

Oklahoma City University School of Law

---

From the Selected Works of Marc J. Blitz

---

2008

# The New and Future Law of Counterterrorism and the Historical Lessons That Support It

Marc J. Blitz, *Oklahoma City University*



Available at: [https://works.bepress.com/marc\\_jonathan\\_blitz/11/](https://works.bepress.com/marc_jonathan_blitz/11/)

---

# OKLAHOMA CITY UNIVERSITY LAW REVIEW

---

VOLUME 33

SUMMER 2008

NUMBER 2

---

## SYMPOSIUM

### THE NEW AND FUTURE LAW OF COUNTERTERRORISM AND THE HISTORICAL LESSONS THAT SUPPORT IT

Marc Jonathan Blitz\*

This issue of the *Oklahoma City University Law Review* has its origins in a symposium held on April 20, 2007. The time and place of the symposium had great significance in the history of America's encounter with modern terrorism: it took place one day after the twelfth anniversary of the bombing of the Alfred P. Murrah federal building in Oklahoma City in 1995, a terrorist attack that killed 168 people and left over 800 people injured.<sup>1</sup> Apart from the September 11 attacks carried out six years later, this was the most devastating terrorist attack to occur on American soil.<sup>2</sup> The library room and conference center where the symposium took place—The Lawson Terrorism Information Center—overlooks the site where the bombing occurred. It is an integral part of the Memorial Institute for the Prevention of Terrorism (“MIPT”), a research and terrorism-prevention training center that was founded in 2000 to honor the survivors of the bombing, the families of the victims of

---

\* Associate Professor, Oklahoma City University School of Law.

1. David C. Teague, *Mass Casualties in the Oklahoma City Bombing*, 422 *CLINICAL ORTHOPAEDICS & RELATED RES.* 77, 77 (2004).

2. *Id.*

the bombing, and the memory of those who perished in it.<sup>3</sup>

As MIPT's mission statement emphasizes, it honors victims of previous acts of terrorism by contributing to America's determined efforts to prepare for and thwart future attacks, and by "Countering Terrorism with Knowledge."<sup>4</sup> Our symposium was a part of this larger, on-going effort. Alongside the valuable work that MIPT does every day to help educate first responders and terrorist policy experts and provide data for researchers and scholars, we aimed to provide a setting and impetus for discussion and scholarship on the important and challenging legal questions that arise concerning how the United States must counter terrorism. How can the United States reconcile its twenty-first century battle against terrorism with centuries-old principles of constitutional government? How, for example, can it assure the security of its borders without destroying the openness in travel and trade essential to modern society? How can it respect the rule of law in detaining and trying suspected terrorists without compromising the confidentiality needed to protect ongoing intelligence investigations? What form must counterterrorism measures take to be consistent with both American's constitutional commitments and with its duties under the laws of war and other relevant international law?

These questions have been important ones over the past eight years, and were part of the key legislative challenges confronting Congress, which at the time of the symposium had recently been passed to control of the Democratic party for the first time in a over a decade and had, shortly before that, suddenly taken on a much more visible role in counterterrorism policy by passing the Military Commissions Act of 2006.<sup>5</sup> Now, of course, many are expecting even more substantial changes in America's answers to key questions about counterterrorism law. When President Barack Obama takes the oath of office on January 20, 2009, the United States will mark the first change in administration since the September 11 attacks. There is little doubt that the Obama administration will bring a new approach to the challenge of fighting terrorism and creating a legal framework for this battle.

But it will not be drawing on a blank slate. It will have to carefully

---

3. See Memorial Institute for the Prevention of Terrorism, About MIPT, <http://www.mipt.org/terrorism/About-MIPT.asp> (last visited Dec. 30, 2008).

4. *Id.*

5. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, 42 U.S.C.).

consider what worked and what did not work in previous efforts to protect the United States against terrorism, and in detaining, trying, and punishing terrorists. To this end, policy makers and scholars interested in rethinking America's counterterrorism laws and policies would do well to attend scholarship like that in this symposium volume. Each article, in its own way, provides a systematic and illuminating account of a lesson or lessons that those who are struggling with today's counterterrorism issues can learn from earlier challenges—historical challenges encountered and addressed not only by past judges and attorneys, but also by constitution-makers and statesmen, generals and soldiers, and agencies and scientific experts. This, at least, seems to me to be the most prominent and important common theme running through each of these superb articles. They each show that, while our twenty-first-century battle against terrorism undoubtedly requires innovative tools and strategies to meet emerging threats, some of the most important principles, tools, or institutional arrangements we need to protect our national security are not that new at all. Rather, they are adapted or refurbished versions of principles, tools, or institutions that are already a familiar part of our legal system, our institutional life, and our history.

