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JUNE 1 - 2, 2005

Los Angeles Terrorism Early Warning Group Conference

Terrorism, Global Security, and the Law



Proceedings

June 1 – 2, 2005

**Los Angeles Terrorism Early Warning Group Conference
Terrorism, Global Security, and the Law**

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The following individuals are recognized for providing outstanding guidance during the planning and organizational phases of the Los Angeles Terrorism Early Warning (TEW) Group Conference. This conference was made successful by the commitment of these individuals over several months, and they should be commended for their time and effort. Thank you!

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INTRODUCTION

Lt. John P. Sullivan, Conference Co-Chair
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For almost a decade, the Los Angeles Terrorism Early Warning Group (LA TEW) has served as a regional intelligence fusion effort supporting all phases of terrorism response in the Greater Los Angeles area. Combining a core staff of law enforcement and intelligence professionals with affiliated law enforcement, fire, medical and other critical first responders the LA TEW represents an ongoing effort to protect the region against terrorist threats, and provide for effective response in the event of a terrorist incident. The LA TEW has pioneered a joint approach for the co-production of intelligence in a distributed, collaborative manner and as such may serve as a valuable model for other cities, counties, states, and countries. Over the course of the conference the need for innovative approaches to emergent threat was discussed thoroughly. We propose that the work of the TEW exemplifies one such creative approach.

As part of its efforts to understand and anticipate emerging and evolving threats, the LA TEW convened this conference on “Terrorism, Global Security, and the Law” in cooperation with the RAND Corporation. All aspects of combating and responding to terrorism are grounded in the understanding and application of the rule of law. This is an especially important concept as the nation seeks to understand and develop legal and operational responses to terrorism as a political tool by non-state actors in the global arena. The LA TEW used this event as a way to inform itself, its partners, and other interested participants of the range of issues that intelligence professionals, law enforcement officers, emergency responders, and legal practitioners face in the current global security environment.

In the post-9/11 world dealing with terrorism has moved from an intelligence and law enforcement focus, with limited military implications, to one merging international military and homeland security concerns with domestic law enforcement and urban management considerations. Homeland security in an era of evolving terrorist threats is now a major national concern. At the same time, these threats and concerns raise a set of new challenges to the judicial and legal system, as well as the integration of traditional intelligence with law enforcement concerns. Those charged with police, security, and public health and safety responsibilities must meet emerging threats, and deal with real concerns about constitutional and civil rights, privacy, technical access, rules of evidence, forensic analysis, and humanitarian concerns.

These are times of emerging law, as well as emerging threats and changing technologies. The purpose of this conference was to bring together operational law enforcement and

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intelligence personnel, as well as national and international experts in terrorism, counter-terrorism, and others concerned with these critical areas.

The conference organizers hoped to provide a forum where the issues raised at the intersection of law, security and terrorism could be discussed across the different disciplines represented. The conference was organized around the linkage between terrorism and three major thematic groupings: legal issues, operational concerns, and forensic medical/ public health issues.

Although a wide range of concerns was discussed during the course of this two-day conference, a theme that came up repeatedly was the need for a new approach to these emergent issues. Speakers addressed the need for new definitions, new *lexica*, and new relationships. Also discussed was the need for new methods, doctrine, and approaches. While these are broad statements, the need underscores the continually evolving nature of this threat. New definitions are required because old terms such as ‘war’, ‘combatant’ and ‘enemy’ have shifted in this new context. Is the nation at war? What is war when this type of conflict is so different from what we traditionally term ‘war’? This ‘twilight conflict’, potentially continuing for years, has created new demands in terms of tactics, strategy and stamina for the personnel who must meet these challenges, not only in foreign nations but in the nation’s cities as well.

New relationships are needed because the realities of ‘war’ and ‘threat’, both conceptually and operationally, have changed, requiring agencies and nations to collaborate and share information more effectively than before. The new security environment, characterized by an emergent amorphous and transnational threat, requires a new approach to defense and a thorough a new understanding of what the ‘threat’ really is. Strong nations are no longer able to protect their citizens; civilians are on the front line – intentionally – of this type of conflict.

As they are involved directly, civilians must be better informed about the decision-making process. For example, there has been much confusion about legal developments such as the USA PATRIOT Act, and the potential invasion of Constitutional privacy guarantees by new surveillance programs. Only through broadening the discourse through many levels of society, can counterterrorism be truly effective.

Conceptually more challenging is the fact that this form of conflict has significantly challenged existing legal structures. The existing legal framework is not adequately equipped to deal with emergent technologies and thus there is strain when laws designed for the systems of several decades ago are applied to the needs of a new type of law enforcement and civil protection. For example, the notion of a search warrant that applies to a “place,” makes no sense in the age of cell phone technology when it is easy to change phone numbers without actually changing the phone.

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Further, our legal system is not structured to deal with a “war” that is undeclared, and that is fought against an enemy that is not defined by its relationship to a national state or geographical place. How does the legal system apply existing legal rules to changing technologies while at the same time respecting constitutionally protected civil liberties, notions of due process, and proper police procedures? Which legal regime takes precedence in this new environment? In the international setting International Humanitarian Law, International Criminal law, and Human Rights Law all play a role.

Domestically, in the US, criminal law at the federal and state levels also play significant roles, as does national security law. What are the structures and capabilities of these legal regimes, how can they work together, where do they conflict, and most importantly, how can they be applied in operational settings to effectively combat terrorism while preserving liberty. This conference provided a starting point for addressing several of these issues and anticipates the evolution of global security structures, approaches, and legal instruments.

The proceedings are organized as follows. Each plenary session, breakout session, and luncheon talk is summarized briefly with the main substantive issues highlighted. The abstracts are enclosed for reference. As the abstracts are different lengths and different levels of comprehensiveness, the breakout panel discussion section serves as an attempt to highlight the relevant substantive questions and issues. To conclude the proceedings we have enclosed a survey of relevant literature followed by case law and discussion questions.

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Plenary Session 1: Issues for Counterterrorism and Homeland Security

Dean Elizabeth Rindskopf-Parker, McGeorge School of Law

Dean Rindskopf-Parker discussed the need to develop a counterterrorism strategy that reconceptualizes security within a legal, constitutional structure. The basis of this will be a proactive rather than reactive approach to terrorism. She discussed the need for a coordinated and global counterterrorism strategy as well as better integrated cooperation between agencies. New legal doctrine must be developed that can inform both security forces and the public. A better understanding of the threat and the cultural context of the Middle East can facilitate future counterterrorism approaches. This links to the education that Rindskopf-Parker feels is important; there should be informed debate about these issues, for example discourse about the PATRIOT ACT should involve the public as well as policy-makers. This type of transparency is necessary for the public to have confidence in the decision-makers they elect; an over-reliance on secrecy diminishes this confidence. Finally, the private sector owns a large percentage of critical infrastructure and therefore must also be informed and involved in counterterrorism.

Abstract of Presentation:

In the aftermath of September 11, the need for change in our counterterrorism policy to enhance homeland security is clear; however, the means for achieving such change are far from obvious. The traditional approach to law enforcement centers on response, not prevention—a model now understood to be poorly suited for the current terrorist threat. If the nation is to anticipate and prevent future catastrophic attacks, not simply respond to them, it must adopt a new doctrine to guide the law enforcement community. Inevitably, such a prevention-based model will raise concerns about the balance between security and individual civil liberties.

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Historically, law enforcement's role has been to investigate, prosecute, and convict criminals. The law enforcement community is thus organized to react to, not prevent, threats against our domestic security. This approach is based on delaying action until a problem has arisen or there is probable cause to believe that it will. In this "wait for certainty," we created a system designed to protect individual liberty. This law enforcement model worked well when the principal goal was obtaining a conviction and the risk of delay raised only modest problems of public safety and security. In the post-September 11 world, the balance has changed. The magnitude for potential devastation is so great that we can no longer afford to limit our efforts to after-the-fact response.

As we can see, a prevention-based model necessarily raises concerns about individual civil liberties. It implies action before the certainty of a threat has been established and invites speculation about activities, motives, and status. Thus, at its extreme, a policy based on prevention could dramatically reduce many traditional forms of individual liberty. The tension between safety and freedom has thus come into sharp focus. How can we structure a system that guards our security without restricting the rights of privacy, liberty, and the constitutional form of government that we so prize? Responding to terrorism demands a multifaceted approach encompassing changes in laws, policies, training, technology and education—at home and abroad. The solution will not be found in one agency or a single directive. Our challenge is to develop a new doctrine for security that makes full use of all of our capabilities, but does so within constitutional limitations.

Plenary Session 2: Evolving National Security and Homeland Security Issues

Honorable Gary Hart, former Senator, and former co-chair, Hart-Rudman Commission

Senator Hart discussed the characteristics of the current security environment. He focused on the globalization and information revolutions and mentioned how the gap between the 'haves' and have-nots' exacerbated by these movements has been filled by resentment. Further characteristics that distinguish this environment are the erosion of the sovereignty of nation-states, originally based on the Westphalian system. Warfare/conflict is changing and one of the byproducts of this change is the increasing inability of the strongest nation to protect its citizens. New challenges will be terrorism, the proliferation of weapons of mass destruction, including both the nuclear and biological threat. Finally, the United States is at a crossroads: it can proceed unilaterally as the dominant global power, or it can cooperate with other nations, particularly with regard to intelligence and the use of elite military troops, such as the special forces. The US must collaborate internationally in order to deal with the emerging threat of terrorism.

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Remarks:

Based upon testimony by expert witnesses and independent research and investigation, the U.S. Commission on National Security for the 21st Century concluded as of September 1999 that America would be attacked by terrorists using weapons of mass destruction (WMD) and, in January 2001, urged President George W. Bush to create a new national homeland security agency. The report of the U.S. Commission on National Security represented the most comprehensive review of U.S. national security since 1947.

We live in an age of multiple revolutions. These include globalization, or the internationalization of finance, commerce, and markets; the information revolution; the erosion of the sovereignty of nation-states and a consequent increase in failed states; and the transformation of war and the changing character of conflict.

The great challenges of the early 21st century are proliferation of WMD; the spread of terrorism; south-north mass migration; climate change and global warming; AIDS and other viral epidemics; and failing states. Except for the terrorist threat, these challenges all have two things in common: they cannot be solved by military means, and they cannot be solved by a single nation, including the sole superpower.

Facing proliferation of nuclear technology in North Korea and Iran, and biological weapons technology in a growing number of countries, the United States is discovering the limits of preemptive or preventive war. The international agenda will require increased reliance on existing international agencies and exploration of new international organizations. The international community must explore creation of a new permanent peace-making capability, a stronger weapons inspection regime, and an international intervention force equipped to deal with rogue regimes and terrorist networks that threaten global stability.

Most of all, the 21st century will require a new definition of security, one that represents the shield of collective military and paramilitary law enforcement, and one that includes the cloak of the security of livelihood, community, the environment, and energy and other natural resources.

Breakout Session 1A: Detention and Trial of Terrorist Suspects under U.S. and International Law

Summary of Presentations:

This break-out session focused on the legal issues relevant to the detention and trial of terrorist suspects. Among these issues are the constitutional rights of the accused, such as the suspension of habeas corpus, and the issue of how to deal with the accused in a new kind of conflict. This issue is particularly pressing as it links to many of the other emergent legal issues discussed at this conference. If 'war' and 'combatant' are newly

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defined, what are the rights of the accused within this context? For example, prisoners-of-war have always been subject to detention for the duration of hostilities. In this new type of 'twilight', undefined and potentially endless conflict, what are the rights of the accused, and how can these rights be balanced against security? Professors Finkelman and Herman addressed some of these issues in their presentations.

As Professor Finkelman pointed out in his presentation, the laws of war are based on a traditional states-system, according to which war had a defined beginning and end. 'Traditional' warfare has now changed, possibly irrevocably, forcing new definitions and legal frameworks. Within this context, a democracy cannot detain people forever.

The issue of 'enemy combatants', however, has been very recently highlighted in the Padilla case, the details of which are highlighted in the literature review in the Appendix of these proceedings. A panel from the Fourth Circuit of Court of Appeals ruled in September 2005 that Padilla may continue to be held although he has not been charged with a crime. This decision was based on what the panel said was the authority conferred on the president by Congress after the attacks of September 11, 2001. This ruling overturned a February 2005 decision by a South Carolina district judge that stated that Padilla should be released.

Professor von Knop addressed the issue of terrorism within the European context, discussing how rather than focusing only on the defeat of terrorism, decision-makers should focus on constricting the environment in which terrorists operate. Policy and enforcement should make it more difficult for terrorists to operate, raise funds, and transfer documents and people. This preemptive approach, according to von Knop, is the focus of European Union (EU) counterterrorism policy. Von Knop feels that although the EU has declared dealing with terrorism a priority, operations lag behind declarations. Her observations focused on the importance of a joint-EU level intelligence-gathering organization. Second, she remarked that the smaller European states represent a security weakness. Third, she feels that establishment of an EU-wide intelligence system would be the most appropriate next step. This could focus on improving what she feels are the most important intelligence shortcomings in the EU: collection capabilities, civil protection and humanitarian action, external intelligence, and verifications capability.

Abstracts of Presentations:

Professor Paul Finkelman, University of Tulsa School of Law

This paper will focus on the historical issues of detention, looking at the constitutional provisions involving the suspension of habeas corpus, the basic constitutional rights of the accused, and the problem of detention. Much of the presentation will be historical, looking at how we have dealt with detention in the past, particularly of civilians. This section of the paper will consider the experience of the Lincoln administration during the Civil War and the experience of Japanese-Americans during World War II. The paper will try to

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make some distinctions between those experiences and the post-September 11 problem. Although not part of the “emerging issues” panel, this paper will also consider some of the emerging issues in this area.

**Professor Katharina von Knop, University of
Innsbruck**

The rise of the global Salafi Jihad in Europe is alarming, not only because of the threat such a movement poses to the European Member States, but also because Europe has served as a launching pad to terrorist operatives plotting attacks elsewhere. The relationships between individual terrorists affiliated with different groups that often do not even have a name are paramount, especially when operating within Diaspora communities in places like Europe and the United States. It will be just a question of time when the fighters in Iraq return to their families in Europe and continue to carry out the ideology they have learned under Abu Musab al-Zarqawi.

This cross-over and pollination facilitates cooperation among groups, including operational cooperation, but far more often, interconnectivity at the logistical and financial support levels. Such links exist even among groups that do not share similar ideologies, leading to cooperation among religious and secular radicals and criminal entities. As such, it should not be a surprise that several investigations into global Jihad operatives in Europe and elsewhere revealed significant crossover to terrorist elements tied to Hamas. The al-Taqwa Banking system with offices in Switzerland, Lichtenstein, Italy, and the Caribbean facilitates the financing of multiple terrorist organizations. Hezbollah is highly qualified and capable of carrying out attacks not only in the United States, where it has never carried out operations before, but in Europe as well, where it has been active in the past.

Antiterrorism is not just about defeating terrorism; it is about constricting the environment in which terrorists operate, making it harder for them to do what they want to do on a daily basis: conduct operations, procure and transfer false documents, ferry fugitives from one place to another, and finance and raise and laundering funds. It is about making it more difficult for terrorists to conduct their operational, logistical, and financial activities. This is the perspective of the European Union (EU) antiterrorism policy being analyzed in the present paper.

The Madrid attacks did not represent a turning point in the policies adopted by the EU in the fight against terrorism, but they obviously show the insufficient implementation of the measures adopted in the aftermath of September 11. In spite of declaring the priority of the fight against terrorism, the declarations have not been followed by sufficient commitment on the part of member states. Only with greater international coordination will authorities success in targeting the international financial support network and constricting the operating environment in which this designated terrorist organization currently thrives. The intelligence and law enforcement agencies should improve their cooperation on the domestic

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and international levels. Especially the smaller member states of the EU represent a serious security risk because they could not afford good intelligence services. Besides these very important issues, to conduct efficient and effective counterterrorism and antiterrorism, it is necessary to look at 100 percent of potential terrorists and their supporters. It could be argued that we did not pay enough attention at 50 percent of potential terrorists and their supports, namely women.

The primary objective of any intelligence system should be to provide what the customers need in a timely and user-friendly format. In the EU's case, the principal customers are the actors of the national and of the political-military decision-making process. Three observations to emerge from the course of the present paper are: first, that there is no joint EU-level intelligence-gathering organization. Second, the intelligence agencies of the smaller member states are representing a security lack. Third, that exchange of intelligence between national intelligence services is still the most common practice. However, when it comes to pooling intelligence, the establishment of SITCEN and the INTDIV constitute a well-organized intelligence section that can make substantial progress if the member states have the political will to provide them with reliable intelligence in times of crisis.

The ideal situation would be to set up a proper, reliable, and effective intelligence system for the EU with an appropriate architecture. Analyzing the political process of the EU, this cannot be envisaged in short-term or long-term, as everything has yet to be built in an area that is extremely sensitive as far as the boundaries of national sovereignty are concerned. If the member states would realize that an effective intelligence system for the EU is compatible with their national interests, the shortcomings concerning intelligence support are to be found in the following four areas: collection capabilities, civil protection and humanitarian action, external intelligence, and verifications capability. A realistic goal is that the EU could play the role of a counterterrorism and antiterrorism coordinator, spreading and sharing best practice across the EU.

To reach this goal, the common known behavior of the EU, which is characterized by appeasements and debates, will have to be given up, and it has to be understood that the conflict with the global Salafi Jihad will most likely last longer than any other of the great military conflicts of the last century—a conflict that cannot be tamed by tolerance and accommodations.

