

# Combating Terrorism: With a Helmet or a Badge?

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*Washington DC - In a surprise development that has the Justice Department spinning, Saudi dissident and wanted terrorist, Osama Bin Laden appeared today at Washington DC police headquarters accompanied by a team of defense lawyers. His attorneys told stunned police officials that Bin Laden wished to surrender to law enforcement authorities. Bin Laden, who has been chased all over the world following his 1998 federal indictment for the dual embassy bombings in Africa as well as his alleged involvement for Sept 11 terrorist attacks, said he'd been hiding in Iranian caves ever since American military assaults on Afghanistan. He decided to turn himself in rather than continue to evade U.S. Special Forces who "wanted him dead - not alive." His defense team refused to reveal how Bin Laden, on the FBI ten-most-wanted-list, managed to make his way into the country undetected. They demanded safety for their client while in detention and, assuming Bin Laden would not be afforded bail, insisted on his right to a speedy trial. A Justice Department lawyer who requested anonymity told reporters that in the coming weeks, Bin Laden's lawyers will probably move for full discovery of all evidence, testimony, witness identities, and details of the prosecution case. Additionally, anticipating that some of the evidence is classified, Bin Laden's defense team may move to be given security clearances as well as for their defendant, so he can assist in his own defense. Exercising due process provisions, Bin Laden's defense team can be expected to force the prosecution to reveal sensitive criminal and intelligence leads or risk dismissal of charges. Furthermore, through the process of voir dire, designed to elicit information about prospective jurors so attorneys can challenge members to find the most receptive audience, Justice lawyers are afraid that the Defense will try to shape the jury with members who are amenable to Bin Laden's cause.<sup>2</sup> In one nightmarish scenario that has the Attorney General scrambling, the accused terrorist and murderer of over 5,000 people, may claim it's impossible to receive a fair trial, and challenge the justice system to relocate the trial where the population has no preconceived ideas about the Sept 11 attack, if that's even possible. If not, the Defense has a good foundation for appealing any conviction based on "an inability to receive a fair trial." According to an experienced attorney with the Justice Department, "This case will bounce from one judicial stage to another until the concept of justice becomes secondary to procedure. A trial court is simply not suited for dealing with this sort of legal quandary posed by prosecuting such a defendant." Initial defense efforts to suppress evidence are already scheduled for pre-trial motions next month.*

How prepared are we for such a development? Is this the way the American public expects terrorists to be handled? Is this the sort of "war" that President Bush envisioned? A war of words, semantics, legal parsing of statutory phrases and Constitutional rights granted to a murderous zealot who despises the very nation which grants him these rights? It's time to consider very carefully how this nation goes about waging war on terrorism. Which is it? Is terrorism a crime to be fought with search warrants and jurisprudence, or is it an act of war as President Bush has affirmed? If criminalists with a badge are the warriors, then the battlefield will look very much like this fictitious account.<sup>3</sup>

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<sup>1</sup> This article, revised in 2011 after the death of Osama Bin Laden, originally appeared in The Journal of Homeland Security in 2002. Online sources were updated and footnotes 3, 11, 12, 15, 42, and 43 were added but in all other respects, the text remains unchanged from the original available at <<http://www.homelandsecurity.org/journal/Articles/Norwitz.html>> [29 Jan 2011].

<sup>2</sup> More information about voir dire can be found at <<http://legal-dictionary.thefreedictionary.com/voir+dire>> [29 Jan 2011].

<sup>3</sup> On May 2, 2011, Osama Bin Laden was killed in Bilal Town, Abbottabad, Pakistan by U.S Navy SEALs. The raid code-named *Operation Neptune Spear* was a Central Intelligence Agency-led operation. Since Sept 11, 2001 a number of groundbreaking criminal prosecutions and Supreme Court decisions reshaped the legal landscape. Yet the American public remains confounded between military force and criminal responses to combating terrorism. The reader is urged to review these hallmark cases which foreshadow the direction criminal solutions have taken in the first decade of this century.

*United States of America v. John Phillip Walker Lindh*; No. 02-37-A (E.D. Va. 2002) [Lindh, an American citizen, was captured fighting on behalf of the Taliban during the United States' 2001 invasion of Afghanistan.]

*United States of America v. Richard Colvin Reid*; No. 02-10013-WGY (Ma. 2003) [Reid is often referred to the "shoe bomber" because of his attempt to destroy an in-flight commercial aircraft with explosives hidden in his shoes. He admitted al Qaeda membership]

*Rasul v. Bush*, 542 U.S. 466 (2004) [This is a landmark U.S. Supreme Court decision which held that the U.S. court system can decide whether foreign nationals held at Camp Delta, Guantanamo, were wrongfully imprisoned.]

The American public was galvanized by the events of 11 September. Military members mourned lost Pentagon comrades but became resolute, as the President said, "I have a message for our military: Be ready."<sup>4</sup> Meanwhile, our leaders in Washington demonstrated bi-partisanship and genuine unity in the face of the largest terrorist attack ever on United States' soil. Indeed, the word **war** became commonplace in media and government lexicon while citizens, political leaders, and the military became energized.

Curiously, as talk of military mobilization permeated the media, we heard of Herculean law enforcement efforts by thousands of federal, state and local officers to gather physical evidence, execute search warrants, and run thousands of leads seeking to establish criminal culpability for this atrocity. This essay will examine old paradigms about terrorism, and offer a perspective on how criminal approaches have not grasped the nature of this war.

## Words Have Meaning

When viewed legally, terrorism will always be a crime regardless if the act is a murder, hijacking, kidnapping or bombing. Within legal vernacular, terrorist crimes have "elements of the offense," each of which must be proven beyond a reasonable doubt; venue must be established to determine the appropriate court to hear the case; finally if convicted, a defendant will be sentenced in accordance with precedent and appeals can run their course as well. As viewed through a political lens, terrorism is a tool of non-state or state actors, driven by religious or political ideation designed to manipulate governments and politics through violence. Consequently, terrorism can be dealt with either as a crime or as an attack on the body politic. Since defeating terrorism is clearly in our national interest, all elements of national power (diplomatic, information, military, and economic) ought to be employed.

