

**CATCHING TERRORISTS: THE BRITISH SYSTEM  
VERSUS THE U.S. SYSTEM**

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**HEARING**  
BEFORE A  
SUBCOMMITTEE OF THE  
COMMITTEE ON APPROPRIATIONS  
UNITED STATES SENATE  
ONE HUNDRED NINTH CONGRESS  
SECOND SESSION

**SPECIAL HEARING**  
SEPTEMBER 14, 2006—WASHINGTON, DC

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## **CATCHING TERRORISTS: THE BRITISH SYSTEM VERSUS THE U.S. SYSTEM**

**THURSDAY, SEPTEMBER 14, 2006**

U.S. SENATE,  
SUBCOMMITTEE ON HOMELAND SECURITY,  
COMMITTEE ON APPROPRIATIONS,  
*Washington, DC.*

The subcommittee met at 9:27 a.m., in room SD-192, Dirksen Senate Office Building, Hon. Judd Gregg (chairman) presiding.  
Present: Senators Gregg, Allard, and Byrd.

### OPENING STATEMENT OF SENATOR JUDD GREGG

Senator GREGG. We will begin the hearing. The subcommittee understands Senator Byrd will be here, but probably not for a few minutes.

We are very appreciative of our witnesses attending today. This committee has viewed the issue of homeland security as first and foremost an issue of obtaining the intelligence necessary in order to stop an attack before it occurs. We have worked very hard to change the mind set of the Federal Government and our local and State law enforcement community, which has always been a reactive mind set, where a crime occurs and the Government then comes forward through the FBI or through the local police and tries to determine the culprits and bring them to justice.

That mind set does not work in the context of the threat that America faces today, which is a terrorist act, because a terrorist act once it occurs will create such harm and damage, as we saw on 9/11, as we have seen England and other nations such as in Spain in Madrid. A terrorist act cannot be tolerated, so a legal system which is structured around the concept of having an event occur and then having the criminals brought to justice is a legal system which is not capable of or appropriate to the threat that we have today.

The question becomes for us how within our constitutional limitations, which are obviously critical and which is what we are fighting for, how within those constitutional limitations will we expand our capability to obtain intelligence to be able to thwart an attack. The English system appears to have taken significant strides in this area. England, of course, functions under a common law system, not under a constitutional system, and does not have a Bill of Rights, although they obviously have rights which have been evolved over time, and our Bill of Rights arguably came in large part from those common law rights.

But the English system has evolved to the point where they do have the capability to pursue a potential threat more aggressively than we appear to be able to pursue it prior to the event occurring. The question that this subcommittee would like to pursue with this extraordinarily talented panel is are there within the context of our constitutional structure actions which we can take which would replicate or take advantage of the experience of the English system and the English successes, which are considerable, as we just recently saw with the situation relative to the bombing of the aircraft which did not occur, thank goodness.

So we have brought together this panel today to give us some thoughts on this. We are also interested, should the panel wish to comment on it, and we can do this in the question period as to the panel's reaction if it has any, to the debate which is ongoing right now over the *Hamdan* decision and how we use electronic eavesdropping in order to effectively interrogate and learn what the potential information there might be from prisoners who we have captured in this war on terror.

But initially we want to get into this discussion of American procedure relative to British procedure and where America can learn from the British situation legally and what are the limitations on the American system that the British system does not have and how can we take advantage of the experience of the British system and still do so in the context of our constitutional structure.

We have, as I said, a very distinguished panel today: the Honorable Richard Posner, Seventh Circuit Court of Appeals Judge and a Senior Lecturer for the University of Chicago, a person of international reputation on issues such as this; John Yoo, a Professor of Law at the University of California at Berkeley, also an expert in this area of national prominence; and Mr. Tom Parker, who is CEO of the Halo Partnership and a former British counter-terrorism official.

So we would like to begin with you, Judge Posner, and then we will move to Mr. Yoo and then to Mr. Parker. So please, we would like to hear your testimony.

**STATEMENT OF HON. RICHARD A. POSNER, FEDERAL JUDGE, U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND SENIOR LECTURER, UNIVERSITY OF CHICAGO LAW SCHOOL**

Judge POSNER. Well, thank you very much, Mr. Chairman. Am I audible?

Senator GREGG. Yes.

Judge POSNER. So in my 5-minute summary I will be very, very brief. I want to make just three—

Senator GREGG. If you need more time, take it.

Judge POSNER. Okay. Well, I will be very brief and I can amplify afterwards. I want to make three points: first, that, contrary to public impression, we can do almost everything that the British do within the limits of the Constitution; second, that I think we are overinvested in the criminal justice system as a way of dealing with terrorism; and third, that the biggest lesson perhaps we can learn from Britain is the need for a domestic intelligence service that would be separate from the FBI.

On the first point, our political and legal culture is of course derivative from England's and when Americans go to England they

do not feel that they are stepping into some lawless society because the Bill of Rights has not followed them to England. In fact, as I explain in my prepared testimony, the innovative anti-terrorist measures used by England might violate an American statute, which of course Congress could change, but would not violate the Constitution.

I want to give just one example of this which seems to me the most important and that is the British rule that permits detention of terrorist suspects for 28 days without formal charges being lodged, and the popular reaction to this is that we could not have—we could not do anything like this, because our Constitution requires that a suspect be charged within 48 hours.

That simply is incorrect. First of all, there is nothing in the Constitution that says anything about 48 hours or prompt hearings. The Supreme Court has, by way of free interpretation of due process, has said that normally a suspect has to be charged within 48 hours, given a probable cause hearing within 48 hours, but that if the government can show a bona fide emergency or other exceptional circumstances then it can hold the person longer without the probable cause hearing.

I think it would be very constructive for Congress to enact a statute which would specify a period of days, like 28 or 38 days, that would be appropriate for detention if there were a real emergency, as there is in many terrorist situations. And I give other examples in my prepared testimony.

My second point about overinvestment in the criminal justice system, I am echoing some remarks that the chairman made. We have not really had a very happy experience with prosecuting terrorists in the ordinary criminal courts and the reason is that the criminal justice system has been designed with ordinary criminal conduct in mind. It has not been tailor-made to special problems of terrorism. We have seen in the prosecutions the problems that our use of the criminal justice system involves: public trials which can become platforms for terrorists to preen themselves on martyrdom and so on; the making public of information that may tip off terrorists about investigative methods and knowledge of the government; and also the fact it is very difficult to deter terrorists by threat of criminal punishment if they are fanatics.

So we should be thinking about alternative, even more than we are, thinking about alternatives to the criminal justice system as a way of dealing with terrorists, even in the United States, where we cannot use military action or covert action.

That brings me to my third point, about our need for a domestic intelligence agency separate from the FBI. There is an op-ed piece in the New York Times this morning by the public affairs officer of the FBI in which he intimates, he does not quite say, that I advocate breaking up the FBI. Absolutely not. I would not disturb the FBI in the least. I think it needs to be supplemented by an agency that is not tied to the criminal law enforcement system the way the FBI is.

The FBI criminal investigation agency. The training of its agents, its culture, its traditions, are all oriented toward arresting people and preparing evidence to enable them to be convicted. That is fine. We need that, but we also need an agency that is focused

exclusively on intelligence, not using the methods of criminal law enforcement. So MI5 does not have arrest powers. The Canadian Security Intelligence Service, which is the counterpart to MI5 in Canada, does not have arrest powers. An agency which can focus exclusively on intelligence-gathering, infiltration, surveillance, disinformation, penetration, that is a very valuable adjunct to our efforts and can get around a lot of the difficulties that our criminal justice system encounters when it tries to deal with terrorists.

This detention for 28 or 30 days that I mentioned where I think we can emulate the United Kingdom, I see the real significance of this as ancillary to intelligence rather than to criminal justice enforcement, because if you are chasing terrorists and you seize one you want to be able to question this person without tipping off his accomplices that you have him and keeping him in isolation for a few weeks is going to make it easier to obtain information from him.

So let us think in terms of alternatives to criminal justice system and let us also not exaggerate the constitutional limitations on our borrowing from England. Just one second more on this. We should recognize that the United Kingdom has a much longer history than the United States in dealing with terrorist threats. In fact, it goes back at least as far as the 16th century, and England has had some very important successes, for example in World War II against German espionage, later against the Irish Republican Army. So we should not be provincial, we should not be too proud to learn from the experience of foreign countries, especially a country like England, which, as I say, is the source of our own legal and political culture.

Thank you, Mr. Chairman.  
[The statement follows:]

PREPARED STATEMENT OF RICHARD A. POSNER

I am honored<sup>1</sup> to have been asked to appear before the subcommittee to testify concerning this important subject. We must not be provincial in our response to the threats to our national security that are posed by global terrorism in an era of proliferation of weapons capable of inflicting catastrophic harm. We must not be too proud to learn from nations such as the United Kingdom that have a much longer history of dealing with serious terrorist threats than the United States has. Queen Elizabeth I faced serious threats from religious fanatics eager for martyrdom dispatched to England by foreign powers with which England was at war in the sixteenth century. Germany peppered England with spies during World War II. The Irish Republican Army waged clandestine war against England for decades. And today England faces at least as serious an internal threat of Islamist terrorism as the United States does.

The United Kingdom is a particularly apt model for us to consider in crafting our counterterrorist policies because our political and legal culture is derivative from England's. The major difference is our Bill of Rights, which has no direct counterpart in English law, though the difference between our two constitutional cultures is narrowing because of England's having signed the European Convention on Human Rights.

In considering the effect of the Bill of Rights on measures to combat terrorism, it is important that we bear in mind the difference between what the Bill of Rights actually says and how the Supreme Court has interpreted its words, because judicial interpretations of the Constitution are mutable, whereas the words themselves can be changed only by the cumbersome procedures for amending the Constitution. Important too that we bear in mind the tradition of flexible interpretation of the

<sup>1</sup>A brief biographical sketch of Judge Posner is appended at the end of this statement for background.

Constitution that permits departures from as well as judicial elaborations of the literal language of the document, and the essential role of balancing competing interests as a technique of flexible interpretation. I have argued in my recent book *Not a Suicide Pact*<sup>2</sup> that in relation to measures, especially measures initiated by or concurred in by Congress, to protect the national security against terrorist threats, the Constitution should be regarded as a loose garment rather than a straitjacket, a protection against clear and present dangers to civil liberties rather than the platform of the American Civil Liberties Union. Judges in our system are (with rare exceptions) generalists rather than specialists. Very few of us have extensive knowledge of the scope and gravity of the terrorist menace and of the efficacy and limitations of alternative measures for coping with terrorism, and we should be cautious therefore in setting our judgment against that of the officials and staffs of the executive and legislative branch, who have the relevant expertise.

The United Kingdom is a liberal democracy, like the United States, and Americans living in the United Kingdom, and therefore fully subject to English law, do not walk in fear that they are at the mercy of a secret police. Yet England has deployed both before but especially after September 11, 2001, counterterrorism measures that frighten our civil libertarians. These include:<sup>3</sup>

- conducting criminal trials without a jury if there is fear of jurors' being intimidated by accomplices of the defendant;
- placing persons suspected of terrorism under "control orders" that require them as an alternative to being detained to consent to being questioned or monitored electronically or forbidden to associate with certain persons, and that limit their travel;
- detaining terrorist suspects for up to 28 days (with judicial approval) for questioning without charges being lodged;
- deportation proceedings from which the alien and his lawyer may be excluded—the alien need not be fully informed of the reasons for deporting him and "his" lawyer is appointed by and, more important, is responsible to the government rather than to the defendant and secret evidence may be concealed from the defendant
- indefinitely detaining aliens who have been ordered deported but cannot actually be removed from the country (there may be no country willing to take them);
- criminalizing the indirect encouragement of terrorism as by "glorifying" terrorism by a statement implying that it would be good to emulate the glorified activity;
- issuance of search warrants by security officials rather than by judges;
- traffic analysis and other data mining of Internet communications without a warrant<sup>4</sup> (Internet Service Providers are required to install devices to enable Internet communications to be intercepted in transit)—a warrant is required to read an intercepted communication, but it may be granted by an official rather than by a judge.

A majority of these measures, while they might if adopted by our government violate Federal statutes, would not violate our Constitution. The Constitution gives illegal aliens much more limited rights in deportation proceedings than they or citizens would enjoy in criminal proceedings; allows criminal suspects to negotiate for "control" orders in lieu of incarceration; and, contrary to a widespread impression, does not require that searches be conducted by warrants, whether issued by judges or (other) officials, but only that searches be "reasonable" (this is patent in the text of the Fourth Amendment), and does not require that a criminal suspect must always be brought before a magistrate for a probable-cause hearing within 48 hours

<sup>2</sup>Richard A. Posner, *Not a Suicide Pact: The U.S. Constitution in a Time of National Emergency* (2006).

<sup>3</sup>The sources on which this summary is based include Antonio Vercher, *Terrorism in Europe: An International Comparative Legal Analysis* (1992); Peter Chalk and William Rosenau, *Confronting the "Enemy Within": Security Intelligence, the Police, and Counterterrorism in Four Democracies* (2004); Dana Keith, "In the Name of National Security of Insecurity? The Potential Indefinite Detention of Noncitizen Certified Terrorists in the United States and the United Kingdom in the Aftermath of September 11, 2001," 16 *Florida Journal of International Law* 405 (2004); Jeremie J. Wattellier, Note, "Comparative Legal Responses to Terrorism: Lessons from Europe," 27 *Hastings International and Comparative Law Review* 397 (2004); Kent Roach, "Must We Trade Rights for Security? The Choice between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain," 27 *Cardozo Law Review* 2151 (2006); Laura K. Donohue, "Anglo-American Privacy and Surveillance," 96 *Journal of Criminal Law and Criminology* 1059 (2006).

<sup>4</sup>A warrant is not required "to monitor patterns, such as web sites visited, to and from whom email is sent, which pages are downloaded, of which discussion groups a user is a member, and which chat rooms an individual visits." Donohue, note 3 above, at 1179–1180.

of his arrest. Not only is there no such requirement anywhere in the text of the Constitution, but the Supreme Court, while imposing this requirement by way of free interpretation of the due process clauses, has created an exception for cases of “bona fide emergency or other extraordinary circumstance.”<sup>5</sup>

That exception is potentially very important, and codifying it should in my opinion be a priority in the congressional deliberations on strengthening our laws against terrorism. The government may have a compelling justification for holding a terrorist suspect incommunicado for longer than 48 hours: to avoid tipping off his accomplices that the government has caught him, while meanwhile extracting from him information that it can use to arrest those accomplices before their suspicions are aroused. It may even be possible during this period of extended detention to “turn” him, so that he becomes a double agent, spying on his erstwhile accomplices; recruiting a double agent tends to be a protracted process and one that must for obvious reasons be conducted in secrecy. Holding a terrorist suspect incommunicado also facilitates interrogation without crossing the line that separates permissible interrogation tactics from torture and other impermissibly coercive methods, simply because a detainee who is isolated, with no access to a lawyer, can more easily be persuaded to provide information sought by the government.

How much longer than 48 hours should it be permissible to detain a terrorist suspect? That would depend on how likely it is that protracted detention would yield significant benefits for national security in the form of additional arrests or of a fuller detection, penetration, and disruption of ongoing terrorist activities or preparations. There must be limits. The longer the period of detention, the greater the hardship to the person detained (who may after all be innocent) and the less likely further detention is to yield significant information or other benefits. The benefits diminish with time, and the costs increase; when the curves cross, the detainee should be brought before a judicial officer for a determination of whether further detention would be proper. There should be a fixed outer limit; 28 days might be the place to start in fixing such a limit.

The English measures that would most clearly run afoul of current constitutional interpretations are conducting criminal trials without a jury and forbidding the “glorifying” of terrorism unless the glorification amounts to an incitement to imminent terrorist activity. Yet the “unless” qualification is significant, as “glorifying” that came within it would be punishable under U.S. law, so that the objection to punishing the glorification of terrorism is not so much to the principle of the English law as to the vagueness of the word “glorifying.” And as for criminal trials without a jury, this requirement of the Bill of Rights can be bypassed by trying suspected terrorists before military commissions, where there is no right to a jury. How far such commissions can go to relax the constitutional constraints required in orthodox criminal trials is an unsettled constitutional issue. It will not be resolved until Congress enacts a law authorizing such commissions, which at this writing seems imminent.

I conclude that, as a matter of constitutional law, Congress and the President can if they want go a considerable distance in the direction of English counterterrorist law. It then becomes a question of policy how far we should go in that direction. And that question in turn depends on how salient a role the formal legal system, and in particular the criminal justice system, should play in the fight against terrorism. My own view is that we are overinvested in criminal law as a response to terrorism and should be trying to deemphasize (though not of course abandon) the effort to prevent terrorism by means of criminal prosecutions, especially in the regular courts, which are not designed for the trial of persons, whether military or civilian, who present a serious threat to national security. We should be making less use of devices such as the warrant that are used mainly in criminal law enforcement and more use of executive and legislative oversight to curb abuses of counterterrorism, and we should be focusing more of our domestic security efforts on intelligence as a means of detecting and disrupting terrorist plots without necessarily prosecuting the plotters.

It is telling that no one was ever tried by the military commissions set up in the wake of 9/11<sup>6</sup> and that criminal prosecutions of terrorists have been few and often

<sup>5</sup> County of *Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991).

