The 2004 Paul Miller Distinguished Lecture: The Rule of Law in an Age of Terror

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I want to thank Paul Miller and Rutgers Law School for giving me this opportunity to offer my perspective on the war on terrorism. In some ways, it's an unusual perspective, in that I experienced the attacks both as they occurred, as Attorney General of New Jersey in the months after 9/11, and also in retrospect, as Senior Counsel to the 9/11 Commission, studying the attacks and the national response to them. I want to try to reconcile those two aspects of my experience tonight by thinking through the sense that overwhelmed me on 9/11 and that grew during my tenure with the 9/11 Commission: the sense that the ground had shifted beneath my feet, the sense that we are living, in the post-9/11 era, in a new legal world.

I.

Ours is not, of course, the first generation of Americans to go to war, and this is not the first administration to believe that the "felt necessities of the time," in Justice Holmes' phrase, require an adjustment of the balance between liberty and security. But the record of those adjustments—and, more particularly, of the courts' treatment of them—has not been a model of jurisprudence.

In last year's Miller Lecture, Secretary of Homeland Security

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Michael Chertoff, who was Assistant Attorney General in charge of the Justice Department's Criminal Division on 9/11, outlined the history of aggressive government responses to wartime and other crises, from the War of 1812 through the Civil War, World Wars I and II to the present. He noted that the case law deciding the constitutionality of executive branch emergency actions—the suspension of habeas corpus during the Civil War, for instance, or the internment of Japanese civilians during World War II—seemed to turn not on the principles of law involved but on the timing of the litigation challenging government conduct. Secretary Chertoff concluded: "Here, as elsewhere, timing is everything. Judicial forbearance is... at its maximum in confronting short-term action in the wake of extraordinary threat. With the passage of time and the extension of duration, deference naturally... wanes."

This observation—that decisions invalidating aggressive executive actions have tended to be issued when the emergency is over, while decisions issued during the crisis have tended to defer to executive authority—was also central to Chief Justice William Rehnquist's pre-9/11 book All the Laws But One. The Chief Justice concluded: "[I]f the decision is made after hostilities have ceased, it is more likely to favor civil liberty than if made while hostilities continue." Defending the pragmatism prevalent in the case law, the Chief Justice concluded: "It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime."

Within days of the 9/11 attacks, Attorney General John Ashcroft announced a "paradigm-shift" in the mission of his department in general—and the FBI in particular—away from traditional prosecution, in which law enforcement typically investigates criminal conduct that has already occurred and prosecutes it, and toward deterrence and interdiction, in which law enforcement seeks to prevent the criminal conduct from occurring in the first instance. This announcement was followed by the passage of the USA Patriot Act, which expanded the investigatory powers of the federal government, by the aggressive use of immigration laws and material

3. *Id.* at 1291.
4. *Id.* at 1303.
5. *Id.*
7. See *id.* at 224.
8. See *id.* at 224-25.
witness statutes to detain people, and by the designation of certain people as "enemy combatants" afforded no rights under the United States Constitution or the Geneva Conventions. These measures, embodying this "paradigm-shift," are now under challenge in the courts.

As an historical truth, the practice of courts to defer to executive action during wartime is undeniable. If we are facing today a new type of war, however, a war that is transnational and unlikely to end, the continuation of that historical tendency would be unacceptable for two reasons. First, if the crisis were deemed to be unending, judicial deference would erode the rule of law by accepting a curtailment of civil liberties with no prospect of their restoration. On the other hand, if the nonoccurrence of further domestic attacks were to lead courts to a false sense that the crisis were at an end, judicial intervention could jeopardize national security.

The threshold question that must be given a searching answer, then, is whether and to what extent this widespread sense that everything changed with 9/11 is accurate. Does the war on terrorism justify what's been called a paradigm-shift in law enforcement and the rule of law? If so, the next question is what ramifications that new reality should have for the role of courts and the rule of law.

So-called "paradigm-shifts" are nothing new to law or, for that matter, to the purest intellectual pursuits. My familiarity with the term dates to college at Georgetown, when in Physics class we read Thomas Kuhn's *The Structure of Scientific Revolutions*. I recall being fascinated by the attempts of medieval astronomers to cling to the old Ptolemaic, geocentric model of the solar system. As the quality of the data regarding planetary orbits improved, the mathematics required to make the geocentric model work became more and more baroque, with epicycles added to orbits, until finally the solar system resembled a Rube Goldberg device. The Copernican model—with the planets orbiting the sun in ellipses—explained the same data in a more elegant and accurate way. The earth-centered paradigm shifted to a new, sun-centered paradigm.

Evolution in the law can be said to proceed along a similar path. Justice Holmes's observation has become almost axiomatic: "The life of the law has not been logic; it has been experience." In reality, however, this is not quite accurate: the life of the law can be found in the interplay of logic with experience. As circumstances change, principles of law evolve to accommodate new experiences. Eventually, however, the felt necessities of the time may so overwhelm legal principle that the principle itself must be

11. HOLMES, supra note 1, at 1-2 (1881).
reformulated, or the experience forced to fit within its reach. Thus insurance, the practice of mitigating risk by allocating loss, was originally proscribed as a form of wagering because people were taking out “life insurance” policies on their neighbors, and then killing them. But when the technology developed to allow world exploration and commerce, experience dictated that contracts to mitigate risk be allowed, and the courts discovered the logic necessary to justify them.

Is such a shift required by the war on terror? I want to test the argument in two ways.

First, based on my experience as Attorney General and then with the 9/11 Commission, I will examine why so many throughout government believe that the existing structures of government and law have to be re-thought and transformed after 9/11.

Second, I will look at the cases in which the new paradigm for fighting the war on terror has met its sternest test to date: the government’s decision to treat certain detainees not within the criminal law, and not within established military law, but as so-called “enemy combatants.”