In defining the nature of war, Clausewitz held, "War is not a mere act of policy but a continuation of political activity by other means." Terrorism is political activity and the terrorist has chosen to make a political statement using violence. To further clarify what war is, consider Clausewitz' observation, "The political objective is the goal, war is the means of reaching it, and means can never be considered in isolation from their purpose."<sup>5</sup> In other words, war is a means toward a political end and, correspondingly, terrorism is war.

Differing definitions confuse the question of whether terrorism is a crime or act of war. The Defense Department defines terrorism as, "The **calculated** [emphasis added] use of violence or threat of violence to inculcate fear; intended to coerce; or to intimidate governments or societies in the pursuit of goals that are generally political,

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*Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) [This U.S. Supreme Court decision reversed the dismissal of a habeas corpus petition brought on behalf of Hamdi, a U.S. citizen, being held as an illegal enemy combatant. The ruling allowed detainees, who are U.S. citizens, to challenge their detention before a judge.]

*United States v. Jose Padilla, et. al.*, No. 04-60001-CR-COOKE (S.D. Fl. 2005) [Padilla, an American citizen, was arrested in Chicago in 2002 and held for almost four years as an enemy combatant on suspicion of plotting a radioactive "dirty bomb" attack. In 2006, he was transferred to Florida and charged with criminal conspiracy. In 2007, a federal jury found him guilty. He was sentenced to 17 years in prison.]

*United States v. Zacarias Moussaoui*; No. 01-455-A (E.D. Va. 2006) [Moussaoui, a French citizen, was convicted of conspiring to kill Americans as part of the September 11, 2001 terrorist attacks.]

*Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) [This U.S. Supreme Court decision held that military commissions, established to try detainees at Camp Delta, Guantanamo, could not proceed because commission structures and procedures violated the Uniform Code of Military Justice and Common Article 3 of the 1949 Geneva Conventions.]

*Boumediene v. Bush*, 553 U.S. 723 (2008) [This controversial U.S. Supreme Court decision was centered on a writ of habeas corpus on behalf of Boumediene, a naturalized citizen of Bosnia and Herzegovina. The case challenged the legality of Boumediene's detention at Camp Delta, Guantanamo. In a 5-4 decision, the Court held that Guantanamo prisoners were entitled to the writ of habeas corpus protected in Article I, Section 9 of the U.S. Constitution.]

<sup>4</sup> George W. Bush, President of the United States, "Address to a Joint Session of Congress", 21 Sep 2001, is available at <<http://archives.cnn.com/2001/US/09/20/gen.bush.transcript/>> [30 April 2010].

<sup>5</sup> The late professor Michael Handel authored three books on Clausewitz. As a Professor of Strategy at the U.S. Naval War College, Handel established a matchless reputation as an expert on theories of war, and Clausewitz in particular. Carl von Clausewitz, quoted in Michael I. Handel, *Masters of War*, 3<sup>rd</sup> ed, (London: Frank Cass, 2001), 68.

religious, or ideological."<sup>6</sup> In contrast, the Justice Department's definition includes "the **unlawful use** [emphasis added] of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political objectives."<sup>7</sup> Words mean something and the differences are striking.

The Defense Department regards terrorism as a "calculated" act. The identity of the actor is irrelevant. It could just as well be an individual or a nation state. Additionally, there is no suggestion of illegality - just that the act be purposeful as opposed to an accident, and intended to intimidate or coerce governance. Implicit in the Justice Department's definition of terrorism is the concept of illegality which clearly empowers Justice, via the FBI, to take the lead in a terrorist incident. Thereafter, the best forensic science and investigative resources are secured enabling leads to be disseminated and results analyzed among countless law enforcement agencies. But consider for a moment, the statutory guidelines, jurisdictional limitations and laws of jurisprudence which must be adhered to in the legal rubric.

Because the objective of a criminal investigation is successful prosecution, all law enforcement effort must withstand judicial scrutiny at trial. Provisions of Articles IV, V, and VI of the U.S. Constitution, as well as the Bill of Rights, offer powerful protections against law enforcement excess which, by extension, applies to international terrorists operating on our soil. Moreover, every decision made by investigators will be reviewed for compliance with legal precedent from countless prior decisions with mind-numbing attention to detail. Any procedural error, intentional or otherwise, will be cause for suppression of evidence or testimony. And what about differing legal structures between allied nations in countering terrorism? Evidence obtained by one nation's police may not meet the standards for admissibility into the court system of a partnered nation. Likewise, will admissions of guilt be universally accepted in all courts regardless of which police conducted the questioning? Even if a conviction is obtained, the criminal justice system still will go over everything on appeal with the threat of a reversal of the first verdict. Is this the way we want to wage war on terrorists? Not according to a prominent commission's findings.

### **Federal Commission Findings**

The National Commission on Terrorism was established by Congress in 1999 with the appointment of 10 commissioners (all eminently qualified) who, after a series of hearings and international visits, produced a report relative to new and emerging threats of international terrorism.<sup>8</sup> One of the commission's recommendations was to "pursue a more aggressive strategy against terrorism." Critical analysis was given to the question of whether terrorism should best be handled as a criminal matter, suggesting a new paradigm which would give Defense a much greater leadership role in the event of a catastrophic terrorist attack. The members of the commission held that law enforcement tools were not adequate to address international terrorism. According to the commission;

Law enforcement is designed to put individuals behind bars, but is not a particularly useful tool for addressing actions by states. The Pan Am 103 case demonstrates the advantages and limitations of the law enforcement approach to achieve national security objectives. The effort to seek extradition of the two intelligence operatives implicated most directly in the bombing gained international support for economic sanctions that a more political approach may have failed to achieve. The sanctions and the resulting isolation of Libya may have contributed to the reduction of Libya's terrorist activities. On the

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<sup>6</sup> Definition of terrorism in accordance with Department of Defense Directive 2000.12, DoD Antiterrorism/Force Protection (AT/FP) Program, 13 Apr 1999, which is available at <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/2000.12.pdf>> [30 April 2010].

