

WHO'S AFRAID OF THE CRIMINAL LAW PARADIGM IN THE "WAR ON TERROR"?

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The criminal law paradigm is now, and has been from the beginning, the right one to apply to the fight against terrorism.

The decision whether to respond to the individuals who perpetrated 9/11 within a war or a criminal framework was from the first day a policy choice. If President Bush had been competently advised by the White House Counsel, Alberto Gonzales, he would have been told that there was a choice to be made and further told that either decision would subject his actions to legal restraints.

What actually happened, as far as I can see, is that Gonzales accepted Bush's assertion "we are at war"¹ as though this were a description of objective empirical reality rather than a political determination. There almost certainly was not a well thought-out decision to choose between the war and criminal paradigms,² each of which would involve benefits and burdens to the Executive Branch. Instead, Gonzales seemingly shared his boss's lay notion that "war" is shorthand for "the President can do whatever he damn pleases," and the word went forth from the White House that the government was to unleash all the forces at its command to liquidate enemies of the state.

But that edict was fundamentally incompatible with the Con-

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¹ *60 Minutes: The President's Story: The President Talks in Detail About his Sept. 11 Experience* (CBS television broadcast Sept. 10, 2003), <http://www.cbsnews.com/stories/2002/09/11/60II/main521718.shtml> (quoting President Bush's recollection of how he reacted to Chief of Staff Andrew Card's initial news of the World Trade Center attacks by saying "We're at war . . .").

² *Id.* (President Bush recalling himself thinking "I didn't need any legal briefs, I didn't need any consultations, I knew we were at war," and telling the Secretary of Defense that "we're going to find out who did this and . . . [we] are going to go get them."). After this Symposium was held, Gonzales, in a speech delivered at the Coast Guard Academy on September 6, 2007, has offered an account of the events in which "reaching a law of war framework was thoroughly-debated and fully-discussed." Prepared Remarks of Attorney General Alberto R. Gonzales at the U.S. Coast Guard Acad. (Sept. 6, 2007), http://www.usdoj.gov/ag/speeches/2007/ag_speech_070906.html. It does not seem too early to predict that history will not ultimately bear out this claim.

stitution. Whatever powers the Executive exercises, including the war power, are subject to legal restraints.³ That is precisely what is meant by a government of laws. And, therefore, when the technical people like Viet Dinh and John Yoo got involved they had the impossible task of attempting to somehow neutralize laws whose very purpose was to constrain executive powers.⁴

The result of its initial failure is that the administration has gotten neither the benefits that would have flowed from a principled application of the war model — for which this country previously had a high reputation⁵ — nor the much greater benefits that would have resulted from using the criminal justice system to deal with the individuals involved.

But now, over five years later, we have the remarkable spectacle of defenders of the administration attacking its critics for its own nonfeasance. In the words of David Rivkind and Lee Casey:

The President's critics . . . should honestly admit that their differences [with him] are, by and large, matters of policy which can and should be debated as such. The question is . . . which legal paradigm—war or law enforcement—makes most sense in meeting the threat. Those who believe that captured al Qaeda operatives should be treated as ordinary criminal defendants (rather than unlawful enemy combatants), entitled to all of the rights enjoyed by civilians in the federal and state courts . . . should acknowledge making a policy choice . . . [and] explain why they believe this to be right and just, and how they think it will checkmate al Qaeda.⁶

Well, better late than never I suppose, and I am more than happy to explain why I wrote in early 2002 that “conducting such trials before military tribunals, even if legal, would be tragically misguided public policy.”⁷ I said then, quoting Edmund Burke in discussing the American Revolution, that in determining what course to pursue, the question is not “what a lawyer tells me I *may* do; but

³ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 (2006) (explaining that President may not disregard limitations placed on his war powers).

⁴ Viet Dinh and John Yoo served as Deputy Assistant Attorney Generals in the Office of Legal Counsel of the U.S. Department of Justice from 2001–2003. For more information see ABA, Patriot Debates, <http://www.abanet.org/natsecurity/patriotdebates/bios> (last visited Oct. 1, 2007).

