi Arabia, and Yemen should perhaps more properly be recognized as a series of attacks in what amounts to a significant and long-term war against the United States.

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23 Quinn v. Robinson, 783 F.2d 776, 804 (9th Cir. 1986).

24 Donna Arzt, *Introduction* to *Terrorism and Terrorists*, *in* JURIST: THE LEGAL EDUC. NETWORK, *at* http://jurist.law.pitt.edu/terrorism/terrorism1.htm (last visited Oct. 9, 2002).

25 Daniel B. Pickard, *Legalizing Assassination? Terrorism, the Central Intelligence Agency and International Law*, 30 GA. J. INT'L & COMP. L. 1, 6 (2001).

26 Arzt, *supra* note 24.

27 For example, President Reagan ordered air strikes against Libya following a Berlin nightclub attack. *See* CANNON, *supra* note 2, at 653–56.

Viewed in this manner, a more military-oriented response to the questions posed at the beginning of this Article would be justified.

II. KILL OR CAPTURE

Before moving on to more complex legal issues, some time must be spent addressing one of the most basic questions our combined military and FBI teams will face as they seek out terrorists around the world. That is, once they are found, whether in caves, apartments, or rural farmhouses in the United States and elsewhere, do we attempt to kill them outright or attempt to capture them and bring them to trial?

As noted above,[28] prior to September 11th we were for the most part dedicated to utilizing the civilian criminal justice system to adjudicate terrorist cases. We could have continued on this law enforcement track afterwards and simply pursued the leadership of al Qaeda with the aim of eventually trying all of them. Indeed, a more timid administration might have done so on the grounds that it did not want to insert the U.S. militarily into internal civil wars and conflicts in countries such as Afghanistan, the Philippines, Pakistan, and India. This administration, however, has already demonstrated that it is not hesitant to utilize the military even if they often work in tandem with the FBI.[29]

The goal of the military is essentially to destroy the enemy, not to capture him. According to a summary of a speech falsely attributed to Retired Air Force General Richard Hawley, the intent of the war on terrorism should be "professional, well-executed violence [so that] afterwards, the other guys are all dead. That's right. Dead. Not 'on trial,' not 'reeducated,' not nurtured back into the bosom of love."[30] Major General Frank Hagenbeck, commander of Operation Anaconda in Afghanistan, seems to agree with this philosophy, telling the

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28 *See supra* Part I.

29 *See supra* note 10 and accompanying text.

30 These remarks were attributed to Retired General Richard Hawley and were widely distributed on the Internet. *See, e.g., Marine* [sic] *Gen. Hawley's Speech, at* http://www.infostew.com/ChangeAmerica/_change1/00000018.htm (May 7, 2002). In fact, the remarks were made by humorist Larry Miller in a column for the *Daily Standard. See* Larry Miller, *You Say You Want a Resolution*, DAILY STANDARD, Jan. 14, 2002, *at* http://www.weeklystandard.com/Content/Public/Articles/000/000/000/762dbnlm.asp. General Hawley recently stated that he did not give the speech but that he shares the sentiments expressed in it. *See* Barbara Mikkelson & David P. Mikkelson, Dick Hawley, Urban Legends Reference Pages, *at* http://www.snopes.com/rumors/Hawley.htm (last updated Apr. 1, 2002). I decided to retain the statement because it clearly expresses the military philosophy as reflected by Major General Frank Hagenbeck's statement. *See infra* note 31 and accompanying text.

media, "[A]s long as they want to send them here, we will kill them here. If they want to go somewhere else, we will kill them there."[31] Law enforcement, on the other hand, is virtually always committed to finding, arresting, and trying criminal suspects. It makes no difference whether there are only a few individuals to be targeted or a large organization, as was the case with the Mafia, the Black Panthers, and the Ku Klux Klan. It is irrelevant whether they have committed one act or a series of acts in what is an assault upon the community. Odious gang leaders, like Al Capone and John Gotti, who damage our entire society may be singled out for increased sentences, even the death penalty after due process of law, but never for instant termination.

So what happens if we determine that an al Qaeda cell has taken refuge in an apartment or farmhouse in England, France, or the United States? One can imagine the chaos that would follow once the media finds out that the cell has been located and surrounded. Defense attorneys would probably appear on television demanding to speak to their "clients" or to negotiate with the authorities; apologists would likely expound on the motives of the beleaguered fugitives; critics would certainly censure the government for not providing enough food and water or for not protecting civil liberties. The reaction would probably be similar to the media circus in Waco which occurred after federal agents armed with handguns and executing a lawful search warrant were greeted by at least seventy Branch Davidians firing automatic assault weapons.[32]

But, if we were truly at war, then our leaders would know exactly what to do in this situation regardless of the media attention. The enemy would be given an opportunity to surrender, and if they did not immediately do so, they would be obliterated by laser-guided bombs, tank shells, or an infantry assault. Yet one must question whether, in today's atmosphere, the United States and our allies would place the military or national law enforcement authority in charge once the terrorists were located. In fact, in the United States, it is likely that our great fear of internal military action, often reflected by vocal but erroneous assertions that *posse comitatus* laws[33] prevent

31 Michael Elliot, *Inside the Battle of Shah-i-Kot*, TIME, Mar. 18, 2002, at 36, 38–39.

32 *See* United States v. Branch, 91 F.3d 699, 710 (5th Cir. 1996) (describing the raid on a Branch Davidian compound in Waco, Texas).

33 *See* 18 U.S.C. § 1385 (2000) ("Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned . . . .").

military assistance to domestic law enforcement,[34] would result in the FBI being tasked with complete oversight of the operation. Once that agency assumed the dominant role, what followed would not be war, but law enforcement aimed at capturing, not destroying, the encircled terrorists.

Another aspect of the kill or capture issue is to ask what should happen if a terrorist leader is traced to a specific location in the United States, Western Europe, or elsewhere. Contemplating this possibility, former General Counsel of the National Security Agency (NSA), Stewart Baker stated:

> We have judicialized more aspects of human behavior than any civilization in history, and we have come to the limit of that. Frankly, if Osama Bin Laden did this, I'm not really interested in bringing him back for trial, and I don't think we're obligated to think in those terms.[35]

A number of commentators have argued that the Army would be legally authorized to deploy a special team to assassinate terrorist leaders. These commentators emphasize that, despite three attempts, Congress has never passed a statute outlawing assassination.[36] The only possible legal restriction is Executive Order 12,333 outlining the organization of the intelligence community. This order states that "[n]o person employed by or acting on behalf of the United States Government shall engage in . . . assassination."[37] The commentators argue, however, that the order applies only to the intelligence agencies, not to the Army and that, in any case, the order could be easily

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34 *See id.*; *see also* Bissonette v. Haig, 776 F.2d 1384, 1387–90 (8th Cir. 1985) (reviewing the history and tradition of the Posse Comitatus Act and concluding that "military involvement . . . does not violate the Posse Comitatus Act unless it actually regulates, forbids, or compels some conduct on the part of those claiming relief"); United States v. Casper, 541 F.2d 1275, 1278 (8th Cir. 1976) ("[The] legal standard for determining [a violation of 18 U.S.C. § 1385 is whether] 'military personnel subjected the citizens to . . . military power which was regulatory, prescriptive, or compulsory in nature . . . .'" (quoting United States v. McArthur, 419 F. Supp. 186, 194 (D.N.D. 1975))).

35 John Lancaster & Susan Schmidt, *U.S. Rethinks Strategy for Coping with Terrorists*, WASH. POST, Sept. 14, 2001, at A9.

36 *See, e.g.*, Patricia Zengel, *Assassination and the Law of Armed Conflict*, 45 MERCER L. REV. 615, 634 (1992) (noting that "[d]espite three different legislative proposals placed before Congress between 1976 and 1980, no statute materialized" (citing Bert Brandenburg, Note, *The Legality of Assassination as an Aspect of Foreign Policy*, 27 VA. J. INT'L L. 655, 685 n.195 (1987))).

37 Exec. Order No. 12,333, 46 Fed. Reg. 59,941, at 59,952 (Dec. 8, 1981).

overridden by a later executive order.[38] Furthermore, the word "assassinate" does not really include the act of proceeding in uniform to kill an enemy at or near the field of battle, which in this case is the entire world.[39] Finally, no matter what you call the termination of someone like Osama bin Laden, such action would be justified under the self-defense provisions of the United Nations Charter.[40]

As noted above, however, law enforcement in today's culture could never consider the pre-planned purposeful killing of a suspect without providing a fair trial followed by the right to appeal. This holds true regardless of the crimes believed to have been committed by the defendant. Agents would be duty-bound to attempt to capture the leaders and bring them into the criminal justice system.

The above situations illustrate why it is helpful to decide early on whether or not we are truly at war. Once a choice has been made, deciding what to do when such events occur flows naturally from the premise that has been adopted and communicated to our citizens and government. An early decision can help avoid placing law enforcement personnel in military-style operations and tasking battle troops to act as police officers. Based on our approach to date, it must be anticipated that if the above scenario takes place, there would be uncertainty at the FBI and the Pentagon as to exactly who would assume the lead role and what the mission would be.

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38 *See* Zengel, *supra* note 36, at 635 (noting that Executive Order 12,333 was intended to pertain to the peacetime activities of intelligence officers and that the order merely forestalled the possibility of more restrictive legislation); Jackson, *supra* note 3, at 675 ("Although the [Executive Order] provided a response to the outrage of alleged assassination plots, it preserved flexibility in interpretation.").

39 *See* Zengel, *supra* note 36, at 622–25 (discussing the definition of assassination under customary international law as "selected killing of an individual enemy by *treacherous means*," for example, through non-uniformed attacks (emphasis added)); *see also* Pickard, *supra* note 25, at 14–15 (noting that, despite a traditional understanding that assassination was a prohibited tactic, early scholars posited an exception to this principle for non-sovereign enemies such as pirates).

40 The United Nations Charter explicitly recognizes a right of national self-defense. *See* U.N. CHARTER art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense . . . ."); *see also* Pickard, *supra* note 25, at 11–12 (noting that force is authorized by the U.N. Charter if used in self-defense and with authorization by the Security Council); Zengel, *supra* note 36, at 638–41 (recounting that the United States justified an attack on Libya in April 1986, in response to a Berlin terrorist bombing, under self-defense provisions of the U.N. Charter). *See generally* Jackson, *supra* note 3, at 679–88 (surveying scholarship on the right of national self-defense against non-state actors).

III. INTERROGATION

Military and Central Intelligence Agency (CIA) agents interrogating a suspected terrorist need quickly to obtain intelligence to protect the troops on the ground and the nation as a whole. The FBI agents working with the military and CIA overseas, although naturally interested in intelligence information, do not have a foreign intelligence role per se.[41] A significant part of their responsibility is to seek evidence that can be admitted against defendants in court. Generally, this requires that a suspect in custody be advised of his *Miranda* rights, including the right to remain silent and to be represented by counsel.[42] An intelligence officer would obviously find such warnings ludicrous and highly counterproductive.