<sup>7</sup> Definition of terrorism in accordance with Code of Federal Regulations, Title 28, Chapter 1, Part 0, Subpart P, Sec 0.85 [CITE: 28CFR0.85] available at <[http://edocket.access.gpo.gov/cfr\\_2002/julqtr/28cfr0.85.htm](http://edocket.access.gpo.gov/cfr_2002/julqtr/28cfr0.85.htm)> [29 Jan 2011].

<sup>8</sup> The members of the commission were; L. Paul Bremer III, Maurice Sonnenberg, Richard K. Betts, Wayne A. Dowling, Jane Harman, Fred C. Ikle, Juliette N. Kayyem, John F. Lewis Jr., Gardner Peckham, R. James Woolsey. See Report of the National Commission on Terrorism, Countering the Changing Threat of International Terrorism (Washington DC: 1999), is available at <<http://www.fas.org/irp/threat/commission.html>> [29 Jan 2011].

other hand, prosecuting and punishing the two low-level operatives for an act almost certainly directed by Qadafi is a hollow victory, particularly if the trial results in his implicit exoneration.

As it happened, only one of the Libyan defendants acting on behalf of the state intelligence service was convicted and the other freed without implication of Qadafi himself - a hollow victory indeed.<sup>9</sup>

In yet another example of apparent ineptitude of a police response to terrorism; research by *The Christian Science Monitor* disclosed that in the six months following September 11, criminalists in the United States and Europe arrested nearly 1,400 people in connection with the attacks but they charged only one.<sup>10</sup> Revelation of the May 8, 2002 Chicago arrest of New York-born Jose Padilla, aka Abdullah al Muhajir, for his part in planning to build and detonate a “dirty bomb”<sup>11</sup> on behalf of Al Qaeda was evidence of the value of militarily-obtained intelligence employed to intercept a terrorist attack. Indeed, Padilla was being treated as an “enemy combatant” by the Justice Department and sent to a military jail in South Carolina.<sup>12</sup> However, following a robust trial defense, Padilla was eventually convicted of mere conspiracy charges further demonstrating the limitations of combating terrorism in a courtroom.<sup>13</sup>

Government statistics concerning criminal prosecutions of terrorism cases are more encouraging however, are they meaningful? In the twelve months following Sept 2001, federal prosecutors charged 1,208 defendants with a variety of crimes they concluded were related to terrorism or internal security. There were only 115 such crimes in the twelve months prior to September 11. Yet, the median prison term before 9/11 was 21 months whereas subsequent the prison sentence was 2 months.<sup>14</sup> Why the decrease in punishment at a time when terrorism is such a high priority? Perhaps the answer can be found by looking at the Justice Department's expanded definition of terrorism-related prosecutions which include identity theft and immigration matters. Although a false ID case may occasionally be of great significance, these kinds of matters have never before been classified as terrorism. The soaring number of prosecutions and the declining length of sentences merely reflect a shift in what kinds of behavior the government considers under terrorism and internal security laws.<sup>15</sup>

While distinguishing terrorism as a crime or an act of war, Stephen Gale a counterterrorism expert who teaches at the University of Pennsylvania points out, "If you think someone is going to take out your electrical grid, in a criminal

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<sup>9</sup> Information about the Pan Am 103 trial and conviction is available at <<http://www.victimsofpanamflight103.org/>> [30 April 2010].

<sup>10</sup> Peter Ford, "Legal War on Terror Lacks Weapons," *The Christian Science Monitor*, 27 Mar 2002, is available at <<http://www.csmonitor.com/2002/0327/p01s04-woeu.htm>> [29 Jan 2011].

<sup>11</sup> A “dirty bomb” is a device that combines conventional explosives, such as dynamite, with radioactive materials. Another name is a radiological dispersion device (RDD). The idea behind a dirty bomb is to blast radioactive material into the area around the explosion. This could possibly cause victims to be exposed to radioactive material.. However, the main purpose of a dirty bomb is to frighten people.” See Radiation Information Network of Idaho State University <<http://www.physics.isu.edu/radinf/dirtybomb.htm>> [29 Jan 2011].

<sup>12</sup> Initial release of information on this case can be read at “Transcript of the Attorney General John Ashcroft regarding the transfer of Abdullah Al Muhajir to the Department of Defense as an enemy combatant,” 10 June 2002, available at <<http://www.fas.org/irp/news/2002/06/ag061002.html>> [29 Jan 2011].

<sup>13</sup> “Judge Sentences Padilla to 17 Years,” *The Washington Post*, 23 Jan 2008, available at <<http://www.washingtonpost.com/wp-dyn/content/article/2008/01/22/AR2008012200565.html>> [29 Jan 2011].

<sup>14</sup> Statistical analysis and reports concerning criminal prosecutions of terrorism and national security cases is studied by the Transactional Records Access Clearinghouse (TRAC), a research organization associated with Syracuse University. Their report entitled *Criminal Enforcement Against Terrorists and Spies in the Year After the 9/11 Attacks* is available at <<http://trac.syr.edu/tracreports/terrorism/fy2002.html>> [29 Jan 2011].