Professor Susan N. Herman, Brooklyn Law School

Professor Herman will speak on the panel on Detention and Trial of Terrorist Suspects under U.S. and International Law. She will be discussing the Federal Constitutional law applicable to detention of terrorism suspects (including the Hamdi and Padilla cases) and the relevance of State and local law to Federal, State, local, and Joint Terrorism Task Force detentions and investigations.

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**Ms. Renee C. Redman, International Institute of
Connecticut**

Emerging Legal Issues – Immigration

Not surprisingly, many issues relating to immigration and aliens emerged following the events of September 11. However, most are not new in the history of the United States, but rather, are issues that have regularly emerged during times of war and other threats to the country's security. Many issues relate directly to security efforts, including the detention of aliens, secret immigration court hearings, monitoring of conversations between lawyers and their clients, and registration of citizens from particular countries. However, all immigration law has been affected in more indirect ways. Examples include the tendency of the judiciary to defer more often to the executive branch when any issue relating to immigration arises, and the failure to renew laws whereby members of U.S. citizen families can live here legally.

Breakout Session 1B: Forensic Epidemiology: U.S. Issues

Summary of Presentations:

This breakout session focused on forensic epidemiology, or 'law at the intersection of public health and criminal investigations'. Another definition is 'investigate responses to public health events possibly associated with criminal activity'.¹ Although public health and law enforcement officials have worked together on investigations of health issues with a potential criminal component since the 1970s, the importance of collaboration between these two disciplines was highlighted and intensified by the anthrax attacks of fall 2001.

Dr. Fielding discussed forensic epidemiology at the ground level, particularly in reference to public health preparedness in the context of biological, chemical, and radiological terrorism. He also discussed the role of public health in dealing with emerging infectious diseases and other public health emergencies, such as pandemic influenza and natural disasters. Dr. Fielding discussed the new public health role as first responder in the context of emergent threat and described the relationship between public health and law enforcement.

Further, Dr. Fielding described approaches to detecting and monitoring epidemics, including detailing how the public health system responds to an emergency. He described the procedures in place, including investigation, analysis, communication, isolation and quarantine, and mass clinics. He then described in detail the interactions between public health and law enforcement officers. Dr. Fielding summarized the major issues as the need

¹ For further detail, see Richard A. Goodman, Judith W. Munson, Kim Dammers, Zita Lazzarini, and John P. Barkley, 'Forensic Epidemiology: Law at the Intersection of Public Health and Criminal Investigations' *Journal of Law, Medicine, and Ethics*, 31 (2003): pp. 684-700. This definition, p. 693.

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for an integrated, all-threats approach to the threat, continued support for infrastructure development, and the need to generate prioritizing scenarios. Readiness must be tested with all partners and effective communication capabilities must be ensured. Dr. Fielding asserted that forensic epidemiology requires collecting and analyzing public health data and transforming it into medical intelligence. First responders are dependent on public health systems for quick, accurate responses. Health and law enforcement must be linked in order to create and maintain a public health rapid response capability.

According to Dr. Allswede, forensic epidemiology focuses on enhancing public safety and public health through combining information from law enforcement, public health, and medical sources. Further, it focuses on early recognition of bioterrorism, and identification of medical anomalies that may represent a public health emergency. The effect of this is to facilitate timely responses to emergencies.

In his presentation Dr. Allswede talked about the elements of bioterrorism and the transnational threat. He also discussed the threat of domestic groups and individual operators. He described different ways the procedure of forensic epidemiology can be organized in order to facilitate the process. Further, he discussed different privacy and communication issues that are linked. Finally, he proposed a new approach – the SMI approach (Strategic Medical Intelligence)– that ensures decisions are made with more complete information and interagency coordination. SMI combines threat and health intelligence and can be adapted to fit state and local institutions and it uses people who are already in place.

Dr. Goodman discussed key aspects of forensic epidemiology and described a cross-disciplinary approach that the CDC has used to deal with these types of joint public health/law enforcement investigations. He defined forensic epidemiology as “The use of epidemiologic methods as part of an ongoing investigation of a health problem for which there is suspicion or evidence regarding possible intentional acts or criminal behavior as factors contributing to the health problem.”

According to Dr. Goodman, some of the issues involved with forensic epidemiology include: understanding how a public health investigation differs from and is similar to a criminal investigation, and understanding public health investigations of disease outbreaks, including defining the exposed population, providing prophylaxis to exposed persons, and identifying the source. He pointed out the importance of identifying procedures and mechanisms to communicate suspicions of intentionality to law enforcement officials.

Dr. Goodman also mentioned some legal issues that arise in the context of this form of joint investigation, including the development of legal frameworks to ensure that evidence is admissible, assuring the establishment of the chain of custody of evidence, and regulating disclosure of confidential/health information. Some practical aspects of the development of forensic epidemiology include redefining thresholds for criminal contributions to public

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health problems, and developing instruments to assist the public health/law investigation and enforcement collaboration.

Abstracts of Presentations:

Dr. Jonathan Fielding, Los Angeles County Department of Health Services

This paper investigates forensic epidemiology at the ground level and looks at public health preparedness for biological, chemical, and radiological terrorism, emerging disease, and other public health emergencies. Dr. Fielding talks about the role of the public health system as a first responder, including its role in surveillance, monitoring, and early detection of epidemics. Further, he describes the relationship between public health and law enforcement.

Dr. Michael Allswede, Department of Emergency Medicine, University of Pittsburgh

This paper explores the components of health and threat intelligence and presents a model for forensic epidemiology practice that integrates both types of analysis to improve early detection of bioterrorism.

The paper is based on a literature review on intelligence process with literature review on the components of health intelligence. These reviews are distilled into actionable steps and actions for evaluation of medical anomalies that may indicate bioterrorism.

A novel forensic epidemiology system (Strategic Medical Intelligence) is evaluated with respect to several real world challenges, including the Nation's largest hepatitis A outbreak in Beaver, PA, and a variety of other threats and incidents. A nomenclature system for threat and health intelligence anomalies is proposed, along with a system of checks and balances to ensure privacy and public safety.

Forensic epidemiology is an evolving discipline whose bioterrorism applications include combining health and threat intelligence for early recognition of bioterrorism incidents. Combining clinical, epidemiological, and law enforcement information will help categorize potential incidents as an emerging infectious disease, a criminal/negligent act, or bioterrorism, and will also guide the initial approach to legal sharing of information and will help address issues of balancing privacy and public safety from the beginning of an incident.

Dr. Richard A. Goodman, Centers for Disease Control and Prevention (CDC)

Dr. Goodman will discuss basic definitions and related key aspects of forensic epidemiology, a cross-disciplinary approach of the Centers for Disease Control and Prevention's (CDC's) Public Health Law Program has developed to address joint public

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health and law enforcement investigative responses to bioterrorism attacks and other public health problems having underlying potential criminal root causes. In particular, this brief presentation will define the term “forensic epidemiology” in relation to threats to human health and illustrate how this term applies to past medical and public health problems; identify selected legal issues potentially arising in the setting of joint investigations by public health and law enforcement officials; and describe implications the evolving area of forensic epidemiology holds for public health and law enforcement practice.

Breakout Session 1C: Operational Intelligence for Counter-Terrorism: U.S. Issues

Summary of Presentations:

This session addressed some of the issues that have arisen in the context of new post-9/11 legislation concerning counter-terrorism intelligence gathering. Ms. Thomas described the shift in roles and responsibilities of state/local law enforcement agencies in the post-9/11 security environment. She talked about how two major changes are the importance of inter-agency cooperation and intelligence sharing, and further described the definition, development and use of criminal intelligence in the U.S. She also described how intelligence has been impacted by political confrontation leading to both federal and state legislation concerning intelligence issues. Finally, Ms. Thomas listed several core operating principles that concern the regulation and use of information in this context.

A major piece of post-9/11 legislation is the USA PATRIOT Act. Ms Reid O’Connell addressed the reality of this Act, what it actually means, and what actual impact it could have. She contrasted this with the myths and, to some degree, paranoia surrounding the statutes. The issues raised here have particular relevance as some of the statutes, set to sunset at the end of this year, have raised a great deal of debate both among lawmakers and the public.

Ms Reid O’Connell clarified, from her perspective, the disparities between myth and reality concerning for example: the speed of enactment of the Act—she states that it wasn’t a panicked, last minute gesture but rather that provisions had been considered by counterterrorism experts before 9/11. Further, she stated that the fear that the government can authorize wiretaps without probable cause is unwarranted as the Act did not alter the probable cause requirement for foreign intelligence wiretaps.

She addressed many other issues such as a public fear that the Act impacts Fourth Amendment rights; that the government has been granted new powers to search private property without prior notification; and that the PATRIOT Act allows the FBI to conduct surveillance operations against normal people living in the US. She made cogent arguments against each of these statements. Taking aside the wide variety of opinions on these issues,

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an important problem is that there is so little clarity on the statutes of the Act. This results in public fear and misinformation.

Abstracts of Presentations:

Ms. Sally Thomas, Los Angeles County District Attorney's Office

Ms. Thomas discusses the emergent legal issues related to counter-terrorism intelligence in the U.S. She describes the shift in the roles and responsibilities of law enforcement agencies in the post-9/11 security environment. She also discusses the historical development of state and federal legislation regarding intelligence information as well as certain fundamental principles related to the use of intelligence information.

Ms. Beverly Reid O'Connell, U.S. Attorney's Office, Los Angeles

The U.S. Patriot Act: Myths v. Realities

Much of the public is unaware of the actual provisions in the Patriot Act and the use by the Federal Government of those provisions of the statute. Ms. Reid O'Connell addresses the misconceptions about the Patriot Act and how the Federal Government has implemented the Patriot Act while preserving individual privacy rights.

Mr. Michael Wermuth, RAND Corporation

This session focused on the challenges and issues in the structures and processes for intelligence sharing among federal, state, local, and private sector entities. It included discussions on the need for consensus on definitions and terminology, including the differences between strategic, operational, and tactical intelligence; the appropriateness of intelligence collection and dissemination by State and local law enforcement and other government entities; the structural relationships and barriers between Federal agencies and with State, local, and private entities; and security classification and clearance regimes. Each subject area will also include a discussion on civil liberties implications.

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Luncheon Topic: Racial Profiling

Dr. Jack Riley, RAND Corporation

Abstract of Presentation:

Approximately 1,000 law enforcement agencies across the country collect and analyze data to show whether racial profiling is occurring in urban traffic stops. These data collection efforts have been invaluable not only because agencies have learned what type of data to collect, but because researchers have learned how to better analyze the data. The result has been significant advances in our understanding of whether racial profiling is occurring and how to address it. The proper analysis of this data has led numerous law enforcement agencies to make important operational changes, including in the handling of citizen complaints, the training of personnel, and the allocation of law enforcement resources. Unfortunately, this kind of data collection and analysis is not occurring with respect to security profiling. This talk identifies emerging issues in the realm of security profiling by reviewing lessons learned from local law enforcement's experience with racial profiling.

Presentation:

Dr. Riley discussed racial profiling in the context of homeland security. Specifically, he addressed the lessons that can be drawn from law enforcement's experience with racial profiling in terms of what is happening with profiling in the context of homeland security.

Racial profiling is the inappropriate use of race as a sole or even primary factor in taking an enforcement action. Allegations of racial profiling arise when there are large differences between the racial distribution of those who are stopped (or subjected to any enforcement action) to the racial distribution of those who are at risk of being stopped (or at risk of being subjected to any enforcement action). Dr Riley pointed out the importance of differentiating between racial profiling – which is inherently bad – and risk profiling, which law enforcement agencies must engage in order to manage crime problems and allocate resources effectively. While risk profiling is legitimate, racial profiling is not.

Racial profiling is a highly charged topic in many communities across the country. In most of these cases the common difficulty is strained police interaction with the minority community. While the specific issue may be use of force or vehicle stops, the central allegation is typically one of disparate treatment of minorities that in some way disadvantages or hurts them.

Current concerns about racial profiling primarily stems from two coincident activities. The first is the development and use of drug courier profiles principally by the Drug Enforcement Administration. Though these profiles used non-racial risk factors (ex: vehicles with large trunk space or Florida rental car license plates), they were generous to

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the point of being exhaustive (ex: lack of luggage and large amounts of luggage were both risk factors). More importantly, these profiling procedures were shared with law enforcement agencies up and down the I-95 corridor. They were then later adapted or customized by the local law enforcement agencies to meet specific local needs, and were not always implemented with vigorous and careful training. It soon became obvious that a highly disproportionate share of highway stops on the I-95 corridor were of young black males.

The second major factor in heightening tensions about racial profiling is the increased use of traffic enforcement for crime control. In jurisdictions such as California, it is permissible to stop probationers and parolees at any time. Indeed, it is considered good policing to manage and monitor offender populations with such scrutiny. In other jurisdictions, police use saturation patrol and vehicle check-points to help cut down on violence and drug activity. Approximately half of all contact between citizens and law enforcement occurs through vehicle stops, so profiling in the context of driving is one of the more frequently cited concerns.

Departments and law enforcement agencies all over the country have responded to this steadily building concern about racial profiling. An initial step for most agencies was data collection. Interpreting the data, however, remains problematic. It is pretty easy to measure – or count – who has been stopped. But how do you measure or count the population that is at risk to law enforcement intervention or at risk of being stopped? This is far trickier. How do you count the racial distribution of who is on the road or who drives? The Census tells you about who lives in the area, but not about who drives (as opposed to who takes public transportation), or how frequently, or what routes they take. Traffic surveys are better, but they are very expensive and they only tell you about a limited set of traffic infringements. Analysts have developed ways to use a natural experiment involving the changing of the clocks at different points in the year to help reduce the need for census, surveys and other unsatisfactory analytic techniques.

In general, apparent patterns of racial profiling in the decision to make a stop disappear when you statistically adjust for some key factors:

- The justification for the stop, such as moving violation, probation and parole checks, and equipment violations.
- The distribution of law enforcement activities – simply put, there are more police on duty in some parts of towns than others.
- The age of the drivers, since law enforcement tends to key on enforcement against younger rather than older drivers.

When these factors are taken in to consideration, apparent disparities are likely to disappear, and the support for claims of racial profiling is correspondingly diminished.

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Data analysis has contributed to measuring the extent of the racial profiling problem. Much of the debate concerning racial profiling now transcends the issue of stops and is focused on issues such as the disparities in the decision to search, the outcome of searches, and the duration of stops. Here there are problem spots. Work performed for Oakland, California, showed that blacks were at a higher risk of being searched than whites, particularly where the search was a discretionary one that could be initiated by the officer as opposed to being required by policy. We saw similar problems in the duration of stops, with blacks enduring longer stops on average than whites.

This would be a negative story if the narrative stopped there. However, this detailed level of data analysis has allowed departments to think through and in some cases modify how they train, deploy and allocate resources. Some police departments, such as Oakland, have used the data analysis process to very positive benefit: they have used it to identify areas where the officers need training and to identify communication methods that need to be improved in interactions with citizens. In short, departments rightfully point to these findings not as evidence of systemic bias, but as indication of where they need to work on developing policies and procedures.

Some agencies, such as the Oakland Police Department, have proactively addressed the problem by forming citizen advisory groups that help the law enforcement agency determine what data to collect, how to analyze the data, and how to interpret the results. The result can be improved citizen understanding of how law enforcement performs its job, and improved law enforcement ability to engage and mobilize the citizenry. It is a badge of honor for the Oakland Police Department that the data analysis that we did satisfied both the ACLU and the OPD command staff. Their process of engagement made this successful outcome possible.

The point is, the law enforcement community is addressing the issue of racial profiling. Sometimes unenthusiastically, or under court order, but increasingly often, in a proactive and open manner. There has been, according to Dr. Riley, substantial public benefit from the light that has been spilled on the topic.

Accusations of racial profiling by law enforcement agencies are a symbol of the deeper pathologies in the relationships between minorities and law enforcement. These allegations symbolize a lack of trust. One of the reasons that there are so many allegations of racial profiling across the US today is that there is a profound lack of trust between citizens and the police. Instances of egregious use of force against minorities, whether the force was justified or not, have been videotaped and instantly broadcast around the globe. The stakes have therefore never been higher for law enforcement.

The lack of trust can manifest itself in a lack of willingness to cooperate in investigations or have police operating in neighborhoods. The allegations can also make law enforcement agencies gun shy and prevent them from doing their jobs appropriately. It is in this way

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that what appears to be a problem of only the minority community becomes a problem for the entire community.

In contrast to law enforcement, the security industry – as distinct from law enforcement – is not addressing the issue of racial profiling. According to Dr. Riley, there are no data collected on federal security stops at airports, let alone private security stops that occur in thousands of office buildings and factory complexes across the country every day. Therefore, we cannot, with any certainty, say anything about racial disparity in the application of security (as distinct from law enforcement).

There are at least two contexts in which security profiling is necessary. The first is in the context of intelligence gathering, such as the FBI's project to interview 5,000 Muslim males living in the US, and the second is point security, such as the searches conducted at airports. Both types of profiling rely, to a surprisingly large degree, on public support. The FBI's domestic intelligence efforts have been hampered by community resistance to profiling. Several communities, such as Ann Arbor MI, have adopted positions of formal opposition to the FBI program, while other communities, such as Portland OR have withdrawn from the FBI JTTF task force. Similarly, virtually all Americans have struggled with the topic of airport profiling and screening in one way or another.

Dr. Riley queried in summary: what are the lessons for security profiling that stem from law enforcement profiling? They fall into three major categories:

First, and most important, is the need for security profiling efforts to collect data. Who is being stopped, and for what purpose? What is the yield from the stop activities? Does the yield in terms of intelligence or contraband vary based on ethnic or racial group? What characteristics or factors are predictive of a good yield? Answers to these questions are only possible with good data. We should be able to answer the same broad set of questions for the FBI and the TSA that we have been able to answer for law enforcement agencies.