This basic problem inherent in combining military and law enforcement resources in our war on terrorism is present in numerous cases, but the problem has been dramatically illustrated by press reports surrounding the captures of Taliban sympathizer John Walker Lindh and reputed al Qaeda Chief of Operations Abu Zubaydah. After detailing how "Pakistani military intelligence, accompanied by American CIA and FBI personnel wearing bulletproof vests"[43] raided an al Qaeda headquarters and arrested Zubaydah and his followers, *Time* asked in a headline, "How Do We Make Him Talk?"[44] There followed speculation that if Zubaydah refused to answer questions, U.S. authorities might send him to "Egypt or Jordan," nations which have "no qualms about extracting information through torture."[45] Meanwhile, Lindh's attorneys vigorously challenged the circumstances of his interrogation by the military, CIA, and FBI. In addition to questioning the conditions of his confinement, they complained that the United States violated the Fifth Amendment by not allowing him to see his attorney while he was held at a U.S. military base in Afghanistan.[46]

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41 Executive Order 12,333 attempted to ensure that there was no overlap between CIA and FBI by confining the FBI's intelligence role to operations in the United States. *See* Exec. Order No. 12,333, 46 Fed. Reg. 59,941, at 59,949.

42 *See* Miranda v. Arizona, 384 U.S. 436, 467–72 (1966) (noting that the right to remain silent is "fundamental to our system of constitutional rule," while the "right to have counsel present at the interrogation is [an] indispensable [right]").

43 Tim McGirk, *Anatomy of a Raid*, TIME, Apr. 15, 2002, at 40, 40.

44 Jodie Morse, *How Do We Make Him Talk?*, TIME, Apr. 15, 2002, at 44, 44.

45 *Id.*

46 *See generally* Naftali Bendavid, *Analysts See Trouble Spots in Legal Case Against Lindh*, CHI. TRIB., Feb. 10, 2002, at C10; Brooke A. Masters, *Prosecutors Deny Claims Lindh Was Tortured*, WASH. POST, Mar. 30, 2002, at A13.

A. *Does the Fifth Amendment Apply to Interrogations Outside the United States?*

The questions raised by these cases could be avoided if Fifth Amendment protections did not apply to interrogations of citizens, or at least non-citizens, for law enforcement purposes conducted overseas. Whether the protections apply is a fair question after the Supreme Court's decision in *United States v. Verdugo-Urquidez*[47] that the Fourth Amendment is not applicable to searches and seizures against foreign persons outside our territorial boundaries.[48] *Verdugo-Urquidez* certainly gave pause to those who had assumed that "the Constitution follows the flag" since the Court's decision in *Reid v. Covert*[49] that citizens tried by the military in Germany and England had a right to due process under the Constitution, including the Sixth Amendment right to a jury trial.[50] Moreover, Chief Justice Rehnquist emphasized in *Verdugo-Urquidez* that the Fourth Amendment did not protect those without "substantial connections" with the United States,[51] a phrase that clearly excludes foreign terrorist suspects. In fact, such terrorists are closely akin to the "alien enem[ies] engaged in the hostile service of a government at war with the United States," whom Justice Jackson held not to be eligible for Fifth and Sixth Amendment trial guarantees in *Johnson v. Eisentrager*.[52] Finally, as a practical matter, how can the United States insure that any individual, including a U.S. citizen, questioned near a battlefield or in a foreign country such as Afghanistan, has access to adequate legal representation if he invokes his Fifth Amendment right to a lawyer?

Although these arguments may have some merit, in the author's opinion, it is not likely that they would prevail. *Verdugo-Urquidez* was a Fourth Amendment case that relied in great part on the fact that the Amendment concerns the rights of "the people" of the United States, that is, a "class of persons who are part of our national community."[53] The Fifth Amendment is not so limited, stating that "no person" shall be compelled to be a witness against himself.[54] *Johnson*, although

47 494 U.S. 259 (1990).

48 *Id.* at 274–75 (noting that "the text of the Fourth Amendment, its history and our cases discussing the application of the Constitution to aliens and extraterritoriality [indicate that if] there are to be restrictions on searches and seizures . . . they must be imposed by the political branches . . . .").

49 354 U.S. 1 (1957).

50 *Id.* at 39–40.

51 *Verdugo-Urquidez*, 494 U.S. at 271.

52 339 U.S. 763, 785 (1950).

53 *Verdugo-Urquidez*, 494 U.S. at 265 (citing U.S. CONST. amend IV).

54 U.S. CONST. amend. V.

referencing the Fifth and Sixth Amendments,[55] dealt only with the trial rights contained in those provisions, not with Fifth Amendment protections against self incrimination. Even *Verdugo-Urquidez* recognized this latter privilege as a "fundamental" right of all criminal defendants.[56] In addition, the Supreme Court has recently held that the *Miranda* safeguards have "become embedded in routine police practice to the point where the warnings have become part of our national culture."[57]

Analyzing this issue in *United States v. Bin Laden*,[58] the embassy bombing case, U.S. District Judge Sand decided that the Fifth Amendment did apply to overseas interrogation of a non-resident alien.[59] His opinion relied in part on the above-cited cases but also on his belief that "any violation of the privilege against self-incrimination occurs, not at the moment law enforcement officials coerce statements through custodial interrogation but when a defendant's involuntary statements are actually used against him at an American criminal proceeding."[60] The initial question, therefore, was really one of domestic, not extraterritorial, application of the Fifth Amendment. Viewed in this context, the full protections of the Amendment are always in force. Judge Sand stated that he appreciated the practical problems associated with providing attorneys for defendants in a foreign culture that has few lawyers or that generally does not allow lawyers to visit clients during questioning.[61] However, Judge Sand believed many of these obstacles could be overcome and that, "[t]o the maximum extent reasonably possible, efforts must be made to replicate what rights would be present if the interrogation were being conducted in America."[62] Only then, in his opinion, could coercion be avoided and confidence placed in the general truthfulness of any statement obtained by the authorities.[63]

The original report on Abu Zubaydah referenced sending him to Egypt or Jordan;[64] however, this action would not necessarily permit U.S. authorities to evade the requirements of the Fifth Amendment.

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55 *Johnson*, 339 U.S. at 784.

56 *Verdugo-Urquidez*, 494 U.S. at 264.

57 Dickerson v. United States, 530 U.S. 428, 443 (2000).

58 132 F. Supp. 2d 168 (S.D.N.Y. 2001).

59 *Id.* at 181–85.

60 *Id.* at 181–82.

61 *Id.* at 187–88.

62 *Id.* at 188.

63 *Id.* at 188–89.

64 *See supra* note 45 and accompanying text.

As the Ninth Circuit held in *Stonehill v. United States*,[65] if the United States participates in a joint venture with foreign officials or uses them as agents to circumvent our law, U.S. constitutional protections must still apply.[66] This principle was specifically extended to the Fifth Amendment in *United States v. Bagaric*.[67] If a foreign government questioned a suspect independently of the United States, the results would be admissible if the defendant was treated humanely,[68] but would in all likelihood be excluded under the court's supervisory power if the foreign government's actions "shocked the conscience" of the U.S. courts.[69] Information "extracted" by a foreign government through physical or mental compulsion, therefore, would probably not be admissible in the United States.

B. POW or Detainee?

If the courts are to hold, as in *Bin Laden*, that the Fifth Amendment applies overseas, competing considerations of intelligence and prosecution will make it extremely difficult to determine exactly how U.S. officials should proceed with interrogation when Taliban, al Qaeda, or terrorist suspects are captured. In analyzing the issue, however, it would appear that perhaps the threshold question to be answered by the government should be whether or not the individuals in custody should be labeled prisoners of war or detainees. Under the Geneva Convention, "lawful combatants" in "a declared war or any other armed conflict . . . even if the state of war is not recognized by one of [the parties]," should be classified as POWs.[70] POWs are not to be prosecuted or punished for military acts they committed during the war, and they are not to be incarcerated in jails or penitentiaries except for disciplinary reasons.[71] Accordingly, as a general rule, POWs need not be given *Miranda* rights because they should not be brought into the criminal justice system. On the other hand, individuals who violate the laws of war and who "do not meet the legal criteria

65 405 F.2d 738 (9th Cir. 1968).

66 *Id.* at 743.

67 706 F.2d 42, 69 (2d Cir. 1983).

68 *See* United States v. Callaway, 446 F.2d 753, 755 (3d Cir. 1971) (allowing evidence obtained through a vehicle search by Toronto police because their conduct "was not the type that would shock the conscience of our courts").

69 *See* United States v. Toscanino, 500 F.2d 267, 280–81 (2d Cir. 1974) (holding that Fifth Amendment protections apply extraterritorially, even if the foreign state does not recognize the protections).

70 Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 136.

71 *Id.* art. 22, 6 U.S.T. 3336, 3336, 75 U.N.T.S. 154, 154.

of [POWs] under the [Geneva Convention]" may be unlawful combatants and "termed detainees instead of [POWs]."[72] They may be prosecuted and jailed for their crimes and, therefore, may be eligible for the protection of *Miranda.*

This does not mean it is necessarily always easy to determine which category applies to a particular combatant. The facts can be cloudy, and the law is still somewhat in dispute. For that reason, the Geneva Convention provided for Article 5 tribunals to rule on a prisoner's status,[73] which tribunals in the United States are directed by military lawyers associated with the Judge Advocate General.[74] For example, the original Geneva Convention ratified by the United States classified as soldiers and potential POWs those who wear "fixed distinctive sign[s] recognizable at a distance," "carry[ ] arms openly," and conduct operations in accordance with the "laws of and customs of war."[75] The Geneva Protocols,[76] however, recognized that "there are situations in armed conflict where, owing to the nature of the hostilities an armed combatant can not so distinguish himself"[77] and stated that, in such situations, "[an armed combatant] shall retain his status as a combatant, provided that . . . he carries his arms openly."[78] These protocols have not been ratified by the United States in part because of the removal of the requirement that combatants wear some type of uniform or sign. But the Geneva Protocols have been accepted by 150 countries and, arguably, carry the force of international law.[79] In addition, under U.S. criminal law, as noted in Part I, an attack upon any U.S. facility with intent to coerce a civilian population or influence a policy of government is a terrorist act subject to

72 INT'L & OPERATIONAL LAW DEPT., THE JUDGE ADVOCATE GENERAL'S SCHOOL, OPERATIONAL LAW HANDBOOK 22 (2002), *at* https://www.jagcnet.army.mil/JAGCNET Internet/Homepages/AC/CLAMO-Public.nsf [hereinafter OPERATIONAL LAW HANDBOOK].

73 Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 70, art. 5, 6 U.S.T. at 3322–24, 75 U.N.T.S. at 140–42.

74 OPERATIONAL LAW HANDBOOK, *supra* note 72, at 22.

75 Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 70, art. 4, 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

76 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Jan. 23, 1979, 1125 U.N.T.S. 609 [hereinafter Geneva Protocol II]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Jan. 23, 1979, 1125 U.N.T.S. 3.

77 Geneva Protocol II, *supra* note 76, sec. II, art. 44, ¶ 3, 1125 U.N.T.S. at 23.

78 *Id.*

79 OPERATIONAL LAW HANDBOOK, *supra* note 72, at 11.

prosecution and imprisonment.[80] However, under the Geneva Convention, such an attack against a military target, as opposed to civilians, might not be a violation of the laws of war,[81] and, accordingly, the perpetrators should be recognized as soldiers and POWs if captured. Those who bombed the *U.S.S. Cole* and the Khobar Towers could thus potentially claim POW status. The same could be said of Afghan fighters supporting the Taliban.