⁵ JOSEPH MARGULIES, *GUANTA' NAMO AND THE ABUSE OF PRESIDENTIAL POWER* 73–83 (2006).

⁶ David B. Rivkin, Jr. & Lee A. Casey, *Claims and Counterclaims*, WALL ST. J., Oct. 5, 2006, at A20.

⁷ Eric M. Freedman, *The Bush Military Tribunals: Where Have We Been? Where Are We Going?*, 17 CRIM. JUST. 14, 16 (2002).

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what humanity, reason, and justice tell me I ought to do.”⁸ So let me briefly apply those criteria to this issue.⁹

Suppose the President had said on September 12, 2001: My friends, a terrible crime has been committed on our soil. To the extent that a government sent infiltrators here, we will deal with that government by wiping it out. But to the extent that a small group of murderers thinks it can disrupt our institutions and cause us to abandon our core values, we will show the world the contrary. We will capture them wherever in the world they are. We will give them a fair trial, which we will invite Al Jazeera to broadcast, just as we did when our embassies in Africa were blown up. And we will let the world judge whose sort of government it would rather live under.

Indeed, in a criminal trial replete with due process, an excellent defense team, and protection of the government's security needs, an openly-selected jury in a public trial convicted the embassy bombers but refused to sentence them to death on the grounds that doing so would create martyrs.¹⁰ As a result, those defendants—like the Blind Sheik, the people accused of planning to bomb tunnels and bridges in New York, and those who bombed the World Trade Center in 1993¹¹ — are serving long sentences¹² and are forgotten.

John Yoo might concede this point but would likely argue that the criminal process functions to adjudicate past events, not to deal with ongoing “threats that [have] to be stopped.”¹³ First of all, that is not true, as the “bridge and tunnel” case shows. In fact, law enforcement authorities frequently act to forestall future activities. The available tools include, to take just a few examples, arresting

⁸ *Id.* (citing Edmund Burke, Second Speech on Conciliation with America (Mar. 22, 1775)).

⁹ See generally *id.* (expanding on a number of these points).

¹⁰ KIRSTEN SCHARNBERG, *Bulldog*, CHICAGO TRIBUNE, Feb. 27, 2005, (Magazine), at 10.

¹¹ Joseph P. Fried, *Sheik Sentenced to Life in Prison in Bombing Plot*, N.Y. TIMES, Jan. 18, 1996, at A1; Benjamin Weiser, *Mastermind Gets Life for Bombing of Trade Center*, N.Y. TIMES, Jan. 9, 1998, at A1; Bruce Fein, *Simply Follow the Constitution*, A.B.A. J., Sept. 2007, at 39, 40.

¹² See *United States v. Yousef*, 327 F.3d 56, 161, 164 (2d Cir. 2003) (affirming conviction, and 240-year sentence, of Ramzi Ahmed Yousef for his role in the 1993 World Trade Center plot), *cert. denied*, 540 U.S. 933 (2003); *United States v. Rahman*, 189 F.3d 88, 111 (2d Cir. 1999) (affirming sentence of life imprisonment for Sheik Omar Abdel Rahman, for his involvement in the conspiracy to kill Egyptian President Hosni Mubarak, and lesser sentences for conspiracy to bomb office buildings, tunnels, and bridges in New York City), *cert. denied*, 528 U.S. 1094 (2000).

¹³ See Adam Liptak, *Confession at Guanta' namo by 9/11 Mastermind May Aid Other Qaeda Defendants*, N.Y. TIMES, Mar. 16, 2007, at A15.

people for conspiracy, detaining them for immigration violations, and holding them as material witnesses while collecting information.¹⁴ Those are some of the reasons Janet Reno and a number of other former federal prosecutors filed a brief in the *Al Marri* case in the Fourth Circuit, saying that criminal law was perfectly adequate to deal with the present threats.¹⁵