Second, we need to use these data to inform the refinement of training and the development of policies and procedures. The security profile that is being applied in point security is basically a search for "things" – a potentially endless list of items that could be used as a weapon. This approach is neither behavior- nor risk-based. Thus we are deploying large cadres of security professionals who don't know what to look for in terms of suspicious behavior. We can use the data to help make our security measures more effective and less onerous.

Third, use the process of data collection to engage the communities. Correctly done, the process surrounding profiling can be used to build support for profiling activities. As one example, a collective and collaborative process could be beneficial for determining what the right denominator is for measuring security profiling, and could help illuminate which particular aspects of security profiling are most problematic to the aggrieved communities.

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It is an undeniable consequence of the terrorist attacks of 9/11 that new security measures are required. But though there is a need for new measures, we cannot let the same mistrust that has built up between law enforcement and our citizenry build up between the citizenry and our security professionals. Look at the consequences of this distrust at the local level: the healing and recovery process takes years if not decades. The thought of this distrust playing out at the national level is chilling. We can avoid the buildup of mistrust by confronting the issue head on. In particular, there is an urgent need for the FBI and the TSA to begin to address this issue in a consequential and systematic manner. I hope too that it has the attention of the new Director of National Intelligence, John Negroponte, and his civil rights panel.

Dr. Riley's concluding remark was that he is concerned that we are headed down the wrong path and repeating the mistakes that have led to a substantial buildup of mistrust between citizens and law enforcement. In the end, we all benefit if we have successful, validated security measures in place that have widespread support.

Plenary Session 3: Constitutional and Civil Rights, Privacy and Counterterrorism

Professor Susan Herman, Brooklyn Law School

Professor Herman addressed the issue of the emerging importance of balancing counterterrorism with civil rights in the context of the post-9/11 security environment. The challenges of 9/11 have fundamentally challenged US Constitutional and legal structures. Many of the changes concern changes related to the PATRIOT ACT, such as to the 1978 FISA. The PATRIOT ACT eases earlier restrictions and allows FISA to be used in place of Title III. This step begins the process of dismantling the 'Wall' between intelligence gathering and criminal investigations. This is a fundamental change to the procedures for gathering intelligence information. One issue Professor Herman discussed is the fact that these legal issues are actually playing out in a political forum, rather than in the more appropriate legal context. With regard to the PATRIOT ACT Professor Herman points out that the legislature is trying to plug new technologies into old rules. There is a demand for new legal rules to contextualize and control emergent technologies.

There are a variety of issues involved in the trade-off between security and public transparency. For example, how do we draw balances between these two sides? It is difficult to have public debates about these types of security issues. How does one draw the line between 1st Amendment rights and the 'war on terrorism'? In the context of current security needs should the 4th Amendment be changed? Finally, where should the balance be drawn between security and civil liberties? Fundamentally, what has happened to checks and balances in the context of the current security environment?

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Breakout Session 2A: Trial of Terrorists in Civilian Courts and Military Tribunals

Summary of Presentations:

This panel discussed the issue of where to conduct the trials of suspected terrorists. A major issue that has developed after the 9/11 attacks is the use of military commissions to try terrorists. All three panelists discussed various characteristics of the commissions as well as their own personal involvement in them. Mr. Carter discussed the trials of suspected terrorists and mentioned a case he was involved in: *Hamdan v. Rumsfeld*. Mr. Sundel described the structure of military commissions and the rules that regulate them. He also compared them with other types of courts, both military and civilian. He talked about his experiences representing a detainee at Guantanamo Bay.

Ms. Amann discussed how the US has traditionally prosecuted war crimes or terrorism in either civilian courts or courts martial. This changed after 9/11, when a new approach to the trial of suspected terrorists – military commissions— was developed. This has generated political debate. As Ms. Amann pointed out, one of the Bush administration lawyers defined this new approach as ‘a new legal regime’, that would deal with all parts of the prosecution of suspected terrorists.

The use of military commissions links to other emergent legal questions addressed at this conference, such as what the rights of the alleged terrorists are, whether they should have the right to habeus corpus, and what body has jurisdiction over them – particularly with regard to the Guantánamo detainees. Military commissions bring up issues such as the relationships between this form of law and international and human rights law as well as whether there is a right of appeal. Further, in some cases the US will be prosecuting the nationals of allies; who should have jurisdiction?

Abstracts of Presentations:

Mr. Phillip Carter, McKenna Long & Aldridge LLP

As moderator, Mr. Carter will present an overview of the current pending trials for suspected terrorists held by the United States, and also introduce the audience to the military commissions that have been established for the trial of detainees at Guantanamo Bay. Mr. Carter will also discuss the case *Hamdan v. Rumsfeld*, now pending before the DC Circuit Court, in which he participated as counsel for a group of military law scholars and practitioners who filed a brief as *amici curiae*.

Mr. Phillip Sundel, Law Offices of David P. Sheldon

Mr. Sundel spoke about the military commission’s structure, rules, and procedures; comparison with courts-martial and Federal civilian prosecutions; and interaction with

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international humanitarian law/human rights law. Mr. Sundel also discussed his experience representing a Guantanamo Bay detainee designated for trial by military commission.

Ms. Diane Marie Amann, UCLA Law School

The United States traditionally prosecuted crimes of war or terrorism in one of two fora: either in civilian courts, operated in accord with the Constitution, or in courts martial, operated in accord with the Geneva Conventions. That changed after September 11, 2001. The executive branch created what one of its lawyers called a “new legal regime,” within which suspected terrorists were to be detained, interrogated, and, perhaps, put on trial. This presentation will focus on trials. First it will give an overview of the two traditional fora; that is, how each operates, what are the perceived advantages and disadvantages of each, and the extent to which either has been used since September 11. The presentation then turned to the third forum, giving an overview of the special military commissions set up to try certain Guantánamo detainees. It also examined other earlier antiterrorism regimes—among them, the Diplock system in place in Northern Ireland for the last three decades—as a means to evaluate the U.S. regime.

Breakout Session 2B: Quarantine and Isolation: Global Issues

Summary of Presentations:

This breakout session focused on the containment of disease and focused on the subject on several levels. One of the main focal points of the session was containment in the context of a biological weapons attack. The speakers all spoke to the different methods and regimes in place to deal with such a catastrophe.

Dr. Katona discussed the issue of epidemics/pandemics within the context of terrorism, WMD, global security, and the law. He divided the issues into local, national and international considerations and used the SARS outbreak as a case study, discussing why the SARS outbreak had such an impact. He pointed out that SARS was new, highly contagious, viral, and characterized by a high level of uncertainty, thus it had a profound medical, as well as socio-economic, religious, cultural, and educational impacts. Some of the lessons from the SARS outbreak point toward improved infection control, quarantine, and panic control. However, Dr. Katona also points out, there are social problems with quarantine in this context as these measures can cause panic, anger and a fear of an infringement on civil liberties. He went on to discuss how community shielding contrasts with measures such as quarantine and spontaneous evacuation.

Dr. Katona placed SARS in historical context with a discussion of past influenza and current avian flu outbreaks. He mentioned that while countermeasures, including better surveillance, vaccines and antivirals, have developed since influenza first had devastating effect, there is still a level of uncertainty regarding the future of similar such outbreaks.

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Normally influenza is more contagious than smallpox and mutates at an extremely rapid rate. Avian flu produces particular concerns due to its very high mortality (50%) and the possibility that it will mutate into a contagious strain between humans.

Dr. Farley discussed the different steps in the process of dealing with a 'bioterrorist communicable disease agent': surveillance, isolation, quarantine, and containment. He also mentioned that it is contingent on local health departments to prepare for the necessary deployment in order to control the release of a bioterrorist agent. Within the context of the terrorist threat, public health departments have a changing role and must organize to prepare for, respond to, and recover from a bioterrorist attack. He described LA County's organizational approach to the threat.

Dr. DeBell discussed the regimes in place in the US to deal with communicable diseases from foreign countries. According to the Constitution, the federal government has the authority to prevent interstate communication of disease, while states and localities have responsibility for quarantine within their borders. Dr. De Bell listed the potential complications of quarantine, such as outbreaks in random pattern, or unresponsive diseases. Reinforcing the main theme of this session, in order for a bioterrorist attack to be dealt with, there are various required responses. Success with quarantine and isolation of the disease will require cooperation, communication, and solid planning.

Abstracts of Presentations:

Dr. Peter Katona, UCLA Medical School

The session was broken down into local, national, and international considerations. It focused on what we have learned from a recent event (severe acute respiratory syndrome [SARS]) regarding quarantine and isolation, and how we can prepare for a new international catastrophe, such as highly contagious avian influenza, in view of past significant influenza outbreaks. All of this is in the context of preparing for the next biological weapons attack.

Dr. Robert Kim-Farley, Los Angeles County Department of Health Services

The public health infrastructure is crucial for disease containment in the event of an intentional release of a bioterrorist communicable disease agent. Surveillance, or information for action, to detect deliberate epidemics is the first step to containment. Isolation is the separation of infected persons during the period of communicability to prevent transmission of the infectious agent. Quarantine is the separation of healthy persons exposed to a communicable disease during the incubation period of the disease to prevent contact with those not exposed. The changing role of the local health department as part of the first responder community requires preparedness and the rapid application of surveillance, isolation, quarantine, other containment measures (e.g., mass or ring

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vaccination, mass prophylaxis, risk communication messages to the public) to detect and control an intentional release of a bioterrorist agent.

Dr. Robert DeBell, The Titan Corporation

Federal authority for the imposition of quarantine and isolation is the statutory responsibility of the Secretary of Health and Human Services. This authority is invoked to prevent the introduction, transmission, and spread of communicable diseases from foreign countries. U.S. Customs and the Coast Guard are required to assist in the enforcement of quarantine. Under the Commerce Clause of the U.S. Constitution, the Federal Government also has the authority to prevent inter-State spread of communicable disease. States and local jurisdictions have primary responsibility for quarantine within their borders. The specific diseases for which Federal isolation and quarantine may be imposed are authorized by executive order of the President. Among the diseases on this list are plague, smallpox, and viral hemorrhagic fevers, which are diseases known to have been developed within offensive biological weapons programs. In the event of bioterrorism where these particular diseases are employed, there are several complications to quarantine. These might include several almost simultaneous disease outbreaks in a random pattern (e.g., reload concept), outbreaks caused by intentional person-to-person spread, or the outbreak of a disease unresponsive to known therapies. It is most important to be able to identify the causative agents of these diseases and how they might be spread to ensure a sound basis for quarantine and isolation. Among the various response components required for a bioterrorist incident, success with quarantine and isolation will depend on high-level cooperation among authorities, well-designed response plans, and successful communications networks.

Breakout Session 2C: Operational Intelligence for Counterterrorism: Global Perspectives

Summary of Presentations:

This breakout session focused on international perspectives on operational counterterrorism intelligence. This session was a rare global view on the different approaches taken to this emergent issue. Particularly interesting was the point of view of the British, who have been dealing with the issue of terrorism much longer than both the Americans and Canadians. Detective Chief Superintendent Weston discussed the Metropolitan Police's strategic approach to counterterrorism, describing the importance of integration and cohesion both in information sharing and in command and control. Mr. Weston pointed out that the purpose of the Met's strategy is to minimize the impact of terrorism through maintaining a hostile environment for the terrorists. He mentioned that he is realistic about the fact that terrorism cannot be eradicated. Further, he discussed the fact that there is a major difference between the US and the UK when it comes to the 'wall'

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between US law enforcement and intelligence gathering. The UK does not have this cut off and therefore there is more integration between the two sides.

Mr. Weston pointed out another interesting contrast between the US and UK when he mentioned that he was astonished that the tools – or as he put it – ‘toolbox’ provided by the USA PATRIOT Act could potentially be taken away. He felt that if that were to be the case, there would be more 9-11s. Mr. Weston highlighted issues that have been widely at this conference and in the wider community. Should the ‘wall’ be dismantled? Where should the trade-off be between civil rights and security? The UK has a good record in counterterrorism activities; should similar approaches, such as widespread CCTV and license plate readers become standard in the US as well?

The following two presentations highlighted the importance of the co-production of intelligence within a global framework. The importance of information sharing was discussed widely during the course of the conference. Mr. Swallow discussed the historical development of international police cooperation, particularly how counterterrorism has been treated separately from the criminal field. Further, he described the institution established by Europol, focusing on counterterrorism activities. He listed the problems of cooperation, including limited resources, the difficulty of the remit, status of the staff, constitutional problems, and competition.

Robert Taylor and Bruce Cooke, of the RCMP and US Border Patrol, respectively, discussed their joint strategy. They demonstrated in their presentation how coordination can be actualized operationally. Their Integrated Border Enforcement Teams (IBETs) have been distributed along the US—Canada border to coordinate a variety of agencies, including the RCMP, the Canada Border Services Agency, the US Bureau of Customs Border Protection, among others.

These teams help enhance border integrity and security by identifying, investigating and interdicting those who could potentially pose a threat to national security. The focus of these teams is on enhancing national security, and dealing with organized crime and other border criminality. It was pointed out in the presentation that one means of effectiveness in this approach is that information/intelligence and investigation components are shared. There is a commitment to partnership and joint management.

Some of these characteristics are considered to be lacking in the US national security decision-making framework. Examples of where improvements can be made are: threat or risk-based decision-making, collaboration between agencies, and facilitating public awareness of the security reality and needs. The process discussed in this presentation demonstrated how these problems have been addressed in a joint-agency, transnational context. These teams have been able to facilitate access to relevant information/intelligence, improve joint risk assessments, and detect potential cross-border illegal activity, thereby mitigating potential national security risks.

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Abstracts of Presentations:

Detective Chief Superintendent Keith Weston, Metropolitan Police, United Kingdom

The British police response to terrorism is based on a five-strand strategy designed to impact on the vulnerabilities of terrorist operations. The foundation of the strategy is the priority of an intelligence system. Of equal importance is the cohesion of the component elements within an integrated command and control system. The British police response to terrorism evolved into a dynamic and resilient strategy that is realistic in what it seeks to achieve.

Detective Chief Inspector Paul Swallow, Metropolitan Police Special Branch, United Kingdom

The discussion will describe the development of international police cooperation in Europe since World War II through Interpol, Trevi, and Europol and will link this to the development of the European Union (EU) itself. It will outline the way in which cooperation in the counterterrorist field has been treated separately from the criminal field and will describe the development and present arrangements that exist to deal with it.

Referring to the EU's response to September 11, the discussion will outline the response to counterterrorism at the political level, and will outline initiatives such as those arising from the EU's Tampere summit in 1999. The paper will highlight the gap between political aspirations and policing realities in the EU. This will be done with specific reference to the lack of success of an international counterterrorist task force set up within Europol in October 2001.

Staff Sergeant Robert Taylor, Royal Canadian Mounted Police (RCMP)

The Governments of Canada and the United States recognize that border integrity is crucial to ensuring the economic security and public safety of both countries. Integrated Border Enforcement Teams (IBETs) have been established in strategic locations along the Canadian-U.S. border to provide a proactive, intelligence-led approach to enhancing the integrity of the border. The IBET program harmonizes border security efforts by bringing together core agencies such as the Royal Canadian Mounted Police (RCMP), the Canada Border Services Agency (CBSA), the U.S. Bureau of Customs Border Protection and Office of Border Patrol, the U.S. Coast Guard, the U.S. Bureau of Immigration and Customs Enforcement, and local law enforcement. Since their implementation in 2001, these integrated teams have effectively disrupted smuggling rings, confiscated illegal drugs, weapons, liquor, tobacco, and vehicles, and have interdicted several criminal networks attempting to smuggle illegal immigrants across the border.

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**Assistant Chief Bruce L. Cooke, U.S. Department of
Homeland Security (USDHS), Office of Border Patrol**

The Governments of Canada and the United States recognize that border integrity is crucial to ensuring the economic security and public safety of both countries. Integrated Border Enforcement Teams (IBETs) have been established in strategic locations along the Canadian-U.S. border to provide a proactive, intelligence-led approach to enhancing the integrity of the border. The IBET program harmonizes border security efforts by bringing together core agencies such as the RCMP, CBSA, U.S. Bureau of Customs Border Protection and Office of Border Patrol, U.S. Coast Guard, U.S. Bureau of Immigration and Customs Enforcement, and local law enforcement. Since their implementation in 2001, these integrated teams have effectively disrupted smuggling rings, confiscated illegal drugs, weapons, liquor, tobacco, and vehicles, and have interdicted several criminal networks attempting to smuggle illegal immigrants across the border.

Breakout Session 3A: Legal Access and New Technologies

Summary of Presentations:

This breakout session addressed how the challenges of terrorism have pushed the government to experiment with new technologies and methodologies. Hurdles and complications still exist, however, when it comes to a relationship between technology and legal and policy restrictions. There are questions of how these should be adapted and updated in order to integrate new technology and maximize the potential of counterterrorism activities. In essence legal regimes must ‘catch up’ with technological developments in order to remain applicable, relevant, and effective. Further, a theme throughout was that there must be a fair and safe balance struck between the needs of national security and civil liberties.

Mr. Pollard talked about how globalization has introduced many trends that could lead to crisis, including the removal of political, economic, and technological divisions, Internet connectivity, and the availability of information. Globalization has facilitated the emergence of terrorist actors. In this context, the security environment is characterized by the convergence of failed states, the proliferation of weapons of mass destruction, and terrorism. As Mr. Pollard pointed out, information technology could contribute greatly to three major areas: intelligence and knowledge, critical infrastructure protection, and cyber-conflict and defense. Information technology could assist, in one example, in tracking terrorists’ transactions through data-mining, aggregation of data and pattern analysis.