<sup>15</sup> Ibid. Additionally, the dramatic post 9/11 surge in prosecutions that the government categorized as terrorism has undergone a four-fold decline, according to TRAC's analysis of data from the Department of Justice. The data show that terrorism and internal security filings in court have dropped from an average of about 100 a month at their peak shortly after the attacks to a current level of just under 25 a month. The most recent available information shows that in January 2010 there were only 11 such prosecutions while in February there were 13. See <<http://trac.syr.edu/tracreports/terrorism/231/>> [29 Jan 2011].

investigation you arrest him. In a war you shoot first and ask questions later."<sup>16</sup> Michael Clarke, head of the Centre for Defense Studies at London University observes, "Terrorism poses a fundamental challenge to the legal system. Terrorists often do nothing indictable till they commit the act. Ninety percent of the time sleepers are absolutely legal, so you can't do anything about them even if you know who they are. Terrorism challenges our categories of what is legal and what is illegal."<sup>17</sup>

The National Commission on Terrorism's findings highlighted unrecognized Pentagon organizational and resource strengths as they relate to terrorism.

The U.S. Government's plans for a catastrophic terrorist attack on the United States do not employ the full range of the Department of Defense's (DoD's) capabilities for managing large operations. Additionally, the interagency coordination and cooperation required to integrate the DoD properly into counterterrorism planning has not been accomplished. The DoD's ability to command and control vast resources for dangerous, unstructured situations is unmatched by any other department or agency. According to current plans, DoD is limited to supporting the agencies that are currently designated as having the lead in a terrorism crisis...FBI and FEMA. But, when a catastrophe is directly related to an armed conflict overseas, the President may want to designate DoD as a lead federal agency.

Missing from the commission's report, but of equal significance, is DoD's ability to compile worldwide intelligence from an array of sources unavailable to civilian law enforcement. Moreover, given the military intelligence community's system of satisfying diverse intelligence requirements, the infrastructure to do the same with terrorism is a DoD strength - and without the dilemma of testimonial scrutiny at a later time. Does that mean that military operations are free from legal constraint? Of course not.

## **Military Limited**

There is an ethos in America, rooted in our birth as a nation, that standing armies are a threat to governments unless they are at war. Whig politics of the early American Colonies held that when conflict is finished, so should be the standing army. Whigs believed that a standing military force in time of peace was a threat to liberty.<sup>18</sup> Evolution and compromise obviously modified that dismal view of standing armies, however, framers of the Constitution still wanted to limit the military's authority over the population, and our citizenry today holds that protection dear. Three documents with Presidential or Congressional authorship seek to ensure legal limits of military power.

*The Posse Comitatus Act* is codified in law under 18 U.S.C. 1385 and explicitly prohibits, unless with Presidential intervention, using the armed forces to execute laws upon the citizenry.<sup>19</sup> Executive Order 12333 - *United States Intelligence Activities*, provides Presidential endorsement to the limits of all intelligence activity, military and otherwise.

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<sup>16</sup> Stephen Gale, quoted in Peter Ford, "Legal War on Terror Lacks Weapons," [The Christian Science Monitor](#), 27 Mar 2002.

<sup>17</sup> The term "sleepers" is a reference to persons who quietly reside in a community and go unnoticed to intelligence or law enforcement but in fact have criminal or terrorist objectives and are waiting for an opportunity or higher direction to execute a pre-planned mission. Sleeper agents are very difficult to detect and harder to prosecute due to the benign nature of their lives. See Michael Clark, quoted in Peter Ford, "Legal War on Terror Lacks Weapons," [The Christian Science Monitor](#), 27 Mar 2002.

<sup>18</sup> In the 16<sup>th</sup> century, a British political faction known as Whigs, drew upon the certain ideas of Niccolo Machiavelli believing that any army powerful enough to defend a state, would also have the power to overthrow it. The danger, according to Machiavelli, was especially acute in time of peace when the army's usefulness was finished. Therefore, the concept of standing armies was challenged by Machiavelli, and by Whigs who found his philosophies attractive. This became central to their political thought and influenced early American colonial politics as well as the crafting of our Constitution and Bill of Rights. See Jeffrey H. Norwitz, "What was the Whig Vision for Military Service?" (Unpublished Research Paper, U.S. Naval War College, Newport, RI: 2001).

<sup>19</sup> An excellent treatment of Posse Comitatus is contained in Thomas R. Lujan, "Legal Aspects of Domestic Employment of the Army," [Parameters](#), Autumn 1997, which is available at <<http://www.carlisle.army.mil/USAWC/Parameters/Articles/97autumn/lujan.htm>> [29 Jan 2011].

The purpose of EO-12333 is to balance constitutional protections against the need for timely and accurate information about the activities, capabilities, plans, and intentions of foreign powers, organizations, and persons.<sup>20</sup> Furthermore, EO-12333 provides succinct, specific and strong language relative to what DoD agencies may and may not do concerning intelligence activities. Lastly, Presidential Decision Directive-39, *U.S. Policy on Counterterrorism*, lays out roles and missions for federal agencies including DoD.<sup>21</sup>

As the bulwark of protection for citizens against military abuse, these three documents provide a tremendous check-and-balance on what our armed forces can do domestically in performing Homeland Security missions. In contrast to fears of rampant military disregard for legal framework and citizens' rights, our courts are very attuned to permissible conduct and so are today's military commanding officers and service personnel. Presently, the Pentagon has already embraced urban warfare in training and doctrine resulting in exemplary skills dealing with such a challenging environment.<sup>22</sup> If there are legal limits on the military's activity at home; what sorts of guidelines exist for military operations on foreign soil?

The legalities of employing U.S. armed forces in foreign countries to battle terrorism are complex. Military operations abroad must complement, and be coordinated with, the strategic use of diplomatic and economic elements of national power. Likewise, if force is envisioned where casualties and property destruction are likely, the Law of Armed Conflict will limit military action to that which is necessary, reasonable, and justified.<sup>23</sup>

Armed conflict is not the end of law. It is in fact, the beginning of a different legal status as it relates to how belligerents behave. Two legal terms underscore the dimension to which the Law of Armed Conflict is codified. *Jus ad bellum* is that law which defines whether or not the conflict has a legal basis to happen in the first place. *Jus in bello* is that law which outlines what actions in war are legal in and of themselves. Clearly, war is not the absence of legal restraint nor does war condone uncontrolled maniacal behavior. War crimes tribunals are evidence that the world will not stand for unconstrained military devastation. Any suggestion of unbridled American military vigilantes, ranging the globe on vendettas, is unsupportable.