To be sure, since an arrested defendant has the right to remain silent the government cannot require him to provide information, with or without the use of coercion. But then again, the overwhelming outcome of all criminal cases is a plea bargain—as in the John Walker Lindh case—and in a plea bargain the defendant has every incentive to voluntarily provide accurate information.¹⁶

That's just not good enough, responds James Comey, the U.S. Attorney who handled the case of Jose Padilla and later served near the top of the Justice Department. We were very sure that Padilla was bent on blowing up buildings, but—take your choice—we either “could not use the evidence because of the sources and methods that generated it,”¹⁷ or our evidence was “clear and convincing,” but maybe not “beyond reasonable doubt.”¹⁸ In short, we in the executive branch decided that we wished to be free of legal constraints limiting our power to imprison citizens and

¹⁴ This technique was used, for example, in the case of Jose Padilla. See James B. Comey, *Fighting Terrorism and Preserving Civil Liberties*, 40 U. RICH. L. REV. 403, 414 (2005–2006).

¹⁵ Brief for Former Senior Justice Department Officials as Amici Curiae Supporting Petitioners—Appellants at 9–15, *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2006) (No. 06-7427), 2006 WL 3670673 (providing numerous examples). See also Kelly Anne Moore, *Take Al Qaeda to Court*, N.Y. TIMES, Aug. 20, 2007, at A19 (op-ed by former federal prosecutor adding further examples). For an empirical social science study supporting this conclusion, see MARK S. HAMM, *TERRORISM AS CRIME* 16 (2007).

¹⁶ See Dean E. Murphy, *American Taliban Soldier Seeks Less Prison Time*, N.Y. TIMES, Sept. 29, 2004, at A6. Cf. Scott Shane & Mark Mazetti, N.Y. TIMES, May 30, 2007, at A1 (“As the Bush administration completes secret new rules governing interrogations, a group of experts advising the intelligence agencies are arguing that the harsh techniques used since the 2001 terrorist attacks are outmoded, amateurish and unreliable.”).

¹⁷ This almost surely means it was coerced, since the government routinely prosecutes criminal cases while preserving the secrecy of legitimate intelligence “sources and methods” utilizing the Classified Information Procedures Act, 18 U.S.C.A. app. 3 §§ 1–13 (2007). In a variation on this argument, Gonzales asserted in his Coast Guard Academy speech, *supra*, note 3, that because “the United States military cannot be expected to stop fighting the enemy to gather evidence like police officers in a local murder case,” it could not present a case in criminal court that would comply with normal evidentiary rules. The former Attorney General appears not to have read either *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) or F.R. Evid. 807.

¹⁸ Comey, *supra* note 14, at 414.

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therefore unilaterally declared ourselves exempt from judicial review of our decisions.¹⁹

All I can say is that Dr. Wen Ho Lee—who you will recall had “links” to China and whose dealings with the secrets of the hydrogen bomb were said to pose a risk of blowing up the planet—is lucky that he was not designated “an enemy combatant.”²⁰

Certitude is not the test of certainty. Governments are sometimes, dare I say often, mistaken. That may be through tyrannical malice or it may be through incompetence, as in the case of Brandon Mayfield who was wrongly connected to the Madrid train bombings.²¹ Or it may be through a commendable desire on the part of executive officials to err on the side of caution. Whatever explanation you like, one purpose of due process is to ensure simple accuracy.

If there might exist some shadowy international plot against the country, it is important for all concerned to get the facts straight. And, contrary to the idea that “on 9/11 everything changed,” there is nothing in the least bit new about this. To pick just a few scattered examples, there was a real Gunpowder Plot in 1605 to blow up the Houses of Parliament, but in an effort to demonstrate links to Spain many people were tortured and ulti-

