**UNITED STATES DISTRICT COURT**

**FOR THE EASTERN DISTRICT OF VIRGINIA**

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| UNITED STATES<br>v.<br>JEFFREY ALEXANDER STERLING,<br>Defendant. | No. 1:10cr485 (LMB) |

**NOTICE OF MOTION OF JAMES RISEN TO QUASH SUBPOENA AND/OR FOR PROTECTIVE ORDER**

James Risen hereby gives notice that he will respectfully move this Court before the Honorable Leonie M. Brinkema, in the United States District Court for the Eastern District of Virginia on July 7, 2011 at 10:00 a.m. as part of the hearing that has been previously set by the Court for consideration of Motions involving Risen in the case of *United States* v. *Sterling*, or at a time and place to be set by the Court, for an order quashing the subpoena directed to him and/or for a protective order.

As set forth at greater length in the supporting brief and affidavits of James Risen and Joel Kurtzberg, the subpoena should be quashed and/or a protective order entered because the testimony the Government seeks is protected by the reporter's privilege arising under the First Amendment to the United States Constitution and under federal common law, and the Government has failed to demonstrate that that privilege does not apply.

June 21, 2011

Respectfully submitted,

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# MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE GOVERNMENT'S MOTION *IN LIMINE* AND IN SUPPORT OF THE MOTION OF JAMES RISEN TO QUASH SUBPOENA AND/OR FOR PROTECTIVE ORDER

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## PRELIMINARY STATEMENT

James Risen, a two-time Pulitzer Prize-winning investigative reporter for *The New York Times* ("*The Times*") and the author of three full-length books of investigative journalism, has been served with a subpoena demanding that he testify about the identity of his confidential source(s) at the trial of Jeffrey Alexander Sterling on charges that Sterling leaked classified national defense information that was then published in Chapter 9 of Mr. Risen's book, *State of War: The Secret History of the CIA and the Bush Administration* ("*State of War*"). The Government has made a motion *in limine* to require Mr. Risen's testimony. Mr. Risen respectfully requests that the Court deny that motion and grant his motion to quash the trial subpoena and for a protective order, because the testimony sought by the Government — with one minor exception for testimony seeking authentication of Mr. Risen's work (*see* pp. 45 - 46 below) — is (1) protected by the reporter's privilege rooted in the First Amendment of the United States Constitution; (2) protected by the reporter's privilege recognized in this Circuit under federal common law; and (3) part of a continuing pattern of government harassment of and retaliation against Mr. Risen for reporting important stories that exposed excessive government secrecy and potential wrongdoing during the Bush Administration.

The Government's brief in support of its motion *in limine* reads as if this Court is deciding this issue on a clean slate. But, as both the Government and this Court are well aware, this is not the first time the Government has demanded that Mr. Risen reveal his confidential source(s) on this subject. The Government issued two grand jury subpoenas to Mr. Risen, in 2008 and 2010 [redacted]



Mr. Risen's testimony is not "critical" or "necessary" to the Government's case in light of the evidence the Government claims to have compiled in the course of its investigation. (*See* pages 37 - 41 below.)

The burden of affirmatively demonstrating that Mr. Risen's testimony is "critical" or "necessary" to this prosecution and that the information sought cannot be obtained by reasonable alternative sources is on the Government. *LaRouche* v. *National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986). The Government has utterly failed to satisfy that burden here. In short, the Government acknowledges that it has other admissible evidence to support its allegations, making Mr. Risen's testimony about his confidential source(s) unnecessary. Under these circumstances, the subpoena must be quashed and the Government's motion *in limine* must be denied.

## CIRCUMSTANCES GIVING RISE TO THE MOTION

James Risen has been a journalist for more than thirty years. He has worked as a reporter at the *Fort Wayne (Indiana) Journal Gazette*, the *Miami Herald*, the *Detroit Free Press*, the *Los Angeles Times*, and, since May 1998, *The Times*. *See* Risen Aff. ¶ 5. He currently writes mostly about intelligence matters, national security issues, and terrorism. *Id.* In addition to his newspaper reporting, Mr. Risen has also written three books, all of which have been the product of Mr. Risen's work as an investigative journalist. *Id.* ¶ 10.

Mr. Risen has long written — and won awards for writing — major stories that disclose excessive government secrecy, incompetence, and mismanagement, regardless of what administration has been in power. *Id.* ¶ 14. On December 16, 2005, Mr. Risen co-wrote a Pulitzer-Prize winning article in *The Times* with fellow *Times* reporter Eric Lichtblau entitled "Bush Lets U.S. Spy on Callers Without Courts." *Id.* ¶ 15 & Ex. 6. Shortly thereafter, in early January 2006, Free Press, an imprint of Simon & Schuster, published Mr. Risen's latest book, *State of War*. In *The Times* article and then in Chapter 2 of the book, Mr. Risen revealed that the National Security Agency had for years been secretly listening in on international phone calls and intercepting international email messages originating or terminating in the United States without first securing warrants (the "NSA Warrantless Eavesdropping Program"). *See id.* ¶ 15, Ex. 6. The NSA Warrantless Eavesdropping Program was, in all likelihood, illegal,[1] and by writing about it, Mr. Risen permitted the public, the Congress, and, eventually, the courts to debate and evaluate the legality of the previously secret program for the first time. *Id.* ¶ 9. Mr. Risen's disclosures helped lead to Congressional efforts to modify the Foreign Intelligence Surveillance Act

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[1] The only courts to have examined the legality of the NSA Warrantless Eavesdropping Program to date found it illegal. *See ACLU* v. *National Security Agency*, 438 F. Supp. 2d 754, 778 (E.D. Mich. 2006), (program violated the First and Fourth Amendments, separation of powers doctrine, and, FISA), *rev'd on other grounds by*, 493 F.3d 644 (6th Cir. 2007) (plaintiffs lacked standing to raise their constitutional claims), *cert. denied*, 552 U.S. 1179 (2008); *In re National Security Agency Telecommunications Records Litigation*, 700 F. Supp. 2d 1182, 1184 (N.D. Cal. 2010) ("plaintiffs were subjected to unlawful electronic surveillance" in violation of FISA).

of 1978 in order to provide more secure legal grounding for domestic surveillance on a going-forward basis. *Id.*; *see also* Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552; Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436. The wiretapping program remains a central issue in discussions of executive power and was the subject of Congressional questioning of then-Judge (and now Supreme Court Justice) Sotomayor. *See id.* ¶ 9.

In addition to reporting about the NSA Warrantless Eavesdropping Program, *State of War* also exposed additional instances of excessive government secrecy, incompetence, and/or mismanagement in the Bush Administration that had previously been unreported. The book also disclosed that:

- President Bush secretly pressured the CIA to use torture on detainees in secret prisons around the world; *id.* ¶ 11 & Ex. 2 at 11-37;
- the CIA had evidence before the Iraq War that Iraq had already abandoned its program to develop weapons of mass destruction, but failed to share that information with President Bush, even as he was publicly warning of the threat posed by Iraq's quest for such weapons; *id.* & Ex. 2 at 85-107;
- in the aftermath of the invasion of Iraq, the Bush Administration punished CIA professionals who warned that the war in Iraq was going badly; *id.* & Ex. 2 at 109-124;
- on sensitive issues, such as torture, the Bush Administration created a "zone of deniability" whereby the president's top advisors were briefed, but the president himself was intentionally kept in the dark; *id.* & Ex. 2 at 24-25;
- the Bush Administration had turned a blind eye to Saudi involvement in terrorism; *id.* & Ex. 2 at 173-91; and
- the CIA's intelligence operations on weapons of mass destruction in Iraq, Iran, and other countries were dysfunctional, and, in some instances, even reckless. *Id.* & Ex. 2 at 193-218.

Chapter 9 of *State of War* focuses primarily on "Operation Merlin," a reportedly botched attempt by the CIA, during the Clinton Administration, to have a former Russian scientist pass on fake and intentionally flawed nuclear blueprints to Iran. *See* Risen Aff. ¶ 16 & Ex. 2 at 193-218. The idea behind the operation, as described in the book, was to induce the Iranians to build a nuclear weapon based on the flawed blueprints and thus ultimately undermine Iran's nuclear program. But the operation was deeply flawed and mismanaged from the beginning.

The flaws in the nuclear blueprints were so obvious that the Russian scientist noticed them within minutes of seeing the plans. *Id.* ¶ 17 & Ex. 2 at 203, 210-11. When the scientist explained this to his CIA handlers, they inexplicably refused to call off the operation and simply told him to proceed as planned by delivering the blueprints to the Iranians. *Id.* ¶ 17 & Ex. 2 at 203-04, 210-11. Thus, notwithstanding that it came to the CIA's attention that the flaws in the nuclear blueprints could be very easily spotted, the CIA pushed ahead anyway. *Id.* ¶ 17 & Ex. 2 at 203-04, 210-11. By reporting on the failed operation, Mr. Risen called into question the competence of the CIA's intelligence related to Iran's ability to produce weapons of mass destruction. *Id.* ¶ 29.

Mr. Risen knew about most of the information reported in Chapter 9, including Operation Merlin, as early as 2003 but held the story for three years until it became clear to him that the competence of intelligence operations concerning Iran's nuclear capabilities was something that the public needed to examine. Risen Aff. ¶ 19. Mr. Risen made the decision to publish this information only after: (1) it became clear that the main rationale for fighting the Iraq War was based on faulty intelligence about the supposed Iraqi nuclear program; (2) the press, particularly *The Times*, had been harshly criticized for not doing more independent investigative reporting before the Iraq War about the quality of U.S. intelligence concerning Iraq's nuclear program; (3) the March 31, 2005 Report to the President by the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction described American intelligence on Iran as inadequate to allow firm judgments about Iran's weapons programs;[2] and (4) there was increasing speculation that the U.S. might be planning for a possible conflict with Iran, once again, based on supposed intelligence concerning WMD. Mr. Risen ultimately con-

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[2] A redacted version of the report, which does not contain the information about the Iranian nuclear program, is available on the Internet. *See* Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, Report to the President of the United States, Mar. 31, 2005 (unclassified version), *available at* http://www.gpoaccess.gov/wmd/index.html (last visited June 20, 2011).

cluded that U.S. intelligence on Iran's supposed nuclear program was so flawed, and that the information in Chapter 9 was so important, that the public needed to know about this story before another war was launched based on faulty intelligence. *Id.*

Mr. Risen and Mr. Lichtblau received the Pulitzer Prize and other prestigious awards for their reporting on the NSA Warrantless Eavesdropping Program. *Id.* ¶ 6. They both also received the Goldsmith Prize for Investigative Reporting, which is awarded to journalism that "promotes more effective and ethical conduct of government by disclosing excessive government secrecy, impropriety, and mismanagement." *Id.* ¶ 7. Much of Mr. Risen's reporting during the Bush Administration was — as it had been with previous administrations — critical of the federal government. *Id.* ¶ 14.

The Government, however, was not pleased. President Bush called the disclosure of the NSA Warrantless Eavesdropping Program a "shameful act," and the administration and its supporters thereafter publicly speculated about potentially prosecuting Mr. Risen for espionage. *Id.* ¶ 3 & Ex. 11. Mr. Risen soon became the target of an organized campaign of hate mail from right wing groups with close ties to the White House, inundating him with personal threats. *Id.* ¶ 31. Protesters supporting the Bush Administration picketed Mr. Risen's office, and right wing pundits and bloggers supporting the Bush Administration took to television and the Internet to call for the White House and the Justice Department to either prosecute Mr. Risen for espionage or put him in jail by making him the target of a subpoena in a leak investigation concerning the identity of his confidential source(s). *Id.*

In January 2006, then-Attorney General Alberto Gonzales held a press conference and, in May 2006, he went on television to discuss the leaks concerning the NSA Warrantless Eavesdropping Program. Both times, he suggested that the Department of Justice was actively considering prosecuting the journalists involved. *Id.* ¶ 32 & Ex. 12. When later asked to clarify Attorney General Gonzales's remarks, the Justice Department stated in writing that, although the Justice Department had "never in its history prosecuted a member of the press under [the Espio-

nage Act] or any other statute relating to the protection of classified information," the Department's current position was that "such a prosecution is possible under the law." *Id.* ¶ 35 & Ex. 15. Then-director of the CIA, Porter Goss, soon chimed in, suggesting that it was his "hope" and "aim" that Mr. Risen would receive a grand jury subpoena requiring him to testify about the identity of his confidential source(s). *Id.* ¶ 33 & 13.

In May 2006, ABC News reported that senior federal law enforcement officials had leaked to the press that the Government was tracking the phone numbers of journalists without the journalists' knowledge as part of an effort to root out journalists' confidential sources. *Id.* ¶ 29. Mr. Risen was mentioned by name as one of the journalists whose work the Government was investigating. *Id.* That senior federal law enforcement officials were reported to have leaked this information to the press was not lost on Mr. Risen. *Id.*

On June 23, 2006, Mr. Risen co-authored another article with Eric Lichtblau, published in *The Times*, which disclosed the existence of another government program of questionable legality that was initiated weeks after the September 11, 2001 terrorist attacks and permitted United States government officials to review money transfer records in the international Society for Worldwide Interbank Financial Telecommunications ("SWIFT") database as part of an effort to detect terrorist financiers (the "SWIFT Program"). *Id.* ¶ 41. The same day that *The Times* published the article about the SWIFT Program by Messrs. Risen and Lichtblau, *The Wall Street Journal* and the *Los Angeles Times* also published similar articles about the program. *Id.* ¶ 42 & Exs. 17, 18.

Nonetheless, the Government reacted with expressions of outrage that were directed only at *The Times* and Messrs. Risen and Lichtblau. As CNN reported on June 27, 2006, even though "[t]he story was [also] reported by the *Los Angeles Times* and *Wall Street Journal*, . . . the attacks have focused on *The New York Times*, including its reporters who worked on the case." *Id.* ¶ 44. Public threats from those close to the administration to put Mr. Risen in jail continued. *Id.* ¶ 45. On August 30, 2006, Republican Congressman Peter Hoekstra publicly

predicted that Mr. Risen and his co-author would "be sitting in jail by the end of the year until they reveal their sources." *Id.* ¶ 45 & Ex. 20. Mr. Risen was even told by one of his sources that Vice President Dick Cheney had pressured the Justice Department to personally target Mr. Risen because Vice President Cheney was unhappy with Mr. Risen's reporting and wanted to see Mr. Risen in jail. *Id.* ¶ 30. After Mr. Cheney left office in 2009, he publicly admitted that the fact that Mr. Risen won a Pulitzer Prize for the NSA story "always aggravated me." *Id.*

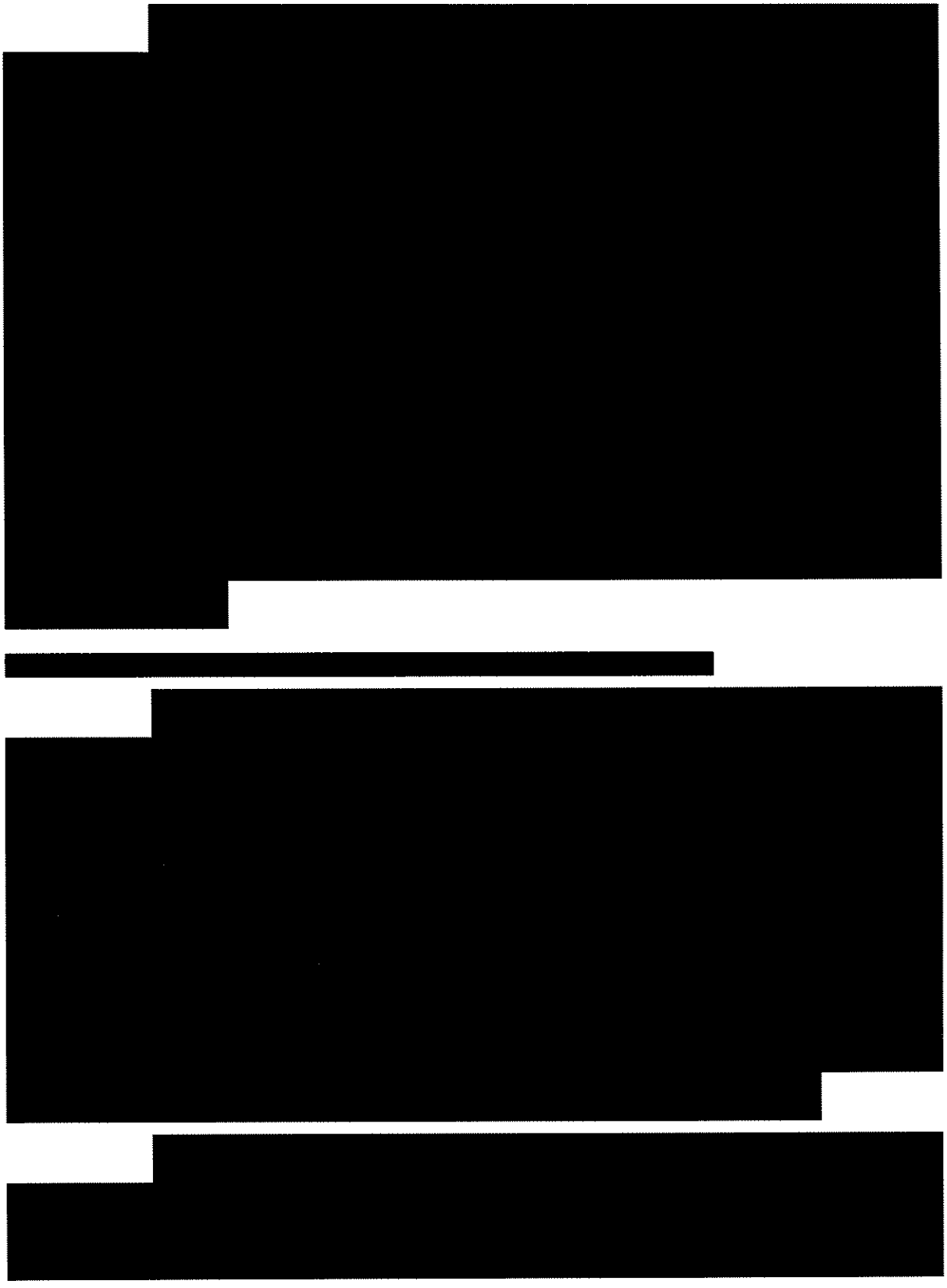
***The 2008 Subpoena***

It was in this atmosphere of selective threats of prosecution, secret surveillance, and jail time that, on January 24, 2008, the Government issued a grand jury subpoena to Mr. Risen. [redacted][3] [redacted] As set forth in Mr. Risen's affidavit, along with the 2008 affidavits and/or dec-

3 [redacted] The Government has now indicated to Mr. Risen's counsel that it will recommend that Mr. Risen be granted immunity in the event he is required to testify. Mr. Risen firmly believes that he has committed no crime, and that any attempt to prosecute him for merely publishing his reports about the NSA Warrantless Surveillance Program or Chapter 9 of his book would be unconstitutional. Given the Government's recent, aggressive, and unprecedented position on the applicability of the Espionage Act to journalists who merely publish classified information, however, Mr. Risen may be obliged to invoke his Fifth Amendment right against self-incrimination if his motion to quash is ultimately unsuccessful. Should Mr. Risen's testimony be sought without immunity, Mr. Risen expressly reserves his Fifth Amendment rights.

larations of journalists Scott Armstrong, Carl Bernstein, Jack Nelson, and Dana Priest, and historian Anna Nelson, compelled disclosure of information related to Mr. Risen's confidential source(s) would seriously impede his ability to gather and report on serious matters of national concern and thus significantly impair the public's ability to learn matters of the greatest potential import. *Id.* ¶¶ 51-53; Armstrong Decl. ¶ 13; Bernstein Decl. ¶¶ 6-8, 10; A. Nelson Aff. ¶¶ 8-11; J. Nelson Aff. ¶¶ 8, 10; Priest Decl. ¶¶ 11, 13 (Exhibits 14 - 18 in the Kurtzberg Affidavit, respectively).

[redacted]

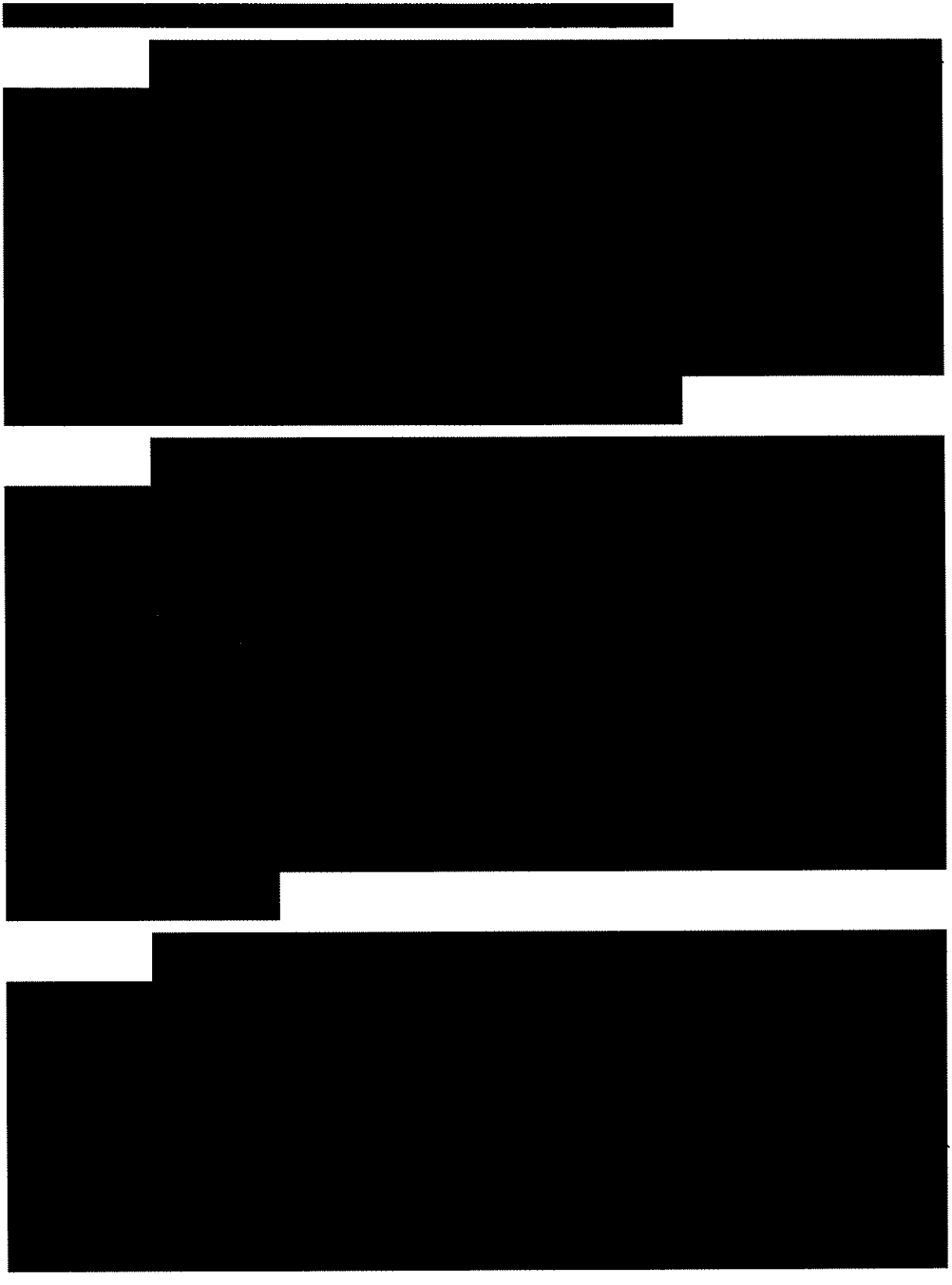


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***The 2010 Subpoena***

[redacted] on April 26, 2010, the United States Attorney's Office issued yet another subpoena to Mr. Risen. [redacted]

[redacted]





***The Indictment, 2011 Subpoena, and the Government's Motion In Limine***

[redacted] the Government secured an indictment of Jeffrey Sterling. On May 23, 2011, the Government served a trial subpoena on Mr. Risen. Risen Aff. ¶ 1 & Ex. 1. The trial subpoena contains no limitation on the testimony sought from Mr. Risen, and the Government has made clear that it expects to ask Mr. Risen to "directly identify Sterling" as his source, "establish venue for certain of the charged counts," "authenticate his book and lay the necessary foundation to admit" *State of War* and certain statements alleged to have been made by Sterling, and "identify the defendant as someone with whom he had a preexisting source relationship that pre-dated the charged disclosures." Government's May 23, 2011 Motion *in Limine* ("Motion in Limine") at 5.

By its own description, the Government is seeking Mr. Risen's testimony, not because it is critical or necessary to the Government's case — as the law in this Circuit requires — but rather merely to "simplify the trial and clarify matters for the jury" and to "allow for an efficient presentation of the Government's case." *Id.* The Government references the evidence it expects to have at trial — although it provides no proof other than citations to the Indictment about the nature of the actual evidence — and does not even argue that Mr. Risen's testimony is necessary or critical to its case. At this time, Mr. Risen has not been granted access to the Government's evidence — [redacted] — but according to the Government, that evidence includes:

- Phone records reflecting a series of phone calls were placed by Sterling to Mr. Risen's personal residence and office, and by Mr. Risen to Sterling's residence, tem-

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4 [redacted]

porary residence, and place of employment in 2003 and 2004. Indictment of Jeffrey Alexander Sterling ("Indictment") ¶¶ 19, 34, 38, 45, 47, 49, 51, 54;

- Emails sent between Sterling and Mr. Risen in 2003 and 2004. *Id.* ¶¶ 19, 37, 44-46, 48-51;
- Evidence of a meeting between Sterling and two Senate Select Committee on Intelligence staffers in which he discussed the classified program at issue. *Id.* ¶ 36
- Evidence of calls made by Mr. Risen to the CIA Director of the Office of Public Affairs seeking comment on classified information he intended to write about, roughly coinciding with alleged contacts between Sterling and Mr. Risen. *Id.* ¶¶ 39-43
- Evidence that Mr. Risen traveled internationally to obtain more information about the classified program. *Id.* ¶ 54
- Evidence that on or about November 3, 2001, Sterling disclosed classified information to Mr. Risen, which information was contained in a subsequently published newspaper article written by Mr. Risen. *Id.* ¶ 23.
- Evidence that in or about February 2002, Sterling met with Mr. Risen, at least once at Mr. Risen's office in Washington, D.C., with the purposes of discussing Sterling's civil litigation with the CIA, and to provide Mr. Risen with documents relating to Sterling's employment with the CIA. *Id.* ¶ 26
- Evidence that Sterling provided Mr. Risen with at least one redacted, unclassified document that referenced the individual referred to in the indictment as "Human Asset No. 1." *Id.* ¶ 26

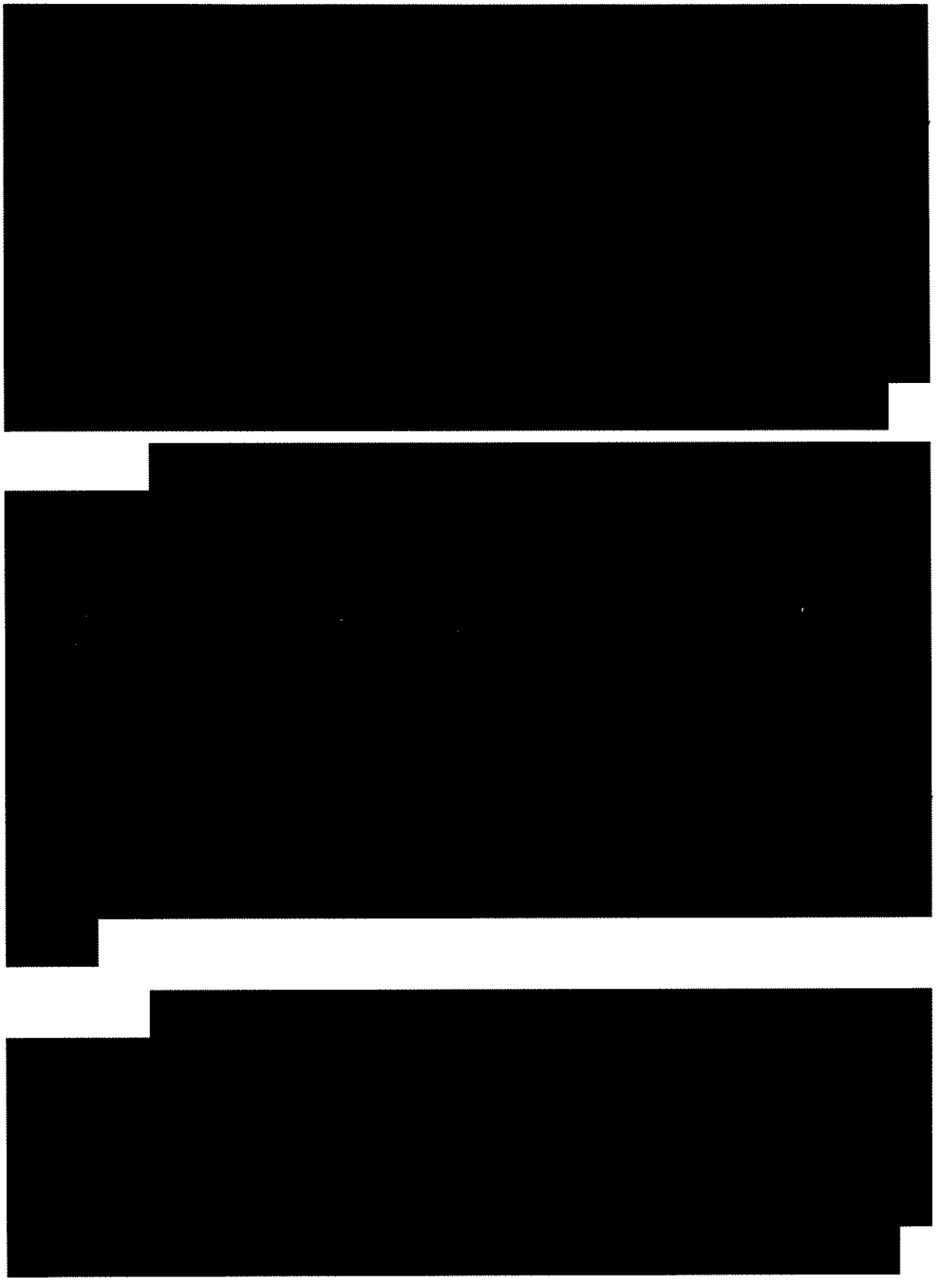
The Government's current demands for Mr. Risen's testimony are a serious threat, not only to Mr. Risen's constitutional rights, but also to his livelihood. Mr. Risen has, over the course of his career, written innumerable newspaper articles based on confidential source information, covering topics that include terrorism, national security issues, weapons of mass destruction, and intelligence issues. Risen Aff. ¶¶ 5, 15. In addition, much of the investigative reporting in his books is based on information that was provided to him by confidential sources. *Id.* ¶ 51. Without promising confidentiality, many if not all of those articles and books would never have been written and disseminated to the public. *Id.* As set forth in Mr. Risen's affidavit, and the affidavits of other investigative journalists, without confidential sources, it would be all but impossible for him to do his job effectively as an investigative reporter. *Id.* ¶¶ 55, 64; *see also* Armstrong Decl. ¶ 25; Bernstein Decl. ¶ 10; J. Nelson Aff. ¶¶ 8, 10; Priest Decl. ¶¶ 11, 13.

Since the [redacted] 2008 and 2010 subpoenas, it has become more clear than ever how important Mr. Risen's promises of confidentiality are to his sources. *See* Risen Aff. ¶ 64 ("numerous sources of confidential information have told me that they are comfortable speaking to me in confidence specifically because I have shown that I will honor my word and maintain their confidence even in the face of Government efforts to force me to reveal their identities or information. The fact that I have not previously revealed my sources has allowed me to gain access to newsworthy information that I could not otherwise get."). If Mr. Risen is forced to testify, it will "immediately and substantially harm [his] ability to gather newsworthy information." *Id.*

**ARGUMENT**

Federal Rule of Criminal Procedure 17 governs subpoenas for witnesses in criminal cases. In relevant part, Fed. R. Crim. P. 17(c)(2) provides that on a motion promptly made, the Court may quash or modify a subpoena if compliance would be unreasonable or oppressive. Because the information sought by the Government is protected by the reporter's privilege and stems from an effort to harass/intimidate a vocal critic of the Government, that is the case here.

**I.** [redacted]



## II. THE INFORMATION SOUGHT TO BE COMPELLED IS PROTECTED BY THE REPORTER'S PRIVILEGE UNDER THE FIRST AMENDMENT

In any event [redacted] the Fourth Circuit has consistently recognized the existence of a qualified First Amendment reporter's privilege that protects journalists from being compelled to testify about their confidential sources. [redacted] This privilege has its roots in Justice Powell's critical concurring opinion in *Branzburg*, 408 U.S. at 709 (Powell, J., concurring). Both this Court and the Fourth Circuit have interpreted *Branzburg* as providing journalists qualified protection in cases involving either confidential sources or bad faith, intimidation, or harassment of journalists. *See* [redacted]; *see also, e.g.*, *LaRouche*, 780 F.2d at 1139 (recognizing qualified reporter's privilege in civil case); *In re Shain*, 978 F.2d 850, 852-53 (4th Cir. 1992) (recognizing qualified reporter's privilege in criminal cases involving claims of confidentiality, harassment, or bad faith) (citing *United States* v. *Steelhammer*, 539 F.2d 373, 376 (4th Cir. 1976) (Winter, J., dissenting), *adopted by the court en banc*, 561 F.2d 539 (4th Cir. 1977); *United States* v. *Lindh*, 210 F. Supp. 2d 780, 783 (E.D. Va. 2002) (recognizing a First Amendment reporter's privilege in a criminal case "where the journalist produces some evidence of confidentiality or governmental harassment") (Ellis, J.); *United States* v. *Regan*, Criminal No. 01-405-A, Memorandum Order at 5 (E.D. Va. Aug. 20, 2002) (unpublished; attached to Kurtzberg Aff. as Ex. 19) (Lee, J.) ("Several circuit courts of appeals, including the Fourth Circuit, have held that the reporter holds a qualified First Amendment privilege against disclosing information acquired during news gathering activities through confidential sources"). Because this case involves both confidential sources and harassment/intimidation, the privilege applies.

In *Branzburg*, the Supreme Court was presented with journalists who had been held in contempt for failure either to appear or testify before grand juries that were investigating criminal conduct that the reporters had learned about in the course of preparing stories for publication. The Supreme Court upheld the contempt convictions in a 5-4 decision. But Justice Powell, who joined the majority with his deciding vote, wrote separately in a concurring opinion to

illustrate the narrow scope of the majority opinion. In so doing, Justice Powell clarified that the Court's holding did not mean that "newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources." *Branzburg*, 408 U.S. at 709 (Powell, J., concurring). In clarifying the nature of these "constitutional rights," Justice Powell explained, in an oft-quoted passage, that:

> [I]f the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationship without legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. *The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.* The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions. *Id.* at 710 (emphasis added).

Justice Powell's concurring opinion — which was intended to "emphasize" the narrow basis on which he provided the fifth and deciding vote for the majority opinion — makes clear that the majority's decision in *Branzburg* did not in any way preclude journalists from asserting in any case, civil or criminal, a "claim to privilege" that is rooted in "constitutional rights with respect to the gathering of news or in safeguarding [reporters'] sources." *Id.* at 709. The opinion further clarifies that courts are required to judge such assertions of privilege "on [their] facts" and on "a case-by-case basis," by balancing the "vital constitutional and societal interests" of freedom of the press, on the one hand, and the obligation of citizens to give relevant testimony concerning criminal conduct on the other. *Id.* at 724.

The Fourth Circuit has unequivocally held time and again that Justice Powell's concurring opinion is the controlling decision in *Branzburg* and has read that opinion as supporting the existence of a qualified reporter's privilege in both civil and criminal cases involving confidential sources. *See, e.g.*, *LaRouche*, 780 F.2d at 1139 (citing Justice Powell's concurring opinion as support for the reporter's privilege in civil cases involving confidential sources); *In re Shain*, 978 F.2d at 852-53 (citing Powell's opinion in support of reporter's privilege in criminal

cases involving either confidential sources or bad faith); *see also Ashcraft* v. *Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000); *Steelhammer*, 539 F.2d at 376 (Winter, J., dissenting), *adopted by the court en banc*, 561 F.2d at 540.[5]

The Court of Appeals has been extraordinarily protective of journalists who are subpoenaed to testify about their confidential sources. In the only two reporter's privilege cases brought in the Fourth Circuit involving confidential sources, the Court quashed the subpoenas both times. *See LaRouche* v. *National Broadcasting Co., Inc.*, 780 F.2d 1134 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986); *Ashcraft* v. *Conoco, Inc.*, 218 F.3d 282 (4th Cir. 2000). As the Court explained in *Ashcraft*, constitutional protection for confidential sources is both mandated by Supreme Court precedent and viewed as essential to a free and open society:

> News reporters are "entitled to some constitutional protection of the confidentiality of [their] sources." *Pell* v. *Procunier*, 417 U.S. 817, 834, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974) (citing *Branzburg* v. *Hayes*, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 66 (1972)); *see also Branzburg*, 408 U.S. at 707, 92 S. Ct. 2646 ("news gathering is not without its First Amendment protections"). Such protection is necessary to ensure a free and vital press, without which an open and democratic society would be impossible to maintain. *See Time, Inc.* v. *Hill*, 385 U.S. 374, 389, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967) ("A broadly defined freedom of the press assures the maintenance of our political system and an open society"). If reporters were routinely required to divulge the identities of their sources, the free flow of newsworthy information would be restrained and the public's understanding of important issues and events would be hampered in ways inconsistent with a healthy republic.

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[5] That Justice Powell's opinion is controlling, notwithstanding that he joined the five person majority opinion, is further supported by Supreme Court authority. The concurring opinion of a Justice who joins a 5-4 majority but issues a separate opinion that "clarifies" the meaning of the majority opinion, represents the holding of the Court because the majority opinion is not a true majority except to the extent that it accords with the views of the concurrence. *Cf. Marks* v. *United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .'" (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)), *superseded in part by statute on unrelated grounds as stated in Armstrong* v. *Bertrand*, 336 F.3d 620 (7th Cir. 2003); *see also McKoy* v. *North Carolina*, 494 U.S. 433, 462 n.3 (1990) (Scalia, J., joined by Rehnquist, C.J. and O'Connor, J., dissenting) (in such situations, what the Justice writes in a concurring opinion is "not a 'gloss,' but the least common denominator").

*Ashcraft*, 218 F.3d at 287 (citations omitted). In the 39 years since *Branzburg* was decided, the Fourth Circuit has never ordered a journalist to testify about his or her confidential sources.

The relevant test in applying the privilege in the Fourth Circuit was first set forth in *LaRouche*. *See* [redacted]. There, following Justice Powell's opinion in *Branzburg*, the Court "balance[d] the interests involved" to determine whether the privilege applied. *LaRouche*, 780 F.2d at 1139 (citing *Branzburg*, 408 U.S. at 710 (Powell, J., concurring)). The Court of Appeals instructed that three factors had to be considered in evaluating the privilege — "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information"[6] — but never ruled out consideration of other factors in the balancing. *See LaRouche*, 780 F.2d at 1139 (three-factor test is described as an "aid" to district courts in balancing the relevant interests). The Court applied this test in both *LaRouche* and *Ashcraft* and, in both cases, quashed the subpoenas after performing the necessary balancing. *See LaRouche*, 780 F.2d at 1139; *Ashcraft*, 218 F.3d at 287. Both *LaRouche* and *Ashcraft* were civil cases; *see also Church of Scientology International* v. *Daniels*, 992 F.2d 1329, 1335 (4th Cir.), *cert. denied*, 510 U.S. 869 (1993) (applying *LaRouche* test in civil case involving request for newsgathering materials).

In the criminal context, the Fourth Circuit has declined to apply the *LaRouche* balancing test in cases that do not involve confidential sources but has made clear that it does require a balancing of the interests whenever confidential sources are involved. *See In re Shain*, 978 F.2d 850, 853 (4th Cir. 1992). In *In re Shain*, four South Carolina journalists interviewed a United States Senator separately and without witnesses. *Id.* at 851.[7] The trial court ordered the

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6 *LaRouche*, 780 F.2d at 1139 (citing *Miller* v. *Transamerican Press, Inc.*, 621 F.2d 721, *modified*, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981)).

7 The interviews were all "on the record," and none of the information was given to the reporters in confidence. *In re Shain*, 978 F.2d at 851. In the interviews, the Senator claimed that he received a legal campaign contribution of no more than $300 from a registered lobbyist who was in fact a federal undercover agent. Each reporter published portions of their interviews, quoting the Senator. *Id.* The Senator was later indicted for allegedly violating the Hobbs Act by accepting $2,800

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journalists to testify in response to narrowly drawn subpoenas for them to "testify for no more than five minutes each to confirm that Senator Long had in fact made the statements they had reported." *Id.* at 852. The Fourth Circuit affirmed, emphasizing the importance that the lack of confidential sources played in reaching its result. In cases that do not involve confidential sources, the Court concluded that the requisite balancing of interests under the reporter's privilege does not apply without evidence of governmental harassment or bad faith. *Id.* at 852-53. Because there was no evidence of confidentiality or governmental harassment, the Court concluded that no balancing needed to be done under the facts of that case:

> In this case the reporters concede that neither Senator Long's identity nor his statements during interviews with him were confidential. Nor do they contend that the government seeks their testimony to harass them or otherwise seeks it in bad faith. . . . The reporters do not . . . assert that their testimony would be irrelevant or duplicative. . . . We conclude, therefore, that the absence of confidentiality or vindictiveness in the facts of this case fatally undermines the reporters' claim to a First Amendment privilege.

*In re Shain*, 978 F.2d at 853.[8] The Court relied heavily on Justice Powell's concurring decision in *Branzburg* and on *United States* v. *Steelhammer*, 539 F.2d 373, 376 (4th Cir. 1976) (Winter, J., dissenting), *adopted by the court en banc*, 561 F.2d at 540. *See In re Shain*, 978 F.2d at 852.

*Steelhammer* similarly involved an attempt to compel journalists to testify as witnesses in a contempt trial about nonconfidential information. The trial court found the reporters in contempt for refusing to testify and rejected their argument that the subpoenas should be quashed because they violated the First Amendment reporter's privilege. The Fourth Circuit reversed and vacated the contempt finding, with Judge Winter issuing a dissenting opinion. *Steel-*

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> from the lobbyist. The government believed that the Senator's insistence before he was arrested that he had received no more than $300 was relevant to proving intent. *Id.* at 852.

[8] A concurring opinion by Judge Wilkinson expressed the view that the *LaRouche* balancing test should have been applied to reach the same result. *See* 978 F.2d at 854 (Wilkinson, C.J., concurring separately).

*hammer*, 539 F.2d 373 (4th Cir. 1976); *id.* at 376 (Winter, J., dissenting). An *en banc* Court reversed the panel, upholding the contempt finding for the reasons set forth in Judge Winter's dissenting panel opinion. *Steelhammer*, 561 F.2d at 540.

The *en banc* Court in *Steelhammer*, like the Court in *In re Shain*, found that the balancing of interests required by the reporter's privilege did not need to be done in cases that involved neither confidential sources nor allegations of bad faith or harassment. *Steelhammer*, 539 F.2d at 376 (Winter, J., dissenting), *adopted by the court en banc*, 561 F.2d at 540. That the lack of confidential sources was central to the Court's holding is plain from its opening lines:

> In the instant case it is conceded that the reporters did not acquire the information sought to be elicited from them on a confidential basis; one of them (Steelhammer) so testified in the District Court. My study of the record fails to turn up even a scintilla of evidence that the reporters were subpoenaed to harass them or to embarrass their newsgathering abilities at any future public meetings that the miners might hold. It therefore seems to me that, in the balancing of interests suggested by Mr. Justice Powell in his concurring opinion in *Branzburg* v. *Hayes*, 408 U.S. 665, 709, 92 S. Ct. 2646, 33 L. Ed 2d 626 (1972), the absence of a claim of confidentiality and the lack of evidence of vindictiveness tip the scale to the conclusion that the district court was correct in requiring the reporters to testify.

539 F.2d at 376; *see also In re Shain*, 978 F.2d at 853 (quoting part of this quote from *Steelhammer*).

The decisions in *In re Shain* and *Steelhammer* (both of which did not involve confidential information but stressed that the analysis would have been different if they had), when coupled with the Fourth Circuit's rigorous application of the privilege in *LaRouche* and *Ashcraft* (which are the only cases that did involve confidential information), demonstrate that the Fourth Circuit affords journalists a qualified First Amendment privilege in both civil and criminal cases whenever there is evidence of confidentiality, bad faith, or harassment. As this Court held in the criminal prosecution of John Walker Lindh, after examining Justice Powell's concurring opinion and *In re Shain*, it is clear that in criminal cases, "[a] First Amendment journalist privilege is properly asserted in this circuit where the journalist produces some evidence of confidentiality *or* governmental harassment.'" [redacted] *Lindh*, 210 F. Supp. 2d at 783 [redacted]

[redacted]; *see also Regan*, Criminal No. 01-405-A, Memorandum Order at 5 (Kurtzberg Aff. ¶ 28 & Ex. 19) (quashing a subpoena in a criminal case and holding that "[s]everal circuit courts of appeals, including the Fourth Circuit, have held that a reporter holds a qualified First Amendment privilege against disclosing information acquired during news gathering activities through confidential sources"). This case involves evidence of both confidentiality and government harassment/intimidation; the First Amendment privilege therefore applies.

## III. THE INFORMATION SOUGHT TO BE COMPELLED IS ALTERNATIVELY PROTECTED BY THE REPORTER'S PRIVILEGE UNDER FEDERAL COMMON LAW

[redacted]We respectfully submit that the existence of a federal common law privilege provides an additional basis for granting Mr. Risen's motion to quash.

In *Steelhammer*, the Fourth Circuit became the first court of appeals to expressly recognize the existence of a common law reporter's privilege in civil cases. *See Steelhammer*, 539 F.2d at 377 n.* (Winter, J., dissenting), *adopted by the court en banc*, 561 F.2d at 540. Supreme Court case law since then further supports application of a common law privilege here.

As noted above, in *Steelhammer*, an *en banc* Fourth Circuit adopted Judge Winter's dissenting panel opinion, which affirmed an order finding journalists in contempt for refusing to testify about nonconfidential newsgathering information in a civil contempt trial. *See Steelhammer*, 539 F.2d at 377-78 (Winter, J., dissenting), *adopted by the court en banc*, 561 F.2d at 540. The journalists had argued that the reporter's privilege under the First Amendment shielded their testimony from disclosure, but Judge Winter and the *en banc* Court rejected that argument in the absence of evidence of confidentiality or bad faith/harassment. *Id.* In that same opinion, however, Judge Winter (and later, the *en banc* Court) found that reporters should be afforded a common law privilege under Federal Rule of Evidence 501 not to testify in civil cases:

> In my view the prerequisites to the establishment of a privilege against disclosure of communications set forth in VIII J. Wigmore, Evidence, §2285 at 527 (1961) should apply to reporters. *Under Federal Rules of Evidence 501, they should be afforded a common law privilege not to testify in civil litigation between private parties.* I do not prolong this opinion by developing this point.

*Steelhammer*, 539 F.2d at 377 n.* (Winter, J., dissenting), *adopted by the court en banc*, 561 F.2d at 540 (emphasis added). *Steelhammer* was a civil case, so it is not surprising that Judge Winter limited his finding to civil litigation. But in light of the criminal precedents outlined above — which provide for a reporter's privilege in criminal cases involving confidential sources — there is no reasoned basis for limiting the common law privilege to the civil context. *See also United States* v. *Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981) ("[T]he interests of the press that form the foundation for the privilege are not diminished because the nature of the underlying proceeding out of which the request for information arises is a criminal trial."). Thus, federal common law provides an alternative ground for recognition of the reporter's privilege in this Circuit.

The case law post-*Steelhammer* provides additional support for a common law reporter's privilege. In *Jaffee* v. *Redmond*, 518 U.S. 1 (1996), the Supreme Court recognized the existence of a psychotherapist/patient privilege under Fed. R. Evid. 501, which provides that privileges in federal criminal cases "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The test outlined in that case for recognizing a privilege under the common law — which is similar to the Wigmore test cited by Judge Winter in the *Steelhammer* footnote quoted above — leads to no other conclusion but that a common law reporter's privilege exists under Fed. R. Evid. 501.

In *Jaffee*, the Supreme Court held that, although the general rule is that "the public . . . has a right to every man's evidence," "[e]xceptions from the general rule . . . may be justified by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Jaffee*, 518 U.S. at 9 (citations omitted). The development of a privilege under Rule 501 is justified if protecting confidential communications of a particular

sort "'promotes sufficiently important interests to outweigh the need for probative evidence. . . .'" *Jaffee*, 518 U.S. at 9-10 (quoting *Trammel* v. *United States*, 445 U.S. 40, 51 (1980)). That is plainly true of the reporter's privilege that we urge this Court to apply.

The Supreme Court's application of these principles in *Jaffee* is instructive. In recognizing a psychotherapist-patient privilege under Fed. R. Evid. 501, the Court noted that protecting communications between psychotherapists and patients serves important private and public interests. "Effective psychotherapy," the Court noted, "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. . . . For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. . . . By protecting confidential communications between a psychotherapist and her patient from involuntary disclosure, the proposed privilege thus serves important private interests." *Jaffee*, 518 U.S. at 10-11. The Court concluded that the privilege also serves the public interest by "facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Id.* at 11.

The Court also held that the costs of recognizing the psychotherapist-patient privilege — in terms of a loss of potentially relevant evidence — were modest. The Court reasoned that, without a privilege, there would likely be a considerable chill on the very type of evidence sought; for example, parties would be unlikely to make statements against their interest to a therapist if they knew in advance that any statements could later be disclosed to governmental authorities or adversarial litigants. *Id.* at 11-12.

Finally, the Court relied upon the fact that "all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege." *Id.* at 12. "[T]he policy decisions of the States," the Court held, "bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one." *Id.* at 12-13. In light of the

general consensus in favor of the privilege, the Court concluded that "[d]enial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." *Id.* at 13.

Application of the *Jaffee* standards demonstrates that there is a reporter's privilege in the grand jury context under federal common law that protects Mr. Risen from compelled disclosure in this case. That the reporter's privilege serves important private and public interests is clear from the Fourth Circuit's decision in *Ashcraft*. As the Court observed there, protections for the press serve the private end of encouraging individuals to provide journalists with truthful, newsworthy information anonymously;[9] in addition, they serve the important public function of keeping the public informed. *See Ashcraft*, 218 F.3d at 287 (protection of confidential sources "is necessary to ensure a free and vital press, without which an open and democratic society would be impossible to maintain. . . . If reporters were routinely required to divulge the identities of their sources, the free flow of newsworthy information would be restrained and the public's understanding of important issues and events would be hampered in ways inconsistent with a healthy republic.") (citations omitted) In short, confidentiality is essential for journalists to sustain the relationships they need with sources and to obtain sensitive information from them. Without it, the press cannot effectively serve the public by keeping it informed. Other federal courts of appeal have unanimously emphasized these strong public and private interests in finding the existence of the reporter's privilege in various contexts.[10] Thus, just as the Supreme

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[9] Significantly, the Supreme Court has held that the freedom to publish anonymously is protected by the First Amendment. *See McIntyre* v. *Ohio Elections Commission*, 514 U.S. 334 (1995) (striking down a state law regulating anonymous leafleting under the First Amendment because it was not narrowly tailored to serve an overriding state interest).

[10] *See, e.g., Shoen* v. *Shoen*, 5 F.3d 1289, 1292, 1292 n.5 (9th Cir. 1993) (citing cases and noting that the reporter's privilege furthers society's interest in protecting the integrity of the newsgathering process and in ensuring the free flow of information to the public); *Baker* v. *F & F Investment*, 470 F.2d 778, 782 (2d Cir. 1972) ("Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis. . . . The deterrent effect such disclosure is likely to have upon future 'undercover' investigative reporting . . . threatens freedom of the press and the public's need to be in-

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Court concluded that the psychotherapist-patient privilege serves "the mental health of our citizenry," an interest that the Court found to be "a public good of transcendent importance," there is a clear consensus today among federal courts that the reporter's privilege enhances the political, economic, and social health of our citizenry by allowing the public to make informed decisions.

Moreover, the important interests served by the reporter's privilege outweigh the likely evidentiary costs. This is because, without a privilege, sources will be much less likely to make statements to the press that prosecutors will be interested in discovering. Armstrong Decl. ¶ 25; Bernstein Decl. ¶ 8; J. Nelson Aff. ¶ 8; Priest Decl. ¶ 13; 2008 Risen Aff. ¶¶ 44-45; *see also* Risen Aff. ¶ 64 ("[N]umerous sources of confidential information have told me that they are comfortable speaking to me in confidence specifically because I have shown that I will honor my word and maintain their confidence even in the face of Government efforts to force me to reveal their identities or information.") (citations omitted). The *Jaffee* Court's analysis of the psychotherapist-patient privilege in this regard is equally applicable here:

> If the [psychotherapist-patient] privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants such as petitioners seek access — for example, admissions against interest by a party — is unlikely to come into being. This unspoken "evidence" will therefore serve no greater truth-seeking function than if it had been spoken and privileged. *Jaffee*, 518 U.S. at 11-12.

In *Jaffee*, as noted, the Court recognized a privilege under Rule 501, in part because "all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege." *Id.* at 12. Noting that "[w]e have previously observed that the policy deci-

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> formed. It thereby undermines values which traditionally have been protected by federal courts applying federal public policy."), *cert. denied*, 411 U.S. 966 (1973); *Riley* v. *City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979) ("A journalist's inability to protect the confidentiality of sources s/he must use will jeopardize the journalist's ability to obtain information on a confidential basis. This in turn will seriously erode the essential role played by the press in the dissemination of information and matters of interest and concern to the public.").

sions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one," the Court held that in light of the consensus on the State level about the propriety of the psychotherapist-patient privilege, "[d]enial of the federal privilege . . . would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." *Id.* at 12-13.

A similar overwhelming consensus exists now about the reporter's privilege. Today, 40 states (plus the District of Columbia) have such statutes.[11] Of the 10 states without statutory shield laws, all but one — Wyoming, which has remained silent on the issue — have recognized a reporter's privilege in one context or another.[12] *See also New York Times* v. *Gonzales*,

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[11] *See* Ala. Code § 12-21-142; Alaska Stat. §§ 09.25.300-.390; Ariz. Rev. Stat. Ann. §§ 12-2214, 12-2237; Ark. Code Ann. § 16-85-510; Cal. Evid. Code § 1070; Colo. Rev. Stat. Ann. § 13-90-119; Conn. Gen. Stat. Ann. § 52-146t; Del. Code Ann. tit. 10, §§ 4320-26; Fla. Stat. Ann. § 90.5015; Ga. Code Ann. § 24-9-30; Haw. Rev. Stat. § 621 Notes; 2011 Haw. Sess. Laws ch. 113 (signed into law June 14, 2011); 735 Ill. Comp. Stat. Ann. 5/8-901 to 8-909; Ind. Code Ann. §§ 34-46-4-1, 34-46-4-2; Kan. Stat. Ann. § 60-480 to 60-485; Ky. Rev. Stat. Ann. § 421.100; La. Rev. Stat. Ann. §§ 45:1451-1459; Me. Rev. Stat. Ann. tit. 16, § 61; Md. Code Ann., Cts. & Jud. Proc. § 9-112; Mich. Comp. Laws Ann.§§ 767.5a, 767A.6; Minn. Stat. Ann. §§ 595.021-.025; Mont. Code Ann. §§ 26-1-902, 26-1-903; Neb. Rev. Stat. Ann. §§ 20-144 to 20-147; Nev. Rev. Stat. Ann. 49.275, 49.385; N.J. Stat. Ann. §§ 2A:84A-21.1 to 21.5; N.M. Stat. Ann. § 38-6-7; N.Y. Civ. Rights Law § 79-h; N.C. Gen. Stat. Ann. § 8-53.11; N.D. Cent. Code § 31-01-06.2; Ohio Rev. Code Ann. §§ 2739.04, 2739.12; Okla. Stat. Ann. tit. 12, § 2506; Or. Rev. Stat. §§ 44.510-.540; 42 Pa. Cons. Stat. Ann. § 5942(a); R.I. Gen. Laws §§ 9-19.1-1 to 9-19.1-3; S.C. Code Ann. § 19-11-100; Tenn. Code Ann. § 24-1-208; Tex. Civ. Prac. & Rem. Code Ann. §§ 22.021-0.27; Utah Order 08-04 [Utah R. Evid. 509]; Wash. Rev. Code Ann. § 5.68.010; 2011 W. Va. Acts 78 (to be codified at W. Va. Code § 57-3-10); Wis. Stat. § 885.14; D.C. Code Ann. § 16-4701 to 16-4704.

[12] *See Idaho* v. *Salsbury*, 924 P.2d 208 (Idaho 1996) (criminal); *In re Wright*, 700 P.2d 40 (Idaho 1985) (criminal); *Winegard* v. *Oxberger*, 258 N.W.2d 847 (Iowa 1977) (civil), *cert. denied*, 436 U.S. 905 (1978); *In re John Doe Grand Jury Investigation*, 574 N.E.2d 373 (Mass. 1991) (grand jury); *Sinnott* v. *Boston Retirement Board*, 524 N.E.2d 100 (Mass. 1988) (civil), *cert. denied*, 488 U.S. 980 (1988); *Ayash v. Dana-Farber Cancer Institute*, 706 N.E.2d 316 (Mass. App. Ct. 1999) (civil); *Missouri ex rel. Classic III, Inc.* v. *Ely*, 954 S.W.2d 650 (Mo. Ct. App. 1997) (civil); *State* v. *Siel*, 444 A.2d 499 (N.H. 1982) (criminal); *Opinion of the Justices*, 373 A.2d 644 (N.H. 1977) (civil statutory proceeding); *Hopewell* v. *Midcontinent Broadcasting Corp.*, 538 N.W.2d 780 (S.D. 1995) (civil), *cert. denied*, 519 U.S. 817 (1996); *Vermont* v. *St. Peter*, 315 A.2d 254 (Vt. 1974) (criminal); *Brown* v. *Virginia*, 204 S.E.2d 429 (Va. 1974) (criminal), *cert. denied*, 419 U.S. 966 (1974); *Clemente* v. *Clemente*, 56 Va. Cir. 530 (2001) (civil); *Philip Morris Cos.* v. *ABC, Inc.*, 36 Va. Cir. 1 (1995) (civil). In Mississippi, a trial court has concluded that the state constitution provides a basis for a qualified reporter's privilege. *Hawkins* v. *Williams*, Hinds County Circuit Court, No. 29,054 (Mar. 16, 1983) (unpublished opinion).

459 F.3d 160, 181 (2d Cir. 2006) ("A qualified journalists' privilege seems to me easily — even obviously — to meet each of those qualifications [i.e., for establishing a federal common law privilege]. The protection exists. It is palpable; it is ubiquitous; it is widely relied upon; it is an integral part of the way the American public is kept informed and therefore of the American democratic process.") (Sack, J., dissenting). In fact, the protection of confidential sources has now even been recognized in countries around the world that typically afford far less protection to journalists than the United States.[13]

The DOJ has itself articulated a policy statement that, if properly applied, effectively provides for a qualified privilege in all federal cases by requiring the Department of Justice not to issue subpoenas to members of the press unless the standard factors of the qualified privilege are first met. *See* 28 C.F.R. § 50.10. Those guidelines prohibit DOJ members from issuing subpoenas to members of the press in criminal cases unless: (1) all reasonable attempts to obtain the information from alternative sources have been exhausted; (2) negotiations with the media have been pursued in which the government clarifies what its needs are in the case and its willingness to respond to concerns of the media; and (3) the Attorney General has authorized the subpoena after considering, among other things, whether there are reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred, and that the

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13 *See, e.g., R.*. v. *National Post*, 2010 S.C.C. 16 (2010) (Canada) (holding that courts should protect confidential sources when such protection is in the public interest); *Goodwin* v. *United Kingdom*, [1996] 22 Eur. Ct. H.R. 123, 143 (European Court of Human Rights) (holding that Article 10 of the European Convention on Human Rights provides protection against the disclosure of confidential sources, and stating that "[p]rotection of journalistic sources is one of the basic conditions for press freedom"); *Financial Times Ltd.* v. *United Kingdom*, [2010] Eur. Ct. H.R. 46 (same); *European Pacific Banking Corp.* v. *Television New Zealand Ltd.*, [1994] 3 N.Z.L.R. 43 (Ct. App. Wellington) (New Zealand) (establishing general rule protecting confidential sources in all cases, both in discovery and at trial); *Oyegbemi* v. *Attorney-General of the Federation & Ors*, [1982] F.N.L.R. 192 (Fed. of Nigeria LR) (Nigeria); *Prosecutor* v. *Radoslav Brdjanin and Momir Talic*, Case No. IT-99-36-AR 73.9 (International Criminal Tribunal for former Yugoslavia 2002) (establishing qualified privilege for war correspondents even when no confidential sources are involved); Freedom of Press Act, Chapter 3, Article 1 (Sweden); Code of Criminal Procedure, Article 109(2) (France); Media Act of 1981, Article 31 (Austria); Criminal Procedure Code, Section 53 (Germany).

information sought is essential to a successful investigation of that crime. *See* 28 C.F.R. § 50.10(b), (c), and (f)(1). The Guidelines, which are not enforceable by third parties, make no distinction between civil, criminal and grand jury cases, and further support a finding of a common law privilege.

In addition to the Fourth Circuit's holding in *Steelhammer* that a reporter's privilege exists under federal common law in civil cases, all of these factors demonstrate the existence of a strong public policy in this district in favor of protecting journalists from making compelled disclosures, in criminal cases as well. This Court should therefore conclude that based on the confluence of these multiple factors there is a federal common law privilege that protects confidential source information in this case.

## IV. ON THE FACTS OF THIS CASE, THE SUBPOENA MUST BE QUASHED AND A PROTECTIVE ORDER ENTERED ON REPORTER'S PRIVILEGE GROUNDS

Whether the reporter's privilege is grounded in the First Amendment, federal common law, or both, the ultimate test is [redacted] to "balance the interests involved" — here, the Government's interest in obtaining evidence for trial versus the interest of Mr. Risen and the public in protecting Mr. Risen's confidential source(s) and thereby ensuring the free flow of newsworthy information. *See LaRouche*, 780 F.2d at 1139 (citing *Branzburg*, 408 U.S. 665, 710 (Powell, J., concurring)) [redacted].

Under this test, the Court is required to consider the three *LaRouche* factors — "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information," *LaRouche*, 780 F.2d at 1139; [redacted] but those factors are not the only ones to be considered. Courts in this Circuit have also considered other factors, such as (1) whether confidential sources were at issue and (2) whether the subpoena was issued in bad faith or for the purpose of harassment. In leak cases, such as this one, we respectfully submit that the relevant balancing must also involve

a weighing of the competing interests as they manifest themselves in the case at hand — that is, by "weigh[ing] the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value." *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1175 (D.C.Cir. 2005) (Tatel, J., concurring in the judgment); *see also Gonzales*, 459 F.3d at 186 (Sack, J., dissenting) (in leak cases courts should look at whether "'nondisclosure of the information would be contrary to the public interest, taking into account both the public interest . . . in newsgathering and maintaining a free flow of information to citizens'") (quoting Free Flow of Information Act, S. 2831, 109th Cong. § 4(b)(4) (2006)). It is only by balancing the newsworthiness against the harm of this specific leak, that one can determine whether the First Amendment interests in this case outweigh those of compelling disclosure.

When all of the relevant factors are considered, it is clear that the subpoena to Mr. Risen should be quashed. [redacted] The subpoena seeks information about Mr. Risen's confidential source(s); the information is not critical or necessary to the Government's trial because Mr. Risen's testimony is unnecessary in light of the evidence that the Government claims to have; the benefits of the leaks at issue outweigh any potential harm caused by them; and there is evidence that the subpoena is motivated largely by a desire to intimidate/harass Mr. Risen, who has worked hard to uncover major governmental abuses by the administration that initiated the criminal investigation that led to this indictment.

### A. The Subpoena Is Directed at Confidential Source Information

[redacted] this subpoena seeks, among other things, direct testimony from Mr. Risen about the name(s) of his confidential source(s). Motion in Limine at 17. The Government also seeks, in the alternative, additional information from Mr. Risen [redacted]. All of the information sought (with the exception of authentication evidence) is protected by the reporter's privilege.

[redacted] Mr. Risen's confidentiality agreement with his source(s) for Chapter 9 extends to all of the types of testimony the Government is seeking here. [redacted] Mr. Risen has determined that providing the Government with the information it seeks would indirectly reveal the identity/ies of his confidential source(s). Risen Aff. ¶ 63.

In cases involving confidential sources, the Fourth Circuit has always tipped the balance in favor of the First Amendment. *See, e.g.*, *LaRouche*, 780 F.2d at 1139; *Ashcraft*, 218 F.3d at 287. As noted above, in the 39 years since *Branzburg* was decided, as far as we are aware, neither the Fourth Circuit nor this Court has ever ordered a reporter to testify about the identity of his or her confidential source(s). *See LaRouche*, 780 F.2d at 1139; *Ashcraft*, 218 F.3d at 287; *Regan*, Memorandum Opinion at 6 (Kurtzberg Aff., Ex. 19). Moreover, those cases in this Circuit that have denied reporters' motions to quash have all stressed that the lack of confidentiality was central to the decision. *See Steelhammer*, 539 F.2d at 376 (Winter, J., dissenting), *adopted by the court en banc*, 561 F.2d at 540; *In re Shain*, 978 F.2d at 853; *Lindh*, 210 F. Supp. 2d at 783. As this Court held in *Regan* when quashing a subpoena to a reporter that sought in-

formation about the identity of confidential sources in the context of a criminal trial, "[i]n balancing the interests at stake, the fact that [the reporter] claims privilege with respect to a confidential source(s) places the thumb on the scale of protecting First Amendment interests at the onset." *Regan*, Memorandum Opinion at 6 (Kurtzberg Aff., Ex. 19).

The Government argues that, even if there is a reporter's privilege, it does not protect information beyond the identity of any confidential source(s). But, [redacted] the reporter's privilege has never been interpreted so narrowly as to only cover the names of confidential sources. Rather, courts have made clear that the privilege covers information that will implicitly reveal the identity of confidential sources. *See, e.g., Continental Cablevision, Inc.* v. *Storer Broadcasting Co.*, 583 F. Supp 427, 436 (E.D. Mo. 1984) (noting that to determine whether privilege applies to questions about the circumstances of an interview, the court must consider whether the answer sought might "implicitly reveal the identity of a confidential source"). Thus, both courts and the DOJ Guidelines governing subpoenas issued to journalists, 28 C.F.R. §§ 50.10(a), (e), and (g), recognize that the First Amendment interests that implicate the reporter's privilege are triggered even when parties subpoena telephone companies for the telephone records of journalists. For example, the court in *Gonzales* performed the balancing analysis derived from *Branzburg* and required that the Government demonstrate a compelling interest in a case where the Government sought the telephone records of a reporter. That was necessary even though telephone records, by themselves, do not reveal any confidential information or directly tie any particular source to any particular information. "Although a record of a phone call does not disclose anything about the reason for the call, the topics discussed, or other meetings between the parties to the calls, it is a first step of an inquiry into the identity of the reporters' source(s) of information. . . ." *Id.* at 168. *See also* 28 C.F.R. §§ 50.10(a), (e), and (g). In this case, the Government has made clear its intent to seek direct testimony for not just the first step, but as many steps as are necessary to identify Mr. Risen's source(s).