As Mr. Pollard mentioned, there are existing legal hurdles that obstruct the US government’s ability to take advantage of technological advances in the context of terrorism. Mr. Pollard pointed out in his presentation that the US will miss these opportunities unless

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its finds solutions to its legal and policy uncertainties, and develops a process by which to integrate technology with law and policy.

Rear Admiral Miller also addressed the issue of meeting developing counterterrorism needs within current legal constraints. He pointed out that although the intelligence agencies have been increasingly empowered to deal with terrorist activities both in the US and abroad, there are still the problems of trade-offs between counterterrorism activities and civil liberties. The issue of this balance between pro-active security measures and civil liberties is fundamental and was addressed many times during the course of the conference. RADM Miller's presentation investigated how the National Security Agency dealt with this task.

A different aspect of emergent legal challenges in the context of terrorism was addressed by Professor Koepsell, who discussed how traditional ideas of attorney-client privilege are now in a state of flux. He described the origins of attorney-client privilege, including its transition from an 'objective' to a 'subjective' privilege. Professor Koepsell mentioned that in the post-9/11 age of terrorism, attorney-client privileges are complicated due to the changes enshrined in the PATRIOT Act. According to Professor Koepsell the provisions of the PATRIOT Act threaten the privilege without actually creating opportunity for new intelligence gathering. He also discussed waivers of the privilege, including inadvertent waivers of the privilege that can occur based on new communication technologies such as cell phones, instant messages, text messaging, and wi fi connections. These developments in communication technologies force re-evaluation of our preconceptions about communication, privacy, and free speech.

Abstracts of Presentations:

Mr. Neal Pollard, Terrorism Research Center, Inc.

In the war against terrorism, information technology offers significant opportunities in three areas: intelligence and knowledge, critical infrastructure protection, and cyber-conflict and defense. However, hurdles exist in law and policy that prevent the United States from exploiting these technology opportunities. These hurdles are challenges of both substance and process. The United States will continue to miss important technology opportunities in the war against terrorism until it resolves substantive legal and policy uncertainties and develops a process to integrate the co-development of technology, policy, and law.

Rear Admiral (Ret.) Alex Miller, The Titan Corporation

In response to September 11 and the resulting need to provide better intelligence on the terrorist threat to America and its citizens, the Nation's intelligence agencies and the FBI dramatically changed their policies, procedures, and processes to enable more accurate and timely detection and early warning of terrorists' intentions. Many of these changes are called for by the 9/11 Commission and the President's Commission on Weapons of Mass

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Destruction and have been written into law by the Patriot Act and the Intelligence Reform and Terrorism Prevention Act of 2004. However, although further empowered to actively seek out and find terrorist activities in the United States and abroad, the intelligence agencies and the FBI have a continuing responsibility not to violate the civil liberties of American citizens. RADM Miller's presentation will examine how the National Security Agency accomplishes this task. As indicated by the 9/11 Commission Report, "This balancing is no easy task, but we must constantly strive to keep it right."

Professor David Koepsell, State University of New York (SUNY) Buffalo, School of Law and the Center for Inquiry, Amherst, New York

Traditional notions of attorney-client privilege have arisen through custom and law over centuries, but never have these notions been more in flux than now. In the age of terrorism, attorney-client privilege would be reevaluated simply because of national security concerns. But in the information age, that reevaluation is complicated further by new communication technologies that challenge our preconceptions about what constitutes communication, our expectations of privacy, and free speech. This talk will address the ontological issues.

Breakout Session 3B: Rendition, Detention, and Interrogation of Terrorist Suspects

Summary of Presentations:

This panel discussed the treatment of terrorist suspects, and touched on some delicate emerging questions concerning the relationship between US policy regarding suspected terrorists and humanitarian law and human rights. A common thread throughout these presentations was that the US is developing a new and controversial mode of dealing with suspects that arguably stretches the US' obligations under international treaties and conventions. This issue brings many questions: for example, if the US decides that the responsibilities under the Geneva Conventions do not apply to the terrorist suspects at Guantánamo, how could this affect foreign governments' treatment of captured American prisoners of war? Is the US setting a new precedent by redefining these categories? What are American responsibilities under international law?

Mr. Watt developed in his presentation one of the most controversial issues regarding US treatment of terrorist suspects. He discussed the shadowy practice of 'extraordinary rendition' in which suspects are transferred from one state to another, in this case, for interrogation and detention. This issue touches, again, on what protections states are legally obliged to provide suspected terrorists. As Mr. Watt mentioned, in the past, rendition was used to surrender a suspect from one state to another for trial; this has

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changed in the new environment to mean something less clear-cut. Controversially it is emerging that suspects are perhaps purposely being rendered to states that employ torture.

As Mr. Watt pointed out, the most controversial aspect of this scenario is that suspects could be being subjected to torture with the knowledge of the US. This brings up issues of the US' obligations under the UN Convention against Torture and the fact that extraordinary rendition violates existing law that is binding on the US.

Professor Harris discussed further this paradigm shift in US policy regarding suspected terrorists. His presentation focused on the US government's shift from a criminal justice model to a war model for the detention and interrogation of suspects. Further, he discussed the government's development of the 'unlawful enemy combatant' doctrine, which has controversial components. He discussed this doctrine in relation to domestic and international law.

These presentations addressed the important question of the relationship between US policy and international humanitarian and human rights law. Additionally, they touched on the question that has run through the conference: where is the balance between national security and civil liberties, and by extension, human rights? Have we entered an entirely new legal regime, where extreme practices are required and thus condoned?

Abstracts of Presentations:

Mr. Steven Watt, American Civil Liberties Union (ACLU)

For many years now, criminal suspects have been transferred from one State to another for arrest, detention, and/or interrogation. Typically, this process has been achieved through formal extradition procedures, by which one State surrenders a person within its jurisdiction to a requesting State via a formal legal process. Since the early 1990s, however, the United States has resorted to an alternative system for the transfer of persons suspected of terrorist activity, one in which suspects are transferred to other countries, absent judicial or other constraints. The term "rendition" or "extraordinary rendition" has been coined to describe this procedure. While in the past, suspects were rendered for subsequent trial, the practice recently appears to have taken on a whole new face; suspects have been transferred by the United States not for trial, but specifically for detention and interrogation. Moreover, the countries of transfer are countries long known to employ torture and other forms of cruel, inhuman, or degrading treatment. Most controversially, evidence also indicates that suspects rendered by the United States have been subjected to torture with the knowledge or acquiescence of the United States.

Publicly, little is known about the practice. Although U.S. officials have acknowledged its existence, the legal basis for extraordinary rendition has never been publicly stated. In its current form, however, it is clear that extraordinary rendition violates existing domestic and

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international law binding on the United States, most notably, the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.

Referencing specific cases of extraordinary rendition, including the case of Maher Arar, a Canadian citizen rendered by the United States to torture in Syria, this presentation will explore the procedures employed in the practice and demonstrate how they violate the fundamental right of everyone to be free from torture.

Professor George Harris, McGeorge Law School

Mr. Harris discussed the U.S. Government's shift from a criminal justice model to a war model for the detention and interrogation of criminal suspects, and its development of the unlawful enemy combatant doctrine. He focused on the implications of that doctrine for domestic and international law and the role of executive branch lawyers in creating that doctrine.

Breakout Session 3C: Trends in Terrorism 1: Dealing with Suicide Bombers and Others

Summary of Presentations:

This breakout session focused on the issue of dealing with suicide bombers, focusing on their motivating factors as well as the cultural, familial and religious contexts that support them. Dr. Berko and Dr. Hasan discussed the use of suicide attacks as both strategy and tactic, and discussed the characteristics, motivation, doctrine, cultural context, and worldview of the suicide bomber. They both approached the issue from a cultural point of view while Dr. Sinai discussed the phenomenon of suicide bombing from a strategic perspective.

Dr. Sinai discussed in his presentation whether suicide terrorism was strategically beneficial to the perpetrating groups. He discussed a definition of terrorism and the characteristics specific to suicide terrorism: the attackers not being part of formal military units, a group rather than individual phenomenon, and a tactic used by both religious and secular groups alongside more 'conventional' terrorist methods such as shootings, conventional explosives, etc. Dr. Sinai pointed out that suicide is based on rational choice on many different levels: group level military benefits such as maximizing accuracy – a suicide bomber can get closer to the target, is able to adjust to conditions, and does not need an escape route. Another level is group level political benefits as the attacker becomes a celebrity, attracting more attention than would a conventional attack, and the attacks are inexpensive. The attention component of suicide bombing also is effective on an international group level as it attracts attention to the organization and its cause. On a more individual level, there is a sense of altruism, self-sacrifice for a greater cause, and potential heavenly rewards.

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Dr. Sinai presented a series of hypotheses including an assertion that suicide terrorism does follow a logic: it is intended to coerce democracies to change policies while disrupting normal life, and it is more effective than conventional warfare. He discussed the impact that suicide bombing has on the perpetrators and perpetrating society and mentioned that the leadership does not sacrifice its own children. This is a strategic choice. Finally, Dr. Sinai presented a framework for assessing the strategic benefits of suicide bombing based on a comparison of benefits to the group and impact on the targeted state. His conclusions were that empirical research is required to compare whether suicide terrorism is strategically beneficial to perpetrating groups, and their supporting constituencies and societies; cost-benefit considerations must be understood from all stakeholders' perspectives, and the study of terrorism needs to encompass the spectrum of tactics.

Abstracts of Presentations:

Dr. Anat Berko, International Policy Institute for Counter-Terrorism

For more than nine years, Dr. Berko has studied and interviewed the suicidal murderers, their dispatchers, and families of the terrorist bombers. Western society that sanctifies life finds it difficult to understand the behavior of the suicide bomber according to this rationale. Durkheim, one of the fathers of sociology, describes it thus: "Man has become man's God; therefore, an act that endangers his life is a kind of sacrilege. Suicide is such an act." The western world cannot accept that a man kills himself to kill others.

Suicide bombing is now a strategic weapon of the Islamic terrorist organizations and has proven effective outside Israel's borders as well; in Turkey, Spain, Saudi Arabia, Egypt, in Russia, in the September 11, 2001, terrorist attacks in the United States, in Iraq, after the American-led military invasion, and in other places.

The hope of a better life motivates potential suicide bombers who are usually socially marginalized people with low self-esteem and uncertain sexual identity. Not necessarily religious, they are introverted and dependent and need to please others, making them easy to spot and recruit. They require no military expertise. The mother is the significant parent. The suicide bomber does not act out of suffering or inferior economic status, but to win social recognition. They dehumanize their victims. Suicide is an expressive act on the part of the suicide bomber, but for the dispatcher it is an instrumental act.

The predisposition to suicide attacks is religious, social, cultural, and moral rationalization. Part of this process of socialization is accompanied by incitement and indoctrination at the mosques, schools, and everywhere there is a constant trickle of hatred of the West (calls for 'Jihad', revenge, rage and hatred of Jews and Americans).

For example, from her book, *The Path to the Garden of Eden*, a female suicide bomber says, "I began counting the days till my death, because they forced me to." She wasn't religious

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enough to be a *Shahida*. “The dispatcher told me ‘Halas ya-binti’ (“Enough my daughter”). When you die, you will be closer to God. God will forgive you and allow you into the Garden of Eden.”

Dr. Nasra Hasan, United Nations Office on Drugs and Crime

With a database of approximately 200 profiles of Palestinian and Pakistani suicide bombers, as well as interviews with suicide bombers, their families and friends, trainers, planners, security officials, clerics, and others directly and indirectly involved in suicide terrorism by Islamist groups, Dr. Hasan spoke on the use of suicide operations by sponsoring groups as strategy and tactic of choice; doctrinal aspects; characteristics, world views, differences, and social contexts; talking to practitioners and supporters of suicide terrorism; and under-explored areas relating to extremist militancy.

Mr. Joshua Sinai, U.S. Department of Homeland Security (USDHS)

This paper provides a methodology to assess whether suicide terrorism is strategically beneficial to the perpetrating group and its supporting constituency. Specifically, does suicide terrorism follow a strategic logic in which more gains are made than before such attacks began in terms of coercing the targeted government to change its policies (such as making significant territorial concessions) or causing its destabilization and demonstrating its vulnerability by radically upsetting normal life routines?

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DAY 2:

Plenary Session 4: Technology and Counterterrorism

Dr. Abraham Wagner, Columbia University

Dr. Wagner discussed the role of technology and counterterrorism, beginning his presentation by questioning some common general assumptions about the terrorist threat. Some examples: that terrorists will enter the US with passports/visas; terrorists will use metal weapons; they will use nitrate-based explosives; they won't use shipping containers; and that terrorists won't use cell phones or the Internet. According to Dr. Wagner, terrorism is a tactic, not an enemy and those who are utilizing this tactic are increasing in numbers and using increasingly sophisticated technology.

Dr. Wagner discussed a group of key areas that are 'enablers' for both terrorists and counter-terrorism efforts. These are communications and information technology, weapons and countermeasures, bio-defense, and non-intrusive inspection. Within the category of communications and information technology, the Internet, availability of computers, infinite and cheap bandwidth have all increased access. Further, there has been an exponential growth in cyberspace with the world dominated by networked systems. The Internet provides efficient and cost effective communications, access to media and information, and a low cost but effective platform for propaganda. Terrorists can use the Internet for covert communications, to gain access to information –i.e. target information and technical data for weapons design and manufacture – and to distribute propaganda. The Internet is ideal for terrorist communication due to global access, relative low cost, and relatively easy security.

Terrorist access to information provides potential targets for future attacks, logistics for terrorist operations, and technical data for terrorist operations such as bomb designs, CBRN devices, etc. Terrorist websites provide a low-cost platform for propaganda and allow terrorists to communicate with each other. This brings up the question of whether this should be stopped. It brings up First Amendment concerns in the U.S. Even if it is decided to stop them, this would only be possible in the short-run. Cyber-attacks could have an impact because the world is dominated by networked systems. The threat could come from hackers, criminals, and disgruntled employees.

Prior to 9/11 the government was not serious about counterterrorism; after 9/11 the government is still not serious but this could be helped by combination of government pressure, funding and user demands. Dr. Wagner pointed out that a positive aspect of this is that technology is asymmetrical – it was developed by US scientists and understand how it works, and protection is easier than penetration.

Cell phone technology is widely used by terrorists and criminals: it has obvious benefits as it is low cost and can be anonymous. Dr. Wagner made a particular point that pre-paid

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SIM cards can be purchased around the world at a multitude of shops, and are not registered to anybody. Tracking becomes almost impossible with a lack of external target data that connects a cell phone to any specific human.

Data mining is an interesting issue in the context of the terrorist threat. These tools find patterns in large data sets. This approach could help counterterrorism efforts as the world is increasingly digital, and there is technical support for data mining. The issue here is legal, not technical. Unfortunately, terrorists can avoid digital encounters and the legal issues won't be solved easily.

Dr. Wagner discussed terrorists' weapons, stating that terrorists are using a mix of stone age, improvised, and advanced technologies. One weapon is the improvised explosive device (IED). Others are real WMDs: chemical, biological, nuclear, and radiological weapons (CBRN). In order to counter this, there have been significant bio-defense efforts made. Protection for the general population still remains a problem. Non-intrusive inspection is another issue: drugs, weapons and other contraband enter the US illegally. A particular problem is shipping containers, a very small percentage of which are searched. Logistics and lack of personnel prohibit any serious approach to searching trucks entering the US.

Abstract of Presentation:

Although the religious and philosophic underpinnings of current terrorist movements may be rooted in the Middle Ages, the various technologies they employ certainly are not. Terrorist organizations have embraced a range of modern technologies to support their operations in areas including communications, targeting, recruitment, as well as in the design and use of weapons against military and civilian targets. At the same time, the intelligence services and military and law enforcement agencies engaged in counterterrorism are operating in an era where a host of new technologies exist, and continue to evolve, that are of potential use in combating terrorism. The focus of this plenary talk is on how technology has served as an "enabler" on both sides of the terrorism problem, as well the problems created for counterterrorist operations, both in terms of making actual operations more difficult or the legal impediments presented by new technologies.

Plenary Session 5: Operational Issues in the Post 9/11 World

Mr. Brian Jenkins, RAND Corporation

Mr. Jenkins addressed the question of where we are in the 'war on terrorism'. We tend to view war as a finite undertaking with a clear beginning and end. In this context the term 'war' is used to enable the mobilization of resources. Are we safer now? According to Mr. Jenkins, we are safer now although the explanation is unclear as to why there have been no attacks [in the U.S. since 9/11]. Among the reasons for this:

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- Al-Qaeda has lost strategic capabilities;
- Intelligence and security have improved;
- Al-Qaeda could be involved in planning a major attack currently and doesn't want to risk spoiling it with a minor attack.

The attacks on 9/11 redefined what is plausible. Before the attacks, that form of terrorism was considered far-fetched; now it is accepted as possible. This marks a shift in strategic thinking as well – from threat-based to vulnerability-based analysis. It is extremely important to consider the enemy's capabilities and intentions. As uncertainty pushes us toward analysis of vulnerabilities and a focus on the worst-case scenario, this is good for assessing the consequences of an attack and for evaluating preparedness. It is, however, not a substitute for a realistic consideration of the threat. Basing analysis on the worst-case scenario, analysts reify hypothetical scenarios into imminent threats. It is also important to consider the terrorists respond to the public's response to them. This has been demonstrated in intelligence chatter, according to which there is a feedback loop between public discourse and the terrorists.