## American Perceptions

The American public has long held that terrorism was something which happened elsewhere. Former Secretary of State George Shultz theorized that our nation's threat was "99% overseas" and empirical data suggested this to be true.<sup>24</sup> When one looks at statistics for the 1970's and 80's, international terrorist incidents varied annually from the middle 400 to over 600 events. Occurrences lessened in the late 1980's; however, following the Gulf War, the number rose to over 560. By 1996, international terrorist incidents diminished to less than 300 a year.<sup>25</sup>

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<sup>20</sup> President, Executive Order 12333, "United States Intelligence Activities, 1981," is available at <<http://www.fas.org/irp/offdocs/eo/eo-12333-2008.pdf>> [29 Jan 2011].

<sup>21</sup> President, Decision Directive 39, "U.S. Policy on Counterterrorism, 1995". PDD-39 is classified SECRET. A redacted version is available at <<http://www.fas.org/irp/offdocs/pdd39.htm>> [29 Jan 2011].

<sup>22</sup> One example of innovative training in the area of urban operations is The Center for Emerging Threats and Opportunities (CETO), a Marine Corps-Potomac Institute for Policy Studies partnership dedicated to exploring innovative ways to deal with non-traditional threats to national security. More information about CETO is available at <[http://www.potomacinstitute.org/index.php?option=com\\_content&view=article&id=306&Itemid=83](http://www.potomacinstitute.org/index.php?option=com_content&view=article&id=306&Itemid=83)> [30 April 2010].

<sup>23</sup> The Yale Law School provides an extensive reference resource concerning the Law of Armed Conflict at <[http://avalon.law.yale.edu/subject\\_menus/lawwar.asp](http://avalon.law.yale.edu/subject_menus/lawwar.asp)> [30 April 2010]

<sup>24</sup> George Shultz, quoted in Douglas Menarchik, "Organizing to Combat 21st Century Terrorism," in *The Terrorism Threat and U.S. Government Response*, ed. James M. Smith and William C. Thomas (Colorado: USAF Institute for National Security Studies, 2001), 222.

<sup>25</sup> U.S. Department of State, *Patterns of Global Terrorism*, (Washington DC: 2001), as well as earlier annual reports, are available at <<http://www.state.gov/s/ct/rls/crt/index.htm>> [30 April 2010].

While the world experienced a statistical roller-coaster of terrorist incidents, the number of domestic episodes remained startlingly low. America's premier law enforcement community of federal, state and local authorities were touted as having halted terrorism at our borders and with that apparent achievement, law enforcement also took on the responsibility of consequence response in the event of a rogue attack. The Federal Emergency Management Agency (FEMA) seemed the likely candidate for coordination of national assets while local and state agencies looked to FEMA for direction. Naturally, FEMA turned to the Army for resources, training and actual response capability, seeing the Army as possessing the greatest disaster response, which, not surprisingly, replicated the mayhem of warfare. Meanwhile, many Americans developed an artificial sense that somehow our guardian oceans would keep harm from our shores, as historically was the case. Terrorism experts, however, warned this sense of safety was fictional because of broadened economic globalization and ease of world travel. September 11 proved them correct.

Nevertheless, what worked in the past seemed adequate to ensure domestic tranquility, especially in light of competing demands for scarce federal resources. The Pentagon was committed elsewhere and terrorism remained the domain of law enforcement. Americans expected terrorism to remain an "overseas" dilemma and the public expected police to be the key protector of the homeland.

### **What Is Our Experience?**

How did our country come to deal with terrorism this way? Upon assuming office, President Reagan was deeply affected by the Carter administration's struggle against international terrorism and as a result, was determined to deploy the traditional elements of national power to defeat the terrorist menace. Economic measures, diplomatic mechanisms, and military force were the tools that supported Reagan's strategy. During the early Reagan years, terrorism became synonymous with warfare, particularly after 241 Marines and other servicemen were killed in Beirut by a terrorist truck bomb on 23 Oct 1983.<sup>26</sup>

Despite early military victories such as airstrikes against Libya, and the capture of Abu al-Abbas, responsible for the *Achille Lauro* hijacking, other driving factors undermined America's military assault on terrorism. Reagan's use of military force against terrorists was curtailed when it appeared we had traded weapons for hostages during Iran-Contra, thereafter diminishing our credibility with other nations as a consequence of our deal with Tehran. Accordingly, military strategies became almost impossible to execute because of reduced international support and, as a consequence, American counterterrorist emphasis returned to a law enforcement and judicial one. Military involvement in counterterrorism dwindled as criminalists took over. Yet, one dilemma remained: the lack of intelligence haunted the battle against terrorism and indeed continues today.

Good intelligence is the cornerstone for dealing effectively with terrorism, and the U.S. intelligence community, heavily dependent on superb technical collection means, is almost omniscient. Unfortunately, terrorists don't tend to be vulnerable to technical collection, owing to their disparate cell-like nature and veiled operational profile, thereby thwarting photographic and signals exploitation. Human intelligence collection (HUMINT) is the most effective source but also the most difficult to obtain. Frequently, terrorist cells have familial foundations and are extremely difficult to penetrate. Unfortunately, American HUMINT capabilities were severely diminished during the 1970's and 80's when, responding to public outcry about the sometimes "dirty" nature of recruiting intelligence operatives, the CIA changed vetting practices disallowing its agents to enlist sources with dubious backgrounds.<sup>27</sup> Furthermore, would intelligence agents be required to testify as to how they obtained information? For instance, would techniques of handling clandestine sources be subject to judicial scrutiny and rules of evidence admissibility? How could a legal case be prosecuted when "chain-of-custody", a judicial requirement to establish "authenticity" of evidence, cannot be

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<sup>26</sup> More information about the Marine Barracks bombing is available at <<http://www.beirut-memorial.org/>> [29 Jan 2011].