The relevant case law also takes as a given that any protection covers information received in confidence, not just identities. In *Steelhammer*, for example, both the initial panel and, later, the entire Court, noted the crucial fact that the reporters in that case were asked to testify about "events they had observed, seen or written of," all of which information was obtained with "no confidences seal[ing] their lips." 539 F.2d. at 375; *see also Id.* at 376-77 (Winter, J., dissenting), *adopted by the court en banc*, 561 F.2d at 540 ("the absence of a claim of confidentiality and the lack of evidence of vindictiveness tip the scale" against the applicability of the reporter's privilege, and noting that the facts of that case "d[id] not involve confidential communications or observations.").

Furthermore, this circuit has generally adopted an expansive view of confidentiality where other evidentiary privileges were implicated. *See, e.g., In re Grand Jury Subpoena*, 204 F.3d 516, 520 (4th Cir. 2000) (noting the Circuit's consistent recognition that, under attorney-client privilege, a client's identity could remain privileged if its disclosure "would in essence reveal a confidential communication"). Without such a broad reading, the privilege would be meaningless. A party should not be able to obtain privileged information indirectly — here, by asking for enough information to identify confidential source(s), without asking for names — if it cannot get such information directly. Risen Aff. ¶ 63.

### B. The Government Must Meet Its Heavy Burden of Overcoming the *LaRouche* Factors

The burden is on the Government to demonstrate that the three factors set forth in *LaRouche* as an aid in the balancing of interests required by the reporter's privilege — "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information," *LaRouche*, 780 F.2d at 1139 — have been satisfied.

Here the Government has come forward with no affirmative evidence to satisfy its burden. Although the Government cites to the Indictment concerning what it expects the evi-

dence to be at trial, it has provided neither the Court nor counsel for Mr. Risen with any evidence — through affidavit or otherwise — that demonstrates the need for Mr. Risen's testimony. Nor should the Government be permitted to do so for the first time on reply.

### C. The Information Sought from Risen Is Not Critical or Necessary To The Government's Case At Trial

The Government's burden under *LaRouche* is more significant than the Government portrays in its brief in support of its motion *in limine* — particularly as to prong 3, which asks "whether there is a compelling interest in the information." The Government examines prong 3 solely at a general level. It argues, for example, that the Government's interest in Mr. Risen's testimony about his confidential source(s) is compelling because this is a criminal trial and the defendant is charged with extremely serious crimes. Motion in Limine at 25-26. But nowhere does the Government demonstrate — as it must — that the particular information the Government seeks from Mr. Risen is "necessary" or "critical" to its case.

There are only a few cases in this Circuit that apply the *LaRouche* balancing test. But those cases and others make plain that the third prong of the test requires the party seeking evidence from a reporter to show that the particular evidence sought is necessary or critical to that party's case. *LaRouche* itself supports such a reading. The *LaRouche* Court adopted the three-part balancing test directly from *Miller* v. *Transamerican Press, Inc.*, 621 F.2d 721, *modified*, 628 F.2d 932 (5th Cir. 1980), *cert. denied* 450 U.S. 1041 (1981). *See LaRouche*, 780 F.2d at 1139. And *Miller* makes clear that a showing of "necessity" is required to satisfy prong three. Specifically, in a paragraph added to the original opinion in response to a request for rehearing *en banc*, the *Miller* court clarified that, to succeed under the three-part test, a party seeking confidential source information from a reporter must show, among other things, "that knowledge of the identity of the informant is *necessary to proper preparation and presentation of the case*." 628 F.2d 932 (emphasis added).

The Fourth Circuit has also interpreted the *LaRouche* test to impose such a requirement in *Church of Scientology* v. *Daniels*, 992 F.2d 1329, 1335 (4th Cir.), *cert. denied*, 510

U.S. 869 (1993). In that case, the Court affirmed denial of discovery from *USA Today* in a civil case involving a subpoena seeking nonconfidential information. Relying on *LaRouche*, the Court made clear that the *LaRouche* balancing test requires that information sought from a reporter be "critical to the case" of the party seeking it. Specifically, the Court held that:

> Nothing in the record shows that there was an abuse of discretion in the denial of discovery of the materials. In fact, the consideration that Daniels [the reporter] offered to stipulate to the accuracy of the quotation that appeared in *USA Today* makes the relevance of the materials CSI seeks questionable, *rather than critical to the case, as the law requires. See [LaRouche]*, 780 F.2d at 1139 (the fact that the plaintiff already knew the names of sources made need for information less than compelling).

*Church of Scientology*, 992 F.2d at 1335 (emphasis added.). Other circuits have imposed a similar requirement. *See, e.g., United States* v. *Burke*, 700 F.2d 70, 76-77 (2d Cir.) ("The law in this Circuit is clear that to protect the important interests of reporters and the public in preserving the confidentiality of journalists' sources, disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, *necessary or critical to the maintenance of the claim*, and not obtainable from other available sources.") (emphasis added), *cert. denied*, 464 U.S. 816 (1983).

Whether characterized as "necessary" or "critical" to the case, the bottom line is clear: *LaRouche* imposes a stringent test on those who seek discovery of confidential sources to demonstrate that the material sought is more than just relevant to their case. Thus, to the extent that the information sought is peripheral, nonessential, speculative, or cumulative of other evidence, then the Government fails to satisfy its burden that the information is relevant and that there is a compelling interest in obtaining it. *LaRouche*, 780 F.2d at 1139; *Burke*, 700 F.2d at 77; 28 C.F.R. § 50.10 (f) (Attorney General should not authorize subpoenas to members of the news media in criminal cases unless "the information sought is essential to a successful investigation — particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral, nonessential, or speculative information."). Without such a showing, the subpoena must be quashed.

To meet its burden of demonstrating that there is a "compelling interest in the information" it seeks, then, the Government cannot rely solely on generalities about the importance of national security, but rather must demonstrate why the specific testimony they seek from Mr. Risen is "necessary" or "critical" to those broad interests. The Government makes no effort to — and cannot — do so here. In fact, it claims just the opposite. Motion in Limine at 5 (Risen's testimony will merely "simplify the trial and clarify matters for the jury" and "allow for an efficient presentation of the Government's case."). We respectfully submit that this is exactly the kind of non-critical, unnecessary testimony — [redacted] — that the reporter's privilege must shield if it is to have any meaning at all.

In fact, the Government has failed to meet its burden to demonstrate that it needs any information from Mr. Risen. Although Mr. Risen does not have access to the full evidentiary record, the Government's papers [redacted] describe the Government's evidence from other sources as follows:

- [redacted]
- [redacted] Indictment ¶¶ 19, 34, 38, 45, 47, 49, 51, 54 (claiming that a series of phone calls were placed by Sterling to Mr. Risen's personal residence and office, and by Mr. Risen to Sterling's residence, temporary residence, and place of employment in 2003 and 2004.)
- [redacted]
- [redacted] Indictment ¶¶ 19, 37, 44-46, 48-51; (describing the content of emails purportedly sent between Sterling and Mr. Risen in 2003 and 2004).
- [redacted]

[redacted]

- [redacted]

The Government has also made no effort to demonstrate that it has exhausted alternative sources. Courts examining the exhaustion requirement have emphasized that the burden of satisfying it is "very substantial." *Zerilli* v. *Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981); *Carey* v. *Hume*, 492 F.2d 631 (D.C. Cir. 1974) (suggesting that taking of 60 depositions might be a reasonable prerequisite to compelling disclosure), *cert. dismissed*, 417 U.S 938 (1974). Thus, the Government may not subpoena Mr. Risen until it has affirmatively demonstrated that it has exhausted all reasonable alternative sources of information. *LaRouche*, 780 F.2d at 1139. Such a showing may not consist of mere conclusory assertions about the insufficiency of the Government's current efforts, but must rather be an affirmative demonstration that the reporter is truly the last reasonable resort for the information. *Grunseth* v. *Marriott Corp.*, 868 F. Supp. 333, 335 (D.D.C. 1994) ("Nor has Plaintiff demonstrated, other than in conclusory language, that he has exhausted all other reasonable sources for obtaining the information."). If the Court finds even a single reasonable alternative source for the information the Government is seeking from Mr. Risen, the subpoena must be quashed.[14]

[redacted]

[14] Given the inherently secret nature of grand jury proceedings, Mr. Risen must rely on the Court's analysis of the Government's evidence as he does not know, for example, what steps have been taken by the Government to obtain from alternative sources the information it now seeks from Mr. Risen.

[redacted] the Government [redacted] effectively concedes that it can prove venue without his testimony. Motion In Limine at 25 n.14. Accordingly, Mr. Risen's testimony is not necessary or critical for this purpose, and the Government's demand for this testimony should be quashed.

### D. The Newsworthiness of the Leaks at Issue Outweighs Any Alleged Harm Caused By Them

The overall reporter's privilege test in the Fourth Circuit involves a weighing of the competing interests as they manifest themselves in the case before the Court. We respectfully submit that this requires the Court to weigh "the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value." *Judith Miller*, 438 F.3d at 1175 (Tatel, J., concurring in the judgment), *see also Gonzales*, 459 F.3d at 86 (Sack, J., dissenting) (in leak cases courts should look at whether "'nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in newsgathering and maintaining a free flow of information to citizens'") (quoting Free Flow of Information Act, S. 2831, 109th Cong. § 4(b)(4) (2006)). Such an approach is consistent with Justice Powell's admonition that the privilege must be evaluated "on a case-by-case basis." *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

Such an approach is also the only way to ensure that leaks that cause more good than harm are protected and those that cause more harm than good are not. As Judge Tatel explained in his concurring opinion in *Judith Miller*:

> [Some] leaks — the design for a top secret nuclear weapon, for example, or plans for an imminent military strike — could be . . . damaging, causing harm far in excess of their news value. In such cases, the reporter privilege must give way. Just as attorney-client communications "made for the purpose of getting advice for the commission of a fraud or crime" serve no public interest and receive no privilege, neither should courts protect sources whose leaks harm national security while providing minimal benefit to the public debate.
>
> Of course, in some cases a leak's value may far exceed its harm, thus calling into question the law enforcement rationale for disrupting reporter-source relationships. . . . News reports about a recent budget controversy regarding a super-

> secret satellite program inspire [an] example. . . . Despite the necessary secrecy of intelligence-gathering methods, it seems hard to imagine how the harm in leaking generic descriptions of such a program could outweigh the benefit of informing the public about billions of dollars wasted on technology considered duplicate and unnecessary by leading Senators from both parties. In contrast to the nuclear weapon and military strike examples mentioned above, cases like these appear to involve a balance of harm and news value that strongly favors protecting news-gathering methods.

*Judith Miller*, 438 F.3d at 1173-74 (Tatel, J., concurring in the judgment) (citations omitted). It is simply not the case that all news stories containing classified information harm national security. In fact, the opposite is often true. As journalist Dana Priest points out in her declaration submitted along with this motion:

> Consider what happened when the news media did not work hard enough before the Iraq war to determine whether the Bush administration's assertions of weapons of mass destruction in Iraq were accurate. For the press to have done a better job reporting about Iraq's nuclear capabilities in the run-up to the war, of course, it would have had to have access to secret or classified information, and it would almost certainly have had to have the assistance of confidential sources.

Priest Decl. ¶ 10. In hindsight, it is clear that the public would have been well served if, during the time period leading up to the Iraq War, more journalists published stories that thoroughly examined the flaws in our intelligence concerning Iraqi WMD. The balancing that we respectfully propose is faithful to both Supreme Court and Fourth Circuit precedent and is the only way to allow the reporter's privilege to protect those leaks of classified information that benefit society while leaving those that cause more harm than good unprotected.

Applying that test to the facts of this case, it clear that the newsworthiness of the information contained in Chapter 9 of *State of War* outweighs any alleged harm that was caused by its publication. As outlined above, the chapter deals with the incompetence and mismanagement of certain intelligence efforts concerning Iran's nuclear ambitions. Its main focus — Operation Merlin, the now-eleven-year old intelligence operation that was intended to stall, but which may have actually helped Iran in its efforts to develop a nuclear program — is undoubt-

edly newsworthy.[15] As Mr. Risen himself explains in his affidavit, at a time when the press has been taken to task for failing to scrutinize our intelligence in evaluating Iraq's WMD capabilities during the time leading up to the most recent war in Iraq, reporting about our intelligence in evaluating Iran's nuclear program is essential. Risen Aff. ¶ 23. Moreover, given the about-face in the National Intelligence Estimate concerning our intelligence agencies' views about whether Iran halted its nuclear program in Fall 2003[16] and subsequent reports claiming that our government has tended to overstate the threat of the Iranian nuclear program, it is that much more important to understand why our intelligence efforts in evaluating Iran's nuclear threat have been limited. In Mr. Risen's own words:

> I believe my decision to report about the matters discussed in Chapter 9 of *State of War* has been vindicated, particularly given subsequent reports about the unreliability of our intelligence about Iran's nuclear capabilities and about our government's tendency to overstate the threat in a way that is not entirely consistent with the intelligence actually gathered. For example, in December 2007, the United States intelligence community published a National Intelligence Estimate ("2007 NIE") on Iran, in which the U.S. government acknowledged that virtually everything it had been saying about Iran's nuclear program for the last four years had been wrong. The 2007 NIE stated that Iran had abandoned its nuclear weapons program in 2003, a complete reversal from previous intelligence assessments that had concluded that Iran was actively seeking a nuclear weapon. It revealed that almost all of the public statements by the Bush Administration about Iran and its weapons program had been wrong, and had been based on bad information. The 2007 NIE . . . . must be seen as a public disavowal of the CIA's earlier intelligence efforts on Iran's supposed nuclear program.
>
> Since then, U.S. intelligence assessments of Iran's nuclear program have swung back and forth. Ever since the 2007 NIE was published, U.S. intelligence analysts

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15 *See* A. Nelson Aff. ¶ 9 ("Mr. Risen's reporting in Chapter 9 of *State of War* deals with an issue that almost certainly will be the subject of countless historical analyses: the incompetence and mismanagement of certain intelligence efforts in Iran. This will be a critically important subject to historians in light of, among other things, recent changes to the National Intelligence Estimate regarding Iran's supposed nuclear capabilities."); *see also* Priest Decl. ¶ 11 (Mr. Risen's reporting in Chapter 9 deals with the "important and newsworthy subject" of "potential incompetence and mismanagement of certain intelligence efforts concerning Iran's WMD capabilities"); Armstrong Decl. ¶ 24 ("Regardless of whether one agrees with all [of Chapter 9's] assertions and analysis, it is by simple definition 'newsworthy'").

16 National Intelligence Council, *National Intelligence Estimate, Iran: Nuclear Intentions and Capabilities* (Nov. 2007), *available at*, http://www.odni.gov/press_releases/20071203_release.pdf (last visited June 20, 2011).

> have been under pressure to disavow it and issue a new one that concludes that Iran is racing to build a nuclear weapon. But while there is substantial evidence of Iran's ongoing uranium enrichment program, the intelligence about the status of Iran's efforts to actually build a nuclear bomb has been far less conclusive. In an article that was quickly attacked by the Obama Administration, Seymour M. Hersh, wrote recently in *The New Yorker* that a new 2011 NIE from the United States intelligence community reaffirms that there is no conclusive evidence that Iran has made any effort to build a nuclear bomb since 2003. *See* "Iran and the Bomb," by Seymour M. Hersh, published on June 6, 2011 in *The New Yorker* at pp. 30-35. . . . "There's a large body of evidence," wrote Mr. Hersh, "including some of America's most highly classified intelligence assessments, suggesting that the U.S. could be in danger of repeating a mistake similar to the one made with Saddam Hussein's Iraq eight years ago — allowing anxieties about the policies of tyrannical regime to distort our estimates of the state's military capacities and intentions." *Id.* at 30.
>
> Whether one agrees with Mr. Hersh's article or not, it is clear that, five years after I wrote *State of War*, there is still a serious national debate about Iran's nuclear ambitions and about whether the current administration has incentives to exaggerate intelligence related to this topic.
>
> The point of Chapter 9 of *State of War* was that the CIA was just as blind and just as reckless in the way it dealt with intelligence on Iran's weapons of mass destruction as it had been on Iraq. That was clearly the message of the 2007 NIE, and perhaps it is the message of the 2011 NIE as well. Given the CIA's own disavowal of its past work on Iran's nuclear program, it is that much more important to understand *why* our intelligence efforts in evaluating Iran's nuclear threat have failed in the past. Chapter 9 of *State of War* is one of the few sources of information covering this important subject.

Risen Aff. ¶¶ 25-28; *see also* A. Nelson Aff. ¶ 9. These types of considerations played a large role in Mr. Risen's decision to publish Chapter 9 in the first place. Significantly, as noted above, Mr. Risen knew about Operation Merlin as early as 2003 but held the story for three years until it became clear to him that the competence of intelligence operations concerning weapons of mass destruction was something that the public needed to examine. Risen Aff. ¶ 19. It was only after: (1) it became clear that the main rationale for fighting the Iraq War was based on faulty intelligence about the Iraqi's nuclear program; (2) the press had been criticized for not doing more independent investigative reporting before the Iraq War about the quality of our intelligence concerning Iraq's nuclear program; (3) the March 31, 2005 Report to the President by the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction described American intelligence on Iran as inadequate to allow firm judgments about Iran's weapons programs; and (4) there was increasing speculation that the United States might be

planning for a possible conflict with Iran based on intelligence concerning weapons of mass destruction, just as in Iraq, that Mr. Risen decided that this was a story that he had to publish. *Id.* "After all of this," explains Mr. Risen, "I realized that U.S. intelligence on Iran's supposed weapons of mass destruction was so flawed, and that the information I had was so important, that this was a story that the public had to know about before yet another war was launched." *Id.*

As for the potential harm caused by the leak, although the Government has publicly criticized the reporting as harming national security, it has never been able to articulate why. Operation Merlin is now approximately eleven years old, and it has been over five years since *State of War* was published. At the time of publication, these stories were old enough that they were not likely to cause any real harm to national security. *Id.* ¶ 21.

The Government may not like the scrutiny that Mr. Risen's reporting — in Chapter 9 and elsewhere — has subjected them to. But there can be no doubt that Mr. Risen's reporting has served the public well. Because the information reported in Chapter 9 benefits the public considerably more than it harms them, the subpoena seeking the identity of Mr. Risen's confidential source(s) for that chapter must be quashed.

### E. Mr. Risen Is Willing To Authenticate His Work Under Oath, Subject To An Appropriate Protective Order

The only subject matter that the Government has identified that Mr. Risen is willing to testify to is authentication of his work. [redacted] The prohibition against hearsay [redacted] will apply at any criminal trial in this matter. *See* Fed. R. Evid. 802. Accordingly, Mr. Risen is willing to provide authentication testimony, subject to a protective order limiting the subject of his testimony to confirming (1) that he wrote a particular

newspaper article or chapter of a book; (2) that a particular newspaper article or book chapter that he wrote is accurate; (3) that statements referred to in his newspaper article or book chapter as being made by an unnamed source were in fact made to him by an unnamed source; and (4) that statements referred to in his newspaper article or book chapter as being made by an identified source were in fact made to him by that identified source. Risen Aff. ¶ 60. Mr. Risen therefore does not oppose the portion of the Government's motion *in limine* seeking this testimony, provided that an appropriate protective order is entered so as to ensure that the questions posed on direct or cross examination will not go beyond this very limited subject area.

### F. There Is Evidence that the Subpoena Was Issued To Harass and Intimidate Mr. Risen

*Branzburg* and the Fourth Circuit precedents outlined above make clear that, in cases where there is evidence that the subpoena is brought in bad faith to harass, intimidate, or silence a journalist, the subpoena must be quashed. As Justice Powell noted in *Branzburg*:

> [N]o harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered.

*Branzburg*, 408 U.S. at 709-10 (Powell, J., concurring). For Justice Powell's admonition that "no harassment of newsmen will be tolerated" to be observed, no harassment must mean no harassment. *See also United States* v. *Lindh*, 210 F. Supp. 2d 780, 783 (E.D. Va. 2002) (recognizing a First Amendment reporter's privilege in a criminal case "where the journalist produces some evidence of confidentiality or governmental harassment"). Thus, if the Government conducts its investigation in a way that appears designed — even in part — to chill a reporter's speech or silence his criticism of the Government, that fact must weigh heavily in favor of quashing the subpoena.

Mr. Risen's reporting about the NSA Warrantless Surveillance Program and in Chapter 9 of *State of War* exposed potential government wrongdoing, incompetence, and mis-management. He was immediately subject to threats of prosecution, possible secret surveillance, and public expressions of outrage from Government officials (*see* Risen Aff. ¶¶ 31 - 37, 44-45), in addition to the threat of potential contempt under the 2008 grand jury subpoena. [redacted]

[redacted]

That revelation further supports a finding that the quest for Mr. Risen's testimony has been part of a pattern of harassment. The current subpoena — though issued by a new administration — is simply the continuation of that impermissible course of conduct. [redacted]

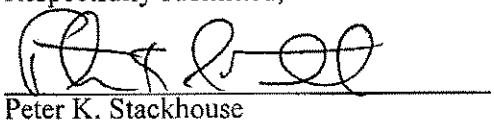
**CONCLUSION**

Because the information sought by the Government is protected by the reporter's privilege under the First Amendment and federal common law, and the subpoena is part of an

effort to harass and retaliate against Mr. Risen for writing things that were critical of the government, Mr. Risen respectfully requests that the Court deny the Government's motion *in limine* and grant Mr. Risen's motion to quash the grand jury subpoena and/or for a protective order. Mr. Risen is willing, however, to provide testimony concerning authentication of information contained his newspaper articles and books provided that an appropriate protective order is entered.

June 21, 2011

Respectfully submitted,



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**UNITED STATES DISTRICT COURT**

**FOR THE EASTERN DISTRICT OF VIRGINIA**

| | |
|---|---|
| UNITED STATES<br>v.<br>JEFFREY ALEXANDER STERLING,<br>Defendant. | No. 1:10cr485 (LMB) |

**AFFIDAVIT OF JAMES RISEN**

DISTRICT OF COLUMBIA ) ss.:

JAMES RISEN, being first duly sworn, deposes and says:

1. I am a reporter for *The New York Times* ("*The Times*") and the author of *State of War: The Secret History of the CIA and the Bush Administration* ("*State of War*"). I submit this affidavit in opposition to a motion in limine by the Government to admit my testimony and in support of a motion to quash a trial subpoena directed at me in connection with the criminal trial of Jeffrey Sterling. The subpoena, which calls for information about the identity of confidential source(s) that I used in reporting certain information in Chapter 9 of *State of War*, is attached hereto as Exhibit 1. A copy of *State of War* is submitted with this affidavit as Exhibit 2.

2. I am fully familiar with the facts set forth herein. The exhibits attached to this affidavit are true and accurate copies of the documents cited herein.

3. This is the third time a subpoena has been directed at me calling for testimony about my confidential source(s) for Chapter 9. The first subpoena directed at me was a grand jury subpoena issued on January 24, 2008. [redacted] A second grand

jury subpoena directed at me was issued on April 26, 2010. [redacted]

4. [redacted]

5. Since my graduation from Brown University in 1977 and receiving a Masters Degree from the Medill School of Journalism at Northwestern University in 1978, I have been a reporter. In 1978 through 1979, I worked as a reporter at the *Fort Wayne (Indiana) Journal Gazette*. In 1980 and 1981, I worked as a business reporter at the *Miami Herald*. From 1981 to 1984, I was a reporter at the *Detroit Free Press*, covering the auto industry. From 1984 until 1990, I was the Detroit Bureau Chief of the *Los Angeles Times*, covering news in Detroit and throughout the Midwest. In 1990, I transferred to the Washington Bureau of the *Los Angeles Times,* and covered economic policy for five years. In 1995, I began to cover intelligence and national security for the *Los Angeles Times* in Washington. In 1998, I joined *The New York Times* in the Washington Bureau, where I have worked ever since as an investigative reporter, largely focusing on intelligence, national security and terrorism.

6. I have won a number of awards in connection with my newspaper reporting. In 2002, I was a member of *The New York Times* reporting team that won the Pulitzer Prize for Explanatory Reporting for coverage of the Sept. 11 attacks and terrorism. In 2006, I won the Pulitzer Prize for National Reporting, for reporting that revealed the existence of President Bush's legally questionable domestic wiretapping program. In awarding the prize, the Pulitzer board cited my "carefully sourced stories on secret domestic eavesdropping that

stirred a national debate on the boundary line between fighting terrorism and protecting civil liberty."

7. In 2006, I was awarded the Goldsmith Prize for Investigative Reporting, for reporting on President Bush's illegal domestic wiretapping program. The Goldsmith Prize is given annually by the Joan Shorenstein Center on the Press, Politics and Public Policy at the John F. Kennedy School of Government at Harvard University to "honor journalism that promotes more effective and ethical conduct of government by disclosing excessive government secrecy, impropriety, and mismanagement." To the best of my ability, I try to write stories that I believe fit the mission of the Goldsmith Prize.

8. In 2007, I was elected to the American Academy of Arts and Sciences. That same year, after winning a Publisher's Award from *The New York Times*, I received a personal letter from Arthur O. Sulzberger, Jr., the publisher of the newspaper. "Your investigative reporting has been an extraordinary asset to the paper since the day you joined us," Mr. Sulzberger wrote to me. "But it has now become a central reason that our Washington report is admired by our readers — not to mention leaders around the nation and the world."

9. It was my reporting, both in *The New York Times* and my book *State of War*, that revealed that the Bush Administration had, in all likelihood, violated the law and the United States Constitution by secretly conducting warrantless domestic wiretapping on American citizens. My reporting helped to spark a national debate that continues today about the legality and propriety of that wiretapping program. My stories led to judicial examination of that program for the first time. In August 2006, for example, partly as a result of my reporting on the subject, a federal judge in Detroit declared that the Bush Administration's domestic wiretapping program was unconstitutional. Likewise, my disclosure of the previously secret domestic wiretapping program helped lead to Congressional efforts to overhaul the Foreign Intelligence Surveillance Act of 1978. More recently, views on domestic wiretapping were the subject of Congressional questioning of then-Judge (and now Supreme Court Justice) Sotomayor.

For example, on July 16, 2009, then-Senator Arlen Specter asked then-Judge Sotomayor questions about the wiretapping debate, including whether or not she would have granted *certiorari* on the facts of the wiretapping case, *American Civil Liberties Union* v. *National Sec. Agency*, 493 F.3d 644 (6th Cir. 2007). An excerpt of the Congressional transcript is attached as Exhibit 3. By bringing this issue out into the open for the first time, I believe that my reporting provided a public service to the nation, enabling Congress, the courts, and the American people to openly debate the proper balance between civil liberties and national security for domestic surveillance and to publicly consider a Supreme Court nominee's stance on this important issue concerning the appropriate limits of executive power.

10. In addition to my newspaper reporting, I have also written three books, all of which have been the product of my work as an investigative journalist. Writing books allows me to give more extensive treatment to newsworthy topics of my choice than my newspaper reporting does alone. My first book, *Wrath of Angels: The American Abortion War* (Basic Books, 1998), which I co-authored with Judy L. Thomas, provided the first comprehensive history of the anti-abortion movement ever written. *The New York Times Book Review* hailed it as "far and away the most thorough and knowledgeable history of anti-abortion activism after *Roe*." My second book, *The Main Enemy: The Inside Story of the CIA's Final Showdown with the KGB* (Random House, 2003), co-authored with Milt Bearden, was a colorful and dramatic history of the espionage wars between the United States and the Soviet Union in the closing days of the Cold War. *The New York Times Book Review* wrote that "revelations twinkle in *The Main Enemy* like stars at sunset." *The Main Enemy* was awarded the Cornelius Ryan Award from the Overseas Press Club for the best book on foreign affairs in 2003.

11. My third book, *State of War: the Secret History of the CIA and the Bush Administration* (Free Press, 2006), was a *New York Times* bestseller. *State of War* included explosive revelations about a series of illegal or potentially illegal actions taken by President Bush, including the domestic wiretapping program. It also disclosed how President Bush se-

cretly pressured the CIA to use torture on detainees in secret prisons around the world; how the White House and CIA leadership ignored information before the 2003 invasion of Iraq that showed that Iraq did not have weapons of mass destruction; documented how, in the aftermath of the invasion, the Bush Administration punished CIA professionals who warned that the war in Iraq was going badly; showed how the Bush Administration turned a blind eye to Saudi involvement in terrorism; and revealed that the CIA's intelligence operations on weapons of mass destruction in Iraq, Iran and other countries were completely dysfunctional, and even reckless. In his review in *The New York Times Book Review*, Walter Isaacson hailed *State of War* and said that "James Risen may have become the new Woodward and Bernstein." *The Dallas Morning News*, in its review of *State of War*, said "Domestic spying, demands for political loyalty in the name of national security, investigating a newspaper's sources: With *State of War*, the Nixonian déjà vu can give a reader whiplash."

12. While the disclosures contained in *State of War* were no doubt embarrassing to the government, I strongly believe that they were important and newsworthy. *State of War* sparked national debate about a number of topics, and that debate continued long after the book was published.

13. The response to *State of War* from the reading public was startling and gratifying to me. Many people actually stopped me on the street, came up to me in restaurants, or wrote to me to thank me for writing it and for uncovering the truth. I believe that the publication of *State of War* contributed to a significant turning point in the American public's understanding of American policies in the post-9/11 era.

14. My investigative reporting, both in my books and in my newspaper articles, has often been critical of the United States government, regardless of the administration in power. Throughout my twenty years of reporting in Washington, I have written stories that angered officials in the first Bush Administration, the Clinton Administration, the second Bush Administration, and the Obama Administration. In 1996, my stories in the *Los Angeles Times*

revealing that President Clinton had given a green light to Iranian arms smuggling into the Balkans prompted the Republican-controlled House of Representatives to take the remarkable step of voting to create a special House Select Subcommittee designed solely to investigate what I had uncovered about the Clinton Administration. A few years later, many of those same Congressional Republicans were calling for me to be thrown in jail for what I had uncovered during the second Bush Administration.

15. My reporting on intelligence and national security has often included major revelations of great public interest:

- I was the first to reveal that the CIA was waterboarding terrorism suspects. *See* James Risen, David Johnston, and Neil A. Lewis, "Harsh C.I.A. Methods Cited In Top Qaeda Interrogations," *New York Times*, May 13, 2004, at A1, attached as Exhibit 4.

- I revealed that, before the invasion of Iraq, the CIA had received information from about 30 relatives of Iraqi scientists that Iraq had abandoned its programs to develop weapons of mass destruction, but failed to share that information with President Bush, even as he was publicly warning of the threat posed by Iraq's quest for such weapons. *See* James Risen, "C.I.A. Held Back Iraqi Arms Data, U.S. Officials Say," *New York Times*, July 6, 2004, at A1, attached as Exhibit 5; *see also* Exhibit 2 (*State of War*) at 85-107.

- I revealed that, contrary to law and with little oversight, the NSA was monitoring and eavesdropping on large volumes of phone calls, emails, and other Internet communications inside the United States to search for evidence of potential terrorist activity, without first securing search warrants or congressional approval. A number of government officials questioned the legality of the program, but the administration insisted on keeping it secret. *See* James Risen and Eric Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts," *New York Times*, December 16, 2005, at A1, attached as Exhibit 6; Eric Lichtblau and James Risen, "Spy Agency Mined Vast Data Trove, Officials Report," *New York Times*, December 24, 2005, at A1, attached as Exhibit 7; *see also* Exhibit 2 (*State of War*) at 39-60.

- I revealed that the Bush Administration was engaged in a secret program that was initiated weeks after the September 11, 2001 attacks and provided counterterrorism officials with access to financial records from the international SWIFT database — including records of banking transactions involving thousands of Americans and others in the United States — in order help detect terrorist financiers. Eric Lichtblau and James Risen, "Bank Data Sifted In Secret By U.S. To Block Terror," *New York Times*, June 23, 2006, at A1, attached as Exhibit 8.

16. In Chapter 9 of *State of War*, I reported on Operation Merlin, an intelligence operation in 2000 during the Clinton Administration that was intended to stall — but

which may have actually helped — Iran in its efforts to develop a nuclear weapons program. The plan behind Merlin, as reported in Chapter 9, was to have a former Russian scientist provide Iranian officials with faulty nuclear blueprints. The CIA hoped that based on those flawed plans, Iran would build an inoperable nuclear weapon. The operation, in theory, would have undermined Iran's efforts to build a nuclear program.

17. As reported in Chapter 9, Merlin was deeply flawed and mismanaged from the start. First, the flaws in the nuclear blueprints were so obvious that the Russian scientist noticed them within minutes of seeing the plans. When the scientist explained this to his CIA handlers, they inexplicably refused to call off the operation and simply told him that he should go ahead and deliver the plans to the Iranians. Thus, notwithstanding their knowledge that the flaws in the plans could be easily spotted, the CIA pushed ahead.

18. I take very seriously my obligations as a journalist when reporting about matters that may be classified or may implicate national security concerns. I do not always publish all information that I have, even if it is newsworthy and true. If I believe that the publication of the information would cause real harm to our national security, I will not publish a piece. I have found, however, that all too frequently, the government claims that publication of certain information will harm national security, when in reality, the government's real concern is about covering up its own wrongdoing or avoiding embarrassment. As a result, I think long and hard before publishing such pieces.

19. I gave this type of serious consideration to my publication of the information contained in Chapter 9 of *State of War*. I actually learned the information about Operation Merlin that was ultimately published in Chapter 9 of *State of War* in 2003, but I held the story for three years before publishing it. I made the decision to publish the information about Operation Merlin only after: (1) it became clear that the main rationale for fighting the Iraq War was based on flawed intelligence about Iraq's non-existent weapons of mass destruction, including its supposed nuclear program; (2) the press, particularly *The New York Times*, had

been harshly criticized for not doing more independent investigative reporting before the Iraq War about the quality of our intelligence concerning Iraq's weapons of mass destruction; (3) the March 31, 2005 Report to the President by the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction described American intelligence on Iran as inadequate to allow firm judgments about Iran's weapons programs, making it clear that the CIA's intelligence on weapons of mass destruction in Iran was just as badly flawed as it had been on Iraq; and (4) there was increasing speculation that the United States might be planning for a possible conflict with Iran, once again based on supposed intelligence concerning weapons of mass destruction, just as in Iraq. After all of this, I realized that U.S. intelligence on Iran's supposed weapons of mass destruction was so flawed, and that the information I had was so important, that this was a story that the public had to know about before yet another war was launched.

20. I was particularly struck by an exclusive interview I had in January 2004 with David Kay, the chief of the CIA's hunt for WMD in Iraq. In his first major interview after returning from Iraq, he told me that the fundamental errors in the CIA's pre-war intelligence assessments were so grave that he would recommend that the CIA and other intelligence agencies completely overhaul their intelligence collection and analytical efforts on weapons of mass destruction. In the interview, he plaintively told me that CIA analysts working for him had come to him, "almost in tears, saying they felt so badly that we weren't finding what they had thought we were going to find — 'I have had analysts apologizing for reaching the conclusions that they did.'" It became clear to me that the Bush Administration had lost its credibility on the issue of intelligence concerning weapons of mass destruction.

21. The information in Chapter 9 about Operation Merlin was about an intelligence effort that was approximately six years old at the time of publication and dated back to the Clinton Administration. The story was so old that it could not harm national security, and in fact I believe I performed a vitally important public service by exposing the reckless and

badly mismanaged nature of intelligence on Iran's efforts to obtain weapons of mass destruction, so that the nation would not go to war once again based on flawed intelligence, as it had in Iraq.

22. Chapter 9 also discloses another failure of our intelligence efforts in Iran. In 2004, a CIA officer mistakenly sent an email to an American CIA agent in Iran that may have contained information sufficient to reveal the identities of the entire network of spies in that country. It turned out that the recipient of the e-mail was actually a double-agent who eventually turned the information over to his Iranian handlers. This mistake, at a minimum, put the entire CIA spy network in Iran at risk.

23. The subjects covered in Chapter 9 were particularly relevant in light of current events at the time the book was published. The press, including my own newspaper, was soundly criticized for failing to scrutinize U.S. intelligence related to Iraq's WMD capabilities in the period immediately preceding the Iraq War. Then, around the time *State of War* was published, there was considerable public speculation about a possible future conflict with Iran. As a result, reporting about our intelligence in evaluating Iran's nuclear program was essential.

24. In my view, information about this type of intelligence failure is particularly newsworthy, particularly when dealing with areas of foreign policy in which our political fears about the policies of a foreign regime might cloud our assessment of their military goals and capabilities. That was certainly the case with our assessment of Iraq's WMD capabilities before the Iraq War. And it seems to be the case with Iran even today.

25. I believe my decision to report about the matters discussed in Chapter 9 of *State of War* has been vindicated, particularly given subsequent reports about the unreliability of our intelligence about Iran's nuclear capabilities and about our government's tendency to overstate the threat in a way that is not entirely consistent with the intelligence actually gathered. For example, in December 2007, the United States intelligence community published a

National Intelligence Estimate ("2007 NIE") on Iran, in which the U.S. government acknowledged that virtually everything it had been saying about Iran's nuclear program for the last four years had been wrong. The 2007 NIE stated that Iran had abandoned its nuclear weapons program in 2003, a complete reversal from previous intelligence assessments that had concluded that Iran was actively seeking a nuclear weapon. It revealed that almost all of the public statements by the Bush Administration about Iran and its weapons program had been wrong, and had been based on bad information. The 2007 NIE (attached hereto as Exhibit 9) must be seen as a public disavowal of the CIA's earlier intelligence efforts on Iran's supposed nuclear program.

26. Since then, U.S. intelligence assessments of Iran's nuclear program have swung back and forth. Ever since the 2007 NIE was published, U.S. intelligence analysts have been under pressure to disavow it and issue a new one that concludes that Iran is racing to build a nuclear weapon. But while there is substantial evidence of Iran's ongoing uranium enrichment program, the intelligence about the status of Iran's efforts to actually build a nuclear bomb has been far less conclusive. In an article that was quickly attacked by the Obama Administration, Seymour M. Hersh, wrote recently in *The New Yorker* that a new 2011 NIE from the United States intelligence community reaffirms that there is no conclusive evidence that Iran has made any effort to build a nuclear bomb since 2003. *See* "Iran and the Bomb," by Seymour M. Hersh, published on June 6, 2011 in *The New Yorker* at pp. 30-35 (attached as Exhibit 10). "There's a large body of evidence," wrote Mr. Hersh, "including some of America's most highly classified intelligence assessments, suggesting that the U.S. could be in danger of repeating a mistake similar to the one made with Saddam Hussein's Iraq eight years ago — allowing anxieties about the policies of tyrannical regime to distort our estimates of the state's military capacities and intentions." *Id.* at 30.

27. Whether one agrees with Mr. Hersh's article or not, it is clear that, five years after I wrote *State of War*, there is still a serious national debate about Iran's nuclear am-

bitions and about whether the current administration has incentives to exaggerate intelligence related to this topic.

28. The point of Chapter 9 of *State of War* was that the CIA was just as blind and just as reckless in the way it dealt with intelligence on Iran's weapons of mass destruction as it had been on Iraq. That was clearly the message of the 2007 NIE, and perhaps it is the message of the 2011 NIE as well. Given the CIA's own disavowal of its past work on Iran's nuclear program, it is that much more important to understand *why* our intelligence efforts in evaluating Iran's nuclear threat have failed in the past. Chapter 9 of *State of War* is one of the few sources of information covering this important subject.

29. The Bush Administration was embarrassed by the disclosures I made in the course of my reporting for *State of War* as well as in *The New York Times*, and eventually singled me out as a target for political harassment. That administration speculated publicly about prosecuting me under the Espionage Act for publication of my reporting about their domestic eavesdropping program and about my reporting in *State of War*, leaked to the press a story about engaging in secret surveillance of journalists' phone calls, and attempted to create an atmosphere of intimidation for reporters, like me, who uncovered wrongdoing and incompetence in the administration. Moreover, the Bush Administration was selective in its attacks. When other journalists reported on the same subjects at the same time that I did, the Bush Administration said and did nothing about potentially prosecuting or even investigating the identity of the source(s) of those journalists, but instead threatened only to "go after" me and *The New York Times*.

30. I believe that the investigation that led to this prosecution started because of my reporting on the National Security Agency's warrantless wiretapping program. The Bush White House was furious over that story. I believe that this investigation started as part of an effort by the Bush Administration to punish me and silence me, following the publication of the NSA wiretapping story. I was told by a reliable source that Vice President Dick Cheney

pressured the Justice Department to personally target me because he was unhappy with my reporting and wanted to see me in jail. After he left office in 2009, Cheney publicly admitted that the fact that I won a Pulitzer Prize for the NSA story "always aggravated me."

31. In fact, the first subpoena issued to me was the culmination of a prolonged campaign against me by the Bush Administration and its supporters. President Bush called the disclosures about the likely-illegal wiretapping program a "shameful act," *see* Dan Eggen, *Fearing More Leaks, White House Targets Officials, Journalists*, Seattle Times, Mar. 6, 2006, at A1, attached hereto as Exhibit 11, and the administration and its supporters thereafter publicly speculated about potential prosecutions of me for espionage. Shortly after that, an organized campaign of hate mail from right wing groups with close ties to the White House was launched, inundating me with personal threats. Meanwhile, protesters supporting the Bush Administration picketed my office, calling for me to be prosecuted. Right wing pundits and bloggers supporting the Bush Administration took to television and the Internet to call for the White House and the Justice Department to prosecute me for espionage. Failing that, they called for the Justice Department to subpoena me in a leak investigation, which right wing pundits said would have the same effect as prosecution, since it could force me to go to jail if I refused to testify about the identity of my confidential source(s).

32. Immediately after *State of War* was released, the Department of Justice announced that investigations were underway concerning disclosures in the book as well as other leaks. On January 13, 2006, the week after my book hit shelves, then-Attorney General Alberto Gonzales held a press conference at which he publicly announced that the Department of Justice was actively considering the prosecution of journalists under the Espionage Act for publishing truthful, classified information. When he was asked about the investigation and the potential imprisonment of reporters, Gonzales said:

> That's a matter that's being handled by career prosecutors and folks within our Criminal Division. And I think it's too early to make decisions regarding whether or not reporters should go to jail. We have an obligation to ensure that our laws are enforced.

*See* January 13, 2006 FDCH Capital Transcripts, attached hereto as Exhibit 12.

33. In mid-March, after Attorney General Gonzales raised publicly the possibility of prosecuting journalists, the Director of the CIA, Porter Goss, suggested that it was his "hope" and "aim" that the leak investigations would lead to subpoenas requiring me to testify about the identity of my confidential source(s). Only two months into the investigation, Goss explained: "It is my aim and it is my hope that we will witness a grand jury investigation with reporters present being asked to reveal who is leaking this information." *See* David Westphal, *Bush's Secrecy Push is Excessive, Critics Say*, The Sacramento Bee, Mar. 12, 2006, at A1, attached hereto as Exhibit 13.

34. Then, on May 21, 2006, Attorney General Gonzales was asked by George Stephanopoulos on ABC's "This Week" if "he believed that journalists could be prosecuted for publishing classified information." He replied that "there are some statutes on the book[s] which, if you read them carefully, would seem to indicate that that is a possibility . . . . We have an obligation to enforce those laws. We have an obligation to ensure that our national security is protected." *See* Transcript of ABC's "This Week with George Stephanopoulos," 2006 WLNR 9116668 (May 21, 2006), attached hereto as Exhibit 14.

35. When asked several weeks later by the Senate Judiciary Committee for a clarification of Attorney General Gonzales' remarks on ABC's "This Week," Matthew W. Friedrich, Chief of Staff and Principal Deputy Assistant Attorney General Criminal Division, submitted written testimony that adopted the Attorney General's remarks as Department of Justice Policy. Even though, as Mr. Friedrich acknowledged in his responses to the Judiciary Committee's questions, the Justice Department "has never in its history prosecuted a member of the press under [the Espionage Act] or any other statute relating to the protection of classified information," the Department's current position is that "such a prosecution is possible under the law." *See* Friedrich Responses to Questions for the Record, attached hereto as Exhibit 15.

36. By publicly speculating about the possibility of prosecuting journalists, such as myself, under the Espionage Act for publishing truthful stories containing classified information, I believe that the Government was trying to intimidate journalists, like me, who publish stories that expose excessive government secrecy, illegality, or malfeasance.

37. Around the same time that the Government was making public statements about potentially prosecuting journalists, Brian Ross and Richard Esposito of ABC News reported on May 15, 2006, that senior federal law enforcement officials had informed them that the government was tracking the phone numbers of journalists without the journalists' knowledge as part of an effort to root out the journalists' confidential sources. According to the article, the journalists' phones were not being "tapped," but the government was tracking the incoming and outgoing numbers called and received on the journalists' phones. The story stated that the government was examining the phone calls and contacts of journalists from ABC News, *The New York Times*, and the *Washington Post* a part of a "widespread CIA leak investigation." I was mentioned by name as one of the reporters whose work the government was looking into. A copy of the story, entitled "Federal Source to ABC News: We Know Who You're Calling," is attached hereto as Exhibit 16.

38. Even if I was not one of the journalists subject to the surveillance outlined in the story by Messrs. Ross and Esposito, the story indicates that senior federal law enforcement officials provided Messrs. Ross and Esposito with information about the surveillance. By leaking the story in the manner that it did, the Government further contributed to creating an atmosphere of fear for journalists who publish stories about national security and intelligence issues.

39. The surveillance described in the story by Messrs. Ross and Esposito is disturbing to me as a journalist. If the Government was, in fact, tracking who I was speaking to on the phone, then it can attempt to learn the identity of potential confidential sources on other stories, including those that I am working on and have yet to publish.

40. I have reason to believe that the story by Brian Ross and Richard Esposito *is* true. Since that story was published, I have learned from an individual who testified before a grand jury in this District that was examining my reporting about the domestic wire-tapping program that the Government had shown this individual copies of telephone records relating to calls made to and from me.

41. As noted above, on June 23, 2006, Eric Lichtblau and I wrote another story in *The Times* that disclosed the existence of another government program of questionable legality that was initiated weeks after the September 11, 2001 attacks and provided counterterrorism officials with access to money transfer records in the SWIFT database as part of an effort to detect terrorist financiers.

42. The same day that the article about the SWIFT program by Eric Lichtblau and me appeared in *The Times*, *The Wall Street Journal* and the *Los Angeles Times* also published articles about the SWIFT program. Those articles are attached hereto as Exhibits 17 and 18.

43. The Bush Administration was outraged by the disclosures about the SWIFT program. Vice President Cheney called the disclosure of the program "a disgrace," while President Bush called it "disgraceful." *See* Transcript of CNN: Paula Zahn Now, *New York Times Guilty of Treason?; Old Glory Becomes Burning Issue in Congress; Israeli Troops Move Into Gaza to Rescue Captured*, 2006 WLNR 11144252 (June 27, 2006), which is attached hereto as Exhibit 19. Members of Congress close to the administration, such as Rep. Peter King of New York, "call[ed] for the attorney general to begin an investigation and prosecution of *The New York Times*, including its reporters who worked on the case."

44. Significantly, however, all of the administration's expressions of outrage concerning the disclosure of the SWIFT program were directed only at Mr. Lichtblau and me. As CNN reported on June 27, 2006, even though "[t]he story was [also] reported by the *Los Angeles Times* and *Wall Street Journal*, . . . the attacks have focused on *The New York Times*,

including its reporters who worked on the case." As far as I am aware, nobody in the administration complained publicly about the other articles written about the SWIFT program the same day as mine. All of the calls for journalists to be investigated or prosecuted were directed solely at Mr. Lichtblau and me. I cannot help but think that the fact that I had written earlier, both in *The Times* and *State of War*, about the administration's legally questionable domestic eavesdropping program, had something to do with the selective attention that was being focused on *The Times* and me.

45. Public threats from the administration of putting me in jail continued. On August 30, 2006, Republican Congressman Peter Hoekstra publicly predicted that "those reporters," meaning Eric Lichtblau and me, "will be sitting in jail by the end of the year until they reveal their sources." *See* Myron Kukla, *Hoekstra Predicts Jailing of Reporters (NYT Traitors To Be Jailed By Year End)*, Grand Rapids Press, Aug. 31, 2006 at B1, attached hereto as Exhibit 20.

46. That was the atmosphere in which I was first subpoenaed to testify concerning my confidential source(s) for Chapter 9 of *State of War*, on January 24, 2008. [redacted]

47. I believe that the efforts to target me have continued under the Obama Administration, which has been aggressively investigating whistleblowers and reporters in a way that will have a chilling effect on the freedom of the press in the United States.

48. The second subpoena directed at me was issued on April 26, 2010. [redacted]

49. [redacted]

[redacted]

I believe that this is further evidence of the Government's intent to harass me in connection with this matter. [redacted]

50. The subpoena that I am fighting now seeks the identity of and other information relating to my confidential source(s) for Chapter 9 of *State of War*. I cannot agree to provide the testimony that the Government seeks.

51. I could not have written Chapter 9 of *State of War* (and many, if not all of the above-referenced articles and books) without the use of confidential source(s). My source(s) for Chapter 9 provided me with information with the understanding that I would not reveal their identity/ies. In circumstances in which I promise confidentiality to a source, I cannot break that promise.

52. Any testimony I were to provide to the Government would compromise to a significant degree my ability to continue reporting as well as the ability of other journalists to do so. This is particularly true in my current line of work covering stories relating to national security, intelligence, and terrorism. If I aided the Government in its effort to prosecute

my confidential source(s) for providing information to me under terms of confidentiality, I would inevitably be compromising my own ability to gather news in the future. I also believe that I would be impeding all other reporters' ability to gather and report the news in the future.

53. Compelling journalists to testify about their conversations with confidential sources will inevitably hinder future attempts to obtain cooperation from those or other confidential sources. It creates the inevitable appearance that journalists either are or can be readily converted into an investigative arm of the government. This would seriously compromise journalists' integrity and independence, qualities that are essential to our ability to gain the trust of potential news sources and to effectively investigate and report on newsworthy events. Persons who would otherwise be willing to speak to me would surely refuse to do so if they perceived me to be not a journalist who keeps his word when he promises confidentiality but one who would break it in the interest of government prosecutors.

54. I understand that, if the Government cannot get testimony from me about the identity of my confidential source(s), the Government may seek testimony from me about the details of my conversations with my confidential source(s) (without actually asking me the name(s) of my source(s)). I cannot provide this testimony to the Government either. The agreement I have reached with my confidential source(s) for Chapter 9 of my book, *State of War*, does not merely cover the name of the source(s). Rather, I understand my agreement(s) to require me not to reveal any information that would enable someone to identify my confidential source(s).

55. I have never heard of any confidentiality agreement made by a journalist that merely requires the journalist not to name his or her source. Such an agreement would be of little value to a source or potential source. If a journalist were to withhold a source's name but provide enough information to authorities to identify the source, the promise of confidentiality would provide little meaningful protection to a source or potential source.

56. The scope of my confidentiality agreement(s) with my source(s) for Chapter 9 are typical of such agreements as they are used for investigative reporting generally. Such confidentiality agreements do not necessarily preclude a journalist from disclosing anything whatsoever about the source. In fact, when reporting using confidential sources, it is quite common to report some generic information that assists in demonstrating the credibility of the source. For example, one might identify the employer of the source by noting that the source is "an employee of Microsoft" or "management at McDonalds." Additionally, or alternatively, a reporter might identify the location of a source by, for example, noting that they work at Microsoft in Seattle, Washington.

57. The common thread in revealing any identifying information about a confidential source is that such disclosures remain general enough that they do not tend to reveal the identity of the source. The above example might be acceptable because there are a sufficient number of employees of Microsoft in Seattle that those characteristics do not materially threaten to reveal the particular source's identity. However, it might violate the same agreement to disclose that a source was an employee of Microsoft located in a very small town that only had a few such employees.

58. In short, confidentiality agreement(s) are not so formulaic as to define specific categories of information for protection, such as occupation, location, or time. Rather, they are common-sense agreements not to disclose whatever information might, alone or in combination, reveal the identity of the source in light of the particular circumstances.

59. Based on my review of the Government's papers and the particular nature of the testimony the Government claims to be seeking, I have concluded that I cannot answer the questions the Government wants to ask me consistent with my obligation to maintain the confidentiality of my source(s). First, the subpoena contains no limitations on the scope of testimony. In its motion papers, the Government has demanded that I identify Sterling as the individual who, as charged in Counts One through Seven of the Indictment, retained and then

transmitted national security information to me. The Government's other requests for testimony are also specifically designed to confirm or rule out Mr. Sterling as a source. The Government seeks "(1) testimony about the specific information that the defendant conveyed to [me], much of which was publicly disclosed by [me] in [my] book; (2) [my] recollection of where and when the specific information was transmitted to [me] (3) testimony authenticating [my] book and laying the foundation for admitting the defendant's statements contained in it; and (4) [my] recollection of [my] preexisting *non*-confidential source relationship with Sterling, including [my] authorship of a newspaper article about Sterling's civil lawsuit in 2002." With the possible exception of #3, it is readily apparent that I cannot testify on these topics without confirming or refuting that Mr. Sterling was a confidential source for Chapter 9 of *State of War*, nor without providing information that would tend to reveal the identity/ies of my confidential source(s).

60. I am willing to testify — as I have told the Government all along — that (1) I wrote a particular newspaper article or chapter of a book; (2) a particular newspaper article or chapter of a book that I wrote was accurate; (3) statements referred to in my newspaper article or book chapter as being made by an unnamed source were in fact made to me by an unnamed source; and (4) statements referred to in my newspaper article or book chapter as being made by an identified source were in fact made to me by that identified source. But I cannot testify as to the Government's other questions.

61. To answer the Government's other questions would violate my agreement to maintain in confidence not just the name(s) of my source(s), but information that would tend to reveal the identity/ies of my source(s). If I provide the testimony that has been requested of me, including the "what," "how," "when," and "where" of acquiring each piece of confidential information, doing so will reveal my confidential source(s), regardless of whether I directly provide any name(s). Accordingly, I cannot comply with the subpoena.

62. I did have a non-confidential reporting relationship with Mr. Sterling in connection with my March 2002 article entitled "Fired by C.I.A., He Says Agency Practiced Bias." To the extent the Government's seeks to verify the information in that article, I stand by it; the article accurately portrays the information provided to me. However, I cannot testify as to whether I had any other discussion(s) with Mr. Sterling outside the context of that article for one simple reason: the questioning appears to be an attempt to elicit information about my communications with Mr. Sterling so as to confirm or deny that he was a confidential source for Chapter 9. To the extent the Government is asking these questions because the Government believes that they might reveal something about my confidential source(s) for the information in Chapter 9, then this appears to be just another indirect route to the same source-identifying information that the Government is seeking through its more direct questions about Chapter 9.

63. I cannot answer questions about information provided to me confidentially by any particular individual in connection with Chapter 9, or even answer whether any particular individual did or did not provide me with information, because to do so would reveal my source(s) by process of elimination. For example, if there were only a handful of people that had access to a particular piece of information in *State of War*, asking whether I had any conversations with each of them, one by one, would quickly reveal my source(s). No matter how creative the Government's approach is, in order to protect my source(s)' confidentiality, I must decline to answer any of these questions designed to either confirm or rule out particular people.

64. If I am forced to testify, it will immediately and substantially harm my ability to gather newsworthy information. Recently, it has become more clear than ever to me how important promises of confidentiality are to my sources. In my ongoing reporting and newsgathering, numerous sources of confidential information have told me that they are comfortable speaking to me in confidence specifically because I have shown that I will honor my word and maintain their confidence even in the face of Government efforts to force me to re-

veal their identities or information. The fact that I have not previously revealed my sources has allowed me to gain access to newsworthy information that I could not otherwise get. Based on these experiences, I have no doubt that if I am forced to reveal my confidential source(s) for Chapter 9 of *State of War*, it will immediately harm my ability to secure the trust of sources in the future.

65. I respectfully urge the Court to deny the Government motion in limine quash the subpoena.

JAMES RISEN

Sworn to before me this

21st th day of June, 2011.

Barbara Brincefield
Notary Public

BARBARA BRINCEFIELD
Notary Public of District of Columbia
My Commission Expires October 14, 2015

# EXHIBIT 1

AO 89 (Rev. 01/09) Subpoena to Testify at a Hearing or Trial in a Criminal Case

# UNITED STATES DISTRICT COURT

for the

Eastern District of Virginia

United States of America )
v. )
Jeffrey Alexander Sterling ) Case No. 1:10cr485
)
*Defendant* )

## SUBPOENA TO TESTIFY AT A HEARING OR TRIAL IN A CRIMINAL CASE

To: **James Risen**
**17905 Hollingsworth Drive**
**Derwood, MD 20855**

**YOU ARE COMMANDED** to appear in the United States district court at the time, date, and place shown below to testify in this criminal case. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

| | | | |
|---|---|---|---|
| Place of Appearance: | United States District Court<br>401 Courthouse Square<br>Alexandria, VA 22314 | Courtroom No.: | 600 |
| | | Date and Time: | September 12, 2011 10 a.m. |

You must also bring with you the following documents, electronically stored information, or objects *(blank if not applicable)*:

Date: 05/17/2011

*CLERK OF COURT*

*Signature of Clerk or Deputy Clerk*

The name, address, e-mail, and telephone number of the attorney representing *(name of party)* United States of America, who requests this subpoena, are:

James L. Trump, AUSA JLT
U. S. Attorney's Office, Alexandria, VA
Jim.Trump@usdoj.gov
(703) 299-3700

Case No.

**PROOF OF SERVICE**

This subpoena for *(name of individual and title, if any)* _____ was received by me on *(date)* _____.

☐ I personally served the subpoena on the individual at *(place)* _____ on *(date)* _____; or

☐ I left the subpoena at the individual's residence or usual place of abode with *(name)* _____, a person of suitable age and discretion who resides there, on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the subpoena on *(name of individual)* _____, who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____; or

☐ I returned the subpoena unexecuted because _____; or

☐ Other *(specify)*:

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____.

My fees are $ _____ for travel and $ _____ for services, for a total of $ _____.

I declare under penalty of perjury that this information is true.

Date: _____

_____
*Server's signature*

_____
*Printed name and title*

_____
*Server's address*

Additional information regarding attempted service, etc:

# EXHIBIT 2

This Exhibit has been filed by hand with the Court.

# EXHIBIT 3

Westlaw. NewsRoom


7/16/09 CQ Cap. Transcripts (Pg. Unavail. Online)
2009 WLNR 13571492

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July 16, 2009

Sen. Patrick J. Leahy Holds A Hearing On The Nomination Of Judge Sonia Sotomayor To Be An Associate Justice Of The U.S. Supreme Court

Sen. Patrick J. Leahy Holds A Hearing On The Nomination Of Judge Sonia Sotomayor To Be An Associate Justice Of The U.S. Supreme Court

xfdtr SENATE-HRG-SOTOMAYOR 26thadd

XXX issues arising from the Constitution are important.SPECTER: Well, I know that, but that's a pretty easy question to answer. I'm not asking you to agree with Justice Roberts that the court ought to take more cases, which seemed to me to be pretty easy, or a question about Justice Scalia saying that there's turmoil when the circuit split.

And you don't have the Supreme Court taking cert, but isn't that of the highest magnitude? Our discussions here have involved a great many issues, but I would suggest to you that, on separation of powers and when you undertake the role of the Congress contrasting with the role of the president, Congress is Article I. It was placed with primacy, because we're closest to the people.

And when you have a question which you wouldn't comment on yesterday, like the terrorist surveillance program, which flatly contradicts the congressional enactment on Foreign Intelligence Surveillance Act, that the only way you'd get a wiretap is with court approval, and the case is declared unconstitutional in the Detroit district court, and the Sixth Circuit dodges the case on standing with very questionable grounds, and the Supreme Court won't even hear it, and you have a case involving September 11th and a very blatant conflict between Congress powers expressed under Article I with the sovereign immunities act, and the president is stepping in under foreign powers, isn't -- isn't that a category of the highest magnitude?

SOTOMAYOR: It is so difficult to answer that question in the abstract. For the reason I've just explained, the issue is much, much more complicated than an absolute that says, if a case presents this question, I'm always going to take it.

That's not how a judge looks at the issue of granting or not granting certiorari, I assume, because the fact is weighing so many different factors at the time that decision is made. I...

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SPECTER: Judge, I don't want to interrupt you, but I've got a minute-and-a-half left and a couple of comments I want to make in conclusion.

I would ask you to rethink that. And I would also ask you to rethink the issues you didn't want to answer yesterday about conflict between the Congress and the court.

Even though the Constitution made Congress Article I and the president Article II, the Supreme Court has really reversed the order. The judiciary is now really in Article I, if the powers were to be redefined.

And I'd ask you to take a look -- you have said repeatedly that the job of the court is to apply the law, not to make the law. And take a look again at the standard of proportional and congruent and see if you don't agree with Justice Scalia that that's another way for the court to make law.

And take a look, too, at what Justice Roberts said here in the confirmation hearings, that there would be deference and respect for congressional fact-finding, how that is not done in the Garrett case and in the voting rights case.

MORE

---- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (1LE33); Government (1GO80); Legislation (1LE97); Judicial (1JU36))

Language: EN

OTHER INDEXING: (CONGRESS; CONSTITUTION; GARRETT; JUSTICE ROBERTS; JUSTICE SCALIA; SIXTH CIRCUIT; SOTOMAYOR; SUPREME COURT; US SUPREME COURT; XXX) (Article; Patrick J. Leahy; Sen; Sonia Sotomayor)

KEYWORDS: (BC-SENATE-HRG-SOTOMAYOR, 26th Add, f1416,0514); (w)

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# EXHIBIT 4

5/13/04 N.Y. Times A1
2004 WLNR 5538566

New York Times (NY)
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May 13, 2004

Section: A

# THE STRUGGLE FOR IRAQ: DETAINEES; Harsh C.I.A. Methods Cited In Top Qaeda Interrogations

This article was reported and written by James Risen, David Johnston and Neil A. Lewis.

Central Intelligence Agency's use of coercive interrogation methods against some high-level leaders and operatives of Al Qaeda produces concern inside agency about abuse; at least one agency employee reportedly has been disciplined for threatening detainee with gun during questioning; Khalid Shaikh Mohammed, thought to have helped plan 9/11 terror attacks, was strapped down, forcibly pushed under water and made to believe he might drown; that and other techniques were authorized by set of secret rules for interrogation of high-level Qaeda prisoners that were endorsed by Justice Dept and CIA; rules are among first adopted by Bush administration after 9/11 for handling detainees and may have helped establish new understanding throughout government that officials would have greater freedom to deal harshly with detainees; methods used by CIA are so severe that senior officials of Federal Bureau of Investigation directed its agents to stay out of interviews for fear of being compromised in future criminal cases; defenders of operation say methods do not violate American anti-torture statutes, and are necessary to fight war against nebulous enemy whose intentions could only be gleaned by extracting information from uncooperative detainees; photo (M)

WASHINGTON, May 12 The Central Intelligence Agency has used coercive interrogation methods against a select group of high-level leaders and operatives of Al Qaeda that have produced growing concerns inside the agency about abuses, according to current and former counterterrorism officials.

At least one agency employee has been disciplined for threatening a detainee with a gun during questioning, they said.

In the case of Khalid Shaikh Mohammed, a high-level detainee who is believed to have helped plan the attacks of Sept. 11, 2001, C.I.A. interrogators used graduated levels of force, including a technique known as "water boarding," in which a prisoner is strapped down, forcibly pushed under water and made to believe he might drown.

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These techniques were authorized by a set of secret rules for the interrogation of high-level Qaeda prisoners, none known to be housed in Iraq, that were endorsed by the Justice Department and the C.I.A. The rules were among the first adopted by the Bush administration after the Sept. 11 attacks for handling detainees and may have helped establish a new understanding throughout the government that officials would have greater freedom to deal harshly with detainees.

Defenders of the operation said the methods stopped short of torture, did not violate American anti-torture statutes, and were necessary to fight a war against a nebulous enemy whose strength and intentions could only be gleaned by extracting information from often uncooperative detainees. Interrogators were trying to find out whether there might be another attack planned against the United States.

The methods employed by the C.I.A. are so severe that senior officials of the Federal Bureau of Investigation have directed its agents to stay out of many of the interviews of the high-level detainees, counterterrorism officials said. The F.B.I. officials have advised the bureau's director, Robert S. Mueller III, that the interrogation techniques, which would be prohibited in criminal cases, could compromise their agents in future criminal cases, the counterterrorism officials said.

After the attacks of Sept. 11, President Bush signed a series of directives authorizing the C.I.A. to conduct a covert war against Osama bin Laden's Qaeda network. The directives empowered the C.I.A. to kill or capture Qaeda leaders, but it is not clear whether the White House approved the specific rules for the interrogations.

The White House and the C.I.A. declined to comment on the matter.

The C.I.A. detention program for Qaeda leaders is the most secretive component of an extensive regime of detention and interrogation put into place by the United States government after the Sept. 11 attacks and the war in Afghanistan that includes the detention facilities run by the military in Iraq and Guantanamo Bay, Cuba.

There is now concern at the agency that the Congressional and criminal inquiries into abuses at Pentagon-run prisons and other detention centers in Iraq and Afghanistan may lead to examinations of the C.I.A's handling of the Qaeda detainees. That, in turn, could expose agency officers and operations to the same kind of public exposure as the military now faces because of the Iraq prison abuses.

So far, the agency has refused to grant any independent observer or human rights group access to the high-level detainees, who have been held in strict secrecy. Their whereabouts are such closely guarded secrets that one official said he had been told that Mr. Bush had informed the C.I.A. that he did not want to know where they were.

The authorized tactics are primarily those methods used in the training of American Special Operations soldiers to prepare them for the possibility of being captured

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and taken prisoners of war. The tactics simulate torture, but officials say they are supposed to stop short of serious injury.

Counterrorism officials say detainees have also been sent to third countries, where they are convinced that they might be executed, or tricked into believing they were being sent to such places. Some have been hooded, roughed up, soaked with water and deprived of food, light and medications.

Many authorities contend that torture and coercive treatment is as likely to provide information that is unreliable as information that is helpful.

Concerns are mounting among C.I.A. officers about the potential consequences of their actions. "Some people involved in this have been concerned for quite a while that eventually there would be a new president, or the mood in the country would change, and they would be held accountable," one intelligence source said. "Now that's happening faster than anybody expected."

The C.I.A.'s inspector general has begun an investigation into the deaths of three lower-level detainees held by the C.I.A in Iraq and Afghanistan. The Justice Department is also examining the deaths.

The secret detention system houses a group of 12 to 20 prisoners, government officials said, some under direct American control, others ostensibly under the supervision of foreign governments.

The C.I.A. high-level interrogation program seemed to show early results with the capture of Abu Zubaida in April 2002. Mr. Zubaida was a close associate of Mr. bin Laden's and had run Al Qaeda's recruiting, in which young men were brought from other countries to training camps in Afghanistan.

Under such intensive questioning, Mr. Zubaida provided useful information identifying Jose Padilla, a low-level Qaeda convert who was arrested in May 2002 in connection with an effort to build a dirty bomb. Mr. Zubaida also helped identify Mr. Mohammed as a crucial figure in the 9/11 plot, counterterrorism officials said.

A few other detainees have been identified by the Bush administration, like Ramzi bin al-Shibh, another 9/11 plotter and Walid Ba'Attash, who helped plan the East Africa embassy bombings in 1998 and the attack on the Navy destroyer Cole in October 2000.

Some of the prisoners have never been identified by the government. Some may have only peripheral ties to Al Qaeda. One Middle Eastern man, who had been identified by intelligence officials as a money launderer for Mr. bin Laden, was captured in the United Arab Emirates. He traveled there when some of the emirates' banks froze his accounts. When the U.A.E. government alerted the the C.I.A. that he was in the country, the man was arrested and subsequently disappeared into the secret detention program.