I conclude by identifying and discussing what I consider to be the most important paradigm-shift that must occur if we are to survive the war on terror.

II.

The intersection of civil liberties and the age of terrorism occurred for me on September 11 itself. I began the day in Atlantic City, where I anticipated hosting the second day of a two-day conference on police-community relations. This was to be the foundation, I believed, of a new relationship that—ultimately more than training and rules—would eliminate the issue and practice of racial profiling by transforming the culture of mistrust that existed between law enforcement and minority communities.

I had been fighting a rear-guard action all summer against forces in the legislature which were advocating outlawing consent searches—in which a police officer lacks probable cause but conducts a search after gaining consent—because the practice had been abused, admittedly, in the past. In arguing against such a ban, the example I had cited in testimony before the Senate Judiciary Committee and in opinion pieces and speeches was United States v. Kikumura, a case from the late 1980s in which a Japanese terrorist on his way into Manhattan with explosives was stopped by a New Jersey State Trooper. A consent search disclosed the existence of

12. 918 F.2d 1084 (3d Cir. 1990).
13. Id. at 1090.
By September 11, the calls for elimination of this practice were subsiding. A consent decree with the Justice Department, designed to eliminate the practice of racial profiling, was in place and operating. The crime rate was at a level not seen since the 1960s. The conference in Atlantic City was the first forum in which law enforcement and minority community leaders actually sat face to face speaking candidly about the levels of mistrust on both sides that had escalated over the years to tragedy. The conversation had been blunt and, I believed, extremely productive. So I was optimistic as I walked over to the convention center that morning.

Fast-forward eighteen hours.

My day ended, for all intents and purposes, in the early morning hours of September 12, banking high in a state police helicopter over the burning rubble of what had been the World Trade Center. That rubble contained the bodies of untold dead and injured; one estimate we heard that day put the number at 10,000. Disturbingly few injured had arrived at the makeshift trauma center we set up in Liberty State Park. Hundreds of ambulances from around New Jersey sat idling in the park, waiting for injured who weren’t coming. We had reports of commuter parking lots from Princeton to Westfield to Rumson jammed with unclaimed cars. Atlantic City, and the events of just that morning, had left my mind completely.

I went out on our deck at three o’clock that morning and faced east. For the first time that day I noticed what so many others had observed earlier: the stark contrast between the beauty of nature, the star-filled sky, and the violence of human events. I saw the glow from lower Manhattan reflected in the clouds of smoke from ground zero, drifting toward where the constellation Orion rose in the southeast. For the first time since that morning, I thought of how bright that day and the future had seemed; my optimism now seemed like pure hubris. Far from feeling that I understood law enforcement’s problems and could manage them, my mind swirled with unanswered questions:

We didn’t know who had done it, although Usama Bin Laden and Al-Qaeda had emerged as strong suspects.

There were reports of Muslims dancing on the rooftops of mosques in Jersey City and Paterson; we did not yet know that they were false.

Social order seemed to be dissolving; incidents of bias attacks against people who looked Middle Eastern were being reported from every part of the state and nation.

14. *Id.*
There were unconfirmed reports of terrorists wearing explosive backpacks in Brooklyn and Queens.

There were unconfirmed reports of suspicious activity near our tunnels and nuclear installations.

We knew from the attacks on the Trade Center and Pentagon and the failed attempt on the Capitol or White House that whoever did this meant to destroy us and had planned carefully; we didn't know whether there was a "second phase"—and I can tell you that there are many in the law enforcement/intelligence community to this day who believe that there was more planned, but that the potential perpetrators were rounded up unknowingly by the government in the weeks and months after 9/11.

Two events of that first thirty-six hours brought home for me the new tension between liberty and security, this feeling that our paradigm of criminal law was shifting with the felt necessities of our time.

First, federal law enforcement requested state police assistance in searching the garbage at Newark Airport hotels where it was believed the hijackers may have stayed. While at first blush an easy call, my decision to allow the warrantless search was complicated by State v. Hempele,15 a New Jersey Supreme Court case holding that people have a reasonable expectation of privacy in the contents of their garbage.16 I'd like to be able to tell you that I agonized over this proposed curtailment of the right to privacy; in reality, I hardly hesitated. After a few moments of reflection, I made the judgment that mechanical application of the Hempele decision would be inappropriate to the felt necessities of 9/11. The expectation of privacy in garbage is less reasonable, I concluded, when the garbage is deposited in an airport hotel room the morning of a terrorist attack. The search proceeded, and yielded extremely probative evidence.

Second, because of the rising tide of vigilante activity and the widespread reports of Muslim celebrating, I asked for a meeting with Muslim community leaders in Jersey City. The meeting was arranged not by federal law enforcement, but by an Egyptian member of the Jersey City Police force.

The Jersey City we drove through late that afternoon was in many respects the same city in which my grandfather drove a trolley and then a bus, the same city in which my father came of age, the city where I was born: a city of rough edges and sharp elbows, of immigrant bars and tenement neighborhoods, of railyards and warehouses.

15. 120 N.J. 182 (1990).
16. Id. at 209.
It was jarring, then, to turn right at the hilltop corner of the street where my private meeting with Jersey City Muslims was to take place. The street fell away toward the Hudson in a panorama of lower Manhattan in flames. This view was framed by a street of ordinary-looking rowhouses with Palestinian flags in the windows. People stared at our black Crown Victoria as we made our way slowly, looking for the right address. The apprehension in their faces mirrored the apprehension I felt.

This was, after all, the city if not the neighborhood where the so-called “blind sheik” had preached his gospel of hate and destruction eight years earlier.