<sup>6</sup>A failure that may have contributed to the government’s losing *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Had the Court had before it a judgment in a trial before a military commission, it might have been persuaded that the commission’s procedures were adequate to prevent miscarriages of justice. Of course the Court can also be criticized for its impatience in refusing to hold its fire until a trial had been held that could have lent concreteness to the Court’s consideration of the legal issues.

trivial,<sup>7</sup> have had no demonstrated impact on the terrorist menace, and indeed seem to be petering out.<sup>8</sup> Contemporary international terrorists are difficult to deter, not only because many of them are suicide attackers but also because most political criminals expect (with considerable basis in history) to be released from prison, as part of a swap for hostages or a political settlement, before completion of their terms. Locking up terrorists (those who survive their terrorist escapades) has only a limited preventive effect because the supply of terrorists is at present effectively unlimited. And criminal trials, being public, provide platforms for terrorists to broadcast their goals and preen themselves as martyrs and yield information about investigative methods that may enable future terrorists to evade detection.

Fortunately, if a terrorist plot is detected, often it can be neutralized without prosecution of the plotters. Some can be deported, some held in administrative detention, some “turned” to work for us, some discredited in the eyes of their accomplices, some paid off, some frightened into neutrality, some sent off on wild-goose chases by carefully planted disinformation, and some carefully monitored in the hope that they will lead us to their accomplices. The greatest value of allowing detention of terrorist suspects for more than 48 hours is not to facilitate prosecution but to support the intelligence function by enabling the government to obtain more complete and timely information concerning the scope, direction, timing, personnel, and links to other networks of the terrorist project that has been detected.

Of course there are incorrigibles who must be prosecuted. But if they are truly threats to national security they can be prosecuted outside the ordinary criminal justice system, for example by military commissions if properly configured to comply with the Supreme Court’s strictures.

My concern with our overinvestment in the criminal law response to terrorism brings me to the most important lesson that we can learn from the English, and that is the need to have a domestic intelligence agency that is separate from a police force. The United Kingdom, like virtually all nations except the United States, has long had such an agency (the Security Service, popularly known as “MI5” because it originated a century ago as a branch of military intelligence). MI5 has no arrest powers—it is a pure intelligence agency—but works closely with Scotland Yard’s Special Branch. It apparently played a major role in breaking up the Heathrow plot, and it had earlier succeeded in foiling German espionage in World War II and in limiting IRA violence. In the United States, domestic intelligence is primarily the responsibility of the FBI. Other agencies have some domestic intelligence functions, but there is no counterpart to MI5 or to the Canadian Security Intelligence Service, which is our northern neighbor’s counterpart to MI5 and played an important role in foiling the recent Toronto terrorist plot.

The problem with placing domestic intelligence responsibility inside the FBI is that the Bureau is first and foremost a criminal investigation agency. It is part of the Department of Justice and its special agents work under the direction of the Department and the Department’s local U.S. Attorneys to make arrests and gather evidence looking to prosecution. The Bureau’s goal is not to prevent crimes but to catch criminals. It is very good at that. But its conception of national security intelligence is shaped by its traditions and primary focus. It sees such intelligence as an adjunct to criminal prosecutions. Its conception of how best to deal with terrorism is to arrest and prosecute and convict and imprison the terrorists. That is a dangerously incomplete strategy because of the limitations of criminal law enforcement, sketched above, as a means of preventing terrorism. Like military and covert action against terrorists abroad, like border controls, and like hardening potential terrorist targets, criminal law enforcement is an important tool for dealing with the terrorist threat. But another important tool, which the FBI so far has been notably unable to forge, is domestic intelligence as a free-standing mode of terrorism prevention. The key to effective intelligence, which is not well appreciated by the Bureau, is to cast a very wide net with a very fine mesh to catch the tiny clues (most of which would not qualify as evidence in a court proceeding) that assembled into a mosaic may enable the next attack to be prevented; for once the plot is detected, as I have said, it can be disrupted without formal legal proceedings even if later it is decided to prosecute some or all of the plotters. The process of detection and disruption requires great patience, and some risk (a risk the FBI and the Justice

<sup>7</sup>According to a recent study, “the median sentence for those convicted [since the 9/11 attacks] in what were categorized as ‘international terrorism’ cases—often involving lesser changes like immigration violations or fraud—was 20 to 28 days, and many received no jail time at all.” Eric Lichtblau, “Study Finds Sharp Drop in the Number of Terrorism Cases Prosecuted,” *New York Times*, Sept. 4, 2006, p. A7.

<sup>8</sup>*Id.*; Dan Eggen, “Terrorism Prosecutions Drop: Analysis Shows a Spike after 9/11, Then a Steady Decline,” *Washington Post*, Sept. 4, 2006, p. A6.

Department are unwilling to take) that a terrorist act will be committed while the intelligence service is still exploring the extent of the terrorist network without tipping its hand by recommending arrests.

I have argued elsewhere and at considerable length for the urgency of our need for a domestic intelligence agency separate from the FBI, and I will not repeat the argument here but will merely refer the interested reader to the relevant sources.<sup>9</sup> I emphasize that there is no constitutional (or, I believe, other legal) bar to the creation of such an agency. It has been argued that an MI5 clone wouldn't work here because the United Kingdom does not have the Bill of Rights. The argument is mistaken. The principal limitations that the Bill of Rights imposes on counterterrorism involve arrest, detention, admissible evidence, trial procedures, and other incidents of criminal law enforcement and are almost entirely irrelevant to an intelligence service that would have no arrest or other prosecution-related powers. The exception is surveillance by means of physical or electronic searches, which are regulated by the Fourth Amendment. But the relevant limitations, some of which indeed pinch too hard in my judgment, notably the Foreign Intelligence Surveillance Act, are statutory rather than constitutional. Warrants are tightly restricted by the warrant clause of the Fourth Amendment. But surveillance, even when it takes the form of wiretapping or other electronic interception, need not be conducted under a warrant. The only limitation the Constitution places on searches without a warrant is, as I have noted already, that they be reasonable, and none of us would wish to see a domestic intelligence agency employ unreasonable methods of surveillance. The potential abuses of such surveillance can be minimized, without judicial intervention, by rules limiting the use of intercepted communications to national security, requiring that the names of persons whose communications are intercepted (and the reasons for and results of the interception) be turned over to executive and congressional watchdog committees, and imposing meaningful penalties on officials who violate civil liberties.

So we can learn a lot from the British experience with fighting terrorism, in particular about the need for detention of terrorism suspects beyond the conventional 48-hour limit and, above all, about the need, which should encounter no obstacle based on our Constitution, for a domestic intelligence agency separate from the FBI.

#### APPENDIX: BRIEF BIOGRAPHICAL SKETCH OF RICHARD A. POSNER

Richard A. Posner was born in 1939. After graduating from Yale College and Harvard Law School, Posner served in various government positions, including in the Justice Department, before entering law teaching in 1968 at Stanford as an associate professor. He became professor of law at the University of Chicago Law School in 1969, where he remained (later as Lee and Brena Freeman Professor of Law) on a full-time basis until 1981. During this period Posner wrote extensively on economic analysis of law and also engaged in private consulting, mainly in antitrust law, and was from 1977 to 1981 the first president of Lexecon Inc., a consulting firm.

Posner became a Judge of the U.S. Court of Appeals for the Seventh Circuit in December 1981 and served as Chief Judge from 1993 to 2000. He has written almost 2,200 published judicial opinions. He continues to teach part time at the University of Chicago Law School, where he is Senior Lecturer, and to write academic articles and books. For several years his major academic focus has been on catastrophic risk (including terrorism and proliferation), national security intelligence, and the intersection between national security and civil liberties. He has published in these areas, besides shorter works, *Catastrophe: Risk and Response* (2004); *Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11* (2005); *Uncertain Shield: The U.S. Intelligence System in the Throes of Reform* (2006); and *Not a Suicide Pact: The Constitution in a Time of National Emergency* (2006).

Posner received honorary degrees of doctor of laws from Syracuse University in 1986, from Duquesne University in 1987, from Georgetown University in 1993, from Yale in 1996, from the University of Pennsylvania in 1997, from Northwestern University in 2002, and from Aristotle University (in Thessaloniki) in 2002; and he received the degree of doctor honoris causa from the University of Ghent in 1995 from the University of Athens in 2002, and an honorary juris doctor degree from Brooklyn Law School in 2000. In 1994 he received the Thomas Jefferson Memorial Foundation Award in Law from the University of Virginia. In 1998 he was awarded the

<sup>9</sup>Richard A. Posner, *Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11*, ch. 6 (2005); Posner, *Uncertain Shield: The U.S. Intelligence System in the Throes of Reform*, chs. 4-5 (2006); Posner, *Remaking Domestic Intelligence* (Hoover Institution, 2006); Posner, "Intelligence and Counterterrorism Five Years after 9/11" (September 2006, unpublished).

Marshall-Wythe Medallion by the College of William and Mary, and he received the 2003 Research Award from the Fellows of the American Bar Foundation. He received the John Sherman Award from the U.S. Department of Justice in 2003, for contributions to antitrust policy. In 2005 he received the Learned Hand Medal for Excellence in Federal Jurisprudence from the Federal Bar Council, the Thomas C. Schelling Award for scholarly contributions that have had an impact on public policy from the John F. Kennedy School of Government at Harvard University, and the Henry J. Friendly Medal from the American Law Institute.

Posner is a member of the American Law Institute, the Mont Pélerin Society, and the Century Association, a fellow of the American Academy of Arts and Sciences, an Honorary Bencher of the Inner Temple, a corresponding fellow of the British Academy, an honorary fellow of the College of Labor and Employment Lawyers, a member of the editorial board of the European Journal of Law and Economics, and a Consultant to the Library of America, as well as a member of the American Economic Association and the American Law and Economics Association (of which he was President in 1995–1996). He was the honorary President of the Bentham Club of University College, London, for 1998. With Orley Ashenfelter, he edited the American Law and Economics Review, the journal of the American Law and Economics Association, from its founding in 1998 to 2005.

Academic writings by Posner have been translated into French, German, Italian, Spanish, Chinese, Japanese, Korean, Greek, Portuguese, Ukrainian, Lithuanian, and Slovenian. He and the economist Gary Becker write weekly commentaries on policy issues, published in “The Becker-Posner Blog,” at <http://becker-posner-blog.com/>.

Senator GREGG. Thank you very much, Judge, for your thoughts. We appreciate them.

Mr. Yoo.

**STATEMENT OF JOHN YOO, PROFESSOR OF LAW, BOALT HALL SCHOOL OF LAW, UNIVERSITY OF CALIFORNIA AT BERKELEY**

Mr. Yoo. Thank you, Mr. Chairman, for inviting me to testify. These are extremely important hearings, a very important subject. In the 5 minutes I have, I find myself in the position many law professors are in, in that I might have something interesting to say, but Judge Posner got there first. So actually a lot of the things I was going to say he has already said. So I am just going to try to supplement some of the points he made and may talk about some areas of difference between the United States and Great Britain where actually the Appropriations Committee in particular could do something that would bring us up to par with Great Britain, not at a constitutional level but at a policy level.

I think Judge Posner is quite right, the things that people have focused on in the media as being great differences between the British and American systems that give the British an advantage I think are somewhat illusory or exaggerated. He correctly pointed out this idea that the British can detain people longer than we can in our system might be a correct as a matter of formal rules, but does not take account of what has happened in the United States over the last 5 or 6 years.

One way to think about it is that the British system is, as you said in your opening remarks, preventative. It aims to try to prevent terrorist attacks from happening in the future. The American approach had been primarily or exclusively law enforcement, which is retrospective. The idea of the criminal justice primarily is you look at an event that has already happened and you try to historically put the facts together about who’s responsible. As Judge Posner said, as you have mentioned, and as Mr. Parker says in his testimony, those two basic goals are often in conflict and may be incompatible often.

So one way you can think about what the administration has done over the last 5 years and in the bill about Hamdan which you mentioned in your opening remarks has been to try to move the American system to have some ability to conduct preventative measures rather than just be stuck in a criminal justice system, which was the approach administrations of both parties took until September 11, I would say.

So on the detention issue, the formal rule is quite right, the United States cannot hold people for longer than 48 hours in the criminal justice system. In Great Britain you can hold people for 28 days without criminal charge. But the administration, in a move approved by the Supreme Court, has said that it will detain people as enemy combatants without criminal charge and that can go on for much longer than 28 days. Obviously it can go on for months or years, until the end of the conflict. That is an example where the administration, I think with Congress' support and Supreme Court approval, has tried to introduce some of these preventative measures.

Another area is surveillance, which you mentioned in your opening remarks. The British have lower standards for the collection of non-content communication, data about phone calls, emails, not the content but the other kind of information connected with that. In Great Britain, as I understand it, one can just go to an agency official for permission to conduct, to collect that kind of information. In the United States you would usually have to go to the FISA court, the FISA court or a regular court, to collect that information.

In an effort to move the system to a more proactive future, forward-looking perspective, the administration introduced the NSA terrorist surveillance program, which is more like the British system. This was I think particularly important, although I think overlooked in the accounts of how Great Britain broke up the plot last month. If you read the accounts carefully, they say there was an initial tip given by a community member. But then it appears that Great Britain used that information to engage in massive amounts of data mining and communications interceptions to try to piece together the network.

That would be difficult under the FISA system, which is based on individual warrants, based on suspicion of a particular person. But under the programs that have been publicly revealed, the administration has tried to move the system in that direction and, as you said, Congress is currently considering right now how far to go in authorizing that. That is one area, at the very least, where I think, as you asked in your opening remarks, what can Congress do now consistent with the Constitution to bring is closer to the British system. It would be to approve at least some elements, I think, of the terrorist surveillance program.

So the two I think really big areas where Great Britain does possess advantages is data mining—and this is particularly I think of interest to the Appropriations Committee. As you might remember, in the winter of 2001–2002 there was a big controversy over research being conducted at the Defense Department to engage in data mining, the total information awareness program, and my understanding was that Congress through an appropriations rider cut off all funding to the Defense Department to conduct that kind of

research, not to put the program in operation, but at least to consider some issues of how can you even balance privacy using computers against the kind of information you could gather and analyze using computers. Research on that has been halted through appropriations and that could be something that this committee could think about and monitor, balance, in order to bring us closer to what the British are able to do.

My sense is the British do not have any constitutional restrictions on data mining and the reports in our press are that the British use that tool quite extensively.

The last thing I will mention—again, Judge Posner beat me to it—is the MI5 model. Another thing that this committee could do is to start the transition of the FBI from a law enforcement-focused setup to something he mentioned, prospective, preventative. There's been a lot of studies done by people in this country and elsewhere about whether it's possible or consistent for that goal to sit with the law enforcement goal.

As someone who has worked in the Justice Department, I have a lot of respect for the FBI agents and their managers, who have a very difficult problem. But I think it is fair to say over the last 5 years the FBI has had serious difficulty trying to upgrade its systems and change its mentality towards a type you would want for national security purposes.

So that is something I think this committee could usefully do in addition to data mining, is to consider whether it wants to start using appropriations as a method to prod the FBI to move faster or even to consider other options, like supplementing the FBI with a new independent agency or telling the FBI to get out of the business of catching bank robbers and kidnappers and focus exclusively on national security and leave those other issues, which are perfectly appropriate in peacetime, to State and local law enforcement.

But thank you very much for having me. I look forward to your questions.

[The statement follows:]

PREPARED STATEMENT OF JOHN YOO

Mr. Chairman, thank you for the opportunity to testify before the Subcommittee on Homeland Security regarding American and British laws for investigating and detaining suspected terrorists. I am a professor of law at the University of California, Berkeley. From 2001 to 2003, I served as deputy assistant attorney general in the Office of Legal Counsel at the Department of Justice, where I worked on issues involving national security, foreign relations, and terrorism. My academic writing on these subjects can be found in two books, one published last year, *The Powers of War and Peace*, and one appearing later this month, *War by Other Means*. The views I present here are mine alone.

Great Britain's successful prevention of a recent terrorist plot to destroy multiple American airliners flying from London to the United States in mid-air has prompted questions whether our counter-terrorism efforts can be improved. Some have suggested that British authorities enjoy broader law enforcement powers to investigate and detain terrorists, and asked whether we can learn from and adopt British practices. This idea has a basic attractiveness because the United States and Great Britain share a common cultural heritage, face a similar threat from international terrorism, and operate a common law legal system.

As I will explain, differences result from both constitutional and policy choices. I hope to demonstrate in what areas the American Constitution prohibits adopting British standards, as well as areas where American laws can be made more effective at fighting terrorism, that is, where our policy choices are not limited by the Constitution. First, I will discuss important constitutional differences between the United States and Great Britain.

### *Constitutional Differences*

Unlike the United States, the United Kingdom does not have a written constitution. The British system lacks formal constitutional protections of many of the rights we consider fundamental as deriving from the constitutional text, structure, and history. Britain's unwritten constitution does not enforce a strict separation of powers at the national level, nor does it have a Federal system of government. Rather than an independent Presidency and Congress, executive power is exercised by a prime minister and cabinet which represent the majority party in Parliament.