In the interrogation of Mr. Mohammed, C.I.A. officials became convinced that he was not being fully cooperative about his knowledge of the whereabouts of Mr. bin

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Laden. Mr. Mohammed was carrying a letter written by Mr. bin Laden to a family member when he was captured in Pakistan early in 2003. The C.I.A. officials then authorized even harsher techniques, according to officials familiar with the interrogation.

The C.I.A. has been operating its Qaeda detention system under a series of secret legal opinions by the agency's and Justice Department lawyers. Those rules have provided a legal basis for the use of harsh interrogation techniques, including the water-boarding tactic used against Mr. Mohammed.

One set of legal memorandums, the officials said, advises government officials that if they are contemplating procedures that may put them in violation of American statutes that prohibit torture, degrading treatment or the Geneva Conventions, they will not be responsible if it can be argued that the detainees are formally in the custody of another country.

The Geneva Conventions prohibit "violence to life and person, in particular . . . cruel treatment and torture" and "outrages upon personal dignity, in particular, humiliating and degrading treatment."

Regarding American anti-torture laws, one administration figure involved in discussions about the memorandums said: "The criminal statutes only apply to American officials. The question is how involved are the American officials."

The official said the legal opinions say restrictions on procedures would not apply if the detainee could be deemed to be in the custody of a different country, even though American officials were getting the benefit of the interrogation. "It would be the responsibility of the other country," the official said. "It depends on the level of involvement."

Like the more numerous detainees at Guantanamo Bay, the high-level Qaeda prisoners have also been defined as unlawful combatants, not as prisoners of war. Those prisoners have no standing in American civilian or military courts.

The Bush administration began the program when intelligence agencies realized that a few detainees captured in Afghanistan had such a high intelligence value that they should be separated from the lower-level figures who had been sent to a military installation at Guantanamo Bay, which officials felt was not suitable.

There was little long-term planning. The agency initially had few interrogators and no facilities to house the top detainees. After the Sept. 11 attacks, the agency began to search for remote sites in friendly countries around the world where Qaeda operatives could be kept quietly and securely.

"There was a debate after 9/11 about how to make people disappear," a former intelligence official said.

The result was a series of secret agreements allowing the C.I.A. to use sites overseas without outside scrutiny.

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So far, the Bush administration has not said what it intends to do over the long term with any of the high-level detainees, leaving them subject to being imprisoned indefinitely without any access to lawyers, courts or any form of due process.

Some officials have suggested that some of the high-level detainees may be tried in military tribunals or officially turned over to other countries, but counterterrorism officials have complained about the Bush administration's failure to have an "endgame" for these detainees. One official said they could also be imprisoned indefinitely at a new long-term prison being built at Guantanamo.

Photo: Khalid Shaikh Mohammed in image on F.B.I. Web site last year. (Photo by F.B.I.)(pg. A13)

---- INDEX REFERENCES ----

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July 6, 2004

Section: A

# THE REACH OF WAR: INTELLIGENCE; C.I.A. HELD BACK IRAQI ARMS DATA, U.S. OFFICIALS SAY

JAMES RISEN

Report from Senate Select Committee on Intelligence is expected to contain scathing indictment of CIA and its leaders for failing to recognize that evidence they collected before war in Iraq did not justify their assesssment that Saddam Hussein had illicit weapons; report says CIA was told by relatives of Iraqi scientists that Baghdad's programs to develop unconventional weapons had been abandoned, but that agency failed to give that information to Pres Bush, even as he publicly warned of threat posed by Hussein's illicit weapons; existence of secret prewar CIA operation to debrief relatives of Iraqi scientists--and agency's failure to give their statements to president and other policymakers--was uncovered by Senate intelligence panel; CIA officials play down significance of information collected in secret debriefing operation, saying they assumed such talk was part of Iraqi denial and deception program; Senate report is said to conclude that entire intelligence community did poor job of collecting information about status of Iraq's weapons programs, and that intelligence analysts did even worse job of writing reports that accurately relected information they had; Senate panel finds no evidence that CIA changed reports as result of political pressure from White House; detailed examination of Senate panel's investigation; photo (L)

WASHINGTON, July 5 The Central Intelligence Agency was told by relatives of Iraqi scientists before the war that Baghdad's programs to develop unconventional weapons had been abandoned, but the C.I.A. failed to give that information to President Bush, even as he publicly warned of the threat posed by Saddam Hussein's illicit weapons, according to government officials.

The existence of a secret prewar C.I.A. operation to debrief relatives of Iraqi scientists -- and the agency's failure to give their statements to the president and other policymakers -- has been uncovered by the Senate Select Committee on Intelligence. The panel has been investigating the government's handling of prewar intelligence on Iraq's unconventional weapons and plans to release a wide-ranging report this week on the first phase of its inquiry. The report is expected to contain a scathing indictment of the C.I.A. and its leaders for failing to

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recognize that the evidence they had collected did not justify their assessment that Mr. Hussein had illicit weapons.

C.I.A. officials, saying that only a handful of relatives made claims that the weapons programs were dead, play down the significance of the information collected in the secret debriefing operation. That operation is one of a number of significant disclosures by the Senate investigation. The Senate report, intelligence officials say, concludes that the agency and the rest of the intelligence community did a poor job of collecting information about the status of Iraq's weapons programs, and that analysts at the C.I.A. and other intelligence agencies did an even worse job of writing reports that accurately reflected the information they had.

Among the many problems that contributed to the committee's harsh assessment of the C.I.A.'s prewar performance were instances in which analysts may have misrepresented information, writing reports that distorted evidence in order to bolster their case that Iraq did have chemical, biological and nuclear programs, according to government officials. The Senate found, for example, that an Iraqi defector who supposedly provided evidence of the existence of a biological weapons program had actually said he did not know of any such program.

In another case concerning whether a shipment of aluminum tubes seized on its way to Iraq was evidence that Baghdad was trying to build a nuclear bomb, the Senate panel raised questions about whether the C.I.A. had become an advocate, rather than an objective observer, and selectively sought to prove that the tubes were for a nuclear weapons program.

While the Senate panel has concluded that C.I.A. analysts and other intelligence officials overstated the case that Iraq had illicit weapons, the committee has not found any evidence that the analysts changed their reports as a result of political pressure from the White House, according to officials familiar with the report.

The Senate report is expected to criticize both the director of central intelligence, George J. Tenet, and his deputy, John McLaughlin, and other senior C.I.A. officials, for the way they managed the agency before the war. Mr. Tenet has announced his resignation, effective July 11, and Mr. McLaughlin will serve as acting director until a permanent director is appointed. The C.I.A. has scheduled a farewell ceremony for Mr. Tenet on Thursday, just as the reverberations from the Senate report are likely to be hitting the agency.

The possibility that Mr. Tenet personally overstated the evidence has been investigated by the Senate panel, officials said. He was interviewed privately by the panel recently, and was asked whether he told President Bush that the case for the existence of Iraq's unconventional weapons was a "slam dunk."

In his book about the Bush administration's planning for the war in Iraq, "Plan of Attack," Bob Woodward reported that Mr. Tenet reassured Mr. Bush about the evidence of the existence of Iraq's illicit weapons after Mr. Bush had made clear he was unimpressed by the evidence presented to him in a December 2002 briefing by Mr. McLaughlin. "It's a slam-dunk case!" Mr. Tenet is quoted as telling the president.

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In his private interview with the Senate panel, Mr. Tenet refused to say whether he had used the "slam-dunk" phrase, arguing that his conversations with the president were privileged, officials said.

In hindsight, the Senate panel and many other intelligence officials now agree that there was little effort within the American intelligence community before the war to question the basic assumption that Mr. Hussein was still seeking to produce illicit weapons. Evidence that fit that assumption was embraced; evidence to the contrary was ignored or seen as part of a clever Iraqi disinformation campaign.

Yet there were some people inside the intelligence community who recognized the need for better evidence, according to intelligence officials. In 1998, the United Nations withdrew its weapons inspectors from Iraq, severely hampering the C.I.A.'s ability to monitor Iraqi weapons efforts. In response, Charlie Allen, the agency's assistant director for collection, began searching for new sources of information, the intelligence officials said.

He pushed for several new collection programs, including one that called for approaching members of the families of Iraqi scientists believed to be involved in secret weapons programs, the officials said. At the time, the C.I.A. had no direct access to important Iraqi scientists, and using family members as intermediaries seemed like the next best thing.

Beginning in 2000, the C.I.A. contacted the relatives and asked them what they knew or could learn about the work being conducted by the scientists. Officials would not say how or where the relatives were contacted.

The relatives told the agency that the scientists had said that they were no longer working on illicit weapons, and that those programs were dead. Yet the statements from the relatives were never included in C.I.A. intelligence reports on Iraq that were distributed throughout the government. C.I.A. analysts monitoring Iraq apparently ignored the statements from the family members and continued to issue assessments that Mr. Hussein was still developing unconventional weapons, Senate investigators have found.

At the time, C.I.A. analysts were deeply cynical about statements from Iraqis suggesting that Mr. Hussein had no illicit weapons, and assumed that such talk was simply part of an Iraqi denial and deception program, several intelligence officials said.

In response, a C.I.A. spokesman said, the families' statements were "not at all convincing."

"There was nothing definitive about it," the spokesman said. "No useful information was collected from the family members, and that's why it wouldn't have been disseminated."

The agency's handling of intelligence on biological weapons has also drawn Congressional criticism. In fact, the C.I.A. relied heavily on four Iraqi defectors to reach its conclusion that Iraq had developed mobile biological weapons laboratories.

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But one defector, an Iraqi scientist, said he had been working on a technical program known as a "protein slurry," and that his work was unrelated to biological weapons. He said he did not know of any other biological weapons activity under way in Iraq. Senate investigators did not discover that his statements contradicted the view that Iraq had an active biological program until they read the original reports of his debriefings from before the war, officials said. A C.I.A. official said the agency still had good reasons to use the defector's information, and has been trying to explain that to the Senate committee. The official would not elaborate.

There were problems with the handling of the other defectors used to buttress the biological weapons case. Information from one was used even though the Defense Intelligence Agency had warned in the spring of 2002 that he had fabricated information. The C.I.A. took statements that another defector had given to German intelligence without knowing his identity or learning that he had ties to the Iraqi National Congress, the Iraqi exile group led by Ahmad Chalabi. Mr. Chalabi, until recently a close ally of the Pentagon, fell into disfavor with the Bush administration after it became clear that his organization had provided disinformation to the United States and had exaggerated the threat posed by Mr. Hussein.

One of the most sensitive elements of the Senate investigation relates to the C.I.A.'s handling of intelligence about the shipment of aluminum tubes seized by the United States in 2001 on its way into Iraq.

Senior C.I.A. analysts became convinced that the shipment was strong evidence that Mr. Hussein was reconstituting his nuclear weapons program. The agency concluded that the aluminum tubes were to be used as spinning rotors in a centrifuge that could enrich uranium for bombs.

But other government experts, particularly at the national laboratories and in the State Department, were skeptical. They argued that the tubes seemed designed for use in conventional military rockets.

The technical debate reached a peak in 2002, just as the intelligence community was preparing a comprehensive National Intelligence Estimate, an interagency assessment of the status of Iraq's unconventional weapons.

Seeking to prove its case, the C.I.A. hired outside experts to conduct technical tests, spinning the tubes at high speeds to determine whether they could withstand the stress of a centrifuge.

But the Senate panel investigated the way in which the C.I.A. selectively sought to prove its case with the outside experts in the face of the skepticism from analysts at other agencies. For example, in the National Intelligence Estimate, the C.I.A. disclosed the initial -- and successful -- test results to support its assertion that the tubes could be used to help produce nuclear weapons. Only later did the C.I.A. report results that showed that the tubes ultimately failed in testing.

C.I.A. officials said in response that only the initial test results were reported

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in the intelligence assessment because those were the only results available at the time. When later results were available in January 2003, they were reported to the rest of the intelligence community, the officials said. The C.I.A. officials added that nearly all of the subsequent test failures were a result of failures of testing equipment, and that the few failures of tubes were at speeds that exceeded those required for centrifuges. The agency had asked the outside experts to push the tubes to their limits in the stress tests, and so their failure did not mean that the tubes could not be used in a centrifuge, the C.I.A. officials say.

The C.I.A.'s views on the tubes ultimately prevailed inside the Bush administration. Although the State Department's own analysts issued a dissent in the National Intelligence Estimate, Secretary of State Colin L. Powell went with the C.I.A. In his presentation to the United Nations in February 2003 laying out the administration's case against Iraq, he relied on the aluminum tubes to show that Mr. Hussein was rebuilding his nuclear weapons program.

Photo: At the Security Council on Feb. 5, 2003, Secretary of State Colin L. Powell said Iraq had obtained aluminum tubes, shown on the screen at right, for uranium enrichment. (Photo by James Estrin/The New York Times)(pg. A10)

---- INDEX REFERENCES ----

COMPANY: PENTAGON LTD; CENTRAL INTELLIGENCE AGENCY; STATE DEPARTMENT; UNITED NATIONS

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December 16, 2005

Section: A

# Bush Lets U.S. Spy on Callers Without Courts

JAMES RISEN and ERIC LICHTBLAU; Barclay Walsh contributed research for this article.

National Security Agency officials privately voice concern about legality of eavesdropping on Americans and others inside United States without court-approved warrants, as secretly authorized by Pres Bush in wake of 9/11 attacks; at issue is NSA's monitoring of international telephone calls and e-mail messages inside US in search of evidence of terrorist activity under presidential order signed in 2002; dozen current and former agency officials question whether this surveillance has stretched, if not crossed, constitutional limits on legal searches; Bush administration views operation as necessary so agency can move quickly on threats to US; defenders of program say it has been critical tool in helping disrupt terrorist plots and prevent attacks inside US; critics say most people targeted for NSA monitoring have never been charged with crime; it is not clear how much members of Congress were told about presidential order and eavesdropping program; photo; timeline of NSA's half-century of surveillance (L)

WASHINGTON, Dec. 15 Months after the Sept. 11 attacks, President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying, according to government officials.

Under a presidential order signed in 2002, the intelligence agency has monitored the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants over the past three years in an effort to track possible "dirty numbers" linked to Al Qaeda, the officials said. The agency, they said, still seeks warrants to monitor entirely domestic communications.

The previously undisclosed decision to permit some eavesdropping inside the country without court approval was a major shift in American intelligence-gathering practices, particularly for the National Security Agency, whose mission is to spy on communications abroad. As a result, some officials familiar with the continuing

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operation have questioned whether the surveillance has stretched, if not crossed, constitutional limits on legal searches.

"This is really a sea change," said a former senior official who specializes in national security law. "It's almost a mainstay of this country that the N.S.A. only does foreign searches."

Nearly a dozen current and former officials, who were granted anonymity because of the classified nature of the program, discussed it with reporters for The New York Times because of their concerns about the operation's legality and oversight.

According to those officials and others, reservations about aspects of the program have also been expressed by Senator John D. Rockefeller IV, the West Virginia Democrat who is the vice chairman of the Senate Intelligence Committee, and a judge presiding over a secret court that oversees intelligence matters. Some of the questions about the agency's new powers led the administration to temporarily suspend the operation last year and impose more restrictions, the officials said.

The Bush administration views the operation as necessary so that the agency can move quickly to monitor communications that may disclose threats to the United States, the officials said. Defenders of the program say it has been a critical tool in helping disrupt terrorist plots and prevent attacks inside the United States.

Administration officials are confident that existing safeguards are sufficient to protect the privacy and civil liberties of Americans, the officials say. In some cases, they said, the Justice Department eventually seeks warrants if it wants to expand the eavesdropping to include communications confined within the United States. The officials said the administration had briefed Congressional leaders about the program and notified the judge in charge of the Foreign Intelligence Surveillance Court, the secret Washington court that deals with national security issues.

The White House asked The New York Times not to publish this article, arguing that it could jeopardize continuing investigations and alert would-be terrorists that they might be under scrutiny. After meeting with senior administration officials to hear their concerns, the newspaper delayed publication for a year to conduct additional reporting. Some information that administration officials argued could be useful to terrorists has been omitted.

Dealing With a New Threat

While many details about the program remain secret, officials familiar with it say the N.S.A. eavesdrops without warrants on up to 500 people in the United States at any given time. The list changes as some names are added and others dropped, so the number monitored in this country may have reached into the thousands since the program began, several officials said. Overseas, about 5,000 to 7,000 people suspected of terrorist ties are monitored at one time, according to those officials.

Several officials said the eavesdropping program had helped uncover a plot by Iyman

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Faris, an Ohio trucker and naturalized citizen who pleaded guilty in 2003 to supporting Al Qaeda by planning to bring down the Brooklyn Bridge with blowtorches. What appeared to be another Qaeda plot, involving fertilizer bomb attacks on British pubs and train stations, was exposed last year in part through the program, the officials said. But they said most people targeted for N.S.A. monitoring have never been charged with a crime, including an Iranian-American doctor in the South who came under suspicion because of what one official described as dubious ties to Osama bin Laden.

The eavesdropping program grew out of concerns after the Sept. 11 attacks that the nation's intelligence agencies were not poised to deal effectively with the new threat of Al Qaeda and that they were handcuffed by legal and bureaucratic restrictions better suited to peacetime than war, according to officials. In response, President Bush significantly eased limits on American intelligence and law enforcement agencies and the military.

But some of the administration's antiterrorism initiatives have provoked an outcry from members of Congress, watchdog groups, immigrants and others who argue that the measures erode protections for civil liberties and intrude on Americans' privacy.

Opponents have challenged provisions of the USA Patriot Act, the focus of contentious debate on Capitol Hill this week, that expand domestic surveillance by giving the Federal Bureau of Investigation more power to collect information like library lending lists or Internet use. Military and F.B.I. officials have drawn criticism for monitoring what were largely peaceful antiwar protests. The Pentagon and the Department of Homeland Security were forced to retreat on plans to use public and private databases to hunt for possible terrorists. And last year, the Supreme Court rejected the administration's claim that those labeled "enemy combatants" were not entitled to judicial review of their open-ended detention.

Mr. Bush's executive order allowing some warrantless eavesdropping on those inside the United States -- including American citizens, permanent legal residents, tourists and other foreigners -- is based on classified legal opinions that assert that the president has broad powers to order such searches, derived in part from the September 2001 Congressional resolution authorizing him to wage war on Al Qaeda and other terrorist groups, according to the officials familiar with the N.S.A. operation.

The National Security Agency, which is based at Fort Meade, Md., is the nation's largest and most secretive intelligence agency, so intent on remaining out of public view that it has long been nicknamed "No Such Agency." It breaks codes and maintains listening posts around the world to eavesdrop on foreign governments, diplomats and trade negotiators as well as drug lords and terrorists. But the agency ordinarily operates under tight restrictions on any spying on Americans, even if they are overseas, or disseminating information about them.

What the agency calls a "special collection program" began soon after the Sept. 11 attacks, as it looked for new tools to attack terrorism. The program accelerated in early 2002 after the Central Intelligence Agency started capturing top Qaeda operatives overseas, including Abu Zubaydah, who was arrested in Pakistan in March 2002. The C.I.A. seized the terrorists' computers, cellphones and personal phone

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directories, said the officials familiar with the program. The N.S.A. surveillance was intended to exploit those numbers and addresses as quickly as possible, they said.

In addition to eavesdropping on those numbers and reading e-mail messages to and from the Qaeda figures, the N.S.A. began monitoring others linked to them, creating an expanding chain. While most of the numbers and addresses were overseas, hundreds were in the United States, the officials said.

Under the agency's longstanding rules, the N.S.A. can target for interception phone calls or e-mail messages on foreign soil, even if the recipients of those communications are in the United States. Usually, though, the government can only target phones and e-mail messages in the United States by first obtaining a court order from the Foreign Intelligence Surveillance Court, which holds its closed sessions at the Justice Department.

Traditionally, the F.B.I., not the N.S.A., seeks such warrants and conducts most domestic eavesdropping. Until the new program began, the N.S.A. typically limited its domestic surveillance to foreign embassies and missions in Washington, New York and other cities, and obtained court orders to do so.

Since 2002, the agency has been conducting some warrantless eavesdropping on people in the United States who are linked, even if indirectly, to suspected terrorists through the chain of phone numbers and e-mail addresses, according to several officials who know of the operation. Under the special program, the agency monitors their international communications, the officials said. The agency, for example, can target phone calls from someone in New York to someone in Afghanistan.

Warrants are still required for eavesdropping on entirely domestic-to-domestic communications, those officials say, meaning that calls from that New Yorker to someone in California could not be monitored without first going to the Federal Intelligence Surveillance Court.

A White House Briefing

After the special program started, Congressional leaders from both political parties were brought to Vice President Dick Cheney's office in the White House. The leaders, who included the chairmen and ranking members of the Senate and House intelligence committees, learned of the N.S.A. operation from Mr. Cheney, Lt. Gen. Michael V. Hayden of the Air Force, who was then the agency's director and is now a full general and the principal deputy director of national intelligence, and George J. Tenet, then the director of the C.I.A., officials said.

It is not clear how much the members of Congress were told about the presidential order and the eavesdropping program. Some of them declined to comment about the matter, while others did not return phone calls.

Later briefings were held for members of Congress as they assumed leadership roles on the intelligence committees, officials familiar with the program said. After a 2003 briefing, Senator Rockefeller, the West Virginia Democrat who became vice chairman of the Senate Intelligence Committee that year, wrote a letter to Mr.

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Cheney expressing concerns about the program, officials knowledgeable about the letter said. It could not be determined if he received a reply. Mr. Rockefeller declined to comment. Aside from the Congressional leaders, only a small group of people, including several cabinet members and officials at the N.S.A., the C.I.A. and the Justice Department, know of the program.

Some officials familiar with it say they consider warrantless eavesdropping inside the United States to be unlawful and possibly unconstitutional, amounting to an improper search. One government official involved in the operation said he privately complained to a Congressional official about his doubts about the program's legality. But nothing came of his inquiry. "People just looked the other way because they didn't want to know what was going on," he said.

A senior government official recalled that he was taken aback when he first learned of the operation. "My first reaction was, 'We're doing what?' " he said. While he said he eventually felt that adequate safeguards were put in place, he added that questions about the program's legitimacy were understandable.

Some of those who object to the operation argue that is unnecessary. By getting warrants through the foreign intelligence court, the N.S.A. and F.B.I. could eavesdrop on people inside the United States who might be tied to terrorist groups without skirting longstanding rules, they say.

The standard of proof required to obtain a warrant from the Foreign Intelligence Surveillance Court is generally considered lower than that required for a criminal warrant -- intelligence officials only have to show probable cause that someone may be "an agent of a foreign power," which includes international terrorist groups -- and the secret court has turned down only a small number of requests over the years. In 2004, according to the Justice Department, 1,754 warrants were approved. And the Foreign Intelligence Surveillance Court can grant emergency approval for wiretaps within hours, officials say.

Administration officials counter that they sometimes need to move more urgently, the officials said. Those involved in the program also said that the N.S.A.'s eavesdroppers might need to start monitoring large batches of numbers all at once, and that it would be impractical to seek permission from the Foreign Intelligence Surveillance Court first, according to the officials.

The N.S.A. domestic spying operation has stirred such controversy among some national security officials in part because of the agency's cautious culture and longstanding rules.

Widespread abuses -- including eavesdropping on Vietnam War protesters and civil rights activists -- by American intelligence agencies became public in the 1970's and led to passage of the Foreign Intelligence Surveillance Act, which imposed strict limits on intelligence gathering on American soil. Among other things, the law required search warrants, approved by the secret F.I.S.A. court, for wiretaps in national security cases. The agency, deeply scarred by the scandals, adopted additional rules that all but ended domestic spying on its part.

After the Sept. 11 attacks, though, the United States intelligence community was

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criticized for being too risk-averse. The National Security Agency was even cited by the independent 9/11 Commission for adhering to self-imposed rules that were stricter than those set by federal law.

Concerns and Revisions

Several senior government officials say that when the special operation began, there were few controls on it and little formal oversight outside the N.S.A. The agency can choose its eavesdropping targets and does not have to seek approval from Justice Department or other Bush administration officials. Some agency officials wanted nothing to do with the program, apparently fearful of participating in an illegal operation, a former senior Bush administration official said. Before the 2004 election, the official said, some N.S.A. personnel worried that the program might come under scrutiny by Congressional or criminal investigators if Senator John Kerry, the Democratic nominee, was elected president.

In mid-2004, concerns about the program expressed by national security officials, government lawyers and a judge prompted the Bush administration to suspend elements of the program and revamp it.

For the first time, the Justice Department audited the N.S.A. program, several officials said. And to provide more guidance, the Justice Department and the agency expanded and refined a checklist to follow in deciding whether probable cause existed to start monitoring someone's communications, several officials said.

A complaint from Judge Colleen Kollar-Kotelly, the federal judge who oversees the Federal Intelligence Surveillance Court, helped spur the suspension, officials said. The judge questioned whether information obtained under the N.S.A. program was being improperly used as the basis for F.I.S.A. wiretap warrant requests from the Justice Department, according to senior government officials. While not knowing all the details of the exchange, several government lawyers said there appeared to be concerns that the Justice Department, by trying to shield the existence of the N.S.A. program, was in danger of misleading the court about the origins of the information cited to justify the warrants.

One official familiar with the episode said the judge insisted to Justice Department lawyers at one point that any material gathered under the special N.S.A. program not be used in seeking wiretap warrants from her court. Judge Kollar-Kotelly did not return calls for comment.

A related issue arose in a case in which the F.B.I. was monitoring the communications of a terrorist suspect under a F.I.S.A.-approved warrant, even though the National Security Agency was already conducting warrantless eavesdropping.

According to officials, F.B.I. surveillance of Mr. Faris, the Brooklyn Bridge plotter, was dropped for a short time because of technical problems. At the time, senior Justice Department officials worried what would happen if the N.S.A. picked up information that needed to be presented in court. The government would then either have to disclose the N.S.A. program or mislead a criminal court about how it had gotten the information.

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Several national security officials say the powers granted the N.S.A. by President Bush go far beyond the expanded counterterrorism powers granted by Congress under the USA Patriot Act, which is up for renewal. The House on Wednesday approved a plan to reauthorize crucial parts of the law. But final passage has been delayed under the threat of a Senate filibuster because of concerns from both parties over possible intrusions on Americans' civil liberties and privacy.

Under the act, law enforcement and intelligence officials are still required to seek a F.I.S.A. warrant every time they want to eavesdrop within the United States. A recent agreement reached by Republican leaders and the Bush administration would modify the standard for F.B.I. wiretap warrants, requiring, for instance, a description of a specific target. Critics say the bar would remain too low to prevent abuses.

Bush administration officials argue that the civil liberties concerns are unfounded, and they say pointedly that the Patriot Act has not freed the N.S.A. to target Americans. "Nothing could be further from the truth," wrote John Yoo, a former official in the Justice Department's Office of Legal Counsel, and his co-author in a Wall Street Journal opinion article in December 2003. Mr. Yoo worked on a classified legal opinion on the N.S.A.'s domestic eavesdropping program.

At an April hearing on the Patriot Act renewal, Senator Barbara A. Mikulski, Democrat of Maryland, asked Attorney General Alberto R. Gonzales and Robert S. Mueller III, the director of the F.B.I., "Can the National Security Agency, the great electronic snooper, spy on the American people?"

"Generally," Mr. Mueller said, "I would say generally, they are not allowed to spy or to gather information on American citizens."

President Bush did not ask Congress to include provisions for the N.S.A. domestic surveillance program as part of the Patriot Act and has not sought any other laws to authorize the operation. Bush administration lawyers argued that such new laws were unnecessary, because they believed that the Congressional resolution on the campaign against terrorism provided ample authorization, officials said.

The Legal Line Shifts

Seeking Congressional approval was also viewed as politically risky because the proposal would be certain to face intense opposition on civil liberties grounds. The administration also feared that by publicly disclosing the existence of the operation, its usefulness in tracking terrorists would end, officials said.

The legal opinions that support the N.S.A. operation remain classified, but they appear to have followed private discussions among senior administration lawyers and other officials about the need to pursue aggressive strategies that once may have been seen as crossing a legal line, according to senior officials who participated in the discussions.

For example, just days after the Sept. 11, 2001, attacks on New York and the

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Pentagon, Mr. Yoo, the Justice Department lawyer, wrote an internal memorandum that argued that the government might use "electronic surveillance techniques and equipment that are more powerful and sophisticated than those available to law enforcement agencies in order to intercept telephonic communications and observe the movement of persons but without obtaining warrants for such uses."

Mr. Yoo noted that while such actions could raise constitutional issues, in the face of devastating terrorist attacks "the government may be justified in taking measures which in less troubled conditions could be seen as infringements of individual liberties."

The next year, Justice Department lawyers disclosed their thinking on the issue of warrantless wiretaps in national security cases in a little-noticed brief in an unrelated court case. In that 2002 brief, the government said that "the Constitution vests in the President inherent authority to conduct warrantless intelligence surveillance (electronic or otherwise) of foreign powers or their agents, and Congress cannot by statute extinguish that constitutional authority."

Administration officials were also encouraged by a November 2002 appeals court decision in an unrelated matter. The decision by the Foreign Intelligence Surveillance Court of Review, which sided with the administration in dismantling a bureaucratic "wall" limiting cooperation between prosecutors and intelligence officers, cited "the president's inherent constitutional authority to conduct warrantless foreign intelligence surveillance."

But the same court suggested that national security interests should not be grounds "to jettison the Fourth Amendment requirements" protecting the rights of Americans against undue searches. The dividing line, the court acknowledged, "is a very difficult one to administer."

Photo: In 2002, President Bush toured the National Security Agency at Fort Meade, Md., with Lt. Gen. Michael V. Hayden, who was then the agency's director and is now a full general and the principal deputy director of national intelligence. (Photo by Doug Mills/Associated Press)(pg. A16)

Chart: "A Half-Century of Surveillance"

HISTORY -- Created in 1952, the National Security Agency is the biggest American intelligence agency, with more than 30,000 employees at Fort Meade, Md., and listening posts around the world. Part of the Defense Department, it is the successor to the State Department's "Black Chamber" and American military eavesdropping and code-breaking operations that date to the early days of telegraph and telephone communications.

MISSION -- The N.S.A. runs the eavesdropping hardware of the American intelligence system, operating a huge network of satellites and listening devices around the world. Traditionally, its mission has been to gather intelligence overseas on foreign enemies by breaking codes and tapping into telephone and computer communications.

SUCCESSES -- Most of the agency's successes remain secret, but a few have been

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revealed. The agency listened to Soviet pilots and ground controllers during the shooting down of a civilian South Korean airliner in 1983; traced a disco bombing in Berlin in 1986 to Libya through diplomatic messages; and, more recently, used the identifying chips in cellphones to track terrorist suspects after the 2001 attacks.

DOMESTIC ACTIVITY -- The disclosure in the 1970's of widespread surveillance on political dissenters and other civil rights abuses led to restrictions at the N.S.A. and elsewhere on the use of domestic wiretaps. The N.S.A. monitors United Nations delegations and some foreign embassy lines on American soil, but is generally prohibited from listening in on the conversations of anyone inside the country without a special court order.

OFFICIAL RULES -- Since the reforms of the late 1970's, the N.S.A. has generally been permitted to target the communications of people on American soil only if they are believed to be "agents of a foreign power" -- a foreign nation or international terrorist group -- and a warrant is obtained from the Foreign Intelligence Surveillance Court.

EXPANDED ROLE -- Months after the terror attacks of Sept. 11, 2001, President Bush signed a secret executive order that relaxed restrictions on domestic spying by the N.S.A., according to officials with knowledge of the order. The order allows the agency to monitor without warrants the international phone calls and e-mail messages of some Americans and others inside the United States.

(pg. A16)

December 28, 2005, Wednesday - Because of an editing error, a front-page article on Dec. 16 about a decision by President Bush to authorize the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without warrants ordinarily required for domestic spying misstated the name of the court that would normally issue those warrants. It is the Foreign -- not Federal --Intelligence Surveillance Court.

---- INDEX REFERENCES ----

COMPANY: JUSTICE DEPARTMENT; PENTAGON LTD; STATE DEPARTMENT; CENTRAL INTELLIGENCE AGENCY; DEFENSE DEPARTMENT; UNITED NATIONS

NEWS SUBJECT: (Legal (1LE33); Social Issues (1SO05); Judicial (1JU36); International Terrorism (1IN37); Legislation (1LE97); United Nations (1UN54); Government (1GO80); Crime (1CR87); Civil Rights Law (1CI34); World Organizations (1IN77); Criminal Law (1CR79); Economics & Trade (1EC26); Political Parties (1PO73); Sept 11th Aftermath (1SE05); Public Affairs (1PU31))

INDUSTRY: (Smuggling & Illegal Trade (1SM35); Aerospace & Defense (1AE96); Defense (1DE43); Security (1SE29); Defense Intelligence (1DE90); Homeland Security (1HO11); Aerospace & Defense Regulatory (1AE25))

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December 24, 2005

Section: A

# DOMESTIC SURVEILLANCE: THE PROGRAM; SPY AGENCY MINED VAST DATA TROVE, OFFICIALS REPORT

ERIC LICHTBLAU and JAMES RISEN

National Security Agency has traced and analyzed large volumes of telephone and Internet communications flowing into and out of US as part of eavesdropping program that Pres Bush approved after Sept 11, 2001, attacks to hunt for evidence of terrorist activity; government officials say volume of information from telecommunications data and voice networks, without court-approved warrants, is much larger than White House has acknowledged; say it was collected by tapping directly into some of American telecommunication system's main arteries (M)

WASHINGTON, Dec. 23 The National Security Agency has traced and analyzed large volumes of telephone and Internet communications flowing into and out of the United States as part of the eavesdropping program that President Bush approved after the Sept. 11, 2001, attacks to hunt for evidence of terrorist activity, according to current and former government officials.

The volume of information harvested from telecommunication data and voice networks, without court-approved warrants, is much larger than the White House has acknowledged, the officials said. It was collected by tapping directly into some of the American telecommunication system's main arteries, they said.

As part of the program approved by President Bush for domestic surveillance without warrants, the N.S.A. has gained the cooperation of American telecommunications companies to obtain backdoor access to streams of domestic and international communications, the officials said.

The government's collection and analysis of phone and Internet traffic have raised questions among some law enforcement and judicial officials familiar with the program. One issue of concern to the Foreign Intelligence Surveillance Court, which has reviewed some separate warrant applications growing out of the N.S.A.'s surveillance program, is whether the court has legal authority over calls outside the United States that happen to pass through American-based telephonic "switches," according to officials familiar with the matter.

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"There was a lot of discussion about the switches" in conversations with the court, a Justice Department official said, referring to the gateways through which much of the communications traffic flows. "You're talking about access to such a vast amount of communications, and the question was, How do you minimize something that's on a switch that's carrying such large volumes of traffic? The court was very, very concerned about that."

Since the disclosure last week of the N.S.A.'s domestic surveillance program, President Bush and his senior aides have stressed that his executive order allowing eavesdropping without warrants was limited to the monitoring of international phone and e-mail communications involving people with known links to Al Qaeda.

What has not been publicly acknowledged is that N.S.A. technicians, besides actually eavesdropping on specific conversations, have combed through large volumes of phone and Internet traffic in search of patterns that might point to terrorism suspects. Some officials describe the program as a large data-mining operation.

The current and former government officials who discussed the program were granted anonymity because it remains classified.

Bush administration officials declined to comment on Friday on the technical aspects of the operation and the N.S.A.'s use of broad searches to look for clues on terrorists. Because the program is highly classified, many details of how the N.S.A. is conducting it remain unknown, and members of Congress who have pressed for a full Congressional inquiry say they are eager to learn more about the program's operational details, as well as its legality.

Officials in the government and the telecommunications industry who have knowledge of parts of the program say the N.S.A. has sought to analyze communications patterns to glean clues from details like who is calling whom, how long a phone call lasts and what time of day it is made, and the origins and destinations of phone calls and e-mail messages. Calls to and from Afghanistan, for instance, are known to have been of particular interest to the N.S.A. since the Sept. 11 attacks, the officials said.

This so-called "pattern analysis" on calls within the United States would, in many circumstances, require a court warrant if the government wanted to trace who calls whom.

The use of similar data-mining operations by the Bush administration in other contexts has raised strong objections, most notably in connection with the Total Information Awareness system, developed by the Pentagon for tracking terror suspects, and the Department of Homeland Security's Capps program for screening airline passengers. Both programs were ultimately scrapped after public outcries over possible threats to privacy and civil liberties.

But the Bush administration regards the N.S.A.'s ability to trace and analyze large volumes of data as critical to its expanded mission to detect terrorist plots before they can be carried out, officials familiar with the program say. Administration officials maintain that the system set up by Congress in 1978 under

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the Foreign Intelligence Surveillance Act does not give them the speed and flexibility to respond fully to terrorist threats at home.

A former technology manager at a major telecommunications company said that since the Sept. 11 attacks, the leading companies in the industry have been storing information on calling patterns and giving it to the federal government to aid in tracking possible terrorists.

"All that data is mined with the cooperation of the government and shared with them, and since 9/11, there's been much more active involvement in that area," said the former manager, a telecommunications expert who did not want his name or that of his former company used because of concern about revealing trade secrets.

Such information often proves just as valuable to the government as eavesdropping on the calls themselves, the former manager said.

"If they get content, that's useful to them too, but the real plum is going to be the transaction data and the traffic analysis," he said. "Massive amounts of traffic analysis information -- who is calling whom, who is in Osama Bin Laden's circle of family and friends -- is used to identify lines of communication that are then given closer scrutiny."

Several officials said that after President Bush's order authorizing the N.S.A. program, senior government officials arranged with officials of some of the nation's largest telecommunications companies to gain access to switches that act as gateways at the borders between the United States' communications networks and international networks. The identities of the corporations involved could not be determined.

The switches are some of the main arteries for moving voice and some Internet traffic into and out of the United States, and, with the globalization of the telecommunications industry in recent years, many international-to-international calls are also routed through such American switches.

One outside expert on communications privacy who previously worked at the N.S.A. said that to exploit its technological capabilities, the American government had in the last few years been quietly encouraging the telecommunications industry to increase the amount of international traffic that is routed through American-based switches.

The growth of that transit traffic had become a major issue for the intelligence community, officials say, because it had not been fully addressed by 1970's-era laws and regulations governing the N.S.A. Now that foreign calls were being routed through switches on American soil, some judges and law enforcement officials regarded eavesdropping on those calls as a possible violation of those decades-old restrictions, including the Foreign Intelligence Surveillance Act, which requires court-approved warrants for domestic surveillance.

Historically, the American intelligence community has had close relationships with many communications and computer firms and related technical industries. But the N.S.A.'s backdoor access to major telecommunications switches on American soil with

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the cooperation of major corporations represents a significant expansion of the agency's operational capability, according to current and former government officials.

Phil Karn, a computer engineer and technology expert at a major West Coast telecommunications company, said access to such switches would be significant. "If the government is gaining access to the switches like this, what you're really talking about is the capability of an enormous vacuum operation to sweep up data," he said.

---- INDEX REFERENCES ----

COMPANY: DEPARTMENT OF HOMELAND SECURITY; JUSTICE DEPARTMENT; PENTAGON LTD

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); International Terrorism (1IN37); Government (1GO80); Economics & Trade (1EC26); Sept 11th Aftermath (1SE05))

INDUSTRY: (Software (1SO30); Data Mining (1DA69); Electronic Information Censorship (1EL52); I.T. in Government (1IT22); Internet Technology (1IN39); I.T. Regulatory (1IT67); Internet Regulatory (1IN49); I.T. (1IT96); Internet Usage Statistics (1IN79); Software Technology (1SO75); Electronic Information Ethics (1EL74); Security (1SE29); Internet (1IN27); Homeland Security (1HO11); Software Regulatory (1SO49); Software Agents (1SO53); Internet Software (1IN50))

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June 23, 2006

Section: A

# BANK DATA SIFTED IN SECRET BY U.S. TO BLOCK TERROR

ERIC LICHTBLAU and JAMES RISEN; Barclay Walsh contributed reporting for this article.

Counterterrorism officials have used secret program, initiated weeks after Sept 11 attacks, to sift through financial records from vast international database and examine banking transactions of thousands of people in US; officials say program is limited to tracing transactions to Al Qaeda by reviewing records from nerve center of global banking, Belgian cooperative called Swift that routes about $6 trillion a day between financial institutions; records involve movements of money overseas and into and out of US, not routine domestic transactions; program, run out of CIA and overseen by Treasury Department, reportedly helped capture most wanted Qaeda figures in Southeast Asia; photos; chart; Under Sec Stuart Levey explains it as unique, powerful and legal window into terrorist networks, interview; cites president's emergency economic powers and multiple safeguards against unwarranted searches of Americans' records; officials have not sought individual court-approved warrants, relying on broad administrative subpoenas for millions of records from Swift; officials inside administration have expressed concern about legal and privacy issues; program is separate from NSA's warrantless eavesdropping but arises from same Bush administration effort to use technological tools and break down longstanding barriers to accessing private information; nearly 20 current and former officials and industry executives discuss Swift operation; authorities are keenly interested in money transfers by individuals, businesses and organizations inside US; Swift executives tried to end cooperation in 2003 and continued only after intervention by top officials including Fed's then-chairman Alan Greenspan, although with new controls, including outside auditing; debate within Treasury and Justice departments on legality discussed; The New York Times turned down administration request not to publish article; executive editor Bill Keller explains (L)

WASHINGTON, June 22 Under a secret Bush administration program initiated weeks after the Sept. 11 attacks, counterterrorism officials have gained access to financial records from a vast international database and examined banking transactions involving thousands of Americans and others in the United States, according to government and industry officials.

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The program is limited, government officials say, to tracing transactions of people suspected of having ties to Al Qaeda by reviewing records from the nerve center of the global banking industry, a Belgian cooperative that routes about $6 trillion daily between banks, brokerages, stock exchanges and other institutions. The records mostly involve wire transfers and other methods of moving money overseas and into and out of the United States. Most routine financial transactions confined to this country are not in the database.

Viewed by the Bush administration as a vital tool, the program has played a hidden role in domestic and foreign terrorism investigations since 2001 and helped in the capture of the most wanted Qaeda figure in Southeast Asia, the officials said.

The program, run out of the Central Intelligence Agency and overseen by the Treasury Department, "has provided us with a unique and powerful window into the operations of terrorist networks and is, without doubt, a legal and proper use of our authorities," Stuart Levey, an under secretary at the Treasury Department, said in an interview on Thursday.

The program is grounded in part on the president's emergency economic powers, Mr. Levey said, and multiple safeguards have been imposed to protect against any unwarranted searches of Americans' records.

The program, however, is a significant departure from typical practice in how the government acquires Americans' financial records. Treasury officials did not seek individual court-approved warrants or subpoenas to examine specific transactions, instead relying on broad administrative subpoenas for millions of records from the cooperative, known as Swift.

That access to large amounts of confidential data was highly unusual, several officials said, and stirred concerns inside the administration about legal and privacy issues.

"The capability here is awesome or, depending on where you're sitting, troubling," said one former senior counterterrorism official who considers the program valuable. While tight controls are in place, the official added, "the potential for abuse is enormous."

The program is separate from the National Security Agency's efforts to eavesdrop without warrants and collect domestic phone records, operations that have provoked fierce public debate and spurred lawsuits against the government and telecommunications companies.

But all the programs grew out of the Bush administration's desire to exploit technological tools to prevent another terrorist strike, and all reflect attempts to break down longstanding legal or institutional barriers to the government's access to private information about Americans and others inside the United States.

Officials described the Swift program as the biggest and most far-reaching of several secret efforts to trace terrorist financing. Much more limited agreements

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with other companies have provided access to A.T.M. transactions, credit card purchases and Western Union wire payments, the officials said.

Nearly 20 current and former government officials and industry executives discussed aspects of the Swift operation with The New York Times on condition of anonymity because the program remains classified. Some of those officials expressed reservations about the program, saying that what they viewed as an urgent, temporary measure had become permanent nearly five years later without specific Congressional approval or formal authorization.

Data from the Brussels-based banking consortium, formally known as the Society for Worldwide Interbank Financial Telecommunication, has allowed officials from the C.I.A., the Federal Bureau of Investigation and other agencies to examine "tens of thousands" of financial transactions, Mr. Levey said.

While many of those transactions have occurred entirely on foreign soil, officials have also been keenly interested in international transfers of money by individuals, businesses, charities and other groups under suspicion inside the United States, officials said. A small fraction of Swift's records involve transactions entirely within this country, but Treasury officials said they were uncertain whether any had been examined.

Swift executives have been uneasy at times about their secret role, the government and industry officials said. By 2003, the executives told American officials they were considering pulling out of the arrangement, which began as an emergency response to the Sept. 11 attacks, the officials said. Worried about potential legal liability, the Swift executives agreed to continue providing the data only after top officials, including Alan Greenspan, then chairman of the Federal Reserve, intervened. At that time, new controls were introduced.

Among the safeguards, government officials said, is an outside auditing firm that verifies that the data searches are based on intelligence leads about suspected terrorists. "We are not on a fishing expedition," Mr. Levey said. "We're not just turning on a vacuum cleaner and sucking in all the information that we can."

Swift and Treasury officials said they were aware of no abuses. But Mr. Levey, the Treasury official, said one person had been removed from the operation for conducting a search considered inappropriate.

Treasury officials said Swift was exempt from American laws restricting government access to private financial records because the cooperative was considered a messaging service, not a bank or financial institution.

But at the outset of the operation, Treasury and Justice Department lawyers debated whether the program had to comply with such laws before concluding that it did not, people with knowledge of the debate said. Several outside banking experts, however, say that financial privacy laws are murky and sometimes contradictory and that the program raises difficult legal and public policy questions.

The Bush administration has made no secret of its campaign to disrupt terrorist financing, and President Bush, Treasury officials and others have spoken publicly

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about those efforts. Administration officials, however, asked The New York Times not to publish this article, saying that disclosure of the Swift program could jeopardize its effectiveness. They also enlisted several current and former officials, both Democrat and Republican, to vouch for its value.

Bill Keller, the newspaper's executive editor, said: "We have listened closely to the administration's arguments for withholding this information, and given them the most serious and respectful consideration. We remain convinced that the administration's extraordinary access to this vast repository of international financial data, however carefully targeted use of it may be, is a matter of public interest."

Mr. Levey agreed to discuss the classified operation after the Times editors told him of the newspaper's decision.

On Thursday evening, Dana Perino, deputy White House press secretary, said: "Since immediately following 9/11, the American government has taken every legal measure to prevent another attack on our country. One of the most important tools in the fight against terror is our ability to choke off funds for the terrorists."

She added: "We know the terrorists pay attention to our strategy to fight them, and now have another piece of the puzzle of how we are fighting them. We also know they adapt their methods, which increases the challenge to our intelligence and law enforcement officials."

Referring to the disclosure by The New York Times last December of the National Security Agency's eavesdropping program, she said, "The president is concerned that once again The New York Times has chosen to expose a classified program that is working to protect our citizens."

Swift declined to discuss details of the program but defended its role in written responses to questions. "Swift has fully complied with all applicable laws," the consortium said. The organization said it insisted that the data be used only for terrorism investigations and had narrowed the scope of the information provided to American officials over time.

A Crucial Gatekeeper

Swift's database provides a rich hunting ground for government investigators. Swift is a crucial gatekeeper, providing electronic instructions on how to transfer money among 7,800 financial institutions worldwide. The cooperative is owned by more than 2,200 organizations, and virtually every major commercial bank, as well as brokerage houses, fund managers and stock exchanges, uses its services. Swift routes more than 11 million transactions each day, most of them across borders.

The cooperative's message traffic allows investigators, for example, to track money from the Saudi bank account of a suspected terrorist to a mosque in New York. Starting with tips from intelligence reports about specific targets, agents search the database in what one official described as a "24-7" operation. Customers' names, bank account numbers and other identifying information can be retrieved, the officials said.

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The data does not allow the government to track routine financial activity, like A.T.M. withdrawals, confined to this country, or to see bank balances, Treasury officials said. And the information is not provided in real time -- Swift generally turns it over several weeks later. Because of privacy concerns and the potential for abuse, the government sought the data only for terrorism investigations and prohibited its use for tax fraud, drug trafficking or other inquiries, the officials said.

The Treasury Department was charged by President Bush, in a September 2001 executive order, with taking the lead role in efforts to disrupt terrorist financing. Mr. Bush has been briefed on the program and Vice President Dick Cheney has attended C.I.A. demonstrations, the officials said. The National Security Agency has provided some technical assistance.

While the banking program is a closely held secret, administration officials have held classified briefings for some members of Congress and the Sept. 11 commission, the officials said. More lawmakers were briefed in recent weeks, after the administration learned The Times was making inquiries for this article.

Swift's 25-member board of directors, made up of representatives from financial institutions around the world, was previously told of the program. The Group of 10's central banks, in major industrialized countries, which oversee Swift, were also informed. It is not clear if other network participants know that American intelligence officials can examine their message traffic.

Because Swift is based overseas and has offices in the United States, it is governed by European and American laws. Several international regulations and policies impose privacy restrictions on companies that are generally regarded as more stringent than those in this country. United States law establishes some protections for the privacy of Americans' financial data, but they are not ironclad. A 1978 measure, the Right to Financial Privacy Act, has a limited scope and a number of exceptions, and its role in national security cases remains largely untested.

Several people familiar with the Swift program said they believed that they were exploiting a "gray area" in the law and that a case could be made for restricting the government's access to the records on Fourth Amendment and statutory grounds. They also worried about the impact on Swift if the program were disclosed.

"There was always concern about this program," a former official said.

One person involved in the Swift program estimated that analysts had reviewed international transfers involving "many thousands" of people or groups in the United States. Two other officials placed the figure in the thousands. Mr. Levey said he could not estimate the number.

The Swift data has provided clues to money trails and ties between possible terrorists and groups financing them, the officials said. In some instances, they said, the program has pointed them to new suspects, while in others it has buttressed cases already under investigation.

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Among the successes was the capture of a Qaeda operative, Riduan Isamuddin, better known as Hambali, believed to be the mastermind of the 2002 bombing of a Bali resort, several officials said. The Swift data identified a previously unknown figure in Southeast Asia who had financial dealings with a person suspected of being a member of Al Qaeda; that link helped locate Hambali in Thailand in 2003, they said.

In the United States, the program has provided financial data in investigations into possible domestic terrorist cells as well as inquiries of Islamic charities with suspected of having links to extremists, the officials said.

The data also helped identify a Brooklyn man who was convicted on terrorism-related charges last year, the officials said. The man, Uzair Paracha, who worked at a New York import business, aided a Qaeda operative in Pakistan by agreeing to launder $200,000 through a Karachi bank, prosecutors said.

In terrorism prosecutions, intelligence officials have been careful to "sanitize," or hide the origins of evidence collected through the program to keep it secret, officials said.

The Bush administration has pursued steps that may provide some enhanced legal standing for the Swift program. In late 2004, Congress authorized the Treasury Department to develop regulations requiring American banks to turn over records of international wire transfers. Officials say a preliminary version of those rules may be ready soon. One official described the regulations as an attempt to "formalize" access to the kind of information secretly provided by Swift, though other officials said the initiative was unrelated to the program.

The Scramble for New Tools

Like other counterterrorism measures carried out by the Bush administration, the Swift program began in the hectic days after the Sept. 11 attacks, as officials scrambled to identify new tools to head off further strikes.

One priority was to cut off the flow of money to Al Qaeda. The 9/11 hijackers had helped finance their plot by moving money through banks. Nine of the hijackers, for instance, funneled money from Europe and the Middle East to SunTrust bank accounts in Florida. Some of the $130,000 they received was wired by people overseas with known links to Al Qaeda.

Financial company executives, many of whom had lost friends at the World Trade Center, were eager to help federal officials trace terrorist money. "They saw 9/11 not just as an attack on the United States, but on the financial industry as a whole," said one former government official.

Quietly, counterterrorism officials sought to expand the information they were getting from financial institutions. Treasury officials, for instance, spoke with credit card companies about devising an alert if someone tried to buy fertilizer and timing devices that could be used for a bomb, but they were told the idea was

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not logistically possible, a lawyer in the discussions said.

The F.B.I. began acquiring financial records from Western Union and its parent company, the First Data Corporation. The programs were alluded to in Congressional testimony by the F.B.I. in 2003 and described in more detail in a book released this week, "The One Percent Doctrine," by Ron Suskind. Using what officials described as individual, narrowly framed subpoenas and warrants, the F.B.I. has obtained records from First Data, which processes credit and debit card transactions, to track financial activity and try to locate suspects.

Similar subpoenas for the Western Union data allowed the F.B.I. to trace wire transfers, mainly outside the United States, and to help Israel disrupt about a half-dozen possible terrorist plots there by unraveling the financing, an official said.

The idea for the Swift program, several officials recalled, grew out of a suggestion by a Wall Street executive, who told a senior Bush administration official about Swift's database. Few government officials knew much about the consortium, which is led by a Brooklyn native, Leonard H. Schrank, but they quickly discovered it offered unparalleled access to international transactions. Swift, a former government official said, was "the mother lode, the Rosetta stone" for financial data.

Intelligence officials were so eager to use the Swift data that they discussed having the C.I.A. covertly gain access to the system, several officials involved in the talks said. But Treasury officials resisted, the officials said, and favored going to Swift directly.

At the same time, lawyers in the Treasury Department and the Justice Department were considering possible legal obstacles to the arrangement, the officials said.

In 1976, the Supreme Court ruled that Americans had no constitutional right to privacy for their records held by banks or other financial institutions. In response, Congress passed the Right to Financial Privacy Act two years later, restricting government access to Americans' banking records. In considering the Swift program, some government lawyers were particularly concerned about whether the law prohibited officials from gaining access to records without a warrant or subpoena based on some level of suspicion about each target.

For many years, law enforcement officials have relied on grand-jury subpoenas or court-approved warrants for such financial data. Since 9/11, the F.B.I. has turned more frequently to an administrative subpoena, known as a national security letter, to demand such records.

After an initial debate, Treasury Department lawyers, consulting with the Justice Department, concluded that the privacy laws applied to banks, not to a banking cooperative like Swift. They also said the law protected individual customers and small companies, not the major institutions that route money through Swift on behalf of their customers.

Other state, federal and international regulations place different and sometimes

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conflicting restrictions on the government's access to financial records. Some put greater burdens on the company disclosing the information than on the government officials demanding it.

Among their considerations, American officials saw Swift as a willing partner in the operation. But Swift said its participation was never voluntary. "Swift has made clear that it could provide data only in response to a valid subpoena," according to its written statement.

Indeed, the cooperative's executives voiced early concerns about legal and corporate liability, officials said, and the Treasury Department's Office of Foreign Asset Control began issuing broad subpoenas for the cooperative's records related to terrorism. One official said the subpoenas were intended to give Swift some legal protection.

Underlying the government's legal analysis was the International Emergency Economic Powers Act, which Mr. Bush invoked after the 9/11 attacks. The law gives the president what legal experts say is broad authority to "investigate, regulate or prohibit" foreign transactions in responding to "an unusual and extraordinary threat."

But L. Richard Fischer, a Washington lawyer who wrote a book on banking privacy and is regarded as a leading expert in the field, said he was troubled that the Treasury Department would use broad subpoenas to demand large volumes of financial records for analysis. Such a program, he said, appears to do an end run around bank-privacy laws that generally require the government to show that the records of a particular person or group are relevant to an investigation.

"There has to be some due process," Mr. Fischer said. "At an absolute minimum, it strikes me as inappropriate."

Several former officials said they had lingering concerns about the legal underpinnings of the Swift operation. The program "arguably complies with the letter of the law, if not the spirit," one official said.

Another official said: "This was creative stuff. Nothing was clear cut, because we had never gone after information this way before."

Treasury officials said they considered the government's authority to subpoena the Swift records to be clear. "People do not have a privacy interest in their international wire transactions," Mr. Levey, the Treasury under secretary, said.

Tighter Controls Sought

Within weeks of 9/11, Swift began turning over records that allowed American analysts to look for evidence of terrorist financing. Initially, there appear to have been few formal limits on the searches.

"At first, they got everything -- the entire Swift database," one person close to the operation said.

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Intelligence officials paid particular attention to transfers to or from Saudi Arabia and the United Arab Emirates because most of the 9/11 hijackers were from those countries.

The volume of data, particularly at the outset, was often overwhelming, officials said. "We were turning on every spigot we could find and seeing what water would come out," one former administration official said. "Sometimes there were hits, but a lot of times there weren't."

Officials realized the potential for abuse, and narrowed the program's targets and put in more safeguards. Among them were the auditing firm, an electronic record of every search and a requirement that analysts involved in the operation document the intelligence that justified each data search. Mr. Levey said the program was used only to examine records of individuals or entities, not for broader data searches.

Despite the controls, Swift executives became increasingly worried about their secret involvement with the American government, the officials said. By 2003, the cooperative's officials were discussing pulling out because of their concerns about legal and financial risks if the program were revealed, one government official said.

"How long can this go on?" a Swift executive asked, according to the official.

Even some American officials began to question the open-ended arrangement. "I thought there was a limited shelf life and that this was going to go away," the former senior official said.

In 2003, administration officials asked Swift executives and some board members to come to Washington. They met with Mr. Greenspan, Robert S. Mueller III, the F.B.I. director, and Treasury officials, among others, in what one official described as "a full-court press." Aides to Mr. Greenspan and Mr. Mueller declined to comment on the meetings.

The executives agreed to continue supplying records after the Americans pledged to impose tighter controls. Swift representatives would be stationed alongside intelligence officials and could block any searches considered inappropriate, several officials said.

The procedural change provoked some opposition at the C.I.A. because "the agency was chomping at the bit to have unfettered access to the information," a senior counterterrorism official said. But the Treasury Department saw it as a necessary compromise, the official said, to "save the program."

Photos: Financial data from the Swift program led to the capture of Hambali, a Qaeda operative, in 2003. (Photo by Associated Press); The Swift data helped convict Uzair Paracha on terrorism-related charges last year in New York. (pg. A10)

Chart: "A Money Transfer"
The Brussels-based Society for Worldwide Interbank Financial Telecommunication,

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also known as Swift, provides electronic messaging services that direct financial transactions worth about $6 trillion a day among some 7,800 institutions worldwide. A look at a typical transaction:

SENDER instructs a bank, or other financial institution, to send money to a desired recipient, often in another country.

SENDER'S BANK sends detailed payment instructions to receiver's bank through Swift.

SWIFT processes the message that includes names and numbers of accounts involved and a description of the asset being transferred. It does not actually move money with the message.

IN THE UNITED STATES
107 institutions are members of Swift.
588 institutions use the system.

When the transaction is settled, the sender's bank transfers the money to the recipent's bank.

RECIPIENT'S BANK credits the amount to the recipient's account according to the message.

RECIPIENT collects the amount.

(pg. A10)

---- INDEX REFERENCES ----

COMPANY: JUSTICE DEPARTMENT; CENTRAL INTELLIGENCE AGENCY; SUNTRUST BANKS INC; FIRST DATA CORP

NEWS SUBJECT: (Consumer Protection (1CO43); Legal (1LE33); Benelux (1BE50); Consumer Privacy (1CO05); Business Lawsuits & Settlements (1BU19); Business Litigation (1BU04); Judicial (1JU36); International Terrorism (1IN37); Technology Law (1TE30); Government (1GO80); Government Litigation (1GO18); Economic Policy & Policymakers (1EC69); World Organizations (1IN77); Economics & Trade (1EC26); Sept 11th Aftermath (1SE05))

INDUSTRY: (E-Commerce Technology (1EC54); Financial Services Products (1FI16); Major Central Banks (1MA01); I.T. in Government (1IT22); Financial Services (1FI37); I.T. in Financial Services (1IT24); I.T. Regulatory (1IT67); Financial Services Regulatory (1FI03); I.T. (1IT96); Security (1SE29); Retail Regulatory (1RE54); Financial Services Convergence (1FI45); Electronic Transaction Technology (1EL86); Federal Reserve (1FE99))

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OTHER INDEXING: (Bush, George W (Pres); Lichtblau, Eric; Risen, James; Keller, Bill; Levey, Stuart (Under Sec); Greenspan, Alan; Hambali (Terrorist); Paracha, Uzair) (CENTRAL INTELLIGENCE AGENCY; CIA; CONGRESS; DANA PERINO; FEDERAL BUREAU OF INVESTIGATION; FEDERAL RESERVE; FIRST DATA; INTERNATIONAL EMERGENCY ECONOMIC POWERS; JUSTICE DEPARTMENT; NATIONAL SECURITY AGENCY; NSA; QAEDA; ROSETTA; SEC STUART LEVEY; SECRET; SOCIETY; SOCIETY FOR WORLDWIDE INTERBANK; STUART LEVEY; SUNTRUST; SUPREME COURT; TIMES; TREASURY; TREASURY DEPARTMENT; WHITE HOUSE; WORLDWIDE INTERBANK) (Al; Al Qaeda; Alan Greenspan; BANK; Bill Keller; Bush; DATA SIFTED; Democrat; Dick Cheney; Fed; Fischer; Greenspan; Leonard H. Schrank; Levey; Mueller; Photo; Qaeda; Quietly; Republican; Richard Fischer; Riduan Isamuddin; Robert S. Mueller; Ron Suskind; Tighter Controls Sought; Uzair Paracha) (Terrorism; Banks and Banking; Privacy; Computers and the Internet; Terrorism; Surveillance of Citizens by Government; Terrorism; Wiretapping and Other Eavesdropping Devices and Methods; Terrorism; Terrorism) (Far East, South and Southeast Asia and Pacific Areas)

COMPANY TERMS: AL QAEDA (TERRORIST GROUP); SWIFT (SOCIETY FOR WORLD INTERBANK FINANCIAL TELECOMMUNICATION); NEW YORK TIMES; CENTRAL INTELLIGENCE AGENCY; TREASURY DEPARTMENT; JUSTICE DEPARTMENT; NATIONAL SECURITY AGENCY; NATIONAL SECURITY AGENCY

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# EXHIBIT 9

National Intelligence Estimate

# Iran: Nuclear Intentions and Capabilities

*November 2007*

## OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

The Director of National Intelligence serves as the head of the Intelligence Community (IC), overseeing and directing the implementation of the National Intelligence Program and acting as the principal advisor to the President, the National Security Council, and the Homeland Security Council for intelligence matters.

The Office of the Director of National Intelligence is charged with:

- Integrating the domestic and foreign dimensions of US intelligence so that there are no gaps in our understanding of threats to our national security;
- Bringing more depth and accuracy to intelligence analysis; and
- Ensuring that US intelligence resources generate future capabilities as well as present results.

## NATIONAL INTELLIGENCE COUNCIL

Since its formation in 1973, the National Intelligence Council (NIC) has served as a bridge between the intelligence and policy communities, a source of deep substantive expertise on critical national security issues, and as a focal point for Intelligence Community collaboration. The NIC's key goal is to provide policymakers with the best, unvarnished, and unbiased information—regardless of whether analytic judgments conform to US policy. Its primary functions are to:

- Support the DNI in his role as Principal Intelligence Advisor to the President and other senior policymakers.
- Lead the Intelligence Community's effort to produce National Intelligence Estimates (NIEs) and other NIC products that address key national security concerns.
- Provide a focal point for policymakers, warfighters, and Congressional leaders to task the Intelligence Community for answers to important questions.
- Reach out to nongovernment experts in academia and the private sector—and use alternative analyses and new analytic tools—to broaden and deepen the Intelligence Community's perspective.

## NATIONAL INTELLIGENCE ESTIMATES AND THE NIE PROCESS

National Intelligence Estimates (NIEs) are the Intelligence Community's (IC) most authoritative written judgments on national security issues and designed to help US civilian and military leaders develop policies to protect US national security interests. NIEs usually provide information on the current state of play but are primarily "estimative"—that is, they make judgments about the likely course of future events and identify the implications for US policy.

The NIEs are typically requested by senior civilian and military policymakers, Congressional leaders and at times are initiated by the National Intelligence Council (NIC). Before a NIE is drafted, the relevant NIO is responsible for producing a concept paper or terms of reference (TOR) and circulates it throughout the Intelligence Community for comment. The TOR defines the key estimative questions, determines drafting responsibilities, and sets the drafting and publication schedule. One or more IC analysts are usually assigned to produce the initial text. The NIC then meets to critique the draft before it is circulated to the broader IC. Representatives from the relevant IC agencies meet to hone and coordinate line-by-line the full text of the NIE. Working with their Agencies, reps also assign the level of confidence they have in each key judgment. IC reps discuss the quality of sources with collectors, and the National Clandestine Service vets the sources used to ensure the draft does not include any that have been recalled or otherwise seriously questioned.

All NIEs are reviewed by National Intelligence Board, which is chaired by the DNI and is composed of the heads of relevant IC agencies. Once approved by the NIB, NIEs are briefed to the President and senior policymakers. The whole process of producing NIEs normally takes at least several months.

The NIC has undertaken a number of steps to improve the NIE process under the DNI. These steps are in accordance with the goals and recommendations set out in the SSCI and WMD Commission reports and the 2004 Intelligence Reform and Prevention of Terrorism Act. Most notably, over the last year and a half, the IC has:

- ***Created new procedures to integrate formal reviews of source reporting and technical judgments.*** The Directors of the National Clandestine Service, NSA, NGA, and DIA and the Assistant Secretary/INR are now required to submit formal assessments that highlight the strengths, weaknesses, and overall credibility of their sources used in developing the critical judgments of the NIE.

- ***Applied more rigorous standards.*** A textbox is incorporated into all NIEs that explains what we mean by such terms as "we judge" and that clarifies the difference between judgments of likelihood and confidence levels. We have made a concerted effort to not only highlight differences among agencies but to explain the reasons for such differences and to prominently display them in the Key Judgments.

# Scope Note

This National Intelligence Estimate (NIE) assesses the status of Iran's nuclear program, and the program's outlook over the next 10 years. This time frame is more appropriate for estimating capabilities than intentions and foreign reactions, which are more difficult to estimate over a decade. In presenting the Intelligence Community's assessment of Iranian nuclear intentions and capabilities, the NIE thoroughly reviews all available information on these questions, examines the range of reasonable scenarios consistent with this information, and describes the key factors we judge would drive or impede nuclear progress in Iran. This NIE is an extensive reexamination of the issues in the May 2005 assessment.

This Estimate focuses on the following key questions:

- What are Iran's intentions toward developing nuclear weapons?
- What domestic factors affect Iran's decisionmaking on whether to develop nuclear weapons?
- What external factors affect Iran's decisionmaking on whether to develop nuclear weapons?
- What is the range of potential Iranian actions concerning the development of nuclear weapons, and the decisive factors that would lead Iran to choose one course of action over another?
- What is Iran's current and projected capability to develop nuclear weapons? What are our key assumptions, and Iran's key chokepoints/vulnerabilities?

**This NIE does *not* assume that Iran intends to acquire nuclear weapons. Rather, it examines the intelligence to assess Iran's capability and intent (or lack thereof) to acquire nuclear weapons, taking full account of Iran's dual-use uranium fuel cycle and those nuclear activities that are at least partly civil in nature.**

This Estimate does assume that the strategic goals and basic structure of Iran's senior leadership and government will remain similar to those that have endured since the death of Ayatollah Khomeini in 1989. We acknowledge the potential for these to change during the time frame of the Estimate, but are unable to confidently predict such changes or their implications. This Estimate does not assess how Iran may conduct future negotiations with the West on the nuclear issue.