In the context of low probability/high consequence events cost-benefit analysis is very difficult. How do you measure effectiveness? The only way is through the absence of attack. We are dealing with a threat that is long term, and within the framework of this type of threat, we must get imaginative. We need a sustainable, efficient strategy for national security. Security should produce a net benefit: permanent defenses of public places merely displace risk. Citizens must accept that there will be residual risk.

When dealing with the impact of terrorism, public education and engagement are important. Along these lines, the [DHS] color-coded communication system was needed because communication is important.

According to Mr. Jenkins there are many problems with security. Among them are: there is a complacency in terms of security due to the fact that there hasn't been an attack in the U.S. since 9/11; there is no overarching strategy that identifies, prioritizes, and allocates resources regarding security issues; pork barrel politics slows allocations of resources; political partisanship destroys national unity; ideology distorts security decisions; budget constraints lead to ill-considered cutbacks in the security arena; bureaucratic infighting reduce the role of bin-Laden to enemy number two, second to partisan politics; and the triumph of narrow agendas breeds cynicism.

Further, Mr. Jenkins remarked on the status of legal issues concerning terrorism. He stated that terrorist acts push us toward preventive measures. We don't have a legal framework that can deal with them. For example, there is a debate about the authority to detain foreign nationals and U.S. citizens as enemy combatants. Further, there are new privacy and

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oversight issues based on the emergence of new, intrusive technologies. Questions emerge: should suspected terrorists be tried in special tribunals or regular courts? Should intelligence information be used in criminal prosecution?

Breakout Session 4A: International Cooperation in Financial Investigation, Enforcement and Trans-Border Data Sharing

Summary of Presentations:

This breakout session again reinforced the importance of sharing intelligence and establishing new, or reinforcing long-standing, international relationships in order to facilitate this. Further, he discussed the importance of bringing law enforcement and intelligence closer together, surmounting ‘the wall’ built into the American system between law enforcement activities and intelligence gathering. In his presentation Mr. Treverton remarked on how the nature of the threat has changed– from the geographical, structural and bureaucratic threat of the Cold War to the multilateral, asymmetric terrorist threat. He pointed out that organizations such as Al-Qaeda are reactive –they respond to our actions – and they find vulnerabilities in our systems and exploit them. The process of dealing with this type of threat is much more like law enforcement than intelligence.

This need for cooperation and integration was further reinforced by Mr. Watson and Brigadier General Sobel in their presentations. Mr. Watson pointed out the importance of information sharing and General Sobel discussed how this new type of transnational threat requires a proactive approach to coordinating national, state, and local agencies. She discussed a variety of approaches to supporting interoperability.

Focusing specifically on the threat of bio-terrorism, Mr. Baciú pointed out how unprepared the international community is to deal with this type of threat and discussed its characteristics, emphasizing that it is rapidly evolving, devastating and largely ignored. Bio-weapons are easy to make and transport and they pose little potential harm to the terrorist. As Mr. Baciú pointed out in his presentation, there is an urgent need for countries to prepare for and protect their citizens from bioterrorist attacks. Interpol has begun preparing a program to deal with this type of threat. Mr. Baciú outlined the details of Interpol’s approach. Further details are provided in the presentation abstract.

This breakout session highlighted again the importance of intelligence sharing and integration as well as agency interoperability. It also touched on the nature of the emergent threat and the urgency with which this issue must be planned for and dealt with by both national and international security agencies.

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Abstracts of Presentations:

Mr. Greg Treverton, RAND Corporation

The United States and its major global partners in the war on terrorism all face the same challenge: bringing intelligence and law enforcement agencies much closer together than they had been, and doing so in ways that do not run high risks of infringing on privacy and civil liberties. In the United States, the wall between intelligence and law enforcement was built rather consciously from the time of forming the Central Intelligence Agency (CIA) in the late 1940s, and it was reinforced by the congressional investigations of intelligence abuses in the 1970s. It extended not just across agencies but also inside them, especially in the Federal Bureau of Investigation (FBI). It sharpened what were not just bureaucratic differences but also deep differences in purpose, method, time, horizon, and standard between intelligence and law enforcement. Now that wall is being dismantled, and law enforcement and intelligence are being pushed together.

At the same time, intelligence and law enforcement are being challenged in many countries to work with State and local officials (or equivalents) in new ways. The process is often called information sharing, but that label is misleading because it presumes not only that the process is technical but also that it is the Federal level that has the information to be shared. In fact, the challenge is changing the way intelligence and law enforcement do their business, a challenge that runs from how information is classified to how the levels of government reach a division of labor. For instance, local officials have neither time nor personnel to conduct special intelligence collection in the war on terrorism; nor do they have much capacity to analyze information. What they do have is “eyes and ears” on the street if they have some sense of what to look for and some confidence that what they report will be processed in ways ultimately useful to them.

Mr. Dale Watson, Federal Bureau of Investigation (FBI) (Ret.)

Mr. Watson discussed the nature of the new threat and different approaches to dealing with it from a federal law enforcement perspective. He highlighted the importance of information-sharing to countering the threat.

Brigadier General Annette L. Sobel, USAF, National Guard Bureau

Countering transnational threats to U.S. national security requires a proactive approach to State and local information integration. The National Guard J2, in partnership with many national, State, and local agencies, is addressing the challenges of our borders through strengthening the analytic cornerstones of Open Source Intelligence and Vulnerability Analysis. This presentation provided an overview of some of the efforts to build methodological standards to support interoperability and actionable intelligence.

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Mr. Adrian Baci u, Interpol

Why is bioterrorism such a threat?

The world is largely unaware of, and therefore largely unprepared for, bioterrorist attacks. Bio-weapons threaten thousands of casualties in addition to other disastrous long-term consequences. Criminal networks can covertly transport lethal agents across borders and terrorists have already proven that anthrax can be fatally deployed.

Biotechnology is undergoing rapid evolution. This process, and the dissemination of developments, is already proving difficult to manage. There is evidence that terrorist organizations have a heightened interest in the use of biological weapons, establishing terrorist support cells in different regions around the world with the ability and motivation to carry out attacks.

An easy option?

An effective biological weapon is potentially devastating and much easier to make and transport than a nuclear weapon. Bioweapons are, however, relatively safe for the terrorist. Pathogens (biological agents or germs) are virtually undetectable and can be brought reasonably easily into a country by an individual and can then be propagated in large quantities.

Recognizing the imminent dangers represented by this lethal form of crime is the first step in countering the threat. Thereafter, it is vital to put in place the tools which will enable society to take appropriate measures.

Isn't there a law against it?

In many countries, criminal justice systems are constrained by inadequate legal frameworks governing the detection and repression of bioweapons. Frequently, no law is violated until the disease or biological agent is actually deployed. Law enforcement officers are therefore unable to begin preliminary investigations into the development of such weapons. Without laws that criminalize activity relating to bioweapons, there is no basis for legal assistance or cooperation to prevent their production and transport.

There is, therefore, an urgent need to ensure countries are adequately prepared for, protected from, and able to respond to bioterrorist attacks. Law enforcement agencies have a crucial role to play, with significant support from, and in collaboration with a range of, other national and international bodies.

What is being done?

As a direct result of a grant of nearly \$1 million from the Alfred P. Sloan Foundation, Secretary General Ronald K. Noble has been able to create a dedicated unit at the Interpol

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General Secretariat in Lyon, France. This unit will develop a programme to build national and international capacity to counter the threat of bioterrorism.

The plan.

This bioterrorism program will do the following:

- ◆ Raise awareness of the threat
- ◆ Develop police training programs
- ◆ Strengthen efforts to enforce existing legislation
- ◆ Promote the development of new legislation
- ◆ Encourage interagency cooperation on bioterrorism

Breakout Session 4B: Choice of Legal Regime

Summary of Presentations:

This breakout session focused on legal regimes, particularly on the controversial issue of whether terrorist suspects should be dealt with through a separate legal regime with specific, special rules. This raises many questions such as what rights to suspected terrorist have, and how the suspects are categorized. As Professor Abrams pointed out, the complications of categorization and treatment have led to some suspects being treated as enemy combatants while others have been dealt with through the normal criminal process. Further, one of the bases of this special legal regime – that wartime powers are applicable – is a contentious issue among scholars, who reject this assertion. This has been a theme throughout the conference; if the US is at war, how is war defined, who is the US fighting, and how will we know when it ends? How do we define who is a combatant and how do we deal with them?

Professor Abrams pointed out that he believes a certain number of ‘terrorism’ cases should be handled differently than normal criminal cases. According to the assertion in his presentation, a special civilian court would apply a regimen of special rules to deal with these cases. He provided background support for this approach, including the constitutional foundation and justification.

Professor Kellman discussed a slightly different issue but one still linked to the importance of international legal regimes. He discussed the fact that there is no international organization or governing body that deals with oversight of bioscience. Further, there is no global institution empowered to issue and enforce measures to secure pathogens, control equipment, or detect covert bioweapons preparations. At this point there is no way to know relevant national legislation and no way to address emerging issues. According to Professor Kellman, there is no need for a new organization, but rather, a more important

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contribution would be a linkage of the existent relevant international organizations into a network that could, by aggregating capability, enhance security.

Furthering this discussion, Mr. Feucht introduced the National Institute of Justice's portfolio on terrorism, counterterrorism, and law enforcement. Then, Professor Renteln discussed the variety of legal mechanisms that can deal with human rights violations such as genocide, torture, and mass rape. She argued for the importance of the International Criminal Court (ICC) as well as some other approaches incidental to US jurisprudence, such as the Alien Tort Claims Act and the Torture Victim Protection Act.

Abstracts of Presentations:

Professor Norman Abrams, UCLA Law School

In the wake of September 11, the idea of dealing with terrorists through a separate legal regime or through special rules has become the subject of debate and controversy. Early on, the Bush Administration staked out a strong position on the subject: we are "at war" and the President's authority as Commander-in-Chief empowers him to detain certain categories of terrorists as "enemy combatants" and to prosecute them in military proceedings. Accordingly, some people thought to be terrorists have been treated as enemy combatants captured during wartime, while others have been dealt with in the normal criminal process.

The administration's position triggered strong responses from a number of scholars, mostly rejecting the idea that wartime powers are applicable. Most of those who have written in this vein have not proposed any alternative approaches, and it must be assumed they subscribe to the view that terrorism cases can be adequately handled through our normal criminal enforcement mechanisms.

A small number of scholars have, however, advanced one form or another of special treatment regimens. Dr. Abrams, himself, subscribed to the notion that a limited category of "terrorism" cases should be handled differently than normal criminal cases, and he advances here a proposal under which a special civilian court would apply a regimen of some special rules. In this paper, after first presenting some important background considerations that are relevant in making judgments on this subject, Dr. Abrams explores the constitutional foundation and justification for such a special court/special rule approach. He then critiques and compares the administration's wartime/military approach and the other approaches that have been proposed.

While recognizing that the vitality of such a proposal ultimately depends on its specific content—and "the devil is in the details," Dr. Abrams will not in this paper present the details of this proposed special court/special rule regimen, although he will generally

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describe some of its key elements. He plans to present the details of the proposal (which are worked out) in a subsequent paper that will be published as Part II.

Professor Barry Kellman, DePaul University, School of Law

Biothreats arise against the backdrop of the fundamental condition impeding efforts to improve biosecurity: there is no institutional capability for international oversight of bioscience or any international authority with expertise to pursue relevant strategies. No global institution is authorized to issue and enforce measures to secure pathogens, control critical equipment, or detect covert bioweapons preparations. This organizational void is an impediment to advancing security. International alarms of biological terrorism ring nowhere.

This anarchic situation is dangerous, but advocacy of a new global institution to coordinate bioweaponization prevention is misguided and is certainly inconsistent with U.S. policy. Prevention of bioterrorism is a multifaceted undertaking with implications for biotechnology, pharmaceutical production, academic research, transportation and ports, export and border controls, public health, information technology, environmental protection, law enforcement, etc. No single institution could advance policies on all these fronts.

There is no urgent need for a new institution. An alternative approach would be to identify and interlink the IOs that have relevant biosecurity tasks into a network that could cumulatively enhance security. Tasks should be assigned to appropriate bodies with information sharing and coordination systems to take advantage of synergistic resources. The eventual objective is a matrix of international controls designed to strive for the common goal of biological security. The changes in global governance necessary to mitigate the dangers posed by bioscience call for an integrated network of organizations working cooperatively but with specialized expertise to carry out distinct aspects of biosecurity, with mutual representation and assistance. Each organization has its own substantive mandate and professional constituency.

The competing and crosscutting considerations that are interwoven with biothreats—the ubiquity and nondetectability of pathogens, the shared vulnerability of humanity to disease, and the global interactivity of bioscience—all suggest that pursuit of biosecurity is a shared human endeavor, demanding a shared human response through shared institutions. This, in turn, suggests an ongoing process of deliberation, negotiation, and joint implementation on a plane that respects transnational representation of interests—scientific, public health, law enforcement, pharmaceutical, economic development, and environmental protection—with the evolving mandate to advance biosecurity in ever richer dimensions of complexity.

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Mr. Tom Feucht, U.S. Department of Justice (DOJ)

Over the past several years, the National Institute of Justice (NIJ) has built a small but important portfolio on terrorism, counterterrorism, and local law enforcement, including work on suicide terrorism, agroterrorism, and public safety challenges in multicultural communities. This presentation reviewed this research and present findings from the projects that have already been completed.

Professor Alison Renteln, University of Southern California (USC)

In the 21st century, there are many possible ways to hold tyrants accountable for gross violations of human rights such as genocide, torture, and mass rapes. This talk provides an overview of various legal mechanisms, domestic and international, civil and criminal, that are designed to bring evildoers to justice. Among these, perhaps the most promising is the new International Criminal Court. Another important development is litigation in U.S. Federal courts concerning gross violations of human rights brought under the Alien Tort Claims Act and the Torture Victim Protection Act. We consider the landmark Filartiga case and some of the numerous cases that followed. After identifying some of the obstacles to the pursuit of international justice such as the doctrine of sovereign immunity, Professor Renteln offers a comparative analysis of the relative efficacy of these approaches.

Breakout Session 4C: Trends in Terrorism 2: Terrorist Operations in the Urban Environment

Summary of Presentations:

This break-out session focused on the operational aspects of dealing with terrorism – particularly ‘new’ terrorism that challenges traditional approaches to the issue. The speakers all had interesting, operational backgrounds. Col. Lotan focused on the importance of counterterrorism intelligence and described how struggle against terrorists is complicated by the asymmetry between states and fragmented groups and cells. Col. Berko addressed more specific counterterrorism measures, such as focusing on gaining the hearts and minds of the population, taking the terrorist seriously as a rational actor, adapting to low-intensity warfare while maintaining a high-deterrent image, and developing multiple alternative scenarios within the larger strategic mission.

Mr. Karchmer also addressed the issues that law enforcement agencies are dealing with regard to intelligence and terrorism. He pointed, for example, that although improving intelligence is widely discussed as important, the evaluation of both the processes and products is not usually mentioned and focused on as a priority. Evaluation of the process could assist adjustment and improvement of intelligence gathering and thus counterterrorism.

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Finally, Mr. Lopez Carresi discussed the attacks in Madrid on March 11, 2004. He described what occurred that day and talked about how the rescue was quick, it was addressed by 'quantity' not 'quality'. The command structure was unclear and there was a lack of overall coordination and direction of the rescue operation. He pointed out that while emergency teams improvised well in the emergency situation, there was a focus on individuals rather than on systems and procedures. Mr. Lopez Carresi mentioned that from a security perspective, although there was a quick response – terrorists were tracked down and arrested and further attacks were prevented – there was mismanagement in terms of coordination between agencies and control of explosives. Further, there were failed investigations and a lack of personnel dedicated to dealing with international terrorism.

Col. Duvdevani discussed the issue of terrorism within the Israeli context. He discussed the development of Palestinian terrorism over four time periods, and talked about Israeli casualties of terrorism and the weapons used against them. He mentioned that while a 'solution' to terrorism hasn't been found, Israeli authorities have discovered methods that decrease the effectiveness of terrorist attacks, and help Israeli civilians maintain normal life. As the civilian population is in the middle of the conflict between terrorists and Israeli authorities, there are problems of differentiating who the enemy is, what the rules of engagement are, and what legal structures should be applied to the situation.

Col. Duvdevani discussed the complications of politico-military relationships and talked about a range of strategic and tactical approaches to counterterrorism. He described the series of operational measures as: deterrence; intelligence; prevention; frustration; after action. Tactical countermeasures include the identification of attackers before the attack as well as stopping attacks through searches, detectors, and barriers. Other issues include communication and coordination between agencies. Finally, Col. Duvdevani described terrorism in terms of regional variation as well as the range of choices of target, method, and timeframe of attack.

Abstracts of Presentations:

Colonel Lior Lotan, International Policy Institute for Counter-Terrorism

Despite the existing disagreements in the field of counterterrorism, such as the fundamental and essential debate over the definition of terrorism, the consensus is that counterterrorism intelligence in the beginning of the 21st century is of the utmost importance and is characterized by unique dilemmas and challenges.

This presentation described relevant characteristics of modern terrorism that influence the counterterrorism intelligence, classify part of the products that are required from counterterrorism intelligence, and characterize typical dilemmas and central challenges.

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The characteristics of modern terrorism that influence the field of counterterrorism intelligence derived from the asymmetrical struggle between state entities and fragmented groups and cells.

Colonel Reuven Berko, Ministry of Police, Jerusalem, Israel

To improve capabilities, one has to remember that the hearts and minds of the population in the given territory are the goal that both we and the terrorists are fighting for. The ways to achieve this goal are familiarity with the language and “operational code,” avoiding “mirror imaging,” recruiting agents of influence while choosing the right partners, building abilities of real-time strike in the “HUMINT” field, and neutralizing similar efforts by the opponent. The terrorist is a rational actor whose declarations must be taken seriously. The strategic mission should be carefully defined and alternative scenarios are to be prepared in advance and parallel to events. Routine should be avoided. Concepts of time and result are different in the Middle East arena. Patience is required, and one should not jump to premature conclusions.