The American Constitution protects many important civil liberties through explicit guarantees in the Bill of Rights which are lacking under the British system. For instance, the Fourth Amendment was enacted in 1791, partly in response to British practices during the Colonial period. This Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment imposes restrictions upon the power of the government to monitor and detain individuals, even for legitimate law enforcement purposes. The Supreme Court has interpreted an individual's right under the Fourth Amendment to require that to allow extended detention after a warrantless arrest, the suspect must be promptly presented before a judge to determine probable cause to stand trial for a crime—in almost all cases, within 48 hours. *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975); *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). If the evidence is found insufficient, the arrestee must be released. It is well established that the suspect may appeal under the writ of habeas corpus to challenge his continued detention. See, e.g., *Ex Parte Bollman*, 4 Cranch 75 (1807). Britain has no such constitutional limits, and has greater flexibility to legislatively alter the time and procedure of detention without charge.

The First Amendment, likewise ratified as part of the Bill of Rights, protects among other things individuals' freedom of speech, religion, and association, which can come into conflict with law enforcement and intelligence purposes. Britain does not have a constitutional analogue to the First Amendment. Finally, the Sixth Amendment guarantees accused criminals certain rights, such as the right to a speedy trial and the right to be informed "of the nature and cause of the accusation," and the right "to be confronted with the witnesses against him."

### *A Comparison of American and British Anti-Terror Laws*

The British Parliament has recently enacted several important pieces of anti-terrorism legislation: the Terrorism Act 2000, the Regulation of Investigatory Powers Act of 2000, the Anti-terrorism, Crime and Security Act of 2001, the Prevention of Terrorism Act 2005, and the Terrorism Act of 2006. These laws set forth comprehensive definitions of terrorism and related offenses, and establish procedures authorities shall follow in combating terrorism. The laws represent Britain's response to two distinct forms of terrorist threat. The first was from Irish separatists who committed acts of terrorism and murder in Northern Ireland and Britain. This was the United Kingdom's greatest domestic security threat for much of the latter part of the 20th Century. The second form of terrorism addressed by the British laws is Islamic fundamentalist terrorism perpetrated by al Qaeda and groups affiliated with it. This has taken on great prominence in Britain post-9/11, and more so in light of the deadly attacks on the London Underground on July 7, 2005, and the recently foiled plot to hijack or blow up passenger jets departing Britain bound for the United States.

The following provides a brief description of the differences in American and British anti-terrorism laws topic by topic. It examines the laws regarding arrest, searches, and detention of suspects; monitoring suspects' bank accounts; monitoring communications data; intercepting communications, i.e. wiretapping; infiltrating suspected groups; and finally, sharing information among law enforcement and the domestic and foreign intelligence communities.

### *Arrest, Searches, and Detention of Suspects*

Under the Terrorism Act of 2000, a British officer may arrest a suspected terrorist or conduct a search of a suspect he "reasonably suspects" is a terrorist or is in possession of "anything which may constitute evidence that he is a terrorist." An American officer, by contrast, must have "probable cause" to make an arrest or conduct a search of a person he suspects to have committed a crime. See, e.g., *United States v. Watson*, 423 U.S. 411 (1976). This is the minimum under the Fourth Amendment and cannot be changed by Congress.

The British have greater power to detain a terrorist without criminal charge. Section 23 of the Terrorism Act of 2006 sets forth a procedure under which a suspect may be detained for up to 28 days before he must be charged with a crime or released. After 48 hours, judicial approval is required, and is required a second time if the authorities wish to detain the suspect beyond 7 days. The judge does not need to find probable cause, but must be satisfied that “there are reasonable grounds for believing that the further detention of the person to whom the application relates is necessary to obtain relevant evidence whether by questioning him or otherwise or to preserve relevant evidence,” and “the investigation in connection with which the person is detained is being conducted diligently and expeditiously.” The suspect has access to counsel and may make written or oral communications before the judge; however, the suspect and his counsel may also be excluded from portions of the hearing. The British government has already invoked this power to detain the individuals arrested in conjunction with the August, 2006 plot to blow up airliners departing Britain. This allowed the plot to be halted, but also allows more evidence to be gathered prior to formally charging the suspects with crimes.

In the United States, law enforcement authorities must generally present probable cause before a judge that a suspect has committed a crime or the suspect will be released. The Supreme Court has interpreted the Fourth Amendment to require the government to charge suspects at most within 48 hours. The Court has made clear that it is unreasonable to delay a probable cause hearing for purposes of gathering evidence to justify the arrest. *McLaughlin*, 400 United States at 56. There are few exceptions to the American probable cause paradigm. One is the material witness statute, 18 U.S.C. §3144, which allows the arrest and detention of suspects whose testimony in a criminal proceeding might be difficult to obtain. This has been applied in the war on terrorism to initially detain Jose Padilla, as well as others who may have had information about the 9/11 hijackers, but its applicability and usefulness are limited.

It is not clear, however, that the unwritten nature of the British constitution permits broader detention authority than in the United States as a constitutional matter. The Supreme Court has made clear, as recently as in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), that the government may detain enemy combatants without criminal charge or hearing until the end of hostilities. On September 18, 2001, Congress voted in the Authorization to Use Military Force statute to approve the President’s authority to use force against those connected to the September 11, 2001 terrorist attacks. Ever since the earliest days of warfare, the lesser power to detain combatants has been understood to fall within the greater authority to use force against the enemy. As the Court recognized, the purpose of detention in the military context is not to punish, but merely to prevent combatants from returning to the fight. In fact, such detention is the merciful, humanitarian alternative to a practice of granting no quarter to the enemy. That power extends even to U.S. citizens, as it did in the case of *Ex Parte Quirin*, 317 U.S. 1, 28 (1942), in which the Court upheld the World War II detention and trial by military commission of Nazi saboteurs, one of whom apparently was a citizen. After noting that the laws of war permitted the detention without criminal charge of Confederate soldiers during the Civil War, the Court observed that “A citizen, no less than an alien, can be ‘part of or supporting forces hostile to the United States or coalition partners’ and ‘engaged in an armed conflict against the United States.’” No specific congressional authorization, the Court further concluded, was needed. “Because detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war,” the Court concluded, “in permitting the use of ‘necessary and appropriate force’ Congress authorized wartime detention of enemy combatants.”

The Constitution imposes much narrower restrictions on the detention of criminal suspects than the British system. But if the subject is a terrorist connected with al Qaeda or with the September 11 attacks, he or she might meet the standard for an enemy combatant. In that case, the U.S. government could detain the subject as an enemy combatant, without having to meet the criminal justice system’s 48 hour requirement. The only complication in this argument is that *Hamdi* addressed a case in which the enemy combatant had been detained in the course of hostilities in Afghanistan, and did not address a different factual circumstance presented by an American citizen affiliated with al Qaeda who is detained on United States soil. While the U.S. Court of Appeals for the Fourth Circuit in *Padilla* found the same logic applied to both cases, the Department of Justice transferred Jose Padilla to the criminal justice system before the Supreme Court could hear an appeal.

#### *Restricting Movements of Suspects*

Britain’s Prevention of Terrorism Act allows authorities to issue “control orders” which impose restrictions upon a suspect’s civil liberties without incarcerating him.

These orders, which require judicial approval and are valid for up to one year at a time, could restrict an individual's freedom to travel, to meet with certain groups or visit certain locations, to be away from his home during certain hours of the day, or to use cell phones or the internet. Currently the regime of control orders is under challenge as a potential violation of European human rights laws. The United States has no comparable Federal laws, and such provisions would run into constitutional difficulties due to the First Amendment's protections of individuals' freedom to travel and associate.

#### *Monitoring Bank Accounts and Communications*

The Anti-terrorism, Crime and Security Act of 2001 allows British authorities to monitor bank accounts upon obtaining a warrant from a judge. The judge must find that the monitoring relates to a terrorist investigation, and also that the particular monitoring order sought will further that investigation. Anti-terrorism, Crime and Security Act of 2001, Schedule 2 Part 1 (amending Terrorism Act 2000 §38). The order lasts for 90 days. Additionally, the Regulation of Investigatory Powers Act of 2000, and an accompanying Code of Practice, allows British law enforcement and intelligence authorities to evaluate communications data for patterns suggestive of terrorist activities. This means the attributes of communications, such as the location where a call was placed and its destination, but not the actual contents of the communication. To monitor communications data, a law enforcement or intelligence agency need only complete a written application, which is considered by a designated individual within the body or agency. Authorizations are valid for up to one month, and can be renewed. The government may also inquire into subscriber information, or the identity of persons to whom a telephone number is registered or who controls an email account or internet domain. British law enforcement and intelligence agencies are allowed to share any information obtained by these or other investigatory means.

In the United States, authorities may obtain a warrant or administrative subpoena for financial records under the Right to Financial Privacy Act, 12 U.S.C. §§3401–3422, which grants individuals some privacy rights over financial records in the hands of third parties. Authorities may also obtain a warrant for tangible items held by third parties, under section 215 of the USA Patriot Act. In 2001, the Patriot Act authorized domestic law enforcement and intelligence agencies to share financial documents for the purposes of fighting terrorism. The ability of American authorities to obtain financial records by administrative subpoenas is somewhat easier than that granted to their British counterparts, and the rules on sharing the information among agencies are comparable. With regard to other tangible items, section 215 of the Patriot Act requires that the Foreign Intelligence Surveillance Court issue a warrant. Britain does not have a statute with scope analogous to section 215.

Upon first examination, it would appear that the British system permits the government easier access to non-content data about communications because of its ability to seek authorization from an agency official. But the administration has sought a similar ability through its warrantless surveillance of communications, with one end of the message or conversation beginning or ending abroad, with a suspected al Qaeda member. These communications do not as yet require a judicial warrant, because the administration claims that the program is authorized by the AUMF of September 18, 2001, and the President's Commander-in-Chief authority to conduct war. The program is under challenge in the courts as a violation of the Foreign Intelligence Surveillance Act, and Congress is currently considering legislation that would approve the program or consolidate it for judicial review before the FISA court.

#### *Data Mining*

Data mining uses supercomputers to analyze vast amounts of information for suspicious patterns of behavior. While British anti-terrorism legislation does not address data mining, some commentators claim that data mining is already widely used in the United Kingdom to combat terrorism. A common misperception about data mining is that it involves gathering information about millions of individuals, and hence implies increased surveillance. Rather, data mining applies algorithms to information that is either already public or on record with third parties.

Analyzing this type of information does not violate an individual's Fourth Amendment right to be free of unreasonable searches and seizures. As the Supreme Court has held with respect to bank records, once information is turned over to a third party in a commercial setting, the individual loses his reasonable expectation of privacy in that information. *United States v. Miller*, 425 U.S. 435 (1976). The Supreme Court likewise has held that an individual does not have a reasonable expectation

to the privacy of the phone numbers he dials, because the phone user voluntarily gives this information to the phone company; thus, a “pen register” to record dialed phone numbers does not require a warrant. *Smith v. Maryland*, 442 U.S. 735 (1979). Data mining is constitutional and does not threaten civil liberties because it deals first and foremost with raw data. It is not an impermissible “fishing expedition” that looks for dirt on a particular person, as civil libertarians may claim.

American restrictions on data mining do not arise because of significant constitutional differences between the United States and Great Britain. Rather, restrictions on data mining in the United States have resulted from policy decisions made by Congress in response to reports of Defense Department efforts to create a “Total Information Awareness” program. I believe that Congress reacted prematurely to exaggerated reports of data mining research. Data mining could be controlled and developed so that it protects us from terror and maintains our privacy. Analysis could be limited to data already turned over to third parties.

Searches could be performed initially by computer. Only after a certain level of suspicious activity had been registered would an intelligence or law enforcement officer be allowed to see the results. A warrant could still be required to investigate the content of communications or the purpose of purchases. Only after a suspicious pattern is detected would authorities seek more complete records about a particular individual’s activities, either through a warrant or administrative subpoena. Because data mining does not violate Fourth Amendment norms, Congress can authorize data mining programs that strike the appropriate balance between providing law enforcement access to useful information and protecting civil liberties.

#### *Profiling, Infiltration, and Privacy*

British authorities have the power to monitor ethnic and religious groups, and radical elements within those groups. British police can infiltrate the groups, instead of merely relying on informants’ accounts. It is unclear precisely where and how often British authorities have infiltrated or attempted to infiltrate such groups. However, there is no indication that such actions are considered illegal or unconstitutional under the British legal system.

In the United States, guidelines issued by the Attorney General set forth the extent to which the FBI can monitor potential terrorist activities and infiltrate criminal or terrorist ventures.<sup>1</sup> These guidelines explicitly allow the FBI to check initial leads that may be related to crime or terrorism, including attending public events. The FBI may also infiltrate terrorist organizations, but such operations are normally considered “sensitive circumstances” requiring approval of high-level FBI officials. The decision regarding when infiltration is appropriate requires that officials weigh factors, but the Guidelines neither prescribe nor proscribe particular instances when infiltration is advisable or forbidden.

The areas of profiling, infiltration, and privacy present fewer constitutional restrictions and more policy choices. Profiling, which may perhaps represent a useful tool, can run afoul of equal protection rules and non-discrimination norms.

#### *Conclusion: administrative reform*

Differences between British and American anti-terrorism policy does not turn on constitutional differences for their scope. Many of the powers thought to be more advantageous to the British, such as detention and surveillance, in fact have some counterpart in the American system. Congress could help by further authorizing these powers, which are under attack in the court. Other important areas, such as in the area of data mining, are restricted in the United States not because of constitutional prohibitions, but because of policy choices made by Congress.

Perhaps the most important British-American difference, however, which can have significant effects on the war on terrorism is the structure of the domestic intelligence agencies. American efforts so far to reform our national security system in response to the lessons of 9/11 have focused on changes of high-level administrative reorganization, such as the creation of a Director of National Intelligence or the Department of Homeland Security. These changes have consumed energy and resources, but have placed an additional layer between the President and those who directly collect and analyze intelligence.

At the same time, Congress has not undertaken any sweeping reform of the Federal Bureau of Investigation. The United States is different from Britain, and France, Canada, and Australia, for that matter, in that it assigns domestic counter-

<sup>1</sup>See The Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations, <http://www.usdoj.gov/olp/generalcrimes2.pdf>; The Attorney General’s Guidelines on Federal Bureau of Investigation Undercover Operations, <http://www.usdoj.gov/olp/fbiundercover.pdf>.

terrorism and counter-intelligence functions to an agency that is also responsible for domestic law enforcement. As I argue in my book, the approaches to law enforcement and national security are very different. The former is retrospective, depends on building cases, and focuses on prosecution and incarceration. The latter is prospective and focuses less on convictions than on preventing future attacks.

In Great Britain, these functions are split up, with MI5 performing the role of an internal intelligence service. Arguably this allows those tasked with counter-terrorism to focus on gathering intelligence, engage in long-term monitoring and investigation, and develop expertise on the enemy that may go beyond what is possible in a domestic law enforcement system, which depends on cases and prosecutions for success. Congress should devote deeper thought to whether our counter-terrorism efforts would meet with greater success if it divided the FBI's current duties between two agencies, one for domestic law enforcement and one for counter-terrorism and national security affairs. This could be a greater contribution to our anti-terrorism laws than making changes to the scope of the substantive powers available to the government.

Senator GREGG. Thank you, professor. I appreciate those comments. We have actually had that debate going on for a while, so I appreciate the reinforcement on the points.

Mr. Parker.

**STATEMENT OF TOM PARKER, CEO, HALO PARTNERSHIP CONSULTING, FORMER BRITISH COUNTERTERRORISM OFFICIAL**

Mr. PARKER. Thank you, Mr. Chairman, and thank you for inviting me. I find myself in the position of an echo to an echo, I think.

I would start by saying the two systems, the United States system and the British system, are much more similar than I think commonly perceived over here. Britain has a large number of restraints on what it can and cannot do, imposed by its membership in the European Convention on Human Rights, the European Convention. Perhaps appropriately, we have heard how the British common law system informed the American Constitution. Well, the European Convention on Human Rights is very strongly informed by the U.S. Constitution. It draws its inspiration from human rights and the codification of private rights pioneered really by the United States in the 18th century and by revolutionary France. So there is a certain symmetry to this.

The big difference, though, is we have oversight that sits outside the United Kingdom, and that is the European Court of Human Rights in Strasbourg. That is our last court for appeals and it is staffed by foreign judges. So although a British judge will sit on a European court case, there will be 7 or perhaps 14 foreign judges hearing the case and the submissions. So there is no natural sympathy on the bench to the British perspective when they hear the British government make its arguments.

That is a very powerful enforcement mechanism. We are—it is a binding court. We are obligated to respond to its judgments, and that means that we are held to a very high standard, one that can be very aggressive in pursuing the reasons behind British legislation. And it has rolled back British counterterrorist strategies in a number of very significant areas over time, most significantly in the area of coercive interrogation.

The other thing that is interesting about the European court and is worth mentioning is its focus is on creating a margin of appreciation for each individual European country. The court does not, and has actually several times made it very explicit in its judgments, ever set out to make any form of judgment about what is or is not

appropriate governmental law enforcement action. What it looks at is purely whether or not the convention itself has been violated, and if it has, if actions of governments are up against the limits of the convention, the degree to which that is appropriate within that forum. For example, it will treat Britain's response to counterterrorism different to the way that it treats Turkey's response to counterterrorism.

So you do not have the same sort of framers' intent, people poring back to a foundational document and trying to tease out nuances. There is a little bit more sympathy for trying to understand the local conditions. But at the same time, there is no great political sympathy for any governmental point of view. So it is kind of an interesting contrast to the Supreme Court in a number of different ways.

Perhaps the most important area for me to dwell on I guess is our approach to counterterrorism activity, which is essentially one of criminalization. We have a doctrine of criminalization in the United Kingdom. We have not always had that and we adopted it primarily because of the lack of success we enjoyed in the early 1970s against the Provisional IRA in Northern Ireland.