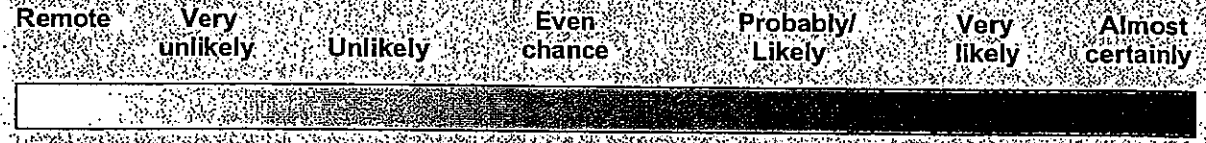
**This Estimate incorporates intelligence reporting available as of 31 October 2007.**

**What We Mean When We Say: An Explanation of Estimative Language**

We use phrases such as *we judge, we assess,* and *we estimate*—and probabilistic terms such as *probably* and *likely*—to convey analytical assessments and judgments. Such statements are not facts, proof, or knowledge. These assessments and judgments generally are based on collected information, which often is incomplete or fragmentary. Some assessments are built on previous judgments. In all cases, assessments and judgments are not intended to imply that we have "proof" that shows something to be a fact or that definitively links two items or issues.

In addition to conveying judgments rather than certainty, our estimative language also often conveys 1) our assessed likelihood or probability of an event; and 2) the level of confidence we ascribe to the judgment.

*Estimates of Likelihood.* Because analytical judgments are not certain, we use probabilistic language to reflect the Community's estimates of the likelihood of developments or events. Terms such as *probably, likely, very likely,* or *almost certainly* indicate a greater than even chance. The terms *unlikely* and *remote* indicate a less then even chance that an event will occur; they do not imply that an event will not occur. Terms such as *might* or *may* reflect situations in which we are unable to assess the likelihood, generally because relevant information is unavailable, sketchy, or fragmented. Terms such as *we cannot dismiss, we cannot rule out,* or *we cannot discount* reflect an unlikely, improbable, or remote event whose consequences are such that it warrants mentioning. The chart provides a rough idea of the relationship of some of these terms to each other.




*Confidence in Assessments.* Our assessments and estimates are supported by information that varies in scope, quality and sourcing. Consequently, we ascribe *high, moderate,* or *low* levels of confidence to our assessments, as follows:

- *High confidence* generally indicates that our judgments are based on high-quality information, and/or that the nature of the issue makes it possible to render a solid judgment. A "high confidence" judgment is not a fact or a certainty, however, and such judgments still carry a risk of being wrong.
- *Moderate confidence* generally means that the information is credibly sourced and plausible but not of sufficient quality or corroborated sufficiently to warrant a higher level of confidence.
- *Low confidence* generally means that the information's credibility and/or plausibility is questionable, or that the information is too fragmented or poorly corroborated to make solid analytic inferences, or that we have significant concerns or problems with the sources.

# Key Judgments

A. We judge with high confidence that in fall 2003, Tehran halted its nuclear weapons program[1]; we also assess with moderate-to-high confidence that Tehran at a minimum is keeping open the option to develop nuclear weapons. We judge with high confidence that the halt, and Tehran's announcement of its decision to suspend its declared uranium enrichment program and sign an Additional Protocol to its Nuclear Non-Proliferation Treaty Safeguards Agreement, was directed primarily in response to increasing international scrutiny and pressure resulting from exposure of Iran's previously undeclared nuclear work.

- We assess with high confidence that until fall 2003, Iranian military entities were working under government direction to develop nuclear weapons.

- We judge with high confidence that the halt lasted at least several years. (Because of intelligence gaps discussed elsewhere in this Estimate, however, DOE and the NIC assess with only moderate confidence that the halt to those activities represents a halt to Iran's entire nuclear weapons program.)

- We assess with moderate confidence Tehran had not restarted its nuclear weapons program as of mid-2007, but we do not know whether it currently intends to develop nuclear weapons.

- We continue to assess with moderate-to-high confidence that Iran does not currently have a nuclear weapon.

- Tehran's decision to halt its nuclear weapons program suggests it is less determined to develop nuclear weapons than we have been judging since 2005. Our assessment that the program probably was halted primarily in response to international pressure suggests Iran may be more vulnerable to influence on the issue than we judged previously.

B. We continue to assess with low confidence that Iran probably has imported at least some weapons-usable fissile material, but still judge with moderate-to-high confidence it has not obtained enough for a nuclear weapon. We cannot rule out that Iran has acquired from abroad—or will acquire in the future—a nuclear weapon or enough fissile material for a weapon. Barring such acquisitions, if Iran wants to have nuclear weapons it would need to produce sufficient amounts of fissile material indigenously—which we judge with high confidence it has not yet done.

C. We assess centrifuge enrichment is how Iran probably could first produce enough fissile material for a weapon, if it decides to do so. Iran resumed its declared centrifuge

[1] For the purposes of this Estimate, by "nuclear weapons program" we mean Iran's nuclear weapon design and weaponization work and covert uranium conversion-related and uranium enrichment-related work; we do not mean Iran's declared civil work related to uranium conversion and enrichment.

enrichment activities in January 2006, despite the continued halt in the nuclear weapons program. Iran made significant progress in 2007 installing centrifuges at Natanz, but we judge with moderate confidence it still faces significant technical problems operating them.

- We judge with moderate confidence that the earliest possible date Iran would be technically capable of producing enough HEU for a weapon is late 2009, but that this is very unlikely.

- We judge with moderate confidence Iran probably would be technically capable of producing enough HEU for a weapon sometime during the 2010-2015 time frame. (INR judges Iran is unlikely to achieve this capability before 2013 because of foreseeable technical and programmatic problems.) All agencies recognize the possibility that this capability may not be attained until *after* 2015.

D. Iranian entities are continuing to develop a range of technical capabilities that could be applied to producing nuclear weapons, if a decision is made to do so. For example, Iran's civilian uranium enrichment program is continuing. We also assess with high confidence that since fall 2003, Iran has been conducting research and development projects with commercial and conventional military applications—some of which would also be of limited use for nuclear weapons.

E. We do not have sufficient intelligence to judge confidently whether Tehran is willing to maintain the halt of its nuclear weapons program indefinitely while it weighs its options, or whether it will or already has set specific deadlines or criteria that will prompt it to restart the program.

- Our assessment that Iran halted the program in 2003 primarily in response to international pressure indicates Tehran's decisions are guided by a cost-benefit approach rather than a rush to a weapon irrespective of the political, economic, and military costs. This, in turn, suggests that some combination of threats of intensified international scrutiny and pressures, along with opportunities for Iran to achieve its security, prestige, and goals for regional influence in other ways, might—if perceived by Iran's leaders as credible—prompt Tehran to extend the current halt to its nuclear weapons program. It is difficult to specify what such a combination might be.

- We assess with moderate confidence that convincing the Iranian leadership to forgo the eventual development of nuclear weapons will be difficult given the linkage many within the leadership probably see between nuclear weapons development and Iran's key national security and foreign policy objectives, and given Iran's considerable effort from at least the late 1980s to 2003 to develop such weapons. In our judgment, only an Iranian political decision to abandon a nuclear weapons objective would plausibly keep Iran from eventually producing nuclear weapons—and such a decision is inherently reversible.

F. We assess with moderate confidence that Iran probably would use covert facilities—rather than its declared nuclear sites—for the production of highly enriched uranium for a weapon. A growing amount of intelligence indicates Iran was engaged in covert uranium conversion and uranium enrichment activity, but we judge that these efforts probably were halted in response to the fall 2003 halt, and that these efforts probably had not been restarted through at least mid-2007.

G. We judge with high confidence that Iran will not be technically capable of producing and reprocessing enough plutonium for a weapon before about 2015.

H. We assess with high confidence that Iran has the scientific, technical and industrial capacity eventually to produce nuclear weapons if it decides to do so.

**Key Differences Between the Key Judgments of This Estimate on Iran's Nuclear Program and the May 2005 Assessment**

| 2005 IC Estimate | 2007 National Intelligence Estimate |
|---|---|
| Assess with high confidence that Iran currently is determined to develop nuclear weapons despite its international obligations and international pressure, but we do not assess that Iran is immovable. | Judge with high confidence that in fall 2003, Tehran halted its nuclear weapons program. Judge with high confidence that the halt lasted at least several years. (DOE and the NIC have moderate confidence that the halt to those activities represents a halt to Iran's entire nuclear weapons program.) Assess with moderate confidence Tehran had not restarted its nuclear weapons program as of mid-2007, but we do not know whether it currently intends to develop nuclear weapons. Judge with high confidence that the halt was directed primarily in response to increasing international scrutiny and pressure resulting from exposure of Iran's previously undeclared nuclear work. Assess with moderate-to-high confidence that Tehran at a minimum is keeping open the option to develop nuclear weapons. |
| We have moderate confidence in projecting when Iran is likely to make a nuclear weapon; we assess that it is unlikely before early-to-mid next decade. | We judge with moderate confidence that the earliest possible date Iran would be technically capable of producing enough highly enriched uranium (HEU) for a weapon is late 2009, but that this is very unlikely. We judge with moderate confidence Iran probably would be technically capable of producing enough HEU for a weapon sometime during the 2010-2015 time frame. (INR judges that Iran is unlikely to achieve this capability before 2013 because of foreseeable technical and programmatic problems.) |
| Iran could produce enough fissile material for a weapon by the end of this decade if it were to make more rapid and successful progress than we have seen to date. | We judge with moderate confidence that the earliest possible date Iran would be technically capable of producing enough highly enriched uranium (HEU) for a weapon is late 2009, but that this is very unlikely. |

# EXHIBIT 10

ANNALS OF NATIONAL SECURITY

# IRAN AND THE BOMB

*How real is the nuclear threat?*

BY SEYMOUR M. HERSH

Is Iran actively trying to develop nuclear weapons? Members of the Obama Administration often talk as if this were a foregone conclusion, as did their predecessors under George W. Bush. There is a large body of evidence, however, including some of America's most highly classified intelligence assessments, suggesting that the United States could be in danger of repeating a mistake similar to the one made with Saddam Hussein's Iraq eight years ago—allowing anxieties about the policies of a tyrannical regime to distort our estimations of the state's military capacities and intentions. The two most recent National Intelligence Estimates (N.I.E.s) on Iranian nuclear progress, representing the best judgment of the senior officers from all the major American intelligence agencies, have stated that there is no conclusive evidence that Iran has made any effort to build the bomb since 2003.

Despite years of covert operations inside Iran, extensive satellite imagery, and the recruitment of many Iranian intelligence assets, the United States and its allies, including Israel, have been unable to find irrefutable evidence of an ongoing hidden nuclear-weapons program in Iran, according to intelligence and diplomatic officials here and abroad. One American defense consultant told me that as yet there is "no smoking calutron," although, like many Western government officials, he is convinced that Iran is intent on becoming a nuclear state sometime in the future.

The general anxiety about the Iranian regime is firmly grounded. President Mahmoud Ahmadinejad has repeatedly questioned the Holocaust and expressed a desire to see the state of Israel eliminated, and he has defied the 2006 United Nations resolution calling on Iran to suspend its nuclear-enrichment program. Tehran is also active in arming Hezbollah in Lebanon and Hamas in Gaza. Iran is heavily invested in nuclear technology, and has a power plant ready to go on line in the port city of Bushehr, with a second in the planning stage. In the past four years, it has tripled the number of centrifuges in operation at its main enrichment facility at Natanz, which is buried deep underground. On the other hand, the Iranian enrichment program is being monitored by the International Atomic Energy Agency, and Natanz and all Iran's major declared nuclear installations are under extensive video surveillance. I.A.E.A. inspectors have expressed frustration with Iran's level of coöperation and cited an increase in production of uranium, but they have been unable to find any evidence that enriched uranium has been diverted to an illicit weapons program.

National Intelligence Estimates, whose preparation is the responsibility of the Director of National Intelligence, Lieutenant General James Clapper, of the Air Force, are especially sensitive, because the analysts who prepare them have access to top-secret communications intercepts as well as the testimony of foreign scientists and intelligence officials, among others, who have been enlisted by the C.I.A. and its military counterpart, the Defense Intelligence Agency. In mid-February, Clapper's office provided the House and Senate intelligence committees with an update to the N.I.E. on the Iranian nuclear-weapons program. The previous assessment, issued in 2007, created consternation and anger inside the Bush Administration and in Congress by concluding, "with high confidence," that Iran had halted a nascent nuclear-weapons program in 2003. That estimate added, "We do not know whether it currently intends to develop nuclear weapons." The Bush White House had insisted that a summary of the 2007 N.I.E. be made public—an unprecedented move—but then President Bush and Vice-President Dick Cheney quickly questioned its conclusions. Peter Hoekstra, a Republican from Michigan who had been chairman of the House Intelligence Committee, characterized the N.I.E. as "a piece of trash."

The public dispute over the 2007 N.I.E. led to bitter infighting within the Obama Administration and the intelligence community over this year's N.I.E. update—a discrepancy between the available intelligence and what many in the White House and Congress believed to be true. Much of the debate, which delayed the issuing of the N.I.E. for more than four months, centered on the Defense Intelligence Agency's astonishing assessment that Iran's earlier nuclear-weapons research had been targeted at its old regional enemy, Iraq, and not at Israel, the United States, or Western Europe. One retired senior intelligence official told me that the D.I.A. analysts had determined that Iran "does not have an ongoing weapons program, and all of the available intelligence shows that the program, when it did exist, was aimed at Iraq. The Iranians thought Iraq was developing a bomb." The Iranian nuclear-weapons program evidently came to an end following the American-led invasion of Iraq, in early 2003, and the futile hunt for the Iraqi W.M.D. arsenal. Israeli Prime Minister Benjamin Netanyahu insists that Iran, like Libya, halted its nuclear program in 2003 because it feared military action. "The more Iran believes that all options are on the table, the less the chance of confrontation," Netanyahu told a joint session of Congress last week.

The D.I.A. analysts understood that the 2011 assessment would be politically explosive. "If Iran is not a nuclear threat, then the Israelis have no reason to threaten imminent military action," the retired senior intelligence official said. "The guys working on this are good analysts, and their bosses are backing them up."

The internal debate over the Iran assessment was alluded to last fall by W. Patrick Lang, a retired Army intelligence officer who served for years as the ranking D.I.A. analyst on the Middle East and contributed to many N.I.E.s. "Do you all know what an N.I.E. is?" Lang said to an

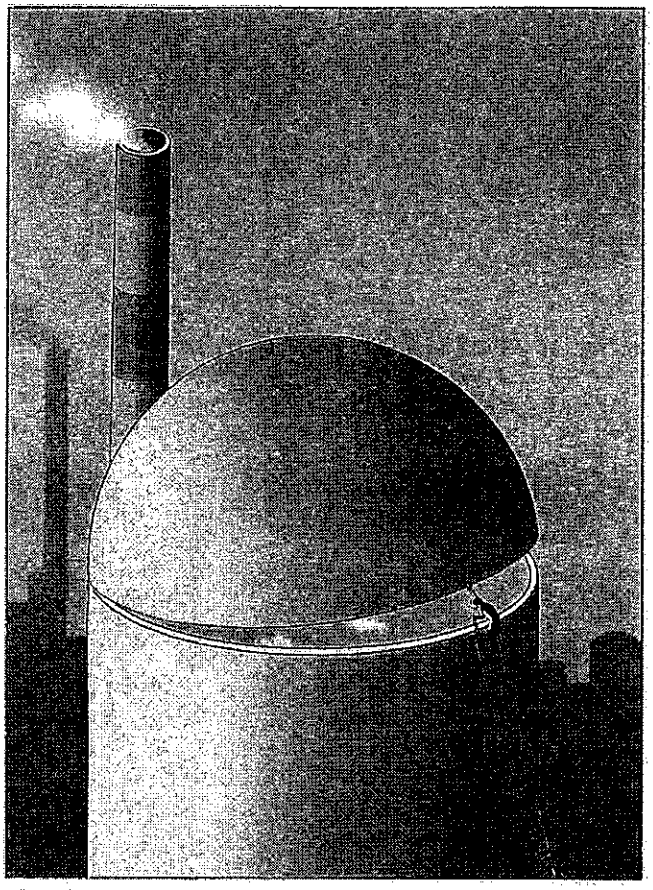
audience at the University of Virginia. "The National Intelligence Estimate is the ground truth of the American government hammered out on the anvil of the Lord. . . . Then, once things are approved, people stand up at meetings and wave them and point to them and say, 'See here, it says here that Saleh'"—Ali Abdullah Saleh, the President of Yemen—"'is a fink.' And then everybody has to agree that Saleh is a fink."

Lang told his audience that there was "enormous pressure" on intelligence analysts in 2002 to produce an N.I.E. that buttressed the Bush Administration's claims about the threat posed by Iraq's suspected nuclear arsenal before the invasion of Iraq. After the disaster of Iraq, the atmosphere shifted. "Analysts in the intelligence community are just refusing to sign up this time for a lot of baloney," Lang said. "I regard that as a highly encouraging sign." The D.I.A. analysts insisted that the updated N.I.E. deal primarily with the facts about Iran's nuclear program, Lang told me later, and Lieutenant General Ronald L. Burgess, Jr., the director of the D.I.A., supported this approach. "These guys are not drinking the Kool-Aid," Lang said. "They stopped the N.I.E. cold."

Burgess, whose long career in Army intelligence includes two years with the Joint Special Operations Command, has repeatedly stressed his belief that Iran would be capable of building a bomb at some point in the future. But Burgess also told the Voice of America in January, 2010, that "the bottom-line assessments of the [2007] N.I.E. still hold true. We have not seen indication that the government has made the decision to move ahead with the program. But the fact still remains that we don't know what we don't know." (A spokesman for General Burgess told me that "because of the classification of the information in the N.I.E., it would be inappropriate for us to engage in a discussion with you.") A government consultant who has read the highly classified 2011 N.I.E. update depicted the report as reinforcing the essential conclusion of the 2007 paper: Iran halted weaponization in 2003. "There's more evidence to support that assessment," the consultant told me.

The D.I.A.'s conclusion that Iran's ultimate target would have been Iraq, and not Israel or a Western power, was not included in the final version of the 2011 report, as presented to the United States government, in February. "It was in, and then got taken out, because, as they"—the analysts in General Clapper's office—"told the D.I.A., 'There's no hard proof, and we can't know because of the uncertainty of the information we're getting,'" the retired senior intelligence official said. "'But the implications of Iran's getting nuclear weapons are so dire and the benefits to them are so great that it will compel them to continue pursuit of a nuclear capability. And you'"—meaning the D.I.A. analysts—"'cannot disprove there is a weapons program.'

"It's the same old shit: the N.I.E. does not say absolutely or unequivocally that Iran has a nuclear program that is going to be deployed," the retired official continued. "The important thing is that nothing substantially new has been learned in the last four years, and none of our efforts—informants, penetrations, planting of sensors—leads to a bomb."



*There is no conclusive evidence that Iran has tried to build a bomb since 2003.*

The N.I.E. makes it clear that U.S. intelligence has been unable to find decisive evidence that Iran has been moving enriched uranium to an underground weapon-making center. In the past six years, soldiers from the Joint Special Operations Force, working with Iranian intelligence assets, put in place cutting-edge surveillance techniques, according to two former intelligence officers. Street



GUY BILLOUT

signs were surreptitiously removed in heavily populated areas of Tehran—say, near a university suspected of conducting nuclear enrichment—and replaced with similar-looking signs implanted with radiation sensors. American operatives, working undercover, also removed bricks from a building or two in central Tehran that they thought housed nuclear-enrichment activities and replaced them with bricks embedded with radiation-monitoring devices.

High-powered sensors disguised as stones were spread randomly along roadways in a mountainous area where a suspected underground weapon site was under construction. The stones were capable of transmitting electronic data on the weight of the vehicles going in and out of the site; a truck going in light and coming out heavy could be hauling dirt—crucial evidence of excavation work. There is also constant satellite coverage of major suspect areas in Iran, and some American analysts were assigned the difficult task of examining footage in the hope of finding air vents—signs, perhaps, of an underground facility in lightly populated areas.

This year, when intelligence officials presented the N.I.E. on Iranian nuclear capacity to the Senate and House intelligence committees, they did not issue a summary for public consumption. The briefings were closed, but, as always, a few legislators and officials provided background accounts to the press. The accounts were incomplete, and did not relay the essential finding of the estimate: that nothing significantly new had been learned to suggest that Iran is pursuing a nuclear weapon.

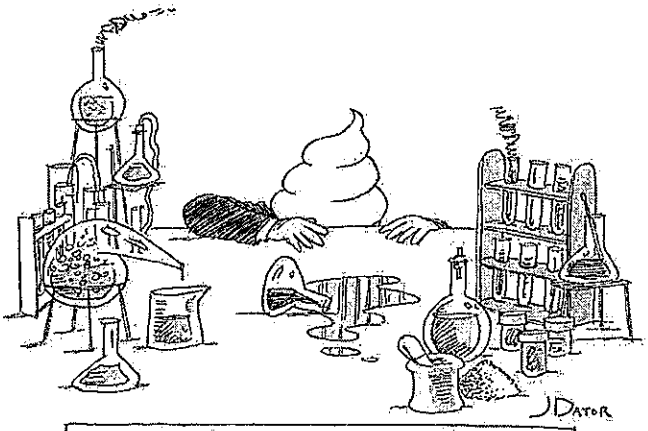
The few official statements at the time made it clear that U.S. intelligence officials simply did not know whether Iran would become a nuclear state. General Clapper told the Senate Intelligence Committee on February 16th, in his annual Worldwide Threat Assessment, that Iran was "keeping open the option to develop nuclear weapons, in part by developing various nuclear capabilities that better position it to produce such weapons, should it choose to do so. We do not know, however, if Iran will eventually decide to build nuclear weapons." He added that Iran was technically capable of producing enough enriched uranium for a nuclear weapon in the next few years, "if it chooses to do so."

A month later, in public testimony before the Senate Armed Services Committee, Carl Levin, Democrat of Michigan, the committee's chairman, asked Clapper about his conclusion that Iran had not decided to re-start its nuclear-weapons work: "Is that correct?" Clapper said yes, but added that he would prefer to speak more fully in a classified hearing. Levin persisted: "O.K., but what is the level of confidence that you have? . . . Is that a high level?" Clapper responded, "Yes, it is."

Joseph Lieberman, an Independent who is conservative on security and foreign-policy issues and one of Israel's strongest supporters in the Senate, chose to speak publicly about Iran after the hearing. "I can't say much in detail," Lieberman said, according to Agence France-Presse, "but it's pretty clear that they're continuing to work seriously on a nuclear-weapons program."

Lieberman's statement reflected the view of many in Congress and in the Obama Administration. As Presidential candidates in 2008, both Barack Obama and Hillary Clinton had warned of an Iranian nuclear arsenal, and occasionally spoke as if it were an established fact that Iran had decided to get the bomb. In Obama's first prime-time news conference as President, in early February, 2009, he declared that Iran's "financing of terrorist organizations like Hezbollah and Hamas, the bellicose language that they've used towards Israel, their development of a nuclear weapon, or their pursuit of a nuclear weapon—that all of those things create the possibility of destabilizing the region and are not only contrary to our interests but I think are contrary to the interests of international peace."

Thomas E. Donilon, Obama's national-security adviser, returned to that theme a few weeks ago. In a speech on May 12th to the Washington Institution for Near East Policy, he said that the United States would continue its aggressive sanctions policy until Iran proves that its enrichment intentions are peaceful and meets all its obligations under the nonproliferation treaty, to which Iran is a signatory. "Like all N.P.T. parties, Iran has the right to peaceful nuclear energy," Donilon said. "But it also has a responsibility to fulfill its obligations. There is no alternative to doing so." He did not mention the current intelligence stating that there is no conclusive evidence that Iran is making any efforts to weaponize; nor could he say that the current sanctions regime is aimed at forcing Iran to stop a nuclear-weapons program that does not exist. Later in his speech, however, Donilon said that Iran's nuclear program "is part of a larger pattern of destabilizing activities throughout the region. . . . We have no illusions about the Iranian regime's regional ambitions. We know that they will try to exploit this period of tumult and will remain vigilant. . . . The




THE STRANGE CASE OF DR. JEKYLL AND MISTER SOFTEE

door to diplomacy remains open to Iran. But that diplomacy must be meaningful and not a tactical attempt to ward off sanctions."

America's sanctions policy thus is increasingly aimed, as Donilon indicated, at changing Iran's political behavior, and the spectre of nuclear-weapons development has become a tool for accomplishing that goal.

President Obama has been prudent in his public warnings about the consequences of an Iranian bomb, but he and others in his Administration have often overstated the available intelligence about Iranian intentions. Last October, Dennis Ross, a leading Administration adviser on the region, told a meeting of the American Israel Public Affairs Committee that "the challenge of Iran" was "a foremost national-security priority of the United States." He said that Iran had "significantly expanded its nuclear program," and accused it of pursuing the program "in violation of its international obligations." He also repeated the President's declaration that his Administration was "determined to prevent Iran from acquiring nuclear weapons."

"The point here is that the pressure on Iran only continues to grow," Ross told the AIPAC convention. "Ultimately, we hope that the severe pressure Iran faces today will compel a change in behavior. . . . Its leaders should listen carefully to President Obama, who has said many times, 'We are determined to prevent Iran from acquiring nuclear weapons.'" The Obama Administration has played a leading role in winning more sanctions against Iran in the United Nations, the European Union, and Congress. The sanctions bar a wide array of weapons and missile sales to Iran, and make it more difficult for banks and other financial institutions to do business there.

In early March, Robert Einhorn, the special adviser to Secretary of State Hillary Clinton for nonproliferation and arms control, gave a talk about the Iranian nuclear posture to the Arms Control Association, in which he went beyond the findings of the most recent N.I.E. "They are clearly acquiring all the necessary elements of a nuclear-weapons capability," Einhorn said. Leonard Spector, the deputy director of nonproliferation studies at the Monterey Institute, and a fellow arms-control expert, pointedly asked whether the Obama Administration now believed that Iran has re-started weaponization activities. Einhorn said, "The N.I.E. addresses this issue, but, as I mentioned before, it remains classified." Einhorn also referred Spector to the most recent I.A.E.A. report on Iran, which, like previous reports, included a complaint that Tehran was refusing to help resolve a number of issues that were preventing the agency from establishing that all nuclear activities in Iran were peaceful. Iran maintains that the issues in dispute were based solely on fabricated documents. (Einhorn said in an e-mail that he would prefer not to discuss Iranian weaponization with me, as did a spokesman for Gary Samore, President Obama's special assistant for arms control.)

Officials in Western Europe and Israel told me what their governments had concluded about Iranian nuclear weapons. Although none knew of any specific evidence of an Iranian weapons program, all said that they believed that Iran was intent on getting the bomb—and quickly. One senior European diplomat complained about America's N.I.E. process. "The American intelligence community was trying desperately not to be blamed anew for an intelligence assessment, as it was in Iraq," he said. "I think Iraq paralyzed the community, and its first N.I.E. on Iran was disastrous, in my view, because it conflated weaponization with the process of developing a nuclear weapon. Weaponization is only a part of the process, but there are other parts as well, including enrichment and the development of delivery systems. Yet to the layman the N.I.E. meant that Iran hadn't been weaponizing. Yes, it may very well be the case that there is no evidence of developing a nuclear weapon. To me, that is not the whole basis of making a judgment. The more important questions are: Is Iran behaving in a way that would be rational if they were not developing a nuclear weapon? And the answer on that is very clear—their behavior only makes sense if their goal is to have the bomb. And are they doing the other elements of developing a bomb? And they definitely are. There may or may not be weaponization in Iran today, but I don't think it is an interesting question. It says nothing about their intention." The diplomat cited as evidence of Iran's weapons intent its decision to enrich some uranium to a purity level of twenty per cent for medical purposes.

Israel views Iran, which provides material and military support to Hezbollah, Hamas, and other such groups, as an existential threat. Many of its generals and political leaders have insisted for decades that once the Iranian leadership acquired a bomb—an inevitability, in their view—they would use it against Tel Aviv or Jerusalem, despite the certainty of massive retaliation. Nevertheless, most Israeli military experts agree that Iran does not now have a nuclear weapon and fear regional proliferation more than they do attack. In January, Meir Dagan, the Mossad chief between 2002 and 2010, marked his retirement by declaring that he did not believe Iran would become a nuclear power before 2015. The statement contradicted many previous Israeli estimates. But, as a former senior adviser to a Labor Prime Minister of Israel told me, the extended timeline revolves, in part, around domestic politics. Dagan believed that Iran should be handled with covert action, not with a major bombing assault. (Israeli fighter pilots have been training for years at the Hatzerim airbase, in the Negev, and at a foreign site, for a potential raid on known and suspected nuclear-weapons facilities in Iran.) "Meir is doing two things," the former official told me. "He's basically saying, 'I've overcome the Iranian threat with covert action,' and he's trying to screw up Bibi's options for going forward with an attack on Iran. And he's also keeping Bibi from taking credit for keeping Iran from going nuclear."

The political infighting in Israel over the Iranian threat continued in early May, when Ehud Barak, the Israeli Defense Minister, told the daily paper *Haaretz* that he did not believe that Iran would drop a nuclear bomb on Israel or any other country in the region. He added, in a clear swipe at Netanyahu, that Israel should not spread public fear about the Iranian nuclear program. "I don't think in terms of panic," Barak said. "I don't think [the Iranian leadership] will do anything so long as they

are in complete control of their senses, but to say that somebody really knows and understands what will happen with such a leadership sitting in a bunker in Tehran and thinking that it's going to fall in a few days . . . I don't know what it would do."

Early in the Obama Administration, Secretary of State Clinton provoked a brief diplomatic furor by raising the concept of an American nuclear deterrent to protect our allies in the Middle East. At a news conference in Bangkok, in July of 2009, Clinton noted the fears of Iran's neighbors "who come to see me and convey their deep apprehension about what might happen" if Iran gets the bomb. She then began discussing the possibility of an American nuclear umbrella in the area, which would give the Iranians pause, "because they won't be able to intimidate and dominate, as they apparently believe they can, once they have a nuclear weapon." The obvious inference was that Iran recognized the limits of nuclear power and the possibility of mutual assured destruction (MAD), the deterrent that may have kept the United States and the Soviet Union from waging nuclear warfare at the height of the Cold War.

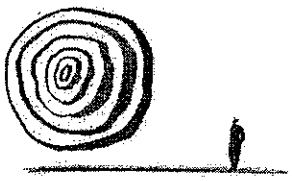
Clinton's remarks prompted Dan Meridor, Israel's minister of intelligence and atomic energy, to say, "I was not thrilled to hear the American statement from yesterday that they will protect their allies with a nuclear umbrella, as if they had already come to terms with a nuclear Iran." Clinton quickly clarified her comments, saying that the Obama Administration was not backing away from its commitment to prevent Iran from developing the bomb. In a subsequent Sunday-morning television interview, Clinton warned Iran, "You do not have a right to obtain a nuclear weapon. You do not have the right to have the full enrichment and reprocessing cycle under your control."

A round of negotiations five months ago between Iran and the West, first in Geneva and then in Istanbul, yielded little progress. Iran continued to insist on the same two preconditions that prevented progress in earlier meetings: that the United States and its allies lift all sanctions and acknowledge Iran's right to enrich uranium. The American response to Iran's demand, as Einhorn told the Arms Control Association in his speech a few weeks later, would be more sanctions. "We have determined that in the wake of Istanbul we have no choice but to increase the cost to Iran of refusing to engage seriously." He revealed that, because of sanctions, in recent years Iran may have lost as much as sixty billion dollars in much needed energy investments. He described other setbacks—to the shipping, banking, and transportation industries—all aimed at forcing Iran to return to negotiations. But Einhorn also acknowledged the limitation of sanctions: "While Iran's leaders are feeling the pressure, the sanctions have not yet produced a change in Iran's strategic thinking about its nuclear program."

During the Cold War, Cuba was similarly confronted by American economic sanctions. Those sanctions took effect in 1962, after Fidel Castro's nationalization of American companies doing business there. Fifty years later, the boycott is still largely in place, and so is the regime.

Meanwhile, the Iranian economy has been bolstered by booming trade with its neighbors and closer ties with Turkey and Syria. The economic and political ties with Turkey are especially significant, because Turkey has been vocal about its opposition to an Iranian bomb. "We tell the Iranians all the time that we would not like to see a nuclear bomb in Iran," a senior Turkish diplomat told me. "They know the price of not telling the truth." Billions of dollars annually in food, oil, and other goods are crossing Iran's borders, and this has strengthened Iran's political ties with its neighbors and established the country as a regional power base and as a counterweight to the Israeli and American influence.

The political stress between Washington and Tehran has promoted some unconventional thinking. A group of English diplomats and public officials have suggested thinking in terms of containing an Iranian bomb, and not in terms of getting rid of it. "We just don't think the Iranians will deal with us," a former senior adviser to the British Foreign Office told me. "We want to talk about nuclear bombs, and they talk about regional issues." The officials at 10 Downing Street were amused by the initial optimism of the Obama Administration. "The President thought an initiative to talk about the bomb with Iran would work, and then he found it would not. And the U.S. had no Plan B."



One of the worries is that Netanyahu "might take a pot shot" at Iran, as the former adviser put it. "Everything in London is now about containment and the notion that if the Iranians get a bomb we'll have to live with it. I believe that the Iranians do understand the logic of nuclear deterrence, but the Israelis do not. London believes we cannot allow containment to be seen as a policy of failure"—in terms of a fallback policy for dealing with Iran. "And so we're trying to shift the public perception of deterrence so it is seen as a good. The Brits are really concerned about the Israelis, and what they might do unilaterally."

A third approach, championed by the American diplomat Thomas Pickering and others, is to accept Iran's nuclear-power program, but to try to internationalize it and offer Iran various incentives. Pickering is a retired ambassador who, having served in Russia, India, Israel, Jordan, and elsewhere, ended his public career by serving for three and a half years as the Under-Secretary of State for Political Affairs in the Clinton Administration. He has been active in many public organizations, including the American Iranian Council, which is devoted to the normalization of relations with Iran, and most recently he has been involved in secret, back-channel talks with Palestinian leaders, with Afghanis, and with some of the key advisers close to Ahmadinejad in Iran. His communications with Iran, known informally as Track II talks, have been shared since early 2005 with Secretaries of State Condoleezza Rice and Hillary Clinton. In a recent interview, Pickering would not discuss the details of his contacts with Iran, but he did express cautious support for the findings of the 2011 N.I.E. When asked for his views about an Iranian

bomb, Pickering said, "I've seen nothing to indicate there is a there there, but there are indications of intent. And there may be programs we don't know about. Even if the Iranians can be mechanical klutzes, we believe they can enrich uranium to ninety per cent."

Pickering and his associates in the Track II talks—they include former Ambassadors William Miller, a Farsi speaker who served in the American Embassy in Tehran, and William Luers, a former president of the Metropolitan Museum of Art, in New York, who spent thirty-one years in the Foreign Service—are convinced that the solution to the nuclear impasse is to turn Iran's nuclear-enrichment programs into a multinational effort. In 2008, Pickering, Luers, and Jim Walsh, of M.I.T., published an essay in *The New York Review of Books* which called for Iran to permit two or more additional governments, such as those of France and Germany, to participate in the operation of their enrichment activities. A critical element would be prohibiting the production of weapons-grade enriched uranium or reprocessed plutonium.

The essay did not get into specifics in terms of Iranian demands, but one official involved said that the Iranians have repeatedly insisted in the Track II talks that "Washington had to give a sign that it was no longer pursuing regime change." It is widely believed in Tehran that either Israel or America was responsible for the assassinations of two Iranian nuclear scientists last year, and that the West and Israel are determined not only to quash a nuclear program but also to force the mullahs from power. Washington, the official involved said, would need to halt covert activities against the religious leadership in Tehran and provide evidence to indicate an official end to the operations.

Pickering, Luers, and Walsh depicted what they said would be the many benefits of reëngagement between the U.S. and Iran:

> Surprisingly, for all their differences—over Israel, Hamas and Hezbollah, and Iran's nuclear program—the two nations have insufficiently appreciated common interests. . . . No two countries have more common interest in the futures of Afghanistan and Iraq. . . . The U.S. and Iran are the strongest regional supporters of the current government in Baghdad; they both stress the importance of Iraq's territorial integrity and the need to maintain a central government. The U.S. and Iran also have a common interest in supporting Afghanistan, reducing opium trafficking, and defeating Sunni extremist movements like the Taliban and Al Qaeda. Moreover, Pakistan seems to have descended into a long period of turmoil and domestic strife, with threatening implications for both Tehran and Washington.




*"Speaking of creativity, I'd like everyone to take a minute and note how Richard is using his tongue to make it look like he has three lips."*

Pickering and his colleagues have long sought a meeting with President Obama. If it were to take place, one of those involved in the Track II talks said, the message to Obama would be clear: "Get off your no-enrichment policy, which is getting you nowhere. Stop your covert activities. Give the Iranians a sign that you're not pursuing regime change. Instead, the Iranians see continued threats, sanctions, and covert operations."

Mohamed ElBaradei, a Nobel Peace Prize recipient who is now a candidate for the Presidency of Egypt, spent twelve years as the director-general of the International Atomic Energy Agency, retiring two years ago. For the past decade, he has been a central player in the dispute among America, Iran, and Israel over the bomb. In "The Age of Deception," his recent memoir, he writes, "My best reading is that the Iranian nuclear program, including enrichment, has been for Iran the means to an end. Tehran is determined to be recognized as a regional power. The recognition, in their view, is intricately linked to the achievement of a grand bargain with the West. Even if the intent is not to develop nuclear weapons, the successful acquisition of the full nuclear-fuel cycle, including enrichment, sends a signal of power to Iran's neighbors and to the world, providing a sort of insurance against attack."

"During my time at the agency," ElBaradei told me in an earlier interview, "we haven't seen a shred of evidence that Iran has been weaponizing, in terms of building nuclear-weapons facilities and using enriched materials." There is evidence that Iranian scientists have studied the issues involved in building and delivering a bomb, he added, "but the American N.I.E. reported that it stopped even those studies in 2003."

ElBaradei said, "I am not God—nobody is—and I don't know the future intentions of Iran, but I don't believe Iran is a clear and present danger. All I see is the hype about the threat posed by Iran." He added, "The core issue is mutual lack of trust. I believe there will be no solution until the day that the United States and Iran sit down together to discuss the issues and put pressure on each other to find a solution." ♦

# EXHIBIT 11

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March 6, 2006

Section: ROP News

# Fearing more leaks, White House targets officials, journalists Wide crackdown Federal employees questioned, warned

Dan Eggen; The Washington Post

WASHINGTON - The Bush administration, seeking to limit leaks of classified information, has launched initiatives targeting journalists and their possible government sources. The efforts include several FBI probes, a polygraph investigation inside the CIA and a warning from the Justice Department that reporters could be prosecuted under espionage laws.

Dozens of employees at the CIA, the National Security Agency (NSA) and other intelligence agencies have been interviewed in recent weeks by agents from the FBI's Washington field office, who are investigating possible leaks that led to reports about secret CIA prisons and the NSA's warrantless domestic-surveillance program, according to law-enforcement and intelligence officials.

Taken together, some media watchers, lawyers and editors say, the incidents represent the most extensive and overt campaign against leaks in a generation and have worsened the already-tense relationship between mainstream news organizations and the White House.

Numerous employees at the CIA, FBI, Justice Department and other agencies also have received letters from Justice prohibiting them from discussing even unclassified issues related to the NSA program, according to sources familiar with the notices. Some GOP lawmakers also are considering whether to approve tougher penalties for leaking.

In a little-noticed case in California, FBI agents from Los Angeles already have contacted Sacramento Bee reporters about stories published in July that were based on sealed court documents related to a terrorism case in Lodi, Calif., according to the newspaper.

"There's a tone of gleeful relish in the way they talk about dragging reporters before grand juries, their appetite for withholding information, and the hints that reporters who look too hard into the public's business risk being branded

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traitors," New York Times Executive Editor Bill Keller said in a statement. "I don't know how far action will follow rhetoric, but some days it sounds like the administration is declaring war at home on the values it professes to be promoting abroad."

President Bush has called the NSA leak "a shameful act" that was "helping the enemy," and said in December that he hoped the Justice Department would conduct a full investigation into the disclosure.

"We need to protect the right to free speech and the First Amendment, and the president is doing that," White House spokesman Trent Duffy said. "But at the same time, we do need to protect classified information which helps fight the war on terror."

Disclosing classified information without authorization has long been against the law, yet such leaks are one of the realities of life in Washington, accounting for much of the back-channel conversation that goes on daily among journalists, policy intellectuals, and current and former government officials.

Presidents also have long complained about leaks. Richard Nixon's infamous "plumbers" originally were set up to plug them, and he tried, but failed, to prevent publication of a classified history of the Vietnam War called the Pentagon Papers. Ronald Reagan exclaimed at one point that he was "up to my keister" in leaks.

Bush administration officials, who complain that reports about detainee abuse, clandestine surveillance and other topics have endangered the nation during a time of war, have taken a more aggressive approach than other recent administrations, including a clear willingness to take on journalists more directly, if necessary.

"Almost every administration has ... come in saying they want an open administration, and then getting bad press and fuming about leaks," said David Greenberg, a Rutgers University journalism professor and author of "Nixon's Shadow." "But it's a pretty fair statement to say you haven't seen this kind of crackdown on leaks since the Nixon administration."

But David Rivkin, who was a senior lawyer in the Reagan and George H.W. Bush administrations, said the leaking is "out of control," especially given the threat posed by terrorist groups.

"We're at the end of this paradigm where we had this sort of gentlemen's agreement where you had leaks and journalists were allowed to protect the leakers," Rivkin said. "Everyone is playing Russian roulette now."

At Langley, the CIA's security office has been conducting numerous interviews and polygraph examinations of employees in an effort to discover whether any of them have had unauthorized contact with journalists.

CIA Director Porter Goss has spoken about the issue at an "all hands" meeting of employees and sent a cable to the field aimed at discouraging media contacts and

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reminding employees of the penalties for disclosing classified information, according to intelligence sources and people in touch with agency officials.

"It is my aim, and it is my hope, that we will witness a grand-jury investigation with reporters present being asked to reveal who is leaking this information," Goss told a Senate committee.

The Justice Department also argued in a court filing last month that reporters can be prosecuted under the 1917 Espionage Act for receiving and publishing classified information. The brief was filed in support of a case against two pro-Israel lobbyists, the first nongovernment officials to be prosecuted for receiving and distributing classified information.

Sen. Pat Roberts, R-Kan., chairman of the Senate Intelligence Committee, said last month that he is considering legislation that would criminalize the leaking of a wider range of classified information than what is now covered by law. The measure would be similar to earlier legislation that was vetoed by President Clinton in 2000 and opposed in 2002 by then-Attorney General John Ashcroft.

But the vice chairman of the committee, Sen. Jay Rockefeller, D-W.Va., complained in a letter to the national intelligence director last month that "damaging revelations of intelligence sources and methods are generated primarily by Executive Branch officials pushing a particular policy, and not by the rank-and-file employees of the intelligence agencies."

As evidence, Rockefeller noted the case of Valerie Plame, a CIA officer whose identity was leaked to reporters. A grand-jury investigation by Special Counsel Patrick Fitzgerald resulted last year in the jailing of Judith Miller, then a reporter at The New York Times, for refusing to testify, and in criminal charges against I. Lewis "Scooter" Libby, who resigned as Vice President Dick Cheney's chief of staff. In court papers, Libby has said his "superiors" authorized him to disclose a classified government report.

The New York Times, which first disclosed the NSA program in December, and The Washington Post, which reported on secret CIA prisons in November, said investigators have not contacted reporters or editors about those articles.

Leonard Downie Jr., executive editor of The Post, said that there has long been a "natural and healthy tension between government and the media" on national-security issues, but that he is "concerned" about comments by Goss and others that appear to reflect a more aggressive stance by the government.

In Sacramento, the Bee newspaper reported last month that FBI agents had contacted two of its reporters and, along with a federal prosecutor, had "questioned" a third reporter about articles last July detailing the contents of sealed court documents about five terrorism suspects. A Bee article on the contacts did not address whether the reporters supplied the agents with any information or whether they were subject to subpoenas.

Executive Editor Rick Rodriguez said last week he could not comment, based on the advice of newspaper attorneys. Representatives of the FBI and the U.S.

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attorney's office in Los Angeles, which is conducting the inquiry, also declined to comment.

In prosecuting a former Defense Department analyst and two pro-Israel lobbyists for allegedly spreading sensitive national-security information about U.S. policy in the Middle East, the Bush administration is making use of a statute whose origins lie in the first anxious days of World War I.

The Espionage Act makes it a crime for a government official with access to "national defense information" to communicate it intentionally to any unauthorized person. A 1950 amendment aimed at Soviet spying broadened the law, forbidding an unauthorized recipient of the information to pass it on, or even to keep it himself.

The Justice Department said "there plainly is no exemption" for the media, but added: A "prosecution under the espionage laws of an actual member of the press for publishing classified information leaked to it by a government source would raise legitimate and serious issues and would not be undertaken lightly; indeed, the fact that there has never been such a prosecution speaks for itself."

---- INDEX REFERENCES ----

COMPANY: JUSTICE DEPARTMENT; PENTAGON LTD; DEFENSE DEPARTMENT; BEE LINE GSM; RUTGERS UNIVERSITY

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Government (1GO80); Police (1PO98); Government Litigation (1GO18); Economics & Trade (1EC26))

INDUSTRY: (Security (1SE29))

REGION: (Middle East (1MI23); USA (1US73); Americas (1AM92); North America (1NO39); California (1CA98))

Language: EN

OTHER INDEXING: (BEE; BUSH; CIA; DEFENSE DEPARTMENT; FBI; GOP; JUDITH MILLER; JUSTICE; JUSTICE DEPARTMENT; NATIONAL SECURITY AGENCY; NSA; PENTAGON; RUTGERS UNIVERSITY; SENATE; SENATE INTELLIGENCE COMMITTEE; WHITE HOUSE) (Bill Keller; Bush; Clinton; David Greenberg; David Rivkin; Dick Cheney; Executive Branch; Fearing; George H.W. Bush; Goss; Jay Rockefeller; John Ashcroft; Leonard Downie Jr.; Libby; Nixon; Pat Roberts; Patrick Fitzgerald; Porter Goss; Reagan; Richard Nixon; Rick Rodriguez; Rivkin; Rockefeller; Ronald Reagan; Trent Duffy; Valerie Plame)

EDITION: Fourth

Word Count: 1774
3/6/06 STLTI A1
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# EXHIBIT 12

WestLaw. NewsRoom



1/13/06 FDCH CAP. TRANSCRIPTS (Pg. Unavail. Online)
2006 WLNR 741791

FDCH Capital Transcripts
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January 13, 2006

Alberto Gonzales Holds A News Conference On The Nomination Of Judge Samuel Alito To The Supreme Court

Alberto Gonzales Holds A News Conference On The Nomination Of Judge Samuel Alito To The Supreme Court

xfdtr JUSTICE-GONZALES-ALITO 1stadd

XXX with this program.QUESTION: Did you yourself promulgate any of those legal authorities? Did you write about them or (inaudible)?

GONZALES: There have been a number of lawyers throughout the administration that have been involved in carefully evaluating the legal authorities in relation to this program.

And so over a period of many months, many years, a number of lawyers have been involved in providing legal advice as to the legal authorities in relation to this program.

QUESTION: (OFF-MIKE)

GONZALES: We're engaged in a discussion with the Congress about that.

I presume that's one of the reasons why the senator would like me to come before the Senate Judiciary Committee and more fully explain our discussions, our reasoning regarding the legal authorities that exist for this program.

I respectfully disagree with the chairman.

We believe the legal authorities are there and that the president acted consistent with his legal authorities and in a manner that he felt was necessary and appropriate to protect this country against this new kind of threat.

QUESTION: Are you prepared to see reporters go to jail for (inaudible)?

GONZALES: Cooperating in connection with what?

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QUESTION: (OFF-MIKE)

GONZALES: That's a matter that's being handled by career prosecutors and folks within our Criminal Division. And I think it's too early to make decisions regarding whether or not reporters should go to jail.

We have an obligation to ensure that our laws are enforced. There's been a serious disclosure of classified information that's occurred in connection with this case and obviously we're going to look at it very, very seriously.

QUESTION: The Democrats say they are probably going to hold the vote a week and you had mentioned that he should be confirmed expeditiously. I was just wondering what you thought of that.

GONZALES: We continue to hope that the Senate remains on the schedule that was previously outlined and that he would receive a floor vote by January 20th.

There's no mystery here about Judge Alito. His record has been out there for a long time. People have known that this is the nominee.

We've now gone through an extensive hearing process. He will be providing additional information through his written answers to written questions.

But we believe the information is out there regarding his qualifications. And certainly a sufficient amount of information is out there for the Senate to make an informed judgment as to whether or not this individual should serve on the Supreme Court of the United States.

Thank you very much.

END

---- INDEX REFERENCES ----

NEWS SUBJECT: (Judicial (1JU36); Legal (1LE33); Government (1GO80))

Language: EN

OTHER INDEXING: (ALITO; CONGRESS; END; GONZALES; QUESTION; SENATE; SENATE JUDICIARY COMMITTEE; SUPREME COURT; XXX) (Alberto; Alberto Gonzales Holds; Alito; Holds; Samuel Alito)

KEYWORDS: (BC-JUSTICE-GONZALES-ALITO, 1st Add, f6831,0422); (w)

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# EXHIBIT 13

3/12/06 Sacramento Bee A1
2006 WLNR 4158622

Sacramento Bee, The (CA)
Copyright 2006 The Sacramento Bee

March 12, 2006

Section: MAIN NEWS

# Bush's secrecy push is excessive, critics say

David Westphal
Bee Washington Bureau Chief

WASHINGTON Working at the National Archives in the late 1990s, historian William Burr stumbled onto a 1962 telegram written by fabled diplomat George Kennan about China's nuclear program. The telegram, essentially a translation of a Yugoslav newspaper article, was mostly innocuous, but Burr decided to make a copy of it.

It proved to be prescient. Today the original document has been removed from the archive, replaced by a notice that declares it to be a government secret.

The document is one of 9,500 that have been removed from the archives in a project that has become the new poster child for open-government advocates, many of whom contend the Bush administration is taking secrecy to new heights. What makes the latest venture especially eye-catching is that many of the reclassified documents already have been published in government books or still appear on federal Web sites.

"It just seems like a complete overreaction," said Burr, a senior analyst for the National Security Archive. Burr said it was understandable that the government would clamp down a bit after the 2001 terrorist attacks, but he added, "Some of this makes little sense because the documents are already in the public domain. It's too late."

Open-government advocates say the massive reclassification project carried out by the CIA and other agencies is more evidence for their assertion that this is one of the most secretive administrations in modern history.

"Open government is under dramatic assault," said Paul McMasters, a First Amendment expert at the Freedom Forum. The Bush administration, he said, seems to view the federal government as being involved in "profligate information sharing" that needs to be curbed.

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Bush has said he favors open government and, in a meeting with newspaper editors a year ago, put his views in the context of urging democratic freedoms around the world. "I talk to the people in Iraq about a free press and transparency and openness," he said, "and I'm mindful we can't talk one way and do another."

But he also added: "We're still at war. And that's important for people to realize."

Throughout American history, anti-secrecy crusaders nearly always have been at odds with presidents over government openness. But many of these advocates say the Bush presidency has been particularly active in limiting the public's access to government information.

"What has happened is that there has been a pendulum swing far in the direction of increased secrecy," said Steven Aftergood, a senior research analyst at the Federation of American Scientists. "It's not just a matter of a few frustrated reporters. It's also Congress, which has had extraordinary difficulty getting the information it needs to do oversight."

Others say that in an age of terror threats, the greater worry is that critical security information will leak into the public domain, at risk to American lives.

"I think times have changed," Sen. Pat Roberts, R-Kan., chairman of the Senate Intelligence Committee, told Fox News after expressing support for legislation that would broaden the scope of criminal charges for leaking classified information.

For some anti-secrecy advocates, the recently discovered program to classify thousands of once-open documents takes the cake. Earlier this year another historian, Matthew Aid, reported that the CIA and other federal agencies had secretly reclassified more than 55,000 pages of records, including many that have appeared in widely disseminated publications.

According to Aid, some of the now-sealed documents seemed noteworthy only because they proved embarrassing to the United States. One was a complaint from the CIA about the bad publicity it was receiving over its inability to forecast anti-American riots in Colombia in 1948. Another documented the CIA's failure to predict China's intervention in the Korean War.

Aid notes Bush's own executive order declares that information cannot be classified simply to "prevent embarrassment to a person, organization or agency."

It is not unusual for federal agencies such as the CIA to conduct reviews of public documents at the National Archives to determine if they should be reclassified. But the volume and nature of this particular project drew a rebuke from the National Archives and Records Administration, which earlier this month declared a moratorium on further reclassifications.

Allen Weinstein, the nation's chief archivist, asked the agencies involved in the reclassification to "restore to the public shelves as quickly as possible the maximum amount of information consistent with the obligation to protect truly

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sensitive national security information."

A CIA spokeswoman said the agency's reclassification effort should be seen as part of a huge amount of information - 26 million pages - that the CIA has released to the archives since 1998.

"The CIA has worked hand in glove with the National Archives over the years on reclassification," said CIA spokeswoman Michele Ness, who added that the agency welcomed Weinstein's call for discussions on how the reclassification project should proceed.

Aftergood, who writes a secrecy newsletter for the Federation of American Scientists, said some of the administration's confidentiality initiatives are a legitimate result of the Sept. 11 terror attacks. But he said the White House's anti-openness bent goes well beyond that, and started when Bush and Vice President Dick Cheney came to office.

"The administration philosophically believes in a strong executive," he said, "and part of that is the belief that strength comes from secrecy."

Last year, Cheney acknowledged in a meeting with reporters that the White House has sought to strengthen the executive powers of the president.

"I think that the world we live in demands it," he said.

For some journalists, the administration showed its intentions early, when then Attorney General John Ashcroft issued revised guidelines for releasing documents under the Freedom of Information Act. The new rules seemed to send a message to federal agencies by declaring that the Justice Department would support any denial of a FOIA request if there was a "sound legal basis" to do so.

In a meeting with news media executives, Justice Department officials initially indicated the revisions would have little practical effect. But a Coalition of Journalists for Open Government study found that agency use of exemptions to limit disclosure grew by 22 percent from 2000 to 2004.

Also striking has been the increase in the number of documents ordered classified.

Between 1999 and 2004, the number of documents ordered sealed annually nearly doubled, to 15.6 million, according to the Information Security Oversight Office. Meanwhile, declassifying documents has slowed dramatically - from 127 million pages in 1999, to 28 million pages in 2004.

Perhaps more disconcerting to journalists is the administration's apparent eagerness to confront reporters who acquire and publish classified national security information. Two investigations are under way, involving reporters from the Washington Post and the New York Times, aimed at uncovering who leaked information about terrorist prison sites abroad and the National Security Agency's domestic eavesdropping program.

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Although ostensibly aimed at the leakers, CIA chief Porter Goss recently told Congress he hopes reporters are implicated as well.

"It is my aim and it is my hope that we will witness a grand jury investigation with reporters present being asked to reveal who is leaking this information," said Goss.

A grand jury subpoena could put the reporters at risk of jail because they likely would refuse to testify, having promised their sources not to reveal identities.

A similar clash sent former New York Times reporter Judith Miller to jail for 85 days last year for refusing to testify before a grand jury investigating the leaking of a CIA employee's identity. Miller ultimately received a waiver from her source and appeared before the grand jury.

In recent weeks the administration has signaled a willingness to play even rougher with the news media, suggesting that reporters probably could be charged with a felony simply by coming into contact with classified information, even if they did nothing with it.

The White House does not buy the argument that it is depriving the public of crucial information, insisting that some uptick in secrecy is necessary because of the war on terror.

OPEN - AND CLOSED

Here's a year-by-year look since 1995 of federal documents that have been classified and declassified, in millions:

Year / New classified documents / Pages declassified

1995 / 3.6 / 69.0

1996 / 5.8 / 196.0

1997 / 6.5 / 204.1

1998 / 7.3 / 193.1

1999 / 8.0 / 126.8

2000 / 11.2 / 75.0

2001 / 8.7 / 100.1

2002 / 11.3 / 44.4

2003 / 14.2 / 43.1

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2004 / 15.6 / 28.4

Source: Information Security Oversight Office; compiled by OpenTheGovernment.org and National Security Archive

The Bee's David Westphal can be reached at (202) 383-0002 or dwestphal@mcclatchydc.com.

---- INDEX REFERENCES ----

NEWS SUBJECT: (Judicial (1JU36); Legal (1LE33); Government (1GO80))

INDUSTRY: (Security (1SE29))

REGION: (USA (1US73); Americas (1AM92); North America (1NO39))

Language: EN

OTHER INDEXING: (AMERICAN SCIENTISTS; BEE; CIA; FOIA; FOX NEWS; FREEDOM FORUM; FREEDOM OF INFORMATION; INFORMATION SECURITY OVERSIGHT OFFICE; JUSTICE DEPARTMENT; NATIONAL ARCHIVES; NATIONAL ARCHIVES AND RECORDS ADMINISTRATION; NATIONAL SECURITY AGENCY; NATIONAL SECURITY ARCHIVE; OPEN; SENATE INTELLIGENCE COMMITTEE; WHITE HOUSE; YUGOSLAV) (Aftergood; Aid; Allen Weinstein; Burr; Bush; Cheney; David Westphal; Dick Cheney; George Kennan; Goss; John Ashcroft; Judith Miller; Matthew Aid; Michele Ness; Miller; Pat Roberts; Paul McMasters; Porter Goss; Source; Steven Aftergood; Weinstein; William Burr)

EDITION: METRO FINAL

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# EXHIBIT 14

Westlaw. NewsRoom


5/21/06 ABC GEO. STEPHANOPOULOS (Pg. Unavail. Online)
2006 WLNR 9116668

ABC GEORGE STEPHANOPOULOS
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May 21, 2006

GeorgeStephanopoulos 2006-05-21 09:30:00

NATIONAL

ABC

ABC

GeorgeStephanopoulos

2006-05-21

09:30:00

This week, President Bush raises the Stakes on Immigration.

The only way to solve this problem is to make sure we have a Rational Debate and have a Comprehensive plan.

But the Senate Debate gets Nasty.

I really believe this Amendment is Racist.

This Merely Declares English to be our National Language.

Where does the President stand, and will Congress pass Reform he can Sign? We'll ask our Headliner, Attorney General Alberto Gonzales.

Then on the Trail with Presidential hopeful John Edwards. You've also said the President is the worst President of our lifetime.

Yes.

Worse than Richard Nixon?

Absolutely.

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George will, Cokie Roberts and Fareed Zakaria Debate the week's politics on our roundtable. Plus, the Star of "America's most wanted" Lobbies Congress.

And this may be the most meaningful Piece of Child protection Legislation ever.

And as always, "The Sunday funnies."

The Senate yesterday voted to make English the National Language of the United States and also our National Muffin, the English Muffin.

Good morning, everyone. We begin today with a little News. Earlier today President Bush called Reporters into the White House to Praise the first full-time Government in Iraq since the Fall of Saddam Hussein.

The Formation of a Unity Government in Iraq is a New day for the Millions of Iraqis who want to Live in Freedom, and the Formation of the Unity Government in Iraq is -- Begins a New Chapter in our Relationship with Iraq.

We'll have more on that New Iraqi Government and how much difference it will make on the roundtable but now we turn to the Fallout from the President's big Speech of the week, Immigration Reform with the man responsible for Enforcing our Immigration Laws, Attorney General Alberto Gonzales. Welcome back to "This week," Sir.

Hey, George. How are you?

I'm Good. Thank you. Let's start with that Debate over whether or not to make English the National Language. The Senate passed an Amendment on Thursday. On Friday, you were in Houston and you said the President was against the idea. You said - While you were saying that, Tony Snow was in the White House Signaling support for the Amendment so can you clear that up for us? Where does the President stand?

Sure, this is really a question of Semantics, George. Of course, English is the common Unifying Language of our Great Country. English Represents a Path to opportunity. I have Consistently said that English Represents Freedom in our Country, in order to be successful and take Advantage of the wonderful opportunities in America, you need to be able to Communicate in English, and we have never been supportive -- The President has never been supportive of English only or English as the Official Language but certainly we support the Fact that English is the National Language of the United States of America.

Let's Tease out the implications of that. Currently the Voting Rights Act Permits Bilingual Ballots. Would you seek to prohibit that?

Of course not, and I don't believe that any of the proposed Amendments that are currently being discussed now would Alter in any way the Rights that are afforded to Citizens, both at the State or at the Federal Level based upon Language, and so we do support the Reauthorization of Section 203 of the Voting Rights Act which does provide a balance in different Languages depending on the Community, and those

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would not be affected based on my reading of the Amendments. Those Rights would not be affected. Of course, we're in the Legislative process now. Ultimately we have to see what passes in the Senate and what comes out of the Conference and what is ultimately presented to the President of the United States.

Part of that is whether or not we should have a Wall across the Mexican Border. You opposed that back in April. The AP reported that you were speaking to Hispanic Publishers and you said -- Yet the Senate this week passed an Amendment which called for a 370-Mile Fence or Wall, whatever you want to call it, across the Border, so do you believe that 370-Mile Fence would be Contrary to our Traditions?

Actually I don't, George. I don't think it would be Feasible or make much sense to have a Wall that stretches 2,000 Miles along our Southern Border. The objective here is to have a Smart Border Strategy, and part of that should include in my Judgment Fencing along certain -- A Wall along certain Portions of the Border. We currently have it in place. It makes sense in certain areas. In other areas we have for example parts of the Border where we have Steep Cliffs and you don't need a Border so depending on the Geography, depends on the use of Technology and Border Patrol Agents you don't need a Border in my Judgment all along our Southern Border but in certain places it does make sense. We do have Infrastructure where we have it along certain Portions of our Border and I think it does make sense that we have additional Fencing.

A third Key Debate is whether Illegal Immigrants who have paid into the Social Security System using Fraudulent Social Security numbers should be able to collect benefits. A Provision to allow that Narrowly passed the Senate but here's what Senator Sessions said about that.

The person comes into our Country Illegally, Submits a False Social Security number, has no Legal right to expect to ever collect on that amount. They would say, well, they paid into it, they're entitled to it. Not so in my opinion.

Where do you stand, Mr. Attorney General?

Well, George, this is a question of Policy. It's something that's being Debated in the Congress today, and I would Prefer to simply wait to see what comes out of the Congress.

So you don't have a Position on whether or not Illegal Immigrants who have paid into the System should get their benefits or should be denied it because they got them Fraudulently?

Well, I am very much concerned about the Fact that People are taking Advantage of a Reliance upon Forged Documents, and that's something, of course, that we will be looking at trying to Address in the future. People should not benefit from that kind of Illegal activity, but with respect to whether or not they should be able to collect on Social Security, that is a Policy Debate that we continue to wait to see how that Unfolds in the Congress.

Finally, on the Broader issue, the President has come out against this Notion that giving Illegal Immigrants the Path to Citizenship if they pay Fines, if they

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pay Taxes is Amnesty, yet, as you know, a number of Republicans in the House, a Majority of Republicans in the House believe it is including their lead negotiator the Chairman of the Judiciary Committee James sensenbrenner, he said after the President's Speech, listen, it is Amnesty. There is no question about that and I know you disagree, but what I'm trying to get at is what's the bottom line for the President here? Can he Sign a Comprehensive Immigration Bill that does not include a Path to Citizenship for Immigrants who are now in the Country Illegally?

Well, I mean the President outlined to the American People five Broad Principles that he wants to see and expects to see in Comprehensive Immigration Reform, and we believe that all of those Components are very, very important to the overall Goal that we all share of Ensuring that our Border is Secure, and I think each of the Components, Principles the President talked about Reinforced the overall Strategy. We believe it will be very, very important in Enhancing our Law Enforcement efforts a temporary worker Program will Enhance our Law Enforcement efforts and make America ultimately more Secure.

Let me turn to another issue. ABC News reported this week that the Government is reviewing Phone Records of Journalists without their knowledge. How Extensive is that Tracking of the Phone Records of Journalists, and are you concerned that it might have a Chilling effect on the first Amendment?

I think there's misunderstanding about these activities, George. We -- To the Extent that we engage in Electronic Surveillance or Surveillance of Content, as the President says, we don't engage in Domestic-To-Domestic Surveillance without a Court order and obviously if, in Fact, there is a basis under the Constitution to go to the Federal Judge and satisfy the Constitutional standards of Probable cause and we get a Court order, that will be Pursued. I will say that I understand very much the Role that the Press plays in our Society, the protection under the first Amendment we want to promote and respect the right of the Press but it can't be the Case that that right Trumps over the right that Americans would like to see, the ability of the Federal Government to go after Criminal activity, and so those two Principles have to be Accommodated. In my Judgment they can be Accommodated. They have been Accommodated, and we will continue to Accommodate both of those Principles going forward.

So you believe Journalists can be Prosecuted for publishing Classified Information?

Well, again, George, it depends on the circumstances. There are some Statutes on the book which if you read the Language carefully would seem to indicate that that is a possibility. That's a Policy Judgment by the Congress in passing that kind of Legislation. We have an Obligation to Enforce those Laws. We have an Obligation to Ensure that our National Security is protected. Obviously we want to work with the Press in getting the Information that we can to Pursue Criminal wrongdoing, but we want to do so in a way, of course, that's respectful of the Role that the Press plays in our Society.

Well, let me try to get specific on it then. Are you open to the possibility that "The New York Times" should be Prosecuted for publishing their Initial story on what the President Calls his Terrorist Surveillance Program?

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George, we're engaged now in an Investigation about what would be the appropriate course of action. In that particular Case I'm not going to talk about it specifically but as we do in every Case, it's a Case-By-Case Evaluation about what the evidence shows us, our Interpretation of the Law. We have an Obligation to Enforce the Law and to Prosecute those who engage in Criminal activity.

Including possibly the Journalists themselves?

I'm not going to talk about, again, specific Cases, but if the Law provides that conduct is, in Fact, Criminal and the evidence is there to support it, we have an Obligation, of course, to look at that very seriously.

Finally, Sir, just earlier this month the Office of Professional responsibility in the Justice Department announced they were closing their Investigation into the development of this Domestic Surveillance Program, what the President Calls the Terrorist Surveillance Program. They said they couldn't get the necessary clearances. Here's a Letter that H. Marshall Jarrot, the Counsel in the Office of responsibility Wrote. He said -- Who denied them Security clearances and did you agree with that decision or do you think this Investigation should go forward?

George, it would be Inappropriate for me to get into the Internal decision-making within the Executive Branch, but let me just say this, the question is whether or not the Lawyers did their job. Did they meet the Professional responsibilities, Ethical standards as Lawyers in providing Legal advice in connection with the Program the President approved last December to the American People. We have laid out a 42-Page Paper that details the work of the Lawyers in connection with this Program. I've gone -- I've testified three times before the Congress with respect to the Legal Analysis. We've provided Numerous additional Briefings and Information to the Congress. We continue to provide additional Briefings to the Congress, and so the work of the Lawyers, what was done in connection with Legal Analysis of this Program is already out there, and so we believe that there is Accountability and continues to be Accountability with respect to the work of the Lawyers.

But, Sir, excuse me. You're the Chief Law Enforcement Officer of the Government. They couldn't Deny the clearances without your okay, could they?

Well, that's not necessarily True, George. Every particular Case is different. Various Officials within the Federal Government have the Authority to Grant clearances with respect to certain Programs, so that would not be something that would necessarily Fall within my area of responsibility. But the Main point is is that the American People need to be Reassured that the Lawyers at the Department of Justice have satisfied their Ethical responsibilities in my Judgment, and that is evidenced by all of the work that we have produced with respect to our Analysis of what the President confirmed last December.

Okay, Mr. Attorney General, thank you very much.

Thanks, George.

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We're on the Trail with John Edwards next.

And later, John Walsh Tracking Predators.