In the context of interrogation, and even detention, however, this expanded reading of the Geneva Convention, while apparently contrary to U.S. policy, does not necessarily harm the United States. First, as noted, if it is determined that a captured suspect has POW status, *Miranda* is not an issue, and the suspect may be freely interrogated without a lawyer. Moreover, once interrogation is complete, the individual may possibly receive a "sentence" that is more effective than most that could be given by a criminal court. As stated by Professor Alfred Rubin of the Fletcher School of International Law and Diplomacy:

> Even if the "armed conflict" has not been declared . . . , those soldiers who have not violated the international laws of war are still "prisoners of war" until the cessation of active hostilities. The questions as to when those hostilities have actually ceased seems to be a question best resolved by the [Article 5] tribunal, which need not accept the word of a prisoner as to his future peaceful intentions. There need be no special commissions, no criminal trials, no "convictions," to result in life in prison enlivened only by periodic Red Cross visitations.[82]

If our goals are (1) to interrogate suspects without telling them that they do not have to talk and without providing a lawyer who may obstruct the interests of government in order to protect his client, and (2) to prevent terrorist suspects from committing future violent acts, then Rubin's approach to determining a prisoner's status has obvious appeal. It must be remembered, however, that this would only be a partial solution. Those who violate the laws of war would not legally qualify as POWs. They would be candidates for prosecution and, as such, could retain Fifth Amendment rights.

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80 18 U.S.C. § 2331 (2000).

81 OPERATIONAL LAW HANDBOOK, *supra* note 72, at 10.

82 Alfred P. Rubin, *Applying the Geneva Conventions: Military Commissions, Armed Conflict, and Al-Qaeda*, 26 FLETCHER F. WORLD AFF. 79, 81 (2002).

C. *Purpose of the Interrogation*

If the government decides that a particular prisoner should not be classified as a POW and should be subject to criminal prosecution, the government could argue that *Miranda* and Fifth Amendment protections are irrelevant in the early stages of interrogation because the questioning is not for law enforcement purposes. For example, if authorities honestly intend to obtain and utilize the information for intelligence only, *Miranda* would not apply even if the subject is in custody. As Judge Sand stated in *United States v. Bin Laden*:

> To the extent that a suspect's *Miranda* rights allegedly impede foreign intelligence collection, we note that *Miranda* only prevents an unwarned or involuntary statement from being used as evidence in a domestic criminal trial; it does not mean that such statements are never to be elicited in the first place.[83]

This statement is consistent with other decisions holding that *Miranda* warnings need not be given by custom officials while determining an immigrant's status,[84] by psychiatrists during evaluation of imprisoned convicts,[85] or by social workers conducting an investigation.[86]

Truly voluntary statements made to intelligence agents may even be admitted later in the defendant's criminal trial regardless of the absence of warnings. For example, in *United States v. Lonetree*,[87] a Marine guard who had committed espionage chose to brief CIA agents in Vienna on his activities and voluntarily reported to them for ten days before they turned him over to Naval Investigative Service law enforcement agents.[88] At trial, the CIA interviews were admitted because they were clearly voluntary and because the agents "analyzed appellant's activities [only] for the purpose of ascertaining what damage may have occurred to the security of the United States and not for the purpose of perfecting a criminal prosecution."[89]

In Afghanistan, however, where FBI agents accompany intelligence operatives, even a pure intelligence purpose may not guarantee the evidentiary admission of an unwarned statement because *Lonetree* relied in large part on the fact that "courts have found that non-police

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83 United States v. Bin Laden, 132 F. Supp. 2d 168, 189 (S.D.N.Y. 2001).

84 United States v. Layne, 973 F.2d 1417, 1420 (8th Cir. 1992).

85 United States v. Mitchell H., 182 F.3d 1034, 1036 (9th Cir. 1999).

86 United States v. Moreno, 36 M.J. 107, 112 (C.M.A. 1992).

87 35 M.J. 396 (C.M.A. 1992).

88 *Id.* at 399–400.

89 *Id.* at 404 (quoting United States v. Lonetree, 31 M.J. 849, 868 (N-M Ct. Crim App. 1990)).

agents do not exert the same coercive force or custodial constraint as do law enforcement agents."[90] Furthermore, in that case the intelligence and law enforcement investigation had not "merged into an indivisible entity" and the intelligence agents were in no way under the guidance, direction, or control of law enforcement.[91] Although the exact facts surrounding the interrogations in Afghanistan and at Guantanamo are unknown, it does appear that the prisoners are questioned in an atmosphere closer to a station house custodial interrogation than to the repeated voluntary appearances of Lonetree. In addition, the previously cited press reports indicating that the FBI and CIA are working together[92] necessarily raise the merger issue that was not present in *Lonetree.*

The government could maintain that *Miranda,* nevertheless, should not apply to questioning of suspected terrorists because the purpose of the questioning is to immediately protect the public safety. In *New York v. Quarles,*[93] the Supreme Court created the "public safety" exception to *Miranda* by authorizing both the questioning and the evidentiary admission of the response when officers captured an armed suspect in a grocery store and asked the suspect where he had concealed the gun without reading him his rights.[94] Appellate courts have since relied upon *Quarles* to permit questioning about the location of weapons even if the defendant has asked for a lawyer.[95] Intelligence and law enforcement officials confronting terrorist suspects immediately after they have been secured certainly have powerful reasons to question the suspects to find out whether other terrorists or weapons might be concealed nearby or whether a major attack is about to take place. This questioning should be allowed under the public safety exception. But, although the argument is worth making, the government may not be able to generally rely on *Quarles* and its progeny as carte blanche authority for the admission in criminal court of the results of a lengthy interrogation without Fifth Amendment protections. This is because the facts of the cited public safety exception cases all relate to brief questions regarding an imminent identifiable threat. Currently, no precedent exists for extending the

90 *Id.*

91 *Id.* at 403 (quoting United States v. Penn, 39 C.M.R. 194, 199 (C.M.A. 1969)).

92 *See supra* note 46 and accompanying text.

93 467 U.S. 649 (1984).

94 *Id.* at 656.

95 *See* United States v. Mobley, 40 F.3d 688, 692–94 (4th Cir. 1994) (reasoning that the danger to public safety persists after the defendant has asked for a lawyer); United States v. DeSantis, 870 F.2d 536, 540–41 (9th Cir. 1989) (same).

exception to admission of the results of detailed probing into long-term dangers.

Questioning for reasons of intelligence or public safety of potential prosecution targets would likely presage a lengthy interrogation by law enforcement agents specifically designed to elicit incriminating evidence for use at the trial of the defendant and his co-conspirators. This follow-up questioning is generally accompanied by oral, written, and signed *Miranda* waivers. These waivers, however, do not guarantee evidentiary admission of a defendant's subsequent confession by cleaning up all problems that might be associated with the initial government interrogation. This is because the defense would probably argue that, in his client's mind, "the cat was out of the bag" once he responded to the earlier unwarned intelligence questioning and he, therefore, saw nothing to be gained by refusing to answer later questions by law enforcement. The Supreme Court addressed this issue at length in *Oregon v. Elstad*.[96] There the Court held that a prior, unwarned statement would not automatically require the suppression of a later confession secured after the defendant knowingly waived his rights,[97] if the initial statement was voluntary and was not the product of coercion or other deliberate means calculated to break a suspect's will.[98] Involuntary unwarned statements still could taint later Mirandized confessions. In that event, the government would only be allowed to admit the defendant's subsequent statement if it could be demonstrated that (1) the statement was voluntary, (2) the statement was not obtained by using the earlier statement, or (3) there was no causal connection between the two statements.[99] As a practical matter, these requirements could prove to be a difficult burden to overcome both because of the likelihood of shared information and the defendant's belief that he had already confessed to the authorities.

D. Torture

Before leaving the subject of interrogation, some reference must be made to the possibility of torturing captured terrorist suspects to obtain critical information. This subject was addressed before September 11th by A.L. DeWitt[100] and the present au-

96 470 U.S. 298 (1985).

97 *Id.* at 312.

98 *Id.* at 313 n.3.

99 United States v. Delvalle, 55 M.J. 648, 653 (A. Ct. Crim. App. 2001) (citing United States v. Pownall, 42 M.J. 682 (A. Ct. Crim. App. 1995)).

100 *See generally* A.L. Dewitt, *The Ultimate Exigent Circumstance*, 5 KAN. J.L. & PUB. POL'Y 169 (1996) (arguing that necessity may justify the use of torture in terrorist situations).

thor[101] before Alan Dershowitz made the subject fashionable by going public with the existing legal theory on the matter.[102] Without rehashing what was written in the prior articles, a few key points need to be reemphasized. First, in a situation where terrorists have knowledge of the imminent deployment of a weapon of mass destruction, torture must be considered. It is understood that international conventions, such as the International Covenant on Civil and Political Rights[103] and the Convention Against Torture,[104] prohibit torture,[105] but international agreements also recognize the importance of the State protecting the life of its citizens.[106] Arguably, a nation-state which did not coerce one terrorist in order to save hundreds of thousands of people would be abandoning its duty to its citizens.[107] Second, although government agents may escape civil liability under a common law defense of necessity, it would be far better for the legislature to outline a protocol for torture, requiring the emergency approval of a judge or judicial panel before the torture is undertaken. Finally, because of the constitutional prohibition, as well as the generally accepted belief that the product of coercive interrogation is unreliable, the courts would never allow evidence obtained by torture to be used in any way by law enforcement to convict a defendant. To the extent that torture is consistent with the successful pursuit of a war and the protection of the population, it would be folly not to employ it under appropriate controls to avoid a devastating attack. But, in essence, the subject of torture is an intelligence and prophylactic matter suitable only to a state

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101 Ronald J. Sievert, *Meeting the Twenty-First Century Terrorist Threat Within the Scope of Twentieth Century Constitutional Law*, 37 HOUS. L. REV. 1421, 1460–63 (2000) (arguing that torture could be justified in rare circumstances based on an extension of the common-law necessity defense or of the public-policy exception to *Miranda*).

102 *See* Morse, *supra* note 44, at 44.

103 International Covenant on Civil and Political Rights, Mar. 23, 1976, S. EXEC. DOC. No. 95-2 (1978), 999 U.N.T.S. 171.

104 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85.

105 *Id.* S. TREATY DOC. No. 100-20, at 1, 5, (1988), 1465 U.N.T.S. at 113; International Covenant on Civil and Political Rights, *supra* note 103, S. EXEC. DOC. No. 95-2, at Part E, 25, 999 U.N.T.S. at 175.

106 *See generally* D.J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 37–54 (1995) (discussing the various protections of human life given in international agreements).

107 This proposition has been argued in Tamar Beyth-Sharon, Permissible Interrogation Methods in the War Against Terrorism: The Ticking Time Bomb Dilemma, (Apr. 2002) (unpublished student paper, on file at the University of Texas School of Law).

of war. The results of torture would not contribute significantly to law enforcement and prosecution.

E. Conclusion

The application of the Fifth Amendment to extraterritorial interrogation of terrorist suspects is highly problematic for those interested in combating terrorism in the courts. Prosecutors can only hope that a subject knowingly and voluntarily waived his rights from the start if they want to guarantee the admission of the results later. Recitation of these rights and provision of lawyers is not, however, consistent with efficient military and intelligence work. The government can legitimately argue that unwarned statements should be admitted in court because the questioners were motivated by intelligence and public safety concerns. The government can further argue that later Mirandized questioning removes the taint from what has gone before. But it is far from certain that these arguments will prevail. If pending cases encounter serious difficulty due to Fifth Amendment objections as they proceed from trial to appellate court review, the government will have additional reason to reevaluate the efficacy of a law enforcement approach to the war on terrorism.