The challenge is to adapt and adopt models of low-intensity warfare while keeping a high-deterrent image. It should be taken into account that there is no separation between the terrorist infrastructure and the political leadership. Therefore, targeted elimination can be used by a democracy as a legitimate defense solution in the fight against the few who want to hurt the many. Efforts must be made to cut off sources of finance to the terrorist organizations, and psychological warfare should be a tool to influence the target population.

Vigilance of the possible cynical use of the “religious trigger” and awareness of “moral traps” that the opponent commits, exploiting your values in the knowledge that you will not do the same, should be kept in mind. Democracy can become a “double-edged sword” when used as a platform to gain control by fundamentalist militant groups. Moderate leadership must be identified, encouraged, defended, and compensated by the “Worthwhile Formula.”

The main fight in the war against terrorism is for the minds and the hearts of the target population. That is where the battle will be won.

Mr. Clifford Karchmer, Police Executive Research Forum (PERF)

Domestic law enforcement agencies face critical questions about how they create new intelligence fusion centers and enhance existing operations. The challenge becomes an especially difficult one best captured as a “two-edged sword”: focused access to targeted populations on the one hand, offset by restricted access to information that promises to be the most telling and predictive on the other. The management of counterterrorism operations in an urban setting calls for sobering questions—from the framing of collection

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requirements to the objective assessment of intelligence products. Notably absent from most discussions about intelligence upgrades are questions about how we evaluate that information—the processes and the products. Carefully crafted answers to difficult but objective questions can help steer the terrorism intelligence function in the right direction and, more important, offer quick midcourse corrections. However, to get the “right” answers, we first must identify the best questions. One core element needs to be made explicit in intelligence mission statements and management plans—the realization that no one should be harder on those systems than ourselves.

Mr. Alejandro López Carresi, Spanish Red Cross

The Madrid train bombings on March 11, 2004, created a major emergency situation. The immediate rescue was quick and massive, but disorganized. It revealed an imbalance between planning and improvisation and the lack of appropriate structures in emergency management and planning. Similarly, the immediate police response, although far from perfect, was quick and effective, arrests were made rapidly, and further attacks were prevented, but previous failures in intelligence management, interagency coordination, and a wrong risk assessment were revealed.

Colonel Eran Duvdevani (Res.), The International Policy Institute for Counter-Terrorism

Col. Duvdevani discusses the operational challenges of terrorism in Israel. He discusses the four major time periods in the development of Palestinian terrorism and talks about how a ‘solution’ to the problem of terrorism has not been found but Israeli authorities have reduced its effectiveness and been able to maintain a level of ‘normal life’ for Israeli civilians. He describes the operational challenges and discusses strategic and tactical approaches to counterterrorism in Israel. He also discusses the broader issues of terrorism across regions, including choice of target, method, and timeframe.

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Luncheon Topic: Nuclear Terrorism: The Ultimate Preventable Catastrophe

**Professor Graham Allison, Kennedy School of
Government, Harvard University**

Professor Allison's presentation was based on his book *Nuclear Terrorism: the Ultimate Preventable Catastrophe*. He discussed how a nuclear terrorist attack is inevitable if governments continue to maintain the same policy approaches to the issue. He described how Al-Qaeda or its affiliates will use ready-made bombs or homemade nuclear devices. The most likely source will be Russia or Pakistan. Professor Allison's recommendation is that in order for this to be prevented – which he insists is possible – the fundamental goal of the US and its allies should be to prevent terrorists from acquiring HEU or weapons-grade plutonium. According to Professor Allison a new international security order should be established based on what he terms the 'Three No's':

- No loose nukes;
- No nascent nukes;
- No new nuclear weapons states.

Within the context of these policy prescriptions, Professor Allison asserts that insecure nuclear weapons and materials must be protected in order to ensure the safety of everyone. Two of the states that pose the most danger in this regard are Russia and Pakistan. Weapons and fissile material should be locked down to a new 'gold standard' of security. An example of an approach to this issue is the Nunn-Lugar program, which focused on securing Russian nuclear warheads. Pakistan is particularly dangerous as through the activities of A.Q. Khan, it has been exposed internationally as a distributor of nuclear technology.

The second recommendation – no nascent nukes – would require that the construction of any new production facilities for HEU or plutonium be prevented. This could be complicated within the current context of the NPT but is worth the attempt, particularly in regarding Iran. A proposed deal would facilitate this idea: non-nuclear states agreeing to forgo enrichment capacity, would receive civilian nuclear power and technologies, nuclear fuel and disposal of nuclear waste at, according to Allison's book, less than half the national production cost.

Finally, the third recommendation is that there be no new nuclear powers added to the current eight. The focus of this statement rests particularly on North Korea. According to Professor Allison, are organizing principles for the essential project of establishing and

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confirming the ‘three no’s’. According to him, these goals are within reach of the civilized world – if it focuses on these goals and stretches its capabilities.

Abstract of Presentation:

If governments keep doing what they are doing today, a nuclear September 11 is inevitable. This ultimate terrorist catastrophe is in fact preventable. To that end, Professor Allison proposes a strategy that applies a doctrine of the “Three No’s”: no loose nukes, no new nascent nukes, and no new nuclear weapons states.

Plenary Session 6: Emerging Legal Issues

Professor Jack Goldsmith, Harvard Law School

Professor Goldsmith pointed out that we must move on from an *ad hoc* approach to the issue of terrorism. We are at war and the president’s actions must be considered within this context. He discussed the complexities of a declaration of war, stating that this has never been necessary to triggering president’s authority.

Further, Professor Goldsmith discussed the distinction between combatants and non-combatants, commenting that the nature of the emergent threat has rendered that distinction irrelevant. A fundamental question is what is a combatant now? Before, according to the dictates of traditional warfare, this was obvious. For example, [as laid out in the Geneva Conventions] among other criteria, the combatant would be wearing a uniform. A couple of other considerations are that our allies don’t share the concept that this is a war; and our detainees are [in some cases] citizens of our allies.

A general definition of enemy combatant is difficult to develop. Congress refused to authorize the president to go after any global terrorists, but rather they had to be terrorist organizations that had a nexus to the attacks of September 11. Further, the definition included al-Qaeda and affiliated organizations. al-Qaeda is not hierarchically organized; it is organized more loosely. These characteristics raise interesting questions: in this context, how do you define who is a member of one of these organizations? Also, how do we minimize mistakes with regard to who is an enemy combatant?

Professor Goldsmith also addressed the issue of military commissions. They are difficult to organize and there is the problem of developing a legal structure from scratch. A question arises of whether the executive branch should support this approach? Would this approach affect international relations?

Abstract of Presentation:

This presentation, titled *The Legal Framework for the War on Terrorism*, defends the war framework for the war on terrorism, place the framework in historical perspective, and

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assess its implications for the scope and limits of presidential authority abroad and at home.

Breakout Session 5A: Emerging Legal Issues

Summary of Presentations:

This breakout session addressed how terrorism challenges the current legal regime. The speakers addressed the issue of matching legal regime with the emergent needs of counterterrorism. Further, two of the speakers spoke about the balance between rights and security. This brings up interesting problems of where new legal developments will have both positive and negative impacts and therefore a careful balance must be struck.

Ms Spaulding discussed how while the attacks on 9/11 catalyzed profound changes in counterterrorism efforts, the US' legal framework has not kept up with these changes. This issue has been a recurring theme throughout the conference. She spoke about the question of what oversight is being provided over DoD intelligence collection operations, as well as what laws are in place to govern the FBI's domestic intelligence collection. There are two sides to the issue of oversight. On one side, protections are important; on the other, there is the question of whether intelligence operations, such as by the NSA, are being hampered by outdated restrictions. Finally, she addressed the question of what legal framework should be used to deal with suspected terrorists.

The question of rights in the context of the post-9/11 security environment was also investigated by Professor Cottrol. He looked into the appropriateness and effectiveness of racial and ethnic profiling, including where it is counterproductive. Further, he talked about the legal issues involved with the practice. Legal issues at the intersection of counterterrorism and civil rights were discussed by Mr. Arulantham, who focused on recent changes in statute, especially changes made by the USA PATRIOT Act, and how they have expanded the definition of what constitutes 'material support' of terrorism. According to Mr. Arulantham, as this statute applies without regard to whether the support can be used for violence, this statute could have problematic effects such as on humanitarian organizations working in conflict zones.

Abstracts of Presentations:

Ms. Suzanne Spaulding, The Harbour Group, LLC

The attacks of September 11, 2001, prompted profound changes in our counterterrorism efforts at home and abroad, particularly in the area of intelligence, and our legal framework has not kept pace. What are the legal implications of the Department of Defense's (DoD's) Homeland Defense mission? Under what legal framework is DoD collecting intelligence inside the United States? Since *posse comitatus* does not apply to military operations, do

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we need to consider new laws on the use of force by the military inside the United States? How do we ensure appropriate oversight of DoD special operations overseas, outside any zone of active combat, that are undertaken as part of the global war on terrorism and are therefore exempt from the covert action definition? What are the legal implications of privatizing national security efforts overseas and at home? Are current laws adequate to govern today's dramatically more robust domestic intelligence collection by the Federal Bureau of Investigation (FBI)? Is the National Security Agency (NSA) hampered by outdated rules on intercepting signals inside the United States? Once suspected terrorists are detained, what is/are the appropriate legal framework(s) for bringing them to justice?

**Professor Robert Cottrol, George Washington School
of Law**

Racial and Ethnic Profiling in the War on Terror: Legal and Policy Perspectives

This talk will explore the issue of racial and ethnic profiling in the war on terror. It will explore the effectiveness of ethnic profiling and the question of whether and under what circumstances such profiling can be counterproductive. The talk will also explore legal issues, including circumstances under which such profiling is legally permissible.

**Mr. Ahilan T. Arulantham, American Civil Liberties
Union (ACLU)**

Changes to Federal criminal and immigration statutes since 1996 have radically expanded the definition of what constitutes the "material support" of terrorism. In particular, changes made by Section 805 of the U.S. Patriot Act, Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004, and Section 103 of the REAL ID Act have criminalized and made conduct, including the provision of "any property, tangible or intangible" to "a group of two or more individuals, whether organized or not," which uses a "weapon or other dangerous device" "to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property." The government has contended that the law applies without regard to whether the support in question can itself be used for violence of any kind. This breathtakingly broad prohibition has created significant problems for humanitarian organizations working in conflict zones. Because assisting civilians in conflict zones often requires working with terrorist groups as defined under the statute, humanitarian organizations often have to violate these criminal laws to provide vital humanitarian services such as food, water, and medical services to civilians living in territory ruled by armed groups. Mr. Arulantham discussed this problem in the context of his experience doing volunteer relief work in Sri Lanka during the aftermath of the tsunami, as well as by reference to the American Civil Liberties Union's (ACLU's) involvement in a constitutional challenge to the material support provisions in *Humanitarian Law Project v. Department of Justice*.

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Honorable Jack Weiss, Councilman, Los Angeles City Council
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Breakout Session 5B: Comparative Terrorism Law: Case Studies

Summary of Presentations:

This breakout session focused on comparative applications of law and terrorism. These presentations pointed out that while we tend to be very US focused when it comes to discussing terrorism, the experience and expertise of other countries can inform and educate US approaches.

The speakers discussed how terrorism has arisen and been dealt with in different regions. Dr. Bossis spoke about the Balkans and how the atomization and ethnic violence there has resulted in networked violence. She discussed how lasting grudges, ethnic problems, and a grey economy were the consequence of the wars. Populations continue to be polarized and fractured enough to re-create the turmoil of the war period.

She discussed the characteristics of networked violence in Kosovo and Bosnia, including links to terror networks, such as al-Qaeda. As she pointed out, both terrorist organizations and drug traffickers now organize themselves in cell structures. More worrying, as she mentioned, is that the poverty, corruption, religious conflict, and ethnic strife in the area create opportunities, which terrorists could easily exploit. This could be potentially exacerbated by the presence of radical Islamic extremists in the region.

Dr. Bossis described criminal trends in the region – including the potential utilization of refugees and illegal immigrants by terrorist organizations -- and then went on to describe the European Union's broader response to the issue of terrorism and networked violence. She also discussed the potential consequences of an attack by a terrorist using a weapon of mass destruction and how regional concerns could impact response. She pointed out that a particular concern in this context is the collaboration between international and regional terrorist groups in addition to the relationships between terrorist and criminal networks.

Both Professor Silke and Dr. Rosenau investigated the approaches that the UK has taken to counterterrorism. Prof Silke focused on how the UK has responded to IRA-related terrorism while Dr. Rosenau focused on comparing the different approaches that the US and UK have taken to the problem of terrorism particularly after the attacks on 9/11.

Dr. Rosenau compared US and UK approaches to terrorism particularly with reference to threats to the homeland. As he pointed out, some key differences between the approaches of these two allies include the conceptualization of the threat and the counterterrorism role of the police. With regard to counterterrorism approaches the UK is traditionally more

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threat-based than vulnerability-based. The focus is on managing vs. eradicating the risk – it is accepted that the risk of terrorism cannot be eradicated. The US tends to be more focused on defeating terrorism completely as the threat is seen as virtually unlimited, although this view is gradually changing toward a more risk-based approach.

Dr. Rosenau described the security structures in place in both countries, and discussed the strengths and weaknesses of a risk management approach to counterterrorism. Finally, he talked about the contributions that policy can make in the counterterrorism effort, such as familiarity with local communities.

Abstracts of Presentations:

Dr. Mary Bossis, Pompano Center

During the Cold War, southeastern Europe was an internationally ignored piece of land. It became a matter of interest during the 1990s, when ethnic tensions turned into conflict and the long-invisible Balkans turned into daily news.

Although September 11 turned world attention to the more pressing issue of international terrorism, in southeastern Europe the grievances, the minority grudges, the unsolved chronic ethnic problems, and the shady economy that spurred as a consequence of the wars polarized the populations to the point that the fractured area might produce a repetition of the past turmoil.

This unstable part of the European continent has not only given ample examples of racial hatred, ethnic violence, and organized criminal activity, but has also produced a new sense of alertness, with the participation and activities of members of the networking violence.

Professor Andrew Silke, University of East London

This paper examines the issues and lessons from the legal responses to Irish terrorism considering elements from both the United Kingdom and the Republic of Ireland. The paper explores the impact and effectiveness of the different approaches taken and draws out useful lessons that can be taken away from that conflict.

Dr. William Rosenau, RAND Corporation

Although they are close allies in the global campaign against al Qaeda, there are significant differences in the way the United States and the United Kingdom approach the problem of terrorism. This is particularly true with respect to threats against the homeland. Developing a fuller understanding of these approaches can help improve cooperation between American law enforcement personnel and their British counterparts, and can help promote a deeper appreciation of the strengths and weaknesses of the British and American responses to terrorism.

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Breakout Session 5C: Private Military and Intelligence Companies

Summary of Presentations:

This breakout session focused on the role of private military companies in conflict. Mr. Carter introduced the session by discussing the current issues regarding private military companies and their operations in Iraq and Afghanistan. He also described legal changes that will affect the operations of these companies in conflict situations overseas.

Dr. Bunker addressed the varieties of identities ascribed to mercenaries. He placed all of this in the context of the Fourth Epoch War Theory. He talked about how the views of mercenaries have shifted from the image of the 'weekend warrior' to that of highly trained, professional former special forces. According to Dr. Bunker, mercenaries are able to adapt to epochal change; this differentiates them from state forces, which are less flexible.

Mr. Brooks presented on the capabilities and constraints of the private sector concerning terrorism. He described the different types of tasks done by the 'peace and stability industry' and focused on why in some cases they may be preferred. For example, according to him they have surge capacity and tend to be better quality and cheaper. Further, they have been able to undertake a wide variety of tasks, including assisting in dealing with terrorism and international peacekeeping. Mr. Troy discussed the SAFETY Act, which provides the manufacturers or sellers with limited liability risks. According to him, this is a recent enacted law that is intended to encourage the development and deployment of antiterrorism technologies.

Abstracts of Presentations:

Mr. Phillip Carter, McKenna Long & Aldridge LLP

Mr. Carter will discuss current issues relating to U.S. private military contractors operating in Iraq and Afghanistan, including procurement integrity issues and recent changes to the law affecting the criminal liability of contractors overseas. Mr. Carter will also discuss a recent rule change by the Department of Defense (DoD) that radically alters the legal landscape for contractors on the battlefield, and discuss some long-term trends toward privatization in warfare.

Dr. Robert J. Bunker, National Law Enforcement and Corrections Technology Center-West (NLECT-West)

The presentation is derived from Fourth Epoch War Theory. It covered the following items: differing views of mercenaries, the blurring of crime and war, epochal change, dominant forms of war sequence, mercenaries in epochal change, mercenaries 2005 Iraq, mercenaries 2015 USA, mercenaries and post-nation-states, and mercenaries as friends or foes.

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Mr. Doug Brooks, International Peace Operations Association

The presentation provided an overview of the peace and stability industry. It will provide a short historical perspective of private sector use in support of U.S. military operations, offer a conceptualization of the industry, and outline the kinds of companies that operate in conflict/post-conflict environments. The specific focus will be on current industry operations that address terrorism issues domestically and internationally, as well as the industry potential. It will provide a brief overview of legal, regulatory, and oversight issues. An outline touches on what clients should expect from companies they hire, an examination of current methods of industry self-regulation and codes of conduct, and a look at the future of the industry.