There are according to the Justice Department 550,000 convicted Sex Offenders in this Country. 150,000 have disappeared, Fallen through the Cracks.

We were on the Trail this week with John Edwards.

Hey, how are you?

No Democrat Angling for the White House has spent more time in early Primary states like New Hampshire and Iowa where John Kerry's running Mate in 2004 is turning up the Heat on President Bush.

George W. Bush, the worst President in my lifetime.

We talked about that tough Rhetoric. His recent Tussles with Mary Cheney and what Edwards thinks about Hillary Clinton when I met with him on Friday in his Home State of North Carolina. There the Former Senator was delivering $300,000 in College Scholarships to Seniors at Green Central high School.

We're very proud to be able to do that, proud to be able to help you to go to College.

Good to see you.

The Scholarships will help Double the number of Green Central high School Students going to College and the money comes from an Anti-Poverty Initiative that Edwards hopes will be the heart of a run for the White House.

First of all, I think you have to Convince the Country that it's the Moral and just thing to do. Second, you have to Convince the Country that the way you want to deal with Poverty Embraces the Values that most Americans believe.

Is the Country not there yet?

I don't think they're completely there. I think the -- I think in their Conscience inside they're there but they haven't had any leadership. No one has made them think about it. And you can sort of see it in the reaction to Katrina.

The big Debate in Washington right now is over Immigration and there's a lot of People who are concerned that by having guest worker Programs you're actually going to make it harder for low-income Americans to work their way out of Poverty. Do you agree with that?

I think actually the Jury is very much out on the impact on the Wages of lower Income Americans of Immigrants working in this Country. The Studies that I have seen are basically evenly divided. I mean there are some -- I know there is a

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Princeton Economist who has determined that it's not having much effect. Much Negative effect.

A Harvard Economist that Taste it is.

We got one on each side so I Honestly don't know the Answer. I think it's still an open question right now.

But you support the compromise in the Senate right now then? You'd bring in guest workers?

The way I think about this is not all that complicated. We basically have three choices. One is we can Pretend the problem is not there, put our head against the Wall, the second we can try to Deport 10 or 11 million People who Live here now which is Absurd, never going to happen or, third, we can find a way to incorporate them into our Country and into our Culture.

Senate passing an Amendment last night that would make English the National Language.

I saw that

Doesn't look like you support it.

No, I wouldn't say that. I think that People need -- I think if we want to Assimilate Folks from all kind of Cultures into America which I think we absolutely do, I mean English is the Language of Commerce in the United States, and I think it is very important for People to Learn to speak English. Now these Amendments -- If I remember right there were two of them, but it sounded like so much Washington Stuff to me, but I do think it's important for Folks who have come here from another Country to Learn to speak English.

So you really have no problem with it being the National Language then?

I think it is the National Language whether I have a problem with it or not which I don't.

Back in the News in the last Couple of weeks because Mary Cheney is out on a book Tour and keeps bringing up the moment which she called in the Vice Presidential Debate bringing Sleazy politics to a whole New Level when you talked about her in the Vice Presidential Debate.

Let me say first that I think the Vice President and his Wife Love their Daughter. I think they Love her very much, and you can't have anything but respect for the Fact that they're willing to talk about the Fact that they have a Gay Daughter, the Fact that they Embrace her, it's a wonderful thing.

I Mouthed a phrase towards Senator Edwards that is not appropriate for Prime time Television.

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What is your reaction to that?

I think that what I said then was appropriate, and I do believe that it was in a very partisan political Environment. We were in the Middle of a very Hot Campaign, very close Campaign. He said thank you and then --

She said he was Acting?

Well, he didn't Act -- It didn't seem like he was Acting although you never know with the Vice President. I think what's more important than all of that is watching what her Father, the Vice President of the United States, has done to this Country. It is not an accident that he's Unbelievably Poorly thought of. I can't even remember what his last poll numbers are, but they're like in the Teens, around 20%. There's a reason for that. I mean, he is one of if not the Principal Architect of this Disaster in Iraq. He put us on an Energy Path that the American People are paying an enormous Price for right now. He paid little or no attention to making sure the Government was prepared to respond to the kind of Disaster that hit our Gulf Coast. I mean, we've got a Health Care Crisis going on. He's had no proposal of any kind that I know of, and People don't Trust him anymore which is understandable. I wouldn't Trust him.

You've also said that his Boss, the President, is the worst President of our lifetime.

Yes.

Who is the President? Who is the President that broke the Law and the Constitution and started Spying on the American People? Listen -- [ Applause ] -- The Answer to that question, as we've already heard, is George W. Bush, the worst President in my lifetime.

Worse than Richard Nixon?

Absolutely, absolutely.

What has President Bush done which is worse than the Crimes and cover-ups of Watergate?

Well, he's done a Variety of thing, things that will take us Forever to recover from. I think we can recover from them but the damage he's done to the way America is viewed in the World, the Lack of respect for America in the World, what the ongoing conflict in Iraq is doing to America's Image, his response to this Hurricane on the Gulf Coast, which I think is part of a pattern of Incompetence.

But if he's worse than Richard Nixon, should President Bush be Impeached?

I think the way we need to deal with it is a Democratic President in the next Election. I think the damage that this President has done -- I didn't get through the whole List, for example, leading an effort, Illegal effort, I think it's absolutely clear it's Illegal effort to Spy on Americans, completely ignoring the

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Law and the Constitution. I mean, the President knew and his Advisers knew --

He says he has the Authority under the Constitution, Article 2 of the Constitution.

He is wrong. He is wrong. It is the reason we have a separation of Powers in this Country, and the Congress had Enacted a Law that told the President exactly what he was supposed to do, and he just ignored it, Intentionally ignored it. If there was any question about this, the very least they should have done is go to the Congress and try to get the Law changed. Should we be monitoring Al Qaeda? Absolutely. It's necessary to keep this Country safe. But we're to do it under the Law and the President is not above the Law.

If it's so clearly Illegal why not move to Impeach, just for political reasons?

I think all these things you and I have already talked about today ranging from People dying in Iraq to Gasoline Prices to this Disaster on the Gulf Coast, this Country is faced with so many problems and having watched up close, because I was in it, the effort to Impeach President Clinton on Grounds that were much, much less than what this President has done, I saw the damage it did, not only to the Country but how it cut the whole Congress -- Tied up in Knots in trying to deal with any other kind of issues so I don't think that's where we ought to --

You're for Censure but not Impeachment?

If I were in the Senate, I'd Vote for Censure. If I had an up-or-down Vote I'd Vote for it.

Would you Vote to confirm General Hayden as Director of the CIA?

No.

Why not?

Because he Oversaw this Domestic Spying Program. There's so many issues that I've already discussed with you about the Illegality and the Unconstitutionality of that Spying Program. I think he is not the person we should put in charge of the CIA.

It sure seems like he'll get through. Do you think Democrats are laying down on this?

I think they ought to be against him. I mean, I can only speak for me and they have to speak for themselves

ABC poll this week came out and showed President Bush Lowest approval Ratings of any President in 25 years, same for the Republican Congress but there was also some troubling News for Democrats. The approval Rating for Democrats in Congress wasn't much higher, and a Majority of Americans don't believe that Democrats are setting a clear direction for the Country. Why do you think that is?

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I think that's -- All of those poll results are Anti-Washington. I think People are Sick of what they see going on there. They're Sick of the fighting. They're Sick of the Corruption. They don't feel like -- They feel like we have too many politicians, not enough leaders.

So you're to blame your leaders in Washington?

I just think that if you don't Live in Washington, which I don't anymore, thank Goodness, I Live here in North Carolina, I think it just gives you a completely -- I can tell you for me it gives me a completely different Perspective. People are out in the Real World worried about things like the War in Iraq, the -- What's happening with the Health Care costs, Gasoline Prices, those are the things they want Solutions to and they want leaders to deal with those issues.

How about the Message about the Republican Congress? I was talking to a Democratic Consultant this morning, and he said Democrats have to Choose. They have to decide is this a do nothing Congress or a do the wrong thing Congress? What's your opinion?

Well, that's a Good question. I think some of both actually. There's some where the Congressional Republican leadership has gotten their way where they've done damage so I think it's some of both but the heart of this question, I think what I hear you asking, is do the Democrats Lay on the side and let the Republicans Implode which they're doing a very Good job of for a lot of reasons, Gas Prices, the War in Iraq, Et Cetera, or do we go out with a Strong Defining Message as an Alternative? I feel very strongly we ought to do the Latter.

But you're not seeing it yet.

I think it will happen between now and November I'm optimistic it will happen.

It's pretty clear you're looking at the 2008 Presidential Race although you haven't made any decisions yet. What could stop you from running?

Elizabeth having her Health problems come back.

How is she doing now?

She's doing Great. She's -- All the tests are Good, and they're very encouraging, you know, but we have Young Children, Emma, Claire and Jack and the Health of Elizabeth and how my Family is doing has to be at the front of anything.

Is that pretty much it though?

No, I think we have to see where we are in this work on Poverty. How I can best advance that and also just where the Country is and what I think the Country needs, but, listen, I'll be the first to tell you I'm thinking about it, and I'm very seriously considering it. Just haven't made a final decision.

As you know, there is a big Debate going on in the Democratic party about one of

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your potential Opponents if you Choose in 2008, Senator Clinton. It Breaks under two Premises. A lot of Democrats believe she can't be denied the nomination, and she can't Win the General Election. Are they right?

I have no idea about either one. I think that if Senator Clinton Chooses to run for President, and that'll be a serious question for her and her Family, she'll be a very Formidable Candidate, and I think it's an Unknowable. Having lived through these Campaigns and all these predictions that were made before 2004 about the nomination and the General Election, what would happen, I mean, I was in the Trenches in both. I mean I was out there fighting for the nomination. John Kerry Won the nomination. He Earned it, then I was on the Ticket with John Kerry in the General Election, I just think anybody who suggests particularly now but even at the time that you can predict what's going to happen is just living in never-never Land.

Neither her nor Kerry's decision will affect yours?

It will not.

You will make your decision by?

Don't have a time Frame but can't wait too long.

We'll be back. Senator Edwards, thanks very much.

Thanks, George.

The roundtable is next with George will, Cokie Roberts and Fareed Zakaria.

And later, "The Sunday funnies."

The Bush Administration is tightening Immigration now. In order to Cross the United States, you have to have Legal Documentation, you want to get into the United States you have to have Legal Documentation or a 95 Mile-An-Hour Fastball and other than that --

The roundtable, John Walsh and "The Sunday funnies" after this from our ABC Stations.

Announcer: Once again, George

And we are back now with the roundtable. I am joined as always by George will, Fareed Zakaria, Cokie Roberts, welcome to all of you and we saw the President come out early this morning after Church designed I think to affect our programming just a little bit talking about a New day and a New Chapter in Iraq. Fareed Zakaria, Tlfz a Government announced yesterday but it didn't include the National Security Secretary, the head of Defense or the head of Interior.

Other than that, other than that, Mrs. Lincoln, how do you like the play? You know, they've kicked the can down the Road one more time. The Core issue for the

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Iraqi Government is the Core issue for any Government, favorite Maxim you need a Monopoly over the use of Force. They Cannot decide who will have that Monopoly. Will it be Militia? Will it be Various Shia parties or will it be some kind of a National Army? And until they can Reconcile, Figure that out, until they can really Reconcile with the Sunnis, I think you're going to continue to see this. Let's hope -- Obviously it might work out. I have to say I met the New Prime Minister a year ago when I was in Iraq. He didn't Strike me as particularly Soft or Conciliatory on the Sunnis. In Fact, he struck me as more hard line than Jaafari, the old Prime Minister. Perhaps he'll change.

If a President after an Election came out and said, I've got a New Cabinet, Good News, I don't have an Attorney General, Secretary of State or Secretary of Defense, you would say why are you taking our time with this? Beyond that, however, there is a question, the Basic question about Contemporary Iraq, what is the Relevance of what goes on in the Green Zone where these People met to announce this Government, what is the Relevance of that to events five Miles away in Sadr City? Or somewhere like that.

Not only Sadr City but also up in the North in Ramadi. One of the things we saw this week was an increase in U.S. Troops at the end of the week, a thousand more Troops to Quell the disturbance.

And Rumsfeld saying the Drawdown which was promised now is no longer promised. I thought, the President came out, I noticed the first lady was by his side. Maybe that will be Permanent from here on out because her approval Ratings are so much higher than his but he's got to do this. Any little Teeny bit of Good News out of Iraq is something that he's got to promote because, of course, it is Iraq that is causing him all of the problems and his problems are now so affecting the political Landscape, that for him to just get any bit of Good News out of Iraq is something that he has to Ballyhoo.

You know, he said this Marks the beginning of a New Relationship between the United States and Iraq. I hope so in the sense that if we will finally begin explaining to the Iraqi Government what precisely are the terms under which we will stay, that is to say, we want to see some kind of political Bargain Brokered between the Shia, Sunnis and Kurds --

We've been pushing it.

Although we haven't been using a lot of Influence.

In some Ways they're getting criticized for having too much Influence.

Well, I think it's better to have too much because we're the ones to the Extent that Iraq is Secure, we're the ones Securing it. We're the ones funding all these Governments and it's important for us to make clear we will not continue -- We will not Baby-Sit a Civil War. I mean, if they can't come to a deal, why are we there?

Is there any way to know, George, whether or not this Government will allow the United States to withdraw what they had hoped for, 40,000 to 60,000 Troops by the end of the year?

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I don't think it's up to them to allow. We will withdraw --

Will the conditions allow it?

Probably not. Because we're in a Civil War. I mean it's not a question of if. We're in the Middle of a Civil War. 90 years ago this month, may 1916, the Psychs-Pico agreement invented Iraq and they've been trying to make a Nation out of it ever since, a Nation that will hold together other than under Tyranny. So far so Bad.

And what we've seen in recent Experience is that Nations that were Cobbled together either as a result of that World War I Truce or as a result of the Soviet Union have Fallen apart when the Tyrants have gone.

Most recently in the Balkans?

That's right, so it's a very Iffy proposition to put it Mildly.

If you say that every Nation that was Drawn by British Cartographers is Illegitimate and should Fall apart that's half of the World.

Nobody is saying Illegitimate. I'm just saying that's just the Experience.

The Truth of the Matter Indonesia exists because of Dutch Imperialism. All of Africa exists --

The question is whether they'll continue to exist and there's lots of fights going on there.

Turn to a fight here. Immigration Debate this week. We saw the Attorney General on this issue of whether or not English should be the National Language. At one Level, George will, it seems like common sense. English is the National Language as Senator Edwards said but this Amendment could have implications.

It could. When you asked the Attorney General if we should have Bilingual Ballots he said, of course. It seems to me the Attorney General needs a Refresher course in American Law. In 1906, high Tide of American Immigration, it was Stipulated as Law that to be eligible for Citizenship you had to demonstrate a Competence in Oral English. 1950, more than half a Century ago, it was Strengthened to say written, Spoken, reading English. You have to have this Competence. Now, Therefore, it follows as night to day that anyone who says I require a Bilingual Ballot has become a Citizen Ineligible to Vote only by the Nonenforcement of the Law and this is what is driving Americans Crazy.

The Voting Rights Act does specifically call for Bilingual Ballots.

Exactly, and the Voting Rights Act is Therefore in Stark contradiction of American Immigration Law.

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Two conflicting Laws and maybe somebody bring them to the Supreme Court but at the moment what you've got is a political Debate over this question of English and it is to me a very Silly Debate because on the one hand we know that most People speak English. It is True that --

Most want to speak English.

Exactly and Learning English is a Pathway to success. It is also True, however, that you Dial 411 and you get Press one for English, Press two for Spanish, and that's not going to change. As long as American Business sees it's in its best Interest to have Bilingual everything we're going to have Bilingual everything.

You know, about 150 years ago, there was -- German was the second most Spoken Language in Bismarck speculated on whether the United States would be a German speaking Country or English speak Country. It's nonsense. It's an English speaking Country. The Commercial Incentives are all to speak English. Anyone trying to get ahead in this Country knows that. There is a transitional Phase for those who come in here and because we take in lots of People that means the transitional Phase Involves lots of People who companies want to Cater to. What is the Great problem in the United States that we don't speak -- That we speak too many Foreign Languages, there are too many signs -- Americans are too Multilingual. We have forgotten what Language we speak?

I grew up in a City where the Stores all said -- [ Speaking French and Spanish ]

If you went to Yorktown in New York until 30 years ago it was essentially a German speaking part --

The first Congress of the United States Contemplated Printing Laws in German as well as in English.

Lost by one Vote.

And they didn't do it and it's a very Good thing. You say it's Silly. You say it's nonsense to worry about this. Let me tell you why it's not. The Law has an Expressive function and by saying there are some expectations that we can have for Immigrants coming to the Country, we set not a high Bar but a Bar which is that we are not a Nation Defined by Ethnicity, we are Defined as Lincoln said by a proposition, we're a Creedle Nation.

Liberty is Spoken in English? George, my point is what is the problem we are trying to solve?

We are trying to solve --

That Americans aren't speaking English?

That there should be some -- No, we're trying to get People who come here to understand that if you Cannot read the Laws, read the founding Documents and follow

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the political arguments of the Country, you are not going to be part of the Country.

But I think that People do understand that.

Believe me, they understand that, George, because they can't cash a check without --

Then why is it -- If you say it is obviously True, why is it Silly or nonsense to Stipulate something obviously True in the Law of the United States?

Because it is a political Football that has nothing to do with the Real problem. It is simply one more way to try to Assert a certain kind of Nativist Populism.

It is like Mr. Reid saying it is Racist --

There is a lot of name calling going on in this Debate.

It won't make much difference. I'll step in. It is not going anywhere. Please anybody disagree with me in a moment but no Matter what happens in the Senate, no Matter how many Debates they have over the English Language, this Bill is going to Die of its own Weight, and there's no way it can get through the House.

I think at the moment that seems to be the Case unless somehow I mean they all keep saying, the President has to Weigh in. The President has Weighed in and all it's done is make the Conservatives Angry and the Hispanics, by the way.

It was designed to Placate them. Was it a mistake for the President to give that Speech in Prime time Monday night?

No, I think not. This is actually something he believes and has been Consistent on this, probably the strongest Thread running through his entire Career.

Right.

It was leadership. It didn't work.

And I think his proposal is a very sensible, Intelligent Solution to a Real problem. His proposal, the three parts Greater Enforcement, Legalization of existing Undocumented workers and guest worker Program is the Solution.

This gets back to what I was saying earlier about Iraq just Casting a Pall over everything. If the President were at decent approval Ratings, the Fact that he came out and led would make a difference.

Would make a much bigger difference.

The Fact he is at the Ratings he is because of Iraq, they just ignore him.

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I think that's right. Elections this week including a big Election last night in New Orleans. Mayor Ray Nagin came back and is going to be Mayor again. Watch this.

This is a Great day for the City of New Orleans. This Election is over, and it's time for this Community to start the Healing process.

Cokie, you're our Resident New Orleans Expert. I got to say I was surprised by this coming off of the runoff, the Primary, it seemed like Mitch Landrieu would Suck up all the Votes. Didn't happen.

Everybody assumed this was much more about Race than it was and the Opponents of Nagin for the most part were White. I mean, the second -- The person who came in third was White, and People thought those White voters would go automatically to Landrieu and Nagin would Lose. The Truth is, I'll be interested in seeing the exit Polls if there are any, but in my Anecdotal Conversations throughout New Orleans, those White voters went with Nagin.

Of course, Nagin got the White Vote the first time around.

But these are also People who would do basically anything other than Vote for a Democrat like Mitch Landrieu and they would Prefer to Vote for Ray Nagin who they think they have some control over Rather than Vote for Mitch Landrieu.

And, George, Ray Nagin Bucked what may be a Tide this year, an Incumbent who stayed in despite voter Anger.

The Incumbent always Wins, also a Fact in those Races.

We saw in Pennsylvania this week a Real scare shot through the Republican Ranks in their Primary.

A lot of Incumbents lost and they lost second point, they lost because Conservatives got Mad at them. It was over a pay raise and other local Matters but still Conservatives, these Turbulent Conservatives Defected. Third, the Conservatives were Outspent eight to one and Won. Now, one of the things the Republicans are Counting on this Fall is their Superior fund-raising ability. They may find out as The New York Yankees have not having Won the World Series since 2000 that there's a declining Marginal Utility of the last Dollar.

Nagin was also Greatly Outspent.

Was Greatly Outspent. And he lost. Thank you all very much. Sorry we couldn't get you in on that, Fareed. The roundtable will keep talking in the Green Room. You can find out later by going to ABC and Clicking on "This week."

Now "In Memoriam." One Singular Sensation every little step she takes one Thrilling combination every move that she makes

I can Scarcely wait Till tomorrow when a New life begins for me as it does each day, as it does each day

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When you take the events that Unfolded in the months before the Tet Offensive and add them up, to me it constitutes a Conspiracy to Deceive.

This week, the Pentagon released the names of 26 Soldiers and Marines killed in Iraq.

We'll be back with John Walsh.

Our Voice this week, John Walsh.

The names of 100 --

America's most Famous Crime fighter is now taking on a New cause, pushing Congress to pass the Toughest Sexual Predators Law ever. But with Congress Tied up in Knots this Election year, Walsh fears that Bill may be a Victim.

I have Hunted every kind of dangerous Fugitive on "America's most wanted." You know who the Toughest to catch are, the Child Killers and the Pedophiles. Their Cunning, they're Smart. They know the Laws. They know how to Beat it. I've been going to Capitol Hill every year for 25 years and this may be the most meaningful Piece of Child protection Legislation ever. It would set up a National Sex Offender Registry. It would Mandate that every Single State keep a Uniform Registry designed by the Justice Department and for the first time in the History of this Country, convicted Sexual Predators, Rapists and Child Molesters who are in Violation of their Parole, Probation or Refuse to Register even though Mandated to would be held Accountable. You're looking at a guy who is the Father of a murdered 6-Year-Old Child. Wake up. It can be the Soccer Coach. It can be the Rabbi. It can be the School Bus driver. For years they've been out there and they've known all the Rules and they've known how to Lure our Kids and hurt our Kids. When I was a little boy, you walked down the Street and your Mom or Dad would say there's a Bad Dog there. Don't go in that Yard. Don't Pet that Dog. It could bite you. Same thing with a Sexual Predator. I want to have the ability to say to my 11-Year-Old Son, do not ever go in that Garage, do not ever be lured in that House. Don't go in and look at that Puppy. Don't go in there and play those Video games because that's a House and that's a man that you shouldn't be talking to. I think that Congress will get the Message, you will be held Accountable this time. You will -- Someone, me, other Parents, the Media, somebody will hold you Accountable for not getting this done.

The Bill is sitting on the Congressional Calendar right now. If you want it passed, call your Representative or Senator.

And for more from John Walsh check out Voices plus. Go to ABCNews.Com and Click on "This week," And now "The Sunday funnies."

And the President made it clear that the issue should be discussed in a Civil Fashion.

America needs to conduct this Debate on Immigration in a reasoned and respectful Tone. We Cannot build a Unified Country by Inciting People to Anger or playing on

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anyone's fears.

That's what -- That's what Terrorism and Gay People are for.

And according to a Washington poll, Washington/Abc News poll actually, People, Americans say they Trust Democrats more than Republicans to deal with Iraq, the Economy, Iraq and other issues, in Fact, if the Election were held today John Kerry would still Lose. Yeah.

Things are very Bad for the President. Even now his own Staff is -- You remember Tony Sopranos in "The Sopranos" started to Lose it and Beat someone up. Look what happened at the Airport.

After a visit to Orlando to promote his Prescription Drug plan, the President was surprised when Air Force one pulled away without him and suffered only Minor bruises.

That is Unacceptable.

As you probably heard, "USA today" reported the Agency is collecting Data on billions of Domestic Calls.

---- INDEX REFERENCES ----

NEWS SUBJECT: (HR & Labor Management (1HR87); Legal (1LE33); Race Relations (1RA49); Social Issues (1SO05); Business Management (1BU42); World Elections (1WO93); Global Politics (1GL73); World Conflicts (1WO07); Social Welfare (1SO83); Judicial (1JU36); Civil Unrest (1CI11); Sex Crimes (1SE01); Labor Unions (1LA31); Legislation (1LE97); Government (1GO80); Minority & Ethnic Groups (1MI43); Crime (1CR87); Criminal Law (1CR79); Economics & Trade (1EC26); Political Parties (1PO73); Public Affairs (1PU31))

INDUSTRY: (Gen Y Entertainment (1GE14); Smuggling & Illegal Trade (1SM35); Gen Y TV (1GE33); Online & Electronic Publishing (1ON84); Publishing (1PU26); Internet Regulatory (1IN49); Entertainment (1EN08); Internet (1IN27))

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OTHER INDEXING: (ABC; ABC NEWS; ABC STATIONS; ACT PERMITS BILINGUAL; AIR FORCE; AMERICAN BUSINESS; AMERICAN IMMIGRATION; AMERICAN LAW; AMERICAN PEOPLE; AP; BILINGUAL; BILINGUAL BALLOT; BILINGUAL BALLOTS; BILL; BORDER; BORDER PATROL AGENTS; BRITISH CARTOGRAPHERS; CHILD; CHILD KILLERS; CIA; CITIZEN INELIGIBLE; CIVIL FASHION; COLLEGE; COLLEGE SCHOLARSHIPS; COMPREHENSIVE IMMIGRATION BILL; CONGRESS; CONGRESSIONAL REPUBLICAN; CONSERVATIVES; CONSERVATIVES ANGRY; CONSTITUTION; CORRUPTION; CREEDLE NATION; DEBATE; DEFINED; DEMOCRAT ANGLING; DEMOCRATIC; DEMOCRATIC CONSULTANT; DEPARTMENT OF JUSTICE; DRAWDOWN; EXTENSIVE; FALSE SOCIAL

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SECURITY; FAREED; FAREED ZAKARIA; FAREED ZAKARIA DEBATE; FEDERAL JUDGE; FORMATION; GEORGE WILL FAREED ZAKARIA; GOOD NEWS; HARVARD ECONOMIST; HISPANICS; HOME STATE; HOUSE; IFFY; ILLEGAL; ILLEGAL IMMIGRANTS; IMMIGRANTS; IMMIGRATION; IMMIGRATION DEBATE; JUDICIARY COMMITTEE; JUSTICE DEPARTMENT; LANGUAGE; LANGUAGE OF COMMERCE; LAW; LAWYERS; LOBBIES CONGRESS; MATE; MATTER INDONESIA; MESSAGE; MEXICAN BORDER; NATIONAL; NATIONAL ARMY; NATIONAL LANGUAGE; NATIONAL MUFFIN; NATIONAL SECURITY; NATIONAL SEX OFFENDER REGISTRY; OFFICE OF PROFESSIONAL; PEDOPHILES; PENTAGON; PEOPLE; POLICY; POLICY DEBATE; PRESIDENTIAL DEBATE; PRESIDENTIAL RACE; PRIMARY; PRINCETON ECONOMIST; PSYCHS PICO; RACE; RAPISTS; RATIONAL DEBATE; REFRESHER; REPUBLICAN CONGRESS; REPUBLICANS; REPUBLICANS IMPLODE; SADDAM HUSSEIN; SCHOLARSHIPS; SCHOOL BUS; SENATE; SENATE DEBATE; SEXUAL; SEXUAL PREDATOR; SHIA; SILLY; SILLY DEBATE; SINGLE STATE; SMART; SMART BORDER STRATEGY; SOCIAL SECURITY; STAKES; STARK; STIPULATED; STRATEGY; STRONG DEFINING MESSAGE; SUNNIS; SUPREME COURT; TASTE; TLFZ; TOUGHEST; TOUGHEST SEXUAL PREDATORS LAW; TURBULENT CONSERVATIVES DEFECTED; UNCONSTITUTIONALITY; UNIFORM REGISTRY; UNIFYING LANGUAGE; VOTE; VOTING; WHITE HOUSE; WHITE VOTE) (Acting; Al Qaeda; Alberto Gonzales; Alberto Gonzales.; Assimilate Folks; Attorney; Bargain Brokered; Beat; Bush; Bush Lowest; Calls; Classified Information; Clinton; Clinton Chooses; Cokie; Cokie Roberts; Consistently; Criminal; Declares English; Documents; Edwards; Election; Elections; Elizabeth; English; English Represents; Ethical; Folks; Forged Documents; George; George W. Bush; George will; GeorgeStephanopoulos; Good; Greatly Outspent; H. Marshall Jarrot; Hayden; Health; Hey; Hispanic Publishers; Impeached; Impeachment; Intelligent Solution; Intentionally; Iowa; Jack; John; John Edwards; John Kerry; John Kerry Won; John Walsh; Kerry; Kurds; Landrieu; Learning English; Liberty; Lincoln; Marginal Utility; Mary Cheney; Mitch; Mitch Landrieu; Nagin; Nagin Bucked; Permanent; Phase; Phase Involves; Poverty; Ray; Ray Nagin; Reid; Represents Freedom; Richard Nixon; Roberts; Rumsfeld; Sessions; Singular Sensation; Spoken; Strengthened; Tony Sopranos; Voices; Wake; Walsh; Walsh Tracking Predators; Washington)

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# EXHIBIT 15

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 1, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find responses to questions posed to Criminal Division Chief of Staff and Principal Deputy Assistant Attorney General Matthew W. Friedrich, following Mr. Friedrich's appearance before the Committee on June 6, 2006. The subject of the Committee's hearing was the unauthorized disclosure of classified information by the press. We apologize for the length of time our response has required.

You also requested the Department's views on S. 2831, the "Free Flow of Information Act of 2006." On June 20, 2006, the Department provided the Committee with a letter setting forth its views in opposition to this legislation. For your convenience, we have enclosed a copy of the letter for the hearing record.

Senator Leahy also requested the Department's views on data retention by Internet service providers. The Attorney General has commissioned a panel of experts within the Department to examine this issue and provide him with recommendations. That panel's work is ongoing. Therefore, I respectfully request that you allow the Department additional time to finalize its own inquiry before we respond to the Committee's request.

We hope that this information is helpful to you. If we may be of additional assistance in connection with this or any other matter, we trust that you will not hesitate to call upon us. The

Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Richard A. Hertling
Acting Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

**Responses to Questions for the Record**
**Matthew W. Friedrich**
**Chief of Staff and Principal Deputy Assistant Attorney General**
**Criminal Division**

**"Examining DOJ's Investigation of Journalists Who Publish Classified Information: Lessons from the Jack Anderson Case"**

**Committee on the Judiciary**
**United States Senate**
**June 6, 2006**

**Senator Specter:**

1. *Last Month Attorney General Gonzales made a series of statements on ABC's This Week program to suggest that DOJ would consider prosecuting a journalist or news organization for publishing classified information.*

   - *To which statutes was he referring when he said, "There are some statutes on the book, which if you read the language carefully, would seem to indicate that [prosecution of journalists] is a possibility."?*
   - *Does the Department of Justice share the views of Benno Schmidt and Harold Edgar, who wrote in 1973 that the Espionage Act does not apply to journalists, or the views of Justices White and Stewart, who wrote in the 1971 Pentagon Papers case that the Act does apply to journalists?*
   - *Title 18, United States Code, Section 798, which bars the willful publication of communications intelligence, appears to apply to journalists. Was this the statute Attorney General Gonzales was discussing?*

Answer: The statutes to which the Attorney General was referring were 18 U.S.C. §§ 793 and 798. These two provisions, on their face, do not provide an exemption for any particular profession or class of persons, including journalists. Many judges (including Justices of the United States Supreme Court) and commentators have examined these statutes and reached the same conclusion. In his concurring opinion in the Pentagon Papers case, for example, Justice White wrote, "from the face of [the statute] and from the context of the Act of which it was a part, it seems undeniable that a newspaper, as well as others unconnected with the Government, are vulnerable to prosecution under § 793(e) if they communicate or withhold the materials covered by that section." *New York Times v. United States*, 403 U.S. 713, 740 (1971). We agree with Senator Specter, who stated on May 2, 2006, in a hearing with FBI Director Mueller, "the White-Stewart opinions" from the Pentagon Papers case "are pretty flat out that there is authority under those statutes to prosecute a newspaper, [and] inferentially [to] prosecute reporters."

In *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988), *cert. denied*, 488 U.S. 908 (1988), the United States Court of Appeals for the Fourth Circuit explicitly rejected a defendant's assertion that the First Amendment barred his prosecution under § 793 for

unauthorized disclosures of classified information. The Fourth Circuit did so over the objections of numerous news organizations that had filed amicus briefs in the case to press the First Amendment defense against prosecution. Further, several legal commentators have concluded, with respect to §§ 793 and 798, that journalists are not exempt from the reach of these statutes if their elements are otherwise met.

It bears emphasis that the Attorney General has made clear that the Justice Department's primary focus has been and will continue to be investigating and prosecuting leakers, not members of the press. The Department strongly believes that the best approach is to work cooperatively with journalists to persuade them not to publish classified information that can damage national security.

2. *How do you square the Attorney General's public comments on the prosecution of journalists with Department of Justice regulations (28 C.F.R. § 50.10) that say that "the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues"?*

Answer: In his "This Week" appearance, the Attorney General was addressing the potential reach of 18 U.S.C. §§ 793 and 798 on their face. The Attorney General's comments are consistent with the Department of Justice's policy, as expressed in 28 C.F.R. § 50.10. Strictly speaking, the provisions of 28 C.F.R. § 50.10 are not "regulations," but a statement of policy that does not "create or recognize any legally enforceable right in any person." *See id.* at 50.10(n); *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1046-47 (D.C. Cir. 1987). As set forth in 28 C.F.R. § 50.10, the policy seeks to "balanc[e] the concern that the Department of Justice has for the work of the news media and the Department's obligation to the fair administration of justice." The Department recognizes the vital role that a free press plays in our society. Accordingly, the Department's voluntarily adopted internal policy requires a rigorous internal review – culminating with the Attorney General himself – of not only decisions to prosecute members of the press but also subpoenas aimed at the press, even in cases where the press itself is not the target of the investigation. The policy demonstrates the Department's ongoing commitment to striking a balance between the public's interest in the free dissemination of ideas and its interest in effective law enforcement and the fair administration of justice.

3. *The Department of Justice argued at this Committee's October 2005 reporters' privilege hearing that reporters' privilege legislation is not necessary because Department of Justice regulations, namely 28 C.F.R. § 50.10, set forth safeguards and a framework for evaluating requests for journalists' testimony and documents.*

   - *Do these regulations apply to requests for records of deceased journalists, like Jack Anderson?*
   - *Does the Department of Justice believe that there should be the same level of First Amendment protection of the notes and confidential sources of deceased journalists?*

- *Don't some of the national security concerns about the publication of national secrets diminish when a journalist dies? Dead journalists don't publish anymore, after all. Accordingly, doesn't the government's interest in and concern about such materials diminish?*

Answer: At the time of my testimony, the Department was reviewing the applicability of 28 C.F.R. § 50.10 to circumstances involving deceased journalists. Subsequent to my testimony, the Department revised the United States Attorneys' Manual to make it clear that "[t]he Department considers the requirements of 28 C.F.R. § 50.10 applicable to the issuance of subpoenas for the journalistic materials and telephone toll records of deceased journalists." United States Attorneys' Manual § 9-13.400.

Separate and apart from the applicability of the Department's policy to deceased journalists, it is the Department's view that, as a legal matter, the treatment of notes and sources of deceased journalists should be the same as that of living journalists. The courts, including the United States Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972), have held that journalists have no First Amendment privilege against disclosing their sources in response to a grand jury subpoena.

With respect to the Department's views on the effect a journalist's death may have on any national security concerns regarding the journalist's sources or records, such a determination is highly fact-specific and would need to be evaluated on a case-by-case basis.

4. *Courts, including the Supreme Court in Swidler & Berlin v. United States, 524 U.S. 399 (1998), have said that testimonial and production privileges, like the attorney-client privilege, apply after the death of the privilege holder.*

   - *If courts are willing to extend privileges beyond the grave when policy supports it, wouldn't a reporter's privilege better safeguard the First Amendment interests of deceased reporters and their sources?*

   - *If the attorney-client privilege, marital privilege, psychiatric privilege, and even executive privilege can survive the death of one of the privilege holders, why shouldn't the same thing apply to reporters? What is the policy difference? For instance, is the First Amendment protection of the press any less than the Sixth Amendment right to counsel?*

Answer: As noted above, the Department has revised the United States Attorneys' Manual to make it clear that "[t]he Department considers the requirements of 28 C.F.R. § 50.10 applicable to the issuance of subpoenas for the journalistic materials and telephone toll records of deceased journalists." United States Attorneys' Manual § 9-13.400.

As a broader matter, the same courts, including the Supreme Court, that have consistently held that the marital, psychiatric, and attorney-client privileges extend beyond the grave also

have consistently held that journalists possess no First Amendment privilege to avoid testifying in response to a valid grand jury subpoena. As the Supreme Court stated in *Branzburg*, "the Constitution does not, as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task." *Branzburg*, 408 U.S. at 691.

The Department remains committed – as it always has been – to striking an appropriate balance between the public interest in the free dissemination of ideas and the public's interest in effective law enforcement and national security. Accordingly, the Department believes that, as a legal matter and as a policy matter, legislation in this area is both unnecessary and unwise.

5. *The Department of Justice has procedures and regulations in place to address subpoenas to journalists.*

   - *What similar procedures are in place to ensure that a decision to prosecute a journalist is carefully considered and the First Amendment interests properly weighed. Shouldn't this be a higher standard than the one that applies to subpoenas?*

Answer: The Department of Justice takes seriously any investigative or prosecutorial decision that implicates – directly or indirectly – members of the news media, whether it be the issuance of a subpoena or the filing of an indictment. The seriousness with which the Department approaches these decisions is reflected in the Department's governing policy, 28 C.F.R. § 50.10, which is reiterated in the United States Attorneys' Manual.

As is noted in the Department's policy, "the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues." The Department has never in its history prosecuted a member of the press under section 793, section 798, or any other statute relating to the protection of classified information, even though, as a legal matter, such a prosecution is possible under the law.

The Department's policy requires the express authorization of the Attorney General for any decision to prosecute a member of the news media for an offense committed during the course of, or arising out of, the news gathering or reporting process. In authorizing any such decision, the Attorney General would necessarily seek to "balanc[e] the concern that the Department of Justice has for the work of the news media and the Department's obligation to the fair administration of justice." 28 C.F.R. § 50.10.

6. *Section 798 of the Criminal Code was enacted in 1950 in response to a June 7, 1942* Chicago Daily Tribune *article that disclosed during wartime that the United States had obtained advanced intelligence of the Japanese navy's attack plans at Midway. This information was later revealed to have come from communications intelligence, specifically intercepted wires and a cracked Japanese code. Section 798 is now being*

*discussed as a potential tool for prosecuting journalists who willfully publish communications intelligence.*

- *What level of national security threat does the Department of Justice believe is needed for prosecution under section 798? Does the threat need to be imminent? Do we need to be at war?*

Answer: As to the requirements of the law, section 798 does not, by its terms, require a showing either that the disclosure of classified communications information resulted in an imminent threat to the United States or that the nation was at war when the disclosure was made. No court has interpreted section 798 as requiring a showing that the disclosure resulted in an imminent threat or occurred in a time of war, nor does the Department believe that such an interpretation would be warranted in light of the clear wording of the statute.

**Senator Leahy:**

1. *You testified that the Department of Justice has never prosecuted a member of the press under 18 U.S.C. § 793 for the publication of national defense information, but believes that such a prosecution could be possible.*

   (a) *Could section 793 be used to prosecute a journalist for publishing national defense information for the purpose of promoting public debate or selling newspapers?*

   (b) *What about conduct that is incidental to a journalist publishing a story, such as retaining classified documents that may be used later in a story, or communicating such information to a publisher or other reporters in the course of writing a story? Does the Department believe that section 793 also reaches this type of conduct?*

Answer: As the Attorney General has indicated, while there are statutes on the books (including, most notably, 18 U.S.C. §§ 793 and 798) that do not appear to exempt any profession or class of persons from their scope, the Department's "primary focus" is on the leakers of classified information and not the media recipients of that information. Having said that, a leading case in this area, *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988), *cert. denied*, 488 U.S. 908 (1988), holds that section 793 makes no distinction between the motivations of those who illegally disclose national defense information to someone not authorized to receive it.

In *Morison*, the defendant claimed that, because he leaked classified national defense information to the news media and not to a foreign power, his actions did not constitute "classic spying" and therefore did not run afoul of section 793. The Fourth Circuit rejected this contention, noting that the language of the statute "includes no limitation to spies or to 'an agent of a foreign government,' either as to the transmitter or the transmittee of the information, and they declare no exemption in favor of one who leaks to the press. It covers 'anyone.' It is difficult to conceive of any language more definite and clear." *Morison*, 844 F.2d at 1063.

To be clear, the defendant in *Morison* was not a member of the news media, although he did work part time for a defense publication, and no court has had occasion to consider the application of section 793 to a member of the news media.

With regard to conduct that is incidental to a journalist publishing a story, whether such conduct falls within section 793 will depend on the particular facts and circumstances. Therefore, it would be inappropriate to offer an advisory opinion about the legality of such conduct.

2. *Section 798 of title 18 prohibits unauthorized disclosure of classified information pertaining to communications intelligence. Like section 793, section 798 has never been used to prosecute a journalist.*

(a) *Without getting into the details of any ongoing investigations, has the Department ever considered prosecuting a journalist for publishing classified information under this provision?*

(b) *Do you believe there is a legally significant difference between the act of publishing a story that reveals only the existence of a classified program involving communications intelligence, and the act of publishing a story that discloses specific details about the program?*

Answer: Respectfully, it would be inappropriate to comment upon whether the Department is now considering the prosecution of journalists for publishing classified information. As to whether such prosecutions have ever been considered, my understanding is that there are historical examples where such prosecutions were considered by the Department. *See* Gabriel Schoenfeld, *Has the* New York Times *Violated the Espionage Act?*, Commentary (Mar. 2006), at http://www.commentarymagazine.com/Production/files/schoenfeld0306advance.html.

With regard to whether there is a legally significant difference between publishing the existence of a classified program and the details of such program, the answer would likely depend on the particular facts and circumstances, including the extent to which the existence of the program is classified information.

3. *You testified that you think improper classification might be a proper defense to certain statutes involving the dissemination of classified information. Specifically, do you believe that improper classification could be a defense to a case brought under section 798? What about a prosecution under section 793?*

Answer: As I stated in my testimony before the Committee on June 6, 2006, improper classification "might be a defense to certain statutes," but it is "not certain" that this defense is available for sections 793 and 798. Some commentators have argued that improper classification could be a defense to prosecution under the Espionage Act. Professors Edgar and Schmidt, for example, in their 1973 article argued that the language of the Espionage Act "suggests that the appropriateness of the classification is a question for the jury." However, in *United States v. Boyce*, 594 F.2d 1246 (9th Cir. 1979), the Ninth Circuit considered and rejected a defendant's challenge to his conviction under sections 793, 794, and 798 for disclosing communications intelligence to the Soviets. The Ninth Circuit specifically held that "[u]nder section 798, the propriety of the classification is irrelevant. The fact of classification of a document or documents is enough to satisfy the classification element of the offense."

Beyond this Ninth Circuit case, the Department is unaware of any case law that addresses the issue of improper classification as a defense, and we are aware of no case that affirmatively holds that such a defense is available to defendants in Espionage Act cases.

4. *Besides sections 793 and 798, are there any other legal authorities that the Justice Department believes could be used to prosecute journalists for publishing classified information?*

Answer: Sections 793 and 798 are the two statutes that are most relevant to the vast majority of crime reports the Department receives from Intelligence Community members relating to the unauthorized disclosure of classified information. Depending on the facts and circumstances of any particular case, there may be other statutes of potential applicability.

5. *What is the Department's position on whether Congress should enact a new law to criminally punish leaks?*

Answer: The Department is prepared to work with the Congress both on crafting new legislation and improving the existing statutory tools at the Department's disposal to combat illegal leaks of classified information.

6. *Other than the Jack Anderson case, has the Department made any attempts over the past 5 years to search the files of journalists, either living or deceased?*

Answer: I am informed that over the past five years, the Department has approved search warrants for materials related to the news gathering process pursuant to the Privacy Protection Act, 42 U.S.C. § 2000aa *et seq.*, in four cases. The Department also issues subpoenas to reporters pursuant to the policy embodied in 28 C.F.R. § 50.10.

7. *You testified that the Department is reviewing its policy for seeking information from the estates of deceased journalists. Is that review complete and, if so, what is the new policy?*

Answer: As noted above, this review is complete and the Department has changed its policy. The Department has revised the United States Attorneys' Manual to make it clear that "[t]he Department considers the requirements of 28 C.F.R. § 50.10 applicable to the issuance of subpoenas for the journalistic materials and telephone toll records of deceased journalists." United States Attorneys' Manual § 9-13.400.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General
Washington, D.C. 20530

June 20, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on S. 2831, the "Free Flow of Information Act of 2006." S. 2831 would create a "journalist's privilege" to be asserted in a number of circumstances by a covered journalist or "communication service provider" against the compelled disclosure of either a source who provided information under a promise or agreement of confidentiality, or of information obtained while acting in a professional capacity. The Department opposes this legislation because it would subordinate the constitutional and law enforcement responsibilities of the Executive branch — as well as the constitutional rights of criminal defendants — to a privilege favoring selected segments of the media that is not constitutionally required.

**Constitutional Concerns**

The leading authority on the constitutional status of a journalist's privilege is *Branzburg v. Hayes*, 408 U.S. 665 (1972), which rejected arguments asserting the privilege on First Amendment grounds in the grand jury context. A recent Federal court of appeals decision on the issue, *In re Grand Jury, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006), dismissed arguments questioning the force of *Branzburg*'s holding and applied *Branzburg* to reject the assertion of a First Amendment journalist's privilege. While some Federal courts have recognized a First Amendment-based journalist's privilege in civil cases — where the Government's law enforcement responsibilities are not directly affected, *see Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) — the privilege proposed in the bill would extend to criminal proceedings, including grand jury investigations, and to the national security context.

In addition, the bill's definitions of privileged "journalist[s]" and "communication service provider[s]" do not exclude the agents and media outlets of hostile foreign entities, and therefore extend protection to these agents against the law enforcement efforts of the United States. For example, the definitions appear to encompass entities such as *Al-Manar* and its

reporters and cameramen. *Al-Manar* is the media outlet and television station of the terrorist organization Hezbollah. *Al-Manar* was placed on the Terrorist Exclusion List by the State Department in 2005 and more recently was designated a specially designated global terrorist by the Treasury Department pursuant to Executive Order 13224.

Because the broad privilege established by the bill is not grounded on a constitutional right, we object to any provision that subordinates to the privilege recognized constitutional imperatives, such as Presidential responsibilities under Article II and a defendant's rights under the Sixth Amendment.

President's Authority to Control Classified Information

Section 7 of the bill would permit disclosure where the information or record in question was obtained by the journalist as a result of his eyewitness observation of criminal conduct or the committing of criminal or tortious conduct by the journalist himself. There is an "exception to the exception," providing: "This section does not apply if the alleged criminal or tortious conduct is the act of communicating the documents or information at issue." As we understand it, this latter provision appears to apply to eyewitness or perpetrator information concerning a criminal disclosure of classified national security information, including, for example, the provision of such information to a journalist for an entity such as *Al-Manar*. Therefore, its effect would be to extend the protection of the privilege to this criminal disclosure of classified national security information. This provision could interfere with the President's constitutional authority to control classified national security information. *See generally Department of Navy v. Egan*, 484 U.S. 518, 527 (1988) (acknowledging the compelling nature of the President's constitutional authority to classify and control access to information bearing on the national security).

National Security and Law Enforcement Responsibilities of the Executive Branch

Section 9(a)(1) of the bill would permit the Executive branch to obtain a journalist's testimony and information involving source identification only if the Government could demonstrate to a court, by "clear and convincing evidence," that the disclosure is "necessary to prevent an act of terrorism or to prevent significant and actual harm to the national security" *and only if* "the value of the information that would be disclosed clearly outweighs the harm to the public interest and the free flow of information that would be caused by compelling the disclosure." Similarly exacting standards are required to bypass the privilege under section 9(a)(2) in criminal prosecutions or investigations of unauthorized disclosure of classified information by a Federal employee. The conditions this provision requires the Government to satisfy in order to obtain information critical to national security place impermissible burdens on

the constitutional responsibilities of the President and the Executive branch.[1] *See generally Haig v. Agee*, 453 U.S. 280, 307 (1981) (stressing that "It 'is obvious and unarguable' that no governmental interest is more compelling than the security of the Nation" in rejecting former CIA agent's claim that passport revocation violated First Amendment rights).

Sixth Amendment

Under subsection 5(b) of the bill, defendants could obtain a journalist's testimony or evidence only if they proved to a court by clear and convincing evidence that, *inter alia*, the information sought was (1) "directly relevant" to guilt or innocence or to a "critical" sentencing fact; (2) "essential"; and (3) non-"peripheral"; and that failure to provide the information sought "would be contrary to the public interest." Thus, a defendant who established that the information or testimony sought was essential information that was directly relevant to innocence still could not obtain it if he could not also persuade a court, by clear and convincing evidence, that nondisclosure of the information would be "contrary to the public interest." This provision is inconsistent with the requirements of the Sixth Amendment.

The Sixth Amendment provides in relevant part: "In all criminal proceedings, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . [and] to have compulsory process for obtaining witnesses in his favor." As the Supreme Court has recognized, "This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967). Although this right is not absolute, the government bears a heavy burden when it seeks to limit it by statute. As the Second Circuit has explained: "While a defendant's right to call witnesses on his behalf is not absolute, a state's interest in restricting who may be called will be scrutinized closely. In this regard, maximum 'truth gathering,' rather than arbitrary limitation, is the favored goal." *Ronson v. Commissioner of Correction*, 604 F.2d

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[1] In *Branzburg*, the Supreme Court described the relative weight to be accorded to law enforcement and national security interests in conflict with an asserted journalist's privilege:

> Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

408 U.S. at 690.

176, 178 (2d Cir. 1979) (State court's refusal to call psychiatrist to testify in support of prisoner's insanity defense violated Sixth Amendment right to compulsory process).

The conditions of subsection 5(b) exceed the standards imposed by courts that have given considerable deference to a reporter's privilege, based upon their view that the privilege is constitutionally required. *See, e.g., In re Shain*, 978 F.2d 850 (4th Cir. 1992) (reporter's privilege against compelled testimony in a criminal case rejected in the absence of government harassment or bad faith); *United States v. Criden*, 633 F.2d 346, 358-59 (3d Cir. 1980) (constitutional reporter's privilege can be overcome if the movant "demonstrates" and "persuades the court" that the information could not be obtained from other sources and such information is "crucial to the claim"; privilege claim rejected and testimony compelled). A district court recently described the balance to be struck between a constitutionally based journalist's privilege and a defendant's Sixth Amendment rights: A defendant's "Sixth Amendment right to prepare and present a full defense to the charges against him is of such paramount importance that it may be outweighed by a First Amendment journalist privilege *only* where the journalist's testimony is cumulative or otherwise not material." *United States v. Lindh*, 210 F.Supp.2d 780, 782 (E.D. Va. 2002) (emphasis added). Last month, the United States District Court for the District of Columbia held that a defendant's Sixth Amendment right to obtain relevant and admissible evidence for his criminal trial could not be subordinated to an asserted reporter's privilege. *See United States v. Libby*, 2006 WL 1453084 (D.D.C., May 26, 2006).

Based upon the continuing validity of *Branzburg* and ensuing opinions such as *Miller*, we conclude that the reporter's privilege described in the bill is not required by the First Amendment. Moreover, on the contrary assumption that the asserted privilege has some constitutional underpinning, the bill's current subordination of criminal defendants' Sixth Amendment rights to the privilege is unsustainable.

**Other Concerns**

Section 3

The bill's critical definition of "journalist" may be challenged legitimately as both overinclusive and underinclusive. It is overinclusive because, as indicated above, it includes hostile foreign entities as well as a wide-ranging category of entities whose ability to invoke the privilege would present obstacles to efficient law enforcement. However, from the standpoint of free speech principles, the definition could also be considered underinclusive because its discrimination between those who write and disseminate news for financial gain and pursuant to an employment or contractual relationship, on the one hand (the protected segment); and those who do so on an uncompensated or unaffiliated basis, on the other (the unprotected segment), is not rationally related to the purpose of the bill. We question whether a definition that effectively reconciles these conflicting considerations is possible as a practical matter.

We also recommend that section 3 define a "promise or agreement of confidentiality" to mean an assurance of confidentiality granted only upon a journalist's reasonable belief that the assurance is essential to gather news that is of significant public interest and for which reasonable alternative sources do not exist. This definition should exclude an assurance given to a source where the journalist has reasonable cause to believe (1) that the disclosure of the information is itself a crime; or (2) that the information being disclosed will place individuals in significant risk of serious bodily injury or will pose a significant risk to national security if not provided to law enforcement or other proper authorities without further delay.

Section 4

Section 4 of the bill ("Compelled Disclosure at the Request of Attorneys for the United States in Criminal Proceedings") would require the Department of Justice to demonstrate to a court "clear and convincing evidence" of a number of factors before it could compel disclosure in Federal criminal proceedings. Initially, we note that there is no evidence that the Department of Justice has abused its subpoena power to obtain source information. Indeed, since 1991, only 4.9% of the media subpoena requests that the Department's Criminal Division has processed were for source information, and only 12 such subpoenas have been issued in the last 14 years.

Additionally, the "clear and convincing" standard is a challenging one to meet, more rigorous than a "preponderance of the evidence," though less rigorous than "beyond a reasonable doubt." *See, e.g., Addington v. Texas*, 441 U.S. 418, 431-32 (noting that the clear and convincing evidence standard is a "middle level of burden of proof"). The bill would make source information more difficult to obtain than, for example, evidence of governmental misconduct sought to be protected by the deliberative process privilege. *See United States v. Lake County Bd. of Com'rs*, 233 F.R.D. 523, 526 (N.D. Ind. 2005) (explaining that the deliberative process privilege can be overcome by a "sufficient showing of a particularized need to outweigh the reasons for confidentiality").

This standard might severely restrict our ability to gain access to the information. It would require the Department to establish that there were reasonable grounds, based upon information from an alternative, independent source, to believe that a crime had occurred. If knowledge of the crime came from only a single source, we might not be able to compel disclosure.

Section 4 also severely conflicts with statutory, court-imposed, and operationally essential protections for sensitive grand jury and other criminal investigative information, by replacing confidential internal Department of Justice reviews of investigative background information (*i.e.*, the Attorney General's guidelines for the use of compulsory process against the news media) with public adversarial judicial proceedings.

Section 4 explicitly should permit compelled disclosure where the source waives the privilege.

We also note that paragraph 4(b)(2) of the bill would require that the Government demonstrate to a court, by clear and convincing evidence "to the extent possible, that the subpoena avoids requiring production of a large volume of unpublished material and is limited to the verification of published information and surrounding circumstances relating to the accuracy of the published information." Depending on how courts applied this provision, it could induce individuals to use journalists to shield documents from production.

Further, paragraph 4(b)(3) would require the Government to give reasonable and timely notice of its demand for documents. While this generally may not be problematic, the provision makes no allowance for exigent circumstances making such notice unworkable.

Finally, we note that subsection 4(a) of the bill states that it applies to "a journalist, any person who employs or has an independent contract with a journalist, or a communication service provider." However the exception provided in section 4(b) omits "communication service provider." This may be a drafting oversight.

Section 5

The provision in section 5 of the bill governing disclosure at the request of a criminal defendant is notably more lenient in favor of disclosure than that in section 4 governing disclosure at the request of attorneys for the United States in criminal proceedings. Specifically, section 5 omits two criteria applicable to requests by Government attorneys. If the intent is to balance the interests of the criminal justice system against the public interest in a privilege against disclosure, we believe that whatever standard is to apply should apply both to defendants and to the attorneys for the Government.

Section 6

Section 6 would create a privilege in civil litigation for journalists to refuse to divulge confidential sources, except upon a showing by a "clear and convincing evidence" standard of certain factors listed in subsection 6(b) of the bill. The statutory criteria for the civil privilege in section 6 of the bill ("Civil Litigation") appear to have been modeled in large part on the criteria contained in the Attorney General's guidelines for the use of compulsory process against the news media. *Cf.* 28 C.F.R. § 50.10(f)(2)-(4) and (6) with D.R. 850, § 6(b)(1)-(2) and (4)-(6). However, there are several potentially important differences, all of which are troubling.

First, the administration of the Attorney General's guidelines is not subject to judicial review, leaving the application of these criteria to the considered judgment and expertise of the Attorney General himself. By contrast, under section 6, the criteria would be applied by the

courts, and the Attorney General's judgment about, for example, the need for the information would receive no deference. We see no reason to displace the Attorney General's judgment with that of the judiciary in this fashion.

Second, section 6 would require the district court to find that all of the designated criteria were established by "clear and convincing evidence." That evidentiary standard compounds our first concern by placing an unduly heavy burden of justification on the Government.

Third, even after all of the criteria that derive from the Attorney General's guidelines were met, section 6 would require an additional showing — again, under the "clear and convincing evidence" standard — that "nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in newsgathering." *See* §6(b)(3). This public-interest criterion is not found in the Attorney General's guidelines because the existing criteria are designed to limit the use of compulsory process to cases where the public interest so demands. Adding an additional public-interest hurdle is at best superfluous and at worst harmful, since it could lead a court to deny disclosure even when the information was essential to the successful completion of the case and the information could not be obtained from other sources. Indeed, the breadth of the criterion might authorize courts to act upon undisclosed and potentially irrelevant factors (as opposed to the more specific considerations set forth in the Attorney General's guidelines).

Fourth, it is unclear whether the exception for cases in which the journalist is an eyewitness or a participant in criminal or tortious conduct, *see* § 7, actually would limit the scope of the privilege in section 6. The section 6 privilege is confined to the identity of confidential sources and the contents of confidential information, and it is hard to imagine how that kind of information would be at issue when a journalist was being asked to testify about what he himself saw or did.

Fifth, the exception for prevention of death or substantial bodily harm (*see* § 8) would require a showing that death or harm was otherwise "reasonably certain" to result. "Reasonable certainty" seems an extraordinarily and unduly demanding standard for the prospective loss of life or prospective serious injury.

The foregoing discussion relates to the application of section 6 to civil litigation involving the Federal government. The statutory privilege also would apply to civil suits between private parties. We note that most Federal courts have recognized a qualified common law reporter's privilege in civil cases, *see, e.g., Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981), and it is not obvious that the common law privilege has proven inadequate to protect legitimate newsgathering interests.

Section 7

Section 7 of the bill ("Exception for Journalist's Eyewitness Observations or Participation in Criminal or Tortious Conduct") would create an exception from the shield for crimes witnessed by the journalist. According to this section, the exception "does not apply if the alleged criminal or tortious conduct is the act of communicating the documents or information at issue." Therefore, if the crime at issue was the disclosure of the information to the journalist, then the shield would attach and the journalist would not have to disclose the source unless the Government satisfied the requirements of section 4 ("Compelled Disclosure at the Request of Attorneys for the United States in Criminal Proceedings").

This provision would virtually immunize a journalist from performing the civic duty that every other citizen is required to perform: serving as a witness to crime. Further, by excepting "disclosure" crimes, the provision would permit the journalist to participate intentionally in a violation of the criminal laws of the United States — indeed, as the recipient of the disclosure, to cause the crime to occur — with impunity. Even the more highly recognized and protected attorney-client privilege does not apply where the attorney participates in crime. We note specifically that this provision would hinder investigations of leaks of classified information.

Section 8

Section 8 of the bill ("Exception to Prevent Death or Substantial Bodily Injury") provides that a journalist has no privilege against disclosure to the extent the information is "reasonably necessary to stop or prevent reasonably certain (i) death or (ii) substantial bodily harm". We believe that the standard of "reasonably certain" death or substantial bodily harm is unreasonably difficult to meet.[2] We also believe that the exception should apply not only to information necessary to prevent death or bodily harm, but to prevent property damage as well.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us

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[2]We recognize that this is the standard used in Rule 1.6 of the ABA Model Rules of Professional Conduct.

that from the perspective of the Administration's program, there is no objection to submission of this letter and enactment of this legislation would not be in accord with the President's program.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

# EXHIBIT 16

# ABC News: The Blotter

## Federal Source to ABC News: We Know Who You're Calling

May 15, 2006 10:33 AM

**Brian Ross and Richard Esposito Report:**

A senior federal law enforcement official tells ABC News the government is tracking the phone numbers we (Brian Ross and Richard Esposito) call in an effort to root out confidential sources.

"It's time for you to get some new cell phones, quick," the source told us in an in-person conversation.

ABC News does not know how the government determined who we are calling, or whether our phone records were provided to the government as part of the recently-disclosed NSA collection of domestic phone calls.

Other sources have told us that phone calls and contacts by reporters for ABC News, along with the New York Times and the Washington Post, are being examined as part of a widespread CIA leak investigation.

One former official was asked to sign a document stating he was not a confidential source for New York Times reporter James Risen.

Our reports on the CIA's secret prisons in Romania and Poland were known to have upset CIA officials. The CIA asked for an FBI investigation of leaks of classified information following those reports.

People questioned by the FBI about leaks of intelligence information say the CIA was also disturbed by ABC News reports that revealed the use of CIA predator missiles inside Pakistan.

Under Bush Administration guidelines, it is not considered illegal for the government to keep track of numbers dialed by phone customers.

The official who warned ABC News said there was no indication our phones were being tapped so the content of the conversation could be recorded.

A pattern of phone calls from a reporter, however, could provide valuable clues for leak investigators.

# EXHIBIT 17

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THE WALL STREET JOURNAL.
The Wall Street Journal

June 23, 2006 Friday

SECTION: Pg. A1

LENGTH: 1212 words

HEADLINE: Treasury Tracks Financial Data In Secret Program --- Since 9/11, U.S. Has Used Subpoenas to Access Records From Fund-Transfer System

BYLINE: By Glenn R. Simpson

BODY:

Since shortly after the Sept. 11, 2001 terrorist attacks, the U.S. Treasury Department has been secretly tracking suspected terrorist financing through a far-reaching program that gives it access to records from the network that handles nearly all international financial transfers.

The information comes from a Belgian firm known by its acronym, Swift, which manages much of the world's financial-message traffic. Under the program, U.S. counter-terrorism analysts query Swift's vast database of billions of financial transactions for information on activity by suspected terrorists. The program operates under a series of broad U.S. subpoenas.

U.S. officials say the Terrorist Finance Tracking Program has been highly successful both in leading to the apprehension of terrorism suspects and in thwarting terrorist operations. People familiar with the program said, for example, that it yielded useful information on the bombings last July 7 in London. The program "has helped to disrupt terrorist cells and operations and has helped save lives," Treasury said in a statement to The Wall Street Journal.

Still, disclosure of its existence may be controversial in Europe and other parts of the world and within the global banking industry, which has long worried about the privacy of transactions. U.S. officials said few American citizens would have financial data that fall under the program, because they are unlikely to engage in international money transfers.

Stuart Levey, Treasury's top counter-terrorism official, said the program was initiated after department lawyers determined they had the legal authority to subpoena Swift, which keeps its data in the U.S. To his knowledge, Mr. Levey said, such broad subpoenas of Swift data had not been attempted previously.

He said the subpoenas are based on a longstanding U.S. law dealing with economic sanctions, known as the International Emergency Economic Powers Act. Passed in 1977, it allows the president to impose economic sanctions when dealing with a national-security threat. The law has been used, among other things, to impose sanctions on rogue states.

The program is known to officials of the world's leading central banks, as well as key U.S. allies in the war on terror, with which the U.S. has shared data. Its existence also is known to Swift's board, which consists of representatives of the organization's member banks.

While U.S. officials had never discussed the tracking program publicly until yesterday, they have repeatedly discussed in broad terms their efforts to engage in surveillance of cross-border financial activity around the world and have widely publicized the fruits of such surveillance in efforts to blacklist corrupt financial institutions.

In a statement, Swift said, "In the aftermath of the September 11th attacks, Swift responded to compulsory subpoenas for limited sets of data. Our fundamental principle has been to preserve the confidentiality of our users' data while complying with the lawful obligations in countries where we operate . . . .Through this process, Swift received significant protections and assurances as to the purpose, confidentiality, oversight and control of the limited sets of data produced under the subpoenas."

The government has a similar program through which it accesses data from Western Union, The Wall Street Journal reported last year.

Formed in 1973 by international banks, Swift is an industry cooperative that acts as an electronic gatekeeper for most of the world's major banks, brokerages, and investment managers to transmit funds across borders. Swift doesn't handle any funds, but processes some 11 million sets of transfer instructions and confirmations daily -- more than 2.5 billion a year.

Through Swift, banks and brokerages relay information to each other about financial transfers through a series of standardized forms that contain large amounts of information, including the identities of sender and recipients, the amount being transferred, the account numbers used and intermediate banks. These forms are transmitted through a secure computer network. The actual funds or securities are transferred later by banks or clearing and settlement companies.

Swift's board of directors is chosen by member banks; its legal regulator is the National Bank of Belgium. Since 1998, it also has been supervised by the world's major central banks, including the Federal Reserve, the Bank of England, the European Central Bank and the Bank of Japan. Formally called the Society for Worldwide Interbank Financial Telecommunications, Swift handles the vast bulk of world-wide cross-border wire traffic.

Swift's headquarters is a tightly guarded campus with long, well-manicured lawns in La Hulpe, a suburb of Brussels, the Belgian capital and headquarters of the European Union. The company is run by an American, Leonard Schrank, whose office is adorned with photos from a management seminar Swift held at the National Aeronautics and Space Administration.

Last night, in a statement, Treasury Secretary John W. Snow called the program an "essential tool" for fighting terror and said it had effective oversight and safeguards. "It is not `data mining,' or trolling through the private financial records of Americans," he said. "It is not a `fishing expedition,' but rather a sharp harpoon aimed at the heart of terrorist activity."

Mr. Levey said safeguards include regular outside audits. Intelligence analysts are allowed to search data only for specific individuals or groups suspected of terrorist involvement, he said, and the data isn't subjected to controversial data-mining techniques such as pattern-seeking algorithms. In addition to the probe of the London bombings, the data helped lead investigators to "a key facilitator of terrorism in Iraq," Mr. Levey said.

U.S. officials agreed to discuss the program after concluding that knowledge of its existence was emerging and public disclosure was inevitable. Aspects of it have recently been declassified. Mr. Snow called the disclosure "regrettable." Mr. Levey said he fears that "sophisticated terrorists will now stop using the system in ways we have access to, or will take extensive precautions to hide their identities, and that is really a loss."

For their part, American banks are more accustomed to providing information to government agencies than are some of their foreign counterparts. Under a series of U.S. laws, domestic banks are required to turn over large amounts of data to the government to fight money laundering and terrorism.

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A Look at Swift

-- What it is: A financial-industry owned co-operative messaging system for financial information. Its name is an acronym for Society for Worldwide Interbank Financial Telecommunication.

-- Clients: Nearly 8,000 financial institutions in 205 countries, including banks, broker/dealers and investment managers, along with their market infrastructures in payments, securities, treasury and trade. About two-thirds of its traffic comes from Europe.

-- Headquarters: Brussels

-- Founded: 1973

-- Total number of messages, year to date: 904,826,708

-- Average daily number of transactions, year to date: 11,034,472

Source: the company

NOTES:
PUBLISHER: Dow Jones & Company, Inc.

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# EXHIBIT 18

WestLaw NewsRoom


6/23/06 L.A. Times (Bus. Sec.) (Pg. Unavail. Online)
2006 WLNR 10850261

Los Angeles Times
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June 23, 2006

# Treasury Secretly Works at Tracking Terrorist Financing

By Josh Meyer and Greg Miller

WASHINGTON -- The U.S. government, without the knowledge of many banks and their customers, has engaged for years in a secret effort to track terrorist financing by reviewing confidential information on transfers of money between banks worldwide.