IV. EVIDENCE COLLECTION

A. Crime Scene Scenario

The basic question of how government authorities should collect evidence on the scene in such foreign locales as Afghanistan, the Philippines, and Pakistan once again highlights the conflict between the law enforcement and military cultures that has been depicted throughout this Article. The primary goal of a military or civilian intelligence organization, especially during war, is to quickly obtain credible information that can immediately be shared with policy makers to assist them in selecting the best options available. Law enforcement, on the other hand, needs to meticulously accumulate evidence that can withstand the myriad challenges to admissibility posed by the judicial system in an effort to convict the guilty parties. A short hypothetical will illustrate the problems naturally created in the area of evidence collection by these two separate missions.

Picture a situation in which indigenous Philippine armed forces hear rumors in a village that an al Qaeda guerrilla leader named Juan Cavazos and his associates occupy a particular nearby cave and that they intend to launch a chemical attack against U.S. facilities. The Philippine army, accompanied by U.S. Special Forces, approaches the

area and receives fire from a cave opening. They respond with a series of high explosive rockets fired directly into the cave. Shortly thereafter, the surviving guerillas surrender, and the troops discover in the cave the remains of documents and vials of unidentified white powder. Cavazos is not present. Interrogation proceeds (with all the issues identified in the previous section) while Philippine soldiers inspect the documents and gingerly view the chemicals. When they are completed, the military packs up what they have found and destroys the entrance to the cave, so it cannot be used again. The documents and chemicals are sent up the chain of command through uncountable hands to the battalion commander. He reviews the material and finds drawings of the floor plan and duct system of the U.S. Embassy. He sends the chemicals to the nearest military or local government lab. Tests indicate that anthrax spores are present in the powder. These findings result in a U.S. intelligence report to Washington and the White House (with headlines in the *Washington Post*) that Juan Cavazos and his organization have been planning an anthrax attack on the U.S. Embassy. U.S. Special Forces redouble their efforts to find Cavazos and eventually capture him. The U.S. government announces that he will be brought to justice.

FBI agents and prosecutors examining the Cavazos case will now find that what was sufficient to generate a highly credible intelligence report to the President falls far short of justifying a criminal prosecution. Moreover, the steps taken by the army in its assault on the cave, while successful from a military standpoint, were extremely counterproductive from the perspective of law enforcement. First, the rumors from the village that originally stimulated the interest of the military are probably hearsay and, in all likelihood, will not have been documented in reports giving a particular villager's name, his statement, and how he knows the truth of any information he might have conveyed to the military. Any fingerprints that Cavazos left on the recovered documents will probably have been destroyed by the heat and fire of the rocket blasts, by the rummaging through the material by the troops in the cave, or by the examination of officers up the chain of command. The chemicals also passed through numerous hands and the chances of recreating an evidentiary chain of custody in a system unaccustomed to making reports of such a transfer is probably impossible. The lab tests may be unreliable because the lab technicians may have been untrained by U.S. standards, may not have been familiar with anthrax, and may not have performed all required tests. In essence, the United States may have Cavazos in custody but may have no physical evidence connecting him to the crime scene. Also, absent credible cooperation from co-conspirators, the United States

may have very little to show a jury that he is the leader of a group planning an attack on U.S. facilities.

Reviewing this scenario, prosecutors would know that if law enforcement had been in charge of the operation, officers would have taken independent reports from all villagers, with an emphasis on finding a solid witness with personal knowledge; would have attacked the caves with tear gas, not rockets; and would have completely cordoned off the area once the guerillas had surrendered. Search teams would have combed through the cave for hours, placing evidence in marked and sealed plastic bags. A special effort would have been made to look for hair, fibers, objects containing DNA, and anything else that would tie Cavazos to the complex. All findings would have been sent with the shortest possible chain of custody to highly qualified labs in the United States.

The problems created by these different approaches are not solved by simply having FBI agents accompany the military as they have done in Afghanistan because, at each point during the operation, decisions have to be made, and they have to be made by an individual from the group—law enforcement or military—in charge. That is, the government attacks the cave with rockets, or it does not; the government relies on indigenous military forces like the Northern Alliance and Philippine military or it does not; military intelligence acts quickly to collect and read documents or it does not; the military seals the cave immediately to deny its use to additional guerillas, or it does not. In this context, the reader may recall press reports that when the FBI assault team at Waco moved cars from in front of the Branch Davidian headquarters the FBI evidence teams vehemently objected because this action irretrievably destroyed critical bullet trajectory evidence.[108] When there are irreconcilable conflicts, you cannot have it both ways, and, in the final analysis, decisions must be made by the one group or organization which everyone understands to have the preeminent role in the anti-terrorist effort.

B. Search and Seizure

1. Extraterritorial Searches Against Foreign Nationals

As our military forces and federal agents search the caves, houses, and apartments of terrorist suspects outside the United States, the agents are fortunate not to be bound in most cases by Fourth Amendment rules demanding a warrant and probable cause. The agents are

108 Special Agent Byron Sage, Presentation Before U.S. Law and Nat'l Security Class (Feb. 27, 2001).

free from such restrictions whether they are motivated by a need for intelligence or a desire to prosecute. They are free because the Supreme Court in *Verdugo-Urquidez* held that the Fourth Amendment does not apply to intrusions directed against foreign nationals outside the territorial limits of the United States.[109] *Verdugo-Urquidez* involved a law enforcement search of the residence of a major drug trafficker.[110] It was clear, however, that Chief Justice Rehnquist was thinking of potential spillover into military operations when he drew a bright line against further extension of the Fourth Amendment. As he stated:

> The rule adopted by the Court of Appeals [applying the Fourth Amendment to the search of a foreign citizen's residence in Mexico] would apply not only to law enforcement operations abroad, but also to other foreign policy operations which might result in "searches or seizures." The United States frequently employs Armed Forces outside this country—over 200 times in our history—for the protection of American citizens or national security. Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest.[111]

2. Extraterritorial Searches Against U.S. Citizens for Intelligence Purposes

A number of terrorist suspects have obtained American citizenship. The Supreme Court cases, as Judge Sand recently wrote in *United States v. Bin Laden*, still "suggest that the Fourth Amendment applies to United States citizens abroad."[112] As authority, he cited *Reid v. Covert* for the proposition that the shield provided to American citizens by the Bill of Rights should not be stripped away simply because the citizens are in a foreign land.[113] He also cited *Verdugo-Urquidez*'s rejection of the defendant's Fourth Amendment claim because he was not one of Athe people" with "substantial connections" to the United States.[114] But how are searches and seizures against citizens overseas to be conducted, especially when U.S. courts have no power to issue warrants outside the United States?[115]

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109 United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990).

110 *Id.* at 262.

111 *Id.* at 273–74 (citations omitted).

112 United States v. Bin Laden, 126 F. Supp. 2d 264, 270 (S.D.N.Y. 2000).

113 *Id.* (citing Reid v. Covert, 354 U.S. 1, 5–6 (1957)).

114 *Id.* (citing *Verdugo-Urquidez*, 494 U.S. at 265, 271).

115 *See Verdugo-Urquidez*, 494 U.S. at 274.

Bin Laden addressed this question in the context of physical and electronic searches in Kenya authorized by the Attorney General against a U.S. citizen in an effort to obtain intelligence on the bin Laden organization.[116] Executive Order 12,333 empowers the Attorney General to

> approve the use for intelligence purposes, . . . against a United States person abroad, of any technique for which a warrant would be required if undertaken for law enforcement purposes, provided that such techniques shall not be undertaken unless the Attorney General has determined in each case that there is probable cause to believe that the technique is directed towards a foreign power or an agent of a foreign power.[117]

Congress, however, had "not addressed the issue of foreign intelligence collection which occurs abroad,"[118] and "the Supreme Court . . . remained . . . essentially silent on both aspects of the issue."[119] The court, therefore, had to determine the constitutionality of an intelligence search against U.S. citizens conducted without statutory authority or judicial approval.[120]

Proceeding in unchartered waters, Judge Sand reasoned that prior to the enactment of the Foreign Intelligence Surveillance Act (FISA) in 1978 authorizing courts to issue warrants for domestic (but not foreign) intelligence operations,[121] courts had generally "affirmed the existence of a foreign intelligence exception to the warrant requirement for searches . . . which target[ed] foreign powers or their agents."[122] This affirmation was based in part on the President's constitutional authority in foreign affairs.[123] FISA had since established clear judicial procedures with respect to domestic searches, but, in the absence of further congressional guidance, the foreign intelligence exception to the warrant requirement must still exist for foreign searches. In addition, the "special needs" cases, such as *Skinner v. Railway Labor Executive Ass'n*[124] and *Camara v. Municipal Court*,[125] had rec-

116 *See Bin Laden*, 126 F. Supp. 2d at 269.

117 Exec. Order No. 12,333, 46 Fed. Reg. 59,941, at 59,951 (Dec. 8, 1981).

118 *Bin Laden*, 126 F. Supp. 2d at 273.

119 *Id.*

120 *Id.* at 273–88.

121 Foreign Intelligence Surveillance Act, 50 U.S.C.A. §§ 1801–1829 (West Supp. 2002).

122 *Bin Laden*, 126 F. Supp. 2d at 271.

123 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) (establishing that the President is the sole organ of the nation in the international field).

124 489 U.S. 602, 620 (1989) (stating that the government's interest in railroad safety creates a "special need" that may justify departure from normal warrant procedures).

ognized that "when the imposition of a warrant requirement proves to be a disproportionate and perhaps even disabling burden on [the safety and security responsibilities of] the Executive, a warrant should not be required."[126] Accordingly, the search of the defendant U.S. citizen's residence in Kenya for intelligence purposes was constitutional.

It should be noted that the defendant in *Bin Laden* complained not only that the United States had conducted a search for intelligence purposes but also that the government was utilizing the evidence it had obtained against him in a criminal prosecution. This potentially carried the search out of the realm of the "foreign intelligence exception" into the more restricted domain of criminal search and seizure. This same issue had, in fact, been raised numerous times in appeals of domestic searches under FISA. As FISA warrants can arguably be obtained by the government with less evidence than they must produce to secure a traditional criminal search warrant or Title III wire interception,[127] defense attorneys have often suspected that the government might be utilizing FISA to circumvent the more stringent criminal search demands of the Fourth Amendment.[128] There has been no proof of these claims, but concern over the allegations led the Department of Justice to seal off its intelligence sections from the Criminal Division to such a degree that the first time the Depart-

125 387 U.S. 523, 533–34 (1967) (recognizing a special needs exception but finding the exception inapplicable to administrative searches because the warrant requirement does not frustrate the purpose of the search).

126 *Bin Laden*, 126 F. Supp. 2d at 273.

127 *See* United States v. Cavanagh, 807 F.2d 787 *passim* (9th Cir. 1987) (upholding the less-demanding requirements for searches of foreign entities set out in FISA and citing authority); United States v. Truong Dinh Hung, 629 F.2d 908, 913–17 (4th Cir. 1980) (finding that conducting searches in a foreign intelligence context requires only reasonableness). Search warrants are authorized only where there is probable cause to believe a particular place contains evidence of a crime. Warden v. Hayden, 387 U.S. 294, 301–02 (1967); *see also* FED. R. CRIM. P. 41(c); Steele v. United States, 267 U.S. 498, 501 (1925) (requiring a warrant "to particularly identify" the place to be searched). Title III wire interceptions also require probable cause to believe that a particular phone is being used by a specific person to commit a named crime. 18 U.S.C. §§ 2511–2522 (2000). FISA essentially only requires probable cause to believe that the target is an agent of a foreign power. *See* 50 U.S.C.A. §§ 1804–1811 (West Supp. 2002).