Mr. Mark Troy, McKenna Long & Aldridge LLP

Mr. Troy presented information about the Support Anti-Terrorism by Fostering Effective Technologies (SAFETY) Act, a recently enacted law intended to encourage the development and rapid deployment of lifesaving antiterrorism technologies by providing manufacturers or sellers with limited liability risks.

Mr. Steve Cooley, Los Angeles County District Attorney

District Attorney Cooley addressed the conference and presented an overview of the efforts being undertaken by his office to investigate and prosecute terrorist suspects in the Los Angeles area, home of the LA TEW. Within the District Attorney's office a number of important initiatives have been undertaken, to increase the number of trained staff members able to deal with increasing terrorist threats, as well as to operate on actionable intelligence provided on potential threats to the community. This office is responsible for all of the non-federal prosecutions in the area, and has a large responsibility to the community in meeting the challenge of terrorism. The conference committee thanked District Attorney Cooley for his presentation to the conference, as well as the support provided to the conference from its outset by his deputy Ms. Sally Thomas and other members of his staff.

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Conference Summary Panel

Lt. John P. Sullivan, LA TEW

Dr. Abraham Wagner, Columbia University

Dr. Peter Katona, UCLA Medical School

Ms. Genevieve Lester, UC, Berkeley

Lieutenant John P. Sullivan, of the Los Angeles Terrorism Early Warning Group (LA TEW) and conference co-chair, summarized the main themes of the conference. Lt. Sullivan noted that the conference sought to explore the interface between intelligence operations and the law in addressing terrorism. He concluded that the conference met its objective. In doing so, three “streams” of intelligence were discussed: threat intelligence; criminal intelligence; and, operational intelligence (including epidemiological intelligence). Each poses unique and interrelated challenges in the context of global security. Foremost among these is the need to maintain “guarded openness” when balancing liberty interests with security concerns. He observed that this concern was evident in the conference’s discussions of intelligence oversight, privacy, and the issues related to habeas corpus. Lt. Sullivan observed that networked approaches to global security are—and will continue to be—required for addressing global terrorist activities.

According to Sullivan, this will necessitate the development of new structures and capabilities. These can be defined as formal and informal networks that will bring together the police, security and intelligence services, health and medical practitioners, government, and non-governmental actors to forge a global security network based upon co-ordination, co-operation, and co-production of intelligence. Such a network (or networks) must be formal and informal, horizontal as well as vertical. Sullivan asserted that new interactions between states and non-state actors, as well as between various legal regimes (international humanitarian law, international criminal law, and human rights law) will be required. In addition to these transnational and international dynamics, questions as to the relationship between federal and local components of domestic law enforcement and the relationship between state or federal law are likely to remain issues of interest in the future.

Together, all of these concerns point toward the development of a new body of “global security” law. Sullivan postulated that “global security” law will require a balance between criminal and national security law, will likely rely upon the development of transnational and/or supranational law – such as European Union law, and perhaps someday “NAFTA” law for a North American “security space.” Finally, he observed that such a body of law, if it develops, would need to be balanced with emerging concepts of civil governance, and would leverage emerging “customary global security norms.”

Dr. Abraham R. Wagner, of School of International and Public Affairs at Columbia University and conference co-chair, summarized some of the key legal issues that were

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explored during the conference. Dr. Wagner noted that the conference addressed some issues that have become increasingly important as the nation deals with terrorist threats abroad and at home. At a more general level these involved the fundamental rights of both US citizens, and US "persons" as well as others detained by the US in military and counter-terrorism operations. Other areas included the nature and limits of Executive power and Constitutional rights to privacy. He concluded that the conference was helpful in presenting various views on these critical topics, and identified the challenges to the nation and the legal community in the future. The US continues to detain hostages in various locations, and has come under increasing criticism at home and abroad for its treatment of prisoners and detainees. Reports of coercive interrogation, torture and other abuses which violate fundamental constitutional rights, existing US statutes, as well as the Geneva conventions all raise serious legal issues that have yet to be resolved.

He also observed that in some cases the current legal regime is at least a generation behind the state of technology. Laws governing electronic surveillance, for example, are based on an old model of the technical environment and do not work well in a world dominated by the Internet, advanced cellular systems and other new technologies.

Dr Katona summarized the two sessions "Forensic Epidemiology: The Intersection of Public Health and Criminal Investigations" and "Quarantine and Isolation: Global - National - Local Issues." He emphasized that laws are how our government works - not just Patriot Act legislation but how the government spends its money in many other ways. There must be a tie in between the clinical, the Public Health and law enforcement. We need to have a broad understanding and exercises regarding operational issues like incident command and unified command. There needs to be an evolution from the hierarchical to the global networked or French "nebula" approach to counter-terrorism. He reiterated that Secretary Chertoff has a huge task: DHS was created out of 22 agencies with 180,000 employees in the biggest federal government reorganization since the DOD was established in 1947. For fiscal year 2006 federal spending on homeland security will be \$50 billion (It was \$13 billion in 2000) - how do you prioritize this in the setting of other more immediate priorities such as heart disease and cancer?

He discussed basic definitions and related key aspects of "Forensic Epidemiology," addressing joint public health and law enforcement investigative responses to bioterrorism attacks and other public health problems having underlying potential criminal root causes. He discussed the interaction between local law enforcement, FBI and local public health, particularly dealing with issues such as chain of custody. He discussed how to create "health or medical intelligence" or threat intelligence to derive actions. The intersection between public health, clinical medicine and law enforcement was emphasized.

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The session on "Quarantine and Isolation: Global - National - Local Issues" dealt with what we do with people that are ill or exposed to illness during a biological or other WMD attack. He noted that we will have to deal with those that come to our ERs but also those that are - or might be - exposed, and of course the largest group: those that think they are ill - the worried well or "not exposed/not ill." How do we deal with all these groups of people? The session looked at this from the int'l, national as well as local perspectives. SARS was discussed regarding the need for quarantine and isolation. Finally, how we can prepare for a new international catastrophe like contagious avian influenza in view of past significant influenza outbreaks, and poor preparedness for other disasters.

Genevieve Lester, of UC, Berkeley, briefly summarized her work providing a literature review for the conference. The literature review covered the major substantive areas of the conference, and included case-law, commentary, and academic articles.

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Appendix I: Conference Agenda

Day One

0730 – 0815	Registration and Coffee
0815 – 0830	Introduction
0830 – 0915	Plenary Session 1: Issues for Counterterrorism and Homeland Security
0915 – 1000	Plenary Session 2: Evolving National Security and Homeland Security Issues
1000 – 1015	Break
1015 – 1200	Breakout Session 1 1A: Detention and Trial of Terrorist Suspects Under U.S. and International Law 1B: Forensic Epidemiology: U.S. Issues 1C: Operational Intelligence for Counterterrorism: U.S. Issues
1200 – 1330	Lunch and Luncheon Topic: Racial Profiling
1330 – 1410	Plenary Session 3: Constitutional and Civil Rights, Privacy and Counterterrorism
1410 – 1415	Break
1415 – 1530	Breakout Session 2 2A: Trial of Terrorists in Civilian Courts and Military Tribunals 2B: Quarantine and Isolation: Global Issues 2C: Operational Intelligence for Counterterrorism: Global Perspectives
1530 – 1545	Break
1545 – 1715	Breakout Session 3 3A: Legal Access and New Technologies 3B: Rendition, Detention, and Interrogation of Terrorist Suspects 3C: Trends in Terrorism 1: Dealing with Suicide Bombers and Others
1730	Reception

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Day Two

0800 – 0830	Coffee
0830 – 0915	Plenary Session 4: Technology and Counterterrorism
0915 – 1000	Plenary Session 5: Operational Issues in the Post 9/11 World
1000 – 1015	Break
1015 – 1200	Breakout Session 4 4A: International Cooperation in Financial Investigation, Enforcement and Trans-Border Data Sharing 4B: Choice of Legal Regime 4C: Trends in Terrorism 2: Terrorist Operations in the Urban Environment
1200 – 1330	Lunch and Luncheon Topic: Nuclear Terrorism: The Ultimate Preventable Catastrophe
1330 – 1415	Plenary Session 6: Emerging Legal Issues
1415 – 1530	Breakout Session 5 5A: Emerging Legal Issues 5B: Comparative Terrorism Law: Case Studies 5C: Private Military and Intelligence Companies
1530 – 1545	Break
1545 – 1715	Plenary Session 7: Conference Wrap-Up

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Appendix II: Conference Speakers

Professor Norman Abrams, UCLA Law School

Professor Graham Allison, Kennedy School of Government, Harvard University

Dr. Michael Allswede, Department of Emergency Medicine, University of Pittsburgh

Ms. Diane Marie Amann, UCLA Law School

Mr. Ahilan T. Arulantham, American Civil Liberties Union (ACLU)

Mr. Adrian Baciú, Interpol

Dr. Anat Berko, International Policy Institute for Counter-Terrorism

Colonel Reuven Berko, Ministry of Police, Jerusalem, Israel

Dr. Mary Bossis, Pompano Center

Mr. Doug Brooks, International Peace Operations Association

**Dr. Robert J. Bunker, National Law Enforcement and Corrections Technology
Center-West (NLECT-West)**

Mr. Phillip Carter, McKenna Long & Aldridge LLP

**Assistant Chief Bruce L. Cooke, U.S. Department of Homeland Security (USDHS),
Office of Border Patrol**

Mr. Steve Cooley, Los Angeles County District Attorney

Professor Robert Cottrol, George Washington School of Law

Dr. Robert DeBell, The Titan Corporation

**Colonel Eran Duvdevani (Res.), The International Policy Institute for Counter-
Terrorism**

Mr. Tom Feucht, U.S. Department of Justice (DOJ)

Dr. Jonathan Fielding, Los Angeles County Department of Health Services

Professor Paul Finkelman, University of Tulsa School of Law

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Professor Jack Goldsmith, Harvard Law School

Dr. Richard A. Goodman, Centers for Disease Control and Prevention (CDC)

Professor George Harris, McGeorge Law School

**Honorable Gary Hart, former Senator, and former co-chair, Hart-Rudman
Commission**

Dr. Nasra Hasan, United Nations Office on Drugs and Crime

Professor Susan N. Herman, Brooklyn Law School

Mr. Brian Jenkins, RAND Corporation

Mr. Clifford Karchmer, Police Executive Research Forum (PERF)

Dr. Peter Katona, UCLA Medical School

Professor Barry Kellman, DePaul University, School of Law

Dr. Robert Kim-Farley, Los Angeles County Department of Health Services

Professor Katharina von Knop, University of Innsbruck

**Professor David Koepsell, State University of New York (SUNY) Buffalo, School of
Law and the Center for Inquiry, Amherst, New York**

Ms. Genevieve Lester, UC, Berkeley

Mr. Alejandro López Carresi, Spanish Red Cross

Colonel Lior Lotan, International Policy Institute for Counter-Terrorism

Rear Admiral (Ret.) Alex Miller, The Titan Corporation

Mr. Neal Pollard, Terrorism Research Center, Inc.

Ms. Renee C. Redman, International Institute of Connecticut

Ms. Beverly Reid O'Connell, U.S. Attorney's Office, Los Angeles

Professor Alison Renteln, University of Southern California (USC)

Dr. Jack Riley, RAND Corporation

Dean Elizabeth Rindskopf-Parker, Mc George School of Law

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Dr. William Rosenau, RAND Corporation

Professor Andrew Silke, University of East London

Mr. Joshua Sinai, U.S. Department of Homeland Security (USDHS)

Brigadier General Annette L. Sobel, USAF, National Guard Bureau

Ms. Suzanne Spaulding, The Harbour Group, LLC

Lt. John P. Sullivan, LA TEW

Mr. Phillip Sundel, Law Offices of David P. Sheldon

Detective Chief Inspector Paul Swallow, Metropolitan Police Special Branch, United Kingdom

Staff Sergeant Robert Taylor, Royal Canadian Mounted Police (RCMP)

Ms. Sally Thomas, Los Angeles County District Attorney's Office

Mr. Mark Troy, McKenna Long & Aldridge LLP

Dr. Abraham Wagner, Columbia University

Mr. Dale Watson, Federal Bureau of Investigation (FBI) (Ret.)

Mr. Steven Watt, American Civil Liberties Union (ACLU)

Honorable Jack Weiss, Councilman, Los Angeles City Council

Mr. Michael Wermuth, RAND Corporation

Detective Chief Superintendent Keith Weston, Metropolitan Police, United Kingdom

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Appendix III: Literature Review

Below is a general survey of some of the main themes that arise at the intersection of, terrorism, security, and the law. The survey includes an overview of the most salient legal issues, followed by discussion questions, and examples of relevant case law and legal precedent and development. This document serves as a backdrop to the issues that will be raised by the sessions of the conference. In most cases websites are listed where the documents can be found.

By Genevieve Lester

International humanitarian law and terrorism:

Within the context of the declaration of ‘war on terrorism’, principles of international humanitarian law have been debated, particularly concerning the detention and trial of terrorist suspects. The boundaries of international humanitarian law and domestic criminal law can be somewhat grey regarding terrorism and the nebulousness of the intersection has led to much discussion. Many fundamental questions have arisen, among them: has the current ‘war on terror’ placed the US on actual war footing where humanitarian law and its somewhat looser requirements of due process apply, or is the threat, consisting generally of networked transnational non-state actors, is a criminal issue. Which rules apply in this new security environment? How should domestic law interact with international law? Should the organs of international law—the ICC, the UN, treaty regimes—have a greater role in dealing with the issue of terrorism?

Selected Relevant Resources:

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<http://www.law.harvard.edu/students/orgs/hrj/iss16/goldstone.shtml>

Guillaume, Gilbert. ‘Terrorism and International Law’ *International and Comparative Law Quarterly*. 53: 2004, pp. 537-548.

<http://iclj.oupjournals.org/cgi/content/abstract/53/3/537>.

Kelly, Michael J. ‘Cheating Justice by Cheating Death : the Doctrinal Collision for Prosecuting Foreign Terrorists - Passage of aut dedere aut judicare into customary law &

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refusal to extradite based on the death penalty' *Arizona Journal of International and Comparative Law* (20: 3, Fall 2003) p. 491.

Lagos, Enrique and Timothy D. Rudy 'Preventing, punishing, and eliminating terrorism in the Western Hemisphere: a post-9/11 Inter-American Treaty' *Fordham International Law Journal* (26: 6, June 2003)p. 1619.
http://www.oas.org/legal/english/osla/terr_w_hemis.pdf

Murphy, Sean D., ed. 'Contemporary Practice of the United States Relating to International Law: Terrorist-State Litigation in 2002-03' *American Journal of International Law*, (97: 4, Oct 2003) p. 966.

Strossen, Nadine. 'Maintaining human rights in a time of terrorism: a case study in the value of legal scholarship in shaping law and public policy' *New York Law School Journal of International and Comparative Law* (22: 1&2, 2003) p. 3.

'Enemy combatants', trial and detention:

The definition of 'enemy combatant' is drawn from the *Ex Quirin* case brought before the Supreme Court in 1942. This case dealt with Nazi saboteurs who entered New York and Florida during World War II and disguised themselves in civilian clothes. In this decision, the court defined 'enemy combatant' as:

'...An enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property [would exemplify] belligerents who are generally deemed not to be entitled to the status of prisoner of war, but to be offenders against the law of war subject to trial and punishment by military tribunals'. *Ex parte Quirin*, 317 US 1, 31 (1942).

As pointed out by a Bar Association Task Force Report, the term 'enemy combatant' is further divided into the designations 'lawful' and 'unlawful' combatants.² Both types of combatants may be captured and detained for the course of the conflict. However, these designations are more than just a semantic issue. The crux of the discussion is that under international law, the detaining government may treat an 'unlawful combatant' differently than a prisoner of war as he is not protected under the established guidelines of international treaty law.

In order to be considered a prisoner-of-war under the Geneva Conventions a prisoner must:

² American Bar Association, Task Force on Treatment of Enemy Combatants, Report to the House of Delegates, 10 February 2003. p. 4.

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- Be commanded by a person responsible for his subordinates;
- Have a fixed distinctive sign recognizable at a distance;
- Carry arms openly;
- Conduct their operations in accordance with the law and customs of war.³

According to the Conventions, a belligerent who does not meet the above criteria is considered an ‘unlawful combatant’. Among a wide range of specifications as to their treatment, prisoners of war are entitled to decent living quarters—equivalent to the soldiers detaining them—the right to practice their religion, and the right to correspond with outsiders. These rights and protections are not granted an unlawful combatant. In addition to not being protected by international law, those deemed unlawful combatants are ‘subject to trial and punishment by military tribunals for acts which render their belligerency unlawful’.⁴

Within the context of the post-9/11 security environment the President relied on the precedent set by the *Quirin* case, the UCMJ and the president’s role as commander and chief of the armed forces to issue a military order on November 13 2001, in which it was stated that members of Al-Qaida and other terrorists as well as those who harbor them can be tried in military commissions.⁵

A complicating factor in the designation and detention of ‘enemy combatants’ is that there are US citizens among the detainees. US citizens being held on the basis of military authority brings up new legal issues.⁶ Is it allowable under law to hold US citizens as enemy combatants? What right to due process do they have? These issues have been highlighted in the cases of Yasser Esam Hamdi and, more famously, Jose Padilla, both US citizens, both detained without charges by the military.⁷ Hamdi was captured in Afghanistan during conflict and detained based on the president’s authority over the theater of war stemming from the Authorization for Military Use of Force of September 18, 2001.⁸ Padilla, on the other hand, was captured outside O’Hare International Airport

³ Geneva Convention relative to the Treatment of Prisoners of War (1949) Article 4 (2).
<http://www.unhchr.ch/html/menu3/b/91.htm>

⁴ *Ex parte Quirin*, 317 U.S. 1, 31 (1942) quoted in American Bar Association, Task Force on Treatment of Enemy Combatants, Report to the House of Delegates, 10 February 2003, p. 4.