The program, run by the Treasury Department, is considered a potent weapon in the war on terrorism because of its ability to clandestinely monitor financial transactions and map terrorist webs.

Current and former officials at multiple U.S. agencies acknowledged the program's existence but spoke on condition of anonymity, citing its sensitive nature. ``We're very, very protective of it,'' said a senior U.S. official familiar with the program. ``It is extremely valuable.''

The program is part of an arsenal of aggressive measures the government has adopted since the Sept. 11 terrorist attacks that yield new intelligence, but also circumvent traditional safeguards against abuse and raise concerns about intrusions on privacy.

The program extracts information about bank transfers from the world's largest financial communication network, which is run by a consortium of financial institutions called the Society for Worldwide Interbank Financial Telecommunication, or SWIFT.

The SWIFT network carries up to 12.7 million messages a day containing instructions on many of the international transfers of money between banks. The messages typically include the names and account numbers of bank customers -- from U.S. citizens to major corporations -- who are sending or receiving funds.

The program gives U.S. intelligence analysts extraordinary access into what is essentially the central nervous system of international banking.

The Treasury Department uses a little-known power -- administrative subpoenas -- to routinely seek data from the SWIFT network, which has operations in the U.S.,

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including a main computer hub in Manassas, Va. The subpoenas are secret and not reviewed by judges or grand juries, as are most criminal subpoenas.

SWIFT acknowledged Thursday in response to questions from the Los Angeles Times that it has provided data under subpoena since shortly after Sept. 11, a striking leap in cooperation from international bankers who long resisted such law enforcement intrusions into the confidentiality of their communications. But SWIFT said in a statement that it has worked with U.S. officials to restrict the use of the data to terrorism investigations.

The program is part of the Bush administration's dramatic expansion of intelligence-gathering capabilities, which includes warrantless eavesdropping on the international phone calls of some U.S. citizens. Critics complain that these efforts are not subject to independent governmental reviews designed to prevent abuse and charge that they collide with privacy and consumer protection laws in the United States.

Steven Aftergood, director of the Project on Government Secrecy at the Federation of American Scientists, said the SWIFT program raises similar issues. ``It boils down to a question of oversight, both internal and external. And in the current circumstances, it is hard to have confidence in the efficacy of their oversight,'' he said. ``Their policy is, `Trust us,' and that may not be good enough anymore.''

A former senior Treasury official expressed concern that the SWIFT program allows access to vast quantities of sensitive data that could be abused without safeguards. The official, who said he did not have independent knowledge of the program, questioned what becomes of the data, some of it presumably on innocent banking customers.

``How do you separate the wheat from the chaff?'' the former official said. ``And what do you do with the chaff?''

The effort also runs counter to the expectations of privacy and security that are sacrosanct in the worldwide banking community. SWIFT promotes its services largely by touting the network's security, and most of its customers are likely unaware that the U.S. government is regularly using subpoenas to review the private financial information.

U.S. officials, some of whom expressed surprise the program had not previously been revealed by critics, acknowledged it would be controversial in the financial community. ``It is certainly not going to sit well in the world marketplace,'' said the former counterterrorism official. ``It could very likely undermine the integrity of SWIFT.''

Bush administration officials asked the Los Angeles Times not to publish information about the program, contending that disclosure could damage its effectiveness and that sufficient safeguards are in place to protect the public.

Dean Baquet, the editor of the Times, said, ``We weighed the government's arguments carefully, but in the end we determined that it was in the public interest to publish information about the extraordinary reach of this program. It is part of

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the continuing national debate over the aggressive measures employed by the government.''

Officials familiar with the program offer conflicting descriptions of whether it allows access only to financial data relating to individual terrorist suspects, or to a much broader range of data that would sweep up innocent people as well.

The senior U.S. official said U.S. authorities subpoena SWIFT data only when they have specific intelligence that connects an individual or company to suspected terrorist activity. ``This program is legal, it is properly run, it's got oversight,'' he said. ``It's exactly what you want your government to be doing.''

But a former U.S. official, who is also familiar with the program, characterized it as more comprehensive than individual searches. ``I think it's more than targeted. I don't know that it's the whole network, but it's very broad.''

The program was initially a closely guarded secret, but over the years it has become known to a steadily wider circle of government officials, former officials, banking executives and outside experts.

Current and former U.S. officials say the effort has only been marginally successful against al-Qaida, which long ago began transferring money through other means, including the highly informal banking system common in Islamic countries.

The value of the program, they said, has been in tracking lower- and mid-level terrorist operatives and financiers who believe they have not been detected, and militant groups, such as Hezbollah and Hamas, that also operate political and social welfare organizations.

It's no secret that the Treasury Department tries to track terrorist financing, or that those efforts ramped up significantly after the Sept. 11 terrorist attacks. But the SWIFT program goes far beyond what has been publicly disclosed about that effort in terms of the amount of financial data that U.S. intelligence agencies can access.

The program also represents a major tactical shift. U.S. investigators have long been able to subpoena records on specific accounts or transactions when they could show cause -- a painstaking process designed mainly for gathering evidence. But access to SWIFT enables them to follow suspicious financial trails around the globe, identifying new suspects without having to seek assistance from foreign banks.

SWIFT is a consortium founded in 1973 to replace telex messages. It has almost 7,900 participating institutions in 205 countries, including Bank of America, JP Morgan Chase Bank, Citibank and Credit Suisse. The network handled 2.5 billion financial messages in 2005, including many originating in countries such as Saudi Arabia, Pakistan and the United Arab Emirates that the United States scrutinizes closely for terrorist activity.

The system does not execute the actual transfer of funds between banks -- that is

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carried out by the Federal Reserve and its international counterparts. Rather, banks use the network to transmit instructions about such transfers. For that reason, SWIFT's data is extremely valuable to intelligence services seeking to uncover terrorist webs.

CIA operatives trying to track Osama bin Laden's money in the late 1990s, figured out clandestine ways to access the SWIFT network. But a former CIA official said Treasury officials blocked the effort because they did not want to anger the banking community.

Historically, ``there was always a line of contention'' inside the government, said Paul Pillar, former deputy director of the CIA's counterterrorism center. ``The Treasury position was placing a high priority on the integrity of the banking system. There was considerable concern from that side about anything that could be seen as compromising the integrity of international banking.''

Before Sept. 11, a former senior SWIFT executive said, providing access to its sensitive data would have been anathema to the Belgium-based consortium. But the attacks on the World Trade Center and the Pentagon led to a new mind-set in many industries, including telecommunications.

SWIFT said that the Office of Foreign Assets Control in the Department of the Treasury sent the first subpoena shortly after Sept. 11, seeking ``limited sets of data'' to learn about how al-Qaida financed the attacks.

Unlike telephone lines and e-mail communications, the SWIFT network cannot be easily tapped. It uses secure log-ins and state-of-the-art encryption technology to prevent intercepted messages from being deciphered. ``It is arguably the most secure network on the planet,'' said the former SWIFT executive who spoke on condition of anonymity. ``This thing is locked down like Fort Knox.''

SWIFT said that it was responding to compulsory subpoenas and negotiated with U.S. officials to narrow them and to establish protections for the privacy of its customers. SWIFT also said it has never given U.S. authorities direct access to its network.

``Our fundamental principle has been to preserve the confidentiality of or users' data while complying with the lawful obligations in countries where we operate,'' SWIFT said in its statement.

Current and former U.S. officials familiar with the SWIFT program describe it as one of the most valuable weapons in the financial war on terrorism, but declined to provide even anecdotal evidence of its successes.

A former high-ranking CIA officer said it has been a success and another official said it has allowed U.S. counterterrorism officials to follow a tremendous number of leads. CIA officials pursue leads overseas and the FBI and other agencies pursue leads in the United States, where the CIA is prohibited from operating.

Officials said the program was relied upon especially heavily when intelligence

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chatter from phone and e-mail intercepts suggested an imminent attack, conveying real-time intelligence for ongoing counterterrorism operations.

The former SWIFT executive said much can be learned from network messages, which require an actual name and address of both sender and recipient, unlike phone calls and e-mails, in which terrorist operatives can easily disguise their identities.

``There is a good deal of detail in there,'' he said.

As the global war on terrorism has succeeded in taking out some senior terrorists and their financiers, particularly within al-Qaida, the organization and its many affiliates have sought to move to hidden locations and to transfer their money through proxies, such as charities, aid organizations and corporate fronts.

The officials said the SWIFT information can be used in ``link analysis.'' That technique allows analysts to identify any person with whom a suspected terrorist had financial dealings -- even those with no connection to terrorism. That information is then mapped and analyzed to detect patterns, shifts in strategy, specific ``hotspot'' accounts, and geographic locations that have become new havens for terrorist activity.

No outside governmental oversight body, such as the Foreign Intelligence Surveillance Court or a grand jury, monitors the subpoenas served on SWIFT.

Current and former U.S. officials said subpoenas must be approved by a senior Treasury administrator and, the senior U.S. official said, are limited to a ``targeted search on a known name where there is an intelligence nexus.''

But the official said it's used frequently.

``Treasury has gone painstakingly, in my view, to ensure the legality,'' said a former U.S. counterterrorism official. ``They have been pretty conservative there.''

SWIFT said it ``has insisted on protecting the data, narrowing the scope, and limiting access and use to terrorism investigations,'' and said that ``independent audit controls provide additional assurance that these protections are fully complied with.''

A SWIFT representative said Booz Allen Hamilton is the auditor, but provided no further details on how the oversight process works.

Although the searches focus on suspected terrorist activity overseas, U.S. officials acknowledged that they do delve into the financial activities of Americans, noting that privacy laws don't protect individuals believed to be acting as a ``foreign terrorist agent.''

Aftergood, the Federation of American Scientists official, said that the SWIFT program is probably very effective, ``but it also needs to be done within the boundaries of the law and with proper respect for constitutional protections.''

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John Pike, the director of the national security information web site, GlobalSecurity.org, said that the subpoena-driven SWIFT effort did not concern him as much as the NSA eavesdropping. ``There are civil liberties concerns,'' he said, but added, ``I would have to say that by prevailing community standards that this was not at the top of my list.''

A senior U.S. official and others familiar with the program said they could not discuss how many searches have been conducted or how successful they have been. SWIFT also declined to provide information on subpoenas, but said, ``Our understanding is that it has been very valuable.''

Current and former U.S. officials said a second program, run by the FBI, is similar in that it seeks to access the financial records of a vast number of individuals, including Americans, who do not know that the information is being accessed.

Officials said the administration has briefed congressional intelligence committees on the SWIFT program, in contrast to the way the information on the NSA wiretapping was withheld. One senior congressional aide said the committees have ``a good handle on what the executive branch is doing to track terrorist financing'' and are generally supportive of those efforts.

But the operation seems to have been kept secret from key segments of the banking industry, including senior banking executives in the United States and overseas.

John McKessy, the chairman of the SWIFT user group in the United States, said he was unaware of any such program. McKessy represents companies and institutions that are not members of the SWIFT co-operative, but use its messaging system.

SWIFT noted that its published policies clearly indicate that it cooperates with law enforcement authorities and that the subpoenas were ``discussed carefully within the board,'' made up of members from 25 major banks. SWIFT said it has also kept informed an oversight committee drawn from the central banks of the major industrial countries.

The SWIFT program plugs a gap in global efforts to track terrorism financing.

In the United States, law enforcement authorities can access bank records if they get permission through the legal process. The FBI also has various legal ways to get almost instantaneous access to financial records. And U.S. banking laws require financial institutions to file Suspicious Activity Reports, but authorities believe al-Qaida and other terrorist groups know how to evade the activities that trigger such red flags.

U.S. officials, however, have long complained that they cannot get access to financial records overseas and that some requests for cooperation from foreign governments and financial institutions took months, while others were rebuffed.

``The sort of 18th century notions on this stuff drive me nuts,'' said one senior U.S. counterterrorism official. ``Somebody can move money with the click of a

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mouse, but it takes me six months to find it. If that is the world in which we live, you have to understand the costs involved with that.''

The Sept. 11 commission urged the government in its July 2004 report to put more emphasis on tracking the flow of funds, rather than seeking to disrupt them, to learn how terrorist networks are organized.

Lee Hamilton, a former congressman and co-chairman of the commission who said he has been briefed on the SWIFT program, said U.S. intelligence agencies have made significant progress in recent years, but are still falling short. ``I still cannot point to specific successes of our efforts here on terrorist financing,'' he said.

---- INDEX REFERENCES ----

COMPANY: SWIFT AND CO; CHASE MANHATTAN BANK; BOOZ ALLEN AND HAMILTON INC; SWIFT AND CO NEW

NEWS SUBJECT: (Legal (1LE33); International Terrorism (1IN37); Technology Law (1TE30); Government (1GO80); Sept 11th Aftermath (1SE05))

INDUSTRY: (I.T. (1IT96); Banking & Financial Services Software (1BA49); I.T. in Government (1IT22); Software (1SO30); Software Products (1SO56); Application Software (1AP32); Security (1SE29))

REGION: (USA (1US73); Americas (1AM92); North America (1NO39))

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OTHER INDEXING: (AMERICAN SCIENTISTS; BOOZ ALLEN HAMILTON; CHASE BANK; CIA; DEPARTMENT OF; FBI; FEDERAL RESERVE; FOREIGN INTELLIGENCE SURVEILLANCE COURT; HEZBOLLAH; NSA; OFFICE OF FOREIGN; PENTAGON; SWIFT; SWIFT CO; TREASURY; TREASURY DEPARTMENT) (Aftergood; Americans; Bush; Credit Suisse; Dean Baquet; Historically; John McKessy; John Pike; Laden; Lee Hamilton; McKessy; Paul Pillar; Qaida; Steven Aftergood; Suspicious Activity Reports; Treasury; Treasury Secretly Works)

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# EXHIBIT 19

6/27/06 CNN: Paula Zahn Now (Pg. Unavail. Online)
2006 WLNR 11144252

CNN: Paula Zahn Now
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June 27, 2006

'New York Times' Guilty of Treason?; Old Glory Becomes Burning Issue in Congress; Israeli Troops Move Into Gaza to Rescue Captured

xfdcn PAULA-ZAHN-NOW-01

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Issue in Congress; Israeli Troops Move Into Gaza to Rescue Captured

Soldier - Part 1)

(Sect: News; International)

(Time: 20:00)

PAULA ZAHN, CNN ANCHOR: And good evening. Thanks so much for joining us tonight.We're staying with this hour's breaking news story. Just a short time ago, Israeli troops and tanks crossed the border into southern Gaza. They are trying to rescue an Israeli soldier who was kidnapped by Palestinian militants on Sunday.

We are trying to make contact with John Vause, who we are hoping to have join us on the telephone from Gaza.

But we should explain what we know so far, the Israeli troops entered southern Gaza. Planes attacked two bridges and a power station. We're told that it has knocked out electricity in most of the coastal strip this early Wednesday morning,

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their time, and, of course, stepping up the pressure on Palestinian militants holding captive that 19-year-old soldier that they have gone in to rescue.

We now have made contact with John Vause.

John, what else do we know?

JOHN VAUSE, CNN CORRESPONDENT: Well, Paula, we know that this all began within the last few minutes. Israeli troops have been moving across the border, concentrated in the southern part of the Gaza Strip, around the town of Rafah, near the border with Egypt.

Thousands of Israeli soldiers have been stationed along the border with Gaza, on standby, awaiting orders from the Israeli prime minister to move in. We know that they're taking up positions around the town of Rafah. Israeli intelligence believes that the 19-year-old corporal, Gilad Shalit, is being held in the southern part of Gaza, quite possibly in a town called Khan Yunus, not far from Rafah.

We know that a number of bridges have been hit by airstrikes. Also, that power station, as you mentioned, Paula, has been hit in an airstrike as well, knocking out a lot of power. But, still, there is power to the -- to Gaza City, which is coming actually from Israel, Paula.

ZAHN: Give us a sense of the back-story here, because we know that there have been intense negotiations going on between the U.N. and Arab leaders -- Condoleezza Rice, the secretary of state here, urging Israel to give diplomacy a chance. And -- and, yet, we see these strikes.

VAUSE: Well, the Israelis have made it perfectly clear that time was running out.

And they have demanded the return of the Israeli corporal ever since he was taken in that morning -- Sunday morning raid from his Israeli military outpost by Palestinian militants. And they said they would not wait forever. That is why the Israeli troops are now moving in. They were not -- Israel was not part of any negotiations.

They would not negotiate with the hostage-takers. What we have seen is a team of mediators, led mostly by the Egyptians, who have been on the ground here, dealing with the various Palestinian factions, trying to secure the release of this Israeli corporal.

It seems that the main sticking point in trying to secure his release has not been from the Palestinian militants within Gaza, but, rather, from the Hamas leadership, which is based outside of Gaza in Damascus, in Syria. Khaled Meshaal, in particular, apparently took a very hard-line stance against releasing this Israeli soldier, apparently highlighting a split within Hamas itself -- Paula.

ZAHN: John Vause, appreciate the update.

And, once again, just to remind the audience of why Israel says it is striking

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those bridges, apparently, that's where they feel that this kidnapped soldier would be being sent from one part of the bridge to the other. And they hope that knocking down that bridge would sort of cut the -- Gaza into two and make it a little bit easier for them to retrieve the soldier.

As more details become available, we will bring them to you.

John Vause, again, thanks for that late report.

We turn now to the Security Watch here tonight. Is one of the country's leading newspapers guilty of treason? The controversy is growing over the revelation in The New York Times that the government has been secretly combing through millions of bank records to catch terrorists.

Republicans are feasting on this, throwing words like disgraceful, offensive and treasonous at The Times for tearing the lid off this secret anti-terrorist program. The Bush administration says it is essential to fighting the war on terror.

We now get the very latest tonight from White House correspondent Ed Henry, part of the best political team on TV.

(BEGIN VIDEOTAPE)

ED HENRY, CNN WHITE HOUSE CORRESPONDENT (voice over): Republicans stepped up their barrage on The New York Times for publishing details of a once-secret program tracking the banking transactions of terrorists.

SEN. PAT ROBERTS (R-KS), SENATE INTELLIGENCE COMMITTEE CHAIRMAN: If another attack occurs because of this information going out and giving the terrorists at least a leg up in regards to what they know and not know and changing their method of operations, if that attack comes the people who have written these stories and the people who have made their decisions should look in the mirror.

HENRY (voice over): From the president on down, Republicans have been reading from the same script.

GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES: The disclosure of this program is disgraceful.

RICHARD CHENEY, VICE PRESIDENT OF THE UNITED STATES: I think that is a disgrace.

REP. PETER KING (R-NY), HOMELAND SECURITY COMMITTEE CHAIRMAN: Disgraceful and illegal.

HENRY: They're teeing off on news stories that reported questions about the legality of a Bush administration program that uses an international database to review the banking transactions of thousands of Americans.

The story was also reported by The Los Angeles Times and Wall Street Journal,

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but the attacks have focused on The New York Times.

The chance to beat up on a newspaper with a liberal reputation is too good to resist for an administration struggling to keep its conservative base happy.

CHENEY: The New York Times has now made it more difficult for us to prevent attacks in the future. Publishing this highly classified information about our sources and methods for collecting intelligence will enable the terrorists to look for ways to defeat our efforts.

HENRY: But White House Press Secretary Tony Snow was less certain than the vice president when pressed Tuesday on what evidence there is the leak has compromised terror probes.

TONY SNOW, WHITE HOUSE PRESS SECRETARY: None of those things have had time to proceed. So, we really don't have any basis right now for knowing exactly how it has influenced things.

HENRY: Snow did charge, The New York Times endangered lives by bucking a tradition of media organizations agreeing to keep government secrets at a time of war.

But Times executive editor Bill Keller defended the decision to publish, writing, I think it would be arrogant for us to preempt the work of Congress and the courts by deciding these programs are perfectly legal and abuse-proof, based entirely on the word of the government.

(on camera): But, unlike the NSA domestic surveillance program, very few Democrats have raised questions about the banking program. Republicans are confident they're on solid legal ground, which is why they're firing away at The Times. And if they score political points with conservatives along the way, so much the better.

Ed Henry, CNN, the White House.

(END VIDEOTAPE)

ZAHN: And now I'm going turn to a member of Congress who says The Times ought to face criminal charges for revealing this secret program, Representative Peter King, a New York Republican who is chairman of the Homeland Security Committee.

Thanks so much for joining us tonight.

KING: Thank you, Paula.

I wanted to start off by reading a short sentence from the Espionage Act of 1917. And it basically says, it makes it a crime for a person to convey information with intent to interfere with the operation or success of the armed forces of the United States or to promote the success of its enemies.

We just heard what Tony Snow had to say. He said it is not clear what the impact

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of printing this story was. Are you saying that The New York Times intended to compromise the security of our nation by printing this story?

KING: Paula, what I'm saying is, they had to know that this would compromise the security of the United States.

The administration laid out the case why it would do that, and they went ahead. To me, this was a reckless disregard of the security of the United States. And I believe that fits within the Espionage Act of 1917. And that's why I'm calling on the attorney general to begin an investigation and prosecution of The New York Times, including its reporters who worked on the case, the editors who worked on the case, and Sulzberger, the publisher.

ZAHN: Why not the sources?

KING: Oh, the sources as well. Obviously, we should go after the sources. What they have done here is absolutely reprehensible. And, in going after the sources, one way to get them is to put the reporters in before the grand jury from The New York Times, and, if they don't reveal those sources, to cite them for contempt.

I think there's a lot of things we can do here. For instance, I don't know why any American who cares about the security of the country would continue to advertise in The New York Times or why anyone would want to hold stock in The New York Times. I mean, what they have done here is absolutely disgraceful.

ZAHN: But, Representative King, you heard Tony Snow. And -- and he said that, right now, there is no way to measure what the impact of this story has been and whether it, in his -- fact, has compromised the the -- investigation.

KING: Well, it is too soon to know the exact extent.

But you have to know, when you reveal secrets in time of war, that it is going to have a significant effect. Now, it will take time to know exactly how significant it is going to be. Are we going to lose tens of lives, or hundreds of lives, or thousands of lives?

But it has definitely compromised America. Just as you -- if you give secrets to an enemy, you don't exactly know how long it's going to take, but common sense shows that, when you compromise such an important program, which has been so successful in tracking down terrorists, then, it has to work against the United States. If nothing else, we have alerted the enemy. We have let them know exactly what we're doing, and they can adjust their methods.

ZAHN: You say we have alerted the enemy. Are you telling me tonight that leaders of these terrorist organizations had no idea that their financial transactions were being monitored?

KING: Oh, they knew we were trying to do it. And they knew we were somewhat successful. And they certainly knew we do a very good job in the United States.

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But they did not -- my understanding, they did not have any real knowledge of the full extent of what we were capable of doing. They guessed we might be able to do it, but they didn't know the full extent of it. They didn't know that we had this agreement with SWIFT, which literally involves millions and millions of transactions.

And they were guessing they were -- and they thought we might, but now that we have laid it out for them. They know exactly what we have. I would much rather have kept them guessing.

ZAHN: Representative King, just a real brief answer to this.

Out of all of the classified information that has ever been passed along to reporters, there has never been one single prosecution under this Espionage Act that we were both talking about. Very quickly, in closing, are you really confident you're going successfully prosecute someone here?

KING: I'm confident the attorney general should do it. Whether he does or not is up to him. But I think the time has come to put an end to this.

The New York Times, they're serial offenders. They're recidivists. They have done it before. They're doing it again. We have a war ahead of us which is going to go for many years. We can't afford the risk of American lives because of the arrogance and the left-wing agenda of The New York Times.

ZAHN: Representative Peter King, thank you so much for your time.

KING: Thank you, Paula.

ZAHN: A characterization that I'm sure some of our guests to come will dispute.

So, we are going to dig deeper now into the legal and ethical questions in this story.

Joining me now, senior legal analyst Jeffrey Toobin and Howard Kurtz, who covers the media for The Washington Post and also hosts CNN's RELIABLE SOURCES.

Good to see the two of you.

You have just heard what Representative King had to say. He would like to see the attorney general forcefully prosecute this case. Is there any evidence that The New York Times broke any law here, Jeffrey?

JEFFREY TOOBIN, CNN SENIOR LEGAL ANALYST: I think there is no way you could or you should prosecute The New York Times for espionage.

ZAHN: Why not?

TOOBIN: Because espionage, as the -- as the statute you read said, requires an

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intent to help our enemies. There is no intent to help our enemies here. There is an intent to inform the public.

And, in this country, it is the private sector, not the government, that decides what gets published. Now, the question about whether The New York Times should have done this is a hard question. But whether it was a crime is an easy question. It wasn't.

ZAHN: So, Howie Kurtz, take a stab at that. Should The New York Times have gone ahead with this story, when the administration repeatedly asked them not to print it?

HOWARD KURTZ, CNN CONTRIBUTOR: This is a much closer call, Paula, than the other Times scoop last December about the domestic surveillance program, which -- and I think a lot of the pent-up frustration and anger that we just heard from Congressman King, which we hear from conservative commentators and people in the White House, is because of that story.

And, so, now, because that story was harder to defend, because, arguably, the domestic eavesdropping story -- program was -- was not entirely legal, they hadn't gotten court warrants, I think this story, which most people was, why should it be revealed about the -- the banking capabilities and -- and scrutiny that the government has, this has given the critic of The Times -- and there are many -- an opening to go after that paper.

TOOBIN: One problem that the -- the government has here is, they haven't really explained very well what the harm is.

They say, well, the banks won't cooperate. Well, the banks have to cooperate. They -- they're under legal obligation to cooperate. And -- and they're saying, well, we're advising the terrorists of what our plans are.

You know, our government officials have held press conferences talking about how we're monitoring the transactions of -- of terrorists, the financial transactions. So, the fact that The New York Times says we're doing this hardly seems to add much to what the terrorists already know.

ZAHN: So, how much of this, Howard, potentially is payback time for The New York Times for going with the NSA story that you just referenced a minute ago?

KURTZ: And not just that. It has a liberal editorial page that was against the war, and a lot -- and there is a lot of political payback here. It is not an entire coincidence that, with the midterm elections coming up, Republicans see some benefit in beating up on the most visible national liberal newspaper. That plays very well with their base.

But, on the legal question, I -- an Espionage Act prosecution may be unlikely. But what is not entirely unlikely is another Judith Miller situation, where there's a leak investigation. Reporters are asked to testify. They refuse to disclose their confidential sources. And then they face the very difficult choice for any

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journalist of having to go to jail in order to protect those sources.

ZAHN: I need a 10-second thought from you. If you had been the lawyers advising The New York Times, would you have told them not to go with this story?

TOOBIN: Boy, that's hard in 10 seconds.

But I -- I probably would have said publish the story. But I think Howie is right. I think we are going to see more reporters in the grand jury. And what we have learned is that, in federal court, reporters have no privilege to avoid testifying. So, we may see more reporters in jail.

ZAHN: Jeffrey and Howard Kurtz, thank you both.

(CROSSTALK)

ZAHN: Jeffrey does have a last name. That would be Toobin.

(LAUGHTER)

ZAHN: Appreciate both of your perspectives tonight.

We move now on to our countdown of the top 10 stories on CNN.com, about 17 million of you logging on to our Web site today.

At number 10 -- supermodel Naomi Campbell -- you remember her -- she makes an appearance again in a New York courtroom. Her lawyers are trying to work out a plea deal in her cell phone assault case. Prosecutors have yet to present that case to a grand jury.

Boy, wouldn't Jeffrey Toobin love to be in the middle of that one, right?

TOOBIN: No. Nothing better than a good cell phone assault case, I will tell you.

(LAUGHTER)

ZAHN: Number nine -- rival Palestinian factions Hamas and Fatah have agreed to an agreement to establish a Palestinian state alongside Israel. Both sides say the accord will be signed a little bit later on this summer.

Numbers eight and seven when we come back, plus, patriotism vs. free speech, an issue that has been simmering since Vietnam, suddenly, it boils over once again.

(BEGIN VIDEOTAPE)

ZAHN (voice-over): Old Glory becomes a burning issue. And senators choose sides for a controversial election-year vote. Is it really time to change the Constitution?

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And the Eye Opener -- the confession. For the first time, a former priest and convicted pedophile speaks out in an explosive new film about the families he victimized and the church he betrayed. So, why is he a free man tonight?

All that and much more when we come back.

(END VIDEOTAPE)

(COMMERCIAL BREAK)

ZAHN: Welcome back.

Here is what's happening at this moment.

We are going to recap a story now that is breaking in the Middle East right now. Israeli tanks and troops are crossing the border into southern Gaza in a campaign to bring back an Israeli soldier kidnapped by Palestinian militants on Sunday. The Israelis had warned the Palestinian Authority of an extended military campaign if the soldier wasn't released.

Attorneys for indicted former White House aide Lewis Libby are asking a judge for more time to request highly sensitive presidential briefing notes for Libby's defense. Libby is charged with lying to investigators looking into the leak of CIA operative Valerie Plame's name to the news media.

And the U.S. is urging Libya to finish compensating families for the 1988 bombing of Pan Am 103 over Lockerbie, Scotland. Libya is about to be removed from the USS -- U.S. terrorist list, but had hinted that it no longer had a legal responsibility to the families, who were to be paid $10 million each.

Now, a week from tonight, all of us will be getting ready for Fourth of July fireworks. But, tonight, all of the fireworks were in the U.S. Senate. Less than two hours ago, a constitutional amendment to protect the U.S. flag failed by a single vote.

Congressional correspondent Dana Bash joins me now with more on that very passionate debate -- Dana.

DANA BASH, CNN WHITE HOUSE CORRESPONDENT: Hi, Paula.

Well, you know, it was a cliffhanger until the very end. As you said, the Senate came very, very close, in fact, closer than they ever have before, to actually amending the Constitution, 66 votes in favor. But that was just one vote short of the two-thirds majority needed for that amendment. And it capped two days of debate about the stars and stripes, freedom of speech, and politics.

(BEGIN VIDEOTAPE)

BASH (voice-over): Senators pushing the flag desecration amendment used the pre-Fourth of July, election-year debate to argue changing the Constitution was

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necessary and, in this case, the ultimate sign of patriotism.

SEN. JOHN CORNYN (R), TEXAS: The American flag is a monument, a symbol, of our freedom, our country and our way of life. Why in the world would we refuse to protect it against desecration?

BASH: Opponents pledged their allegiance to the flag, too, but said changing the Constitution goes too far.

SEN. ROBERT BYRD (D), WEST VIRGINIA: I believe that amending the Constitution to prohibit the flag desecration flies in the face, the very face of First Amendment right, like freedom of speech.

BASH: But supporters have been pushing to amend the Constitution since 1989, to overcome Supreme Court rulings that laws banning flag desecration violate the First Amendment.

SEN. ORRIN HATCH (R), UTAH: It just says we're going to return this issue back to the Congress, where it should have been to begin with. And it says these exact words: The Congress shall have power to prohibit the physical desecration of the flag of the United States. Does that mean the Congress has to? No. Will the Congress? I hope so.

BASH: Democrats asked, where do you draw the line?

SEN. FRANK LAUTENBERG (D), NEW JERSEY: There he is, Kid Rock, with his head through the flag. Is that a desecration? It was such a desecration that he was invited to address the Republican Convention. And they partied with him, and they loved him. What constitutes desecration?

(END VIDEOTAPE)

BASH: Now, Democrats, even those who voted for this amendment, say that Republicans bringing it up now, four months before Election Day, are doing it just because of crass political reasons.

They also say that Republicans, this is another example of the fact that their priorities are perhaps misguided. But, Paula, supporters of this amendment, especially Republicans, the Republican leader in the Senate, insists that this is all about values, and that is why it deserved a place on the Senate floor for debate -- Paula.

ZAHN: Something else that is being widely debated.

Dana Bash, thank you so much. Appreciate the update.

And, in just a minute, an incredible view of abuse, through the eyes of an abuser himself -- in his own words, a former Catholic priest tells how he preyed on children in California for two decades.

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And, then, a little bit later on: the medical facts behind today's stern new warning from the U.S. surgeon general: Are we doing enough to protect ourselves from other people's smoke? You might be pretty darn shocked by the results of this latest study.

First, though, number eight on our CNN.com countdown -- the seven-member crew of shuttle Discovery arrived at Kennedy Space Center this morning to get ready for this weekend's launch. Discovery is scheduled to lift off on Saturday.

Number seven -- in Clinton, Missouri, crews are cleaning up after a three-story building housing an Elks Lodge collapsed. It happened last night. The lodge's president was killed. Nine other people were trapped and had to be rescued. Right now, the cause of the collapse is unknown -- numbers six and five straight ahead.

Please stay with us.

(COMMERCIAL BREAK)

ZAHN: Keep on sticking around with us tonight. We have more breaking news -- this story out of Las Vegas.

Police say two officers have been involved in a shooting at a checkpoint inside the city's airport.

Our own Dan Simon happened to be at McCarran Airport. He joins me now on the phone from Las Vegas with the very latest.

Do we have any idea exactly what happened here?

DAN SIMON, CNN CORRESPONDENT: Well, Paula, these -- the reports I'm getting now are unconfirmed.

What we're hearing is that a man may have gotten a knife through security and then took a woman and a child hostage. At some point, police got involved and actually shot this man. We know that one man has been shot by a police officer. That has been confirmed.

What has not been confirmed is exactly what happened. Did somebody get a knife through security and take somebody hostage at a -- at a store? That's where we're hearing this occurred.

Police are about to give us a news conference in the next few minutes. At this point, it doesn't look like travel has really been disrupted to any degree. There is a portion that has been cordoned off here at the airport. But I'm looking at passengers going through security right now. And planes are taking off on time. But this does -- at least -- at least a few minutes ago, this may have been a pretty tense situation, as we're hearing that a police officer actually fired on a suspect, and that suspect was shot and is down -- Paula.

ZAHN: Well, we know there are a lot of details to nail down here, Dan. As soon as

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you get them, we will come back to you live.

Once again, our own Dan Simon at McCarran Airport in Las Vegas, where it has been confirmed that two officers have shot someone who apparently was involved in some kind of incident beyond a checkpoint at the airport. Initial reports suggested that he might have been carrying a knife -- that is something we certainly haven't been able to confirm -- also, a report that he had taken, perhaps, a woman and child hostage -- all of this very much in the very beginning stages of reporting..

And we will try to confirm all this information for you throughout this hour.

We are going to take a short break. We will be right back.

(COMMERCIAL BREAK)

ZAHN: Now we move on to a very chilling story. He was an abusive priest who preyed on children in California for two decades. His story, as told in his own words, is a subject of a documentary making its debut this week at the Los Angeles Film Festival. The movie is a disturbing view of abuse through the eyes of the abuser himself, former priest Oliver O'Grady.

Here is investigative correspondent Drew Griffin with tonight's Eye Opener.

(BEGIN VIDEOTAPE)

DREW GRIFFIN, CNN INVESTIGATIVE REPORTER (voice-over): The film is not just a horrific story, but also the confession of former priest Oliver O'Grady.

OLIVER O'GRADY, FORMER PRIEST: I want to promise myself that this is going to be the most honest confession of my life and in doing that, I need to make the long journey backwards to understand what I did, to acknowledge that, in some way to make reparation for it.

GRIFFIN: In Deliver Us From Evil, filmmaker and former CNN freelance producer Amy Berg travels to Ireland and is granted unlimited access to this convicted child molester, who for nearly two decades was shuttled from parish to parish in northern California's Catholic Church. And during those two decades, O'Grady claims in this film the church knew about the abuse and did little to stop it.

---- INDEX REFERENCES ----

NEWS SUBJECT: (Government (1GO80))

REGION: (Middle East (1MI23); USA (1US73); Americas (1AM92); Palestine (1PA37); North America (1NO39); Arab States (1AR46))

Language: EN

OTHER INDEXING: (BASH; BASH: OPPONENTS; CATHOLIC; CATHOLIC CHURCH; CIA; CNN; CNN

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WHITE HOUSE; CONGRESS; CONSTITUTION; DANA; DANA BASH; ELKS LODGE; EYE OPENER; FRANK; GLORY; GRIFFIN; HENRY; HOMELAND SECURITY COMMITTEE; INTELLIGENCE; KENNEDY SPACE CENTER; KHAN YUNUS; LIBBY; NSA; OLIVER; ORRIN; PALESTINIAN; PALESTINIAN AUTHORITY; PAN AM; PAT; PETER; PRIEST; REPUBLICAN CONVENTION; REPUBLICANS; ROBERT; SECURITY; SENATE; SUPREME COURT; SWIFT; TOOBIN; UN; UTAH; WHITE HOUSE; ZAHN) (Amy Berg; Bill Keller; Boy; Bush; Condoleezza Rice; Congressional; Dan; Dan Simon; Democrats; Discovery; Ed Henry; Egyptians; GEORGE W. BUSH; Gilad Shalit; Howard; Howard Kurtz; Howie Kurtz; Initial; Jeffrey; Jeffrey Toobin; John; John Vause; Khaled Meshaal; KING; Lewis Libby; Libby; Naomi Campbell; O'Grady; Oliver; Oliver O'Grady; Paula; Peter King; Representative; Representative King; Snow; Tony Snow; Toobin; Valerie Plame; VAUSE)

KEYWORDS: (PAULA-ZAHN-NOW-01); (w)

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# EXHIBIT 20

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August 31, 2006

Section: City & Region

# Hoekstra predicts jailing of reporters
## Congressman decries revelation of secret wiretapping program

Myron Kukla / The Grand Rapids Press

HOLLAND -- New York Times reporters who broke the story of a three-year program of warrantless wiretapping of U.S. citizens will be in jail by yearend if they don't reveal their government sources, U.S. Rep. Peter Hoekstra predicted Wednesday.

The revelation last December has been a devastating blow to intelligence gathering, said Hoekstra, chairman of the House Intelligence Committee.

"If people understood the threat out there (from terrorist organizations), Americans would be absolutely furious that the tools we have to track the terrorists have been lost," said Hoekstra, R-Holland, in an address to the Holland A.M. Rotary Club.

"The Justice Department is going after those who violated their oath of office by giving classified information to reporters. Those reporters will be sitting in jail by the end of the year until they reveal their sources."

Times reporters James Risen and Eric Lichtblau in a Dec. 16, 2005, story reported President Bush secretly authorized the National Security Agency in 2002 to eavesdrop on phone and e-mail communications of thousands of Americans, seeking information about terrorist planning.

The story said nearly one dozen current and former government officials provided details, but did not identify them.

Hoekstra said the Justice Department investigation likely will lead to a grand jury questioning individuals and reporters under oath.

Since the story broke, terrorists have used more pre-paid cell phones and tossed them away, making it hard to track them, Hoekstra said.

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A federal judge in Detroit has described the warrantless eavesdropping as an attack on the Constitution and U.S. Bill of Rights.

U.S. District Judge Anna Diggs Taylor this month ruled President Bush exceeded his authority, citing it as a violation of the First and Fourth amendments.

"I couldn't disagree with the ruling more. It could disarm America in a time of war," Hoekstra said, noting the Justice Department is appealing the ruling and has negotiated a deal to continue the program while the appeal is pending.

"This will likely go all the way to the Supreme Court," he said.

---- INDEX REFERENCES ----

NEWS SUBJECT: (Judicial (1JU36); Legal (1LE33); International Terrorism (1IN37); Government (1GO80))

INDUSTRY: (Security (1SE29))

Language: EN

OTHER INDEXING: (CONSTITUTION; HOEKSTRA; HOUSE INTELLIGENCE COMMITTEE; JUSTICE DEPARTMENT; NATIONAL SECURITY AGENCY; PETER HOEKSTRA; SUPREME COURT; US BILL) (Anna Diggs Taylor; Bush; Eric Lichtblau; James Risen)

KEYWORDS: Government; Media

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**UNITED STATES DISTRICT COURT**

**FOR THE EASTERN DISTRICT OF VIRGINIA**

| | |
|---|---|
| UNITED STATES<br>v.<br>JEFFREY ALEXANDER STERLING,<br>Defendant. | No. 1:10cr485 (LMB) |

**AFFIDAVIT OF JOEL KURTZBERG**

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

JOEL KURTZBERG, being first duly sworn, deposes and says:

1. I am a member of the bar of the State of New York and a partner in the firm of Cahill Gordon & Reindel LLP, attorneys for James Risen, who is a reporter for *The New York Times* and the author of *State of War: The Secret History of the CIA and the Bush Administration* ("*State of War*").

2. I have been admitted to practice before this Court *pro hac vice* in this case. My client is not a party to this action, but I was brought into this case by the issuance of a subpoena by the Government for testimony from James Risen in connection with his work as an investigative journalist on Chapter 9 of his book, *State of War*.

3. I am fully familiar with the facts and circumstances set forth herein and make this affidavit based on my personal knowledge unless otherwise stated. I make this affidavit in support of my client's brief in opposition to the Government's motion *in limine* and in support of his motion to quash the subpoena and/or for a protective order and to place before the Court documents that are relied on in support of that motion. The exhibits annexed hereto are true and correct copies of the documents cited herein.

4. I have been personally involved in negotiating with the Government concerning the scope of its current and prior demands for Mr. Risen's testimony. Following is a brief summary of the relevant portions of those discussions.

5. Because this affidavit discusses things that were part of a sealed proceeding, several documents and events referred to herein are being filed under seal. We may revisit with the Court to determine what documents are appropriate to remain sealed.

***The 2008 Grand Jury Subpoena***

6. The first subpoena directed to Mr. Risen was a grand jury subpoena issued on January 24, 2008. A true and correct copy of that subpoena is attached hereto as Exhibit 1.

[redacted]

7. After Mr. Risen was subpoenaed by the Government in 2008, I had conversations about the subpoena with Special Assistant United States Attorney Eric B. Bruce. During our conversations, Mr. Bruce confirmed [redacted]

[redacted]

8. [redacted]

9. [redacted]

*The 2010 Grand Jury Subpoena*

10. [redacted]

11. [redacted]

[redacted]

12. [redacted]

13. [redacted]

[redacted]

14. [redacted]

15. [redacted]

***The 2011 Trial Subpoena***

16. Neither the trial Subpoena recently served on Mr. Risen nor the Government's Motion in Limine seeking to admit Mr. Risen's testimony contain any limitations on the nature and breadth of information sought from Mr. Risen. As the Government's brief in support of its motion *in limine* makes clear, the Government is unwilling to put any limitation on the testimony they will seek from Mr. Risen about his confidential source(s) at trial.

17. The Government has indicated to me that it will recommend that Mr. Risen be granted immunity in the event he is required to testify.

18. Attached hereto as Exhibit 4 is a true and correct copy [redacted]

19. Attached hereto as Exhibit 5 is a true and correct copy of [redacted]

20. Attached hereto as Exhibit 6 is a true and correct copy of [redacted]

21. Attached hereto as Exhibit 7 is a true and correct copy of [redacted]

22. Attached hereto as Exhibit 8 is a true and correct copy of [redacted]

23. Attached hereto as Exhibit 9 is a true and correct copy of [redacted]

24. Attached hereto as Exhibit 10 is a true and correct copy of [redacted]

25. Attached hereto as Exhibit 11 is a true and correct copy of [redacted]

26. Attached hereto as Exhibit 12 is a true and correct copy of [redacted]

27. Attached hereto as Exhibit 13 is a true and correct copy of [redacted]

28. Attached hereto as Exhibit 14 is a true and correct copy of the declaration of journalist Scott Armstrong; Attached hereto as Exhibit 15 is a true and correct copy of the declaration of journalist Carl Bernstein; Attached hereto as Exhibit 16 is a true and correct copy of the affidavit of historian Anna Kasten Nelson. Attached hereto as Exhibit 17 is a true and correct copy of the affidavit of journalist Jack Nelson. Attached hereto as Exhibit 18 is a true and correct copy of the declaration of journalist Dana Priest. These affidavits and declarations were submitted in connection with the grand jury subpoenas served on Mr. Risen. Because the same facts are relevant here, these affidavits and declarations are submitted in connection with this proceeding. One of the affiants, Jack Nelson, died on October 21, 2009.

29. Attached hereto as Exhibit 19 is a true and correct copy this Court's decision in *United States* v. *Regan*, Criminal No. 01-405-A, Memorandum Order (E.D. Va. Aug. 20, 2002) (unpublished) (Lee, J.).

Joel Kurtzberg

Sworn to before me this
20th day of June, 2011

Notary Public

NEIL I. FELDMAN
Notary Public, State of New York
No. 01FE6162954
Qualified in New York County
Commission Expires March 19, 2015

# EXHIBIT 1

# This exhibit has been filed under seal.

# EXHIBIT 2

**This exhibit has been filed under seal.**

# EXHIBIT 3

**This exhibit has been filed under seal.**

# EXHIBIT 4

**This exhibit has been filed under seal.**

# EXHIBIT 5

**This exhibit has been filed under seal.**

# EXHIBIT 6

**This exhibit has been filed under seal.**

# EXHIBIT 7

**This exhibit has been filed under seal.**

# EXHIBIT 8

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# EXHIBIT 9

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# EXHIBIT 10

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# EXHIBIT 11

**This exhibit has been filed under seal.**

# EXHIBIT 12

**This exhibit has been filed under seal.**

# EXHIBIT 13

**This exhibit has been filed under seal.**

# EXHIBIT 14

**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**

| | |
|---|---|
| IN RE: GRAND JURY SUBPOENA, JAMES RISEN | Case No.: 1:08dm61 — LMB |
| | UNDER SEAL |

**DECLARATION OF SCOTT ARMSTRONG**

(Russell) Scott Armstrong, declares under penalty of perjury as follows:

1. I have been a professional journalist for 31 years. I am the executive director of the Information Trust, a Washington, D.C.-based, not-for-profit organization devoted to improving the quality of journalism. I worked for *The Washington Post* as a reporter covering national security matters from 1976 through 1985. I have worked for many national newspapers, television and radio networks in the course of my career. Along with Bob Woodward, I wrote *The Brethren*, a narrative account of the Supreme Court from 1969 through 1976 describing the Court's inner workings. I assisted Bob Woodward and Carl Bernstein in the research and writing of *The Final Days*. I taught journalism as a visiting scholar at the American University School of Communication and have lectured on journalism and/or investigative techniques at various other institutions including: Brown University, Columbia University Graduate School of Journalism, Harvard University, George Mason University, George Washington University, Georgetown University, Pennsylvania State University, Princeton University, University of Scranton, Syracuse University, the Universities of California (Berkeley, Davis, UCLA, USC), University of Illinois, Indiana University, University of Maryland, University of Pennsylvania, University of Texas, University of Virginia, as well as law schools at Columbia, Duke, Georgetown, Harvard, Washington School of Law, University of Virginia, and Yale.

2. I make this declaration at the request of attorneys representing James Risen in connection with a filing concerning whether he should be compelled to disclose the identity of one or more confidential sources with whom he spoke while engaged in newsgathering.

3. In addition to my extensive reporting on national security matters, I have been the co-convener of the ongoing "Dialogue between the Media and the Intelligence Community on Unauthorized Disclosures." ("Dialogue"). In the Dialogue, representatives of the media and senior government officials have met periodically to discuss issues surrounding the media's relationship with confidential sources employed by the government.

4. In 1985, I founded the National Security Archive, a private, non-profit research institute, which makes available to journalists, historians, scholars, congressional staffs, present and former public officials, other public interest organizations, and the general public comprehensive government documentation pertaining to important issues of foreign and national security policy.

5. In addition, I have been invited to address issues relating to government secrecy and unauthorized disclosures (leaks) by such official organizations as The First Judicial Circuit Court Conference, the National Security Agency's Senior Seminar, the Defense Investigative Service, the Defense Security Service, the National Defense University, the National War College, the Naval War College, the Foreign Service Institute, the National Industrial Security Program, the National Archive and Record Administration, the U.S. Security Policy Board, the General Accounting Office, the Congressional Research Service, and the Commission on Protecting and Reducing Government Secrecy. I have testified or consulted with committee staff on related issues for such congressional committees as the Senate Select Committee on Intelligence, the Senate Judiciary Committee, the House Permanent Select Committee on Intelligence, the House Armed Services Committee, the House Appropriations Committee, and such unofficial organizations as the American Bar Association's Committee on National Security, American Society for Industrial Security, and the American Society of Access Professionals. I have also lectured on

myriad occasions to groups of professional journalists on matters relating to leaks and national security information including: the American Society of Newspaper Editors, the Society of Professional Journalists, the Investigative Reporters and Editors, the Radio and Television News Directors Association, the Associated Press Managing Editors, the National Newspaper Association, the Newspaper Association of America, the Freedom of Information coalitions in Illinois, Indiana, New York, Oklahoma, as well as the full gamut of library associations including national and regional groups affiliated with the American Library Association, the Association of Research Libraries, the American Association of Law Librarians, and the Society of Archivists. I have also been a board member and consultant to the Government Accountability Project, a whistleblower protection organization, which often assists government employees who have become confidential sources to other branches of government or the media on matters involving fraud, waste, abuse, and government improprieties.

6. I have been qualified as an expert witness in the use of secret or classified documents in daily journalism by federal District Judge Joseph Young in the case of *United States. v. Morison*, 655 (D. Md. 1985). I was qualified as an expert witness in media coverage, use of confidential sources and libel by Federal District Court Judge Ewing Werlein, Jr. in *MMAR Group, Inc. v. Dow Jones & Co., Inc.*, 987 F. Supp. 535 (S.D. Texas, Houston Division, 1997), by Judge Geoffrey Alprin in *Prentice v. McPhilemy*, 27 Med. L. Rptr. 2377 (D.C. Sup. Ct. 1999) and by Texas District Court Judge Joseph H Hart in *Jack Taylor, et al. v. Barry Switzer, et al.*, (No. 4-91-001; 126th District Travis County) and in numerous other federal and state cases involving issues of confidential sources. I was qualified as an expert witness in the analysis of media coverage and editorial decision-making in regard to venue issues by Chief Judge Richard P. Matsch in *United States v. Timothy James McVeigh and Terry Lynn Nichols*, and have prepared and submitted testimony for introduction in other federal court cases on media coverage and editorial decision making as they relate to venue issues.

7. I have been the plaintiff in a number of federal cases designed to preserve and to increase access to classified and sensitive government information and to contest the failure to declassify government information. My involvement has included the selection of special masters with high level government clearances and the preparation of expert testimony.

8. In the course of my experience as a reporter, I have maintained confidential source relationships with thousands of present and former U.S. government and private sector employees. The purpose of these relationships is to get and verify accurate information. In order to promote a free and candid relationship with confidential sources, I have frequently found it necessary to guarantee them anonymity in regard to information provided about classified or otherwise confidential and sensitive information. Much of the verification process could not be done without the guarantee of anonymity. Over the course of three decades, such guarantees of confidentiality, when used to confirm information with multiple confidential sources, have proven to my satisfaction that this process yields more candid and accurate information than to rely solely or predominantly on public or official comments or documentation. In order to secure and sustain cooperation of a series of sources on an issue or topic, the sources must be confident that the full extent of their cooperation and role will remain anonymous and that they will not be subjected to professional recriminations, chastisement, or in very rare cases, even prosecution.

9. Many sources require such guarantees of confidentiality before any extensive exchange of information is permitted. In my experience, even in public and private institutions that are known for their transparency and openness, officials and staff often require such guarantees of confidentiality before discussing sensitive matters such as major policy debates, personnel matters, investigations of improprieties, and financial and budget matters.

10. Many types of reporting require the use of confidential sources. Prominent among these uses are three types of investigative or "enterprise" journalism: (a) original investigative reporting, which involves reporters developing factual accounts and documentation unknown to the public; (b) interpretive investigative reporting, which takes a mix of known facts and new information and produces an interpretation previously unavailable to the public; and (c) reporting on investigations, which publicizes information developed in government investigations that has not been known to the public and might well be suppressed.[1] These different types of investigative reporting are often mixed in the reporting of a single story. They share one key feature: to verify information, the journalist applies enterprise and initiative to examine information from as many knowledgeable and often confidential sources as can be developed.

11. Some information communicated under confidentiality arrangements will include significant "details" or "secrets." At other times, the information communicated simply amounts to candid, relevant background information, context and detailed leads, which in turn allow other information to be sought from yet other sources. Each confidential relationship with a source may provide one or more individual details that eventually are distilled and woven into a comprehensive news story. It would be rare for there not to be multiple sources — including confidential sources — for news stories on highly sensitive topics. The important "enterprise" stories tend to be built on information elicited from and verified with multiple confidential sources.

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1 For a coherent description of these types of reporting see pp. 116-129, *The Elements of Journalism: What Newspeople Should and the Public Should Expect* by Bill Kovach and Tom Rosenticl, Three Rivers Press, 2001.

12. Daily reporting most often does not enjoy the same amount of reporting time and flexibility as the investigative enterprise methods outlined above. Journalists on daily deadlines therefore often make use of confidential sources to report on daily developments in government and other institutions. These confidential relationships are necessary for reporters because even official government pronouncements must be verified before they are published. Official news conferences, daily news briefings, and government reports and studies require further checking by reporters. Traditionally, journalists will talk with other knowledgeable officials who are not authorized to speak to the subject but are individuals with whom they have developed a track record of candor and confidence. In some instances, this additional briefing goes beyond corroboration to add perspective that can be helpful to the reporter in writing a story but which the individual (or even the government) will not permit to be attributed by name or even position or sometimes even quoted directly in any way. Publicly available or acknowledged information may in turn prompt more detailed or relevant information from a confidential source, which may in turn lead back to additional on-the-record acknowledgments, which increase the pool of accurate and verifiable public information and/or may lead to yet more information from other confidential sources. Thus, in daily journalism, as in investigative enterprise journalism, information essential to the verification of facts within a story may come from confidential sources in the form of unique and relevant, contextual comments, which become part of the process of expanding, correcting, confirming or contradicting what other public and confidential sources have said. Thus, a relationship with the confidential source permits, among other things, the authentication of the public information. The maintenance of confidential sources is therefore essential to daily journalism.

13. The broad use of secrecy in government and in the corporate and institutional world creates a need for journalists to rely on confidential sources. In the national security community, the compulsory addition of security clearances, information classification, safeguards, nondisclosure disclosure agreements, security monitoring, polygraphs, special-access programs and compartments all inhibit the disclosure of information — even non-sensitive details — through routine means. Because so much in-

formation is routinely classified, the verification of something as mundane as a press briefing may involve talking to scores of sources who are not authorized to add further detail and could be subject to sanctions for doing so. In journalism, stories about major national security or diplomatic policy or military activities warrant confirmation, contextual perspective, and detailed elaboration. In order to provide readers with information as accurate and verified as possible, reporters often find it only available from confidential sources. In my opinion, the vast majority of high level government officials become confidential sources at one time or another. In my experience, they understand that the efficient operation of government and minimal standards of accountability to the public require that they provide confidential briefings to journalists covering daily stories. Moreover, I have observed that frequently important events about government that are embarrassing to senior officials, to important government agencies and/or a presidential administration are cloaked in multiple layers of secrecy, more often than not for political rather than national security reasons.

14. National security is often the rationale used by government officials to deny the public information about illegal or unauthorized intelligence activities, about failed operations and bankrupt policy, about fraud, waste and abuse within national security budgets and about activities that are diplomatically or politically inconvenient to disclose publicly. On a daily basis, the overly broad application of official secrecy occludes accurate descriptions of policy and practice not only for the public, but also for other agencies and even whole branches of government. The highest ranking government officials may prefer to be confidential sources to the news media in order to communicate candidly their differences of opinion or fact with others in the same department or administration to an oversight committee. Such confidential source relationships are often the only manner through which the mixture of sensitive and non-sensitive national security information can be integrated and conveyed to the public.

15. In cases involving classified or officially-restricted federal government information, journalists customarily seek to develop confidential sources in multiple executive branch agencies among senior officials and their staffs and in multiple congressional offices of members of Congress, their personal staff, and their committee staff. Stories often develop as a result of the alternative flow of information to the reporter from congressional and executive branch offices. Congressional oversight responsibilities enable congressional officials and their staffs to request information and entitle them to receive briefings on most details. Since congressional investigators often conduct their own field research, the intellectual process that develops information often includes a symbiotic relationship between journalists and congressional investigators. I have observed that similar interaction occurs between reporters and executive branch officials. The symbiotic interaction between journalists and congressional and executive officials has become the norm in terms of interactions between the press and the government. In recent years, this pollination process has often been the most important catalyst for constitutionally critical exchanges among the branches of federal government and the American public.

16. Executive agencies of the federal government regularly require journalists reporting on national security matters to conduct much of their work through interviews of officials and former officials that are given on background (without direct attribution) or deep background (with guarantees of anonymity). In my experience, these agencies include the Departments of Defense, State, Energy, Justice, Homeland Security, Commerce, and Treasury, the Central Intelligence Agency, the military services, the National Security Council, the Homeland Security Council, and the White House. Officials from these organizations typically say far more on background, deep-background, or off-the-record (a category which had traditionally meant the information could not be pursued for a news story, but which has come to mean the equivalent of deep background) than is ever said on the record. These are "authorized" disclosures, which agencies insist be conducted on background or deep background precisely to avoid specific accountability for any government official. Professional journalists typically find it necessary to obtain verification, perspective, correction, and commentary on these official leaks by interviewing others,

who are not authorized to comment on the officially authorized disclosure. This system is largely of the government's making, but requires the media to comply with the requests for anonymity or be excluded from essential information.

17. Elected legislators and congressional staff with access to controlled information regularly discuss such information with journalists in order to provide background information to the public and — on occasion — to surface the gravamen of serious concerns about executive branch policy. In my experience, journalists use this access to various officials in different branches of government to provide what is often the only information the public will receive on national security topics for months, years, or even decades.

18. In many instances, national security reporting also involves developing non-U.S. official sources including knowledgeable American experts as well as foreign officials and experts. Former officials of the U.S. and other governments are often able to provide important factual information and policy insights that are identical to classified details but not controlled by confidentiality agreements with the U.S. government. For many of the same reasons, these individuals also require a guarantee of confidential source status as a condition of their cooperation.

19. In my experience, journalists usually prefer to ascribe every statement and assertion in news articles to a specific source either by naming the individual or by providing an explicit indication of the individual's position, affiliations, and an indication of the source's knowledge or perspective about the events or policy reported upon. National security stories, however, commonly require that the identity and the identifying characteristics of the source be protected. This occurs even to the point where a confidential source may be quoted publicly and officially by name and position in a story at one point without disclosing the same source provided additional material anonymously. In such a case, reporters will normally attempt to guide the reader as candidly as possible to a conclusion about the degree of confi-

dence that is warranted in the source for any specific statement. The attribution may be generic in form and may credit the confirming sources' authority rather than the original source's profile.

20. In the process of evaluating information for publication, national security journalists or their editors normally consult with knowledgeable official sources about the sensitivity of the information and the consequences of disclosure. As a final draft is prepared, they customarily consult with one or more executive agencies in order both to seek official comment and to provide a last opportunity for official expressions of concern — nearly always made "off-the-record" — regarding the sensitive information to be disclosed. Such consultations may result in no changes, the exclusion of certain details or may lead to ongoing discussions which may take months or even years.

21. Once a decision has been made to protect the identity of a confidential source, it is extremely unusual for journalists to reveal their own confidential sources. I can count on one hand the number of instances where journalists or editors have cooperated with a leak investigation and revealed the identity of their sources. In instances where their sources' careers — and indeed their liberty — hang in the balance, journalists customarily take precautions to prevent intentional or inadvertent disclosures by their colleagues or their editors. Most national security journalists operate on the assumption that they will not reveal sources even where their refusal to comply with a court order may yield a contempt citation and even incarceration or fines. This commitment has proven essential to secure the cooperation and candor of sources responsible for virtually all national security stories.

22. In 1975, in the wake of the *Branzburg v. Hayes* decision three years earlier, the Justice Department issued regulations which, in their present form, specify that "[t]he use of subpoenas to members of the news media should, **except under exigent circumstances**, be **limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information**." 28 C.F.R. §§ 50.10(b), 50.10(f)(3). (emphasis added). The Guidelines seek to limit attempts to use grand jury subpoenas to learn "unpublished information" such as the identities of confi-

dential sources per se. Thus the guidelines stress that the following principles apply when requesting authorization to subpoena a member of the press: the government must have reasonable grounds to believe, "based on information obtained from **non-media** sources, that a crime has occurred, and that the information sought is essential to a successful investigation – particularly with reference to directly establishing guilt or innocence," *see id.* § 50.10(f)(1) (emphasis added); "all reasonable efforts should be made to obtain the desired information from alternative sources," *id.* at §§ 50.10(b); the government should have "unsuccessfully attempted to obtain the information from alternative nonmedia sources," *id.* §50.10(f)(3); the government should treat "[e]ven . . . requests for publicly disclosed information . . . should be treated with care to avoid claims of harassment," id. § 50.10(f)(5); and, "wherever possible," the government should seek material information on a limited subject matter and for a limited time period, and "avoid requiring the production of large quantities of unpublished material." *Id.* § 50.10(f)(6). In particular, "[t]he subpoena should not be used to obtain peripheral, nonessential, or speculative information." Id. § 50.10(f)(1). It is my understanding that these guidelines continue to embody the policy of the United States government.

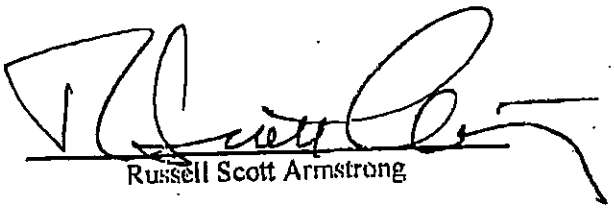
23. I am generally familiar with the national security reporting of James Risen that has appeared in *The New York Times* and that is contained in his book *State of War: The Secret History of the CIA and the Bush Administration* ("*State of War*"). At the request of Mr. Risen's attorneys, I have again reviewed Chapter Nine (which is entitled, "A Rogue Operation") of *State of War*. The chapter includes an eclectic narrative of newsworthy information and assertions presented regarding U.S. intelligence about Iran, several covert operations conducted by the CIA and other agencies against Iranian targets and broader policy implications of intelligence analysis and operational failures. Certain significant assertions appear to be unique to the book. Other details such as internal government debates, which have been published elsewhere, are woven into Mr. Risen's narrative in a singular manner.

24. *State of War's* publication and the wide serialization of excerpts — including Chapter Nine — created a wave of news coverage in the U.S. and abroad about the information contained in Chapter Nine as well as other information elaborating on previously published information from *The New York Times*. Ensuing commentary about the U.S. intelligence community's perceptions and analysis of the Iranian nuclear program have made regular reference to certain details first revealed in the book. Regardless of whether one agrees with all the Chapter's assertions and analysis, it is by simple definition, "newsworthy."

25. In my professional opinion, the government's issuance of a grand jury subpoena to Mr. Risen is in conflict with the intention and thirty-year practice under the Department of Justice guidelines for issuing subpoenas to news media. A judicial order requiring a national security reporter at a major news media organization, such as James Risen, to disclose confidential sources for the publication of newsworthy information would damage the quality of information available to the public on national security issues. Were Mr. Risen to comply, in my opinion, the damage would significantly undermine the confidence of a wide variety of confidential sources across many U.S. government agencies and institutions as well as many knowledgeable individual sources not associated with the U.S. government. The consequences to the public would be a degradation of the newsgathering capabilities of not only Mr. Risen and his colleagues at *The New York Times* but also of most other journalists providing in-depth coverage of national security matters and the important intricacies of national government affairs. Such an order would further unsettle an untidy but well-established accommodation between government institutions and the media that allows critically important information to surface publicly in an era when secrecy, classification and other governmental controls technically cover almost every detail of the most newsworthy national security topics. Without the protection of confidential sources, public policy discussion and debate would be devoid of the most important national security information, that which is essential to sustaining an informed democracy.

26. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: February 16 2008



Russell Scott Armstrong

# EXHIBIT 15

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

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|---|---|
| IN RE: GRAND JURY SUBPOENA, JAMES RISEN | Case No.: 1:08dm61 – LMB |
| | UNDER SEAL |

**DECLARATION OF CARL BERNSTEIN**

Carl Bernstein hereby deposes and says:

1. I have been a journalist for 47 years. I have worked as an investigative reporter for *The Washington Post*, a senior correspondent and Washington Bureau Chief for ABC News, and have taught journalism at New York University. I have contributed to *Time*, *Rolling Stone*, *The New Republic*, *The New York Times*, and *The Los Angeles Times*, among other publications. With Bob Woodward I co-authored the books *All the President's Men* and *The Final Days* and I contributed to Mr. Woodward's book *The Secret Man*. I am also the co-author of *His Holiness*, a biography of Pope John Paul II, and *A Woman in Charge: The Life of Hillary Rodham Clinton*.

2. I am fully familiar with the facts set forth herein and make this declaration based on my personal knowledge unless otherwise stated.

3. More than thirty years ago, while an investigative reporter for *The Washington Post*, my colleague Bob Woodward and I reported the facts and circumstances arising out of the break-in of the Democratic National Committee's offices in the Watergate. Those facts and circumstances were among those that ultimately led to the resignation of President Richard M.

Nixon. Our work was cited in the Pulitzer Prize award to *The Washington Post* for Public Service in 1973.

4. Throughout our investigation, we relied on confidential sources, among them an individual who became known to the public as "Deep Throat," and whose identity remained secret until 2005, more than thirty years after our investigation. In 2005, W. Mark Felt and his family announced, and Mr. Woodward and I confirmed, that Mr. Felt was our confidential source, Deep Throat. At the time of our reporting, Mr. Felt was the number-two official at the Federal Bureau of Investigation.

5. Mr. Felt, like all our confidential sources, would not have agreed to be a source for our Watergate reporting had Mr. Woodward and I not been able to assure him total and absolute confidentiality. Stated differently, almost all of the articles I co-authored with Mr. Woodward on Watergate could not have been reported or published without the assistance of our confidential sources and without the ability to grant them anonymity, including the individual known as Deep Throat. In fact, we identified no major sources of information by name in any of more than 150 articles we wrote in the first ten months after the Watergate break-in. In virtually all of them, anonymous sources were the basis for the significant information we developed.

6. Throughout my career — in my own reporting and the reporting of staff that I have directed — I have been involved in numerous situations where sources with information on matters of great public interest and concern insist on confidentiality for fear of retaliation or retribution if their identities became known. Without the ability to grant confidentiality to the sources involved, those stories would not have been published or broadcast.

7. I am greatly concerned about the federal government's drive in recent years to subpoena reporters to testify about their confidential sources. Not only do I believe it is an assault on the First Amendment and the press freedoms we are guarantee, but on an individual level, compelling the disclosure of confidential information by any reporter is certain to obstruct his future newsgathering and make it nearly impossible to do his job effectively. In my experience, confidential sources will speak only to a journalist they trust and one whom they believe is sufficiently independent of government influence and authority. If an investigative reporter is compelled by the government to testify as to confidential information, his trustworthiness, integrity and independence will likely be forever tainted and any potential sources who might have previously approached him with important information may very well be deterred.

8. I also believe, based on my professional experience, that compelled disclosure of confidential information will cause irrevocable damage to the quality of information the public receives. Many times, in my experience, people who have valuable information about corporate or governmental wrongdoing will only come forward if granted confidentiality. Without such individuals (in some circumstances called "whistleblowers") and the ability to protect them, the press will not be able to sufficiently develop important stories — as in the case of Watergate — or even learn of the existence of potential important stories, and the uninformed public will suffer as a result.

9. I understand that *New York Times* investigative reporter and author James Risen has been served with a subpoena seeking, among other things, the identity of the source, or sources, for information contained in Chapter Nine of his book, *State of War: The Secret History of the CIA and the Bush Administration* ("*State of War*").