I took off my shoes as requested at the door to the ground-floor apartment, and crossed the threshold into a foreign world. The room was elegantly appointed. There were Arabic-captioned patterned prints on the walls and an ornate oriental rug on the floor. The room was crowded with bearded faces, some smiling, some worried-looking, some angry. They assured me that there had been no celebrating in the mosques, that they were in fact loyal Americans. Some had been here for forty years; one had fought in Vietnam. They were afraid of community backlash. I pledged to prosecute any acts of vigilantism, and to do a public service announcement reinforcing that pledge.

They were also afraid of the FBI, of persecution and a loss of civil liberties—a fear that was frankly more difficult to address. I asked for their understanding, given the difficulty of investigating a crime of this magnitude, and I told them that heavy-handed law enforcement techniques are more often than not a by-product of ignorance, not malice. When you have no idea who has committed a crime, everyone is suspect. When you know that the crime was committed by Muslims, then Muslims are suspect. When you know that most of the perpetrators were Saudis, and that some of them took off from Newark Airport, and that Jersey City had been the staging ground for the 1993 attack on the World Trade Center, suspicion grows. I urged them to dispel suspicion by coming forward with any possible information. It was a tense meeting—not unfriendly, but tense. It would be the first of many that fall. I left without any assurances.

As I look back on those early days—those days of waiting for a second wave of attacks, then experiencing that wave in the form of the anthrax attacks—as I look back in light of what I have since learned from working on the 9/11 Commission about what all levels of government were thinking and doing, it strikes me that we were all motivated by fear stemming from ignorance. Fear that because of what we didn't know, the public was being left unprotected. Fear that we lacked the right structures of law or thought to cure our ignorance. The government cast a wide net in those early days
because it had no choice; we simply did not know who the enemy might be.

We have all become familiar in the days since 9/11, and from the 9/11 Commission’s Final Report, with what the federal government knew in advance of the attacks. We’ve learned that the “system was blinking red” in the summer of ‘01, and that there was a lot of ill-defined chatter about an imminent threat. We know about the Phoenix memo warning of Muslims taking flying lessons in Arizona (none of whom, by the way, was involved in the 9/11 attacks), and about the arrest of Zacharias Moussaoui. We know about the FBI’s futile search for Khalid al Mihdhar and Nawaf al Hazmi. We know about the failure of the federal government to “connect the dots” in time.17

What strikes me, though, is not how much we knew but how little, how relatively few dots there were. Given the knowledge at the highest levels of the threat Bin Laden and Al Qaeda posed and given the enormous resources of the intelligence budgets and the FBI, it is remarkable how little was known of Atta and most of the other hijackers and how little was known of the potential domestic threat they posed.

So little effective knowledge existed, for instance, that our nation’s air defenses consisted of fourteen fighter jets from Air National Guard wings on alert at seven alert sites across the nation. Witness after witness told us that they were prepared only for attacks coming from overseas, and lacked even the capability to see vast sections of the nation’s interior. Furthermore, military personnel considered themselves to be prohibited by the doctrine and statute of posse comitatus from even contemplating a military response to a domestic terrorist strike.18 Domestic attacks were considered a law enforcement responsibility. At most, the military could be called upon to assist law enforcement.

So little was known that FBI agents in New York working on the U.S.S. Cole bombing criminal case had been prohibited just weeks before from helping FBI intelligence agents in searching for hijackers Hazmi and Mihdhar because of what was known as “the wall” separating intelligence and criminal investigations.19

So little was known that FAA’s no fly list contained the names of not one of the eventual September 11 hijackers.

Clearly, then, I was not alone in feeling that the ground had shifted beneath my feet that morning. No one in law enforcement quarreled seriously with the Attorney General's conclusion that a paradigm-shift in enforcement, from prosecution to prevention, was warranted. Indeed, the “law enforcement perspective” was very much akin to president Lincoln's perspective during the Civil War: you are sworn to uphold the constitution, but you know that our great charter's guarantees become, in Lincoln's terms, “tantalizing mockeries” if people can exploit them to kill thousands if not millions of their fellows.

Moreover, I do not believe that the scale of the threat is exaggerated; I believe this is the greatest internal threat we've faced since the Civil War. For the first time in our history, we are dealing with an enemy who is willing to obtain and use the most powerful weapons humankind can construct. We are dealing with an enemy who has the patience to obtain such destructive weapons and to plan his operations meticulously. We are dealing with an enemy whose hatred for us is utterly implacable, who is willing to die in order to kill us, and who is willing to exploit our civil liberties to destroy our society.

We deal with this enemy within the framework of a Constitution that allows flexibility in judging governmental conduct. In other words, the Constitution prohibits seizures of “persons, houses, papers, and effects” that are “unreasonable.”\(^{20}\) The very concept of “reasonableness” presumes that the government’s conduct will be calibrated against the severity of the threat to public safety that the government seeks to address. I do not believe our nation has faced a more serious threat to domestic tranquility than the threat posed by terrorism.

How is a free society to cope with a threat of this magnitude and remain free? How is reasonableness to be evaluated against a threat that promises unlimited destruction and no end but, perhaps, ours? That is, of course, the challenge. For it is one thing to conclude, as I have, that a paradigm-shift is justified. It is quite another to get the paradigm-shift right.

III.

I want to turn now to perhaps the most fundamental paradigm-shift to occur after 9/11, because it raises a question that is on the front burner in our courts today: the classification of people as enemy combatants.

Prior to 9/11, there were two legal systems existing to deal with attacks on the United States. First, they could be treated as criminal

\(^{20}\) U.S. Const. amend. IV.
acts and prosecuted in the courts, subject to normal rules of discovery and the usual burden of proof beyond a reasonable doubt. The criminal model had been the model of choice for terrorist acts ranging from the bombing of the World Trade Center in 1993 to the Oklahoma City bombing, from the plot to blow up New York City's tunnels and bridges to the indictment of Bin Laden himself for the embassy bombings.