<sup>27</sup> An outstanding treatment of the challenges of human source intelligence and specifically the recruitment of questionable sources was authored by Admiral Stansfield Turner, USN (RET) where the author reviews his controversial tenure as Director of CIA and the problems of operating a secret intelligence organization in a democratic society. See Stansfield Turner, Secrecy and Democracy – The CIA in Transition, (Boston: Houghton Mifflin, 1985).

demonstrated for bomb-making gear supplied by a double agent? If law enforcement captured a terrorist, would they face their accuser and have the benefit of legal representation? Lastly, the rise of "leaderless resistance," a concept of independent action encouraging unitary but coordinated violence, has also severely limited American counterterrorist efforts.<sup>28</sup>

By 1990, with the fight against terrorism returned to the law enforcement world, the military went back about its business of fighting and winning the nation's wars, and also being relegated to a "supporting" role in counterterrorism. However, the paradigm of FBI-lead primacy in the fight against terrorism took a new shift on September 21, 2001 when President Bush addressed Congress and the American people to explain a new war on terrorism. According to the President and congressional sentiment, the military seemed again to be the tool of choice.

## Present Driving Forces

Released just seven months before the terrorist attack of 11 September, The U.S. Commission on National Security/21<sup>st</sup> Century, popularly called the Hart-Rudman Commission after its chairpersons, issued their report, *Road Map for National Security: Imperative for Change*. In it, the commission made some startlingly prophetic observations about the preparedness of the U.S. to deal with a catastrophic terrorist attack. One of the key findings is related to "organizational realignment," in a subchapter of the same title. Therein is suggested the creation of the National Homeland Security Agency with cabinet-level status and direct responsibility to the President. The commission's findings included minimizing the Justice Department and FBI's leadership role in homeland defense and increasing Defense's profile across the range of mission tasks.<sup>29</sup>

Likewise, increased priority of Homeland Security is reflected in the Quadrennial Defense Review (QDR) Report, which lays out DoD vision for future force structure and strategy. The QDR, "restores the defense of the United States as the Department's primary mission."<sup>30</sup> Furthermore, the Pentagon acknowledges that preparing for homeland security will impact organization and structure of future forces, as well as redefined expectations of Reserve and Active components. Indeed, the newly issued Unified Command Plan established Northern Command (NORTHCOM) as a separate combatant commander to provide a more coordinated approach for military support to homeland defense civil authorities.<sup>31</sup> As a road map for national military strategy, the QDR points out, "the U.S. military will be prepared to respond in a decisive manner to acts of international terrorism committed on U.S. territory or the territory of an ally." DoD's vision for the future unequivocally includes the war on terrorism.

*On War*, Clausewitz' seminal work, states war is successfully waged only when there is a synergy between the **government**, the **military**, and the **will of the people**. Support of all three is necessary for victory.<sup>32</sup> Likewise, Clausewitz observes that organized warfare between great powers has a construct which can be studied, albeit sometimes clouded by fog and friction of battle. He also comments on the fortunes of a war against the likes of modern terrorists suggesting that poor political understanding and a constrained military policy will play into the

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<sup>28</sup> The concept of Leaderless Resistance was proposed by Ulius Louis Amoss in 1962. In 1983, Louis Beam expounded on Amoss' idea in a quarterly journal entitled *The Seditonist* wherein he wrote essays proposing the overthrow of the American government. Leaderless Resistance is a system based upon the cell organization, but does not have any central control or direction. Utilizing the Leaderless Resistance concept, all individuals and groups operate independently of each other, and never report to a central headquarters or single leader for direction or instruction. Beam's essay is available at <<http://www.louisbeam.com/leaderless.htm>> [29 Jan 2011].

<sup>29</sup> The commission's suggestion of a cabinet-level agency to deal with Homeland Security included some of the earliest deliberation reflected in the President's proposed Department of Homeland Security. See The United States Commission on National Security/21<sup>st</sup> Century, *Road Map for National Security: Imperative for Change*, (Washington DC: 2001), 10-29.

<sup>30</sup> U.S. Department of Defense, *Quadrennial Defense Review Report*, (Washington DC: 2001). A copy and analysis of the 2001 QDR is available at <<http://www.comw.org/qdr/01qdr.html>> [30 April 2010].

<sup>31</sup> More information about Northern Command (NORTHCOM) is available at <<http://www.northcom.mil/>> [30 April 2010].

<sup>32</sup> Handel, 102.

hands of an enemy without rules or moral limitations. As if predicting the difficulty of facing terrorism, Clausewitz observed, "Woe to the government, which, relying on half-hearted politics and a shackled military policy, meets a foe who, like the untamed elements, knows no law other than his own power."<sup>33</sup>

Colin Gray, Professor of International Politics and Director of the Centre for Strategic Studies at the University of Reading, England supports the idea that terrorists are enemy soldiers and not criminals but he points out, "If we redefine what the concept and the legal idea of 'war' encompasses, then so also will we have to redefine who can wage it legitimately."<sup>34</sup> Indeed, the matter of militarily-captured terrorists in Afghanistan challenged our concept of war-time prisoners and whether they could be questioned about terrorist activity. If interrogated as prisoners of war, must they be afforded self-incrimination protections? The American Bar Association, Task Force on Terrorism and the Law, concluded that the actions of September 11 were acts of war although; because noncombatant civilians were attacked, the perpetrators violated the law of armed conflict forfeiting Hague Convention protections.<sup>35</sup> At the same time, Pentagon doctrine states that captured terrorists are not afforded "prisoner of war" protection because terrorists act outside the laws of war.<sup>36</sup> As we redefine notions about crime and war while rethinking strategies to fight terrorism, there are some key areas for consideration.