One of the reasons, one of the factors in returning back to this doctrine of criminalization, was the European Court on Human Rights and the checks that it imposed on British activity and the embarrassment the British government felt having its different operations held up to scrutiny in Strasbourg.

I am going to read you the home office strategy because I think it is quite interesting. The home office basically gives four core strategic areas for combating terrorism. It is prevention, which it lists as basically falling into four different areas: social inclusion, international dialogue, legislation, border security. So that is block number one, preventative.

Block number two is pursuit and we see pursuit basically as falling into only two spheres, intelligence activity and law enforcement activity. There is no real mention of military as an option within the British counterterrorist strategy.

Protection, that is target hardening, protective security; and then preparedness, focus on emergency responses.

So that is sort of the four pillars, if you like, for the British counterterrorism approach. The other interesting thing that the idea, the doctrine of criminalization, does is there is always pull back to the status quo ante. We have had a history of having temporary legislation for counterterrorism. In Northern Ireland we had basically over an almost two decade, three decade period, annual renewal of the laws, prevention of terrorism acts, that define terrorism purely in the context of Northern Ireland. This meant, for example, until 2000, the year 2000, in the United Kingdom you could not be a terrorist unless you were Irish, unless you were one of the proscribed organizations within the Prevention of Terrorism Act, which was very, very tightly defined just to focus on the terrorist threat in Northern Ireland. It is only in the year 2000 that we ended up with permanent counterterrorist or anti-terrorist legislation. Up until this point there was always this doctrine that this is an extraordinary circumstance and we will limit our devi-

ations from the norm and try and get back to the norm as soon as possible.

But having said that, there are many, many areas in which we compromise the norm. A good example, particularly after Judge Posner's comments, the Diplock courts. In Northern Ireland it really was impossible to have a normal jury trial of terrorism offenses. So we introduced a court system where a judge heard cases without a jury sitting and somewhat relaxed the rules of evidence, so that it would be easier to present evidence and protect security concerns in that court. Again, Diplock courts only sat in Northern Ireland and so they were only relevant for offenses that occurred in Northern Ireland, not for offenses that occurred on the mainland.

So there is this interesting, again, tension in the British system between a desire and focus on treating terrorists as criminals. We flirted—we in the early 1970s gave terrorists special category status as prisoners, effectively recognizing that they fell into a political character, category of offender, rather than simple criminals, and we moved back away from that in 1974 and 1975.

So the statute of criminalization has served us pretty well. And I think—far be it, I do not feel like I really represent Her Majesty's government, but at the same time I think it would be fair to say that the current government in the United Kingdom still clings to that as a very important touchstone of its counterterrorist approach, that we should always see this as a temporary circumstance, one in which we should always be pulling back away toward normalization of our normal criminal justice system. That is essentially the concept.

Finally, since—and I am thrilled to hear MI5 get such a good press in front of the committee. I will say a few brief words about what I think the strengths of our system are. The primary strength is the focus. You have an agency that is devoted, not exclusively to counterterrorism, but now at least 80 percent of the service's work is counterterrorism. It recently released its support of organized crime function, which it had got in the mid-1990s, simply so it could focus more closely on the threat of international terrorism. So you have a laser beam focus on a threat, which is very useful.

You also have a central coordinating point, and that for me is the really key thing about our system. We have one agency whose job it is to get the word out to everybody. We do not have 4,000—I forget the number of police and law enforcement—

Senator GREGG. 18,000.

Mr. PARKER. 18,000 law enforcement agencies. We have less than 60, which makes life a lot easier. I think there is about 50 regional police forces. It keeps changing and there is a bill to make it—reduce the number of forces even more in front of Parliament at the moment. Then we have a small number of very specialized police forces, like the transport police.

But basically MI5's role is to make sure that the information, the intelligence, gets out to the people who need it, whether that is law enforcement, whether that is people responsible for protective security in individual buildings, whether that is to government ministers who need to make policy judgments. MI5 is the hub and it makes sure that all information that comes through it gets out to the right people.

Now, this of course does not happen overnight. You do not just create something and have it function perfectly. What you would not get from my written statement is a sense of the conflicts which certainly did occur, particularly with the metropolitan police special branch in the early 1990s, when the security service took over primacy for counterterrorist investigations on the mainland.

But what has happened is the service has proved that it adds value, and it has added value by sharing intelligence and working very closely with police forces. But it still keeps the wall. I hesitate to mention the wall, but the wall is very important in Britain. You know, you have intelligence investigations and you have law enforcement investigations. The fact that it sits in a different agency makes it much easier to draw where that line is.

Security service officers and police officers work very closely together. Although MI5 is the central coordinating point, it has a filter in regional special branches. So there are police officers in every police force who have, if you like, an intelligence hat on that can to a degree take the security service's concerns in mind when they are working day to day with the police forces.

So it is a very effective system. It is one that keeps intelligence out of the courts, although the security service has on occasion engineered ways to perhaps use obsolete equipment in court cases where you might actually want to disclose the methods used. But primarily it tries to keep the two things separate. It will go to court in support of police investigations if absolutely necessary. There is certainly no constitutional or legal bar from them doing that.

The final mechanism that we have that is tremendously useful is a thing called a public interest immunity certificate. Then the service can apply to a judge for a certificate of immunity for disclosure of information that could be damaging from an intelligence perspective. Essentially what happens there is the judge gets to see what the information is and rule whether or not this is a legitimate concern. And if it is, the government is issued with a PII that protects intelligence from disclosure in court. That is a very, very useful little legal nicety or statutory nicety.

I think I probably should wind up there. Thank you very much.  
[The statement follows:]

PREPARED STATEMENT OF TOM PARKER

Acts of terror on British soil have been remarkably commonplace in the past 35 years. In addition to Irish nationalist and Loyalist violence relating to the Troubles in Northern Ireland, groups as diverse as Black September, the Animal Liberation Front and the Angry Brigade, individuals with links to Hezbollah and Al Qaeda, and agents of foreign powers such as Libya, Iraq and Syria have all mounted attacks in the United Kingdom. In the past 5 years British citizens have been killed in terrorist attacks in Turkey, Jordan, Qatar, Saudi Arabia, Indonesia and the United States. More Britons were killed in the World Trade Center on September 11, 2001 than in any terrorist event before or since. In July 2005 52 people were killed and more than 700 injured in suicide bombings that targeted the London Transport system. Suffice it to say, the British government takes the threat from terrorism, whether domestic or international in origin, extremely seriously.

*What constitutional limits does the United States have that Great Britain does not have?*

There appears to be a perception in the United States that there are fewer civil liberties protections in the United Kingdom and that the British government consequently has a far freer hand to develop stringent counterterrorist measures. However, this impression is not entirely accurate. The protective framework for civil lib-

erties in the United Kingdom is dense and complex, and at times can be both more flexible and more implacable than the equivalent protective measures in the United States.

Unlike the United States, Great Britain does not possess a single foundational document that amounts to a written constitution. Constitutional practice has evolved over centuries and is embedded in common law and a series of legislative instruments. In this sense there is a great deal of flexibility for British legislators to shape the legal landscape. However, in past 50 years a significant external check on this power has emerged in the shape of the European Convention on Human Rights (ECHR).

The ECHR is a treaty that operates within the framework of the Council of Europe. It was ratified by Britain in 1953, which is currently one of forty-six Contracting States. The original draft of the Convention was inspired by the United Nations' 1948 Universal Declaration of Human Rights. The closest that Britain comes to a Bill of Rights, in the American sense, is the Human Rights Act of 1998. This Act of Parliament was passed to "give further effect" to the rights and freedoms detailed in the ECHR by enshrining them in British law.

As a signatory of the ECHR, Britain has voluntarily submitted to a binding enforcement mechanism in the shape of the European Court of Human Rights in Strasbourg, France. Britain, like the other Contracting States, has accepted the Strasbourg Court's ultimate jurisdiction in adjudicating matters arising from alleged breaches of the Convention. This means that the judgments of British courts are no longer sovereign in such cases but must give way to a higher authority staffed by foreign judges. The Court seeks to empathetically balance Contracting States' individual circumstances against the human rights standards embodied in the Convention by allowing each State "a margin of appreciation" in interpreting their treaty obligations. In such instances, the basic test applied by the Court is whether or not the disputed practice answers a pressing social need and, if so, can be considered proportionate to the legitimate aim pursued. The domestic margin of appreciation is thus accompanied by a level of European supervision.

This margin of appreciation has been applied by the Court in considering cases related to terrorism and other threats to parliamentary democracy with a flexibility not enjoyed by the U.S. Supreme Court. For example, in 1972 the Federal Republic of Germany adopted a decree aimed at excluding political extremists from employment in the civil service and reiterating all civil servants' legal duty of loyalty to the free democratic constitutional system. In a series of cases arising from the dismissal of members of the left-wing German Communist Party (KPD) and right-wing National Democratic Party (NDP) from Civil Service positions (most often in the teaching profession), the Court accepted that "a democratic state is entitled to require civil servants to be loyal to the constitutional principles in which it is founded" and took into account "Germany's experience under the Weimar republic and the bitter period that followed the collapse of that regime" (*Vogt v. Germany*, 1995).

In questions of free speech the Court has recognized that there is a balance to be struck between protecting national security and protecting fundamental human rights. The Court has explored where this balance lies most carefully in a series of complaints from Turkey arising from the local prosecution of articles and statements critical of Turkish government policy towards the Kurdish Workers' Party (PKK) finding for the government in *Zana v. Turkey* (1997) and against it in *Incal v. Turkey* (1998) and *Arslan v. Turkey* (1999). In its deliberations the Court weighed such factors as the prominence of the individual concerned, the circumstances of publication, the political climate at the time the statement was made and the "virulence" of the language used. It is therefore unlikely that the Court will strike down the most controversial section of *Britain's Terrorism Act* (2006) which creates a new offence of "glorifying terrorism."

The Court made it clear in *Ireland v United Kingdom* (1978) that it did not see that it was any part of its function "to substitute for the British Government's assessment any other assessment of what might be the most prudent or most expedient policy to combat terrorism." The Court restricted its role to reviewing the lawfulness, under the Convention, of the measures adopted by the Government in Northern Ireland. In this context, in *Ireland v. United Kingdom* the Court did not find extra-judicial internment a breach of the Convention nor did it find the British primary focus on Irish nationalist groups discriminatory. It did, however, rule against the use of coercive interrogation methods in detention centers in the Province (of which more below).

The reason for this discrepancy is that, although States do have the right under Article 15 of the ECHR to lodge a derogation from some aspects of the Convention—during a period of public emergency "threatening the life of the nation" to the extent strictly required by the exigencies of the situation—there can be no derogation from

the core values embodied in Article 2 (right to life), except in respect of deaths resulting from lawful acts of war, Article 3 (prohibition on torture or inhuman or degrading treatment), Article 4 (prohibition on compulsory labor) and Article 7 (prohibition on retrospective criminalization).

The United Kingdom was the only European state to register a derogation from the Convention after the attacks in the United States on September 11th, 2001. The British government formally derogated from article 5(1)(f) of the ECHR, which protects against deprivation of liberty except for purposes of deportation or extradition. The reason for this decision was to allow the government to operate a special detention regime for political asylum applicants to the United Kingdom suspected of involvement in terrorism, where it was not possible to deport them because they would be at risk of torture or death if returned to their country of origin.

Introduced in December 2001 as part of the Anti-Terrorism Crime and Security Act (ATCSA), this detention regime was finally overturned by the Law Lords (the British equivalent of the U.S. Supreme Court) in December 2004 as a breach of Britain's Human Rights Act (1998). In all, sixteen individuals were detained under the ATCSA and all were subsequently released although most are still subject to control orders restricting their freedom of movement.

Britain has contributed more to the evolving jurisprudence of the European Court in the area of national security than other nation (except perhaps for Turkey) because of the Troubles in Northern Ireland. A number of landmark cases have had a major impact on British counterterrorism practice in areas such as the use of telephone intercepts, the legal status of the intelligence services, the use of military forces in a civilian context, oversight mechanisms, and the use of coercive interrogation methods. A selection of relevant cases can be found at Annex A.

*How do the British balance individual liberties with the need for collective security?*

#### *A Doctrine of Criminalization*

In the early 1970s a series of missteps in Northern Ireland—notably the introduction of internment, the deployment of troops armed with live ammunition in public order situations and the use of coercive interrogation (see below)—resulted from the initial decision to treat the Troubles in much the same way as a colonial disturbance. Emblematic of this approach was the arrival Brigadier Frank Kitson, the celebrated author of the classic counterinsurgency manual *Low Intensity Operations* and a veteran of British military campaigns in Malaya, Kenya and Oman, to command the British Army Brigade in Belfast. The legacy of this policy was a major escalation in the level of violence across the Province and the extension of the nationalist terror campaign to the British Mainland. As Sinn Féin leader Gerry Adams noted in his memoir *Before the Dawn*: “The attitude and presence of British troops was also a reminder that we were Irish, and there was an instant resurgence of national consciousness and an almost immediate politicization of the local populace.”

A change of government in 1974 ushered in a new approach in Northern Ireland, one that aimed to delegitimize PIRA violence by treating terrorism as just another criminal activity to be dealt with at a local level. This strategy, which became known as criminalization, normalization and Ulsterization, guided British attitudes for the remainder of the conflict and has become a benchmark for British governmental responses to terrorism. In Northern Ireland this policy ultimately created a climate in which both cross-border co-operation could flourish and a meaningful peace process could gain ground amongst the warring parties. Since 1974 successive British governments from the two major parties have pursued a policy of treating terrorism—both foreign and domestic—as a law enforcement problem.

Having tried brute force and found it wanting, the British government has come to appreciate the importance of legitimacy in counterterrorism operations. Criminalizing terrorism adds greatly to the appearance of legitimacy. It also creates a framework which significantly mitigates the sort of abuses that can discredit a government internationally:

- The British criminal justice system has demonstrated an increasing willingness to address and eventually rectify past mistakes, such as the wrongful convictions of the Birmingham Six and Guildford Four who had been suspected of involvement in a series of pub bombings in the autumn of 1974.
- The Stalker and Stevens independent police enquiries into allegations of a government sanctioned “shoot-to-kill” policy in Northern Ireland together comprise the largest criminal investigation ever undertaken in the United Kingdom generating 9,256 witness statements, 10,391 seized documents and 16,194 exhibits. The enquiries have resulted in almost 100 convictions for a variety of offences but they ultimately failed to demonstrate the existence of an official “shoot-to-kill” policy.

—The Courts have been vigilant in upholding basic human right standards. As outlined above, in December 2004 the Law Lords overturned the immigration detention regime established under the ATCSA. In December 2005 the Law Lords ruled that material gathered overseas by means of torture would be inadmissible as evidence in British Courts.

Finally, it should also be noted that Parliament has played a major role in advocating for civil liberties in recent years. In 2005 the Labour government introduced a Terrorism Bill that proposed a maximum 90 day period of detention without charge for terrorism offences. This Bill was defeated despite a substantial government majority in the House of Commons because a number of Labour MPs voted against their own front bench. The Terrorism Act (2006) introduced a shorter 30 day maximum period of detention and this passed with significant misgivings and a commitment to further consultation.

#### *Oversight*

It is probably fair to say that the British public lacks “the dread of government” often ascribed to the American people and this can be seen in the relatively benign oversight mechanisms that govern the operations of the security and intelligence agencies. Although a former Director General of the Security Service, Dame Stella Rimmington, has observed that accountability lies at the heart of the tension between liberty and security, this is an area in which the United Kingdom differs markedly from the United States.

In the United Kingdom the oversight applied to the operation of the intelligence and security services is primarily either Ministerial (the Home Secretary or Foreign Secretary) or bureaucratic (the Joint Intelligence Committee and National Audit Office) although some public mechanisms for redress exist through designated Tribunals or Commissioners. Parliamentary oversight is limited to a single statutory committee with a legally defined brief restricted to matters of expenditure, administration and policy. This is a constitutional oddity—the parliamentary oversight of governmental bodies is usually conducted by Parliamentary Select Committees which have greater freedom to set their own agendas. More details on the oversight regime in the United Kingdom can be found at Annex B.

#### *What can the United States Learn From the British?*

##### *Coordination*

The greatest single strength of the British approach to counterterrorism is the high degree of coordination that now extends throughout the national security hierarchy. This was not something that happened overnight but has evolved over several decades. At the apex of this system is the Joint Intelligence Committee (JIC) comprised of the heads of each intelligence agency and chaired by a senior civil servant with experience of, but not necessarily from, the intelligence community.

The Committee meets weekly or more frequently should circumstances require it. Its primary role is to produce definitive top-level all-source assessments for British ministers and senior officials. These assessments are produced by Cabinet Intelligence Groups (CIGs) chaired by Cabinet Office staff and comprised of subject experts from the intelligence community. Every relevant party is represented and the objective of the group is to agree a corporate assessment that reflects a consensus view across government. Thus ministers are not bombarded by conflicting information and left to reach their own conclusion regarding the most compelling interpretation.

Each Service also submits an account of its overall performance to the Joint Intelligence Committee (JIC) for consideration by the Security and Intelligence Coordinator as part of the Agency Performance Review. The JIC reviews and validates the Services’ plans and priorities for the forthcoming year as part of this process.