Alternatively, they could be handled under the law of war, under which "[i]n general, the status of a person who is captured by the enemy during an armed conflict will be ascertained by applying the four Geneva Conventions of 1949." The Geneva Conventions "create a comprehensive . . . regime for the treatment of detainees in an armed conflict," conferring prisoner of war status on captured members of a regular armed force and members of "volunteer corps, militias, and organized resistance forces" who meet certain proscribed criteria.

But here is the problem posed by the 9/11 attacks: neither model quite works.

What's wrong with the criminal law model? After all, it had been the primary weapon used against terrorism prior to 9/11. To put the matter in its simplest terms, the potential harm is so great that we can no longer wait until a crime is committed before responding. Given that Al Qaeda members are trained to be law-abiding until their mission is activated, arrest prior to the commission of the criminal act may well leave law enforcement with an extremely weak case, or no case at all.

Take, for instance, the case of Mohdar Abdullah, a Yemeni university student in San Diego in 2000-01, a man in his early twenties, fluent in both Arabic and English, and, as the 9/11 Commission Final Report states, "perfectly suited to assist the hijackers in pursuing their mission." Abdullah befriended Khalid al Mihdhar and Nawaf al Hazmi, two future hijackers, in January 2000, when they arrived in California, as part of the "planes" conspiracy, to attempt to become pilots. He translated for them, drove them around, and helped them to obtain driver's licenses and to enroll in flight school. He also introduced them to his circle of friends, one of whom was found after

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23. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, *supra* note 17, at 218.
9/11 to possess photos, videos, and articles related to Bin Laden, and to have lived in a house where "Bin Ladin's fatwas and other similar materials were distributed to the residents." Abdullah's own apartment, which was searched by the FBI after 9/11, contained "a notebook (belonging to someone else) with references to planes falling from the sky, mass killing, and hijacking." 

Abdullah's conduct in the days leading up to the 9/11 attacks was described by his neighbors as strange. There is evidence that he stayed in contact with Hazmi, in particular, after the two Saudis left California, and that he received a call from Hazmi in August 2001. In any event, he stopped making calls from his phone after August 25, 2001; perhaps not coincidentally, that was the date his two friends visited the William Paterson University library in New Jersey and made reservations for a flight on September 11.

Detained as a material witness after 9/11, Abdullah admitted knowing of Hazmi and Mihdhar's extreme Islamist views and of Mihdhar's involvement with an Al Qaeda-affiliated organization; he, moreover, "clearly was sympathetic to those extremist views." Abdullah expressed "hatred for the U.S. government and 'stated that the U.S. brought 'this' on themselves.'" While in prison, Abdullah allegedly bragged to other inmates that he had known Hazmi and Mihdhar were planning a terrorist attack. One inmate has stated that Abdullah claimed that Hazmi and Mihdhar told him they were planning to fly an airplane into a building, and invited him to be on the plane; this inmate also states that Abdullah claimed to have learned about the attacks three weeks prior to 9/11, a claim that is consistent with his unusual behavior prior to 9/11.

Now put yourself in a federal prosecutor's shoes. What do you think the government should have done with someone like Abdullah? Even assuming that every piece of information related above were admissible in criminal court, a criminal prosecution would have been a sketchy proposition at best. Jailhouse snitches are notoriously unreliable, the damning documents did not belong to Abdullah, and his expression of hatred of the United States is protected under our Constitution.

As it happened, the government didn't think it had enough admissible evidence; Abdullah wasn't prosecuted. He was rounded up after 9/11 and detained on a material witness warrant, then on immigration charges. He was deported to Yemen on May 21, 2004, after the United States Attorney for the Southern District of

24. Id. at 220-21.
25. Id. at 218.
26. Id. at 219.
27. Id. at 218-19.
California declined to prosecute him on charges arising from his alleged jailhouse admissions.

Although this "remedy" succeeded in removing Abdullah from the country, it did little else. From a national security standpoint, it is senseless. Abdullah's hatred for us remains, as does his sympathy for our enemies. There is no assurance that he won't recruit others to the Al Qaeda cause in Yemen, or migrate to Iraq or Afghanistan to kill Americans, or that he will remain in Yemen and not show up in another western country—England, say, or France—or even in the United States, where we don't have the best record of keeping undesirables out.

Still, it could be worse. What if the "remedy" of deportation—however inadequate—weren't available? What if, in other words, the Al Qaeda sympathizer is an American citizen, and you don't have enough to prosecute?

Then you'd have the case of Jose Padilla. Padilla, an American citizen, was arrested upon landing in Chicago on May 8, 2002 based on a material witness warrant issued in the Southern District of New York. He was transferred to New York and detained. On May 15, the district court appointed an attorney to represent him and she filed a motion seeking his release on the grounds that his detention was unauthorized and unconstitutional. A hearing date was set for June 11. On Sunday, June 9—two days prior to the hearing—President Bush issued a written command to the Secretary of Defense concerning Padilla. The President determined, "based on the information available to [him] from all sources," that Padilla was an "enemy combatant," "closely associated with al Qaeda, an international terrorist organization with which the United States is at war," and that he possessed valuable intelligence information. The President's order directed the Secretary of Defense to receive Padilla from the Justice Department and to detain him as an enemy combatant. Custody was transferred, and Padilla was moved to a naval brig in South Carolina, where he was held uncharged and without access to counsel.