Consider the Keynote Speech for the symposium—the Honorable John Richter's illuminating first-hand account of how the U.S. Department of Justice worked swiftly to adapt to the new manifestations of the terrorist threat after 2001.<sup>6</sup> Mr. Richter is intimately familiar with this transformation, because he headed the Department of Justice's Criminal Division, which includes its Divisions of Counterterrorism and Counterespionage. As he points out, new investigative tools made possible by the USA PATRIOT Act<sup>7</sup> were an essential part of the measures that the government took to meet—and allow federal prosecutors to meet—the newest incarnation of terrorist threats. But his analysis also makes clear that while some of the resources Americans have relied upon are new—others go further back. The repertoire of tools made available to prosecutors for fighting terrorism includes “long-established investigative techniques” such as “roving surveillance, pen registers, requests for production of business records, and delayed-notice

---

6. See John C. Richter, *Counter-Terrorism: A Federal Prosecutor's View*, 33 OKLA. CITY U. L. REV. 297 (2008).

7. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S.C.).

search warrants.”<sup>8</sup> Indeed, some of legal sources that inform and inspire the current struggle against terrorism go back even further. As Richter observes, America’s experience with battling violent fanaticism goes back to the first years of the American Republic and its confrontations with the Barbary Pirates.<sup>9</sup> “Just as during the time of the Barbary Pirates,” he writes, “the present-day conflict is not based fundamentally on territory, but in large part on differences in ideals—‘on freedom versus fear, on tolerance versus tyranny.’”<sup>10</sup> Our struggle against terrorism therefore requires not only reliance on effective technologies and strategies, but also our use of them to further a commitment to freedom and the rule of law, which go back to the beginning of America’s political history and are woven into its core legal institutions.

Christopher J. Borgen’s article likewise emphasizes the importance of taking stock of the value of, and adapting to, legal sources that in many cases pre-date the twenty-first-century struggle against terrorism.<sup>11</sup> Drawing on network theory, he argues that we need to meet terrorist groups’ organizational innovation with our own, and that one of the most important ways to do so is not only to draw upon new technologies for sharing intelligence information, but also to take advantage of channels of transnational cooperation and instruments of international law that came into existence long before the September 11 attacks. Since terrorists have a diffuse web-like organization of networks wherein different members of a terrorist enterprise are scattered across different countries,<sup>12</sup> traditional methods of warfare and crime fighting quickly seem inadequate. We cannot hit such a diffuse network with a focused bombing campaign;<sup>13</sup> nor can we roll it up with a single targeted investigation and sting operation.<sup>14</sup> Rather, we need a counter network that will—like the threat it is fighting—necessarily be transnational in character. One of the crucial pieces of this effort, writes Borgen, is “[t]he network of domestic and international laws” that aims to thwart

---

8. Richter, *supra* note 6, at 316 (footnotes omitted).

9. *Id.* at 298-300.

10. *Id.* at 299-300 (quoting Robert S. Mueller, III, Dir., Fed. Bureau of Investigation, Address at National Defense University (Mar. 28, 2007), [www.fbi.gov/pressrel/speeches/mueller032807.htm](http://www.fbi.gov/pressrel/speeches/mueller032807.htm)).

11. See Christopher J. Borgen, *A Tale of Two Networks: Terrorism, Transnational Law, and Network Theory*, 33 OKLA. CITY U. L. REV. 409 (2008).

12. See *id.* at 410-18.

13. *Id.* at 418-20.

14. See *id.* at 419.

terrorism and preserve civil liberties as it does so.<sup>15</sup>

Robert L. Strayer's article likewise urges Homeland Security officials engaged in rulemaking to take stock of administrative-law methods and strategies used by agencies and discussed by administrative-law scholars since long before 2001.<sup>16</sup> More specifically, he argues, Department of Homeland Security ("DHS") rulemakings should make more careful and rigorous use of the cost-benefit analysis that has, in one form or another, been an important part of agency rulemaking since the Reagan Administration.<sup>17</sup> This, he argues, will not only help lead to more sensible Homeland Security decisions, but also to decisions that are more transparent and democratic, since the public will be better able to understand DHS's basis for arriving at the rules it ultimately selects.<sup>18</sup> Strayer acknowledges and analyzes some of the difficulties of applying a cost-benefit analysis to counterterrorism regulations.<sup>19</sup> But he argues—drawing on past administrative-law scholarship—that DHS can and should try to adhere to disciplined assessments of how the costs and benefits of one security measures compare to those of possible alternatives. He illustrates how such rigorous comparisons could have led, and might still lead, to better, more democratic rulemaking, and more effective security protection concerning issues such as container and cargo screening at ports, and ID requirements at airports and border crossings.<sup>20</sup>

Lessons from the past, writes Geoffrey S. Corn in his article, were also at the core of the change that the Supreme Court hoped to provide to the Bush administration's military commissions structure in its decision (and plurality opinion) in *Hamdan v. Rumsfeld*.<sup>21</sup> In fact, says Corn, these lessons drew on long-established features of the laws of war—both international and domestic. One of the great insights of the *Hamdan* decision, says Corn, was that America should not lightly discard the "broad policy-based application of the laws of war" to all participants in

---

15. *Id.* at 424.