Subject experts from different agencies frequently have the formal opportunity to add their comments to intelligence reports issued by other agencies ensuring that key intelligence—HUMINT and SIGINT—is presented along with corroborating or discrediting material from other sources. Finally, it is worth noting that the relatively small size of the British intelligence community allows subject experts to develop strong relationships with their counterparts in other agencies. This greatly facilitates the flow of information between agencies and helps to reduce inter-service rivalry.

The Joint Terrorism Analysis Center (JTAC) was established in June 2003 as the United Kingdom’s center for the analysis and assessment of international terrorism. JTAC sets threat levels and issues warnings of threats and disseminates in-depth reports on trends, terrorist networks and capabilities to its partners in government. Eleven government departments and agencies are represented on the staff of JTAC

and the center is based in Thames House, the headquarters of the British Security Service. The head of JTAC reports directly to the Service's Director General.

*The Role of the Security Service (MI5)*

The Security Service has primacy in all counterterrorism intelligence investigations conducted either on the British mainland or overseas. According to the Intelligence and Security Committee report on the July 2005 London Transport bombings, the number of MI5's "primary investigative targets" rose from 250 to 800 between September 11, 2001 and July 2005. Intelligence-gathering operations relating to these "primary targets" are the Service's main priority.

The Security Service also acts as an interface between the intelligence community and law enforcement. It has developed a deep institutional understanding of the demands and operational constraints of each paradigm. The Service is not an executive agency and its officers have no powers of arrest. Executive action can only be taken by the nation's law enforcement agencies although Chief Constables have the option of requesting military support in certain circumstances. Post-incident primacy rests with the police service in whose force area a terrorist incident has occurred, although MI5 can continue to act in a supporting role to the police investigation. The Service can bring a range of resources not usually available to Chief Constables to support local operations. The Northern Ireland Police Service still enjoys intelligence primacy in Northern Ireland although this status is currently under review.

As the central coordinating point in Britain's pre-emptive counterterrorist effort, the Security Service also disseminates intelligence to regional police forces and other governmental partners in the form of both actionable reports and background bulletins which can cover anything from briefings on different terrorist organizations to technical reports on terrorist weapon systems. The Service advises Whitehall and the business community on protective security measures and runs training courses for external—even foreign—personnel. It spearheaded the installation of nationwide secure communications system for police Special Branches and provides national coverage in a system which is otherwise robustly regional in character.

The Security Service can be seen as the glue that holds the architecture of the British counterterrorist effort together. There are currently forty-three regional police forces in England and Wales most with less than 4,000 officers, another eight in Scotland operating under a separate judicial system, the Northern Ireland Police Service and a small number of forces with specialized roles such as British Transport Police or the Ministry of Defence Police. There is no national police force equivalent to the Federal Bureau of Investigation (FBI) although the newly created Serious Organized Crime Agency (SOCA) is beginning to partly develop in this direction. The fact that the government chose a former Director General of the Security Service, Sir Stephen Lander, as the first head of the SOCA is an important illustration of the reputation MI5 has established for building effective coalitions within the law enforcement community.

*An American MI5*

Post incident investigation and pre-emptive intelligence gathering require a different—and not always symbiotic—skill set. Furthermore, from a managerial perspective prosecution and intelligence exploitation can frequently be mutually exclusive objectives greatly detracting from clarity of purpose. While clearly there is no a priori reason why both functions cannot effectively be undertaken by the same agency, the British experience suggests that this can prove problematic.

The counterterrorist function in the United Kingdom was initially vested in Police Special Branches (SB) comprised of detectives operating within regional constabularies. The first Special Branch was established by the Metropolitan Police in 1883 to counter the threat from the Irish Republican Brotherhood. Police Special Branches, coordinated by the Metropolitan Police, enjoyed primacy in counterterrorist intelligence investigations on the British mainland for most of the Twentieth Century.

At the outset of the 1990s a degree of governmental dissatisfaction at the lack of success of this arrangement, coupled with an expectation that the collapse of the Warsaw Pact would free up intelligence resources, led in 1992 to the transfer of primacy from the Special Branches to the Security Service. The Special Branches had been able to boast very few successful intelligence-led arrests. The Service by contrast had an almost immediate impact and the number of pre-emptive disruptions of terrorist activity increased, with Service operations leading to 21 convictions for terrorism-related offences between 1992 and 1999.

However, this consideration also needs to be balanced against another important lesson of the British experience, which is that institutional relationships need time

to bed down and that once agencies start operating effectively these relationships improve and strengthen over time. Police Special Branches have been working closely with the Security Service since 1910 when the then Home Secretary, Winston Churchill, provided MI5's first Director General, Vernon Kell, with a letter directing the chief constables to extend him "the necessary facilities for his work." The Security Service and the Secret Intelligence Service were both born out of the same government agency, the Secret Service Bureau, and ties have remained close. The key to this virtuous circle in the United Kingdom has been effective executive leadership. There is definitely a sense in which disrupting existing relationships can have a retrograde effect on effective cooperation.

#### *The Mistakes of the Past*

The British government's early missteps in its counterterrorism campaign against the Irish Republican Army (IRA) and the Provisional IRA (PIRA) are also instructive. Comparison and analogy are not always reliable policy guides but the British experience in Northern Ireland offers some useful insights into the inherent risks involved in the following areas: internment without charge, coercive interrogation and the use of military personnel in a traditional law enforcement role.

#### *Internment*

In the fall of 1971, faced with escalating violence in the Province, the Unionist Prime Minister of Northern Ireland Brian Faulkner persuaded the British government that the introduction of internment might bring the situation under control. On August 9, 1971 British troops mounted a series of raids across Northern Ireland which resulted in the detention of 342 IRA suspects. The operation, codenamed Demetrius, was characterized by poor and out of date intelligence which resulted in many individuals being wrongly detained. Joe Cahill, then Chief of Staff of the Provisional IRA and a prominent target of Operation Demetrius, taunted the authorities by surfacing to hold a press conference in Belfast at which he claimed only 30 of the men who had been detained were actually members of PIRA.

Within Northern Ireland internment further galvanized the nationalist community in its opposition to British rule and there was an immediate upsurge in violence against the security forces. 27 people had been killed in the first 8 months of 1971 prompting the introduction of internment, in the four remaining months of the year 147 people were killed. 467 were killed in 1972 as a result of terrorist action. The number of terrorist bombings in the Province increased dramatically from around 150 in 1970, to 1,382 in 1972. In the words of a former British Intelligence officer Frank Steele who served in Northern Ireland during this period: "[Internment] barely damaged the IRA's command structure and led to a flood of recruits, money and weapons."

Internment was to continue in Northern Ireland until December 5, 1975 by which time a total of 1,981 people had been detained, the vast majority of them from the Catholic community. The British Army estimated that up to 70 percent of the long-term internees became re-involved in terrorist acts after their release so the measure clearly did little to deter committed activists. The British government finally took the decision to discard the power of internment in January 1998. Announcing the decision, the Junior Northern Ireland Minister Lord Dubs told the House of Lords: "The Government have long held the view that internment does not represent an effective counter-terrorism measure. The power of internment has been shown to be counter-productive in terms of the tensions and divisions which it creates."

#### *Coercive Interrogation*

In the immediate aftermath of the introduction of internment in August 1971 the British security forces implemented a policy of "interrogation in depth" for selected detainees. RUC interrogators working "under the supervision" of the British Army applied five well-established techniques which had previously been practiced in the course of colonial emergencies: (1) hooding, (2) wall-standing, (3) subjection to noise, (4) relative deprivation of food and water and (5) sleep deprivation. Almost a third of those detained on the first day of Operation Demetrius were released within 48 hours and with these releases came the first stories about the ill-treatment of those held by the security forces. In addition to the use of the "five techniques", detainees reported being forced to run an obstacle course over broken glass and rough ground whilst being beaten and, perhaps most seriously of all, being deceived into believing that they were about to be thrown from high flying helicopters unless they agreed to co-operate with the authorities.

In August 1971 British Home Secretary Reginald Maudling responded to growing public concern by appointing Sir Edmund Compton to investigate forty such complaints made by suspects apprehended on the first day of internment. Despite ac-

cepting that the events described by the plaintives did indeed take place, Sir Edmund reported: “Our investigations have not led us to conclude that any of the grouped or individual complainants suffered physical brutality as we understand the term.” The failure of the Compton Report to meaningfully address the abuses that had occurred in British detention facilities further damaged the government’s credibility.

Ultimately, the government’s failure to act decisively to curb abuses and put an end to the use of the “five techniques” led the Republic of Ireland to file an application with the European Commission on Human Rights alleging that the emergency procedures applied against suspected terrorists in Northern Ireland violated several articles of the European Convention on Human Rights. The case was referred to the European Court of Human Rights for adjudication which found that the “five techniques” were “cruel, inhuman and degrading” and thus breaches of Article 3 of the Convention (See Annex A).

The actual utility of coercive interrogation was also addressed at some length in the course of the *Ireland v. United Kingdom* case. The British government sought to argue that it had been necessary to introduce such techniques to combat a rise in terrorist violence. The government claimed that the two instances of “interrogation-in-depth” addressed by the Court had obtained a considerable quantity of actionable intelligence, including the identification of 700 active Republican terrorists and the discovery of individual responsibility for about 85 previously unexplained criminal incidents. However, other well-informed sources are more skeptical. The former British intelligence officer Frank Steele told the journalist Peter Taylor: “As for the special interrogation techniques, they were damned stupid as well as morally wrong . . . in practical terms, the additional usable intelligence they produced was, I understand, minimal.” Certainly the last quarter of 1971, the period during which these techniques were most employed, was marked by mounting not decreasing violence—a fairly obvious yardstick by which to measure their efficacy.

#### *Military Operations*

The final incident to have a major impact on the evolution of IRA violence in the period 1971–1972 was the event that has become known as *Bloody Sunday*. On January 30th, 1972 soldiers from the British Parachute Regiment opened fire on civilian demonstrators in Londonderry/Derry killing 13 and wounding 29. The march that sparked the violence had been called to protest internment, rocks had been thrown at the soldiers and a shot allegedly fired, but the disproportionate British response prompted widespread international condemnation. In Dublin an enraged mob stormed the British Embassy burning it to the ground. The British government appointed the Widgery Tribunal to investigate the incident but it exonerated the soldiers involved handing the Republican community yet a further propaganda victory.

The nature of IRA violence changed dramatically after *Bloody Sunday* as the incident prompted the first mainland bombing of the Troubles in February 1972 when the Official IRA left a car bomb outside the Officer’s Mess of the Parachute Regiment in Aldershot, Hampshire. An Official IRA spokesman issued a statement in Dublin that the attack had been carried out “in revenge” for the *Bloody Sunday* killings. Deliberate attacks on civilian targets on the British Mainland soon followed including four simultaneous car bombs left in London in March 1973, bombs at mainline London railway stations in September 1973 and in public houses in Guildford and Birmingham in the autumn of 1974.

Throughout the Troubles Britain found itself defending the use of deadly force against terrorist suspects in a succession of ECHR cases. In perhaps the most damaging case—*McCann and Others v. United Kingdom* (1995)—the court found that three members of a PIRA Active Service Unit (ASU) had been killed unlawfully when British Special Forces troopers indicted their operation on the British overseas territory of Gibraltar (See Annex A). Lingering suspicions that Britain operated a ‘shoot-to-kill’ policy in its counterterrorist operations against PIRA were extremely damaging to the country’s international reputation and became a major source of resentment in the nationalist community.

#### ANNEX A

##### *Ireland v. United Kingdom (1978)*

In August 1971, faced with escalating violence in the Province of Northern Ireland, the British government introduced non-judicial internment for suspected members of nationalist terrorist organizations. On the first day of internment 342 suspected members of the Irish Republican Army (IRA) were detained by the British security forces. A small number of these detainees (there are only 14 well-docu-

mented cases) were selected by the security forces for a new coercive regime of “interrogation in depth.”

Royal Ulster Constabulary (RUC) interrogators working “under the supervision” of the British Army applied five well-established techniques which had previously been practiced in the course of colonial emergencies: (1) hooding, (2) wall-standing, (3) subjection to noise, (4) relative deprivation of food and water and (5) sleep deprivation. As details of these techniques became public there was an outcry against their use which was eventually discontinued in April 1972.

The terms used are fairly self explanatory. Hooding meant that a prisoner’s head was covered with an opaque cloth bag with no ventilation, except during interrogation or when in isolation. The prisoner would often also be stripped naked to enhance his feeling of vulnerability. Wall-standing consisted of forcing prisoners to stand balanced against a cell wall in the “search position” for hours at a time inducing painful muscle cramps. One prisoner was forced to remain in this position for 43.5 hours and there were at least six other recorded instances of prisoners being kept like this for more than 20 hours. Subjection to noise meant placing the prisoner in close proximity to the monotonous whine of machinery such as a generator or compressor for as long as 6 or 7 days. At least one prisoner subjected to this treatment, Jim Auld, told Amnesty International that having been driven to the brink of insanity by the noise he had tried to commit suicide by banging his head against metal piping in his cell. Food and water deprivation meant a strict regimen of bread and water. Sleep deprivation was practiced prior to interrogation and often in tandem with wall-standing. Detainees were usually subjected to this conditioning over the course of about a week.

However, the matter did not end there. On December 16, 1971 the Republic of Ireland had filed an application with the European Commission on Human Rights alleging that the emergency procedures applied by the British security forces in Northern Ireland violated several articles of the European Convention. In its February 1976 report to the Committee of Ministers of the Council of Europe the Commission unanimously found that the “five techniques” amounted to “a modern system of torture” and a violation of Article 3 of the Convention. The case was referred to the European Court of Human Rights for adjudication.

*Ireland v. United Kingdom* (1978) was the first inter-state case ever brought before the European Court. Reviewing the evidence the Court found the “five techniques” to be “cruel, inhuman and degrading” and thus breaches of Article 3 of the Convention but stopped short of describing them as torture noting that “they did not occasion suffering of the particular intensity and cruelty implied by the word torture.” The UK was directed to pay compensation to the victims.

In the course of the hearings British Attorney General, Samuel Silkin, gave the following commitment to the Court: “The Government of the United Kingdom have considered the question of the use of the ‘five techniques’ with very great care and with particular regard to Article 3 of the Convention. They now give this unqualified undertaking, that the ‘five techniques’ will not in any circumstances be reintroduced as an aid to interrogation.” And, to this day, they have not.

#### *Malone v. United Kingdom* (1984)

Article 8 of the Convention guarantees a right to privacy and protects citizens from state interference with this right “except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or—for the prevention of disorder or crime.”

Article 8 was put to the test in *Malone v. UK*. In March 1977, a British national, Mr. James Malone, was charged with a number of offences relating to dishonest handling of stolen goods. It emerged in the original trial that the police had been privy to private telephone conversations between Malone and his associates although this material was not (and could not be in) tendered in evidence.<sup>1</sup> Malone ultimately challenged what he believed to be the extended monitoring of his telephone line in the Strasbourg Court. In *Malone v. UK* the Court found that the mechanisms governing the interception of communications by the police were sufficiently legally ill-defined to place Britain in breach of Article 8 of the ECHR. The Malone case also raised the question of effective remedy, a right established under Article 13 of the ECHR, although the Court did not rule on the issue.

The British government of the day responded to the Malone judgment by introducing the Interception of Communications Act (IOCA) in 1985. IOCA was designed to govern all circumstances in which the interception of communications might be

<sup>1</sup> Britain remains one of the few legal regimes in the world in which telephone intercept material is still not admissible as evidence in Court. Curiously, material gathered from eavesdropping devices is considered admissible.

required including the exigencies of national security. Under the terms of the Act this method of intelligence collection could only be undertaken in a domestic context if expressly authorized by a warrant signed by the appropriate Secretary of State. IOCA also established a right of redress for anyone who believed that interception had taken place unlawfully in the form of an independent Interception of Communications Tribunal and Commissioner.

*McCann and others v. United Kingdom (1995)*

On March 6, 1988, forewarned by intelligence sources, British soldiers from the Special Air Service (SAS) interdicted what they thought to be a Provisional IRA attempt to plant a car bomb on the route of a military parade on Gibraltar. The soldiers' mission was to affect an arrest in support of the local police, but because the suspects allegedly adopted "an aggressive stance" when challenged, they were shot dead by the troopers.

All three PIRA members proved to be unarmed at the time of the shooting and the car they had positioned along the parade route did not contain a bomb although a car linked to the trio, discovered later in nearby Marbella, was found to be packed with explosives. Daniel McCann, Sean Savage and Mairead Farrell were all well known PIRA activists, indeed Farrell had served 10 years for her part in the bombing of a hotel outside Belfast in 1976.

There was widespread criticism of the SAS's failure to apprehend three unarmed suspects without loss of life. Allegations of "a shoot-to-kill policy" resurfaced—primarily in a controversial BBC television documentary entitled *Death on the Rock* in which two alleged eyewitnesses alleged that the British soldiers had opened fire on the PIRA trio without warning.

The families of the dead PIRA volunteers took the case to the European Court of Human Rights in *McCann and others v. United Kingdom*. In September 1995 the Court narrowly ruled in a 10–9 majority decision that the PIRA team had been "unlawfully killed" in breach of Article 2(2) because it was not convinced the use of lethal force by the SAS troopers had been "absolutely necessary" to protect the public. In a closely argued opinion the majority members of the Court criticized the British actions on three main grounds.