30. Id. at 2715.
31. Id.
32. Id. at 2730 (Stevens, J., dissenting).
33. Id.
34. Id. at 2715 (Rehnquist, J., majority).
35. Id. at 2730 (Stevens, J., dissenting).
36. Id. at 2716 (Rehnquist, J., majority).
37. Id.
On June 11, the date scheduled for the hearing on the motions, Padilla's attorney instead filed a petition for habeas corpus. A front-page story in that day's New York Times, under the headline "U.S. Says it Halted Qaeda Plot to Use Radioactive Bomb," revealed that law enforcement had acted on information that Padilla had planned to travel to Chicago and detonate a bomb containing radioactive materials. I will turn to the legal disposition of the case shortly. For now, though, let's accept as a fact that the government received information concerning Padilla's allegiance to al Qaeda, his training in Afghanistan and his intention to detonate a radioactive bomb in Chicago. Let's also assume, from the way the government handled the case, that the information was credible, but either insufficient or too source-sensitive to bring a criminal charge.

As law enforcement in a post-9/11 era, what do you do? Do you really let him go? Can you afford to wait and hope you don't lose him before he acts?

Our criminal justice system affords substantial and necessary presumptions to criminal defendants: the presumption of innocence, the requirement of proof beyond a reasonable doubt, the requirement of jury unanimity, the protections afforded by the bill of rights. These protections are the very definition of our freedoms.

In providing them, our system tacitly accepts the reality that some crimes will go unpunished, that some guilty parties will not be caught. It is one of the great frustrations of law enforcement. The FBI does not keep statistics on unsolved crimes, but anyone who has been involved in law enforcement knows that there are thousands of unsolved murders, rapes, and aggravated assaults. It is a reality that our society has proven willing to live with because the alternative—a much more intrusive governmental presence in our lives—has been shown by history to lead to the greater evil of governmental criminality.

That calculus is simply harder to sustain, however, when the "crime" involved is destroying the twin towers and killing everyone inside or detonating a radioactive bomb in Chicago. Such conduct is not like breaking and entering, or even assault, or even murder; it's
worse than those "normal" crimes after it occurs, but before it occurs—when all you have is a visit to the public library to make travel plans, or some notebooks with pro-Islamist writings, or four guys meeting at a mall or a subway station—there may be no crime at all, no basis beyond general intelligence information even to detain suspects temporarily.

Beyond its inadequacy as a preventive measure, there is a further danger to relying on the criminal law as the primary weapon against domestic terrorism: that reliance may transform the criminal law itself. Perhaps because terrorism cases are so difficult to prove if the attack hasn’t occurred, forcing terrorism prevention to fit within the ambit of criminal law requires a potentially dangerous redefinition of what acts can be considered criminal.

The crime of providing "material support" for terrorism, for instance, has been expanded to encompass conduct that is perilously close to free speech, and conviction for providing material support does not require knowledge that the organization has been designated a terrorist organization or of any specific terrorist activity. Thus, two traditional bulwarks of criminal law—the constitutional protection of free speech and the requirement of guilty knowledge—have been eroded in the service of transforming the primary purpose of criminal law from punishment to prevention.

There are other examples. The "material witness" statute, designed to secure the appearance of witnesses in criminal proceedings, was never intended to permit the kind of pretextual arrests that occurred after 9/11, when many of those arrested were never asked to testify. And the FBI is now seeking the power to issue administrative subpoenas on its own authority not just in terrorism cases, but in every criminal investigation.

Some FBI agents interviewed by the 9/11 Commission captured the inadequacy of the criminal law as a weapon against terrorism when they noted that they "do not have cruise missiles. They declare war by indicting someone. They took on the lead role in addressing terrorism because they were asked to do so."41

The military law model, however, is also arguably inadequate as applied to al Qaeda, for several reasons.42 First, al Qaeda is a non-

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41. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, supra note 17, at 82 (citing Interview with Dale Watson (Feb. 4, 2004); Interview with Frank P. (Aug. 26, 2003); Interview with Dan C. (Aug. 27, 2003); and Interview with Louis Freeh (Jan. 8. 2004)).

42. The Bush administration has agreed to treat Taliban fighters under the Geneva Convention. Although the Taliban is not a recognized Afghan governmental body, Afghanistan is a party to the Geneva Convention. See Press Release, Office of the White House Press Secretary, Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), available at http://www.whitehouse.gov/news/releases/2002/02/
state actor, and possesses no legally cognizable status; its soldiers' identities are not open and notorious, but kept hidden, indistinguishable from other civilians; it is not a participant in or signatory to the Geneva Convention, and does not itself operate in accordance with the law of war. The terms of the conflict are open-ended; there is unlikely ever to be a legal document terminating hostilities. Finally, as a practical matter, treating captured al Qaeda members in accordance with the law of war—in which the only information they could be required to give would be name, rank, and serial number—would frustrate any efforts to gather intelligence in order to prevent further attacks.43

The Bush administration realized the difficulties inherent in treating Al Qaeda members uniformly under either the criminal law or under military law. In response, the administration adopted a hybrid approach, applying the criminal law to some, such as John Walker Lindh (the so-called American Taliban),44 Zacharias Moussaoui (the so-called 20th hijacker),45 and Richard Reid (the so-called shoe bomber).46 It has applied military law to captured soldiers of the Taliban regime, and created a third category—"enemy combatants"—for other alleged Al Qaeda detainees. The government maintained that individuals declared to be "enemy combatants" may be detained indefinitely with no right under the laws of war or the Constitution to consult with counsel during their detention.

This designation was roundly criticized from its inception. One commentator noted that "until now, as used by the Attorney General, the term 'enemy combatant' appeared nowhere in U.S. criminal law, international law, or in the law of war."47 Rather, the term derived from a 1942 case, Ex Parte Quirin,48 in which the Supreme Court held that "an enemy combatant who without uniform comes secretly
through the lines for the purpose of waging war [is] generally deemed not to be entitled to the status of prisoner of war, but to be . . . subject to trial and punishment by military tribunals."49

Critics of the use of Quirin as precedent pointed out that that case "does not stand for the proposition that detainees may be held incommunicado and denied access to counsel, since the defendants in Quirin were able to seek review and they were represented by counsel."50 Legal challenges to "combatant" status, in the form of habeas corpus petitions, were filed and began working their way through the courts.