10. In my professional opinion, for all of the reasons set forth in this Affidavit, were an order to compel Mr. Risen to disclose information about his confidential sources issued and were it to be obeyed, it would do irreparable harm to investigative reporting across the nation.

11. Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 12, 2008



Carl Bernstein

# EXHIBIT 16

**UNITED STATES DISTRICT COURT**

**FOR THE EASTERN DISTRICT OF VIRGINIA**

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| IN RE: GRAND JURY SUBPOENA, JAMES RISEN | Case No.: 1:08dm61 -- LMB |
| | UNDER SEAL |

**AFFIDAVIT OF ANNA KASTEN NELSON**

DISTRICT OF COLUMBIA ) ss.:

1. I am Anna Kasten Nelson, the Distinguished Historian in Residence at the American University in Washington, D.C., where I teach courses related to the history of U.S. Foreign Policy. I have also taught history at George Washington University and Tulane University and was a Distinguished Visiting Professor in history at Arizona State University in 1992.

2. I have also been a member of the staff of the Public Documents Commission, which was formed after President Nixon's efforts to destroy his tapes and the U.S. State Department Historical Advisory Committee. I was one of five presidential appointees to the John F. Kennedy Assassination Records Review Board. Each of these was formed to release historical records to the public.

3. I am writing in support of investigative journalist James Risen, who I understand has refused to reveal to the Government the names of confidential source(s) used for Chapter Nine of his book, *State of War: The Secret History of the CIA and the Bush Administration* ("*State of War*"). The work of journalists such as Mr. Risen is essential to historians such as myself. Compelling him and other journalists like him to testify about the identity of their confidential source(s) would, in my view, have a direct impact on the work of many historians.

4. Historians no longer limit themselves to writing about past centuries. Every year, we see countless historical treatises and articles in scholarly and public interest journals about the rise of the United States as a world power in the last half century. Traditionally, historians have looked to official government records as their primary sources. These materials, however, are often not open to researchers for 25 to 30 years and, even then, are frequently censored for purported national security information or privacy reasons. Thus, researchers seeking to understand the immediate past now frequently look to investigative journalism to provide the first cut of history.

5. In January 2004, for example, I published an article about a woman chosen by Secretary of Defense George Marshall to be an Assistant Secretary in the Defense Department in 1950. She was attacked by supporters of Sen. Joseph McCarthy. Among my most important sources were three articles published at that time in the *Washington Post*. Those articles — which were based on information received from anonymous sources — helped me determine that masked by false accusations of communist

party membership was a deep anti-Semitism among the woman's opponents. Thus, the journalist who had informed his readers also was in a unique position to inform a future historian.

6. Investigative journalism is a particularly indispensable source when it comes to historical research and writing into matters of foreign policy and intelligence. Indeed, most of what we know about the recent use of intelligence in the making of foreign policy — which began in earnest with the beginning of the Cold War and passage of the National Security Act of 1947 — originally emerged in articles and books by investigative journalists. Without these journalists, historians would simply be unaware of key elements of their narratives.

7. That journalists write the first draft of history is much more than a cliché when it comes to national security policy. Newspapers like *The New York Times* and books like *State of War* have been important research tools for those of us examining the use of intelligence by America at home and abroad. Since we have only official government documents and statements, we rely upon journalists to tell us what they saw and heard, which is indispensable to our understanding and analysis of events we could not possibly witness.

8. If Mr. Risen and other investigative journalists are unable to report effectively on matters of intelligence, the historical record will be incomplete, if not erroneous. After World War II, for example, many scholarly books and articles were published explaining the course of the war and the crucial role of intelligence. Many of these accounts were wrong or misleading, however, because they were written before the release of information about the Ultra code breaking machine.

9. In this case, future historians would be hard-pressed to present accurate and informative portrayals of our current foreign policy without the benefit of reporting by journalists like Mr. Risen on the use of human and signal intelligence. Indeed, Mr. Risen's reporting in Chapter 9 of *State of War* deals with an issue that almost certainly will be the subject of countless historical analyses: the incompetence and mismanagement of certain intelligence efforts in Iran. This will be a critically important subject to historians in light of, among other things, recent changes to the National Intelligence Estimate regarding Iran's supposed nuclear capabilities.

10. Consider, as well, the extent to which historians will rely on the work of investigative journalists to explain and evaluate our intelligence agencies' failures to evaluate Iraq's WMD capabilities and the ensuing consequences of those failures. Without the work of investigative reporters, and the information provided by their confidential sources, historians would be left to write the history of the Iraq War buildup based in large part on the official, often self-serving, statements of government and military officials.

11. Although our own books and articles are stuffed with footnotes, we historians understand that investigative journalists, as observers of the present, must protect their sources. If they do not, the American people will never learn about corruption, incompetence, excessive government secrecy, flaws in homeland security, or disastrous decisions made by policy makers who are advised by their intelligence chiefs. We must depend upon journalists and journalists must be permitted to depend upon confidential sources. If not, the historic record will ultimately suffer.

Anna Nelson

Date: February 13, 2008

Witnessed by me this 13 day of February, 2008,

(Notary Public)

My commission expires on: Oct. 14, 2011

# EXHIBIT 17

**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**

| | |
|---|---|
| IN RE: GRAND JURY SUBPOENA, JAMES RISEN | Case No.: 1:08dm61 -- LMB |
| | UNDER SEAL |

**AFFIDAVIT OF JACK NELSON**

Jack Nelson, being duly sworn, deposes and says:

1. Prior to my retirement at the end of 2001, I spent 36 years as a journalist with the *Los Angeles Times*, including 22 years as the *Times'* Washington Bureau Chief. Before I began working for the *Los Angeles Times*, I worked as a reporter for *The Atlanta Journal-Constitution* and *The Biloxi Daily Herald*.

2. In 1960, I was awarded a Pulitzer Prize for reporting that exposed widespread financial corruption and medical malpractice at the Milledgeville (Ga.) State Hospital, then the world's largest mental institution. Much of my career has been spent either doing investigative reporting or overseeing investigative reporting. During my career as a reporter, I used confidential sources at all levels of government to report on financial corruption, vote fraud, medical malpractice, and other wrongdoing. I am, through these experiences, personally familiar with news reporting in general, and with the importance of confidential sources in newsgathering, in particular.

3. I make this affidavit in support of a fellow investigative reporter, James Risen, who, I understand, has been served with a grand jury subpoena seeking to obtain, among other things, the identity of the source, or sources, of information provided to him and published in Chapter 9 of his book, *State of War: The Secret History of the CIA and the Bush Administration* ("*State of War*"). I am fully familiar with the facts set forth herein and make this affidavit based on my personal knowledge unless otherwise stated.

4. I have utilized and protected confidential sources throughout a career of more than 50 years as a journalist. During that time, I have found it essential to use confidential sources to adequately report and keep the public informed of government at the local, state and national level. In order to fully report stories on many subjects, especially in order to learn of government activities that otherwise would have been shielded from the public, I often found it necessary to rely on confidential sources.

5. I have covered the activities of six different presidential administrations -- four Republican and two Democratic -- and have directed the Washington bureau's coverage of five of them. And in all of the administrations we had to rely on confidential sources in reporting on government developments that were of great public interest but that government officials tried to keep concealed.

6. In Washington, my own reporting and the reporting of staffers I've directed routinely disclosed governmental abuses of one kind or another based on solid sources who insisted on confidentiality for fear of reprisal if their identities became known. Without those sources the *Los Angeles Times* would have been unable to report numerous such stories involving corruption or governmental abuses in at least six administrations. Examples include: aspects of the Watergate scandal and abuses of power of the FBI and other federal agencies in the Nixon Administration; questions surrounding President Ford's pardon of President Nixon; scandals in the Carter Administration involving OMB Director Bert Lance and President Carter's brother Billy Carter's

representation of Libya; illegal and inappropriate payments and cover-up attempts in the Iran/Contras scandal in the Ronald Reagan Administration; President George H. W. Bush's role in the Iran/Contras scandal and other wronging in his Administration; and lies told by President Clinton in the Monica Lewinsky scandal. All of these stories contributed in a positive way to important national debates in this country and none of them would have been possible without information obtained from confidential sources.

7. Similarly, the information reported in Chapter 9 of *State of War* provided considerable benefit to the public. The chapter relates to a critically important subject: flaws and mismanagement of U.S. intelligence efforts concerning Iran's nuclear capabilities. Mr. Risen's reporting in Chapter 9 is all the more important given our apparent failures to gather accurate intelligence regarding Iraq's WMD capabilities (and the catastrophic consequences of that failure), and in light of recent changes to the National Intelligence Estimate concerning our intelligence agencies' views regarding the existence of an active nuclear program in that country.

8. Based on my experience, a reporter who obeys a court order to disclose a source to whom he has promised confidentiality would seriously damage his ability to cover government in the future. In my opinion, other government sources who insist on confidentiality and hear news about a reporter disclosing the identity of a confidential source obviously would consider that reporter, and perhaps other reporters, to be untrustworthy and refuse to deal with them in the future. And it undoubtedly would have a ripple effect, silencing whistleblowers and other government employees who might otherwise cooperate with the press in exposing government wrongdoing.

9. In fact, high government officials from presidents on down routinely have leaked classified information when it has promoted their agenda or otherwise suited their purposes. Any reporter who has covered Washington for any length of time knows that officials routinely leak classified information. Some government public information officials have publicly acknowledged that they routinely use classified information in briefing reporters. Congress passed a bill cracking down on leaks in 2000, but President Clinton vetoed it after Kenneth Bacon, the Assistant Secretary of Defense for Public Affairs, and Strobe Talbot, the Deputy Secretary of State, reportedly told the President they routinely used classified information in briefing reporters and could not adequately do their jobs if the bill became law. Bacon told the *Washington Post* the measure was "disastrous for journalists . . . disastrous for any official who deals with the press in national security, whether at State, the NSC or the Pentagon." And Talbot told me, for a paper on government secrecy that I wrote while at Harvard University as a Shorenstein Fellow in 2001, that the bill was "unbelievably pernicious for all kinds of reasons." The paper was a chapter in a 2003 book, "Terrorism, War, and the Press," published by the Joan Shorenstein Center on the Press, Politics and Public Policy and the John F. Kennedy School of Government.

10. I believe a federal court order that holds reporters or their news organizations in contempt for refusing to divulge confidential sources would be closely watched by all government sources and potential sources who might be inclined to help the public know how its government is operating. And if a contempt order were to compel a reporter to reveal his source, it would have a chilling effect on sources and not only damage the reporter's ability to do his job, but the ability of all reporters covering government to do their jobs.

Jack Nelson

Jack Nelson

Date: 2/15/08

Witnessed by me this 15th day of Feb., 2008,

(Notary Public)

My commission expires on 05/01/2010

# EXHIBIT 18

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

TO BE FILED UNDER SEAL

| | |
|---|---|
| IN RE GRAND JURY SUBPOENA, JAMES RISEN | x Case No. 1:08dm61 - LMB |

## DECLARATION OF DANA PRIEST

I, Dana Priest, hereby declare under the penalty of perjury as follows:

1. I am a staff writer for *The Washington Post.*

2. I was the *Post's* Pentagon correspondent for seven years and subsequently covered the intelligence beat for three years. I also covered the invasion of Panama, reported from Iraq, and covered the Kosovo air war. I have traveled widely with Army Special Forces in Asia, Africa and South America, with Army infantry units on peacekeeping duty in Bosnia, Kosovo and Afghanistan, and with the regional four-star military commanders. In 2003 I authored a book about the military's expanding responsibility and influence, *"THE MISSION: Waging War and Keeping Peace With America's Military,"* which won the New York Public Library Bernstein Book Award and was a finalist for the 2003 Pulitzer Prize for non-fiction. I worked for three years as an analyst and contributor for NBC News and am currently a contributor to CBS News as well as a fellow at New York University's Center on Law and Security.

3. My work has been recognized by my profession with a number of awards including The Pulitzer Prize, The George Polk Award, the Overseas Press Club Award, the American Academy of Diplomacy's Award for Distinguished Reporting and Analysis on Foreign Affairs, the Gerald R. Ford Prize for Distinguished Reporting on the National Defense, and Harvard University's David Nyhan Award for Political Journalism "for many years of distinguished investigative reporting."

4. Beginning in 1996 and continuing to this day, I have authored hundreds of news articles on matters of national security. Some of those articles have revealed government waste, corruption and wrongdoing. Some have disclosed controversial, secret policy decisions and the real-life effects of those decisions on the lives of Americans and people living outside the United States. A number have revealed the tactics, operations and strategy of the U.S. government's war on terror in a way that allows the public to judge whether government's actions in this realm are achieving the stated goal of these policies, namely the destruction of Al Qaeda-influenced terrorism around the world.

5. Because the U.S. government has made secret nearly every aspect of its counterterrorism program, it would have been impossible to report even on the basic contours of these decisions, operations and programs without the help of confidential sources. The same is true for most military operations, particularly those involving special operations forces and counterintelligence assets. In my experience, the individuals who provide information about these matters on the condition of anonymity do so because they believe that the information should be made public, but they are not officially authorized to disclose the information or do not wish the information to be attributed to a named official.

6. The subjects that I have been able to cover, based on information provided by confidential sources, include the existence and conditions of hundreds of prisoners, some later to be found innocent, held at the military prison at Guantanamo Bay, Cuba; the capture, treatment and interrogation of prisoners in Afghanistan and Iraq; the workings of the joint CIA-Special Forces teams in Afghanistan responsible for toppling the Taliban and Al Qaeda; the use of the predator unmanned aerial vehicle to target suspected terrorist leaders; the wasteful spending of tens of billions of dollars in taxpayer funds on an outdated and redundant satellite system; the legal opinions supporting the "enhanced interrogation techniques" of prisoners captured in the war on terror; the specifics of those techniques, including waterboarding; the rendition of multiple suspected terrorists by the CIA in cooperation with foreign intelligence services to third countries; the lack of success in capturing Osama bin Laden; the absence of human sources in Iraq, Iran and Pakistan by the CIA despite the high priority put on those countries by the U.S. intelligence services; the abuse of prisoners at the Abu Ghraib prison in Iraq; the accidental death of an innocent Afghan prisoner at the hands of an inexperienced CIA officer; the imprisonment of innocent

Afghans sold for bounties to the U.S. military by Pakistan police and others; the mistaken capture, rendition, abuse and detention of Khalid al-Masri, an innocent naturalized German citizen of Lebanese extraction by the CIA and its allies; the mistaken rendition of Maher Arar, a Canadian citizen, into Syrian hands and his subsequent torture there; and the existence and evolution of the CIA's secret prisons in the countries of Eastern Europe. (These prisons were illegal in those countries, the very countries that the United States had worked so long to liberate from their Soviet-dominated and allied intelligence agencies and to welcome into the world of nations governed by the rule of law.) All of the revelations in my stories on these subjects were at one point secret from the American public. None of them could have been reported without the help of confidential sources.

7. Many of the above stories, which are attached, have resulted in significant, thoughtful and on-going public debate, including within the governments of our closest allies in Europe and in the U.S. Congress, where some of these practices, once revealed by myself and other reporters, have been prohibited or substantially modified. The legality of these programs has been questioned and defended by the public, interest groups, elected members of Congress, the president and his national security team, and even presidential and Congressional candidates seeking office in 2008. This is, it seems to me, the essence of a democracy.

8. If reporters believe, as I do, that it is their responsibility to describe the broad contours of the war on terror, in order to help the public judge whether the tactics of the war on terror are effective in achieving our goals, then they, together with their editors and publishers, must necessarily delve into the realm of secret information. It can not be avoided.

9. As a reporter covering matters of national security, I am aware that there is no broad prohibition against the publication of secret or classified information per se. Why is that? Justice Potter Stewart, writing in the Pentagon Papers cases, described it this way: "So far as the Constitution goes, the autonomous press may publish what it knows, and it may seek to learn what it can. But this autonomy cuts both ways. The press is free to do battle against secrecy…in government. But the press cannot expect from the Constitution any guarantee that it will succeed….The Constitution, in other words, establishes the *contest*, not its resolution. Congress may provide a resolution through carefully drawn legislation. For the

rest, we must rely, as so often in our system we must, on the tug and pull of the political forces in American society."

10. The media's responsibility, as I see it, is to play its role in that contest—for, as Justice Stewart reminded us, "it is the contest itself that serves the public interest." If the press fails at this, we fail to meet our responsibility. In times of war and conflict, the stakes can be especially high. Consider what happened when the news media did not work hard enough before the Iraq war to determine whether the Bush administration's assertions of weapons of mass destruction in Iraq were accurate. For the press to have done a better job reporting about Iraq's nuclear capabilities in the run-up to the war, of course, it would have had to have access to secret or classified information, and it would almost certainly have had to have the assistance of confidential sources.

11. Mr. Risen's reporting in Chapter 9 of his book *State of War: The Secret History of the CIA and the Bush Administration* deals with potential incompetence and mismanagement of certain intelligence efforts concerning Iran's WMD capabilities. This is the kind of important and newsworthy subject that, in my experience, cannot be covered without the assistance of confidential sources.

12. In 2007, I co-authored a series of articles in the *Post* that revealed the systematic lack of adequate care for soldiers and Marines returning from wars in Iraq, Afghanistan and elsewhere at the Walter Reed Army Medical Center. The abuses revealed in those articles could not have been uncovered without the help of people who agreed to speak only in return for promises to keep their identities confidential. These articles, which I have attached, resulted in significant reform to the Veteran's Administration services to Iraq and Afghanistan veterans, and to the Army and wider Defense Department's system of care for the physically and mentally wounded. Defense Secretary Robert Gates cited these articles in his May 2007 commencement speech at the U.S. Naval Academy: "As officers, you will have a responsibility to communicate to those below you that the American military must be non-political and recognize the obligation we owe the Congress to be honest and true in our reporting to them. Especially when it involves admitting mistakes or problems. The same is true with the press, in my view a critically important guarantor of our freedom. When it identifies a problem, as at Walter Reed, the response of senior leaders should be to find out if the allegations are true—as they were at Walter

Reed—and if so, say so, and then act to remedy the problem. If untrue, then be able to document that fact. The press is not the enemy, and to treat it as such is self-defeating."

13. The press would be severely hobbled in its efforts to reveal problems if it were not able to rely upon and protect confidential sources. If reporters are compelled to identify their confidential sources in cases such as this one, my ability and the ability of other reporters to obtain newsworthy information in the future on the kinds of subjects described in this Declaration would be severely impaired. Sources who would otherwise feel a responsibility to reveal potential abuses would be reluctant to do so, and the public would be left without the information necessary ultimately to ensure that government is responsive to its will.

I declare under the penalty of perjury that the foregoing is true to the best of my knowledge, information and belief.

Dana Priest

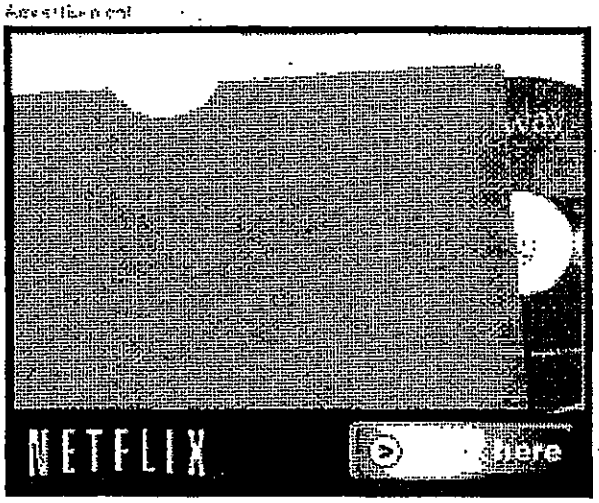
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# The Hotel Aftermath

Inside Mologne House, the Survivors of War Wrestle With Military Bureaucracy and Personal Demons

By Anne Hull and Dana Priest
Washington Post Staff Writers
Monday, February 19, 2007; A01




The guests of Mologne House have been blown up, shot, crushed and shaken, and now their convalescence takes place among the chandeliers and wingback chairs of the 200-room hotel on the grounds of Walter Reed Army Medical Center.

Oil paintings hang in the lobby of this strange outpost in the war on terrorism, where combat's urgency has been replaced by a trickling fountain in the garden courtyard. The maimed and the newly legless sit in wheelchairs next to a pond, watching goldfish turn lazily through the water.

But the wounded of Mologne House are still soldiers -- Hooah! -- so their lives are ruled by platoon sergeants. Each morning they must rise at dawn for formation, though many are half-snowed on pain meds and sleeping pills.

In Room 323 the alarm goes off at 5 a.m., but Cpl. Dell McLeod slumbers on. His wife, Annette, gets up and fixes him a bowl of instant oatmeal before going over to the massive figure curled in the bed. An Army counselor taught her that a soldier back from war can wake up swinging, so she approaches from behind.

"Dell," Annette says, tapping her husband. "Dell, get in the shower."

"Dell!" she shouts.

Finally, the yawning hulk sits up in bed. "Okay, baby," he says. An American flag T-shirt is stretched over his chest. He reaches for his dog tags, still the devoted soldier of 19 years, though his life as a warrior has become a paradox. One day he's led on stage at a Toby Keith concert with dozens of other wounded Operation Iraqi Freedom troops from Mologne House, and the next he's sitting in a cluttered cubbyhole at Walter Reed, fighting the Army for every penny of his disability.

McLeod, 41, has lived at Mologne House for a year while the Army figures out what to do with him. He worked in textile and steel mills in rural South Carolina before deploying. Now he takes 23 pills a day, prescribed by various doctors at Walter Reed. Crowds frighten him. He is too anxious to drive. When panic strikes, a soldier friend named Oscar takes him to Baskin-Robbins for vanilla ice cream.

"They find ways to soothe each other," Annette says.

Mostly what the soldiers do together is wait: for appointments, evaluations, signatures and lost paperwork to be found. It's like another wife told Annette McLeod: "If Iraq don't kill you, Walter Reed will."

**After Iraq, a New Struggle**

The conflict in Iraq has hatched a virtual town of desperation and dysfunction, clinging to the pilings of Walter Reed. The wounded are socked away for months and years in random buildings and barracks in and around this military post.

The luckiest stay at Mologne House, a four-story hotel on a grassy slope behind the hospital. Mologne House opened 10 years ago as a short-term lodging facility for military personnel, retirees and their family members. Then came Sept. 11 and five years of sustained warfare. Now, the silver walkers of retired generals convalescing from hip surgery have been replaced by prosthetics propped against Xbox games and Jessica Simpson posters smiling down on brain-rattled grunts.

Two Washington Post reporters spent hundreds of hours in Mologne House documenting the intimate struggles of the wounded who live there. The reporting was done without the knowledge or permission of Walter Reed officials, but all those directly quoted in this article agreed to be interviewed.

The hotel is built in the Georgian revival style, and inside it offers the usual amenities: daily maid service, front-desk clerks in formal vests and a bar off the lobby that opens every afternoon.

But at this bar, the soldier who orders a vodka tonic one night says to the bartender, "If I had two hands, I'd order two." The customers sitting around the tables are missing limbs, their ears are melted off, and their faces are tattooed purple by shrapnel patterns.

Most everyone has a story about the day they blew up: the sucking silence before immolation, how the mouth filled with tar, the lungs with gas.

"First thing I said was, '[Expletive], that was my *good* eye,' " a soldier with an eye patch tells an amputee in the bar.

The amputee peels his beer label. "I was awake through the whole thing," he says. "It was my first patrol. The second [expletive] day in Iraq and I get blown up."

When a smooth-cheeked soldier with no legs orders a fried chicken dinner and two bottles of grape soda to go, a kitchen worker comes out to his wheelchair and gently places the Styrofoam container on his lap.

A scrawny young soldier sits alone in his wheelchair at a nearby table, his eyes closed and his chin dropped to his chest, an empty Corona bottle in front of him.

Those who aren't old enough to buy a drink at the bar huddle outside near a magnolia tree and smoke cigarettes. Wearing hoodies and furry bedroom slippers, they look like kids at summer camp who've crept out of their rooms, except some have empty pants legs or limbs pinned by medieval-looking hardware. Medication is a favorite topic.

"Dude, [expletive] Paxil saved my life."

"I been on methadone for a year, I'm tryin' to get off it."

"I didn't take my Seroquel last night and I had nightmares of charred bodies, burned crispy like campfire marshmallows."

Mologne House is afloat on a river of painkillers and antipsychotic drugs. One night, a strapping young infantryman loses it with a woman who is high on her son's painkillers. "Quit taking all the soldier medicine!" he screams.

Pill bottles clutter the nightstands: pills for depression or insomnia, to stop nightmares and pain, to calm the nerves.

Here at Hotel Aftermath, a crash of dishes in the cafeteria can induce seizures in the combat-addled. If a taxi arrives and the driver looks Middle Eastern, soldiers refuse to get in. Even among the gazebos and tranquility of the Walter Reed campus in upper Northwest Washington, manhole covers are sidestepped for fear of bombs and rooftops are scanned for snipers.

Bomb blasts are the most common cause of injury in Iraq, and nearly 60 percent of the blast victims also suffer from traumatic brain injury, according to Walter Reed's studies, which explains why some at Mologne House wander the hallways trying to remember their room numbers.

Some soldiers and Marines have been here for 18 months or longer. Doctor's appointments and evaluations are routinely dragged out and difficult to get. A board of physicians must review hundreds of pages of medical records to determine whether a soldier is fit to return to duty. If not, the Physical Evaluation Board must decide whether to assign a rating for disability compensation. For many, this is the start of a new and bitter battle.

Months roll by and life becomes a blue-and-gold hotel room where the bathroom mirror shows the naked disfigurement of war's ravages. There are toys in the lobby of Mologne House because children live here. Domestic disputes occur because wives or girlfriends have moved here. Financial tensions are palpable. After her husband's traumatic injury insurance policy came in, one wife cleared out with the money. Older National Guard members worry about the jobs they can no longer perform back home.

While Mologne House has a full bar, there is not one counselor or psychologist assigned there to assist soldiers and ~~families in crisis -- an idea proposed by Walter Reed social workers but rejected~~ by the military command that runs the post.

After a while, the bizarre becomes routine. On Friday nights, antiwar protesters stand outside the gates of Walter Reed holding signs that say "Love Troops, Hate War, Bring them Home Now." Inside the gates, doctors in white coats wait at the hospital entrance for the incoming bus full of newly wounded soldiers who've just landed at Andrews Air Force Base.

And set back from the gate, up on a hill, Mologne House, with a bowl of red apples on the front desk.

**Into the Twilight Zone**

Dell McLeod's injury was utterly banal. He was in his 10th month of deployment with the 178th Field Artillery Regiment of the South Carolina National Guard near the Iraqi border when he was smashed in

the head by a steel cargo door of an 18-wheeler. The hinges of the door had been tied together with a plastic hamburger-bun bag. Dell was knocked out cold and cracked several vertebrae.

When Annette learned that he was being shipped to Walter Reed, she took a leave from her job on the assembly line at Stanley Tools and packed the car. The Army would pay her $64 a day to help care for her husband and would let her live with him at Mologne House until he recovered.

A year later, they are still camped out in the twilight zone. Dogs are periodically brought in by the Army to search the rooms for contraband or weapons. When the fire alarm goes off, the amputees who live on the upper floors are scooped up and carried down the stairwell, while a brigade of mothers passes down the wheelchairs. One morning Annette opens her door and is told to stay in the room because a soldier down the hall has overdosed.

In between, there are picnics at the home of the chairman of the Joint Chiefs of Staff and a charity-funded dinner cruise on the Potomac for "Today's troops, tomorrow's veterans, always heroes."

Dell and Annette's weekdays are spent making the rounds of medical appointments, physical therapy sessions and evaluations for Dell's discharge from the Army. After 19 years, he is no longer fit for service. He uses a cane to walk. He is unable to count out change in the hospital cafeteria. He takes four Percocets a day for pain and has gained 40 pounds from medication and inactivity. Lumbering and blue-eyed, Dell is a big ox baby.

Annette puts on makeup every morning and does her hair, some semblance of normalcy, but her new job in life is watching Dell.

"I'm worried about how he's gonna fit into society," she says one night, as Dell wanders down the hall to the laundry room.

The more immediate worry concerns his disability rating. Army doctors are disputing that Dell's head injury was the cause of his mental impairment. One report says that he was slow in high school and that his cognitive problems could be linked to his native intelligence rather than to his injury.

"They said, 'Well, he was in Title I math,' like he was retarded," Annette says. "Well, y'all took him, didn't you?"

The same fight is being waged by their friends, who aren't the young warriors in Army posters but middle-age men who left factory jobs to deploy to Iraq with their Guard units. They were fit enough for war, but now they are facing teams of Army doctors scrutinizing their injuries for signs of preexisting conditions, lessening their chance for disability benefits.

Dell and Annette's closest friend at Mologne House is a 47-year-old Guard member who was driving an Army vehicle through the Iraqi night when a flash of light blinded him and he crashed into a ditch with an eight-foot drop. Among his many injuries was a broken foot that didn't heal properly. Army doctors decided that "late life atrophy" was responsible for the foot, not the truck wreck in Iraq.

When Dell sees his medical records, he explodes. "Special ed is for the mentally retarded, and I'm not mentally retarded, right, babe?" he asks Annette. "I graduated from high school. I did some college. I worked in a steel mill."

It's after 9 one night and Dell and Annette are both exhausted, but Dell still needs to practice using

voice-recognition software. Reluctantly, he mutes "The Ultimate Fighting Challenge" on TV and sits next to Annette in bed with a laptop.

"My name is Wendell," he says. "Wendell Woodward McLeod Jr."

Annette tells him to sit up. "Spell 'dog,' " she says, softly.

"Spell 'dog,' " he repeats.

"Listen to me," she says.

"Listen to me." He slumps on the pillow. His eyes drift toward the wrestlers on TV.

"You are not working hard enough, Dell," Annette says, pleading. "Wake up."

"Wake up," he says.

"Dell, come on now!"

**For Some, a Grim Kind of Fame**

No one questions Sgt. Bryan Anderson's sacrifice. One floor above Dell and Annette's room at Mologne House, he holds the gruesome honor of being one of the war's five triple amputees. Bryan, 25, lost both legs and his left arm when a roadside bomb exploded next to the Humvee he was driving with the 411th Military Police Company. Modern medicine saved him and now he's the pride of the prosthetics team at Walter Reed. Tenacious and wisecracking, he wrote "[Expletive] Iraq" on his left leg socket.

Amputees are the first to receive celebrity visitors, job offers and extravagant trips, but Bryan is in a league of his own. Johnny Depp's people want to hook up in London or Paris. The actor Gary Sinise, who played an angry Vietnam amputee in "Forrest Gump," sends his regards. And Esquire magazine is setting up a photo shoot.

Bryan's room at Mologne House is stuffed with gifts from corporate America and private citizens: $350 Bose noise-canceling headphones, nearly a thousand DVDs sent by well-wishers and quilts made by church grannies. The door prizes of war. Two flesh-colored legs are stacked on the floor. A computerized hand sprouting blond hair is on the table.

One Saturday afternoon, Bryan is on his bed downloading music. Without his prosthetics, he weighs less than 100 pounds. "Mom, what time is our plane?" he asks his mother, Janet Waswo, who lives in the room with him. A movie company is flying them to Boston for the premiere of a documentary about amputee hand-cyclers in which Bryan appears.

Representing the indomitable spirit of the American warrior sometimes becomes too much, and Bryan turns off his phone.

Perks and stardom do not come to every amputee. Sgt. David Thomas, a gunner with the Tennessee National Guard, spent his first three months at Walter Reed with no decent clothes; medics in Samarra had cut off his uniform. Heavily drugged, missing one leg and suffering from traumatic brain injury, David, 42, was finally told by a physical therapist to go to the Red Cross office, where he was given a T-shirt and sweat pants. He was awarded a Purple Heart but had no underwear.

David tangled with Walter Reed's image machine when he wanted to attend a ceremony for a fellow amputee, a Mexican national who was being granted U.S. citizenship by President Bush. A case worker quizzed him about what he would wear. It was summer, so David said shorts. The case manager said the media would be there and shorts were not advisable because the amputees would be seated in the front row.

" 'Are you telling me that I can't go to the ceremony 'cause I'm an amputee?' " David recalled asking. "She said, 'No, I'm saying you need to wear pants.' "

David told the case worker, "I'm not ashamed of what I did, and y'all shouldn't be neither." When the guest list came out for the ceremony, his name was not on it.

Still, for all its careful choreography of the amputees, Walter Reed offers protection from a staring world. On warm nights at the picnic tables behind Mologne House, someone fires up the barbecue grill and someone else makes a beer run to Georgia Avenue.

Bryan Anderson is out here one Friday. "Hey, Bry, what time should we leave in the morning?" asks his best friend, a female soldier also injured in Iraq. The next day is Veterans Day, and Bryan wants to go to Arlington National Cemetery. His pal Gary Sinise will be there, and Bryan wants to give him a signed photo.

Thousands of spectators are already at Arlington the next morning when Bryan and his friend join the surge toward the ceremony at the Tomb of the Unknowns. The sunshine dazzles. Bryan is in his wheelchair. If loss and sacrifice are theoretical to some on this day, here is living proof -- three stumps and a crooked boyish smile. Even the acres of tombstones can't compete. Spectators cut their eyes toward him and look away.

Suddenly, the thunder of cannons shakes the sky. The last time Bryan heard this sound, his legs were severed and he was nearly bleeding to death in a fiery Humvee.

Boom. Boom. Boom. Bryan pushes his wheelchair harder, trying to get away from the noise. "Damn it," he says, "when are they gonna stop?"

Bryan's friend walks off by herself and holds her head. The cannon thunder has unglued her, too, and she is crying.

**Friends From Ward 54**

An old friend comes to visit Dell and Annette. Sgt. Oscar Fernandez spent 14 months at Walter Reed after having a heart attack in Afghanistan. Oscar also had post-traumatic stress disorder, PTSD, a condition that worsened at Walter Reed and landed the 45-year-old soldier in the hospital's psychiatric unit, Ward 54.

Oscar belonged to a tight-knit group of soldiers who were dealing with combat stress and other psychological issues. They would hang out in each other's rooms at night, venting their fury at the Army's Cuckoo's Nest. On weekends they escaped Walter Reed to a Chinese buffet or went shopping for bootleg Spanish DVDs in nearby Takoma Park. They once made a road trip to a casino near the New Jersey border.

They abided each other's frailties. Sgt. Steve Justi would get the slightest cut on his skin and drop to his

knees, his face full of anguish, apologizing over and over. For what, Oscar did not know. Steve was the college boy who went to Iraq, and Oscar figured something terrible had happened over there.

Sgt. Mike Smith was the insomniac. He'd stay up till 2 or 3 in the morning, smoking on the back porch by himself. Doctors had put steel rods in his neck after a truck accident in Iraq. To turn his head, the 41-year-old Guard member from Iowa had to rotate his entire body. He was fighting with the Army over his disability rating, too, and in frustration had recently called a congressional investigator for help.

"They try in all their power to have you get well, but it reverses itself," Oscar liked to say.

Dell was not a psych patient, but he and Oscar bonded. They were an unlikely pair -- the dark-haired Cuban American with a penchant for polo shirts and salsa, and the molasses earnestness of Dell.

Oscar would say things like "I'm trying to better myself through my own recognizance," and Dell would nod in appreciation.

To celebrate Oscar's return visit to Walter Reed, they decide to have dinner in Silver Spring.

Annette tells Oscar that a soldier was arrested at Walter Reed for waving a gun around.

"A soldier, coming from war?" Oscar asks.

Annette doesn't know. She mentions that another soldier was kicked out of Mologne House for selling his painkillers.

The talk turns to their friend Steve Justi. A few days earlier, Steve was discharged from the Army and given a zero percent disability rating for his mental condition.

Oscar is visibly angry. "They gave him nothing," he says. "They said his bipolar was preexisting."

Annette is quiet. "Poor Steve," she says.

After dinner, they return through the gates of Walter Reed in Annette's car, a John 3:16 decal on the bumper and the Dixie Chicks in the CD player. Annette sees a flier in the lobby of Mologne House announcing a free trip to see Toby Keith in concert.

A week later, it is a wonderful night at the Nissan Pavilion. About 70 wounded soldiers from Walter Reed attend the show. Toby invites them up on stage and brings the house down when he sings his monster wartime hit "American Soldier." Dell stands on stage in his uniform while Annette snaps pictures.

"Give a hand clap for the soldiers," Annette hears Toby tell the audience, "then give a hand for the U.S.A."

**A Soldier Snaps**

Deep into deer-hunting country and fields of withered corn, past the Pennsylvania Turnpike in the rural town of Ellwood City, Steve Justi sits in his parents' living room, fighting off the afternoon's lethargy.

A photo on a shelf shows a chiseled soldier, but the one in the chair is 35 pounds heavier. Antipsychotic

drugs give him tremors and cloud his mind. Still, he is deliberate and thoughtful as he explains his path from soldier to psychiatric patient in the war on terrorism.

After receiving a history degree from Mercyhurst College, Steve was motivated by the attacks of Sept. 11, 2001, to join the National Guard. He landed in Iraq in 2003 with the First Battalion, 107th Field Artillery, helping the Marines in Fallujah.

"It was just the normal stuff," Steve says, describing the violence he witnessed in Iraq. His voice is oddly flat as he recalls the day his friend died in a Humvee accident. The friend was driving with another soldier when they flipped off the road into a swamp. They were trapped upside down and submerged. Steve helped pull them out and gave CPR, but it was too late. The swamp water kept pushing back into his own mouth. He rode in the helicopter with the wet bodies.

After he finished his tour, everything was fine back home in Pennsylvania for about 10 months, and then a strange bout of insomnia started. After four days without sleep, he burst into full-out mania and was hospitalized in restraints.

Did anything trigger the insomnia? "Not really," Steve says calmly, sitting in his chair.

His mother overhears this from the kitchen and comes into the living room. "His sergeant had called saying that the unit was looking for volunteers to go back to Iraq," Cindy Justi says. "This is what triggered his snap."

Steve woke up in the psychiatric unit at Walter Reed and spent the next six months going back and forth between there and a room at Mologne House. He was diagnosed with bipolar disorder. He denied to doctors that he was suffering from PTSD, yet he called home once from Ward 54 and shouted into the phone, "Mom, can't you hear all the shooting in the background?"

He was on the ward for the sixth time when he was notified that he was being discharged from the Army, with only a few days to clear out and a disability rating of zero percent.

On some level, Steve expected the zero rating. During his senior year of college, he suffered a nervous breakdown and for several months was treated with antidepressants. He disclosed this to the National Guard recruiter, who said it was a nonissue. It became an issue when he told doctors at Walter Reed. The Army decided that his condition was not aggravated by his time in Iraq. The only help he would get would come from Veterans Affairs.

"We have no idea if what he endured over there had a worsening effect on him," says his mother.

His father gets home from the office. Ron Justi sits on the couch across from his son. "He was okay to sacrifice his body, but now that it's time he needs some help, they are not here," Ron says.

**Outside the Gates**

The Army gives Dell McLeod a discharge date. His days at Mologne House are numbered. The cramped hotel room has become home, and now he is afraid to leave it. His anxiety worsens. "Shut up!" he screams at Annette one night, his face red with rage, when she tells him to stop fiddling with his wedding ring.

Later, Annette says: "I am exhausted. He doesn't understand that I've been fighting the Army."

Doctors have concluded that Dell was slow as a child and that his head injury on the Iraqi border did not cause brain damage. "It is possible that pre-morbid emotional difficulties and/or pre-morbid intellectual functioning may be contributing factors to his reported symptoms," a doctor wrote, withholding a diagnosis of traumatic brain injury.

Annette pushes for more brain testing and gets nowhere until someone gives her the name of a staffer for the House Committee on Oversight and Government Reform. A few days later, Annette is called to a meeting with the command at Walter Reed. Dell is given a higher disability rating than expected -- 50 percent, which means he will receive half of his base pay until he is evaluated again in 18 months. He signs the papers.

Dell wears his uniform for the last time, somber and careful as he dresses for formation. Annette packs up the room and loads their Chevy Cavalier to the brim. Finally the gates of Walter Reed are behind them. They are southbound on I-95 just past the Virginia line when Dell begins to cry, Annette would later recall. She pulls over and they both weep.

Not long after, Bryan Anderson also leaves Mologne House. When the triple amputee gets off the plane in Chicago, American Airlines greets him on the tarmac with hoses spraying arches of water, and cheering citizens line the roads that lead to his home town, Rolling Meadows.

Bryan makes the January cover of Esquire. He is wearing his beat-up cargo shorts and an Army T-shirt, legless and holding his Purple Heart in his robot hand. The headline says "The Meaning of Life."

A month after Bryan leaves, Mike Smith, the insomniac soldier, is found dead in his room. Mike had just received the good news that the Army was raising his disability rating after a congressional staff member intervened on his behalf. It was the week before Christmas, and he was set to leave Walter Reed to go home to his wife and kids in Iowa when his body was found. The Army told his wife that he died of an apparent heart attack, according to her father.

Distraught, Oscar Fernandez calls Dell and Annette in South Carolina with the news. "It's the constant assault of the Army," he says.

Life with Dell is worsening. He can't be left alone. The closest VA hospital is two hours away. Doctors say he has liver problems because of all the medications. He is also being examined for PTSD. "I don't even know this man anymore," Annette says.

At Mologne House, the rooms empty and fill, empty and fill. The lobby chandelier glows and the bowl of red apples waits on the front desk. An announcement goes up for Texas Hold 'Em poker in the bar.

One cold night an exhausted mother with two suitcases tied together with rope shows up at the front desk and says, "I am here for my son." And so it begins.

*Staff researcher Julie Tate contributed to this report.*

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# Hospital Investigates Former Aid Chief

Walter Reed Official Had Own Charity

By Dana Priest and Anne Hull
Washington Post Staff Writers
Tuesday, February 20, 2007; A01




For the past three years, Michael J. Wagner directed the Army's largest effort to help the most vulnerable soldiers at Walter Reed Army Medical Center. His office in Room 3E01 of the world-renowned hospital was supposed to match big-hearted donors with thousands of wounded soldiers who could not afford to feed their children, pay mortgages, buy plane tickets or put up visiting families in nearby hotels.

But while he was being paid to provide this vital service to patients, outpatients and their relations, Wagner was also seeking funders and soliciting donations for his own new charity, based in Texas, according to documents and interviews with current and former staff members. Some families also said Wagner treated them callously and made it hard for them to receive assistance.

Last week, Walter Reed launched a criminal investigation of Wagner after The Washington Post sought a response to his activities while he ran the Army's Medical Family Assistance Center, a position he left several weeks ago. Maj. Gen. George W. Weightman, the commander at Walter Reed, said the probe by the Criminal Investigation Command (CID) "reflects the seriousness with which we take these allegations."

Weightman's legal adviser, Col. Samuel Smith, said that "it would clearly be a conflict of interest" prohibited by federal law, Army regulations and Defense Department ethics rules if Wagner used his position to solicit funds for his own organization.

The saga of the Medical Family Assistance Center is just one example of the problems at Walter Reed, where nearly 700 soldiers and Marines from the wars in Iraq and Afghanistan live as outpatients while recuperating. Some families are happy with the help they received from Wagner and his office, and many soldiers and their families applauded the dedication of workers there. Others said that they had problems with Wagner and that the center seemed chaotic and disorganized.

"We had many family members who came to me because they couldn't get a respectful and compassionate response from Dr. Wagner," said Peggy Baker, director of a charity that helps wounded soldiers, Operation First Response.

Wagner, who has a doctorate in education, resigned his position last month to work full time on his Military, Veteran and Family Assistance Foundation, based in Dallas. The foundation includes the Phoenix Project, which runs marriage retreats for soldiers returning from combat. According to its Web site, the foundation is supported by several corporations, other foundations and individuals.

In a phone interview, Wagner denied he had solicited funds or made contact with donors during office

hours. "It's just not true," he said. "I intentionally stayed out of that. I couldn't do that. I couldn't do both." He said he is not paid by the foundation. The documents that would verify that have not yet been filed with the Internal Revenue Service.

Wagner said his superiors "knew of my involvement right from the beginning." Weightman said the command had been unaware of Wagner's Texas charity until recently.

Wagner defended his work at the center. "My only purpose and my priority 12 to 19 hours a day was to assist the families of the wounded," he said. "I saw 6,000 people coming back from Iraq and Afghanistan. I did my best, but I'm not God. What I did there was a job that was superhuman."

Wagner said that the charity was founded by his brother and that he did not officially become its executive director until he left Walter Reed. But fundraising documents from early January, before he resigned, list him as the director, and the organization's Web site called him its executive director months before he resigned.

In a fundraising letter he signed shortly before he quit the Medical Family Assistance Center, Wagner referred to his work at Walter Reed. As head of the center, he wrote, "I have had over a thousand citizens in this great country asking what they might be able to do at Walter Reed for our wounded troops and their families. I found myself telling them that Walter Reed was blessed with the outpouring of the goodness and generosity of the American public and that if they were really interested in assisting, they should look within their own communities."

But, his letter continued, "I realized they were not working with their local communities so . . . I decided to found the Military, Veteran and Family Assistance Foundation to do just this, to do what I am able to help our soldiers reenter their home and local community."

Wagner included an ambitious business plan to take the charity from a $237,000 pilot project in the first year, which ended in August 2006 -- while he was working at Walter Reed -- to a $145 million foundation by 2011. He signed the letter "Executive Director and Founder."

Leita Sosin, an 11-year Army veteran who worked in Wagner's office for two years, said she complained to him and to co-workers about his involvement with the charity. "It really broke me to see what he was doing," said Sosin, 29, a former Army operating-room technician. "Instead of working with the families at Walter Reed and with us, he spent all his time putting together the Phoenix Project."

Moscow Spencer, a case manager fired by Wagner in October, also complained to her co-workers. "All day long he'd work on his program," she said. "If someone came in to donate money, he would talk to them about his project."

Sosin said the office was overwhelmed by the number of families who needed assistance and who were confused by the complex bureaucracy. "Everyone needed help, but you couldn't get them the help as fast as they needed it," she said. "Someone like me could scream all day about how it was broken, but no one wanted to take the time to fix it."

She also said Wagner was arrogant toward some staff members and families. "People got hurt in the process, whether it be financially or because he promised a lot of things he never followed up on," she said.

In April, Sosin said, she laid out her concerns in a three-page letter to her superiors. She received no

response and resigned. Wagner said that Sosin never complained to him and that he had no idea why she quit.

Poverty among soldiers returning from war is not uncommon. While they continue to live on the Army payroll until they return to active duty or are discharged, some experience a substantial decrease in pay when combat pay or hazard pay disappears.

Some Army families breach the poverty line when a spouse quits a job to help the soldier recuperate; mortgage payments don't stop, and they still need to feed their children. Many turn to the generosity of Americans eager to prove they have not forgotten the troops' sacrifices. While staff members and soldiers acknowledge that some families take advantage of the plentiful freebies at Walter Reed, many others ask for help only as a last resort.

The assistance center is supposed to be the connection between a soldier's family and private donors. Until recently, it did not accept cash contributions but instead matched families' needs -- for bus or plane tickets, clothing, emergency food vouchers, grants for mortgages or living expenses -- with organizations set up to help.

According to Walter Reed, 14 families on average seek assistance from the center each day. Although it is difficult to quantify the value of donations, the center received $4,500 worth of phone cards in 2006 and handled $1.9 million worth of donated plane tickets. Weightman said the center's staff was recently increased from five to nine employees, with two people assigned to keeping track of the donations, and training has been improved.

The system for receiving donations is often confusing, even for the staff, Weightman said. "There's too much for any one person to know, but depending on the question, they may know [the answer] or direct you to the person who does know it."

Some soldiers go directly to the many volunteer organizations set up to help the wounded. Last year, Wagner began an effort to funnel all requests and donations through the family assistance center. It was a good idea, said Sosin and others, but because Wagner seemed preoccupied, a bottleneck of requests resulted.

"It was really all at the expense of the service member," said Sandra Butterfield, who worked at Walter Reed as an ombudsman for a Defense Department-funded relief organization. "He decreed that everything had to go through him," and it didn't seem to matter if that slowed the process. Officials, she said, "don't understand what it meant to have no money. Family members changed the sheets, empty the bedpan. But they are leaving their homes across the country. . . . Every day I came home angry."

Some families were also angered by the way Wagner treated them.

"The patient care was absolutely wonderful, but the administration was horrible, especially Dr. Wagner," said Maria Mendez, whose 25-year-old nephew, Spec. Roberto Reyes Jr., suffered severe brain and limb damage when a mine exploded near him outside Baghdad. "It was like running around in circles. He was never around."

"They were unprofessional, discourteous and uncompassionate all in one," Mendez said. "I was very surprised. You figure any family who's gone through such devastation, then faces this, to be treated with such unprofessionalism . . . it's like you're putting salt on the wounds."

Frustrated, Mendez set up an account for her sister, Aida Rivera, Reyes's mother, to pay for her stay at Walter Reed. Rivera eventually got financial assistance from the Army and outside organizations, but she also received a $3,519 bill from Mologne House, a hotel at Walter Reed, for her stay as her son's nonmedical attendant.

Staff members from other offices also complained to the command about Wagner, according to memos obtained by The Post. In one, an employee, who asked not to be named, questioned why a soldier's mother "who had subsisted on dried soups . . . due to her lack of funds" could not get help. Four months after approaching the center, the memo said, the mother had not received the per diem owed her as her child's nonmedical attendant "and has no cash for essentials nor emergencies."

A wife who accompanied her wounded husband, who was based in Germany, said Wagner asked her repeatedly why she did not return to Germany so she could continue working. The woman "reported she felt harassed and bullied but that she held her ground," the employee's memo states.

Wagner said families were often angry at his office, not because it failed them but because they were distraught over their situation. "Their true need is an emotional one. They're going to be angry at somebody. . . . I did my best; no, more than my best."

*Staff researcher Julie Tate contributed to this report.*

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# The War Inside

Troops Are Returning From the Battlefield With Psychological Wounds, But the Mental-Health System That Serves Them Makes Healing Difficult

By Dana Priest and Anne Hull
Washington Post Staff Writers
Sunday, June 17, 2007; A01




Army Spec. Jeans Cruz helped capture Saddam Hussein. When he came home to the Bronx, important people called him a war hero and promised to help him start a new life. The mayor of New York, officials of his parents' home town in Puerto Rico, the borough president and other local dignitaries honored him with plaques and silk parade sashes. They handed him their business cards and urged him to phone.

But a "black shadow" had followed Cruz home from Iraq, he confided to an Army counselor. He was hounded by recurring images of how war really was for him: not the triumphant scene of Hussein in handcuffs, but visions of dead Iraqi children.

In public, the former Army scout stood tall for the cameras and marched in the parades. In private, he slashed his forearms to provoke the pain and adrenaline of combat. He heard voices and smelled stale blood. Soon the offers of help evaporated and he found himself estranged and alone, struggling with financial collapse and a darkening depression.

At a low point, he went to the local Department of Veterans Affairs medical center for help. One VA psychologist diagnosed Cruz with post-traumatic stress disorder. His condition was labeled "severe and chronic." In a letter supporting his request for PTSD-related disability pay, the psychologist wrote that Cruz was "in need of major help" and that he had provided "more than enough evidence" to back up his PTSD claim. His combat experiences, the letter said, "have been well documented."

None of that seemed to matter when his case reached VA disability evaluators. They turned him down flat, ruling that he deserved no compensation because his psychological problems existed before he joined the Army. They also said that Cruz had not proved he was ever in combat. "The available evidence is insufficient to confirm that you actually engaged in combat," his rejection letter stated.

Yet abundant evidence of his year in combat with the 4th Infantry Division covers his family's living-room wall. The Army Commendation Medal With Valor for "meritorious actions . . . during strategic combat operations" to capture Hussein hangs not far from the combat spurs awarded for his work with the 10th Cavalry "Eye Deep" scouts, attached to an elite unit that caught the Iraqi leader on Dec. 13, 2003, at Ad Dawr.

Veterans Affairs will spend $2.8 billion this year on mental health. But the best it could offer Cruz was group therapy at the Bronx VA medical center. Not a single session is held on the weekends or late enough at night for him to attend. At age 25, Cruz is barely keeping his life together. He supports his disabled parents and 4-year-old son and cannot afford to take time off from his job repairing boilers. The

rough, dirty work, with its heat and loud noises, gives him panic attacks and flesh burns but puts $96 in his pocket each day.

Once celebrated by his government, Cruz feels defeated by its bureaucracy. He no longer has the stamina to appeal the VA decision, or to make the Army correct the sloppy errors in his medical records or amend his personnel file so it actually lists his combat awards.

"I'm pushing the mental limits as it is," Cruz said, standing outside the bullet-pocked steel door of the New York City housing project on Webster Avenue where he grew up and still lives with his family. "My experience so far is, you ask for something and they deny, deny, deny. After a while you just give up."

**An Old and Growing Problem**

Jeans Cruz and his contemporaries in the military were never supposed to suffer in the shadows the way veterans of the last long, controversial war did. One of the bitter legacies of Vietnam was the inadequate treatment of troops when they came back. Tens of thousands endured psychological disorders in silence, and too many ended up homeless, alcoholic, drug-addicted, imprisoned or dead before the government acknowledged their conditions and in 1980 officially recognized PTSD as a medical diagnosis.

Yet nearly three decades later, the government still has not mastered the basics: how best to detect the disorder, the most effective ways to treat it, and the fairest means of compensating young men and women who served their country and returned unable to lead normal lives.

Cruz's case illustrates these broader problems at a time when the number of suffering veterans is the largest and fastest-growing in decades, and when many of them are back at home with no monitoring or care. Between 1999 and 2004, VA disability pay for PTSD among veterans jumped 150 percent, to $4.2 billion.

By this spring, the number of vets from Afghanistan and Iraq who had sought help for post-traumatic stress would fill four Army divisions, some 45,000 in all.

They occupy every rank, uniform and corner of the country. People such as Army Lt. Sylvia Blackwood, who was admitted to a locked-down psychiatric ward in Washington after trying to hide her distress for a year and a half [story, A13]; and Army Pfc. Joshua Calloway, who spent eight months at Walter Reed Army Medical Center and left barely changed from when he arrived from Iraq in handcuffs; and retired Marine Lance Cpl. Jim Roberts, who struggles to keep his sanity in suburban New York with the help of once-a-week therapy and a medicine cabinet full of prescription drugs; and the scores of Marines in California who were denied treatment for PTSD because the head psychiatrist on their base thought the diagnosis was overused.

They represent the first wave in what experts say is a coming deluge.

As many as one-quarter of all soldiers and Marines returning from Iraq are psychologically wounded, according to a recent American Psychological Association report. Twenty percent of the soldiers in Iraq screened positive for anxiety, depression and acute stress, an Army study found.

But numbers are only part of the problem. The Institute of Medicine reported last month that Veterans Affairs' methods for deciding compensation for PTSD and other emotional disorders had little basis in science and that the evaluation process varied greatly. And as they try to work their way through a

confounding disability process, already-troubled vets enter a VA system that chronically loses records and sags with a backlog of 400,000 claims of all kinds.

The disability process has come to symbolize the bureaucratic confusion over PTSD. To qualify for compensation, troops and veterans are required to prove that they witnessed at least one traumatic event, such as the death of a fellow soldier or an attack from a roadside bomb, or IED. That standard has been used to deny thousands of claims. But many experts now say that debilitating stress can result from accumulated trauma as well as from one significant event.

In an interview, even VA's chief of mental health questioned whether the single-event standard is a valid way to measure PTSD. "One of the things I puzzle about is, what if someone hasn't been exposed to an IED but lives in dread of exposure to one for a month?" said Ira R. Katz, a psychiatrist. "According to the formal definition, they don't qualify."

The military is also battling a crisis in mental-health care. Licensed psychologists are leaving at a far faster rate than they are being replaced. Their ranks have dwindled from 450 to 350 in recent years. Many said they left because they could not handle the stress of facing such pained soldiers. Inexperienced counselors muddle through, using therapies better suited for alcoholics or marriage counseling.

A new report by the Defense Department's Mental Health Task Force says the problems are even deeper. Providers of mental-health care are "not sufficiently accessible" to service members and are inadequately trained, it says, and evidence-based treatments are not used. The task force recommends an overhaul of the military's mental-health system, according to a draft of the report.

Another report, commissioned by Defense Secretary Robert M. Gates in the wake of the Walter Reed outpatient scandal, found similar problems: "There is not a coordinated effort to provide the training required to identify and treat these non-visible injuries, nor adequate research in order to develop the required training and refine the treatment plans."

But the Army is unlikely to do more significant research anytime soon. "We are at war, and to do good research takes writing up grants, it takes placebo control trials, it takes control groups," said Col. Elspeth Ritchie, the Army's top psychiatrist. "I don't think that that's our primary mission."

In attempting to deal with increasing mental-health needs, the military regularly launches Web sites and promotes self-help guides for soldiers. Maj. Gen. Gale S. Pollock, the Army's acting surgeon general, believes that doubling the number of mental-health professionals and boosting the pay of psychiatrists would help.

But there is another obstacle that those steps could not overcome. "One of my great concerns is the stigma" of mental illness, Pollock said. "That, to me, is an even bigger challenge. I think that in the Army, and in the nation, we have a long way to go." The task force found that stigma in the military remains "pervasive" and is a "significant barrier to care."

Surveys underline the problem. Only 40 percent of the troops who screened positive for serious emotional problems sought help, a recent Army survey found. Nearly 60 percent of soldiers said they would not seek help for mental-health problems because they felt their unit leaders would treat them differently; 55 percent thought they would be seen as weak, and the same percentage believed that soldiers in their units would have less confidence in them.

Lt. Gen. John Vines, who led the 18th Airborne Corps in Iraq and Afghanistan, said countless officers keep quiet out of fear of being mislabeled. "All of us who were in command of soldiers killed or wounded in combat have emotional scars from it," said Vines, who recently retired. "No one I know has sought out care from mental-health specialists, and part of that is a lack of confidence that the system would recognize it as 'normal' in a time of war. This is a systemic problem."

Officers and senior enlisted troops, Vines added, were concerned that they would have trouble getting security clearances if they sought psychological help. They did not trust, he said, that "a faceless, nameless agency or process, that doesn't know them personally, won't penalize them for a perceived lack of mental or emotional toughness."

**Overdiagnosed or Overlooked?**

For the past 2 1/2 years, the counseling center at the Marine Corps Air Ground Combat Center in Twentynine Palms, Calif., was a difficult place for Marines seeking help for post-traumatic stress. Navy Cmdr. Louis Valbracht, head of mental health at the center's outpatient hospital, often refused to accept counselors' views that some Marines who were drinking heavily or using drugs had PTSD, according to three counselors and another staff member who worked with him.

"Valbracht didn't believe in it. He'd say there's no such thing as PTSD," said David Roman, who was a substance abuse counselor at Twentynine Palms until he quit six months ago.

"We were all appalled," said Mary Jo Thornton, another counselor who left last year.

A third counselor estimated that perhaps half of the 3,000 Marines he has counseled in the past five years showed symptoms of post-traumatic stress. "They would change the diagnosis right in front of you, put a line through it," said the counselor, who spoke on the condition of anonymity because he still works there.

"I want to see my Marines being taken care of," said Roman, who is now a substance-abuse counselor at the Marine Corps Air Station in Cherry Point, N.C.

In an interview, Valbracht denied he ever told counselors that PTSD does not exist. But he did say "it is overused" as a diagnosis these days, just as "everyone on the East Coast now has a bipolar disorder." He said this "devalues the severity of someone who actually has PTSD," adding: "Nowadays it's like you have a hangnail. Someone comes in and says 'I have PTSD,' " and counselors want to give them that diagnosis without specific symptoms.

Valbracht, an aerospace medicine specialist, reviewed and signed off on cases at the counseling center. He said some counselors diagnosed Marines with PTSD before determining whether the symptoms persisted for 30 days, the military recommendation. Valbracht often talked to the counselors about his father, a Marine on Iwo Jima who overcame the stress of that battle and wrote an article called "They Even Laughed on Iwo." Counselors found it outdated and offensive. Valbracht said it showed the resilience of the mind.

Valbracht retired recently because, he said, he "was burned out" after working seven days a week as the only psychiatrist available to about 10,000 Marines in his 180-mile territory. "We could have used two or three more psychiatrists," he said, to ease the caseload and ensure that people were not being overlooked.

Former Lance Cpl. Jim Roberts's underlying mental condition was overlooked by the Marine Corps and successive health-care professionals for more than 30 years, as his temper and alcohol use plunged him into deeper trouble. Only in May 2005 did VA begin treating the Vietnam vet for PTSD. Three out of 10 of his compatriots from Vietnam have received diagnoses of PTSD. Half of those have been arrested at least once. Veterans groups say thousands have killed themselves.

To control his emotions now, Roberts attends group therapy once a week and swallows a handful of pills from his VA doctors: Zoloft, Neurontin, Lisinopril, Seroquel, Ambien, hydroxyzine, "enough medicine to kill a mule," he said.

Roberts desperately wants to persuade Iraq veterans not to take the route he traveled. "The Iraq guys, it's going to take them five to 10 years to become one of us," he said, seated at his kitchen table in Yonkers with his vet friends Nicky, Lenny, Frenchie, Ray and John nodding in agreement. "It's all about the forgotten vets, then and now. The guys from Iraq and Afghanistan, we need to get these guys in here with us."

"In here" can mean different things. It can mean a 1960s-style vet center such as the one where Roberts hangs out, with faded photographs of Huey helicopters and paintings of soldiers skulking through shoulder-high elephant grass. It can mean group therapy at a VA outpatient clinic during work hours, or more comprehensive treatment at a residential clinic. In a crisis, it can mean the locked-down psych ward at the local VA hospital.

"Out there," with no care at all, is a lonesome hell.

**Losing a Bureaucratic Battle**

Not long after Jeans Cruz returned from Iraq to Fort Hood, Tex., in 2004, his counselor, a low-ranking specialist, suggested that someone should "explore symptoms of PTSD." But there is no indication in Cruz's medical files, which he gave to The Washington Post, that anyone ever responded to that early suggestion.

When he met with counselors while he was on active duty, Cruz recalled, they would take notes about his troubled past, including that he had been treated for depression before he entered the Army. But they did not seem interested in his battlefield experiences. "I've shot kids. I've had to kill kids. Sometimes I look at my son and like, I've killed a kid his age," Cruz said. "At times we had to drop a shell into somebody's house. When you go clean up the mess, you had three, four, five, six different kids in there. You had to move their bodies."

When he tried to talk about the war, he said, his counselors "would just sit back and say, 'Uh-huh, uh-huh.' When I told them about the unit I was with and Saddam Hussein, they'd just say, 'Oh, yeah, right.' "

He occasionally saw a psychiatrist, who described him as depressed and anxious. He talked about burning himself with cigarettes and exhibited "anger from Iraq, nightmares, flashbacks," one counselor wrote in his file. "Watched friend die in Iraq. Cuts, bruises himself to relieve anger and frustration." They prescribed Zoloft and trazodone to control his depression and ease his nightmares. They gave him Ambien for sleep, which he declined for a while for fear of missing morning formation.

Counselors at Fort Hood grew concerned enough about Cruz to have him sign what is known as a Life Maintenance Agreement. It stated: "I, Jeans Cruz, agree not to harm myself or anyone else. I will first contact either a member of my direct Chain of Command . . . or immediately go to the emergency

room." That was in October 2004. The next month he signed another one.

Two weeks later, Cruz reenlisted. He says the Army gave him a $10,000 bonus.

His problems worsened. Three months after he reenlisted, a counselor wrote in his medical file: "MAJOR depression." After that: "He sees himself in his dreams killing or strangling people. . . . He is worried about controlling his stress level. Stated that he is starting to drink earlier in the day." A division psychologist, noting Cruz's depression, said that he "did improve when taking medication but has degenerated since stopping medication due to long work hours."

Seven months after his reenlistment ceremony, the Army gave him an honorable discharge, asserting that he had a "personality disorder" that made him unfit for military service. This determination implied that all his psychological problems existed before his first enlistment. It also disqualified him from receiving combat-related disability pay.

There was little attempt to tie his condition to his experience in Iraq. Nor did the Army see an obvious contradiction in its handling of him: He was encouraged to reenlist even though his psychological problems had already been documented.

Cruz's records are riddled with obvious errors, including a psychological rating of "normal" on the same physical exam the Army used to discharge him for a psychological disorder. His record omits his combat spurs award and his Army Commendation Medal With Valor. These omissions contributed to the VA decision that he had not proved he had been in combat. To straighten out those errors, Cruz would have had to deal with a chaotic and contradictory paper trail and bureaucracy -- a daunting task for an expert lawyer, let alone a stressed-out young veteran.

In the Aug. 16, 2006, VA letter denying Cruz disability pay because he had not provided evidence of combat, evaluators directed him to the U.S. Armed Services Center for Research of Unit Records. But such a place no longer exists. It changed its name to the U.S. Army and Joint Services Records Research Center and moved from one Virginia suburb, Springfield, to another, Alexandria, three years ago. It has a 10-month waiting list for processing requests.

To speed things up, staff members often advise troops to write to the National Archives and Records Administration in Maryland. But that agency has no records from the Iraq war, a spokeswoman said. That would send Cruz back to Fort Hood, whose soldiers have deployed to Iraq twice, leaving few staff members to hunt down records.

But Cruz has given up on the records. Life at the Daniel Webster Houses is tough enough.

After he left the Army and came home to the Bronx, he rode a bus and the subway 45 minutes after work to attend group sessions at the local VA facility. He always arrived late and left frustrated. Listening to the traumas of other veterans only made him feel worse, he said: "It made me more aggravated. I had to get up and leave." Experts say people such as Cruz need individual and occupational therapy.

Medications were easy to come by, but some made him sick. "They made me so slow I didn't want to do nothing with my son or manage my family," he said. After a few months, he stopped taking them, a dangerous step for someone so severely depressed. His drinking became heavier.

To calm himself now, he goes outside and hits a handball against the wall of the housing project. "My

son's out of control. There are family problems," he said, shaking his head. "I start seeing these faces. It goes back to flashbacks, anxiety. Sometimes I've got to leave my house because I'm afraid I'm going to hit my son or somebody else."

Because of his family responsibilities, he does not want to be hospitalized. He doesn't think a residential program would work, either, for the same reason.

His needs are more basic. "Why can't I have a counselor with a phone number? I'd like someone to call."

Or some help from all those people who stuck their business cards in his palm during the glory days of his return from Iraq. "I have plaques on my wall -- but nothing more than that."

*Staff researcher Julie Tate contributed to this report.*

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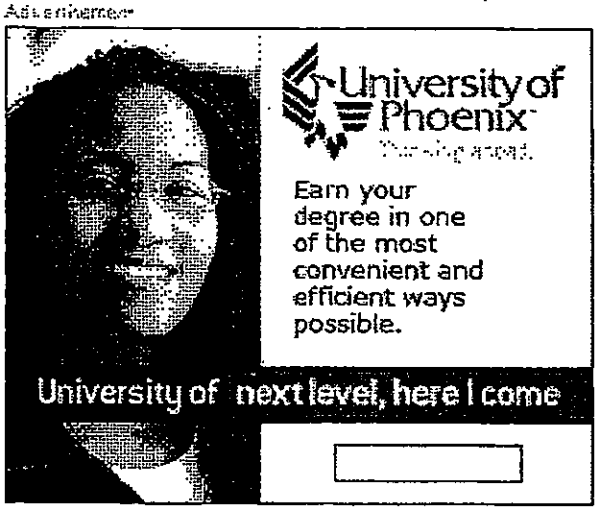
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# Little Relief on Ward 53

At Walter Reed, Care for Soldiers Struggling With War's Mental Trauma Is Undermined by Doctor Shortages and Unfocused Methods

By Anne Hull and Dana Priest
Washington Post Staff Writers
Monday, June 18, 2007; A01




On the military plane that crossed the ocean at night, the wounded lay in stretchers stacked three high. The drone of engines was broken by the occasional sound of moaning. Sedated and sleeping, Pfc. Joshua Calloway was at the top of one stack last September. Unlike the others around him, Calloway was handcuffed to his stretcher.

