

## UNPATRIOTIC ACTS: AN INTRODUCTION

SADIQ REZA\*

John Walker Lindh. Zacarias Moussaoui. Jose Padilla. Richard Reid. Who reading these lines does not instantly recognize the names of these men? Or at least their assigned *noms de guerre*: American Taliban, 20th hijacker, dirty bomber, shoe bomber. For two and a half years these names and others have flitted through our daily copies of *The New York Times* like shadow characters in a play, along with black-and-white photographs underneath which black-and-white text tells us of their alleged (and sometimes proven) wrongdoing and the latest developments in their tribulations (and sometimes trials) with our government. But the men themselves are almost invisible, hidden from us by our government, which insists that the characters and the play are too dangerous for public view.

The cliché that the events of September 11, 2001, “changed everything” is perhaps nowhere more true than in the realm of criminal procedure. Soon the Supreme Court will decide whether aliens the United States has imprisoned at Guantanamo Bay, Cuba, can challenge their detention in U.S. courts, and whether a U.S. citizen captured in a foreign war zone can be held indefinitely, without counsel or even a charge, when the president decides he is an “enemy combatant.”<sup>1</sup> The Court will also decide whether a U.S. citizen arrested *inside* the U.S. and deemed an enemy combatant can be similarly detained;<sup>2</sup> and the Court may decide whether the government can continue to detain individuals under the federal

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\* Associate Professor, New York Law School. My thanks to Gene Cerruti, Steve Ellmann, Tanina Rostain, and Don Zeigler for comments; second-year student Courtney Fennimore, for quick and very capable assistance with citations; and the National Association of Muslim Lawyers (NAML), for initially gathering attorneys who represent terror accusees, including some of the authors in this Symposium issue, on a panel at its Third Annual Conference at Columbia Law School in October 2002.

1. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 72 U.S.L.W. 3327 (U.S. Nov. 10, 2003) (No. 03-343); *Hamdi v. Rumsfeld*, 337 F.3d 335 (4th Cir. 2003), *cert. granted*, 72 U.S.L.W. 3446 (U.S. Jan. 9, 2004) (No. 03-6696).

2. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *cert. granted*, 72 U.S.L.W. 3486 (U.S. Jan. 23, 2004) (No. 03-1027).

material-witness statute in order to obtain grand jury testimony from them.<sup>3</sup> Meanwhile, the American Civil Liberties Union is challenging the government's authority to search homes without probable cause and to order libraries and other organizations to disclose information about private citizens, both in secret;<sup>4</sup> the Fourth Circuit is deciding whether a terror defendant can have access to other alleged terrorists in government custody who a trial court has decided might provide evidence exculpating the defendant;<sup>5</sup> and U.S. military tribunals will soon begin trying Guantanamo Bay detainees in proceedings shorn of constitutional protections long embraced as essential to due process.<sup>6</sup> Each of these matters involves a criminal procedure issue that is central to the government's post-September 11 domestic antiterrorism efforts. Few of us, if any, imagined that any of these issues would ever arise.

This is not to say we were not warned that terrorism might alter the criminal procedure equation — that ever-shifting and never fully satisfying balance of civil liberty and individualized justice on the one hand, and effective and efficient criminal law enforcement on the other. The Supreme Court itself has suggested that constitutional rules of procedure might differ in terror cases, and our law and history abound with examples of constitutional "exceptions" in the face of perceived threats to national security.<sup>7</sup> We thus await

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3. *United States v. Awadallah*, 349 F.3d 42 (2d Cir. 2003) (holding that material-witness statute permits detention for grand jury testimony), petition for rehearing filed January 20, 2004.

4. *Muslim Community Ass'n. v. Ashcroft*, No. 03-72913 (E.D. Mich. filed July 30, 2003), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13248&cc=206>; USA PATRIOT Act § 215, 50 U.S.C. § 1861 (West 2003).

5. *See United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. 2003) (barring death penalty and forbidding prosecutors to introduce evidence that defendant accused in September 11 attacks had knowledge of or involvement in those attacks, as sanctions for government's refusal to produce potentially exculpatory witnesses in U.S. custody), *appeal docketed*, No. 03-4792 (4th Cir. Oct. 7, 2003).