¹⁹ Is this an overstatement? Consider the record. The government suddenly declared Padilla an “enemy combatant” when after holding him in custody for some time it found itself unable to produce any evidence against him. *See Padilla v. Bush*, 233 F. Supp. 2d 564, 571–73 (S.D.N.Y. 2002). While Padilla sat incommunicado in a military brig (just a few weeks before the Supreme Court was to rule on the lawfulness of his detention), Mr. Comey gave a press conference on Capital Hill accusing Padilla of involvement in an extraordinarily wide-ranging plot to detonate a “dirty bomb” in the United States and blow up a number of apartment buildings using natural gas. *See Jerry Seper, Padilla Tied to Apartment Plot; Justice Outlines Bomb Scheme*, WASH. TIMES, June 2, 2004, at A3. Eventually, the government, in a successful effort to moot a case that it was destined to lose in the Supreme Court, transferred Padilla back to the criminal justice system. *See Padilla v. Hanft*, 126 S. Ct. 1649 (2006) (mem.) (denying petition for writ of certiorari). At that point, all the spectacular allegations disappeared and he was charged with having traveled overseas from October 1993 to November 2001 “to receive violent jihad training and to fight violent jihad.” Press Release, Dep’t of Justice, Jose Padilla Charged with Conspiracy to Murder Individuals Overseas, Providing Material Support to Terrorists (Nov. 22, 2005), http://www.usdoj.gov/opa/pr/2005/November/05_crm_624.html. *See Owen Fiss, The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEG. STUD. 235, 239–40 (2006).

²⁰ *See* Matthew Purdy & James Sterngold, *The Prosecution Unravels: The Case of Wen Ho Lee*, N.Y. TIMES, Feb. 5, 2001, at A1 (noting the apology of District Judge upon the release of Wen Ho Lee).

²¹ ERIC LICHTBLAU, *U.S. Will Pay \$2 Million to Lawyer Wrongly Jailed*, N.Y. TIMES, Nov. 30, 2006, at A18. *See also* Press Release, Fed. Bureau of Investigation, Statement on Brandon Mayfield Case (May 24, 2004), <http://www.fbi.gov/pressrel/pressrel104/mayfield052404.htm>.

mately wrongly executed.²² In the so-called Haymarket Massacre of 1886, a bomb was undeniably thrown at police lines during an anarchist rally in Chicago and seven policemen died.²³ But in the atmosphere of mass hysteria against the international Bolshevik conspiracy that followed, the resulting trials led to the execution of four people whom the governor concluded a few years later were innocent and pardoned posthumously.²⁴ Similarly, in 1920, a huge bomb concealed in a wagon blew up on Wall Street, killing thirty-three ordinary passers-by.²⁵ A note was left at the scene by anarchists (and it was an anarchist who had assassinated President McKinley in 1901),²⁶ leading the Washington Post to call the event “an act of war,” supported no doubt by Italy.²⁷ Amid the resulting hysterical “Red Scare” and surrounding mass deportations the criminal trials received by those anarchists that the authorities managed to capture are ones whose outcomes are still seriously questioned.²⁸ Nor do we need to look deep into the past to know that even when due process protections do apply, the legal system is fallible: there have been 124 exonerations of Death Row inmates since 1973.²⁹

The fact that our system is designed to limit the power of executive officials is not a bug; it is a product feature. The difference between a government that acts on what it “knows” and a government that is required to prove its charges in adversarial proceedings before a neutral tribunal is the difference between a government of laws and a police state. And lawyers who fight to enforce this difference are not engaged in “lawfare” but in promoting the precise values for which the United States armed forces

²² ANTONIA FRASER, *THE GUNPOWDER PLOT: TERROR AND FAITH IN 1605* (1996). See also *A v. Secretary of State for the Home Department* (2005) UKHL 71 (appeal taken from Eng.) (speech of Lord Hope of Craighead, ¶ 103).

²³ Chicago Public Library, 1886, May 4: The Haymarket Tragedy (1996), <http://www.chipublib.org/004chicago/disasters/haymarket.html>.

²⁴ *Id.*

²⁵ Beverly Gage, *The First Wall Street Bomb*, Hist. News Serv., Sept. 17, 2001, <http://www.h-net.org/~hns/articles/2001/091701a.html>; see also Daniel Gross, *Previous Terror on Wall Street—A Look at a 1920 Bombing*, THESTREET.COM, Sept. 20, 2001, <http://www.thestreet.com/comment/ballotdance/10001305.html>.