The circuit courts of appeal differed widely in their treatment of the "enemy combatant" designation. The Fourth Circuit, sitting in the case of Hamdi v. Rumsfeld,51 responded with the classic deference afforded executive action during times of crisis. Yasir Hamdi, an American citizen, was captured in Afghanistan allegedly fighting against the Northern Alliance.52 Originally held at Guantanamo, he was transferred to a naval brig in Norfolk Virginia after the government learned he was a citizen, and he was labeled an enemy combatant.53

Reversing district court orders appointing counsel for habeas purposes, ordering private access to counsel, and ordering the government to provide extensive documentation justifying its detention of Hamdi, the Fourth Circuit held that "the privilege of citizenship entitles Hamdi to a limited judicial inquiry into his detention, but only to determine its legality under the war powers of the political branches."54 The government's submission of an affidavit setting forth the conditions of Hamdi's capture, the court held, was sufficient.55 The court noted in particular that the courts' deference to the political branches on national security issues "extend[ed] to military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle."56

Similar deference was exhibited in Rasul v. Bush,57 in which the

49. Id. at 31.
52. Id. at 280.
54. Id. at 475.
55. Id. at 473.
56. Hamdi, 296 F.3d at 281.
D.C. circuit affirmed a district court judgment that it was without jurisdiction to hear the habeas petitions of foreign nationals being held at Guantanamo Bay.

The Hamdi and Rasul decisions stand in sharp contrast to the Second Circuit’s handling of the Padilla case. That court held that the president does not have the inherent authority under the constitution to detain American citizens as enemy combatants when they are “seized on American soil outside a zone of combat.” The Circuit Court found Congress’s resolution of September 18, 2001 authorizing the president to use force to respond to the attacks insufficient to justify Padilla’s detention (a dissenting judge noted the irony that the resolution unquestionably authorized the interdiction and shooting of an Al Qaeda operative but not his detention).

The Supreme Court heard all three cases and issued its rulings last summer. The rulings reflect the difficulties inherent in the issues; the court was badly split in all three cases.

In the Hamdi case, a plurality of the Court disagreed with the reasoning of some lower courts that the congressional resolution was insufficient to empower the president to detain citizens as enemy combatants. Thus, the Court displayed, in some measure, the deference accorded executive actions pertaining to imminent threats to national security.

The Court also held, however, that due process required that a citizen being held as an enemy combatant “be given a meaningful opportunity to contest the factual basis for his detention.” The Court rejected the government’s position that the capture of Hamdi in a combat zone should, in effect, end the inquiry. Rather, the court held that a citizen-detainee seeking to challenge his classification as an enemy combatant “must receive notice of the factual basis for his classification, and a fair opportunity to rebut the government’s factual assertions before a neutral decisionmaker.”

The Court noted, however, that hearsay evidence would probably be acceptable and that the “Constitution would not be offended by a presumption in favor of the Government’s evidence,” and indicated that the due process rights applied only when the government decides to continue to hold the detainee. Finally, the Court indicated that a military tribunal may be competent to afford the

60. Id. at 2635.
61. Id. at 2644-45.
62. Id. at 2648.
63. Id. at 2649.
required due process.\textsuperscript{64} In its absence, however, a court confronted with a habeas petition would be obliged to satisfy itself that the demands of due process have been met.\textsuperscript{65}

The Court, however, was badly split. Justices Souter and Ginsburg concurred in the result, but concluded that the congressional resolution did not empower the government to detain citizens as enemy combatants.\textsuperscript{66} Justices Scalia and Stevens argued that in the absence of a suspension of habeas corpus, the sole alternative open to the government was to try Hamdi for treason.\textsuperscript{67} Justice Thomas dissented, arguing that the administration’s determination lay squarely within its war powers and outside the competence of the courts.\textsuperscript{68}

The \textit{Hamdi} plurality represents a mix of deference to the government—upholding the president’s authority to detain citizens as enemy combatants—and reassertion of the courts’ authority—upholding the right to notice and a determination by a neutral decisionmaker.

In a companion case, \textit{Rasul,}\textsuperscript{69} a majority of the court held that the courts have jurisdiction to hear habeas petitions filed by aliens being held at Guantanamo Bay, “a territory over which the United States exercises plenary and exclusive jurisdiction, but not ‘ultimate sovereignty.’”\textsuperscript{70} In reaching this result, the Court distinguished two World War II-era cases which seemed to suggest an opposite result,\textsuperscript{71} and read the language of the habeas statute conferring jurisdiction to the courts “in their respective Jurisdictions” not to be limiting.\textsuperscript{72}

But in the third case, the aforementioned \textit{Padilla} case, the Court avoided answering the question of whether the President had authority to detain Padilla as an enemy combatant, deciding that Padilla’s attorney had filed the petition in the wrong venue—New York—when Padilla was, in fact, being held in South Carolina.\textsuperscript{73} Thus, the Court gave an extremely narrow construction in \textit{Padilla} to the precise “in their respective Jurisdictions” language it had read broadly in \textit{Rasul}.\textsuperscript{74}

\begin{thebibliography}{99}
\bibitem{64} \textit{Id.} at 2651.
\bibitem{65} \textit{Id.}
\bibitem{66} \textit{Id.} at 2653 (Souter, Ginsburg, JJ., concurring in part, dissenting in part).
\bibitem{67} \textit{Id.} at 2671 (Scalia, Stevens, JJ., dissenting).
\bibitem{68} \textit{Id.} at 2674 (Thomas, J., dissenting).
\bibitem{70} \textit{Id.} at 2687.
\bibitem{71} \textit{Id.} at 2693-95 (citing Johnson v. Eisentrager, 339 U.S. 763 (1950), and Ahrens v. Clark, 335 U.S. 188 (1948)).
\bibitem{72} \textit{Id.} at 2692-98.
\bibitem{73} \textit{Padilla}, 124 S. Ct. at 2717-27.
\bibitem{74} \textit{Id.} at 2722-25.
\end{thebibliography}
The four dissenting justices were outraged by what they considered the majority's disingenuous avoidance of the critical question: "whether respondent is entitled to immediate release is a question that reasonable jurists may answer in different ways. There is, however, only one possible answer to the question whether he is entitled to a hearing . . . . Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber."\textsuperscript{75}

What are we to make of these cases and their sharp divisions? First, Justice Holmes would clearly love them. As a matter of logic, they are difficult to reconcile. They attest to evolving experience in the war on terror, and to the pressure that our new experience is placing on the courts' customary deference to executive branch action.