### **A New Paradigm is Necessary**

America must remove impediments, real and perceived, to Defense Department involvement in homeland security. We must reflect on the original purpose of the Posse Comitatus Act with a long view toward broadening the use of armed forces in traditional law enforcement roles. Only the military can truly deal with catastrophic events such as biological and chemical attack as well as radiological release and consequence management. Furthermore, the organic capability for superb military investigation, intelligence analysis and fact-finding, can be an invaluable augmentation to state and local authority during a calamity. This may need to include questioning of civilians and perhaps collection of information relevant to tracking terrorists. Furthermore, the possibility that this material may have evidentiary value, cannot be discounted.

According to John R. Brinkerhoff, a retired Army officer and former FEMA associate director and OSD senior career executive; the Posse Comitatus Act has been grossly misinterpreted as preventing the military services from acting as a national police force. Brinkerhoff points out that Posse Comitatus was passed in 1878 when, reacting to southern sheriffs and U.S. marshals pressing Army troops into their service without Washington's approval, Congress voted to restrict the ability of U.S. marshals and local constabulary to conscript military personnel into their posses.<sup>37</sup> In passing the Posse Comitatus Act, Congress conceded the use of military troops for police actions when authorized by the president or Congress. Brinkerhoff offers that an erroneous interpretation has resulted from a general Pentagon desire to avoid domestic unrest quagmires. He adds that much of the twisting of Posse Comitatus was by persons averse to any role for military forces in law enforcement including the military itself.

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<sup>33</sup> Ibid, 121.

<sup>34</sup> Colin S. Gray, "Thinking Asymmetrically in Times of Terror," *Parameters*, (Spring 2002), is available at <<http://www.carlisle.army.mil/USAWC/Parameters/Articles/02spring/gray.htm>> [29 Jan 2011].

<sup>35</sup> American Bar Association. Task Force on Terrorism and the Law. "Report and Recommendations on Military Commissions." 4 January 2002, is available at <<http://www.abanet.org/leadership/military.pdf>> [29 Jan 2011].

<sup>36</sup> Joint doctrine states, "By definition, terrorists do not meet the four requirements necessary for combatant status (wear uniforms or other distinctive insignia, carry arms openly, be under command of a person responsible for group actions, and conduct their operations in accordance with laws of war)... For this reason, captured terrorists are not afforded the protection from criminal prosecution attendant to prisoner of war status." See Joint Chiefs of Staff Publication 3-07.2, Joint Tactics, Techniques and Procedures for Antiterrorism (Washington DC: 17 Mar 1998) which is available at <[http://www.fas.org/irp/doddir/dod/jp3\\_07\\_2.pdf](http://www.fas.org/irp/doddir/dod/jp3_07_2.pdf)> [29 Jan 2011].

<sup>37</sup> An excellent treatment and analysis of Posse Comitatus and its history is found in John R. Brinkerhoff, "The Posse Comitatus Act and Homeland Security," (Analytic Services Inc; 2002), available at <<http://www.homelandsecurity.org/journal/articles/brinkerhoffpossecomitatus.htm>> [30 April 2010].

It now appears that to fully engage our armed forces to defeat terrorism, we must rethink *Posse Comitatus*. It is not a rigid proscription on use of the military to enforce or execute laws. Rather, when so ordered by the president, the military can support civilian authorities in a wide array of enforcement missions where it is uniquely trained and equipped. Why continue to craft strategies that require states to shoulder additional burden owing to *Posse Comitatus* since, when strictly construed, it is no obstacle to armed forces and civilian partnership in domestic security? Rethinking policy and practice regarding *Posse Comitatus* should be a priority for the new Department of Homeland Security as it creates linkages to the Pentagon's NORTHCOM in the coming heretofore criminal justice-constrained battle against terrorism.<sup>38</sup>

Furthermore, *Preemption* is a term which has drawn considerable attention, particularly in the President's rhetoric, and deserves consideration in the quiver of weapons against terrorism. When thought of in a criminal context; police can frustrate unlawful schemes only within a legally consistent framework of probable cause, elements of the offense, legally obtainable evidence, reasonable expectation of privacy, hearsay, and entrapment. *Preemption*, as envisaged by the Law of Armed Conflict, has none of these constraints and therefore finds fertile ground as a military option. Along these lines, P.H. Liotta offers that terrorists can be expected to practice *chaos* as a strategy. "We will practice preemption against those who seek to harm our vital interests and our way of life. Military forces will increasingly be in the business of shooting archers, and not just catching arrows. That is to say that we cannot just wait for chaos provocations to occur before we react."<sup>39</sup> According to Liotta however, our execution of military options must be tempered with a clear understanding of the nature of the enemy and how, if misapplied, military force may play right into the hands of terrorists who will practice chaos as a strategy.

The Whitehouse released the *National Strategy for Combating Terrorism* which conveys the four-point methodology of Defeat, Deny, Diminish and Defend in a war against terrorist organizations of global reach. The national strategy brings to bear, "direct or indirect use of diplomatic, economic, information, law enforcement, military, financial, intelligence and other instruments of national power."<sup>40</sup> Clearly, the war on terrorism is emerging from the sterile impartiality of the court room to reflect dynamic new challenges.

The March 1st, CIA orchestrated, pre-dawn seizure of Khalid Shaikh Mohammed, Al Qaeda's chief of operations and suspected master-mind behind 9/11, from a house in Rawalpindi, Pakistan, illustrates what cooperation between intelligence, military and law enforcement authorities can achieve in the terror war. Mr. Mohammed was quickly spirited out of Pakistan to an undisclosed location presumably for interrogation by CIA specialists, since his knowledge as well as information gathered at his capture sight, is time perishable. Considerations of evidence admissibility or prosecutorial strategy are moot since Mr. Mohammed is not envisaged to face a jury of his peers.