²⁶ See Leroy Parker, *The Trial of the Anarchist Murderer Czolgos*, 11 YALE L. J. 80 (1901); Sidney Fine, *Anarchism and the Assassination of McKinley*, 60 Am. Hist. Rev. 777 (1955); Lona Manning, *9/16: Terrorists Bomb Wall Street*, <http://crimemagazine.com/06/wallstreetbomb,0115-6.htm>.

²⁷ Gage, *supra* note 25.

²⁸ CHOICES, *WORLD ALMANAC VIDEO, LANDMARK AMERICAN TRIALS* (1999), <https://www.choices.webaplus.net/guidebooks/WAV/SaccoVanzetti.pdf>; James Barron, *After 1920 Blast, The Opposite of ‘Never Forget,’* N.Y. TIMES, Sept. 17, 2003, at B1.

²⁹ Death Penalty Info. Ctr., *Innocence and the Death Penalty*, <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6> (last visited Sept. 30, 2007).

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should be fighting when they go to war in the name of the American people. To sue the government is not to wage war against it by other means, but rather to channel what otherwise might be violent resistance into a form of opposition which legitimates that very government.³⁰

Does constraining Executive action involve risks? Of course it does. But so does allowing the Nazis to march in Skokie. If the Nazis ever gained office they would abolish free speech. But we take that risk consciously.³¹ In a land of free speech Nazis are much less likely to come to power.³² Conversely, to allow the government to suppress them in order to guard against that risk is both to sacrifice the vibrancy of discussion on which we stake our hopes of a better future and to hand our enemies a pre-emptive victory by becoming like them in order to defeat them.³³

As he was leaving office in December 2006, Donald Rumsfeld said,

I don't think I would have called it the 'war on terror.' . . . I've worked to reduce the extent to which that [label] is used and increased the extent to which we understand it more as a . . . conflict . . . against a relatively small number of terribly dangerous and violent extremists.³⁴

That's the correct definition of the problem.

And perhaps when David Rivkind understands it, he will also understand the appropriate solution. But he has not gotten the

³⁰ See generally Scott Horton, *State of Exception: Bush's War on the Rule of Law*, HARPER'S MAG., July 2007, at 74, 75 (explaining that "the lawfare doctrine is the conceptual framework that best reveals the degree to which the Bush administration has effectively declared war on the rule of law itself.").

³¹ See *Gitlow v. New York*, 268 U.S. 652, 672-73 (1925) (Holmes & Brandeis, JJ., dissenting) ("If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.").

³² See *Dennis v. United States*, 341 U.S. 494, 588 (1951) (Douglas, J., dissenting) ("Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party.").

³³ See *People v. Huss*, 241 Cal. App. 2d 361, 368 (1966) ("Speech is free under the First Amendment, not so much because free speech is inherently good as because its suppression is inherently bad."); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (Vintage Books ed. 1971); Eric M. Freedman, *A Rational Constitutional Faith: Remarks in Response to Professor Amsterdam*, 33 HOFSTRA L. REV. 417, 418-20 (2004-2005); Eric M. Freedman, *The People of the State of New York v. Jesse A. Stump: Dissenting Opinion*, in *GROUP DEFAMATION AND FREEDOM OF SPEECH: THE RELATIONSHIP BETWEEN LANGUAGE AND VIOLENCE* 331 (Monroe H. Freedman & Eric M. Freedman eds., 1995). See also *A v. Secretary of State for Home Department* [2004] UKHL 56 (appeal taken from Eng.) (speech of Lord Hoffmann, ¶¶ 91, 95-96).

³⁴ Cal Thomas, *For Rumsfeld, 'War on Terror' Is Misleading Label*, CHI. TRIB., Dec. 12, 2006, at 23.

message yet. He says, “The only people who don’t think we’re at war are the critics. We think we’re at war and they [the terrorists] think we’re at war.”³⁵ In other words, if Osama bin Laden (or, I suppose a right-wing militia like the one that spawned Timothy McVeigh and the Oklahoma City bombings) declares “war” on the United States, we should take the bait and play into his hands by abandoning precisely our greatest strength.