128 *See* United States v. Pelton, 835 F.2d 1067, 1076 (4th Cir. 1989) (holding that knowledge that FISA will make admission of evidence in a criminal trial easier does not pose any problem as long as the primary purpose of the search was foreign intelligence); *Cavanagh*, 807 F.2d at 790–91; United States v. Duggan, 743 F.2d 59, 71–74 (2d Cir. 1984) (holding that FISA requirements fully comply with the Fourth Amendment).

ment of Justice Criminal Division heard about the Wen Ho Lee espionage investigation was when the case was reported in the *Wall Street Journal*.[129] Theoretically, the entire issue is another example of the difficulties faced both here and abroad with attempts to gather "intelligence" for a war and "evidence" for law enforcement.

In the present author's opinion, however, to date, this particular question has been far more speculative than real. There is no evidence in the cases that the domestic espionage and terrorism FISA investigations prior to September 11th were motivated from the start by anything but a desire for intelligence information. Accordingly, any criminal evidence obtained incidental to the intelligence surveillance has been generally admitted.[130] In *Bin Laden*, Judge Sand also recognized that the foreign searches authorized by the Attorney General were motivated purely by the need for intelligence. The motion to suppress the evidence, therefore, was denied. Both Judge Sand and the other courts examining this issue have understood that the government has always foreseen the possibility that a prosecution may result down the road.[131] But prosecution has not been the focus of government actions at the time of the search nor the probability that it may become in the years ahead.

3. Extraterritorial Searches Against U.S. Citizens for Criminal Prosecution

If the United States embarks on an investigation against a terrorist suspect who is a U.S. citizen, fully expecting to accumulate sufficient evidence to try and convict him, it is an entirely different matter than for the United States to initiate a search for intelligence purposes. Criminal investigations may arise more frequently if we view the war on terrorism as a global law enforcement operation. Outside of the United States, *Verdugo-Urquidez* holds that Fourth Amendment protections do not apply to searches against foreign citizens.[132] But if the goal is prosecution, and the suspect is a U.S. citizen located outside the territory of the United States, we are once more thrown into somewhat unchartered waters, similar, but adjacent, to those en-

129 *See* Final Report: Attorney General's Review Team on the Handling of the Los Alamos National Laboratory Investigation 688 (May 2000), *available at* www.usdoj.gov/ag/readingroom/bellows.htm (last visited Oct. 9, 2002).

130 *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 311 (1936) (admitting evidence of arms sales); *Bin Laden*, 126 F. Supp. 2d at 278 (explaining the foreign intelligence exception and citing authority).

131 *Bin Laden*, 126 F. Supp. 2d at 278 (finding that foreseeable use of evidence in criminal prosecution does not bar the use of FISA).

132 United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990).

countered by Judge Sand in *Bin Laden.* Judge Sand's ruling in *Bin Laden* was confined to extraterritorial intelligence searches against U.S. citizens.[133] He did not have to confront the question of how the United States should proceed overseas if its primary aim were undeniably criminal prosecution. The Ninth Circuit had this opportunity in 1995 in *United States v. Barona,*[134] and the result was a highly contentious split decision.

Barona involved six high-level cocaine traffickers who were discovered during a major worldwide drug investigation labeled "Operation Pisces."[135] Three of the traffickers had U.S. citizenship.[136] The Drug Enforcement Agency (DEA) traced the defendants to Copenhagen and prevailed on the authorities there to obtain wiretaps on their hotel phones.[137] The wiretaps resulted in the interception of numerous incriminating conversations.[138] There was no question that the Danish wiretaps were a joint venture initiated at the request of the United States.[139] As a result, the court applied Fourth Amendment principles to the appellants with U.S. citizenship.[140] The parties debated the application of these principles. In the majority opinion, written by Chief Judge Wallace, the court held that "compliance with foreign law alone determines whether the search violated the Fourth Amendment."[141] If the government adhered to the host nation's law and that law did not "shock the conscience," the government's actions were "reasonable."[142] The Fourth Amendment, stating the people shall be secure from "unreasonable searches,"[143] demands nothing more.[144] Probable cause, as that term is understood in American jurisprudence, is not required[145] because the Fourth Amendment only states only that "no Warrants shall issue, but upon probable cause"[146] and the Supreme Court had already acknowledged in *Verdugo-Urquidez* that U.S. warrants could not be issued for overseas searches.[147]

133 *Bin Laden*, 126 F. Supp. 2d at 278.
134 56 F.3d 1087 (9th Cir. 1995).
135 *Id.* at 1089–90.
136 *Id.* at 1094.
137 *Id.* at 1090.
138 *Id.*
139 *Id.* at 1094.
140 *Id.*
141 *Id.* at 1091 n.1.
142 *Id.* at 1091–96.
143 U.S. CONST. amend. IV.
144 *Barona*, 56 F.3d at 1093.
145 *Id.* at 1091–92 n.1.
146 *Id.* at 1092 n.1 (citing U.S. CONST. amend. IV).
147 *Id.* (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 274 (1990)).

Judge Reinhardt vigorously dissented in language quite harsh for an appellate court opinion, stating that:

> The majority's cavalier treatment of a well-reasoned explication by this court concerning the question before us suggests that panel composition, not persuasive legal analysis, has determined the result in this case. . . . [T]here is no sound basis in law for the majority's failure to analyze the relevant legal authorities properly.[148]

In Judge Reinhardt's opinion, probable cause was an indispensable element of the Fourth Amendment, and Judge Wallace had stripped "this important principle of all significance by holding that we must look exclusively to *foreign law* when determining whether the search violates the Fourth Amendment."[149] Without probable cause, any U.S. citizen traveling outside the nation's boundaries would be fair game for wiretapping and surreptitious searches "*whenever* members of the CIA, the DEA, the FBI, or who knows how many other alphabet law enforcement agencies[] so desire."[150] Although U.S. courts cannot issue warrants abroad, there was no reason why in a criminal case conducted in the United States a federal agent should not be required to explain to a U.S. judge the facts that justified a search against our citizens.

Despite the strength of the dissent, *Barona* was not heard en banc or accepted for review by the Supreme Court.[151] As of the date of this writing *Barona* has yet to be questioned by any other court. The case, therefore, stands, by a two-to-one margin, for the proposition that prosecution-motivated searches may be conducted by U.S. authorities outside the United States against U.S. citizens without probable cause. But *Barona* still demands that the United States at least comply in good faith with foreign law. If the reasoning of the dissent is adopted by other courts, the government might even be forced to comply with more traditional Fourth Amendment law. In either case, our armed forces and intelligence agents could potentially face difficult legal obstacles in attempting to conduct foreign searches against terrorist suspects who are American citizens where our clear intent is criminal prosecution.

4. Domestic Search and Seizure

As previously noted, if the United States locates terrorist suspects inside our borders, it may rely upon FISA to conduct intelligence-re-

148 *Id.* at 1105 & n.15.
149 *Id.* at 1099.
150 *Id.*
151 Barona v. United States, 516 U.S. 1092 (1996).

lated wiretaps[152] or physical searches.[153] The Act requires only that the government certify to the court that the information sought is foreign intelligence information and establish probable cause that the target is a foreign power or agent of a foreign power.[154] In the case of a U.S. citizen, the government must demonstrate that the certifications are "not clearly erroneous."[155]

The above-mentioned challenges to use of FISA evidence in later criminal prosecutions signaled the need for a change in the language of the statute if FISA evidence was going to be used increasingly to prosecute terrorists. Accordingly, in 2001, the Patriot Act[156] changed the provision requiring that the surveillance be primarily for intelligence purposes to state that a "significant purpose" of the intrusion must be to obtain intelligence information.[157] Theoretically, a related and later "significant purpose" of criminal prosecution will not affect the use of the material collected.[158] However, to the extent that FISA demands something less than a criminal search warrant, it is essential that the statute retain its design for use, first and foremost, as an intelligence tool.[159] FISA will then be able to maintain its constitutional underpinnings as "special needs" legislation and as part of the foreign

152 Foreign Intelligence Surveillance Act of 1978, 50 U.S.C.A. §§ 1801–1811 (West Supp. 2002).

153 *Id.* §§ 1821–1829.

154 *Id.* § 1804(a) (electronic surveillance); *id.* § 1823(a) (physical searches).

155 *Id.* § 1804(a)(5) (electronic surveillance); *id.* § 1824(a)(5) (physical searches).

156 USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 8, 12, 15, 18, 22, 28, 31, 42, 47, 49, 50 U.S.C.).

157 *Id.*, 50 U.S.C.A. §§ 1804(A)(7)(B), 1823(A)(7)(B).

158 *Id.*

159 This issue was highlighted by the Foreign Intelligence Surveillance Court's opinion and order of May 17, 2002. *In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, No. 02-429, 2002 WL 31017386, at *1–2 (Foreign Intel. Surv. Ct. May 17, 2002). The court mentioned that, in the past, intelligence agents had shared information with criminal investigators without following proper procedures. *Id.* at *8–9. There was no indication in the opinion, however, that this was the result of criminal agents or prosecutors using FISA to deliberately circumvent the requirements of Title III. More importantly, the court rejected the DOJ's new intelligence sharing procedures because of concerns that provisions allowing criminal investigators and prosecutors to "advise" intelligence officials regarding the initiation and operation of FISA searches could lead to prosecutorial "direction and control" of FISA searches in violation of Title III. *Id.* at *12. The court ordered that, although consultation between intelligence and criminal divisions was allowed, the FBI and the DOJ must insure that prosecutors did not use FISA to enhance criminal prosecution. *Id.* at *14.

In the first ever opinion by a designated FISA appellate court, the FISA court's order was reversed on November 14, 2002. *In re* Sealed Case, No. 02-001, 2002 WL 31548122 (Foreign Intel. Surv. Ct. of Review Sept. 9, 2002). It is unknown at this date

intelligence exception to traditional Fourth Amendment requirements.

If the government's goal is prosecution, then officials must adhere to the strict rules governing search warrants and Title III interceptions.[160] The rules currently apply whether the target is a foreign national or U.S. citizen.[161] However, we must question whether these protections should shield a foreign national who enters the United States with intent to commit a terrorist act. Does he have "substantial connections" if he is here less than thirty days? Even if he is present longer, is he one of the people of the national community the Fourth Amendment was meant to protect? If the government emphasizes criminal prosecution in terrorist cases, courts will likely be forced to address these questions in the years to come.[162]

C. Discovery

Military and intelligence operatives routinely collect intelligence through covert means to support policy decisions. As a general rule, the operatives have no concern that any material they have secured through sensitive sources and methods will be delivered to the enemy or his representatives. Law enforcement officers, however, understand that, with rare exception, virtually every item of relevant evidence they collect must be given to the defendant and his attorney. As the FBI painstakingly constructs formal criminal cases against terrorist suspects, it must necessarily turn to the intelligence community for guidance and information. The CIA, NSA, Defense Intelligence Agency, National Reconnaissance Office, and others are the governmental organizations with the international contacts and expertise in-

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whether the opinion will be appealed further by the FISA court with the assistance of the ACLU, which filed a brief as amicus curiae.

160 18 U.S.C. § 2518 (dictating procedures for the interception of wire, oral, and electronic communications); FED. R. CRIM. P. 41 (establishing procedures for conducting a warrantless search and for obtaining a search warrant).

161 18 U.S.C. § 2518.