I read these decisions as signaling a healthy willingness of our courts not to "sit the war out," deferring indefinitely to executive authority in a war that may have no end. These decisions are less deferential out of a realization that this is a different kind of war; at the same time, however, the decision in Padilla—however tortured its reasoning—reflects a reluctance on the Court's part—in a case potentially involving a radiological domestic attack—to decide ultimate issues prematurely.

These cases represent the early, hesitant groping toward a new legal paradigm to deal with a new wartime reality. They also represent, in my view, a missed opportunity on the government's part to shape that paradigm constructively. By taking the position that "enemy combatants" have no fundamental rights, the government challenged the courts; traditional deference to such a position would have been an abdication.

The bottom line after the \textit{Rasul} trilogy is this:

- "Enemy combatant" status survives as a consequence of the Court's rulings, but in modified form.
- People designated as "enemy combatants" may challenge the designation and have access to counsel, but military tribunals may try the "enemy combatants," hearsay evidence will be admissible, and the Government's evidence may enjoy a presumption of validity.
- American citizens who are captured in armed struggle overseas may be held as "enemy combatants."
- It is unclear whether suspects like Jose Padilla, Americans who are detained on American soil, may be

\textsuperscript{75} \textit{Id.} at 2735 (Stevens, Souter, Ginsburg, Breyer, J.J., dissenting).
held as “enemy combatants.” The Supreme Court recently declined to consider this question in Padilla’s case on expedited review, after a federal district court in South Carolina ordered Padilla released because, in its view, American citizens who are detained on American soil cannot be held as “enemy combatants.”

After the Court’s decisions, the Government established Combatant Status Review Tribunals, panels of three military officers, to determine whether each detainee was an “enemy combatant.” The CSRTs began in July 2004; final decisions were issued for the existing population in late March 2005. In 93% of the 558 cases reviewed, the CSRT affirmed the detainee’s status.

On January 31, 2005, U.S. District Judge Joyce Green found that the CSRT process was unconstitutional because the detainees have no access to the evidence against them or to counsel, or to contest the voluntariness of statements extracted under interrogation. Judge Green’s colleague, Judge Leon, reached the opposite result a few days earlier, holding that the detainees had no constitutional rights they could assert in their habeas cases.

Although the trio of cases decided in June 2004 by the Supreme Court provided some guidance and early indications of an emerging rule of law for terrorism, a constitutional perfect storm is gathering nonetheless. The split in the lower courts regarding the constitutionality of the Combatant Status Review Team process must be resolved. The D.C. Circuit’s decision that the Geneva Conventions have no application to prisoners held at Guantanamo will certainly be appealed. Perhaps most important, given the pending order to release Jose Padilla, the Court will not be able to avoid for much longer the question it deferred in Padilla of whether an American citizen detained on American soil can be designated by the President an enemy combatant.

From the standpoint of the rule of law, either possible resolution in Padilla seems unacceptable. If the Court were to uphold the President’s power to declare an American citizen arrested on American soil an “enemy combatant,” it would be sanctioning essentially unchecked Executive authority in a crisis. If, on the other hand, it were to reject that claim and order Padilla released, the Court could well be leaving the public unprotected against the new

76. Argument in the Padilla case was heard in the Court of Appeals for the Fourth Circuit on July 19, 2005.


species of threat represented by Islamist terrorism.

Our lawmakers should not await that resolution. Instead, Congress should develop a procedural model that will honor the rule of law but allow the government to place a person in preventive detention where it has reasonable grounds to believe that the person is associated with or involved in terrorist activity. The constitutionality of preventive detention statutes for demonstrably dangerous people like sex offenders has been upheld.80

Any person preventively detained should have rights clearly defined by statute, such as access to counsel and to regular hearings to reevaluate his or her status. Congress should decide who bears the burden of persuasion in such hearings. In my view, once the government has established its basis for suspicion, the burden should shift to the detainee—at least in the early hearings—to persuade the court that the government's suspicion of him is unreasonable.

The war on terror, in sum, has placed enormous stress on the rule of law and on our traditional respect for civil liberties. Although extremely troublesome issues remain, the willingness of the courts not to defer during wartime, as in the past, remains our best assurance that the rule of law will survive even as its underlying logic adjusts to new experience.

IV.

I would be remiss, finally, if I failed to mention the most important paradigm shift that must, in my view, occur.

My wife and I spent September 11 this year at the home of friends who had lost loved ones in 2001. That night I found myself once again out on our deck at 3 a.m. As in 2001, the weather was clear, and the constellation Orion was rising in the southeast. Instead of smoke, this year I could see the twin beams of white searchlight reaching as high as Orion from lower Manhattan.

I thought of the suffering inflicted that day, and again wondered: How? How could people who espouse Islamic culture—the culture that gave the world the elegance of algebra and higher mathematics, the majesty of the Al Hambra and of mosaic art, of soaring astronomy and mystic poetry—how could people who claim to embody that cultural tradition perpetrate in its name an act of mass slaughter and desire annihilation in its name?