16. See Robert Strayer, *Making the Development of Homeland Security Regulations More Democratic*, 33 OKLA. CITY U. L. REV. 331 (2008).

17. See *id.* at 334.

18. *Id.* at 343.

19. *Id.* at 345-46.

20. *Id.* at 346-59.

21. Geoffrey S. Corn, *Viewing Hamdan Through a Military Lens*, 33 OKLA. CITY U. L. REV. 377 (2008). For the decision, see *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), *superceded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *as stated in* *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

the conflict that were “the legal foundation for U.S. forces for almost three decades following the Vietnam War.”<sup>22</sup> As Corn observes, “the unconventional nature of military operations” in Vietnam forced the U.S. military and government to confront difficult questions about applying the laws of war long before the current War on Terrorism.<sup>23</sup> During that conflict, and in subsequent atypical uses of military personnel over the past thirty years—such as peacekeeping operations—the United States found that there were great benefits (and logic) in applying the laws of war “en toto,” including protections for detainees.<sup>24</sup> The *Hamdan* decision, Corn adds, also emphasized an important message about constitutional politics: “in the realm of military affairs, the nation is strongest when the political branches of government operate in unison,”<sup>25</sup> and not when the executive seeks to fashion a method for trying and detaining alleged enemy combatants without the meaningful participation of Congress.

Emily Garcia Uhrig’s article emphasizes that it is not simply the role of the executive and legislative departments that require adequate attention in counterterrorism law, but also the role of the judiciary.<sup>26</sup> The Constitution, she argues, gives the judiciary an indispensable role in reviewing Writs of Habeas Corpus filed by those detained as terrorists. She carefully reviews and clearly explains each step in the sequence of events that culminated in the Supreme Court’s 2008 decision, *Boumediene v. Bush*,<sup>27</sup> which affirmed this judicial role in habeas review by striking down Congress’s attempt, in the Military Commissions Act, to strip federal courts of jurisdiction to hear habeas claims by alien terrorism suspects detained in Guantanamo.<sup>28</sup> She shows how the Court drew upon and interpreted the history of the writ in England, the constitutional debates between the Framers’, and key judicial precedents on the “extraterritorial reach of habeas corpus.”<sup>29</sup> These cases included the *Insular Cases*<sup>30</sup> (on “the application of the Constitution to

---

22. *Id.* at 380 (citing U.S. DEP’T OF DEF., DIR. 5100.77, DoD LAW OF WAR PROGRAM (10 July 1979)).

23. *Id.* at 379.

24. *Id.* at 380.

25. *Id.* at 384.

26. See Emily Garcia Uhrig, *Boumediene v. Bush, The Great Writ, and the Power to Say What the Law Is*, 33 OKLA. CITY U. L. REV. 389 (2008).

27. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

28. See generally Uhrig, *supra* note 26.

29. *Id.* at 402. See also *id.* at 399-407.

30. See, e.g., *Downes v. Bidwell*, 182 U.S. 244 (1901).

noncontiguous U.S. territories, specifically, Puerto Rico, Guam, the Philippines, and Hawaii”<sup>31</sup> and the 1950 case of *Johnson v. Eisentrager*,<sup>32</sup> in which the Court found it had no jurisdiction to hear the claims of German war prisoners captured in World War II (and held by the allies in Landsberg prison in German territory).<sup>33</sup> Ultimately, writes Uhrig, the central principle in the *Boumediene* decision, which affirmed the petitioner’s right to a habeas hearing, was hardly new or unique to *Boumediene*. Rather, *Boumediene* reaffirmed a separation-of-powers principle recognized by the Framers: checks and balances play a “critical role . . . in defining the constitutional structure of our government,” and “[i]t is neither the executive’s nor the legislature’s prerogative to exempt itself from that structure.”<sup>34</sup>

Glenn Sulmasy focuses his article on analyzing the tribunal procedures of the Military Commissions Act, the extensive precedent for those procedures he finds in American constitutional history, and the sources of British law that were central to the Framers’ thinking on military power.<sup>35</sup> He argues that many critics of the Military Commissions Act and the Bush Administration’s policies have neglected or misunderstood this historical context. When one attends to this context, he has said, it becomes apparent that the strictures of the Military Commissions Act “provide more due process and more judicial involvement in the various aspects of the war-on-terror related policies than is required by either the U.S. Constitution or American international law obligations.”<sup>36</sup> He systematically analyzes both the Founders’ original understanding of how military power was to be exercised and how military justice was to be dispensed under the American constitutional system. This understanding drew heavily on the British model, and on influential political thinkers such as Locke, Montesquieu, and Blackstone. He advises, when the incoming Obama administration seeks a new approach to trying terrorists, it would do well not to return to the pre-2001 model of trying all terrorism suspects in civilian courts. He

---

31. Uhrig, *supra* note 26, at 402.

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

33. *Id.* at 790-91.