162 This issue was raised in an immigration case. *See* United States v. Guitterez, 983 F. Supp. 905, 914–16 (N.D. Cal. 1998) (surveying Supreme Court precedent, including *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), before finding that a noncitizen has Fourth Amendment standing), *rev'd on other grounds*, 203 F.3d 833 (9th Cir. 1999). In *Guitterez*, the court refused to deny Fourth Amendment rights to an illegal alien in the United States in part because Chief Justice Rehnquist's statements in *Verdugo-Urquidez*, were dicta and part of the plurality opinion. *Guitterez*, 983 F. Supp. at 915 (noting that *Verdugo-Urquidez* did not *hold* that an alien must demonstrate substantial connections with the United States, while articulating the standard that the Ninth Circuit "does not construe Supreme Court plurality decisions as *binding* precedent").

valuable to determining exactly who committed a particular crime. But in the process of reaching out to these agencies for assistance, the FBI can potentially expose and even destroy critical resources.

A specific example will serve to illustrate the potential pitfalls attendant to what is sometimes necessary cooperation between law enforcement and the intelligence community. Imagine that the NSA has identified the cell phone number of a particular terrorist and, after a series of tests, has penetrated the encryption device that he uses alongside the phone. The NSA intercepts a series of calls in which the leader directs two subordinates to commit an attack on a civilian facility in a large city. The attack is completed before it can be prevented, and the FBI contacts the intelligence community for help. The NSA advises the FBI of the interceptions, and, after further investigation, the FBI arrests the two interceptees as well as a third suspect outside a local residence. Obtaining probable cause through consent or other sources, the FBI searches the residence and finds evidence linking all three to the crime. The three suspects are indicted.

What is likely to follow from this scenario? As the U.S. prosecutor (cleared for national security information) reviews files and interviews witnesses in preparation for trial, he will learn of the intercepts that broke the case. Because the intercepts are terrific evidence and will guarantee a conviction, he would naturally ask the NSA for permission to use them in court. The CIA, NSA, and DOD would all strenuously object because use of the intercepts could expose that those agencies are monitoring the leader's phone calls. The Director of Central Intelligence (DCI), who has final responsibility, is likely to decide against release of the information for use in the prosecution's case-in-chief.

Though the intelligence community may prevail on the merits in this initial dispute, the intercepts may still be disclosed to the defense under Rule 16 of the Federal Rules of Criminal Procedure.[163] Rule 16 mandates that the government turn over to the defense not only the evidence it will use in its case in chief but also (1) recorded statements of the defendant in the care, custody, or control of the government, (2) books, documents, papers, and other tangible objects which are material to the preparation of the defense, and (3) any results of scientific tests or experiments which are material to the preparation of the defense.[164]

163 *See infra* note 164 and accompanying text.

164 FED. R. CRIM. P. 16(a), (c), (d).

The obligation to produce evidence material to the preparation of the defense is a reflection of the demand in *Brady v. Maryland*[165] that the United States provide the defense with all exculpatory evidence.[166] In most cases the government can argue that it is not required to search all intelligence agency files for any trace of such information unless the agency has "aligned" itself with the Department of Justice during the criminal investigation.[167] The government can even maintain that intelligence leads and tips not utilized by law enforcement in search warrants, arrest warrants, and indictments should not subject intelligence agency files to discovery.[168] In the factual scenario presented, however, the NSA possibly aligned itself with the investigation and the NSA's information also contains "recorded statements of the defendant" and potentially exculpatory evidence because the third suspect is not included in the intercepted calls. Thus, the DCI may win out in the beginning by forbidding the prosecutor to use the evidence in his case, but the DCI may eventually be required to hand over the information. As Daniel Richard says on the *Brady* problem, "This loss of control presents a tremendous threat to the CIA and makes CIA officials leery about supporting a tasking policy that encourages greater cooperation with the Department of Justice and exposes them to being 'aligned' with the prosecution."[169]

Once it appears that the information may have to be turned over to the defense, the government would seek *in camera* judicial review under the Classified Information Procedures Act (CIPA) to prevent its public disclosure.[170] CIPA permits the government, with the court's approval, to delete specified items of classified information, to summarize the information, or to admit relevant facts that the information would tend to prove.[171] The tactic has worked in a number of sensitive cases, such as *United States v. Noriega*[172] and *United States v.*

165 373 U.S. 83.

166 *Id.* at 88.

167 *See* Dan Richard, *Overseas Tasking of the CIA for Domestic Law Enforcement*, NAT'L SEC. STUD. Q., Summer 1996, at 1, 12 (citing *United States ex rel. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985); *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992).

168 Commission on Roles and Capabilities of the United States Intelligence Community, *cited in* Richard, *supra* note 167, at 13.

169 *Id.* at 12–13.

170 Classified Information Procedures Act § 6, 18 U.S.C.A. app. 3 (West 2000 & Supp. 2002); *see also* Richard, *supra* note 167, at 11–13 (describing *in camera* review).

171 Classified Information Procedures Act § 4.

172 117 F.3d 1206, 1215–17 (11th Cir. 1997) (upholding trial court's exclusion, under CIPA, of classified information because the probative value was marginal).

North.[173] But the tactic is not foolproof, as illustrated by the scenario provided. Specifically, defense attorneys would probably demand to know the particulars of the actual cell phone intercepts to insure that their clients were talking to a terrorist leader. In addition, they would probably want to know how the government penetrated the encryption device and documented proof of the test on the decryption machine to guarantee that the recordings actually reflected the exact words spoken by the defendants. All of this, of course, the defense attorneys would probably share with their clients. These are not illogical requests from a defensive perspective, and the court may feel compelled to grant them. The government, on the other hand, has overwhelming reasons not to comply. The outcome mandated by CIPA could be dismissal of charges or of the entire case.[174]

Although cooperation between the intelligence community and law enforcement is often essential,[175] the intelligence community must be allowed to continue to protect highly sensitive information. The government has been working for several years to formulate procedures whereby both law enforcement and intelligence can cooperate without undue damage to the mission of either. But it must be understood that aggressive use of the civilian courts for criminal prosecution as part of our anti-terrorism effort will probably at some point expose invaluable intelligence sources and methods. If trials are indeed necessary, part of the solution may be widespread use of military commissions.

V. MILITARY COMMISSIONS

On November 13, 2001, President Bush authorized the creation of military commissions with an order titled, "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism."[176] The sound reasons for this order were set forth in part by the subsequent American Bar Association report on military commissions:[177]

> U.S. civilian courts, federal or state, would have jurisdiction to try war crimes and other offenses under various criminal statutes. Ma-

173 708 F. Supp. 389, 397–98 (D.D.C. 1988) (calling "mistaken" defendant's claim that he was entitled to use classified material in his defense without apprising the court of its significance as required under CIPA).

174 Classified Information Procedures Act § 6(e)(2).

175 See Richard, *supra* note 167, at 4–5 (describing cooperation in the investigations of the Bank of Credit and Commerce International and the Banca Nazionale Del Lavoro).

176 Military Order, *supra* note 7.

177 ABA TASK FORCE ON TERRORISM AND THE LAW, REPORT AND RECOMMENDATION ON MILITARY COMMISSIONS (2002) [hereinafter ABA REPORT].

> jor concerns with the exercise of such jurisdiction centers on security. This includes the physical security of the courthouse and the participants . . . in the trial. It also includes the ability to safeguard classified information, including intelligence sources and methods whose compromise could facilitate future terrorist acts. While mechanisms exist to protect evidence of a classified nature from public exposure [i.e., CIPA], these may not suffice to protect the information from the defendants and, through them, others who may use such information to the harm of the United States and its citizens.[178]

In his testimony before Congress, retired Judge Advocate General of the Army, Major General Michael Nardotti cited the above reasons as justification for military tribunals.[179] He also cited the need to have "due regard for the practical necessity to use as evidence information obtained in the course of a military operation rather than through traditional law enforcement means."[180] These statements highlight the previously noted evidence collection and discovery problems[181] that the government will experience if it adheres to a law enforcement approach to the war on terrorism.

Although the military commission announcement raised a media furor,[182] the announcement was supported not only by logic but also by law and historical precedent. The Constitution gives Congress the power to provide for the common defense and to define and punish offenses against the law of nations.[183] In Article 21 of the Uniform Code of Military Justice,[184] "Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate

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178 *Id.* at 14.

179 *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism Hearings Before the Subcomm. on Admin. Oversight and the Courts of the Senate Judiciary Comm.*, 107th Cong., 2001 WL 26188000, at *1 (statement of Major General Michael Nardotti, former Judge Advocate General, United States Army), *reprinted in* ARMY LAW., Mar. 2001, at 1, 4.

180 *Id.*

181 *See supra* Part IV.

182 Tyrangiel, *supra* note 4; *see also* William Safire, *Seizing Dictatorial Power*, N.Y. TIMES, Nov. 15, 2001, at A31.

183 U.S. CONST. art. I, § 8.

184 10 U.S.C. § 821 (2000). Article 21 of the Uniform Code of Military Justice reads

> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

cases."[185] The September 11th attacks were part of a war that bin Laden had long prosecuted against the United States and violated the laws of war because they deliberately targeted non-combatant civilians.[186] Although some have argued that the United States must be engaged in a declared war to utilize military tribunals, the Supreme Court has long recognized that a state of war may exist without a formal declaration.[187] Military commissions have previously "been used in hostilities in which there was no declaration of war, including the Civil War and the Indian Wars."[188]

The President's order states that an individual tried before a military commission may not seek a remedy by means of an appeal to a civilian court.[189] This same language was contained in past orders, but the Supreme Court has traditionally reviewed applications for habeas corpus in such cases. Such review requires that the rules employed by the commission comply with basic due process principles of fundamental fairness for the procedure to be sustained. The order sets forth a general outline of the rules, directing a "full and fair trial," "admission of such evidence as would . . . have probative value to a reasonable person," and the protection of classified information through control of the admission and access to such information as well as the closure of the proceedings.[190] The Secretary of Defense subsequently issued detailed regulations fulfilling these requirements. The regulations provided that defendants would be presumed innocent and must be convicted beyond a reasonable doubt by a two-thirds vote of a seven-member commission.[191] Defendants would be protected against self-incrimination and would have the right to obtain

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Id. Article 21 of the Uniform Code of Military Justice was adopted verbatim from Article 15 of the Articles of War. *See* Timothy Maconnel, *Military Commissions and Court Martials*, ARMY LAW., Mar. 2002, at 20–21.

185 *Ex parte* Quirin, 317 U.S. 1, 28 (1942) (construing the Articles of War passed by Congress during the Second World War); *see also In re* Yamashita, 327 U.S. 1, 7–9 (1946) (discussing the Court's ruling in *Ex parte Quirin*).

186 *See* ABA REPORT, *supra* note 177, at 7 & n.14.

187 *See* Prize Cases, 67 U.S. (2 Black) 635, 667–70 (1862) (noting that the Civil War was no less a war because of the absence of a declaration); Bas v. Tingy, 4 U.S. (4 Dall.) 35 *passim* (1800) (noting that although a declaration of war was not made, in 1799 the United States and France were in a situation of "a qualified maritime war").

188 ABA REPORT, *supra* note 177, at 5.

189 Military Order, *supra* note 7, at 57,835–36.

190 *Id.* at 57,835.