Reminiscent of the case against Jose Padilla, who was planning new attacks in the United States, Mr. Mohammed will not be afforded legal counsel. In a nine-page legal affidavit concerning Padilla, Vice Admiral Lowell E. Jacoby, director of the Defense Intelligence Agency, asserted that more than 100 terrorist attacks have been thwarted due to the interrogation of enemy combatants captured by counterterrorist efforts. In recommending against Padilla talking

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<sup>38</sup> The Department of Homeland Security web site is <<http://www.dhs.gov>> [30 April 2010].

<sup>39</sup> Dr. Peter Liotta, Professor of Strategy at the U.S. Naval War College, writes about the emergence of "Adversaries who...will increasingly look for innovative ways to 'attack' without attacking directly the brick wall of American military predominance. The chaos strategist thus targets the American national security decision making process and, potentially the American people, rather than American military force, in order to prevail. Such a strategist seeks to induce decision paralysis." Liotta applies this concept to the war on terrorism and offers insightful analysis for American defense planners. See P.H. Liotta, "Chaos as Strategy," *Parameters*, (Summer 2002), which is available at <<http://www.carlisle.army.mil/USAWC/Parameters/Articles/02summer/liotta.htm>> [29 Jan 2011].

<sup>40</sup> The Whitehouse, *National Strategy For Combating Terrorism*, (February 2003), 15; which is available at <[https://www.cia.gov/news-information/cia-the-war-on-terrorism/Counter\\_Terrorism\\_Strategy.pdf](https://www.cia.gov/news-information/cia-the-war-on-terrorism/Counter_Terrorism_Strategy.pdf)> [30 April 2010]. The 2006 version of this strategy can be found at <[http://www.globalsecurity.org/security/library/policy/national/nsct\\_sep2006.pdf](http://www.globalsecurity.org/security/library/policy/national/nsct_sep2006.pdf)> [29 Jan 2011].

to a lawyer Jacoby said, "I also firmly believe that providing Padilla access to counsel risks loss of a critical intelligence resource, resulting in a grave and direct threat to national security."<sup>41</sup>

The conundrum of legal process in the terror war is also playing itself out in Portland, Oregon where, in an ongoing criminal prosecution of five defendants charged with conspiring to assist Al Qaeda, the defense is challenging the FBI's use of expanded surveillance power under the USA Patriot Act.<sup>42</sup> Regardless of the Oregon court's decision, this legal maneuver underscores the controversy over methods when terrorists are pursued with prosecution as an objective or when they are considered combatants rather than defendants, as in the case of Khalid Shaikh Mohammed.

## Conclusions

Considering the challenges and new risks that America is facing, "We are going to have to invent new ideas about what war is, and that will have far-reaching implications for the legal system," says Stephen Gale.<sup>43</sup> According to noted national security expert Ralph Peters, the inevitability of another terrorist attack in the United States is undeniable.<sup>44</sup> Also undeniable is the role for law enforcement in this fight against terrorism and via the newly chartered Department of Homeland Security, coordination and consolidation of federal enforcement agencies will be the challenge for the new cabinet-level appointee. Nevertheless, we must acknowledge the limitations of constabulary soldiers and courtroom battlefields, put aside the fingerprint powder and handcuffs, and instead tighten our helmet straps. This is after all, a war.<sup>45</sup>

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<sup>41</sup> Vice Admiral Lowell E. Jacoby, quoted in Richard Serrano and Greg Miller, "100 Terrorist Attacks Thwarted U.S. Says," Los Angeles Times, 11 Jan 2003. <<http://articles.latimes.com/2003/jan/11/nation/na-padilla11>> [30 April 2010].

<sup>42</sup> The USA Patriot Act is available at <<http://f11.findlaw.com/news.findlaw.com/cnn/docs/terrorism/hr3162.pdf>> [30 April 2010]; additional analysis and review of the Act is available at <<http://fas.org/irp/crs/RL31377.pdf>> [30 April 2010].

<sup>43</sup> Stephen Gale, quoted in Peter Ford, "Legal War on Terror Lacks Weapons," The Christian Science Monitor, 27 Mar 2002.

<sup>44</sup> According to his published biography, "Ralph Peters is a former Army officer who rose from the enlisted ranks. He retired in 1998, after his promotion to lieutenant colonel. As a soldier and civilian, he has experience in more than 70 countries. He's the author of 24 books; including works on military and international affairs . . . [h]e has covered conflicts in Iraq, Israel and sub-Saharan Africa, has published more than 800 essays, columns and reviews, and is Fox News' first strategic analyst." In a July 2009 interview available at <<http://transcripts.usatoday.com/Chats/transcript.aspx?c=2077>>, Peters said, "*We will be attacked again by Islamist terrorists. We cannot predict the time, place or scope, but the attack will come . . . [a]l-Qaeda is a post-modern, trans-national organization with operatives and sympathizers in many countries . . . al-Qaeda has been badly battered since Sept. 11 and has been pushed onto the strategic defensive . . . [f]act is, our troops and [police] agents have done great work--for which they don't get credit.*"

<sup>45</sup> In February 2010, retired Admiral Dennis C. Blair, Director of National Intelligence, testified before the Senate Select Committee on Intelligence where he said, "*We face a persistent terrorist threat from al-Qa'ida and potentially others who share its anti-Western ideology. A major terrorist attack may emanate from either outside or inside the United States. Enhanced offensive and defensive counterterrorism efforts have certainly interrupted or deterred some plotting against the Homeland, but actionable intelligence on the key details of terrorist plots—dates, specific targets, and the identity of operatives—are often fragmentary and inconclusive thanks to the terrorists' stringent operational security practices.*" His testimony is available at <[http://www.dni.gov/testimonies/20100202\\_testimony.pdf](http://www.dni.gov/testimonies/20100202_testimony.pdf)> [30 April 2010].