6. *See, e.g.*, Neil A. Lewis, *U.S. Charges Two at Guantanamo with Conspiracy*, N.Y. TIMES, Feb. 25, 2004, at A1; Neil A. Lewis, *Bush's Power To Plan Trial Of Detainees Is Challenged*, N.Y. TIMES, Jan. 6, 2004, at A16 (discussing Supreme Court brief filed by five military defense lawyers challenging president's constitutional authority to try detainees in military tribunals); Neal Katyal & Laurence Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002).

7. *See, e.g.*, *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) ("the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack") (holding Fourth Amendment violated by road-

today's pending decisions with bated breath, half of us hoping and the other half fearing such exceptions will become the rule.

But many men and women have done more than simply wait; instead they have joined the battle, defending alleged terrorists against government prosecutions and practices that many feel pose as much of a threat to democracy as the terrorists themselves. In this special issue of the *New York Law School Law Review*, some of these advocates share their stories with us, presenting the facts and the law of cases they have worked on along with lessons they have learned in the process. Accompanying the insight of these practitioner-scholars is analysis from full-time legal scholars who grapple with the same issues of criminal procedure, substantive criminal law, and professional ethics that practitioners face in these cases. And valuable wisdom from abroad is here too, in a unique contribution from public defenders in Israel, a country that has a bit more experience with terror prosecutions than we do. I hope you find the articles in this issue an invaluable resource, a primer if you will, for practitioners and scholars interested in the rights of individuals accused of terrorism.<sup>8</sup>

The Symposium begins with Robert Boyle's discussion of the case of his client Osama Awadallah, a Palestinian-Jordanian student from San Diego whose telephone number appeared on a scrap of paper found in the belongings of one of the alleged September 11 hijackers. Mr. Boyle describes Mr. Awadallah's seizure, interrogation, and arrest as an alleged material witness, his treatment while detained, and his ultimate indictment for perjury — on startlingly weak grounds — after he testified before a grand jury pursuant to a government summons. Mr. Boyle also presents his argument that the federal material-witness statute, 18 U.S.C. § 3144, does not authorize the detention of prospective grand jury witnesses. A federal

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block the primary purpose of which was crime control); *Florida v. J.L.*, 529 U.S. 266, 274 (2000) ("We do not say . . . that a report of a person carrying a bomb need bear indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk.") (holding Fourth Amendment violated when police frisk suspect upon no more than anonymous tip of gun possession); DAVID COLE, *ENEMY ALIENS* 88-179 (2003).

8. It is a matter of public record that I have met with Zacarias Moussaoui as a legal adviser in connection with the charges he faces related to the September 11 attacks. My role in this Symposium, however, is only to introduce the articles and some of the issues raised by the range of terror cases.

trial judge in New York ruled that the material-witness statute was indeed misused in Mr. Awadallah's case and dismissed his indictment, but a second federal trial judge in New York in another case decided the statute did apply to grand jury witnesses; the Second Circuit agreed with the latter decision and ordered Mr. Awadallah's indictment reinstated.<sup>9</sup> Mr. Boyle's argument is now before the Second Circuit in a petition for rehearing *en banc*. However the statutory issue is ultimately resolved, Mr. Boyle's account raises separate questions about the propriety of the government's treatment and indictment of Mr. Awadallah.

The Symposium next presents edited portions of briefs written by Donna Newman on behalf of her client, José Padilla. Ms. Newman chronicles Mr. Padilla's May 2002 arrest and detention by the Department of Justice as an alleged material witness (to what, the DOJ has not publicly disclosed), President George W. Bush's designation of him as an enemy combatant, Mr. Padilla's transfer to the custody of the Department of Defense, and Mr. Padilla's subsequent imprisonment — approaching two years — without a criminal charge or access to counsel. Ms. Newman also presents the legal arguments against this unprecedented treatment of an American citizen — arguments that have already prevailed before the Second Circuit, which found Mr. Padilla's detention unlawful and ordered his release from military custody. The Supreme Court is scheduled to hear the government's appeal of that ruling the same day it considers the case of Yaser Hamdi, the other U.S. citizen-cum-enemy combatant whose incommunicado detention the Court is reviewing.<sup>10</sup> Meanwhile, after barring all access to Mr. Padilla since the time he was designated an enemy combatant, the government has now allowed Ms. Newman to meet with him, although it still maintains that Mr. Padilla's access to counsel is a matter of executive discretion.<sup>11</sup> While we await the Supreme Court's decision, we

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9. United States v. Awadallah, 202 F.Supp. 2d 55 (S.D.N.Y. 2002) (Scheindlin, J.); *In re Material Witness Warrant*, 213 F. Supp. 2d 287 (S.D.N.Y. 2002) (Mukasey, J.); United States v. Awadallah, 349 F.3d 42 (2nd Cir. 2003), petition for rehearing filed January 20, 2004.