191 *See* Vernon Loeb, *Rumsfeld Announces New Military Tribunal Rules*, WASHINGTONPOST.COM, Mar. 21, 2002, *at* http://www.washingtonpost.com/wp—dyn/articles/A62986-2002Mar21.html.

evidence and call witnesses.[192] Classified evidence could be reviewed by the defendant's counsel but not necessarily by the defendant himself.[193]

These rules may not satisfy ardent civil libertarians, but no one can seriously question that they guarantee that life and liberty will not be denied without due process of law. In addition, from the government's perspective, they perform the important function of safeguarding classified information and permitting the introduction of evidence which may not fit the strict hearsay or chain of custody requirements of the civilian courts. The obvious question is, if we are truly in a war, why did we not use these commissions to try John Walker Lindh and Zaccarias Moussaoui?

It is possible that the government's decision to prosecute Moussaoui in a U.S. district court can be traced to concern over the Supreme Court's post-Civil War opinion in *Ex parte Milligan*.[194] Milligan was the leader of a secret, anti-government society that supported the Confederacy in the North.[195] The Supreme Court held that it was unconstitutional to try Milligan for insurgency before a military commission in Indiana because he was a resident of that state, because he was not in the military service, and because the civilian courts were available, open, and operating.[196] In addition, the state was not occupied military territory or under martial law.[197] When German saboteurs were caught in the United States during World War II, they also maintained that they should be tried in civilian courts because they were residing in this country, and the courts were open and operating.[198] In *Ex parte Quirin*, however, the Supreme Court held that whereas Milligan was a non-belligerent not subject to the laws of war and military tribunals, the German saboteurs were enemy belligerents and, thus, could legally be tried before a military commission.[199]

Considering the circumstances of the Civil War, *Quirin*'s rationale may be a distinction without a difference. But regardless, Moussaoui's activities, if the indictment is correct, go far beyond those of Milligan. Specifically, the government has alleged that Moussaoui was involved in the attempt to hijack planes and crash them into U.S. buildings

192 *See id.*

193 *See id.*

194 71 U.S. (4 Wall.) 2 (1866).

195 *Id.* at 6.

196 *Id.* at 121–25.

197 *Id.* at 126–27.

198 *Ex parte* Quirin, 317 U.S. 1, 23–24 (1942).

199 *Id.* at 36–40.

and/or to use crop dusters to spray poison over U.S. cities.[200] That is, he is charged with planning an attack against this country. This surely constitutes belligerency within the ambit of *Quirin* and qualifies him, like the German saboteurs, for trial before a military commission.

Senators Carl Levin and Joseph Lieberman both strongly criticized the government's decision to try Moussaoui before a civilian court.[201] Sen. Lieberman stated, "What greater violation of the laws of war could there be than to have been a co-conspirator in the attacks that resulted in the deaths of four thousand Americans here on our soil?"[202] Sen. Levin and Deputy Defense Secretary Paul Wolfowitz stated that the Justice Department did not consult with the Defense Department prior to the indictment,[203] suggesting that the decision could have been the result of bureaucratic infighting. It is equally possible that the administration was justifiably sensitive to potential political reaction against military commissions. But whether the decision was the product of bureaucracy, politics, or overreaction to *Milligan*, or a combination of all three, the trial of Moussaoui before a civilian court instead of a military commission stands as a prime example of the war on terrorism being conducted as a law enforcement operation.

The same can be said of the decision to indict and try John Walker Lindh before a civilian court. This decision was preordained by the President's order limiting commissions to the trial of certain non-citizens.[204] The President likely imposed this restriction because of the holding in *Reid v. Covert*[205] that when the government reaches out to punish a citizen abroad, "the shield which the Bill of Rights and other parts of the Constitution provide . . . should not be stripped away . . . ."[206] But Chief Justice Rehnquist's decision in *Verdugo-Urquidez*[207] not only excluded aliens from the shelter of the Fourth Amendment during the course of foreign searches but also challenged the belief that *Reid* demanded all-encompassing constitutional protection for U.S. citizens wherever they might be.[208] The opinion

200 Indictment, United States v. Moussaoui, Crim. No. 01-455-A (E.D. Va. filed Dec. 11, 2001), *available at* http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/64329/0.pdf (last visited Oct. 9, 2002).

201 Rebecca Carr, *Senators Question Terror Trial in Federal Court*, ATLANTA J. & CONST., Dec. 13, 2001, at 11A.

202 *Id.*

203 *Id.*

204 *See* Military Order, *supra* note 7, at 57,834.

205 354 U.S. 1 (1956).

206 *Id.* at 6.

207 494 U.S. 259 (1989).

208 *Id.* at 270–74.

specifically noted that *Reid* was a plurality decision only and that Justices Harlan and Frankfurter had

> resolved the case on much narrower grounds than the plurality and declined even to hold that U.S. citizens were entitled to the full range of constitutional protection. . . . [They believed] "the question of which specific safeguards of the constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case."[209]

Barona cited this passage in speculation about whether or not the Supreme Court would hold that the Fourth Amendment applies to U.S. citizens overseas,[210] although Judge Sand in *United States v. Bin Laden* assumed that would be the case.[211] But, at the very least, Chief Justice Rehnquist's opinion undermines any belief that *Reid v. Covert* automatically guarantees civilian trials for terrorist acts committed outside our territorial boundaries by U.S. citizens.

More directly on point is the Supreme Court's decision in *Ex parte Quirin* upholding the use of military commissions against the German saboteurs caught in the United States.[212] In that case, most of the German agents had lived in this country for years before the war,[213] and at least one claimed U.S. citizenship at the time of his secret trial in the Department of Justice before a military commission.[214] The defense raised the issue of citizenship on appeal before the Supreme Court, but the Court held that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war."[215] John Walker Lindh, and any other U.S. citizen affiliated with al Qaeda, therefore, could be tried before a military commission. Excluding citizens from the President's order on military tribunals is, again, symptomatic of an effort to treat the war on terrorism as a civilian law enforcement operation.[216]

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209 *Id.* at 270 (quoting *Reid*, 354 U.S. at 75 (Harlan, J., concurring)).

210 United States v. Barona, 56 F.3d 1087, 1093 (9th Cir. 1995).

211 United States v. Bin Laden, 126 F. Supp. 2d 264, 270 (S.D.N.Y. 2000).

212 *Ex parte* Quirin, 317 U.S. 1, 46, 48 (1942).

213 *Id.* at 20.

214 *Id.*

215 *Id.* at 37.

216 In September 2002, the United States arrested five "U.S. born Yemenis" and charged them in the U.S. District Court for the Western District of New York with providing material support to terrorism in violation of 18 U.S.C. § 2339 (2000). Josh Tyrangiel, *Breaking the Buffalo Five: Easy as "A,B,C"*, TIME, Sept. 23, 2002, at 30. The charges are based on the defendants' traveling to Afghanistan to train at al Qaeda camps. *Id.* The defendants clearly need to be incarcerated, although proving the

At publication of this Article, the government has not decided how it will handle José Padilla, a U.S. citizen suspected of planning a "dirty bomb" attack in the United States. As a U.S. citizen, Padilla does not fit within the President's order on military commissions, and, after his arrest in Chicago, he was held as a civilian prisoner. There was, however, apparently insufficient admissible evidence to indict him within the thirty days following arrest required by speedy trial provisions[217] for civilian criminal cases. Yet there is also good reason to consider him a danger to the public safety if released. Accordingly, the government recently announced that it is indefinitely detaining Padilla as an "enemy combatant."[218] This action, although proper in the present author's opinion, at first blush appears inconsistent with the order excluding U.S. citizens from such military procedures. If so, the Padilla case further illustrates why the order should not be so limited.

Although the use of military commissions can help avoid some of the issues associated with collection of evidence and discovery of classified information, military commissions are not necessarily a panacea that would cure all problems mentioned in this Article. Specifically, a defendant tried before a military commission is likely to attempt to suppress any statements that he made to the military or to the FBI on the basis of alleged Fifth Amendment violations. If he is a citizen, he will claim Fourth Amendment violations in connection with any search and seizure. Useful evidence may have been destroyed during armed conflict. It is even possible, as discussed later, that the defendant may be able to assert lack of jurisdiction.[219] Considering the fact that these issues may be heard by the Supreme Court on writ of habeas corpus, even trials by military commission can potentially be ineffective as a means of defeating terrorism.

VI. CAN LAW ENFORCEMENT JURISDICTION BE SUSTAINED?

The law enforcement approach to terrorism followed by our government before the second World Trade Center attack and continued in part today necessarily raises the question of whether federal agents

specific charges may be challenging. This highlights the problem discussed in the text and raises the interesting question: if five "U.S. born Germans" trained as saboteurs and terrorists in German military camps had been arrested in the United States during World War II, would they have faced civilian criminal charges, or been treated as the saboteurs in *Ex parte Quirin* and tried before a military commission?

217 *See* 18 U.S.C. § 3161.

218 Angie Cannon, *Throwing Away the Key*, U.S. NEWS & WORLD REP., June 24, 2002, at 22, 22.

219 *See infra* Part VI.

and the courts have legal jurisdiction to act in cases involving offenses which may take place in various foreign locations. The President has stated that we should eradicate all terrorists of global reach.[220] As a foreign policy and military proposition, that directive is beyond legal challenge. The President may send the military to fight or provide assistance wherever he believes such action is consistent with U.S. foreign policy interests as long as Congress permits, or at least acquiesces in, the deployment.[221] He may do so even if there is a strong argument, as was the case with Lebanon, Somalia, and Vietnam,[222] that events in the nation selected for U.S. military intervention will have no direct impact on this country. Criminal law, however, requires that the government and the courts have legal jurisdiction to act.[223] Are members of al Qaeda or other terrorist groups related to a larger organization captured in the Philippines, or even in Afghanistan, while fighting to overthrow or support a specific local government such as the Taliban subject to U.S. criminal jurisdiction? Was it permissible to charge John Walker Lindh, as was done in Counts Two and Three of his indictment, with assisting the Harakat ul Mujahideen, a group conducting terrorist activity in Kashmir against India?[224] Was the government legally justified in charging Ramsey Yousef with placing a bomb on a Philippine airliner en route from the Philippines to Tokyo that killed a Japanese citizen?[225]

As a general rule, U.S. criminal law encompasses acts that occur on U.S. soil. In certain instances, however, Congress has made it clear that specific criminal statutes should have extraterritorial effect. For example, the Maritime Drug Law Enforcement Act (MDLEA) states, "This section is intended to reach acts of possession, manufacture, or

220 *See* Apple, *supra* note 1.

221 *See* Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring) (articulating the extent to which the President may set policy without violating the separation of powers); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318–22 (1936) (explaining that the President has broad powers to set foreign policy). For further information, see Ronald J. Sievert, Campbell v. Clinton *and the Continuing Effort To Reassert Congress' Predominant Constitutional Authority To Commence, or Prevent, War*, 105 DICK. L. REV. 157, 157–59 (2001) (discussing the conflict between Congress and the President over the exercise of war power).

222 *See* CANNON, *supra* note 2, at 654 (Lebanon); COLIN POWELL, MY AMERICAN JOURNEY 564–67 (1995) (Somalia); ARTHUR M. SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 841–50 (1978) (Vietnam).

223 *See, e.g.*, United States v. Davis, 905 F.2d 245, 249 n.2 (9th Cir. 1990); United States v. Yousef, 927 F. Supp. 673, 678–82 (S.D.N.Y. 1996).

224 Indictment, United States v. Lindh, No. 02-37-A (E.D. Va. filed Feb. 5, 2002), *available at* http://www.usdoj.gov/ag/2ndindictment.htm (last visited Oct. 9, 2002).