34. Uhrig, *supra* note 26, at 407.

35. Glenn Sulmasy, *Military Commissions Act of 2006*, 33 OKLA. CITY U. L. REV. 361 (2008).

36. DAVID B. RIVKIN, JR., LEE A. CASEY, ANDREW C. MCCARTHY & GLENN M. SULMASY, *MILITARY COMMISSIONS ACT OF 2006: STRIKING THE RIGHT BALANCE 4* (2006), [http://www.fed-soc.org/doclib/20070326\\_MCA2006StrikingtheRightBalance.pdf](http://www.fed-soc.org/doclib/20070326_MCA2006StrikingtheRightBalance.pdf).

argues that the new administration should instead establish new homeland-security courts of a kind that he had previously proposed in a 2006 article.<sup>37</sup> (This has also been endorsed by other legal scholars, lawyers, and policy makers such as Amos Guiora,<sup>38</sup> Kenneth Anderson,<sup>39</sup> Benjamin Wittes,<sup>40</sup> Jack Goldsmith,<sup>41</sup> Neal Katyal,<sup>42</sup> Andrew McCarthy,<sup>43</sup> and Ali Velshi,<sup>44</sup> and is one of the options discussed in analyses of the post-Guantanamo regime for trying suspected terrorists.)<sup>45</sup>

Whether new national-security courts (or other innovations in American national-security law) will form a part of President Obama's approach to the battle against terrorism is something we will know more about in the coming months and years. What the articles in this issue make clear, however, is that although thwarting new forms of terrorism will require new strategies and novel technologies, as well as changes to criminal law and other statutes, this endeavor will also require careful attention to legal sources and lessons that pre-date the September 11 attacks. We are deeply grateful to each of the contributors to this symposium issue for contributing their insightful analyses, both in this volume and in their presentations at the symposium itself. We are likewise grateful to the other national-security scholars who spoke at the

---

37. Sulmasy, *supra* note 35, at 375; Glenn M. Sulmasy, *The Legal Landscape after Hamdan: The Creation of Homeland Security Courts*, 13 NEW ENG. J. INT'L & COMP. L. 1 (2006).

38. Amos N. Guiora & John T. Parry, *Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists*, 156 U. PA. L. REV. PENNUMBRA 356 (2008); Amos N. Guiora & Daniel C. Barr, *Where Should the U.S. Try Terrorism Cases? Domestic Terror Courts U.S. Should Establish Domestic Terror Courts to Try Cases*, SALT LAKE TRIB., June 20, 2008.

39. See Kenneth Anderson, *Law and Terror*, POL'Y REV., Oct.-Nov. 2006, at 3, 4.

40. See BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* (2008).

41. See Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at 19; Jack Goldsmith, *The Laws in Wartime: Boost Trust, Close Guantanamo, and Establish a National-Security Court*, SLATE, Apr. 2, 2008, <http://www.slate.com/id/2187870/>.

42. See Goldsmith & Katyal, *supra* note 41.

43. See Andrew McCarthy & Alykhan Velshi, *We Need a National Security Court* (July 16, 2007) (unpublished manuscript, on file with the Foundation for Defense of Democracies).

44. See *id.*

45. See, e.g., Kelli Arena, *Obama Team Ponders What To Do With Guantanamo Inmates*, CNN.COM, Nov. 10, 2008, <http://www.cnn.com/2008/POLITICS/11/10/obama.transition.guantanamo/index.html>; Peter Finn, *Guantanamo Closure Called Obama Priority*, WASH. POST, Nov. 12, 2008, at A01.

2008] *New and Future Law of Counterterrorism* **295**

symposium—Alison Danner, Gregory S. McNeal, Trevor Morrison, Peter Swire, Robert Turner. The symposium also could not have succeeded without the invaluable support and advice we received from M. Joe Crosthwait—a past President of the Oklahoma Bar Association and current Advisory Committee member of the ABA Standing Committee on Law and National Security Law. We are also grateful, of course, to the MIPT whose support for the symposium and numerous other events dedicated to expanding and improving upon our knowledge of counterterrorism is of tremendous help to scholars, experts, and government officials working to protect the United States from modern terrorism. I and the law-school faculty are also thankful for the diligent work of two Editors-in-Chief at the Law Review, Michael Matthews and Scott David Smith, and the work of their team of law-review editors in preparing these articles for publication.