10. Padilla v. Rumsfeld, 352 F.3d 695 (2nd Cir. 2003), *cert. granted*, 72 U.S.L.W. 3486 (U.S. Feb. 20, 2004) (No.03-1027); Hamdi v. Rumsfeld, 337 F.3d 335 (4th Cir. 2003), *cert. granted*, 72 U.S.L.W. 3446 (U.S. Jan. 9, 2004) (No. 03-6696).

11. See Michael Powell, *Lawyer Visits "Dirty Bomb" Suspect*, WASH. POST, Mar. 4, 2004, at A10.

have Ms. Newman's winning arguments to digest. And we may be especially proud that Ms. Newman is a graduate of New York Law School.

The next article is written by Sam Schmidt and Josh Dratel, a pair of seasoned terror-defense lawyers who represented Wadih El-Hage in the pre-September 11 trial in the Southern District of New York relating to the August 1998 bombings of the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania. That trial ended in the conviction of Mr. El-Hage and his three co-defendants, but not before our attorney-authors were able to turn some of the government's special terror-prosecution practices to their client's advantage. These practices are now *de rigueur* in terror cases: "Special Administrative Measures" that impose onerous conditions of confinement on defendants and severely restrict their access to counsel and to the outside world; protective orders that allow the government to designate discovery material "particularly sensitive," which prevents counsel from sharing that material with anyone not "cleared" by the government; and the designation of wide swaths of relevant information, including impeachment material and other potentially exculpatory information, as "classified," thus preventing even the client from seeing it. All of these practices of course make defending terror accusees monumentally more difficult than representing the everyday criminal defendant, to say nothing of the novel and serious constitutional questions they raise.<sup>12</sup> Messrs. Schmidt and Dratel describe how, through ingenuity and persis-

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12. See, e.g., *Moussaoui*, 282 F. Supp. 2d at 482 (Sixth Amendment requires defense access to potentially exculpatory witnesses in government custody despite government's asserted national security concerns); Memorandum in Support of Defendant's Motion for Relief from Conditions of Confinement at 9, *Moussaoui* (No. 01-455-A) (arguing special administrative measures violate due process right to participate in defense and Sixth Amendment right to counsel), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/64929/0.pdf>; Memorandum of Law in Support of Defendant's Motion for Access to Classified and Sensitive Discovery and for Relief from Special Administrative Measures Concerning Confinement at 11, *Moussaoui* (No. 01-455-A) (challenging withholding of material designated classified or sensitive from *pro se* defendant on Fifth and Sixth Amendment grounds), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/65801/0.pdf>; but see *United States v. El-Hage*, 213 F.3d 74, 81-82 (2d Cir. 2000) (rejecting due process challenge to special administrative measures); *United States v. Bin Laden*, No. S(7)98 CR. 1023 LBS, 2001 WL 66393 (S.D.N.Y. Jan. 25, 2001) (rejecting Fifth and Sixth Amendment challenges to allowing counsel but not defendant access to classified material).

tence, they nonetheless managed to turn these restrictions in part to their client's benefit.

Next, Kenneth Mann and David Weiner provide an illuminating account of the Israeli public defender system — and in the process they show that we have much to learn from Israel about defending terror accusees. The authors describe how the right to appointed defense counsel has evolved in Israel, culminating in the 1996 establishment of the Office of the Public Defender (OPD), in which they both proudly worked. They also demonstrate the extraordinary pains attorneys in that office take to establish trust with Palestinian clients and vigorously defend them — including those charged with terrorist crimes resulting in the death of scores of Israeli civilians — in the very best traditions of zealous advocacy and client-centered representation. Professors Mann and Weiner do identify shortcomings in the defense of those charged not in Israel's civilian courts but in its military courts, to which OPD jurisdiction does not extend, and it is not clear whether those courts accord defendants more or less procedural protection than the U.S. military tribunals that are soon to commence. But their story of how the OPD defended Marwan Barghouti, the alleged terrorist leader tried in Israeli civilian court in 2002 for a series of terrorist murders and conspiracies going back some two and a half years, is a tale of inspired defense lawyering, sophisticated understanding of a client's objectives, and fierce devotion to the principle of client autonomy. It should be required reading for every lawyer who represents a terror defendant in the U.S.