225 *See Yousef*, 927 F. Supp. at 675.

distribution committed outside the territorial jurisdiction of the United States."[226] Section 32 of 18 U.S. Code prohibits attacks against "civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce."[227] Our anti-terrorism statutes criminalize acts, such as conspiring to assault American citizens abroad[228] and conspiring to cross U.S. borders to destroy buildings,[229] and contain provisions stating that "there is extraterritorial Federal jurisdiction . . . over any offense" violating these statutes.[230]

The courts have consistently held, however, that a mere statement of extraterritorial jurisdiction by the legislature does not end the inquiry as to proper jurisdiction over matters that occur outside of our borders. As the court stated in *United States v. Davis*, "We require [that] Congress make clear its intent to give extraterritorial effect to its statutes. And secondly, as a matter of constitutional law, we require that application of the statute to the acts in question not violate the due process clause of the fifth amendment."[231] In other words, "there must be a sufficient *nexus* between the defendant and the United States . . . so that such application would not be arbitrary or fundamentally unfair."[232] "Nexus," as noted by the Ninth Circuit in *United States v. Klimavicius-Viloria*, "ensures that a United States 'court will assert jurisdiction only over a defendant who 'should reasonably anticipate being haled into court' in this country.'"[233]

International law has been held to be a proper guide as to whether sufficient nexus exists to comply with constitutional due process.[234] For example, if the act was intended to take effect in the United States, or either a U.S. national or U.S. facility was the target, the territorial, passive personality, and protective principles of international law would provide a basis for U.S. jurisdiction.[235] The more

226 46 U.S.C. app. § 1903(h) (2000).

227 18 U.S.C. § 32(a)(1).

228 *Id.* § 2332. See also United States v. Evans, 667 F. Supp. 974 (S.D.N.Y. 1987) for extraterritorial application of U.S. export control laws.

229 18 U.S.C. § 2332a.

230 *Id.* § 2332b(e).

231 United States v. Davis, 905 F.2d 245, 248 (9th Cir. 1990) (citation omitted).

232 *Id.* at 248–49 (emphasis added) (citation omitted). *But see* United States v. Suerte, 291 F.3d 366, 372–77 (5th Cir. 2002) (surveying Supreme Court opinions and holding that "due process does not require a nexus for the MDLEA's extraterritorial application").

233 United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 287 (1980)).

234 *Davis*, 905 F.2d at 249 n.2.

235 *See* United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991); United States v. Benitez, 741 F.2d 1312, 1316 (11th Cir. 1984).

difficult question, however, involves the terrorist act that does not directly impact the United States, such as those in Indonesia, Afghanistan, or Israel, targeting local or adjacent governments.

Can the United States properly invoke criminal law jurisdiction in such cases? According to the *Restatement of the Foreign Relations Law of the United States,* the courts may have jurisdiction for "certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism"[236] even absent any specific connection between the state and the offense. Citing this provision as a foundation for Israeli jurisdiction against a World War II concentration camp guard in *Demjanjuk v. Petrovsky,*[237] the Sixth Circuit stated:

> When proceeding on that jurisdictional premise, neither the nationality of the accused or the victim(s), nor the location of the crime is significant. The underlying assumption is that the crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations.[238]

In *United States v. Yunis,*[239] a decision involving a 1985 aircraft hijacking in Beirut, and in *United States v. Yousef,*[240] the aircraft bombing referenced above, the courts favorably cited the universality principle as a potential basis for the exercise of U.S. jurisdiction.[241] However, as the hijacking in *Yunis* affected two American citizens and the bombing in *Yousef* was part of a larger plot eventually to attack U.S. airliners, neither case stands for the proposition that the United States can proceed against terrorists on the basis of universal jurisdiction alone. But in *United States v. Martinez-Hidalgo,*[242] a narcotics case under the MDLEA, the Third Circuit held that the United States could exercise jurisdiction over a vessel found in international waters carrying 282 kilos of cocaine solely because "the trafficking of narcotics is condemned universally by law-abiding nations . . . [It is not] 'fundamentally unfair' for Congress to provide for the punishment of persons apprehended with narcotics on the high seas."[243] The Court further stated that "in concluding that there is no due process prob-

236 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

237 776 F.2d 571 (6th Cir. 1985).

238 *Id.* at 582–83.

239 *Yunis,* 924 F.2d 1086.

240 927 F. Supp. 673 (S.D.N.Y. 1996).

241 *Yunis,* 942 F.2d at 1091; *Yousef,* 927 F. Supp. at 681–82.

242 993 F.2d 1052 (3d Cir. 1993).

243 *Id.* at 1056.

lem here, we pose the rhetorical question of who would prosecute narcotics offenders in cases such as this if the United States did not?"[244]

It is, nevertheless, far from certain that U.S. civilian courts will look favorably upon exercising jurisdiction based on universality against suspects caught in the President's effort to eradicate global terrorism. One commentator has questioned whether terrorism can be labeled a crime against humanity in the same category as such offenses as the trading of slaves and piracy because terrorism is often state-sponsored or politically motivated.[245] Furthermore, although states and the international community have relied upon universality to try World War II war criminals such as the Nuremberg defendants and Adolph Eichmann, apparently the United States is the only government that has ever asserted universality as a potential basis for trying terrorists who may not directly impact the nation.[246] The philosophy behind *Martinez*'s rhetorical question, asking in effect who will prosecute international drug dealers (or terrorists), may also raise a note of caution with some courts. They may believe that if we pursue those who commit terrorist acts in the Philippines, Kashmir, or elsewhere, we will be acting as the oft-criticized "world's policeman" when it would be better for others to accept responsibility for matters taking place in their own backyard. Moreover, the actual holding of *Martinez* accepting universal jurisdiction has not been adopted by other circuits.[247]

Accordingly, it cannot be assumed that U.S. courts will completely embrace the concept of universality. They may demand at least some U.S. nexus similar to that present in *Yunis* and *Yousef* before accepting jurisdiction in a terrorist case.[248] This requirement would indicate that U.S. policymakers, before attempting to proceed, may want to evaluate closely all potential terrorists cases involving action in foreign lands, including Afghanistan, and to insure that the

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244 *Id.* at 1057.

245 Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 348 (2001).

246 *See Yousef*, 927 F. Supp. at 681; Indictment, United States v. Lindh, No. 02-37-A (E.D. Va. filed Feb. 5, 2002), *available at* http://www.usdoj.gov/ag/2ndindictment.htm (last visited Oct. 9, 2002). See also Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REV. 383 *passim* (2001) for a discussion of categories of crime subject to universal jurisdiction.

247 *See* United States v. Klimavicius-Viloria, 144 F.3d 1249, 1256 (9th Cir. 1998); United States v. Greer, 956 F. Supp. 531, 536 (D. Vt. 1997.)

248 *See supra* notes 221–25 and accompanying text.

defendant's connection with the United States is open and obvious before attempting to proceed.

CONCLUSIONS AND RECOMMENDATIONS

To paraphrase Stewart Baker, quoted earlier in this Article,[249] we have "judicialized" more aspects of human behavior than any civilization in history, and we may have come to the limit of that. Our past and continuing focus on civilian criminal trials, with their attendant interrogation, search, and discovery issues, becomes problematic when our primary goal should be to fight a war successfully. The military role need not be exclusive, but it must be made clear that it is predominant. This will facilitate intelligent decisions when the inevitable conflicts arise between the philosophy and culture of the military and law enforcement, and it will prevent mixed messages that can potentially undermine the overall anti-terrorist effort.

If the military approach prevails, we will understand that religious fundamentalists who attack military targets in the Middle East or elsewhere and defend their homeland are, in essence, soldiers. They may be attacked, killed, or captured, and if captured should be treated as POWs. Trials, with Fourth and Fifth Amendment, as well as other, legal issues, need not be considered for these individuals. Because POWs may be retained "for the duration," there will naturally be debate as to how long they should actually be held. But there need not be dispute as to how they are initially handled by the government.

Those who attack civilians are in a different category because they have violated the laws of war. They are war criminals. If captured, they should not be incarcerated for the duration, but may be sentenced to life or even assessed the death penalty. Such sentencing requires trials. In accordance with a predominant military role, however, these trials, in the present author's opinion, should be conducted by military commissions. Such tribunals will avoid the problems inherent in evidence collection, discovery of intelligence information, and physical security.

Defendants tried before military commissions will still raise Fourth and Fifth Amendment issues, and these issues may eventually be reviewed by the Supreme Court. If the government intends to challenge a defendant's invocation of U.S. constitutional rights, the government might be in a better posture if interrogations and searches were conducted by the military and CIA. The practice of having FBI agents accompany Special Forces as reported in this Arti-

249 *See supra* note 35 and accompanying text.

cle can in a reviewing court's opinion potentially convert an interrogation or search for intelligence into a full-scale law enforcement inquiry. The law enforcement approach is likely to carry with it a mandate that the agents comply with traditional Fourth and Fifth Amendment requirements.

But even if the FBI is involved in the initial stages, the government should consider testing any defendant's claim that *Miranda* applies overseas or that any foreign searches must be supported by probable cause or foreign law. The government should do so because decisions such as *Barona*[250] and *Bin Laden*,[251] although well-reasoned, are cutting-edge and may not comport with the thinking of the Rehnquist Court as to the extraterritorial application of constitutional rights.

Finally, Congress may want to consider the creation of a Foreign Search Court on the model of the Foreign Intelligence Surveillance Court. The difficulties of fighting a war on terrorism, especially when relying upon criminal procedures, are compounded when the terrorists have obtained American citizenship. Classic examples are John Walker Lindh and Wadi el Hage, the bin Laden supporter whose apartment was searched in Kenya, leading to Judge Sand's opinion in *Bin Laden*.[252] As noted above, such defendants will raise Fourth Amendment challenges to overseas searches regardless of the forum. *Barona*'s reliance on foreign law to justify these intrusions may not stand. It may also be practically impossible to comply with a host country's legal requirements. The United States could, as an alternative, seek a later ruling from the trial judge that the agents acted reasonably in conducting the search, as was suggested by the dissent in *Barona*.[253] But this approach would put the government in the position of not knowing whether it was likely that it would be able to introduce seized evidence until trial. If agents were allowed to seek permission early in the process from a specially designated court, however, an impartial judge would be able to evaluate the reasons for the search beforehand, and the government, thereafter acting in good faith reliance, would be relatively certain of admissibility of the evidence. It is true, as noted in *Verdugo-Urquidez*, that a U.S. court has no authority overseas,[254] but the constitutionality of a search, like the voluntariness of a confession, is finally evaluated when the evidence is

250 United States v. Barona, 56 F.3d 1087 (9th Cir. 1995).

251 United States v. Bin Laden, 126 F. Supp. 2d 264 (S.D.N.Y. 2000).

252 *Id.*

253 *Barona*, 56 F.3d at 1102 (Reinhardt, J., dissenting).

254 United States v. Verdugo-Urquidez, 494 U.S. 259, 275 (1990).

offered in a U.S. court. A prior ruling by a special magistrate could, therefore, be acknowledged by the trial court at the time the evidence is presented in much the same way that trial courts generally accept the findings of magistrates who issue domestic search warrants.

The creation of such a Foreign Search Court, however, should not obscure the fact that our primary focus in the immediate future should be on the military. Our war against terrorism is critical to the well-being of our nation and the survival of our people. Despite our initial victories, it is clear that this will be a long struggle. It is now time, in the early stages of this conflict, to reconsider the philosophy that dominated the last decade and to recognize that we are not chasing domestic criminals but are fighting a war.