First, the British authorities could have chosen to apprehend the PIRA suspects at an earlier stage in their preparations but chose to allow the operation to run long to gather further incriminating evidence of their activities, thus in part assuming some of the responsibility for placing the public at risk. The Court commented that allowing the operation to proceed to the point that it was thought a bomb may have been activated was a "serious miscalculation" which "set the scene" for the fatal shooting.

Second, the Court noted that the British authorities had rushed to judgment in assuming that the car parked by the PIRA Active Service Unit would contain a remotely activated bomb. The briefings received by the SAS troopers disproportionately focused on this possibility and did not sufficiently reference other, less threatening, but equally reasonable alternatives. This too created a climate which made recourse to lethal force "almost unavoidable."

Finally, the Court found the reflexive resort to lethal force by the SAS troopers themselves troubling. The Court noted that the training received by Special Forces soldiers lacked "the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society" and failed to emphasize "the legal responsibilities of the individual officer in the light of conditions prevailing at the moment of engagement."

*McKerr v. United Kingdom (2001)*

The ECHR was again called to rule on four separate cases in which 14 people had been killed in Northern Ireland between 1982 and 1992 allegedly by or with the collusion of the security forces—*McKerr v. United Kingdom (2001)*, *Hugh Jordan v. United Kingdom (2001)*, *Kelly and Others v. United Kingdom (2001)* and *Shanaghan v. United Kingdom (2001)*. However, on each occasion the Court stopped short of finding that the victims had been unlawfully killed, commenting instead in May 2001 that the post-incident proceedings for investigating the use of lethal force by the security forces had sufficient shortcomings for the UK to be in breach of the procedural obligations imposed by Article 2 of the Convention but nothing more.

ANNEX B

*Oversight*

Prior to 1985 none of the work of the British intelligence or security agencies was done on a statutory basis. The Government denied the very existence of the Secret Intelligence Service (SIS) and the Security Service (MI5). The agencies derived their

authority from ministerial directives, such the Maxwell Fyfe Directive<sup>2</sup> which governed the operation of MI5, and the royal prerogative. There were no oversight mechanisms outside the chain of command of both agencies other than those afforded by the government departments to which they reported—the Foreign and Commonwealth Office and Home Office respectively. Financing for the agencies was obtained through an annual “Secret Vote” which approved a global figure submitted to Parliament without any supporting explanatory material. As a former Home Secretary, Jack Straw, has publicly acknowledged, the main catalysts for change were a series of cases before the European Court Human Rights, commencing with *Malone v. United Kingdom* (see Annex A), which incrementally addressed issues relating to the gathering of intelligence material and the operation of the intelligence agencies.

The government responded to this criticism by introducing the Security Service Act in 1989. This placed the UK’s domestic intelligence agency on a statutory footing for the first time. The Act also established a Security Service Commissioner and a Complaints Tribunal. Between the introduction of the Security Service Act in 1989 and the end of 1997 the Tribunal investigated 275 complaints. No complaint was upheld. In the great majority of cases, the complainants were unknown to the Service.

The European Court of Human Rights considered that the Security Service Act placed the Service on sufficient legal footing for two pending cases involving alleged Security Service investigations to be discontinued. In the 1993 case *Esbester v. UK* the Court explicitly recognised that the Security Service Act struck a reasonable compromise between the requirements of defending a democratic society and the rights of the individual.

Although the Security Service Act went far enough to satisfy Britain’s European Convention on Human Rights obligations it still fell short of providing for the sort of parliamentary oversight that many critics of the intelligence apparatus were calling for. It also made no mention of the Secret Intelligence Service (SIS) the existence of which was only avowed for the first time by Prime Minister John Major in 1992. These shortcomings were addressed in the Intelligence Services Act of 1994 which in addition to placing both SIS and GCHQ on a statutory footing and creating a complaints apparatus to cover both agencies also created a committee of Parliamentarians, the Intelligence and Security Committee, to “examine the expenditure, administration and policy” of all three intelligence and security agencies (SIS, GCHQ and MI5).

The Intelligence and Security Committee (ISC) is constitutionally unique within the British system. Despite the fact that it is made up of Parliamentarians, it is not a Parliamentary Select Committee but a statutory committee with a legally defined brief. In some respects this gives it greater authority, adding weight to the Committee’s requests for information. Its members are appointed from both Houses of Parliament by the Prime Minister after consultation with the Leader of the Opposition. Despite the executive’s control over its appointments, the Committee has been characterized by its bipartisanship.

The bulk of the Committee’s work is done in camera and its findings must effectively be taken on trust. The Committee also reports to the Prime Minister rather than to Parliament. As with the Commissioners’ reports, the Prime Minister is free to withhold material from Parliament out of security concerns. In the words of one former Committee member: “A good oversight committee will never be able to answer all the questions that are raised by honourable Members about the secret agencies or their work. It may never be able to answer questions about all the issues that it is investigating. That is inevitable. However, colleagues in the House should be able to feel confident that someone is investigating issues on their behalf and has the power to do the job properly, even if ordinary Members of Parliament are not able to get the answers themselves.”

The Committee’s original remit was strictly limited by the Intelligence Services Act to the examination of ancillary issues. Any responsibility for the oversight of operational matters was pointedly omitted from the Act. However, the members of the ISC have been effective advocates for some extension of their powers in this area and in recent years they have been briefed on a wide range of the Services’ operational work—often at the request of ministers who see the utility in gaining independent validation for policy decisions. Since 1998 the ISC has employed an Investigator to undertake specific enquiries under the Committee’s direction. Intel-

<sup>2</sup>The Maxwell Fyfe Directive is named after the Conservative Home Secretary and former Nuremberg Prosecutor who issued it on the occasion of the Security Service’s formal transfer from the authority of the War Office to the Home Office.

ligence officials themselves have largely embraced the ISC as a new source of legitimacy for their work.

Senator GREGG. Thank you, Mr. Parker.

We have been joined by our senior member, the Senator from West Virginia. Do you have an opening statement you want to make, Senator?

STATEMENT OF SENATOR ROBERT C. BYRD

Senator BYRD. Mr. Chairman, thank you. Thank you, Mr. Chairman—my favorite chairman, right here. One might as well proclaim his choice, had he not, openly and publicly?

Senator GREGG. Very kind of you. My favorite ranking member.

Senator BYRD. Bless your heart.

Well, thank you, Mr. Chairman.

Five years ago, more than 3,000 people lost their lives due to the September 11 attacks. Since then, Congress has passed and reauthorized the PATRIOT Act to give law enforcement more powers, and has reorganized government twice. Yet, polls indicate that many Americans still feel less safe than before the 9/11 attacks, including I.

President Bush has said many times that those attacks were inspired by hatred of the freedoms that Americans enjoy. Surrendering our constitutional liberties, and especially the system of checks and balances that allow those liberties to endure, would seem to me to be a strike at the very principles upon which this country was founded.

In this age of international terrorism, there is much that our Government can learn from the experience of other countries. Controversial British anti-terrorism laws, such as the suspension of the right to trial by jury in terrorism cases and the so-called “Diplock courts,” were passed as merely temporary measures. However, these temporary measures were extended time and again for nearly three decades. So, there is a lesson here. Could our country already be headed down the same path, in which our legislative branch approves curbs on civil liberties that last for decades even though they are labeled temporary?

Take, for instance, the warrantless wiretapping that allows government to eavesdrop on millions of Americans without their knowledge. As Edmund Burke wrote in 1777, “The true danger is when liberty is nibbled away for expedience and by parts.” Listen to what Edmund Burke said again. Edmund Burke wrote in 1777: “The true danger is when liberty is nibbled away for expedience and by parts.”

Mr. Chairman, we have worked on a bipartisan basis to strengthen our defense against terrorists by adding billions of dollars to border security and billions of dollars to airline security, billions of dollars to law enforcement, intelligence collection, and other essential programs. Yet, the funding has not caught up with the vast security vulnerabilities that remain.

So, this brings us to what may be the key question of this hearing. If we do not adequately fund vital homeland security programs, might our vulnerabilities lead to even greater demands to set aside existing individual liberties in pursuit of more security? Is there not a close relationship between better funding of existing

homeland security, law enforcement, and intelligence programs and the preservation of our liberties?

There must be better ways to protect the American people from terrorism absent the abrogation of constitutional protections and the adoption of foreign models which concentrate more and more power in the hands of one man, the President.

I thank the chairman for calling this important hearing. I thank the witnesses who are appearing before us.

Senator GREGG. Thank you, Senator Byrd. That is a very interesting question you raise, which is, if we do not adequately fund and we respond to that by some action which limits liberty or the rights instead of funding. That is an interesting issue and maybe we can expand on that as we go forward.

But initially the question which I think I would like to get to is this issue of, looking at British successes, what can we do to replicate those successes here without affronting our liberties and our constitutional rights. Judge Posner, you made it pretty clear that you felt that we could—do we need to do anything legislatively to give the executive branch the right to restrain people or to hold people longer than 48 hours? Do we have to declare that a person is—is there some sort of—should there be some sort of court approval of that event in a FISA type of situation, or does that authority basically lie with the executive branch? That is my first question.

The second question is, you suggest that we not bifurcate the FBI, although I have to tell you I used to chair the committee that had the FBI and my biggest frustration was that they were not able to move that culture from law enforcement into intelligence, and I still do not think they have even though I have not chaired that committee for 2 years. This was something we put a tremendous amount of pressure on them to do and they just—basically, the culture resisted.

But let us assume we are not going to bifurcate it. Does that mean that an organization like Mr. Negroponte's new intelligence responsibility as sort of the intelligence czar is the place where you might set up a structure that would mirror the MI5 effort, and is that appropriate?

So I would like to get those thoughts from all three of the witnesses—well, Mr. Yoo relative to whether American law, there is any statutory need in order to get to this British position of being able to hold people for a longer period of time if they are deemed to be terrorists, beyond the 48 hours, and then get your thoughts on those.

Judge POSNER. Let me respond briefly in reverse order, starting with the question of the FBI, MI5. Mr. Parker made a very important point. He said that the fact that the MI5, the security service, has a laser beam focus on intelligence is of great value because the FBI—you mentioned, Senator, that maybe FBI should be shifting its focus from kidnapping and bank robberies to national security and intelligence. Well, the problem is—this happened in Chicago—when the FBI tries to do that, the banks and the people in Chicago, they say: Well, wait a second. The number of bank robberies in Chicago is rising because the FBI is allocating resources to intelligence. That is the problem.

So the FBI is torn. We want it to be the premier criminal investigation agency and that is of course what they are accustomed to doing, what they are trained to do, what they want to do. So very difficult to change their culture. You are quite right, 5 years, very little progress has been made in actually altering the focus of the FBI.

He also mentioned, Mr. Parker, the fact that of course MI5 works closely with the special branch of Scotland Yard and of the other British police offices. The special branches are specialized for criminal law enforcement focused on terrorism and espionage and so on. Well, we have the germ of that system here because the FBI—the President did insist, over the FBI's objections, that it fuse its terrorist-related units into a new division called the national security branch. It is interesting, they use the same word, "branch."

That national security branch, which is really very similar to the special branch of Scotland Yard, that would work well, I think, with a separate domestic intelligence service. Where to place that service, whether it should be free-standing, whether it should be in the Department of Homeland Security—as I understand it, MI5 reports to the home secretary in the United Kingdom, which corresponds to the Secretary of Homeland Security. Whether it should be free-standing like the CIA and report to the Director of National Intelligence, whether it should actually be in his office, those are important organization questions which would require further study.

In fact, what I would like to see from Congress, from the Director of National Intelligence, would be as a first step a feasibility study: Is this something we need, a separate agency, and concretely how would we establish it, where would we put it, would it work, and so on.

With regard to your previous question, the first question about detention, Professor Yoo reminded me that the Supreme Court has permitted detention of terrorists outside the criminal justice system as enemy combatants. I was thinking more of a system of detention of terrorist suspects which would not require actually designating them as enemy combatants. The value of congressional intervention here is that Supreme Court has left everything very vague. You can hold a person—the government can hold a person for more than 48 hours if it can show that it is a bona fide emergency or there are other exceptional circumstances.

I think it would be helpful for Congress to specify what constitutes an emergency and also to set some limit, so that the Government officials have some sense how long can they hold a person beyond 48 hours. We do not want it to be indefinite. Under the English system as I understand it—and it would be a good feature of our system—you do not just make an initial decision this person is going to be in for 28 days. You have frequent reauthorization by a judge. That I think, prescribing the procedures and the timetable for this sort of thing, that would be a function for Congress, rather than leaving it to the courts, I would think.

Senator GREGG. Thank you, Judge.

Mr. Yoo, did you want to comment on those?

Mr. YOO. Yes, thank you, Senator. I quite agree with what Judge Posner says on the detention issue. It is the case that the Supreme

Court has read the authorization to use military force that you passed on September 18, 2001 as authorization to detain enemy combatants outside the criminal justice system. But the case of *Hamdan* where this was decided, the individual in question was captured outside the United States, in Afghanistan, so it left open the question whether these rules would apply within the United States.

The Government detained Jose Padilla under that same claim of authority. The U.S. Court of Appeals for the Fourth Circuit upheld that as an exercise of this power to detain enemy combatants, but it did not reach the Supreme Court. So there is unclarity and ambiguity about whether this power could be used in the future, and so that would be an appropriate area, I agree, for further congressional explication of the standards.

The other difference I would just point out is I take it under the British system, even when you are in this 28-day period, there are regular hearings, there is regular opportunity to go to a judge. In the enemy combatant process we use the system of habeas corpus, which can take much longer, and then under the Defense Department regulations there is an annual, I think, review of the combatant status. So the British system actually has more judicial review than ours does.

One question you might want to ask if you are going to go ahead and draft legislation is whether you want to have more than just annual reviews. This is also tied up in the litigation about—I am sorry, the consideration of how Congress is going to react to the Hamdan bill. There is elements in that bill which talk about civilian judicial review over these determinations and how often they might occur. That is something you could change as that bill goes forward.

In terms of the division between MI5—whether to have an MI5 type agency or not, I think everyone on the panel seems to agree that the current system is not working, that the FBI's mixture of criminal law enforcement and national security purposes is not a good one.

I do not think it is a question of whether you need the change the statutory authority of the FBI. In a way, what Judge Posner describes, and I quite agree with this, is that maybe the statutory focus of the FBI has become too diffuse. They have too many things which they try to focus on—criminal law enforcement, bank robberies. You know, bank robberies, if you look at the history of the FBI the reason why bank robberies and kidnappings became their initial focus was because they were relatively easy to solve, you had high publicity when you solve them, and it is easy to measure how agents were doing. You could say, I caught five bank robbers this month. So it led to this case-based system for promotion within the FBI.

That is an example of how you cannot change that kind of culture easily, because it is difficult to count, well, is this man or this agent doing a good job stopping terrorist attacks. Someone cannot come in and say, I stopped five terrorist attacks, because often you do not now how many terrorist attacks you stopped, if any, by taking a measure, because it is more future and prospective.

So I think one thing you could do through the appropriations tool which I think would be a quite appropriate exercise of your power would be to start moving resources out of those areas of the FBI that focus on criminal justice, like bank robbery and kidnapping, and devote more money toward the counterterrorism and national security mission.

You might also use your funding tool to try to change the way that the FBI measures success and how they reward employees, who gets promoted or not. That also I think would be a legitimate use of the appropriations tool.

It may be that we made a mistake—I know you—I think you think this, is that we might have made a mistake trying to evolve the FBI into what we want, rather than making a clean break, whether you detach another agency or just start a new one. That might have been in the long run the more effective way to go, although there would be much more disruption when it happened. That is the kind of thing I think is something the committee can do.

I do not know whether there is a lot of good studies on that in the United States. Most of the studies have been about how difficult it is to combine agencies into something like DHS. We have as far as I know very little work on how you split up an agency's functions and what is the most effective way to do it.

One place one could look would be to look into the literature and work that has been done on corporations, which go through this all the time, and they make various choices about how to organize things appropriately.

Senator GREGG. Thank you, Mr. Yoo.

Did you wish to comment on either of those points, Mr. Parker?

Mr. PARKER. I thought it might be quite useful just to explain the genesis behind the 30-day detention period. The logic there is very specific and it has to do with operating in Europe with porous borders. There is a perception, I think a legitimate perception, as we have seen from the London transport bombings, with one of the suspects fleeing immediately to Italy where he had previously been a resident, that people would be able to cross national boundaries within Europe to carry out attacks very easily. It is almost impossible to get a response from a foreign police agency in less than 30 days. That was why police needed more time. A letter rogatoire, if you were to deliver it to the French authorities, even with great urgency by the time that has been processed and action has been taken and that information comes back your 48-hour detention period is certainly gone. The 7-day detention period that you had under the Prevention of Terrorism Act has almost certainly expired.

That was why police agencies asked for more time. It was primarily—there were three cases cited. I believe one was European, one was North African, and it was the length of time that key information took to come back from local law enforcement in foreign countries that would have had a material effect on the cases brought before the courts. So that was the logic behind it.

There is judicial review every 7 days, so the police have to go back, the crown prosecution service has to go back, and make the case for the continued detention.

It is tremendously controversial. The government originally asked for 90 days. It was Parliament, despite the fact that Labour Party has a significant majority, that voted against that proposal and forced a change in the legislation. So it is controversial. There has been a commitment from the government to continue consultations on this issue, to review its effectiveness.