The Symposium next presents an article by Professor Randolph Jonakait concerning the hotly-debated pre-September 11 law that forbids providing “material support” or resources to designated “foreign terrorist organizations.”<sup>13</sup> The Ninth Circuit has twice declared parts of this law unconstitutionally vague, and has added that a conviction under the statute requires proof the defendant knew of the organization's terrorist activities.<sup>14</sup> Professor

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13. 18 U.S.C. § 2339B (West 2000 & Supp. 2003).

14. *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000) (holding that terms “personnel” and “training” as forms of forbidden material support are void for vagueness); *Humanitarian Law Project v. DOJ*, 352 F.3d 382 (9th Cir. 2003) (same, and to satisfy due process conviction requires proof beyond a reasonable doubt that defendant knew organization was designated as a foreign terrorist organization or knew

Jonakait identifies yet a third possible constitutional infirmity. In 2001, the D.C. Circuit ruled that due process is violated when the government designates — without notice or an opportunity to be heard, as the statute allows — a group that has sufficient presence in the U.S. as a qualifying terrorist organization. Building on this ruling, Professor Jonakait argues that due process is again violated when the government prosecutes a person for providing material support to a group so designated because the statute creates an irrebuttable presumption the group is a qualifying terrorist organization. As a remedy, Professor Jonakait urges amending the statute to require constitutionally sufficient notice to any organization whose designation is imminent, or at least allowing individuals charged under the statute to challenge the designation.

Next, Professor Cameron Stracher writes about the government's efforts to shroud significant portions of its terrorist prosecutions in secrecy. Professor Stracher addresses the issue through the case of Zacarias Moussaoui, the only person in the U.S. who faces charges related to the September 11 attacks. In Mr. Moussaoui's case, the district court had routinely sealed pleadings and orders at the government's request until Professor Stracher and his colleagues, representing several news media intervenors, convinced the court that the First Amendment compelled public access to virtually all documents not marked "classified." Similarly, Professor Stracher and his colleagues convinced the Fourth Circuit to open the filings and arguments in the government's appeal of the district court's order directing the government to produce detained witnesses — one of whom is widely reported to be Ramzi bin al-Shibh, named in Mr. Moussaoui's indictment as a co-conspirator — to determine whether their testimony might exculpate Mr. Moussaoui.<sup>15</sup>

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of organization's unlawful activities that caused designation); *see also* Humanitarian Law Project v. Ashcroft, No. CV03-6107 ABC., 2004 WL 112760 (C.D. Cal. 2004) (holding in part that language "expert advice or assistance," added to definition of forbidden material support by provision of USA PATRIOT Act, 18 U.S.C. § 2339A, is impermissibly vague).

15. The Fourth Circuit ruled that only those portions of pleadings and arguments specifically designated as "classified" could remain sealed. *United States v. Moussaoui*, 333 F.3d 509, 513 (4th Cir. 2003); *see also* Tom Jackman, *Moussaoui Asks to Call Three More al Qaeda Witnesses*, WASH. POST, Mar. 22, 2003, at A18 ("Sources close to the case have said that U.S. District Judge Leonie M. Brinkema has granted the defense access to Binalshibh and that the government has appealed. But that is not a matter of public

These efforts, which Professor Stracher describes here, have effectively thwarted the government's attempt to prevent public knowledge of much of Mr. Moussaoui's case with indiscriminate invocations of national security concerns. We now await a Fourth Circuit ruling on the merits of the witness issue, much better informed thanks to Professor Stracher.<sup>16</sup>