To answer that question you must concede, at the outset, that the same question hangs over all cultures, all history. One way of looking at history—a pessimistic way—sees it as a sequence of atrocities, not limited by time or space, religion or culture, extending

How could my Roman Catholic tradition, for instance, which gave the world the grand vision of the Sistine Chapel and the magnificence of the gothic cathedral, also have given the world the brutal intolerance of the Inquisition, the burning of heretics, the persecution of the Jews?

How could German culture, the culture of Mozart and Beethoven, the culture of Goethe, have produced Auschwitz and Buchenwald?

How could Japanese culture, with its majestic gardens at Kyoto and its cultivation of inner serenity, have produced the mass beheadings of the Chinese at Nanking?

How could Anglo-American culture, the culture of Eliot and Shakespeare, the culture of the American Declaration of Independence, have countenanced slavery and segregation and the near-genocide of the American Indian?

Every major culture in human history has produced stirring self-affirmations: the Al Hambra, the Sistine Chapel, the music of Mozart, the gardens at Kyoto, the Declaration of Independence. But tragically, every culture seems also to have had the need to define what it is by renouncing—in some instances obliterating—what it is not, often in the name of its highest principles: the Inquisition; the Holocaust; Nanking; slavery; Cambodia; Kosovo; Rwanda; the bombing of the World Trade Center.

Why? I believe that cultures in the past have fallen prey to the same dilemmas of logic versus experience that challenge our legal system and, for that matter, every intellectual pursuit: an adherence to the narrow consistency of the existing paradigm even in the face of incompatible elements, for fear that the inclusion of those elements may imperil the entire system.

That fear is the power of fundamentalism, and it is not, in the abstract, illegitimate; it is, instead, a dilemma of the human mind, a reaction akin to the effort, in the middle ages, to accommodate new data about how the planets move to an earth-centered paradigm. We know now that the ultimate reaction was to forge a new synthesis, to recognize that our world’s center is the sun. At the time, however, people clung to the old paradigm even when its logic was clearly no longer the best description of the world, and they lashed out at those who insisted otherwise.

That lashing out is the handprint of fundamentalism upon human history. It is why medieval astronomers were burned alive for believing that there are other suns, other solar systems, why Galileo was forced to recant.

We define by excluding; we say who we are, at least in part, by saying who we are not. When we delude ourselves that our
definitions are universally true, or morally superior, it's a short step—even a logical step—to the impulse to oppress or destroy everything and everyone that lies outside those definitions. So Africans are deemed subhuman so that their “owners” can believe that all men are created equal and still keep their property; Chinese are beheaded as an exercise in the art of samurai swordsmanship; Jewish skulls are crushed as a scientific test of mammalian pain thresholds; jetliners loaded with people and fuel are flown into crowded skyscrapers in the name of Allah, with no thought for human suffering and the endless ripples of family heartbreak.

Mathematics teaches that you can construct elegant, self-contained systems of logic, and that many such systems can be true, but that all such systems are limited, necessarily incomplete. They exclude important but true aspects of reality. Conversely, any system that aspires to completeness—to contain all aspects of reality—will eventually become inconsistent, because of the limitations of our minds and the complexities of the world.81

If the purest systems of thought humankind can devise—mathematical systems—can acknowledge their mortal limitations, isn't it time for our systems of belief—religious or political—to recognize their limited reach?82

The current struggle is so vital, then, because we are at a crossroads in the history of human nature. Twenty-first century terrorism is different in kind from the atrocities of the past, if only because the stakes—the nature and survival of civilization itself—are so much higher. In the grand scheme of things, we haven't been here that long, and we will not be here much longer—we are too far advanced technologically—if the fundamentalist patterns of the past continue.

America is the first nation founded on completeness, rather than consistency, as a goal. At its best, its offers the world it greatest hope, for we are the first nation for which tolerance is a bedrock principle. This means that our open society will, in embracing the ideal of

81. See Rebecca Goldstein, INCOMPLETENESS: THE PROOF AND PARADOX OF KURT GODEL 177-88 (2004) (by creating an arithmetical proposition that is true by virtue of being unprovable within the arithmetical system, Godel “showed how to construct a true but unprovable proposition . . . for any formal system whatsoever containing arithmetic”). See also Douglas Hofstadter, GODEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID (1974).
82. See Goldstein, supra note 81, at 204 (“Just as no proof of the consistency of a formal system can be accomplished within the system itself, so, too, no validation of our rationality . . . can be accomplished using our rationality itself. How can a person, operating within a system of beliefs, including beliefs about beliefs, get outside that system to determine whether it is rational? If your entire system becomes infected with madness, including the very rules by which you reason, then how can you ever reason your way out of madness?”).
completeness, admit people whose beliefs are incompatible with the survival of our system; the struggle for our courts now is how to cope with this new and dangerous reality without losing the essence of our ideals. But it is no abandonment of those ideals to recognize that the threat we face is unprecedented; our Constitution’s command is that our government’s response be “reasonable” when calibrated against the severity of the threat we face.

The American dream, in short, may never have been realized, but it's the right dream. Because it’s the right dream, it is our duty to see that it prevails.

We owe it to the people we have lost, to our ancestors, and to our children to ensure that the American dream survives, to move beyond this age of terror to a new paradigm. In this war’s darkest days, we should look to a world where we can celebrate one culture without despising another: a world where we can speak of love without engendering hate, where we can call out our different prayers in darkness and live their wisdom in daylight, a world where we are free to view the night sky's unending worlds in wonder, as we have through the ages, and to give that sense of wonder a human signature.

For, above all, this was utterly transformed on the morning of 9/11: our duty—in the name of all the suffering and injustice of the past, in the name of the innocent lives lost that day and since—to forge our future together as one world, a small world, under the transcendent mysteries of heaven.