That strength is not our military strength. Secretary Rumsfeld ultimately figured out that the United States armed forces simply cannot occupy every inch of the globe. In fact, at this moment those forces are stretched perilously thin.³⁶ The policy of waging a “war on terror,” meaning the use of the military to incapacitate anyone whose activities strike the administration as contrary to the national interest,³⁷ is a prescription for bankruptcy on multiple levels.

To defeat ideologies opposed to ours we will have to win the hearts and minds of people around the world.³⁸ That requires demonstrating in deed adherence to our professed ideals. The Executive’s insistence on arrogating unlimited power has squandered what is in fact America’s greatest strength: the moral force that comes from being an example to the world, a country that others justifiably want to emulate, one confident enough in its own values that its President wears his amenability to the rule of law “as a re-

³⁵ Liptak, *supra* note 14, at A15.

³⁶ David S. Cloud, *Army Brigade, Long a Symbol of Readiness, Is Stretched Thin*, N.Y. TIMES, Mar. 20, 2007, at A1.

For decades, the Army has kept a brigade of the 82nd Airborne Division on round-the-clock alert, poised to respond to a crisis anywhere in 18 to 72 hours.

Today, the so-called ready brigade is no longer so ready. Its soldiers are not fully trained, much of its equipment is elsewhere, and for the past two weeks the unit has been far from the cargo aircraft it would need in an emergency.

Id.

See also, Samantha Power, *Our War on Terror*, N.Y. TIMES BOOK REV., July 29, 2007, at 1, 8.

³⁷ Readers who think this description a caricature might consult *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475–77 (D.D.C. 2005). See Jules Lobel, *The Preventive Paradigm and the Perils of Ad Hoc Balancing*, 91 Minn. L. Rev. 1407, 1421–22 (2007).

³⁸ Cf. David Rieff, *Policing Terrorism*, N.Y. TIMES MAG., July 22, 2007, at 14 (suggesting that British Prime Minister Gordon Brown has adopted “the terror-as-crime view” after concluding “that preventing terrorism requires winning the hearts and minds of actual human beings” and “that the war model has only fueled rage and resentment within precisely those communities whose support is most essential—the Muslim diasporas outside the Islamic world”).

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publican crown”³⁹ rather than casting it aside in times of stress.

Today, a young person in an authoritarian nation who were asked to compare the behavior of her government in addressing perceived security threats with that of ours might well answer—accurately and tragically—that there is not much difference.⁴⁰ That is by far the greatest long-term damage that has been done to the interests of the United States by the terrorism policies of the current administration.⁴¹

The strongest blow that could be struck against ideologies opposed to ours would be the recovery of our commitment to the rule of law. “[T]he preservation of . . . [its] safeguards is a powerful weapon against our enemies and an inspiration to our friends.”⁴²

The right way, as well as the genuinely American way, to deal with “a relatively small number of terribly dangerous and violent extremists”⁴³ is to prosecute them.

³⁹ See Eric M. Freedman, *On Protecting Accountability*, 27 HOFSTRA L. REV. 677, 705 (1999).

⁴⁰ See Freedman, *supra* note 7, at 16.

If we are indeed at war, what values are we fighting for? Are we now announcing that when the chips are really down due process is simply an unaffordable luxury that unacceptably retards reaching a predetermined result? In that case, why should an ordinary citizen of an Arab country whose government takes the same view believe that its justice system is any worse than ours? To abandon our core values in times of stress is to confess that we lack confidence in them.

Id.

⁴¹ See Zbigniew Brzezinski, *Terrorized by 'War on Terror': How a Three-Word Mantra Has Undermined America*, WASH. POST, Mar. 25, 2007, at B01; Wesley K. Clark & Kal Raustiala, *Why Terrorists Aren't Soldiers*, N.Y. TIMES, Aug. 8, 2007, at A19.

⁴² Freedman, *supra* note 7, at 19–20.

⁴³ Thomas, *supra* note 34.

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