It is going to be very interesting to see how the recent airplanes plot impacts on the use of this 30-day detention procedure. If the prosecutions are successful, I suspect it will be claimed as evidence that this detention process works. If the prosecutions collapse, I am sure there will be great pressure to reduce the length of detention prior to charging.

On the point of an American MI5, it is quite useful to think of these agencies as a triage process. The role that the security service plays in Britain is kind of the spear of the point in the intelligence world. But investigations do not just begin and end there. There are still investigations at police district levels. There are still detectives carrying out investigations. It is only when it becomes significant and serious that the intelligence service becomes involved.

You do not need a huge agency. In the mid-1990s the security service, at the height of the mainland bombing campaign by the Provisional IRA, had 200 officers and 1,800 support staff and that was it. It has doubled in size since then, but it is still a relatively small agency, and it can get a lot of bang for your buck. This is very innovative. If designed properly, this can be a very, very effective way to focus on cases.

The point has been made—I have worked both in intelligence and in law enforcement. There are different mind sets. There is a huge tension between gathering information for prosecution and looking for opportunities to exploit for intelligence purposes an ongoing investigation. The British tend to let cases run as long as possible because that is the greatest way, the greatest intelligence opportunity. The longer the case runs, the greater the opportunity you have to gather more information about people's contacts, funding sources, and so forth.

As we saw recently in the Florida case, law enforcement's approach tends to be: This is worrying, this is dangerous; we cannot take the risk that something might happen. Interestingly, the European Court of Human Rights has criticized the United Kingdom in the *McCann* case, about the IRA attempt to put a bomb in Gibraltar on a military parade, for allowing a case to run so long that it put the public in danger, necessitating the use of force to apprehend, in fact kill, the three terrorists involved. The court said: Look, you let this case run too long; you put the public in danger every bit as much as the terrorists did. And Britain got rapped on the knuckles for that.

But that was primarily because it was intelligence-led and they wanted to see how the operation was going to work, learn as much as possible, particularly because it was in Europe, and improve protective measures in the future from that information.

Senator GREGG. Thank you.

Senator Byrd.

Senator BYRD. Thank you, Mr. Chairman.

The United Kingdom, unlike the United States, has a specialized domestic intelligence agency known as MI5. Due largely to concerns about Big Brother and past intelligence abuses within our borders, the United States has been hesitant to permit the FBI, for example, to undertake broad domestic surveillance. What in the United Kingdom legal system constrains MI5 from conducting overly intrusive or unwarranted surveillance of the average law-abiding British citizen?

Judge POSNER. If I could respond, a domestic intelligence agency in the United States would be subject to all the restrictions that the Constitution and statutes impose on the FBI. So it is not proposed to create an agency that would have some kind of immunity from the Constitution or the laws. It is really an organizational question: Is it more efficient to place this surveillance, intelligence operation inside the FBI or to put it somewhere else? It is not a legal matter. It is a matter of organization theory really.

Mr. Parker I think gave really strong arguments for why it makes sense to separate these, and it is not to take anything from the FBI. It is to add a small additional service with a very special focus, which would work with the FBI.

One point he made earlier which I would like to echo is the importance of communication between Federal intelligence authorities and our local police. Our 18,000 police forces of course have a great deal of knowledge of what is going on in their communities, but if they are going to be a first line of defense against terrorism they have to know what to look for. We have to have effective communication with them, what should they be on the lookout for.

This has been a serious problem with the FBI because of historic rivalries and tensions between the FBI and local police, because they compete for the same cases and there is cultural differences. The FBI are kind of, they wear suits and they have college educations, they do not wear uniforms, and so on. So just the communication function, which would not raise any kind of legal issues, is I think a very strong argument for having a separate agency.

Mr. PARKER. If I could add on that, the security service in the United Kingdom is restricted in what it can do by the Regulation of Investigatory—sorry—Regulation of Investigatory Powers Act of 2000. So like all law enforcement and intelligence agencies in the United Kingdom, there is a legal structure. It is relatively new, but it is binding on the security service.

The security service also has to obtain home office warrants—these are warrants signed by the home secretary—to authorize telephone intercepts, property invasions, or eavesdropping operations, beaconing a car or something like that. Any sort of property or communications interference requires a warrant signed by the home secretary. Now, this is clearly an elected political official and not a judge, one of the big differences between the two systems. But it is still a very stringent process. There is an ombudsman, there is a commissioner that oversees independently the proper use of this power. Then finally, Parliament has a committee, the intelligence and security committee, that, although it was strictly established not to look at operational issues, has increasingly taken on that role. In fact, the security service has really benefited from that, the legitimacy that comes from having a degree of support

from the legislative branch. Very noticeably, this committee was very supportive actually of the actions taken by the security service in the run-up to the London transport bombings, even though, as you are aware, the security service reduced its threat level just before the bombings took place. The inquiry in the intelligence and security committee found that that was a logical inference given the intelligence they had. That is useful. The public gets a very useful steer from people who have access to the material but are outside the system, very beneficial. It is a great example of bipartisan cooperation in the United Kingdom as well.

I think I will probably stop there. Thank you.

Senator BYRD. Thank you.

Why do you believe that the British do not share our suspicion of state authority, or perhaps they do. Do they?

Mr. PARKER. The dread of Government. No, I think would be the answer. It is instructive, the sort of language we use. This is a sort of a bit extempore sort of sociology, is it not, but we refer to "the Nanny State," not "Big Brother," even though "Big Brother" is George Orwell's great phrase. We tend to talk of the state in terms of an overprotective mother rather than as a frightening, to be feared bully figure. Now, that no doubt has lots of cultural wellsprings and so forth.

The other thing that I think is quite significant is there has not been any great history of abuse by Government. That is not to say Government has not committed abuses, but we never had the experience that Germany had, for example, or Italy had with an authoritarian power taking control of the government of the country, or at least we did have that experience for 10 years in the 17th century.

Senator GREGG. Not since Cromwell, you mean?

Mr. PARKER. Not since Oliver Cromwell, exactly.

So again, the British government has not got a particular reason to fear. That obviously does not necessarily hold true for every community in the United Kingdom. If you were Catholic and you came from Belfast or Londonderry, clearly you would not necessarily take such a rosy view of the actions of the British state. But typically most citizens feel that the state is there to protect it, that it has discharged those functions fairly effectively.

Bear in mind, this is not a new experience for us. We have had terrorist bombings in London going back now 120 years. I cannot think of a decade since the 1880s when a terrorist bomb has not exploded in London, whether it is Russian anarchists or the Fenians or the Provisional IRA, the Angry Brigade, the Animal Liberation Front, Hezbollah, al Qaeda. We have had pretty much everybody pass through London and kill somebody or blow something up, and this is a feature of our lives, and the state has been dealing with it continually for a long period without losing the public's confidence. Add to that two world wars on top of that, with the inevitably increased security regime that that entails.

The public has faith the restrictions will be lifted when the emergency is passed because it has always been in the past, and we have a great reverence for tradition in the United Kingdom, so if it has happened before thus it will happen again. I think we are very comfortable that that weight of history will protect us.

Judge POSNER. Could I offer a brief footnote——

Senator GREGG. Certainly, Judge.

Judge POSNER [continuing]. To what Mr. Parker said? His mention of Germany reminded me, after World War II when we permitted West Germany to have its own government again, as a condition the allies insisted that Germany separate domestic intelligence from law enforcement in a separate agency because they had been combined in the Gestapo and we thought that combination dangerous.

So historically having a separate domestic agency, intelligence agency, has not been thought to compromise civil liberties, but quite the contrary.

Senator GREGG. Senator Byrd.

Senator BYRD. Judge Posner, you state in your testimony that the only limitation the Constitution places on searches without a warrant is that they be “reasonable.” You then state that any unreasonable methods of surveillance can be minimized “without judicial intervention” by rules subject to oversight by the executive and congressional watchdog committees. But, are there not three equal branches of Government under our constitutional system of checks and balances? Why would we trust the executive and a Congress of the same party to determine in every instance what is reasonable? Is that not the job of the Federal judiciary?

Judge POSNER. That certainly is an important function of the judiciary, but the question is the efficacy of judicial control over surveillance when it is exercised through the grant or denial of warrants. Of course, a warrant proceeding is *ex parte*. The Government goes in, tells its side of the story to the judge, and there is no adversary process and the judge grants or denies the warrant. So there is some judicial check, but it is not like an ordinary litigation.

So the question is would some alternative be more effective than a warrant, such as simply reporting to the Congress and to the executive branch what the surveillance agencies are doing, who did they listen to and why, and are they targeting political enemies or is it legitimate investigation.

It is important to emphasize that the fourth amendment does not require warrants. It limits warrants. It requires that searches be reasonable, and that reasonableness requirement, which is constitutional and fundamental, can be enforced in ways other than warrant requirements.

The warrant approach—this is the criticism of FISA—it really is not designed for a situation where you are not wanting to monitor the people you know are terrorists, you want to find out, are there terrorists, where are they, who are they. For that, you cannot give the kind of information to the magistrate or the judge that you would when you ask for a warrant.

So I think—it is part of what I said in my opening—we do not want to—we do not want to be confined by the criminal justice system and judicial norms and customs in thinking about how to protect civil liberties while not endangering national security.

Senator GREGG. Thank you.

Two questions here. Let me try to frame the *Hamdan* issue as I see it, as we are wrestling with it here in the Senate, and get

your thoughts as legal experts, Judge Posner and Mr. Yoo, as to which is the proper approach. As I see it, it comes down to essentially this. The administration wants to set up a regime where they interpret Common Article 3 under the Geneva Conventions specifically enough so that they can basically give a safe harbor to the interrogators who are trying to find out from terrorists who we captured information which will stop us from being attacked by somebody, without using torture or processes which would be outside the bounds of reasonable interrogation.

Those who oppose that specific, defining Common Article 3 with specific language that would give a safe harbor, take the position that if we do that then we will be having—we will have set up a regime which basically says we can define the Geneva Convention in whatever way we desire to define it, which means that North Korea could do the same thing, theoretically, were it a signatory to the Geneva Convention, which I do not know if it is or not. It probably is not. So it would mute the effectiveness of the Geneva Convention.

The bottom line, of course, is how do we stop people from attacking us who might use a weapon of mass destruction and how do we get the intelligence to do that. This is a war of intelligence. It is not a war of armies. I think that was an interesting point that you made, Mr. Parker, that you do not have the military as part of your structure. We have become too absorbed as a war of armies instead of a war of intelligence.

But independent of that, which is another side issue of very big significance, I would be interested in you, Judge and professors, if you feel an expertise in this area or comfortableness in this area, giving us your thoughts on this, because this is an issue that is very current and very hot here in the Senate.

Judge POSNER. You are the expert.

Mr. Yoo. Well, if a judge orders me to speak I will speak.

It had been my view before *Hamdan* that Common Article 3 did not apply to the war on terrorism or the Geneva Conventions, which is a view I worked on in the Justice Department after 9/11. But assuming it does apply, as the Supreme Court suggested in *Hamdan*, one important thing to just mention is you have focused on I think what really is the most important part of this military commission bill. If you think about it, the military commission issue is about how to deal with people who are no longer a threat. They have already been removed from the battlefield. All the fights we are having are about things we could defer until the war was over. We could try them, as we did in World War II, after the conflict was over.

The part you are focused on is really the most important part of the bill in terms of our ability to fight the war going forward. It is interesting that there has been less focus on it actually than whether we give certain kinds of evidence to the defendant. But I think it is the most important part of the bill in terms of our future abilities.

One is I think no one would deny that Common Article 3 is very vague. It goes well beyond cruel and inhumane treatment. It also says you cannot engage in affronts to the personal dignity of a prisoner, and if the prisoner is a fundamentalist Islamic person I

would think they might be offended, for example the hypothetical that is actually raised, what if we used female interrogators? Would that be a violation of Common Article 3 if they are personally, if they feel their dignity is offended by that?

So I think it is perfectly appropriate for Congress, and Congress has traditionally done this with vague treaty terms, is to pass laws that specify what they mean. And I quite agree with you, I think it is also important for Congress to do that because otherwise our interrogators are going to not use measures which may be legal, but they are just uncertain, so they may hold back. That may be the wrong attitude we want our counterintelligence and counterterrorism people to have in this kind of war. I think Mr. Parker is quite right, it is a very different kind of war, where information, as you said, where information is of the highest priority.

The other thing that is different, that makes it different than the IRA example, we are fighting a purely non-state network that is not attached to any certain kind of territory or has territorial claims against the United States. It really is much more, in many ways much more difficult than the IRA example because of that, which may require that we try harder to get intelligence than the British may have had to. That is a cost-benefit decision that you and the executive branch should make.

Let me also get to the reciprocal treatment argument. I think that is a very important policy argument. It is not clear to me whether that holds in the war on terrorism. Traditionally under the laws of war, nations have used reciprocal threats to prevent the opponent from conducting certain kinds of operations. The greatest example is why there was no use of chemical or biological weapons in World War II on the western front. Both sides essentially deterred each other through threat of reciprocal harm.

One question to ask is that really something that is possible with al Qaeda. From everything we see, they will violate the laws of war, they will behead our soldiers, they will try to kidnap and behead civilians, no matter how we treat their prisoners. So it is really this—it is a really I think more tenuous claim that is being made about reciprocal treatment, which is suppose the United States got in a war with China, for example. Would the fact that the Chinese—would the fact that we did not apply the Geneva Conventions to al Qaeda affect how the Chinese treat our own soldiers?

Just two points on that. One is I would think that what would be most important to the Chinese or any future opponent is how we treat their prisoners in that war, not how we treated prisoners from this non-state terrorist organization in a previous conflict.

The second thing you ought to ask—I am sorry, which you raised, is historically our prisoners have been quite badly abused in many conflicts since the Geneva Convention even when we followed the highest standards. So that is another question you ought to take into consideration when you and the executive branch consider how to define Common Article 3.

Senator GREGG. Well, I thank you for that answer. I wish you would communicate it to some of my colleagues.

My last question, and you have given us a lot of your time and we very much appreciate it, is: Under our system—the English were able to move to an MI5 system rather comfortably. It is a

great country, but a small country compared to us. We have got this now huge complexity of intelligence capability. We have got the FBI, we have got the CIA, we have got Ambassador John Negroponte's group, we have Homeland Security's initiatives, and then almost every sub-agency has their own intelligence capability. CDC has an intelligence capability.

If you were to take the FBI's responsibility for intelligence out of the FBI, I guess the question becomes, do you undermine one of the few premier agencies we have in the area of fighting people who might do us harm and get very little for it? And if you did do that, how robust would this new agency be, because it is going to compete with turf—with the CIA, which is a vicious turf organization, with DIA, which is even more vicious, and the FBI. And those are just three of the big boys, is it even feasible for us to have an MI5 that is functional in the way we have this Government structured or do we just sort of have to get all these guys, all these agencies to work together, through the National Center for Terrorism which we have set up or some other agency like that?

What do you think, Judge?

Judge POSNER. Well, I would not take anything out of the FBI, because what the FBI—the FBI's conception of intelligence is really intelligence in support of criminal law enforcement, and that is similar to the intelligence focus of Scotland Yard Special Branch. So I would leave the FBI as it is and set up a separate agency.

It is true, we have a very complicated Government. We have too many agencies. But we do have a kind of vacuum, and it is extremely—we have a real hole in our counterterrorism structure and that hole is that we do not have a domestic intelligence service. Every other country that I know of has recognized that domestic intelligence—that there should be a domestic intelligence function which is separate from the national police force or the national criminal investigation system. It could be France, Germany, Spain, Italy, New Zealand, Australia, Japan, India, Israel, Canada, and the United Kingdom. They all think that.

Many of these are countries which have much longer histories of struggling with terrorism than we do. So yes, we have a huge number of agencies, maybe too many, but we do not have a really critical component of an all-around counterterrorist structure and that is a separate domestic intelligence agency. But again to repeat, I do not think we should take anything out of the FBI because even if we had a separate intelligence agency it would need to work with specialists in counterterrorist criminal law enforcement.

So if you look inside the FBI and inside its new national security branch, you have a counterterrorism division which is a division that tries to arrest and prosecute terrorists, and you have a counterintelligence division, which tries to do the same thing with foreign spies, and you have a directorate of intelligence, which gathers information in support of these criminal law investigative activities involving terrorists and spies.

So we need that. We need that national security branch. But we want it to—we need it to be working with people who are specialized in intelligence. One of the things Mr. Parker pointed out is that the intelligence services like to continue investigations and allow these terrorist plots to evolve to the point where you know

the extent of the network. You know, it is like cutting a worm in half or something like that. You do not want to by arresting a few people simply warn the others, so the terrorist gang regrows the part you have lopped off, because there are so many prospective terrorists.

I will mention just one more point on the difference. During World War II—and this recurred during the struggle with the Irish Republican Army—there were cases in which the MI5 learned that there was a planned attack. In World War II they caught a German saboteur who had been instructed to blow up an electrical plant, and MI5 said: Let us let him blow up the electrical plant because this will give him such tremendous credibility in Germany that we will then be able to use him to feed the Germans with all sorts of disinformation that they will believe.

Scotland Yard, being a police force, said: No, we must not do that; it is too dangerous. So the dispute was raised to a higher level and the government said: Yes, we will go ahead and let him blow up the plant. And he did that and it was reported in the newspapers, got back to Germany. The Germans thought: This guy is terrific; he did what we told him; he blew up the plant. They sent him a lot of money, which of course the British confiscated, and from then on anything that he told his German masters they believed, even though it had been made up by MI5.