⁵ For Executive Order text see: <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>.

⁶ David Golove and Stephen Holmes, ‘Terrorism and Accountability: Why Checks and Balances Apply Even in “The War on Terrorism”’ in *The NYU Review of Law and Security* (April 2004) p. 4.

⁷ The text of the Hamdi petition (Petition for Writ of Habeas Corpus at 3, *Hamdi v. Rumsfeld* (E.D. Va. June 11, 2002). <http://pacer.ca4.uscourts.gov/opinion.pdf/027338.P.pdf>.

⁸ <http://www.whitehouse.gov/news/releases/2001/09/20010918-10.html>

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outside Chicago and classified by President Bush as an enemy combatant.⁹ In the case of Hamdi, the U.S. Supreme Court held that he was entitled to some due process for the government to hold him as an enemy combatant; the U.S. government eventually released him without charges. In Padilla's case, a federal district court in South Carolina recently took up his case (after having the Supreme Court transfer it from New York), and decided that the government's detention was unlawful; the judge ordered that he be charged with a crime or released. That case is now pending before the 4th Circuit Court of Appeals. For further information on Hamdi and Padilla, please see notes below and citations at end of text.

Military Commissions:

Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).¹⁰ This order gave the executive branch authority to detain those suspected of being 'enemy combatants' in the war on terror. The basis for the authority is the president's role as commander in chief, the Authorization for Use of Military Force (18 September 2001), and sections 821 and 836 of the UCMJ.¹¹ Among the arguments in support of the president's right to establish military tribunals and try alleged terrorists before them are that the U.S. is in a state of armed conflict and that during such a state the president has wide powers to protect national security.¹² Further that there is historical legal precedent for the establishment of military tribunals. Finally, it is argued that another basis for the president's authority in this matter is the 'crisis government' theory, according to which the government has greater and more undefined power during a time of crisis.

The most relied upon case law for this issue is *Ex parte Quirin*—the details of the case are described above, but the most salient point with regard to military tribunals is that enemy combatants were subject to the jurisdiction of military tribunals. A critique of using the *Quirin* case to support tribunals in the current environment is that there existed no state of war before the attacks on the morning of 9/11.¹³ Further, it is argued (in a leitmotif that keeps arising with regard to these issues) that in the *Quirin* case as Congress had declared war, President Roosevelt was operating under express Congressional approval. However,

⁹ <http://news.findlaw.com/hdocs/docs/padilla/padillabush60902det.pdf>. Memorandum classifying Padilla as an enemy combatant. *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002)

¹⁰ <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>.

¹¹ Christopher M. Evans, 'Terrorism on Trial: The President's Constitutional Authority to Order The Prosecution of Suspected Terrorists by Military Commission' : 51 *Duke L. J.* 1831.

<http://www.law.duke.edu/journals/dlj/articles/DLJ51P1831.HTM#B13>

¹² *Ibid*, p. 1838. As pointed out by Evans the Military Order establishes that the 9/11 attacks have 'created a state of armed conflict'.

¹³ *Ibid*, p. 1845.

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the counterargument to the above is that the terrorist attacks were severe enough to qualify as acts of war. Section 1(a) of the Order states that '[i]nternational terrorists, including members of al Qaeda, have carried out attacks on United States diplomatic and military personnel . . . within the United States *on a scale that has created a state of armed conflict* that requires the use of the United States Armed Forces'.¹⁴

'Enemy combatants', trial and detention:

Discussion questions:

- Is the definition of 'combatant' according to the Geneva Conventions even relevant to the post-9/11 security environment?
- Who should have jurisdiction over alleged transnational terrorists?
- Should domestic US due process laws be waivable?
- Is a military commission an appropriate forum to try an 'enemy combatant'? Or should alleged terrorists have access to civil courts?
- Is it appropriate that the Guantánamo detainees be detained outside the jurisdiction of US courts?
- Should alleged terrorists have the right of habeas corpus? What should their rights be? Access to counsel?
- How is a balance struck with regard to civil rights vs. national security? How are trade-offs between transparency and secrecy made?

Selected relevant source material:

American Bar Association, Task Force on Treatment of Enemy Combatants, Report to the House of Delegates, 10 February 2003.

Dean, John. 'Appropriate Justice for Terrorists: Using Military Tribunals Rather Than Criminal Courts' FindLaw's Legal Commentary. 28 September 2001. <http://writfindlaw.com/dean/2000928.html>.

Dorf, Michael C. 'What is an "unlawful combatant," and why it matters: The Status of Detained Al Qaeda and Taliban Fighters'. FindLaw's Legal Commentary. 23 January 2002. <http://writ.findlaw.com/dorf/20020123.html>.

Evans, Christopher M. 'Terrorism on Trial: The President's Constitutional Authority to Order The Prosecution of Suspected Terrorists by Military Commission': *51 Duke Law Journal*, pp. 1831-1856. <http://www.law.duke.edu/journals/dlj/articles/dlj51p1831.htm>

¹⁴ Ibid, p. 1846.

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The NYU Review of Law and Security Issue no. 2; April 2004. 'Crime versus War: Guantanamo. This issue contains a discussion of a wide range of related issues from a variety of perspectives.
<http://www.law.nyu.edu/centers/lawsecurity/publications/quarterly/spring04.pdf>

Policy Comment, 'A Small Problem of Precedent: 18 USC §4001 (a) and the Detention of U.S. Citizen "Enemy Combatants"' in *The Yale Law Journal* (Vol. 112: 2003).

Roth, Kenneth. 'The Law of War in the War on Terror' *Foreign Affairs*. January/February 2004.
<http://www.foreignaffairs.org/20040101facomment83101/kenneth-roth/the-law-of-war-in-the-war-on-terror.html>.

Tribe, Laurence and Katyal, Neal. 'Waging War, Deciding Guilt: Trying the Military Tribunals', 111 *Yale L.J.* 1259 (2002)

Wedgwood, Ruth and Kenneth Roth, 'Combatants or Criminals? How Washington Should Handle Terrorists'. *Foreign Affairs*, May/June 2004.
<http://www.foreignaffairs.org/20040501faresponse83312/ruth-wedgwood-kenneth-roth/combatants-or-criminals-how-washington-should-handle-terrorists.html>.

Detention of 'enemy combatants': further legal background¹⁵

Geneva Convention III Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force Oct. 21, 1950

Press Conference, Secretary of Defense Donald Rumsfeld, Feb. 8, 2002.

¹⁵ <http://www1.law.ucla.edu/~abrams/casebook.htm>. For further detail, please see this excellent website.

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Coalition of Clergy, Lawyers and Professors v. Bush, 310 F.3d 1151 (9th Cir. 2002)

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

Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004)

Rasul v. Bush, 124 S. Ct. 2686 (2004)

Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004)

Hamdan v. Rumsfeld, No. 04-1519 (JR), 2004 US Dist. LEXIS 22724 (DDC Nov. 8, 2004) (No. CV04-0777L)
<http://www.perkinscoie.com/content/aboutperkins/relatedlinks/MemorandumOpinion.pdf>

Unlawful or enemy combatant status: further legal background¹⁶

Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (*see also* Opinion and order re: Motion for Reconsideration in Part, Mar. 11, 2003) (*see also* Opinion and order re: Motion for Certification of Interlocutory Appeal and for Stay, Apr. 9, 2003)

Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003)

ABA Task Force on Treatment of Enemy Combatants, Preliminary Report, Aug. 8, 2002

William J. Haynes II, General Counsel, U.S. Department of Defense, Statement Rebutting the ABA Task Force Report on Treatment of Enemy Combatants, Oct. 2, 2002.

Military commissions: further legal background

Presidential Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, November 13, 2001, 66 Fed. Reg. 57833 (2001 WL 1435652).

10 U.S.C. § 821. Jurisdiction of courts-martial not exclusive.

10 U.S.C. § 836. President may prescribe rules.

Ex Parte Quirin, 317 U.S. 1 (1942)

¹⁶ Ibid.

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Application of Yamashita, 327 U.S. 1 (1946)

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Briefs File in Hamdan v. Rumsfeld (D.C. Cir. 2005)

Merits Brief of Petitioner-Appellee Hamdan (Dec. 29, 2004)
(<http://www.law.georgetown.edu/faculty/nkk/documents/hamdanBrief12-29-04.pdf>)

Brief of the United States (December 8, 2004)
(<http://www.law.georgetown.edu/faculty/nkk/documents/Hamdan-opening-brief2.pdf>)

Amicus Brief of Retired Generals and Admirals in Support of Affirmance (Enforcing Geneva Conventions Necessary to Protect American Troops, Court Should Rule that Commissions Violate Them)
(<http://www.law.georgetown.edu/faculty/nkk/documents/generals.pdf>)

Amicus Brief of People for the American Way, Rutherford Institute, and Gene Fidell in Support of Affirmance (Hamdan's Military Commission Violates Confrontation Rights of the UCMJ Apart from Only 10 U.S.C. 839)
(<http://www.law.georgetown.edu/faculty/nkk/documents/peopleamway.pdf>)

Amicus Brief of Professor Noah Feldman, Legal Advisor in Iraq, in Support of Affirmance (Hamdan's Military Commission denies the fundamental right to be present and to confront witnesses, guarantees that are crucial to the war crimes tribunals in Iraq.)
(<http://www.law.georgetown.edu/faculty/nkk/documents/feldman.pdf>)

Amicus Brief of Military Law Practitioners and Academics in Support of Affirmance (Hamdan's Military Commission Violates 10 U.S.C. 836 and Longstanding Court-Martial Rules)
(<http://www.law.georgetown.edu/faculty/nkk/documents/philcarter.pdf>)

Amicus Brief of Louis Fisher in Support of Affirmance (Senior Librarian, Librarian of Congress, arguing Hamdan's Military Commission is Unlike Any Other in History and Violates Basic Constitutional Principles)
(<http://www.law.georgetown.edu/faculty/nkk/documents/LouisFisher.pdf>)

'Extraordinary' rendition—law and intelligence:

Rendition is the transfer of a prisoner from one country to another for interrogation and prosecution. Extraordinary rendition refers to transferring a prisoner through extra-legal

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means. This has been a procedure used by the CIA for a number of years but has recently become more controversial as it has been perceived to be used to transfer suspected terrorists to countries where torture is permitted. The US is a party to the UN Convention Against Torture, which proscribes ‘cruel, inhuman, and degrading’ of prisoners. Under this Convention it is forbidden to render a suspect when there are ‘substantial grounds for believing’ that the suspect will be tortured. The vagueness of this clause has caused significant debate. It has been argued by some, among them Attorney General Alberto Gonzales, that this ban on torture does not apply to the treatment of terrorist suspects overseas.¹⁷

Discussion Questions:

- Within the context of the balance between security and transparency, is extraordinary rendition ever appropriate?
- What is the US’ responsibility if the detainee is transferred to country that utilizes torture?
- How much must be known for there to be ‘substantial grounds for believing’ that a suspect will be tortured?
- Is extraordinary rendition and torture ever acceptable? When?

Selected relevant source material:

<http://www1.law.ucla.edu/~abrams/casebook.htm>. An excellent database of relevant case law and statute.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. <http://www.hrweb.org/legal/cat.html>.

Press Briefing by White House Counsel Judge Alberto Gonzales, 22 June 2004.
<http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html>

¹⁷ Jane Mayer, ‘Annals of Justice: Outsourcing Torture: The Secret History of America’s “extraordinary rendition” program’ in *The New Yorker* (14 February 2005) p. 1.

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Commentary:

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McCoy, Alfred. 'Cruel Science: CIA Torture & U.S. Foreign Policy', in *New England Journal of Public Policy*, Winter 2005, vol. 19, no. 2
http://www.mccormack.umb.edu/Publications/nejpp/articles/19_2/McCoy.pdf

Legal access and information sharing:

'Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism' (PATRIOT Act) became law on October 26, 2001. In response to the attacks of 9/11 it greatly expanded law enforcement powers including authorizing new methods of sharing information, greater surveillance access, and wider latitude for investigations. Further provisions of the Act include strengthened anti-money laundering laws in order to cut terrorists off from their resources, and tightened immigration laws both to enable the deportation of suspected terrorists already in the United States and to stop potential terrorists from entering the country.¹⁸ Specific provisions of the Act are set to sunset 31 December 2005.¹⁹ Attorney General Gonzales is pushing for renewal.

A commonly perceived positive aspect of the Act is that it enables greater sharing of information between law enforcement and intelligence officials regarding suspected

¹⁸ Charles Doyle, 'The USA PATRIOT Act: A Legal Analysis' CRS Report for Congress, 12 April 2002.

¹⁹ Charles Doyle, 'USA PATRIOT Act Sunset: Provisions that Expire on December 31 2005' CRS Report. June 10, 2004. <http://www.fas.org/irp/crs/RL32186.pdf>. See this document for a list of the provisions due to sunset.

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terrorists. At a functional level, it had been unclear what information could be shared across a perceived boundary between agencies and how much collaboration there could be between law enforcement and intelligence officers. The 'wall' had been perceived as greatly limiting government agencies' abilities to coordinate information on terrorist movements. Sections of the PATRIOT Act were intended to facilitate greater communication and information sharing between the agencies.

'Section 203(b) of the USA Patriot Act specifically authorizes the sharing of foreign intelligence information obtained in a Title III electronic surveillance with other federal officials, including intelligence officers and national security officials, such as DHS and DOD officials. Section 203(d) specifically authorizes the sharing of foreign intelligence information collected in a criminal investigation with intelligence officials'.²⁰

A significant change under the Act has been the broadened powers of The Foreign Intelligence Surveillance Act (FISA) of 1978, which created a legal framework for the purposes of foreign intelligence gathering. FISA facilitated foreign intelligence gathering as it allowed the FBI to obtain a warrant from a classified court in order to conduct intelligence investigations. FISA is '... is directed at foreign governments, international terrorists, and their agents, spies and saboteurs'.²¹ The PATRIOT Act loosens the restrictions for searches from circumstances where the 'primary purpose' of the search was foreign intelligence gathering to where 'a significant purpose' is intelligence-gathering.²² Some aspects of Title II of the PATRIOT Act that deal with this issue of surveillance are set to sunset on 31 December 2005.

There are many issues of debate regarding the PATRIOT Act. Among them are the question of whether civil liberties are a casualty of increased government authority, and whether there are appropriate checks and balances to maintain oversight over these expanded powers. Some particular provisions such as Section 215, which allows investigators to request records—such as library records—on suspected terrorists have caused a great deal of debate. Further questions involve whether the Act has been effective at facilitating the apprehension of terrorists.

Selected Relevant Resources:

'Attorney General Defends PATRIOT Act: Gonzales tells Senate Panel he is 'open to suggestions' 5 April 2005. <http://www.cnn.com/2005/POLITICS/04/05/patriot.act/>.

²⁰ Congressional Testimony of Maureen A. Baginski, 19 April 2005.

²¹ Doyle, 'The USA PATRIOT Act: A Legal Analysis' p. 11.

²² Dahlia Lithwick and Julia Turner, 'A Guide to the PATRIOT Act, part 2' slate.com. 9 Sept. 2003. <http://slate.msn.com/>

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Congressional Testimony of Maureen A. Baginski, Executive Assistant Director-Intelligence Federal Bureau of Investigation Before the Subcommittee on Crime, Terrorism, and Homeland Security, House Committee on the Judiciary, April 19, 2005. This testimony concerns how the USA PATRIOT Act provisions have assisted in the sharing of intelligence information. Useful as it lays out the issues from an FBI perspective. <http://www.fbi.gov/congress/congress05/baginski041905.htm>

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Loyka, Stephan A. et al 'Protecting your Community from Terrorism: Strategies for Local Law Enforcement: Chapter 4: The Production and Sharing of Intelligence Information'. 2005.

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‘National Criminal Intelligence Sharing Plan’, April 2004. Report sponsored by the Office of Justice Programs, US Department of Justice. Report outlines needs and recommendations for the facilitation of criminal intelligence sharing.

http://it.ojp.gov/documents/National_Criminal_Intelligence_Sharing_Plan.pdf

‘Are We Safer? In New York City? In our States? In the Country at Large?’ *New York Review of Law and Security*. Fall 2004. This publication provides an excellent overview of emergent issues at the intersection of law and security. This issue has an interesting discussion of the USA PATRIOT Act.

<http://www.law.nyu.edu/centers/lawsecurity/publications/quarterly/fall04.pdf>

The USA PATRIOT Act. H.R. 3162. October 24, 2001.

<http://www.epic.org/privacy/terrorism/hr3162.pdf>. This is one of many sites where the text of the USA PATRIOT Act can be found.

<http://www.epic.org/privacy/terrorism/usapatriot/default.html> This website contains material critical of the USA PATRIOT Act.

<http://www.epic.org/privacy/terrorism/usapatriot/sunset.html>. As above this website contains material critical of the USA PATRIOT Act. The site contains interesting specifics on which parts of the Act will sunset on 31 December 2005.

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Transcript: Senate Judiciary Hearing on the Patriot Act, *Washington Post*, 5 April 2005. <http://www.washingtonpost.com/wp-dyn/articles/A28081-2005Apr5.html>

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‘Anti-terrorism Investigations and the Fourth Amendment after September 11, 2001’ Hearing before the Subcommittee on the Constitution on the Committee on the Judiciary, House of Representatives, 108th Congress, 20 May 2003.

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