Finally, two scholars square off over an issue that must lie at the outer boundary of permissible antiterrorism practices: the use of torture to interrogate suspected terrorists. Professor Marcy Strauss presents the various definitions of torture and the provisions of domestic and international law that ostensibly forbid it. She shows how interrogation methods that qualify as torture might find breathing room in the space between the Fifth Amendment privilege against compulsory self-incrimination and the due process clauses of the Fifth and Fourteenth Amendments, particularly if the goal is to prevent imminent catastrophic harm (the "ticking bomb" scenario) and the information obtained is not used in a criminal trial. Nevertheless, Professor Strauss concludes, torture should be forbidden on constitutional or policy grounds because it is immoral, ineffective, and difficult to limit in any principled way. In response, Professor Alan Dershowitz focuses not on whether or not torture should be employed, but rather, given its widely-reported post-September 11 use by the U.S. and its likely future use in a ticking-bomb scenario, his preference that it be regulated by warrant. Professor Dershowitz shows how a warrant requirement could reduce the use and the severity of torture; he answers those who would permit torture only when it is done "off the books" by stressing the virtues of judicial control and public accountability.

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record, because Brinkema has sealed most of the proceedings, citing national security concerns."); see also Philip Shenon, *Judge Grants the Government A Delay of Moussaoui's Trial*, N.Y. TIMES, Feb.13, 2003, at A21 ("the Justice Department [. . .] is appealing a ruling by Judge Brinkema that would allow Mr. Moussaoui's court-appointed lawyers to question Ramzi bin al-Shibh, another admitted Qaeda member who was captured in Pakistan last October, people with access to court information said.").

16. It bears noting that the government's refusal to make detainee Ramzi bin al-Shibh available has now reportedly derailed two German prosecutions related to the September 11 attacks, including the sole conviction in the world in those attacks. See Desmond Butler, *German Judges Order a Retrial for a 9/11 Figure*, N.Y. TIMES, Mar. 5, 2004, at A1; Desmond Butler, *Faulting U.S., Germany Frees a 9/11 Suspect*, N.Y. TIMES, Feb. 6, 2004.

There are, of course, many more issues of criminal procedure raised by the government's terror prosecutions than those discussed in this volume. There are also many other practitioners representing terror accusees today with courage, creativity, and commitment to the constitutional rights of even these most vilified of defendants and detainees. (No U.S. case other than that of Zacarias Moussaoui, incidentally, involves terrorism charges arising out of the September 11 attacks — and even that case may no longer.)<sup>17</sup> No one can fault the government for moving aggressively to protect national security and for using the criminal process to do so. We can and should, however, take the government to task for *misusing* the criminal process, for violating clear mandates and cherished principles of that process, and for attempting to evade judicial review and public accountability in its terror prosecutions. For our enemies to be anti-American is understandable; that is what makes them our enemies. For American attorneys to defend these alleged enemies, and for lawyers, legal scholars, and others to hold the government to core constitutional principles in pursuing them, is quintessentially American. But for our government to employ un-American methods in pursuing these enemies is unacceptable. It is, in fact, unpatriotic.

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17. The trial court has forbidden the government to introduce any evidence of Mr. Moussaoui's alleged involvement in the September 11 plot as one sanction for the government's refusal to produce the potentially exculpatory detainee-witnesses. *United States v. Moussaoui*, 282 F. Supp. 2d 480, 487 (E.D. Va. 2003). The government has, moreover, long since given up its theory that Mr. Moussaoui was the "20th hijacker," naming, instead, first Ramzi bin al-Shibh and more recently a different individual as that hijacker. See Philip Shenon, *Man Held in U.S. Was Wired 2 Large Sums From Germany*, N.Y. TIMES, Oct. 16, 2001, at B8; *New Theory on a 20th Hijacker Is Offered*, N.Y. TIMES, Nov. 16, 2001, at B10; James Risen, *U.S. Says Suspect Tied to 9/11 And Qaeda Is Captured in Raid*, N.Y. TIMES, Sept. 14, 2002, at A1; Philip Shenon, *Panel Says a Deported Saudi Was Likely "20th Hijacker"*, N.Y. TIMES, Jan. 27, 2004, at A16 (quoting member of independent commission on September 11 attacks as saying "[i]t's extremely possible if not probable that Mohamed al-Kahtani was to be the 20th hijacker"); see also Jonathan Turley, *Commentary, The Growing Collection of "20th Hijackers"*, L.A. TIMES, Nov. 7, 2003, at B17 ("When the case against Moussaoui began falling apart under a mountain of contradictory evidence, the government announced that it had captured Bin al-Shibh — who was then labeled the 20th hijacker.").