This very similar incident with blowing up a building in London happened during the fight with the IRA. Again, disagreement with the police. They always want to—they do not want to take risks. The intelligence service argues, it is raised to a higher level, and again a judgment is made.

That is what we need. We need a domestic intelligence service that will argue with the FBI and say: Do not arrest those jokers in Miami, they are harmless; use them, play with them, see if you can, if through them you can learn more about international terrorism. But we do not have an agency that has that commitment to intelligence. There is no one to argue with the FBI in the Justice Department. So they arrest these people prematurely. That is my concern.

Mr. YOO. Mr. Chairman, I would say there is two different issues wrapped up in your question. One is an organizational theory of when do you want to develop a capability from within your corporation and when do you go out and buy a new unit instead of trying to build it from within. That is sort of the same issue corporations have.

Then the second thing I think built into your question is just a question of allocation of resources, whether we should be spending so much on domestic law enforcement versus intelligence. So I think that is what the FBI is concerned about, is you create this new agency and it is going to start drawing resources and funding that would have been given to the FBI in the first place.

On the first question, I think it is fair to say that the usual response that we have had from 9/11 in terms of organization has been just to create new layers between, new layers of bureaucracy between the people who are on the ground fighting terrorism and the President. So I think about the creation of DHS and now the

DNI. They impose just another layer between the different agencies and the President, and that may not be a good thing.

What Judge Posner is essentially applying is a sort of free market approach to the way intelligence agencies work. He wants them to compete with each other to do better work, which is not a surprise because this is how he got started in his academic career, was calling for more competition amongst corporations. I think that makes a lot of sense. If you look at the failures about the Iraq WMD and so on, everybody may use the same information, but they may analyze it differently. And it would be a better system, it seems to me, to create more units at a lower level that can produce alternate strategies, an alternate way of looking at things. We are always saying we want people to think outside the box, to be aggressive. It is harder to do that when everybody works for one giant bureaucracy.

So I would probably think that it is not that you want to undermine the FBI, but you want to create a competitor that will have maybe a different viewpoint and different capabilities. It may not be possible to have that done within the FBI itself.

In terms of the allocation of resources, I think, again I think you ought to ask as the Appropriations Committee whether you want to spend so much money on the enforcement of crimes that can also be handled by State and local law enforcement. The FBI does pour a lot of resources into fighting drug crime. Our Federal courts are choked with drug cases. This consumes an enormous amount of Federal resources and attention. State and local law enforcement can do that, too, and whether you want to move the bulk of those resources into fighting terrorism, which seems to me the more—more the kind of thing that the national government should be doing, which is protecting us from an external threat rather than focusing its resources on problems that also overlap with the competences of the 18,000 other police forces we have in the country.

Senator GREGG. We have been joined by Senator Allard. Did you have some questions, Senator Allard?

Senator ALLARD. Mr. Chairman, I do have some questions. We have a number of committee meetings running this morning and hopefully the questions I have are not repetitive of what you covered.

But I was curious. If we look at the recent terrorist plot that was foiled by the British authorities, if this had been put together in the United States, given the tools that U.S. law enforcement agencies currently have at their disposal, would we have been equally successful as they were? I would like to have some kind of comparison between the way they handle their investigations and the way we handle our investigations and whether that leads to more successful outcomes.

Who wants to start with that?

Judge POSNER. Well, it is of course difficult to say, but I think there would have been a danger that we would have begun arresting people too soon and as a result would not have gotten as many of the terrorists. I am not sure the British are sure that they have everybody, but they did arrest I think more than 20 people.

Our tendency has been not to take the risk of allowing a plot to develop, to evolve, but instead pouncing at the earliest opportunity. There is a big danger there that we get the small fry and we miss their accomplices.

Mr. Parker was saying before you arrived, Senator, that the British do tend to let the investigation continue longer before they intervene. You have to—it requires a certain amount of guts because you are watching these people and you know there is always some danger that they are going to act before you intervene. But taking that risk is often the right way to go because you take a small risk, but the payoff is that you may be able to uncover the entire network and not let little pieces out there which can regrow and hit you.

Mr. PARKER. Can I make two observations. I think that is a really important point and, without going into any operational details, I am aware of cases where attacks are taken place because the preventative mechanisms put in place failed. If you let a case run wrong, you do run the risk that attacks will occur and you do run the risk that citizens will lose their lives, and that has I believe on one occasion at least happened in the United Kingdom, through no intention on the part of either the police or the security service.

I wanted to address one point. Security service officers are not allowed in any way, shape, or form to commission an offense or participate in the commissioning of an offense. So they would not be allowed to participate through an agent, for example, in allowing a building to get blown up so the agent would get better access. In fact, we spend an awful lot of time in training trying to come up with imaginative ways to get potential agents over hurdles like carrying out a terrorist act to infiltrate further within a group. There is a red line there and the security service—I cannot imagine it would cross it except in the most extreme of circumstances. I am not aware of them ever having done it. I had not heard the case from World War II.

What is true in the Second World War, the British security service ran the Doublecross system. I think we got something like 15 Iron Crosses for our double agents, several personally pinned on by Hitler himself. And as far as I am aware I do not believe any German agent successfully operated from the beginning of the Second World War to the end of it on British soil. So it was tremendously successful.

But again, the idea that one would actually participate in an event that led to destruction of property or loss of life intentionally would be a red line for the United Kingdom.

To address also this issue of how one might help nurture a new agency, one thing you will notice from the London bombings is who took the credit for stopping it. You will never see a security service spokesman. There is no security service spokesman. It is a home office spokesman talking on behalf of the security service. They never take credit. They never take credit. Always a police officer, always a police officer up there taking the credit.

What is interesting in the last 3 or 4 years is the metropolitan police have started to actually acknowledge that the security service was involved and extend thanks for their participation, which I can assure you was not the case in the early 1990s.

But nothing succeeds like success, and effective relationships where everybody is able to share in a result, which you have with an intelligence division and a law enforcement division, where the intel guys help the law enforcement chaps get a result, everybody looks good, and that is why it has grown closer in England. It has been this sort of benign circle, virtuous circle of success, where the police have maintained their public role as the guardians of law and order and the security service has been able to direct their activities or assist in directing their activities more efficiently than the special branches had before.

So it has worked out well.

Mr. YOO. May I just give a quick point?

Senator ALLARD. Yes, Mr. Yoo.

Mr. YOO. Thank you. I think Judge Posner and Mr. Parker focused on the human intelligence side of investigation and I think one issue that I think the British do not have the same kind of strengths we have is on the signals intelligence, interception of emails, phone calls, financial records. It looks like from the accounts that the British were able to quickly move based on one tip, to use those kinds of methods to quickly identify the network of people through those kinds of links.

I think our FISA system allows us to have that same scope, but it is much slower because you have to put together a case that involves probable cause and so on, and that takes a lot of work and it takes time. So I think it is doubtful that we could have put the case together as fast as the British did. It might have taken much longer, not because of human intelligence sources, but just because we have more restrictions on the collection of information.

Senator ALLARD. Well, I appreciate your comment. I have always been very appreciative of the relationship that we have with the British. I mean, we have a very close relationship on intelligence gathering, and it is a lot of confidence in both our systems and I just think that statement needs to be made.

Mr. Yoo, you were talking about more competition in law enforcement. The only way I can see that we can make things more competitive is to contract it out. I mean, to keep people within the Government where you have the protections of the civil service system, it just, you take away incentives many times that you need to have in a more competitive environment.

Then when you talk about contracting out, then there becomes issues about who you are contracting with and whether they are secure or not and whether they have the legal authority to do what needs to be done.

Can you address those problems a little more in your comments?

Mr. YOO. I have to confess it is a really interesting point that I had not thought of quite clearly, as to whether you could create competition just by privatization of some aspects of it. I think one thing that you would get is you would get certain skills that are not common in the Government, entrepreneurial skills. So if you think about it, one of the things we are trying to do or the Government is trying to do in law enforcement is we are trying to destroy a network, an enemy network of agents, and this is much like the mentality that hackers might have attaching computer networks. That is not probably the kind of mentality you have in law enforce-

ment, is how do you destroy other networks. They are usually focused on protecting them.

So it is an interesting point, that there may be ways to use things like—I know the CIA had a venture capital firm in Silicon Valley where they tried to seed research that they thought might be helpful, and the Defense Department has done similar things historically. It may be the case there might be opportunities to do something like that using Federal funding to promote research by the private sector into technologies.

That is one of our great advantages in this war on terrorism, is that the United States is a technological leader. The enemy is very good at using technology, too, but maybe we can encourage research and development—I think it is less likely we will develop those tools from within the Government. That has not, I do not think, been historically the case really when it comes to sort of fine-tuned kind of approaches. Our kind of research and development I think within the Government is more sort of a brute force approach to sparking big changes by pouring in a lot of money.

So your idea could lead to—there might be a better way to create that kind of work with less expenditure of funds. It is interesting.

Judge POSNER. If I could add something, there has been a big talent drain from the intelligence community since 9/11 because private companies, banks, investment banks, telephone companies, computer companies, and so on, very concerned about security, have hired a lot of very good intelligence people from the Government. What that means is that, just as Professor Yoo is saying, we want to make sure that these private security people, private intelligence people, are part of an overall national network to protect us, and one need we have is to coordinate our Federal intelligence activities, not only with other Federal agencies and with State and local police, but also with the private security firms and the private intelligence units of major banks.

For example, one of the senior officials at CIA, Ted Price, became the senior security officer for Lehman Brothers in New York, very experienced intelligence officer and very concerned about threats to his bank from terrorists. So we should be drawing on these people.

Echoing what Professor Yoo said about technology, one of the big problems we have—this is an FBI problem. You know, of course the FBI has acknowledged having blown more than \$100 million on a computer system that did not work. One of the problems is that the Government agencies tend to hire contractors to custom build a computer system for a Government agency. They do not sufficiently exploit the opportunities to buy commercial equipment, adapt it for Government needs, but not try to build a computer system from scratch, because in fact the commercial systems, they are cheaper, they are tested, and they have very efficient security features, encryption and so on.

So yes, we should not—the Government should not think it can do everything itself in this area.

Senator ALLARD. Well, Mr. Chairman, if I can continue here to follow up on that. We have had a tough time—

Senator GREGG. I unfortunately have to go to a meeting. Can I turn the hearing over to you?

Senator ALLARD. That would be fine. I did not realize you—

Senator GREGG. I want to thank the witnesses, though, for their time and their courtesy. It has been an extraordinarily informative hearing for me and hopefully we can take some of the knowledge you have imparted to us and make good use of it. Thank you very much.

I have got to go to a meeting with the Leader here at 11 o'clock and I will turn it over to Mr. Allard to chair the balance of the hearing.

Senator ALLARD [presiding]. Thank you, Mr. Chairman, and I will not take up too much more of the witness' time.

The problem we have had here is getting the FBI to talk with the CIA, and they are both Government agencies. I see even greater barriers in getting either one of those agencies to talk to somebody in the private sector. It is a confidence issue, I think, that you have very sensitive information, and of course the more people who know about it the more apt it is to leak out when you have an open society, particularly like what we have here.

I do agree, I understand your concerns with these contractors coming in on computer systems and tailoring that computer system just to that Department and they do not worry about interactivity between other Departments. I think that is a big problem, not only in the security but throughout the Government, and I think it needs to be dealt with, and there are some attempts to do that.

I guess we need to do some things, I think, to encourage them to participate with the private sector. Have you got any thoughts on how we can break down those barriers of confidence? The only way I can think of is maybe if they pick up people who had previous clearance experience and had worked within the agencies, if they go in the private sector then obviously they have already maybe established some confidence there. But I think it is a tough problem.

Judge POSNER. Well, one of the problems is that overclassification makes it difficult for the Government people to communicate with private people. But especially when we are talking about terrorism, some of the most important information to guide our conflict with the terrorists is knowledge of foreign cultures, foreign languages, foreign history and so on. Much of that expertise resides in universities and other private sector activities. So we do want to make sure that the Government officials can talk to these people, can consult them and bring them in, and not be impeded by overclassification, by paperwork, by conflict of interest rules that makes it very difficult for private people to consult with the Government.

I do think the Director of National Intelligence is concerned about that problem and is trying to lower the barriers to intercommunication with the private sector.

Mr. YOO. I very much agree with what you say, Senator, about the classification and clearance issue. In part it is a hangover from the cold war cultural problem, because a lot of the rules on clearances and so on were built up to prevent the Soviet Union from getting an agent inside and learning information. That does not seem to be the challenge that we face with al Qaeda. We do not as far as I know have examples of al Qaeda agents infiltrating into the United States Government.

So I think this would be an appropriate area for the Appropriations Committee to consider, is whether it wants to change the way clearances are given, how many people are permitted to have them. This does not just cause problems for interoperability between Federal agencies; it is a major barrier for interoperability between the Federal agencies and State and local law enforcement. That is I think where you even see more resistance to the sharing, not even just between the FBI and the CIA, but then down to the people who actually have to make the tough decisions.

This is also an area where computers could provide help. Corporations and universities, other entities, have all used technology to control the flow of information in different ways using commercially available products. I have always wondered why we do not—it does not seem like we have a chief information officer in the Federal Government. There are certain kinds of innovations, the technology you can use, which the private sector is way ahead in, which I think could be rather easily adapted to face some of those problems you have raised. But we do not have anyone in the Government who is looking at the use of information technology centrally. Each agency has their own CIO, but we do not have one for the Government as a whole, it seems. That might be an area, the Appropriations Committee might call for that kind of work to be done by the executive branch, and it would be very helpful, I think.

Mr. PARKER. If I could offer a personal observation, I am not sure it is quite as bad as you fear. I spent 6 months in Baghdad in 2003 as the British special adviser on transitional justice and I was struck actually at how closely the other Government agencies worked with contractors, how heavily involved they were in all aspects of operations in the field.

I was there essentially as a private sector contractor for the foreign office. Within a month and a half, I sat on the high value detainee video conferencing, telephone conferencing system, with the CIA and Defense Intelligence Agency. I was amazed, absolutely amazed that they would allow me in the room, and in fact we had very useful, very fruitful discussions.

So I think again successful collaboration tends to breed relationships of trust. Perhaps one of the things, the good things that does come out of Iraq, is that there is a much, much greater awareness now of the values sometimes of these sort of contractor relationships and the skills that are out there in the private sector and how that can be utilized by the intelligence agencies. So maybe there is a ray of hope perhaps already there.

Senator ALLARD. I am going to change the subject just a little bit, but it is very pertinent to the debate going on in the Congress as we sit here. You brought up the issue of detainees and one of the debates that we are having is, because of our Constitution and the way we protect the rights of the accused, citizens have to face their accuser and they have to be informed of those facts in a civilian court.

With the recent Supreme Court decision which has now extended certain rights to detainees, we have a problem. If we disclose all that information that we know about to the accused in a court case, we make it public, or potentially public. This creates a problem on security issues where we do not necessarily want them to know

how we got the information or who the informer is and those kind of things.

How do other countries deal with that issue, or are we just unique in that because of the protections we provide to the accused? I wonder, maybe you could comment on that, Mr. Parker, and any of you on the panel that may be familiar with—and maybe some suggestions on how we can deal with that?

Mr. PARKER. Disclosure became an issue in British law in the early 1990s. It took a while for the British intelligence agencies to adapt to that. The first case in fact was an animal rights case, I believe in Reading just west of London, where the police were forced to drop the case because the judge ruled in the interest of disclosure the identity of the informant had to be revealed and the police simply dropped the case at that point.

We have moved a long way from that. There is an instrument in British law called a public interest immunity certificate, where agencies who want to protect intelligence can apply to a judge to have it excluded from the rules of disclosure. The judge gets to read it, he gets to make his own judgment about the sensitivity of the document, and if he feels that the Government puts together a reasonable case he will issue a public interest, a PII certificate. So that is the mechanism that we use in the United Kingdom.

Also, the other thing we have done is reverse engineer cases, so that if for example technical capabilities might be exposed in the course of a trial we might use obsolete equipment for that particular case, a listening device or some sort of beacon device. We might deliberately use equipment for that case simply hoping that it will get disclosed to the court.

The IRA used to send intelligence officers to every trial. They would sit there, they would write down, they would do lessons learned on every single case that came before the court. One of the biggest intelligence successes we had in the early 1990s was this debate about whether or not digital phones could be intercepted, cell phones, digital cell phones could be intercepted. There was what is essentially an urban myth that analog cell phones could be intercepted but digital phones could not be. For a 3- or 4-year period, a lot of people used digital cell phones when they were perfectly easy to intercept and talked quite openly on it.

Well, that was clearly a capability that we had no wish in revealing in court. In this particular instance, of course, we are I think the only country in the world where telephone intercept material is not admissible as evidence, period. So that issue does not come up specifically. But sharing intelligence, identity of sources, technical capabilities, are serious issues, and we have typically tried to protect our techniques by going for these public interest immunity certificates.

#### CONCLUSION OF HEARING

Senator ALLARD. If we do not have any other comments on the question, I do not have any more questions. I want to thank the panel for your participation and your comments. I want to check with the staff and see if there is anything here on closing the committee we need to mention. 10-day comment period or anything like that?

Then I am going to declare the committee recessed.  
[Whereupon, at 11:10 a.m., Thursday, September 14, the hearing was concluded, and the subcommittee was recessed, to reconvene subject to the call of the Chair.]

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