When the 20-year-old infantry soldier woke up, he was on the locked-down psychiatric ward at Walter Reed Army Medical Center. A nurse handed him pajamas and a robe, but they reminded him of the flowing clothes worn by Iraqi men. He told the nurse, "I don't want to look like a freakin' Haj." He wanted his uniform. Request denied. Shoelaces and belts were prohibited.

Calloway felt naked without his M-4, his constant companion during his tour south of Baghdad with the 101st Airborne Division. The year-long deployment claimed the lives of 50 soldiers in his brigade. Two committed suicide. Calloway, blue-eyed and lantern-jawed, lasted nine months -- until the afternoon he watched his sergeant step on a pressure-plate bomb in the road. The young soldier's knees buckled and he vomited in the reeds before he was ordered to help collect body parts. A few days later he was sent to the combat-stress trailers, where he was given antidepressants and rest, but after a week he was still twitching and sleepless. The Army decided that his war was over.

Every month, 20 to 40 soldiers are evacuated from Iraq because of mental problems, according to the Army. Most are sent to Walter Reed along with other war-wounded. For amputees, the nation's top Army hospital offers state-of-the-art prosthetics and physical rehab programs, and soon, a new $10 million amputee center with a rappelling wall and virtual reality center.

Nothing so gleaming exists for soldiers with diagnoses of post-traumatic stress disorder, who in the Army alone outnumber all of the war's amputees by 43 to 1. The Army has no PTSD center at Walter Reed, and its psychiatric treatment is weak compared with the best PTSD programs the government offers. Instead of receiving focused attention, soldiers with combat-stress disorders are mixed in with psych patients who have issues ranging from schizophrenia to marital strife.

Even though Walter Reed maintains the largest psychiatric department in the Army, it lacks enough psychiatrists and clinicians to properly treat the growing number of soldiers returning with combat stress. Earlier this year, the head of psychiatry sent out an "SOS" memo desperately seeking more clinical help.

Individual therapy with a trained clinician, a key element in recovery from PTSD, is infrequent, and targeted group therapy is offered only twice a week.

Young Pfc. Calloway was put in robes that first night. His dreams were infected by corpses. He tasted blood in his mouth. He was paranoid and jumpy. He couldn't stop the movie inside his head of Sgt. Matthew Vosbein stepping on the bomb. His memory was shot. His insides burned.

Calloway's mother came to Walter Reed from Ohio and told the psychiatrist everything she knew about her son. Sitting in the office for the interview, Calloway jiggled his leg and put his head in his hands as he described his tour in Iraq. His mental history was probed and more notes were taken. The trivia of his life -- a beagle named Zoe, a job during high school at a Meijer superstore, a love of World War II history -- competed with what he had become.

"I can't remember who I was before I went into the Army," he said later. "Put me in a war for a year, my brain becomes a certain way. My brain is a big, black ball of crap with this brick wall in front of it."

After a week in the lockdown unit, Calloway was stabilized. They gave him back his shoelaces and belt. On the 10th day, he was released and turned over to outpatient psychiatry for treatment. And Calloway, a casualty without a scratch, began the longest season of his young life.

**Inside Walter Reed**

The Washington Post began following Calloway after he was brought to Walter Reed last fall with an initial diagnosis of acute stress disorder. He had all the signs of PTSD, but it would be the hospital's job to treat him and then decide whether he met the Army's strict guidelines for a PTSD diagnosis -- which required a certain level of chronic impairment -- and whether he could ever return to duty.

Calloway's physical metamorphosis was rapid. The burnished soldier turned soft and fat, gaining 20 pounds the first month from tranquilizers and microwaved Chef Boyardee. He lived at Mologne House, a hotel on the grounds of Walter Reed that was overtaken by wounded troops. His roommate was another soldier from Iraq with psych problems who kept the curtains drawn and played Saints Row video games all day until one day he vanished -- poof, AWOL, leaving nothing behind but empty bottles of lithium and Seroquel.

For the first time in almost a year, Calloway had a plush bed and a hot shower, but he was too angry to appreciate the simple comforts. On an early venture outside Walter Reed, he went to downtown Silver Spring and became enraged by young people laughing at Starbucks. "Don't they know there is a war going on?" he said.

Wearing a rock band T-shirt, Calloway looked like any other 20-year-old on the sidewalk, but an unspeakable compulsion tore through him. He said he wanted to hatchet someone in the back of the neck.

"I want to see people that I hate die," he said. "I want to blow their heads off. I wish I didn't, but I do." He made similar statements to his psychiatry team at Walter Reed.

Violence seeped into his life in a thousand ways. When he cut himself shaving, the iron smell of blood on his fingertips gave a slight euphoria. But it was the distinct horror of his sergeant's death that was encoded in his brain. The memory made him physically sick. He would sweat and shake as if having a seizure, and sometimes he felt as if he were back in the heat and sand of Iraq.

The recognized treatment for PTSD is cognitive behavioral therapy, in which patients are encouraged to face their feared memories or situations and to change their negative perceptions. A key technique is

known as prolonged exposure therapy. It involves revisiting a traumatic memory in order to process it. The idea is not to erase the memory but to prevent it from being disabling. Highly structured, one-on-one sessions over a limited time period have proved most effective, according to Edna B. Foa, a professor of psychology in psychiatry at the University of Pennsylvania, who has been contracted by the Department of Veterans Affairs to train 250 therapists who treat PTSD.

But Calloway and a dozen other soldiers from Iraq and Afghanistan interviewed by The Post described a vague regimen at Walter Reed's outpatient psychiatric unit, Ward 53. They get a heavy dose of group sessions such as "Reflecting with Music," "Decisions," "Feelings Exploration" and "Art Expressions." Calloway reported to his "Reel Reflections" class one morning for a screening of "The Devil Wears Prada." Only two hours a week are devoted to a post-traumatic recovery group, according to a copy of their schedule.

These soldiers said they are over-medicated and treated with none of the urgency given the physically wounded. One desperate patient, a combat medic who broke down after her third tour in Iraq, said she begged her psychiatrist: "We are handicapped patients, too. Cut off both my legs, but give me my sanity. You can't get a prosthesis for that."

In an interview this month, Col. John C. Bradley, head of psychiatry at Walter Reed, said soldiers with combat-stress disorders receive the accepted psychotherapeutic treatment there. He said they are placed in a specially designed "trauma track" and are given at least an hour of individual therapy a week and a full range of classes to help them cope with their symptoms. Exposure therapy is as effective in group settings as in individual sessions, he maintained -- a belief that runs counter to the latest clinical research.

Bradley acknowledged staff shortages and said vacancies in his department go unfilled for as long as a year because of the Army pay scale and the high cost of living in the Washington area. He recently asked to increase his staff by 20 percent, and last month he brought on a reservist to help doctors with the time-consuming duties of preparing reports for the soldiers' medical evaluation board process. "We are constantly looking for innovative ways to provide service and outreach and support to soldiers," said Bradley, who deployed to Iraq last year with a combat-stress unit.

One of the country's best PTSD programs is located at Walter Reed, but because of a bureaucratic divide it is not accessible to most patients. The Deployment Health Clinical Center, run by the Department of Defense and separate from the Army's services, offers a three-week program of customized treatment. Individual exposure therapy and fewer medications are favored. Deployment Health can see only about 65 patients a year but is the envy of many in the Army. "They need to clone that program," said Col. Charles W. Hoge, chief of psychiatry and behavior services at the Walter Reed Army Institute of Research.

Instead, Deployment Health was forced to give up its newly renovated quarters in March and was placed in temporary space one-third the size to make room for a soldier and family assistance center. The move came after a series of articles in The Post detailed the neglect of wounded outpatients at Walter Reed. Therapy sessions are now being held in Building T-2, a rundown former computer center, until new space becomes available.

Joshua Calloway reported to Ward 53 five mornings a week in his uniform. He was a tough patient from the start, angering easily and impatient with anyone who had not experienced combat. He was irritated that he had to attend groups with soldiers who had bombed out of boot camp or never deployed. He participated in processing exercises using work sheets to help him manage his fears. ("For example,

original thought: 'I'm in a crowd, they're looking at me, they're all going to jump me, the enemy looked at me in Iraq and shot me, I leave.' Feelings: Anxious. Behavior: Leave situation.")

With the exception of the post-traumatic stress group run by Joshua Friedlander, a clinical psychologist and former Army captain who had served in Iraq, most of the classes felt like B.S. sessions to Calloway. "Civilians reading from a booklet," he said.

Ultimately, his treatment was in the hands of a civilian psychiatrist. Before taking a contract job at Walter Reed in 2005, the doctor had worked at Washington's St. Elizabeths Hospital and specialized in addictions and pedophilia. On Ward 53, he was responsible for about 30 soldiers, many back from Iraq. Calloway felt little validation from the psychiatrist. Sometimes the doctor typed on his computer while Calloway talked.

There was another, more delicate, problem. The psychiatrist was Indian. Calloway had a gut reaction to anyone he thought looked Iraqi, a paranoia shared by many of Walter Reed's wounded.

"You are seeing a [expletive] Pakistani?" asked Spec. Isaac Serna, a fellow war-wounded soldier in the 101st Airborne. "I'd freak, dude."

Calloway confessed his bias to the doctor. "I want to kill Arabs," he said.

"Does that include me?" the Hindu doctor asked, according to Calloway. "You can say it."

Antidepressants are most commonly used to treat PTSD, and Calloway was on a total of seven medications by Christmas, including lithium, used to treat bipolar disorder. He had now gained 30 pounds and was too lethargic to exercise. Bored one night, he took out the sweat-stained spiral notebook he had carried in Iraq. Grains of sand were still between the pages scribbled with Arabic commands. He repeated the phrases that loosely translated to "don't speak" and "shut up."

"Balla hashee!" he said. "In chep!"

He spent the holidays reading "The PTSD Workbook" and eating Starbursts in a room piled high with goody boxes from his church back home.

"You are in our prayers, Josh," one card read. "We are so proud of your service to your country."

**Unabating Anger**

In Iraq he was infected with MRSA, a microbe that makes the skin boil, and at Walter Reed he suffered a painful outbreak that landed him in the hospital. Festering sores brought a respite from Ward 53. In the hospital, he got Percocet and "The Daily Show," and late at night he read a memoir by a soldier who served in Iraq called "The Last True Story I'll Ever Tell." A friend in the 101st lent it to him with underlined passages, and Calloway read aloud the one on Page 172 about trying to fit back in after war.

*I spent most of my time watching the rooftops and side roads, looking into my rearview mirror to make sure no one was creeping up on my car from behind. . . . Every time I saw someone sitting contently inside a coffee shop or restaurant, I wanted to yell at them, wake them up.*

A social worker with a clipboard came to his room the next afternoon. "The surgeon general is concerned about all the soldiers coming home with smoking habits," he said.

Calloway said he never smoked before Iraq but smoked three packs a day in theater.

"Have you ever considered a patch?" the man asked.

By his fourth month as an outpatient on Ward 53, Calloway had learned breathing techniques to ease his panic. He had been asked to recite statements of self-love in group therapy. He had learned to cook in occupational therapy. But his core anger was as high as ever, made worse by the relationship with his psychiatrist. They met once or twice a week, mostly to discuss meds and argue. "Why don't you ever come in here and smile?" the doctor asked, according to Calloway. "Why don't you ever come in here and think today will be a good day?"

Walter Reed officials refused to discuss individual patients for this story, citing privacy concerns.

Calloway wanted to scream. Disillusioned, he stopped faithfully attending the combat-stress group he first found helpful. In the cold of winter he went down to Capitol Tattoo on Georgia Avenue, where the milky skin of his arms became a canvas of colors and death poetry. In honor of Vosbein, he had a silhouette of a soldier drawn on, with the words: "Lay down your armor. And have no fear. I'll be home soon."

Even with his nihilistic markings, Calloway still saw himself as a soldier. On Sunday mornings he attended a VFW brunch in Arlington, feeling at home with the snowy-haired veterans who sipped coffee under an American flag. As an Iraq vet, he was treated as part of the newest generation of warriors. One Sunday, he was accompanied by a girl from Ohio who'd come to visit him at Walter Reed. She wore his dog tags, and his eyes were full of light. "Thank you, ma'am," he told the waitress who brought his biscuits and gravy.

But the girl went back to Ohio and Calloway came to the next brunch alone, secretly terrified that in 30 years he'd be sitting in a support group like the Vietnam guys. With his nightmares and balled-up fists, what woman would want him?

"I'm not getting any better," he told his mother on the phone.

His step-grandfather in Ohio spent a morning making calls, trying unsuccessfully to reach anyone at Walter Reed. "He's meeting with people 15 minutes a day, he's been written off," said Greg Albright. "Josh has not been cooperative, he's been insulting to the doctor. But that's a function of the place he's been." Albright met with an aide from the district office of Rep. John A. Boehner (R) in Ohio. He wanted help bringing Josh home for treatment, and the family was willing to pay for it. But Calloway was still in the Army.

One night in his room, Calloway put in a DVD and watched the opening scene of "Saving Private Ryan," the American G.I.s coming onto Omaha Beach, retching in fear as they unloaded from the boats and faced a rain of German bullets. Limbs severed, necks punctured, foreheads blown open, but the grunts kept charging.

"See why I picked infantry?" Calloway said, his leg furiously twitching. "There's no other place in the world where you can have a job like that. It's a brotherhood that's deeper than your own family."

His romanticized ideals clashed with reality. His anti-nightmare medication made him a zombie in the morning, and he slept through his alarm. After missing morning formation, he was ordered by his platoon sergeant to pick up trash, but in the middle of his work duty he had an anxiety attack; shaking

and unable to focus his eyes, he was taken to the ER, where he overheard his sergeant tell the doctor that it seemed to be a big coincidence that Calloway had an attack while doing work.

**'I Can't Handle Another Day'**

He often wondered why he snapped. Several factors make PTSD more likely -- youth, a history of depression or trauma, multiple deployments, and relentless exposure to violence. Calloway hit most of the criteria. He had been depressed in high school, and four months out of basic training he was in one of the most dangerous sectors of Baghdad.

Alpha Company, 2nd Battalion, 502nd Infantry Regiment got to Baghdad in the fall of 2005. The roads around Yusufiyah, where they patrolled, were littered with bombs. A first sergeant was lost right away, and the casualties never stopped. Living in abandoned Iraqi houses, Calloway went weeks without bathing and days without sleep. He went on raids at night, kicking in doors and searching houses to the sound of gunfire and screams.

Calloway had never felt such excitement or sense of belonging. His best friend was Spec. Denver Rearick, a grizzled 23-year-old on his second tour. In his Kentucky cowboy wisdom, Rearick warned Calloway: "Your entire body is a puzzle before you go to war. You go to war and every little piece of that puzzle gets twisted and turned. And then you are supposed to come back home again."

The pressure and dread and exhaustion began to smother Calloway. He survived several bomb blasts. Some soldiers were sucking on aerosol cans of Dust-Off to get high, and one accidentally died. Sleep deprivation mixed with the random violence scrambled Calloway. He wore it on his face. One of the sergeants asked him, "Are you gonna kill yourself, Calloway?"

Music was his escape. On rare nights on base, Calloway, Rearick and Vosbein would strip off their armor and climb up to the roof to play guitars and harmonica. Vosbein loved Johnny Cash. He was from Louisiana, free and easy with his affections, and at 30 he treated Calloway like a kid brother.

The day Vosbein died was sunny and hot. A convoy patrol in three Humvees pulled over to check a crater in the road. As Calloway was opening his door, Vosbein was already moving toward the crater. The force of the explosion rattled Calloway's teeth and knocked two other soldiers to the ground. Vosbein -- whistling, happy Vos -- was eviscerated. Parts of him were everywhere.

Calloway buckled and puked. Then rage. He wanted to shoot the first Iraqi he saw, but his legs weren't working. He was useless to help clean up the scene. Later that night as the chaplain gathered the platoon to talk, Calloway stood off to the side with two sergeants, crying. They confiscated his weapon. Rearick sat up with him in his room until he fell asleep. His commanders watched him closely. "We want to do what's best for you," the company commander told him with compassion. "You need to tell me what you need."

"I can't handle another day of this place," Calloway answered. He was sent to the combat-stress control trailers, where the decision was made to ship him to Walter Reed.

In his room at Mologne House, Calloway kept photos from Iraq on his computer: Vosbein grilling steaks at their patrol base. Calloway's gang piled on a tank with their guitars. Driving through a blinding orange sandstorm. Rearick, wiry and invincible, smiling in a dirty cowboy hat.

"He was able to handle it," Calloway said.

But Rearick was in bad shape. While Calloway was at Walter Reed, Rearick was home in Waco, Ky., sleeping with a .45 and the furniture pushed in front of the window. He was so anxious in crowds that he no longer went to bars or restaurants, ordering his meals at the drive-through window. To rouse him in the morning, his father tossed a boot from the doorway because he startled so violently when touched.

Rearick had sought help after coming home from his first tour in Iraq. While asleep one night, he knocked his girlfriend to the floor. "I damn near broke her nose," he said. Without telling his commanders at Fort Campbell, he went to the VA hospital in Lexington, where he was prescribed antidepressants. He didn't like the pills, so he drank himself to sleep, while gearing up for his second tour.

"All the banners said 'Welcome Home Heroes,' " Rearick said. "But the moment we start falling apart it's like, 'Never mind.' For us, it was the beginning of the dark ages. It was the dreams. It was going to the store and buying bottles of Tylenol PM and bottles of Jack."

Rearick retired from the Army earlier this year. In the bucolic green of Kentucky, he threw himself into the physical work of breaking horses and moving cattle. The only places he feels safe are the pastures and his barricaded room.

"At least Calloway doesn't try to sugarcoat it," he said. "He's like, 'I'm [expletive] up and I'm pissed off.' "

Rearick knows his outlaw paradise of guitars, guns and Willie Nelson is just a cover.

"Everyone thinks you are a badass," he said. "But you are scared of the dark."

**Going Home, Far From Cured**

Calloway put a Johnny Cash song on his cellphone to describe his sixth month on Ward 53.

*I'm stuck at Folsom Prison*

*And time keeps dragging on*

One night he mixed Monster energy drink and Crown Royal and got so drunk he was taken to the ER at Walter Reed, which landed him in the Army's alcohol counseling program. He had to submit to a breathalyzer test at 7 each morning. "I am losing my mind more and more while I'm here," he said.

His psychiatrist had referred him to the Deployment Health Clinical Center, but Calloway blew his chance at getting into the coveted program when he missed appointments. He blamed his meds and memory problems. He had been exposed to multiple bomb blasts in Iraq, but after seven months at Walter Reed he had not been tested for traumatic brain injury, which affects memory. Instead he was given a Dell PDA to help him remember appointments.

The relationship with his psychiatrist was barely tolerable. The frustration seemed mutual. "He complained about his problems but did not seem eager to listen to any suggestions I provided him," the doctor noted in Calloway's records. He added that Calloway showed up to Ward 53 not in uniform but in cutoff shorts with his tattoos showing.

Even on high doses of sedating drugs, Calloway's rage crackled, and one night he started breaking things

outside Mologne House. He was again taken to the ER, where he screamed that he wanted to kill his psychiatrist.

Finally, Calloway got what he wanted -- a new doctor. Lt. Col. Robert Forsten had served in Iraq and had published studies on combat stress. Right away, Calloway noticed Forsten's combat badge and his listening skills. Forsten agreed that the violence of Iraq was transforming and harrowing but said it should not define the rest of Calloway's life. The doctor also tried to reframe the experience. "You're a soldier," he said, according to Calloway. "You went to Iraq. You did your job.' "

Something clicked for Calloway. But it was so late in the game. His physical evaluation board process was nearly complete, and he would be going home soon. His worries turned to what diagnosis the Army would give him and how he would be rated for disability pay. His case worker had told him that she could not locate anyone at Fort Campbell to provide written proof that he had witnessed a traumatic event in combat. Forsten picked up the phone and within days had an official statement:

"During a routine route clearance in August 2006, PFC Calloway's team leader (SGT Vosbein) was clearing a suspected IED crater while PFC Calloway was inside his M1114. SGT Vosbein stepped on a crush wire that detonated 2X155 mm artillery shells. The detonation killed SGT Vosbein and knocked the remaining soldiers to the ground. PFC Calloway came to the site and saw his team leader blown apart into several pieces."

Forsten would soon get another assignment and leave Walter Reed.

The evaluation board diagnosed depression and chronic PTSD in Calloway, and ruled that his conditions had a "definite impact" on his work and social capabilities. He was given a temporary disability rating of 30 percent, which meant he would get $815 a month. He would be reevaluated in 2008. He would report to the VA hospital in Cincinnati for treatment when he got home.

After eight months at Walter Reed, Calloway showed "some improvement of his symptoms," according to his medical records. But his step-grandfather, Greg Albright, who came from Ohio to help him pack, was astounded at his volatility. "He's a grenade with the pin half-out," Albright said.

Even on his last night, Calloway avoided the open grassy spaces in front of Mologne House. He chain-smoked under the awning. He wondered what home would be like.

At dawn the next morning, he set out for Ohio, a combat infantry sticker on the bumper of his car.

*Staff researcher Julie Tate contributed to this article.*

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# 'A Soldier's Officer'

By Dana Priest and Anne Hull
Washington Post Staff Writers
Sunday, December 2, 2007; Page A01

In a nondescript conference room at Walter Reed Army Medical Center, 1st Lt. Elizabeth Whiteside listened last week as an Army prosecutor outlined the criminal case against her in a preliminary hearing. The charges: attempting suicide and endangering the life of another soldier while serving in Iraq.

Her hands trembled as Maj. Stefan Wolfe, the prosecutor, argued that Whiteside, now a psychiatric outpatient at Walter Reed, should be court-martialed. After seven years of exemplary service, the 25-year-old Army reservist faces the possibility of life in prison if she is tried and convicted.

Military psychiatrists at Walter Reed who examined Whiteside after she recovered from her self-inflicted gunshot wound diagnosed her with a severe mental disorder, possibly triggered by the stresses of a war zone. But Whiteside's superiors considered her mental illness "an excuse" for criminal conduct, according to documents obtained by The Washington Post.

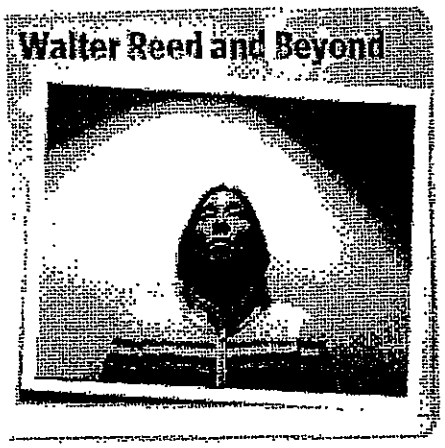
At the hearing, Wolfe, who had already warned Whiteside's lawyer of the risk of using a "psychobabble"

defense, pressed a senior psychiatrist at Walter Reed to justify his diagnosis.

"I'm not here to play legal games," Col. George Brandt responded angrily, according to a recording of the hearing. "I am here out of the genuine concern for a human being that's breaking and that is broken. She has a severe and significant illness. Let's treat her as a human being, for Christ's sake!"

In recent months, prodded by outrage over poor conditions at Walter Reed, the Army has made a highly publicized effort to improve treatment of Iraq veterans and change a culture that stigmatizes mental illness. The Pentagon has allocated hundreds of millions of dollars to new research and to care for soldiers with post-traumatic stress disorder, and on Friday it announced that it had opened a new center for psychological health in Rosslyn.

But outside the Pentagon, the military still largely deals with mental health issues in an ad hoc way, often relying on the judgment of combat-hardened commanders whose understanding of mental illness is vague or misinformed. The stigma around psychological wounds can still be seen in the smallest of Army policies. While family members of soldiers recovering at Walter Reed from physical injuries are provided free lodging and a per diem to care for their loved ones, families of psychiatric outpatients usually have to pay their own way.




• Timeline: How Did She Get Here?
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"It's a disgrace," said Tom Whiteside, a former Marine and retired federal law enforcement officer who lost his free housing after his daughter's physical wounds had healed enough that she could be moved to the psychiatric ward. A charity organization, the Yellow Ribbon Fund, provides him with an apartment near Walter Reed so he can be near his daughter.

Under military law, soldiers who attempt suicide can be prosecuted under the theory that it affects the order and discipline of a unit and brings discredit to the armed forces. In reality, criminal charges are extremely rare unless there is evidence that the attempt was an effort to avoid service or that it endangered others.

At one point, Elizabeth Whiteside almost accepted the Army's offer to resign in lieu of court-martial. But it meant she would have to explain for the rest of her life why she was not given an honorable discharge. Her attorney also believed that she would have been left without the medical care and benefits she needed.

No decision has yet been made on whether Whiteside's case will proceed to court-martial. The commander of the U.S. Army Military District of Washington, Maj. Gen. Richard J. Rowe Jr., who has jurisdiction over the case, "must determine whether there is sufficient

evidence to support the charges against Lieutenant Whiteside and recommend how to dispose of the charges," said his spokesman.

**'A Soldier's Officer'**

A valedictorian at James Madison High School in Vienna, a wrestler and varsity soccer player, Whiteside followed in her father's footsteps by joining the military. She enlisted in the Army Reserve in 2001 and later joined ROTC while studying economics at the University of Virginia. During her time in college, Whiteside said, she experienced periods of depression, but she graduated and was commissioned an officer in the Army Reserve.

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January 6, 2005 Thursday
Final Edition

# Terror Suspect Alleges Torture; Detainee Says U.S. Sent Him to Egypt Before Guantanamo

**BYLINE: Dana Priest** and Dan Eggen, Washington Post Staff Writers

**SECTION:** A Section; A01

**LENGTH:** 1385 words

U.S. authorities in late 2001 forcibly transferred an Australian citizen to Egypt, where, he alleges, he was tortured for six months before being flown to the U.S. military prison at **Guantanamo Bay,** Cuba, according to court papers made public yesterday in a petition seeking to halt U.S. plans to return him to Egypt.

Egyptian-born Mamdouh Habib, who was detained in Pakistan in October 2001 as a suspected al Qaeda trainer, alleges that while under Egyptian detention he was hung by his arms from hooks, repeatedly shocked, nearly drowned and brutally beaten, and he contends that U.S. and international law prohibits sending him back.

Habib's case is only the second to describe a secret practice called "rendition," under which the CIA has sent suspected terrorists to be interrogated in countries where torture has been well documented. It is unclear which U.S. agency transferred Habib to Egypt.

Habib's is the first case to challenge the legality of the practice and could have implications for U.S. plans to send large numbers of **Guantanamo Bay** detainees to Egypt, Yemen, Saudi Arabia and other countries with poor human rights records.

The CIA has acknowledged that it conducts renditions, but the agency and Bush administration officials who have publicly addressed the matter say they never intend for the captives to be tortured and, in fact, seek pledges from foreign governments that they will treat the captives humanely.

A Justice Department spokesman declined to comment on Habib's allegations, which were filed in November but made public only yesterday after a judge ruled that his petition contained no classified information. The department has not addressed the allegation that he was sent to Egypt.

An Egyptian official reached last night said he could not comment on Habib's allegations but added: "Accusations that we are torturing people tend to be mythology."

The authority under which renditions and other forcible transfers may be legally performed is reportedly summarized in a March 13, 2002, memo titled "The President's Power as Commander In Chief to Transfer Captive Terrorists to the Control and Custody of Foreign Nations." Knowledgeable U.S. officials said White House counsel Alberto R. Gonzales participated in its production.

The administration has refused a congressional request to make it public. But it is referred to in an August 2002 Justice Department opinion -- which Gonzales asked for and helped draft -- defining torture in a narrow way and concluding that the president could legally permit torture in fighting terrorism.

When the August memo became public, Bush repudiated it, and last week the Justice Department replaced it with a broader interpretation of the U.N. Convention Against Torture, which prohibits the practice under all circumstances. The August memo is expected to figure prominently in today's confirmation hearing for Gonzales, Bush's nominee to run the Justice Department as attorney general.

In a statement he planned to read at his hearing, made public yesterday, Gonzales said he would combat terrorism "in a manner consistent with our nation's values and applicable law, including our treaty obligations."

Also yesterday, the American Civil Liberties Union released new documents showing that 26 FBI agents reported witnessing mistreatment of **Guantanamo Bay** detainees, indicating a far broader pattern of alleged abuse there than reported previously.

The records, obtained in an ongoing ACLU lawsuit, also show that the FBI's senior lawyer determined that 17 of the incidents were "DOD-approved interrogation techniques" and did not require further investigation. The FBI did not participate in any of the interviews directly, according to the documents.

The new ACLU documents detail abuses seen by FBI personnel serving in Afghanistan, Iraq and **Guantanamo Bay,** including incidents in which military interrogators grabbed prisoners' genitals, bent back their fingers and, in one case, placed duct tape over a prisoner's mouth for reciting the Koran.

In late 2002, an FBI agent recounted that one detainee at **Guantanamo Bay** had been subjected to "intense isolation" for more than three months and that his cell was constantly flooded with light. The agent reported that "the detainee was evidencing behavior consistent with extreme psychological trauma," including hearing voices, crouching in a corner for hours and talking to imaginary people.

According to the e-mails, military interrogators at **Guantanamo Bay** tried to hide some of their activities from FBI agents, including having a female interrogator rub lotion on a prisoner during Ramadan -- a highly offensive tactic to an observant Muslim man.

Habib was taken to the **Guantanamo Bay** prison in May 2002.

Three Britons released from the prison -- Rhuhel Ahmed, Asif Iqbal and Shafiq Rasul -- have said Habib was in "catastrophic shape" when he arrived. Most of his fingernails were missing, and while sleeping he regularly bled from his nose, mouth and ears but U.S. officials denied him treatment, they said.

Habib's attorney, Joseph Margulies, said Habib had moved to Australia in the 1980s but eventually decided to move his family to Pakistan. He was there in late 2001 looking for a house and school for his children, Margulies said. U.S. officials accuse Habib of training and raising money for al Qaeda, and say he had advance knowledge of the Sept. 11, 2001, attacks. Australian media have reported that authorities in that country cleared him of having terrorist connections in 2001 and have quoted his Australian attorney as saying he was tortured in Egypt.

On Oct. 5, 2001, Pakistani authorities seized Habib, and over three weeks, he asserts in a memorandum filed in U.S. District Court in the District of Columbia, three Americans interrogated him.

The petition says he was taken to an airfield where, during a struggle, he was beaten by several people who spoke American-accented English. The men cut off his clothes, one placed a foot on his neck "and posed while another took pictures," the document says.

He was then flown to Egypt, it alleges, and spent six months in custody in a barren, 6-foot-by-8-foot cell, where he slept on the concrete floor with one blanket. During interrogations, Habib was "sometimes suspended from hooks on the wall" and repeatedly kicked, punched, beaten with a stick, rammed with an electric cattle prod and doused with cold water when he fell asleep, the petition says.

He was suspended from hooks, with his is feet resting on the side of a large cylindrical drum attached to wires and a battery, the document says. "When Mr. Habib did not give the answers his interrogators wanted, they threw a switch and a jolt of electricity" went through the drum, it says. "The action of Mr. Habib 'dancing' on the drum forced it to rotate, and his feet constantly slipped, leaving him suspended by only the hooks on the wall . . . This ingenious cruelty lasted until Mr. Habib finally fainted."

At other times, the petition alleges, he was placed in ankle-deep water that his interrogators told him "was wired to an electric current, and that unless Mr. Habib confessed, they would throw the switch and electrocute him."

Habib says he gave false confessions to stop the abuse.

The State Department's annual human rights report has consistently criticized Egypt for practices that include torturing prisoners.

After six months in Egypt, the petition says, Habib was flown to Bagram Air Base in Afghanistan.

U.S. intelligence officials have said renditions -- and the threat of renditions -- are a potent device to induce suspected terrorists to divulge information. Habib's petition says the threat that detainees at Bagram would be sent to Egypt prompted many of them to offer confessions.

His petition argues that his "removal to Egypt would be unquestionably unlawful" in part because he "faces almost certain torture."

The U.N. Convention Against Torture says no party to the treaty "shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

"The fact that the United States would contemplate sending him to Egypt again is astonishing to me," said Margulies, the attorney.

Researcher Julie Tate contributed to this report.

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# CIA Avoids Scrutiny of Detainee Treatment

## Afghan's Death Took Two Years to Come to Light; Agency Says Abuse Claims Are Probed Fully

*By Dana Priest*
Washington Post Staff Writer
Thursday, March 3, 2005; Page A01

In November 2002, a newly minted CIA case officer in charge of a secret prison just north of Kabul allegedly ordered guards to strip naked an uncooperative young Afghan detainee, chain him to the concrete floor and leave him there overnight without blankets, according to four U.S. government officials aware of the case.

The Afghan guards--paid by the CIA and working under CIA supervision in an abandoned warehouse code-named the Salt Pit--dragged their captive around on the concrete floor, bruising and scraping his skin, before putting him in his cell, two of the officials said.

As night fell, so, predictably, did the temperature.

By morning, the Afghan man had frozen to death.

After a quick autopsy by a CIA medic--"hypothermia" was listed as the cause of death--the guards buried the Afghan, who was in his twenties, in an unmarked, unacknowledged cemetery used by Afghan forces, officials said. The captive's family has never been notified; his remains have never been returned for burial. He is on no one's registry of captives, not even as a "ghost detainee," the term for CIA captives held in military prisons but not registered on the books, they said.

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"He just disappeared from the face of the earth," said one U.S. government official with knowledge of the case.

The CIA case officer, meanwhile, has been promoted, two of the officials said, who like others interviewed for this article spoke on the condition of anonymity because they are not authorized to talk about the matter. The case is under investigation by the CIA inspector general.

The fact that the Salt Pit case has remained secret for more than two years reflects how little is known about the CIA's treatment of detainees and its handling of allegations of abuse. The public airing of abuse at Abu Ghraib prompted the Pentagon to undertake and release scathing reports about conduct by military personnel, to revise rules for handling prisoners, and to prosecute soldiers accused of wrongdoing. There has been no comparable public scrutiny of the CIA, whose operations and briefings to Congress are kept classified by the administration.

Thirty-three military workers have been court-martialed and an additional 55 received reprimands for their mishandling of detainees, according to the Defense Department. One CIA contractor has been charged with a crime related to allegations of detainee abuse. David A. Passaro is on trial in federal court in North Carolina, facing four assault charges in connection with the death of Abdul Wali, a prisoner who died while at a U.S. military firebase in Afghanistan in June 2003.

The CIA's inspector general is investigating at least half a dozen allegations of serious abuse in Iraq and Afghanistan, including two previously reported deaths in Iraq, one in Afghanistan and the death at the Salt Pit, U.S. officials said.

A CIA spokesman said yesterday that the agency actively pursues allegations of misconduct. Other U.S. officials said CIA cases can take longer to resolve because, unlike the military, the agency must rely on the Justice Department to conduct its own review and to prosecute when warranted.

"The agency has an aggressive, robust office of the inspector general with the authority to look into any CIA program or operation anywhere," said a CIA representative who spoke on the condition of anonymity. "The inspector general has done so and will continue to do so. We investigate allegations of abuse fully." The spokesman declined to comment on any case.

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# CIA's Assurances On Transferred Suspects Doubted

## Prisoners Say Countries Break No-Torture Pledges

*By Dana Priest*
Washington Post Staff Writer
Thursday, March 17, 2005; Page A01

The system the CIA relies on to ensure that the suspected terrorists it transfers to other countries will not be tortured has been ineffective and virtually impossible to monitor, according to current and former intelligence officers and lawyers, as well as counterterrorism officials who have participated in or reviewed the practice.

To comply with anti-torture laws that bar sending people to countries where they are likely to be tortured, the CIA's office of general counsel requires a verbal assurance from each nation that detainees will be treated humanely, according to several recently retired CIA officials familiar with such transfers, known as renditions.

But the effectiveness of the assurances and the legality of the rendition practice are increasingly being questioned by rights groups and others, as freed detainees have alleged that they were mistreated by interrogators after the CIA secretly delivered them to countries with well-documented records of abuse.


At a news briefing, President Bush defended the practice of transferring suspected terrorists to countries of origin. (Bill O'Leary/twp - Twp)

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President Bush weighed in on the matter for the first time yesterday, defending renditions as vital to the nation's defense.

In "the post-9/11 world, the United States must make sure we protect our people and our friends from attack," he said at a news conference. "And one way to do so is to arrest people and send them back to their country of

origin with the promise that they won't be tortured. That's the promise we receive. This country does not believe in torture. We do believe in protecting ourselves." One CIA officer involved with renditions, however, called the assurances from other countries "a farce."

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Another U.S. government official who visited several foreign prisons where suspects were rendered by the CIA after the attacks of Sept. 11, 2001, said: "It's beyond that. It's widely understood that interrogation practices that would be illegal in the U.S. are being used."

The CIA inspector general recently launched a review of the rendition system, and some members of Congress are demanding a thorough probe. Canada, Sweden, Germany and Italy have started investigations into the participation of their security services in CIA renditions.

The House voted 420 to 2 yesterday to prohibit the use of supplemental appropriations to support actions that contravene anti-torture statutes. The measure's co-author, Rep. Edward J. Markey (D-Mass.), singled out renditions, saying "diplomatic assurances not to torture are not credible, and the administration knows it."

Rendition, a form of covert action that is supposed to be shrouded in the deepest secrecy, was first authorized by President Ronald Reagan in 1986 and was used by the Clinton administration to transfer drug lords and terrorists to the United States or other countries for military or criminal trials.

After the 2001 attacks, Bush broadened the CIA's authority and, as a result, the agency has rendered more than 100 people from one country to another without legal proceedings and without providing access to the International Committee of the Red Cross, a right afforded all prisoners held by the U.S. military.

The CIA general counsel's office requires the station chief in a given country to obtain a verbal assurance from that country's security service. The assurance must be cabled back to CIA headquarters before a rendition takes place.

CIA Director Porter J. Goss told Congress a month ago that the CIA has "an accountability program" to monitor rendered prisoners. But he acknowledged that "of course, once they're out of our control, there's only so much we can do."

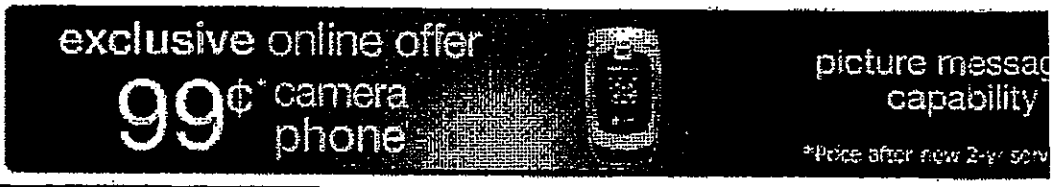
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# Italy Knew About Plan To Grab Suspect

## CIA Officials Cite Briefing in 2003

*By Dana Priest*
Washington Post Staff Writer
Thursday, June 30, 2005; Page A01

Before a CIA paramilitary team was deployed to snatch a radical Islamic cleric off the streets of Milan in February 2003, the CIA station chief in Rome briefed and sought approval from his counterpart in Italy, according to three CIA veterans with knowledge of the operation and a fourth who reviewed the matter after it took place.

The previously undisclosed Italian involvement undercuts the accusation, which has fueled public resentment in Italy toward the United States, that the CIA brashly slipped into the country unannounced and uninvited to kidnap an Italian resident off the street.

In fact, former and current CIA officials said, both the CIA and the Italian service agreed beforehand that if the unusual operation was to become public, as it has, neither side would confirm its involvement, a standard agreement the CIA makes with foreign intelligence services over covert operations.

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Last Thursday, an Italian magistrate issued arrest warrants for 13 U.S. intelligence operatives. The warrants charged that they kidnapped a suspected terrorist, Hassan Mustafa Osama Nasr -- also known as Abu Omar -- held him hostage at two U.S. military bases and then flew him to Cairo, where he alleged to his wife in a phone call that he was tortured under interrogation.

The CIA "told a tiny number of people" about the action, said one intelligence veteran in the management chain of the operation when it took place. "Certainly not the magistrate, not the Milan police."

It is unclear how high in the Italian intelligence service the information was shared or whether the office of Prime Minister Silvio Berlusconi was aware. It was not shared with the magistrate issuing the warrants, who works independently from the national government.

The Italian court case offers an accidental glimpse into how U.S. and foreign intelligence agencies coordinate and communicate on sensitive counterterrorism matters in ways that are expressly kept secret, even from other parts of their governments. This bifurcation between stated policies and secret practices has become more common since the Sept. 11, 2001, attacks, as the CIA has sought cooperation from other governments to covertly apprehend and transport suspected terrorists to undisclosed locations without legal hearings.

The CIA has conducted more than 100 of these apprehensions, known as extraordinary rendition, since Sept. 11, according to knowledgeable intelligence officials.

In Italy, the justice department and public have been demanding answers from the United States and their own government since Nasr disappeared as he was walking to a mosque on Feb. 17, 2003. And justice departments and government investigators in other countries have begun to unearth information about their governments' roles in apprehensions once thought to be the work of the CIA alone.

In Sweden, an inquiry discovered that Swedish ministers had agreed to apprehend and expel two Egyptian terrorism suspects in 2002 but called the CIA for help in flying them out of the country when they could not charter a flight quickly to take the suspects to Egypt.

A former CIA official said the covert operation was exposed after the CIA paramilitaries drew attention to it by arriving commando-style, in semi-opaque masks, and "went through the standard drill as if they were arresting Khalid Sheik Mohammed," the architect of the Sept. 11 attacks.

In Canada, a government inquiry has revealed a greater role by Canadian intelligence in the Justice Department's secret 2002 "expedited removal" of a Syrian-born Canadian citizen to Syria after he was detained as he changed flights at a New York airport.

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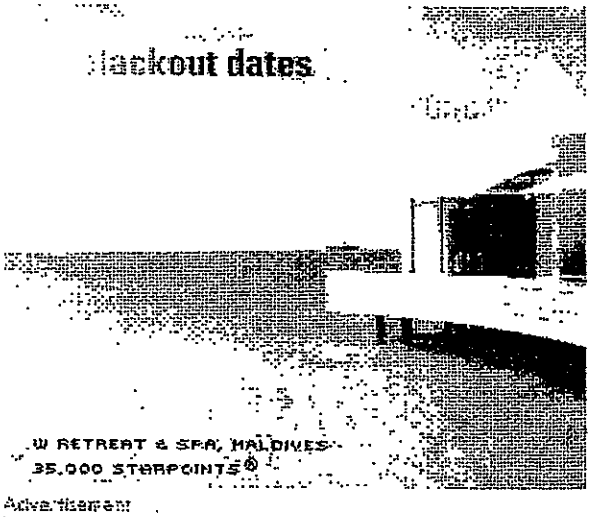
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# Help From France Key In Covert Operations

Paris's 'Alliance Base' Targets Terrorists

By Dana Priest
Washington Post Staff Writer
Sunday, July 3, 2005; A01



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PARIS -- When Christian Ganczarski, a German convert to Islam, boarded an Air France flight from Riyadh on June 3, 2003, he knew only that the Saudi government had put him under house arrest for an expired pilgrim visa and had given his family one-way tickets back to Germany, with a change of planes in Paris.

He had no idea that he was being secretly escorted by an undercover officer sitting behind him, or that a senior CIA officer was waiting at the end of the jetway as French authorities gently separated him from his family and swept Ganczarski into French custody, where he remains today on suspicion of associating with terrorists.

Ganczarski is among the most important European al Qaeda figures alive, according to U.S. and French law enforcement and intelligence officials. The operation that ensnared him was put together at a top secret center in Paris, code-named Alliance Base, that was set up by the CIA and French intelligence services in 2002, according to U.S. and European intelligence sources. Its existence has not been previously disclosed.

Funded largely by the CIA's Counterterrorist Center, Alliance Base analyzes the transnational movement of terrorist suspects and develops operations to catch or spy on them.

Alliance Base demonstrates how most counterterrorism operations actually take place: through secretive alliances between the CIA and other countries' intelligence services. This is not the work of large army formations, or even small special forces teams, but of handfuls of U.S. intelligence case officers working with handfuls of foreign operatives, often in tentative arrangements.

Such joint intelligence work has been responsible for identifying, tracking and capturing or killing the vast majority of committed jihadists who have been targeted outside Iraq and Afghanistan since the Sept. 11, 2001, attacks, according to terrorism experts.

The CIA declined to comment on Alliance Base, as did a spokesman for the French Embassy in Washington.

Most French officials and other intelligence veterans would talk about the partnership only if their names were withheld because the specifics are classified and the politics are sensitive. John E.

McLaughlin, the former acting CIA director who retired recently after a 32-year career, described the relationship between the CIA and its French counterparts as "one of the best in the world. What they are willing to contribute is extraordinarily valuable."

The rarely discussed Langley-Paris connection also belies the public portrayal of acrimony between the two countries that erupted over the invasion of Iraq. Within the Bush administration, the discord was amplified by Defense Secretary Donald H. Rumsfeld, who has claimed the lead role in the administration's "global war on terrorism" and has sought to give the military more of a part in it.

But even as Rumsfeld was criticizing France in early 2003 for not doing its share in fighting terrorism, his U.S. Special Operations Command was finalizing a secret arrangement to put 200 French special forces under U.S. command in Afghanistan. Beginning in July 2003, its commanders have worked side by side there with U.S. commanders and CIA and National Security Agency representatives.

**Organizing Alliance Base**

Alliance Base, headed by a French general assigned to France's equivalent of the CIA -- the General Directorate for External Security (DGSE) -- was described by six U.S. and foreign intelligence specialists with involvement in its activities. The base is unique in the world because it is multinational and actually plans operations instead of sharing information among countries, they said. It has case officers from Britain, France, Germany, Canada, Australia and the United States.

The Ganczarski operation was one of at least 12 major cases the base worked on during its first years, according to one person familiar with its operations.

"It's really an effort to come up with innovative ideas and deal with some of the cooperation issues," said one CIA officer familiar with the base. "I don't know of anything like it."

Factions within the intelligence services of several countries opposed a multinational approach, according to current and former U.S. and European government officials who described its inception. The CIA's Counterterrorist Center did not want to lose control over all counterterrorism operations; the British service did not want to dilute its unique ties to Washington; Germany was not keen to become involved in more operations.

And no country wanted to be perceived as taking direction from the CIA, whose practice of extraordinary renditions -- secretly apprehending suspected terrorists and transferring them to other countries without any judicial review -- has become highly controversial in Europe. In Italy, 13 alleged CIA operatives are accused of kidnapping a radical Egyptian cleric off the streets of Milan in 2003.

To play down the U.S. role, the center's working language is French, sources said. The base selects its cases carefully, chooses a lead country for each operation, and that country's service runs the operation.

The base also provides a way for German case officers to read information from their own country's law enforcement authorities, sources said. German law bars criminal authorities from sharing certain information directly with their intelligence agencies.

French law, by contrast, encourages intelligence sharing among its police and security services. In fact, since the Napoleonic Code was adopted in 1804, French magistrates have had broad powers over civil society. Today, magistrates in the French Justice Department's anti-terrorism unit have authority to detain people suspected of "conspiracy in relation to terrorism" while evidence is gathered against them.

The top anti-terrorism magistrate, Judge Jean-Louis Bruguiere, has said that in the past decade, he has ordered the arrests of more than 500 suspects, some with the help of U.S. authorities. "I have good connections with the CIA and FBI," Bruguiere said in a recent interview.

In France, which has a Muslim population reaching 8 percent -- the largest in Europe -- U.S. and French terrorism experts are desperate to take terrorist-group recruiters and new recruits off the streets, and have been willing to put their own anti-terrorism laws into the service of allies to lure suspects such as Ganczarski from abroad.

"Yes, without a doubt there are some cases where we participate that way," one senior French intelligence official said.

France sent its interrogators to Guantanamo Bay to gather evidence that could be used in French court against the French detainees the United States was holding there. France is the only one of six European nations that continues to imprison detainees returned to it from the U.S. military facility at Guantanamo Bay, Cuba.

Bruguiere and other French intelligence officials like to note dryly that France first realized it had become a target of al Qaeda-style jihadists when a group of Algerian radicals hijacked an airliner with the intent of crashing it into the Eiffel Tower in 1994. They viewed the attacks on the World Trade Center and the Pentagon as another, if much larger, part of the jihadist campaign against Western civilization.

So it did not surprise many intelligence officers when, in the days after the attacks, President Jacques Chirac issued an edict to French intelligence services to share information about terrorism with the U.S. intelligence agencies "as if they were your own service," according to two officials who read it.

The steady, daily flow of encrypted messages increased. "We saw a quantitative and qualitative difference in the degree of detail in the information," said Alejandro Wolff, the second-in-charge at the U.S. Embassy here, whose portfolio includes fighting terrorism.

One CIA veteran with knowledge of the U.S.-French intelligence work estimates that the French have detained about 60 suspects since the end of 2001, some with the help of the CIA. "They do as much for us as the British and in some ways more -- if you ask them," said a recently retired senior intelligence official who worked closely with France and other European countries.

France was also an early and willing collaborator in other parts of the world, allowing the CIA to fly its top-secret, armed Predator drone, still controversial inside the Pentagon, from France's air base in the former French colony of Djibouti. Its mission was to kill al Qaeda figures on a classified CIA list of "high-value targets." On Nov. 3, 2002, CIA officers operating remote controls from the air base took their first shot, killing Abu Ali al-Harithi, the mastermind of the October 2000 attack on the destroyer USS Cole, and six others, including Ahmed Hijazi, a naturalized U.S. citizen, in a Yemeni desert.

The broader cooperation between the United States and France plays to the strengths of each side, according to current and former French and U.S. officials. The CIA brings money from its classified and ever-growing "foreign liaison" account -- it has paid to transport some of France's suspects from abroad into Paris for legal imprisonment -- and its global eavesdropping capabilities and worldwide intelligence service ties. France brings its harsh laws, surveillance of radical Muslim groups and their networks in Arab states, and its intelligence links to its former colonies.

"There's an easy exchange of information," said Pierre de Bousquet de Florian, director of France's domestic CIA, the Directorate of Territorial Surveillance, who declined to comment on specifics of the relationship. "The cooperation between my service and the American service is candid, loyal and certainly effective."

France's willingness to share its dossiers on terrorists has helped the United States make some of its most significant convictions, including those of Ahmed Ressam, who was stopped at the Canadian border on his way to attempt to blow up Los Angeles International Airport in 1999, and Zacarias Moussaoui, a Moroccan who once lived in France and is the only person in the United States to have pleaded guilty in the Sept. 11 hijacking plot.

**Tension Over Iraq**

In the run-up to the Iraq war, the White House drew the battle lines between countries that were tough on terrorists -- the administration included Iraq in the mix -- and those that were not. France's government believed U.N. inspections had successfully contained Saddam Hussein's development of weapons programs, and Bruguiere saw no connection between Iraq and al Qaeda. At the Defense Department, on Capitol Hill and elsewhere, many cast France's opposition to war as evidence it was a slacker when it came to fighting terrorism.

French fries became "freedom fries" on Air Force One and in congressional cafeterias. Rumsfeld prohibited general officers from telephoning their French counterparts, grounded U.S. planes at the Paris Air Show and disinvited the French from Red Flag, a major U.S. military exercise in which they had participated for decades.

Three months into the dispute, the State Department and the CIA made a case for France, citing its intelligence cooperation. Bush eventually told Rumsfeld to desist, according to two former State Department officials. Then-Secretary of State Colin L. Powell wrote a memo saying that punishing the French was not U.S. policy. A. Elizabeth Jones, the assistant secretary of state for European and Eurasian affairs, kept it on top of her desk. "I frequently needed to be able to pull it out and quote it to my Pentagon colleagues," Jones said.

But Rumsfeld persisted a year later, excluding the French Air Force from the Red Flag exercise in 2004.

Rumsfeld's symbolic jabs baffled some officials inside the Bush administration. "Most things the secretary of defense did I could understand, even if I disagreed with him," said Lawrence B. Wilkerson, former chief of staff to Powell. "On this one, it was totally irrational, even dumb."

The intelligence services tried to insulate themselves from the public fray.

"The French were very keen on demonstrating there was no drop-off at all," said Wolff, the U.S. diplomat here. "There was never any sense of this spilling over. There was an effort on both sides to compartmentalize" the differences.

The same was true for the CIA and other U.S. intelligence agencies, which report a steady, daily flow of encrypted messages on terrorism between the CIA and its French counterpart.

"The relations between intelligence services in the United States and France has been good, even during the transatlantic dispute over Iraq, for practical reasons," Bruguiere said. "If you want to have a better grasp of a difficult situation, you have to share intelligence real time."

**The Ganczarski Operation**

Ganczarski, a metallurgist from the industrial Ruhr district in Germany, had been radicalized by a Saudi cleric touring European mosques in the early 1990s, studied Islam on a religious scholarship in the kingdom, traveled to Afghanistan four times, trained in al Qaeda camps, met Osama bin Laden, and returned to Germany from his last trip nine days before Sept. 11, 2001.

Intelligence officials say he was part of a patient, post-9/11 al Qaeda plan to activate European converts, including failed British "shoe-bomber" Richard Reid. Ganczarski's cell phone was the last number that a suicide bomber who killed 21 people on the island of Djerba called in April 2002. Some of the casualties were French, which gave Bruguiere legal grounds to arrest Ganczarski.

On May 20, 2003, an urgent bit of intelligence was fed into Alliance Base: Ahmed Mehdi, an associate of Ganczarski, had just booked a 14-day vacation to the French island of Reunion in the Indian Ocean.

Mehdi, then a 34-year-old Moroccan who had lived near Ganczarski in Germany, was under surveillance and showing a worrisome interest in remote-control detonators. German authorities, who did not have enough evidence to arrest him or Ganczarski, believed Mehdi was planning an attack on Reunion.

Mid-level case officers working at Alliance Base met to devise a plan: They would entice first Mehdi, then Ganczarski, to France. Bruguiere would lock them up on suspicion of associating with terrorists.

The CIA arranged for an asset to suggest that Mehdi stop in Paris on his way to Reunion to surveil targets. Mehdi, Alliance Base learned from wiretaps, worried that France would not give him a visa, which he needed because he is Moroccan. On cue, the French services arranged for a visa. The Germans monitored calls and contacts there for a change of plans.

On June 1, French authorities apprehended Mehdi at Charles de Gaulle International Airport in Paris. He was sent to Fresnes Prison outside Paris. Two days later, on June 3, 2003, Ganczarski was there, too.

Unbeknownst to the two men, they were held in cells just yards from each other. Authorities used the information gained from one to question the other. Within days, Mehdi told Bruguiere's investigators about the plot, the network and Ganczarski. Investigators now believe that Mehdi has links to al Qaeda's Hamburg cell that plotted the Sept. 11 attacks and that Ganczarski associated directly with Sept. 11 architect Khalid Sheikh Mohammed.

Alliance Base's role in the operation was noted obliquely on June 11, 2003, by Interior Minister Nicholas Sarkozy. Speaking before Parliament, he said, "This arrest took place thanks to the perfect collaboration between the services of the great democracies."

*Staff researcher Julie Tate contributed to this report.*

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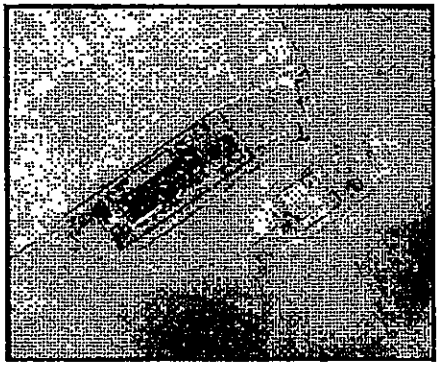
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# CIA Holds Terror Suspects in Secret Prisons

## Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11

*By Dana Priest*
Washington Post Staff Writer
Wednesday, November 2, 2005; Page A01



In Afghanistan, the largest CIA covert prison was code-named the Salt Pit, at center left above. (Space Imaging Middle East)

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The CIA has been hiding and interrogating some of its most important al Qaeda captives at a Soviet-era compound in Eastern Europe, according to U.S. and foreign officials familiar with the arrangement.

The secret facility is part of a covert prison system set up by the CIA nearly four years ago that at various times has included sites in eight countries, including Thailand, Afghanistan and several democracies in Eastern Europe, as well as a small center at the Guantanamo Bay prison in Cuba, according to current and former intelligence officials and diplomats from three continents.

The hidden global internment network is a central element in the CIA's unconventional war on terrorism. It depends on the cooperation of foreign intelligence services, and on keeping even basic information about the system secret from the public, foreign officials and nearly all members of Congress charged with overseeing the CIA's covert actions.

The existence and locations of the facilities -- referred to as "black sites" in classified White House, CIA, Justice Department and congressional documents -- are known to only a handful of officials in the United States and, usually, only to the president and a few top intelligence officers in each host country.

The CIA and the White House, citing national security concerns and the value of the

program, have dissuaded Congress from demanding that the agency answer questions in open testimony about the conditions under which captives are held. Virtually nothing is known about who is kept in the facilities, what interrogation methods are employed with them, or how decisions are made about whether they should be detained or for how long.

While the Defense Department has produced volumes of public reports and testimony about its detention practices and rules after the abuse scandals at Iraq's Abu Ghraib prison and at Guantanamo Bay, the CIA has not even acknowledged the existence of its black sites. To do so, say officials familiar with the program, could open the U.S. government to legal challenges, particularly in foreign courts, and increase the risk of political condemnation at home and abroad.

But the revelations of widespread prisoner abuse in Afghanistan and Iraq by the U.S. military -- which operates under published rules and transparent oversight of Congress -- have increased concern among lawmakers, foreign governments and human rights groups about the opaque CIA system. Those concerns escalated last month, when Vice President Cheney and CIA Director Porter J. Goss asked Congress to exempt CIA employees from legislation already endorsed by 90 senators that would bar cruel and degrading treatment of any prisoner in U.S. custody.

Although the CIA will not acknowledge details of its system, intelligence officials defend the agency's approach, arguing that the successful defense of the country requires that the agency be empowered to hold and interrogate suspected terrorists for as long as necessary and without restrictions imposed by the U.S. legal system or even by the military tribunals established for prisoners held at Guantanamo Bay.

The Washington Post is not publishing the names of the Eastern European countries involved in the covert program, at the request of senior U.S. officials. They argued that the disclosure might disrupt counterterrorism efforts in those countries and elsewhere and could make them targets of possible terrorist retaliation.

The secret detention system was conceived in the chaotic and anxious first months after the Sept. 11, 2001, attacks, when the working assumption was that a second strike was imminent.

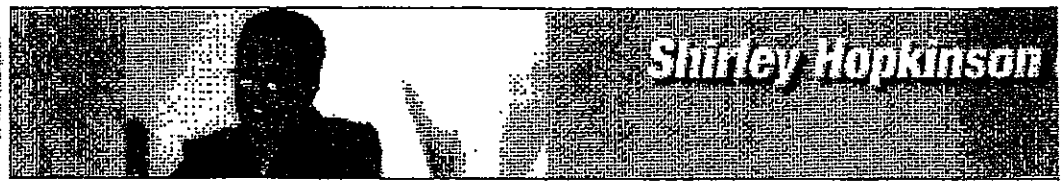
Since then, the arrangement has been increasingly debated within the CIA, where considerable concern lingers about the legality, morality and practicality of holding even unrepentant terrorists in such isolation and secrecy, perhaps for the duration of their lives. Mid-level and senior CIA officers began arguing two years ago that the system was unsustainable and diverted the agency from its unique espionage mission.

"We never sat down, as far as I know, and came up with a grand strategy," said one former senior intelligence officer who is familiar with the program but not the location of the prisons. "Everything was very reactive. That's how you get to a situation where you pick people up, send them into a netherworld and don't say, 'What are we going to do with them afterwards?' "

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# Foreign Network at Front of CIA's Terror Fight

## Joint Facilities in Two Dozen Countries Account for Bulk of Agency's Post-9/11 Successes

*By Dana Priest*
Washington Post Staff Writer
Friday, November 18, 2005; Page A01

The CIA has established joint operation centers in more than two dozen countries where U.S. and foreign intelligence officers work side by side to track and capture suspected terrorists and to destroy or penetrate their networks, according to current and former American and foreign intelligence officials.

The secret Counterterrorist Intelligence Centers are financed mostly by the agency and employ some of the best espionage technology the CIA has to offer, including secure communications gear, computers linked to the CIA's central databases, and access to highly classified intercepts once shared only with the nation's closest Western allies.

The Americans and their counterparts at the centers, known as CTICs, make daily decisions on when and how to apprehend suspects, whether to whisk them off to other countries for interrogation and detention, and how to disrupt al Qaeda's logistical and financial support.

The network of centers reflects what has become the CIA's central and most successful strategy in combating terrorism abroad: persuading and empowering foreign security services to help. Virtually every capture or killing of a suspected terrorist outside Iraq since the Sept. 11, 2001, attacks -- more than 3,000 in all -- was a result of foreign intelligence services' work alongside the agency, the CIA deputy director of operations told a congressional committee in a closed-door session earlier this year.



CIA Director Porter J. Goss appears to have eased off the earlier drive to sign up local services in the fight against terrorism – he said his goal is to improve "unilateral" intelligence collection and operations. (Photos By Ron Edmonds -- Associated Press)

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The initial tip about where an al Qaeda figure is hiding may come from the CIA, but the actual operation to pick him up is usually organized by one of the joint centers and conducted by a local security service, with the CIA nowhere in sight. "The vast majority of successes involved our CTICs," one former counterterrorism official said. "The boot that went through the door was foreign."

The centers are also part of a fundamental, continuing shift in the CIA's mission that began shortly after the 2001 attacks. No longer is the agency's primary goal to recruit military attaches, diplomats and intelligence operatives to steal secrets from their own countries. Today's CIA is desperately seeking ways to join forces with other governments it once reproached or ignored to undo a common enemy.

George J. Tenet orchestrated the shift during his tenure as CIA director, working with the agency's station chiefs abroad and officers in the Counterterrorist Center at headquarters to bring about an exponential deepening of intelligence ties worldwide after Sept. 11.

Beneath the surface of visible diplomacy, the cooperative efforts, known as liaison relationships, are recasting U.S. dealings abroad.

The White House has stepped up its criticism of Uzbek President Islam Karimov in the past year for his authoritarian rule and repression of dissidents. But joint counterterrorism efforts with Tashkent continued until recently. In Indonesia, as the State Department doled out tiny amounts of assistance to the military when it made progress on corruption and human rights, the CIA was pouring money into Jakarta and developing intelligence ties there after years of tension. In Paris, as U.S.-French acrimony peaked over the Iraq invasion in 2003, the CIA and French intelligence services were creating the agency's only multinational operations center and executing worldwide sting operations.

The CIA has operated the joint intelligence centers in Europe, the Middle East and Asia, according to current and former intelligence officials. In addition, the multinational center in Paris, codenamed Alliance Base, includes representatives from Britain, France, Germany, Canada and Australia.

"CTICs were a step forward in codifying, organizing liaison relationships that elsewhere would be more ad hoc," a former CIA counterterrorism official said. "It's one tool in the liaison tool kit."

The CIA declined to comment for this article. The Washington Post interviewed more than two dozen current and former intelligence officials and more than a dozen senior foreign intelligence officials as well as diplomatic and congressional sources. Most of them spoke on the condition that they not be named because they are not authorized to speak publicly or because of the sensitive nature of the subject.

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September 10, 2006 Sunday
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# Bin Laden Trail 'Stone Cold'; U.S. Steps Up Efforts, But Good Intelligence On Ground is Lacking

**BYLINE:** Dana Priest and Ann Scott Tyson, Washington Post Staff Writers

**SECTION:** A Section; A01

**LENGTH:** 3201 words

The clandestine U.S. commandos whose job is to capture or kill Osama bin Laden have not received a credible lead in more than two years. Nothing from the vast U.S. intelligence world -- no tips from informants, no snippets from electronic intercepts, no points on any satellite image -- has led them anywhere near the al-Qaeda leader, according to U.S. and Pakistani officials.

"The handful of assets we have have given us nothing close to real-time intelligence" that could have led to his capture, said one counterterrorism official, who said the trail, despite the most extensive manhunt in U.S. history, has gone "stone cold."

But in the last three months, following a request from President Bush to "flood the zone," the CIA has sharply increased the number of intelligence officers and assets devoted to the pursuit of bin Laden. The intelligence officers will team with the military's secretive Joint Special Operations Command (JSOC) and with more resources from the National Security Agency and other intelligence agencies.

The problem, former and current counterterrorism officials say, is that no one is certain where the "zone" is.

"Here you've got a guy who's gone off the net and is hiding in some of the most formidable terrain in one of the most remote parts of the world surrounded by people he trusts implicitly," said T. McCreary, spokesman for the National Counterterrorism Center. "And he stays off the net and is probably not mobile. That's an extremely difficult problem."

Intelligence officials think that bin Laden is hiding in the northern reaches of the autonomous tribal region along the Afghanistan-Pakistan border. This calculation is based largely on a lack of activity elsewhere and on other intelligence, including a videotape, obtained exclusively by the CIA and not previously reported, that shows bin Laden walking on a trail toward Pakistan at the

end of the battle of Tora Bora in December 2001, when U.S. forces came close but failed to capture him.

Many factors have combined in the five years since the Sept. 11, 2001, attacks to make the pursuit more difficult. They include the lack of CIA access to people close to al-Qaeda's inner circle; Pakistan's unwillingness to pursue him; the reemergence of the Taliban and al-Qaeda in Afghanistan; the strength of the Iraqi insurgency, which has depleted U.S. military and intelligence resources; and the U.S. government's own disorganization.

But the underlying reality is that finding one person in hiding is difficult under any circumstances. Eric Rudolph, the confessed Olympics and abortion clinic bomber, evaded authorities for five years, only to be captured miles from where he was last seen in North Carolina.

It has been so long since there has been anything like a real close call that some operatives have given bin Laden a nickname: "Elvis," for all the wishful-thinking sightings that have substituted for anything real.

After playing down bin Laden's importance and barely mentioning him for several years, Bush last week repeatedly invoked his name and quoted from his writings and speeches to underscore what Bush said is the continuing threat of terrorism.

Many terrorism experts, however, say the importance of finding bin Laden has diminished since Bush first pledged to capture him "dead or alive" in the aftermath of the Sept. 11 attacks. Terrorists worldwide have repeatedly shown they no longer need him to organize or carry out attacks, the experts say. Attacks in Europe, Asia and the Middle East were perpetrated by homegrown terrorists unaffiliated with al-Qaeda.

"Will his capture stop terrorism? No," Rep. Jane Harman (D-Calif.), vice chairman of the House Intelligence Committee, said in a recent interview. "But in terms of a message to the world, it's a huge message."

Despite a lack of progress, at CIA headquarters bin Laden and his deputy, Ayman al-Zawahiri, are still the most wanted of the High Value Targets, referred to as "HVT 1 and 2." The CIA station in Kabul still offers a briefing to VIP visitors that declares: "We are here for the hunt!" -- a reminder that finding bin Laden is a top priority.

Gary Berntsen, the former CIA officer who led the first and last hunt for bin Laden at Tora Bora, in December 2001, says, "This could all end tomorrow." One unsolicited walk-in. One tribesman seeking to collect the $25 million reward. One courier who would rather his kids grow up in the United States. One dealmaker, "and this could all change," Berntsen said.

On the videotape obtained by the CIA, bin Laden is seen confidently instructing his party how to dig holes in the ground to lie in undetected at night. A bomb dropped by a U.S. aircraft can be seen exploding in the distance. "We were there last night," bin Laden says without much concern in his voice. He was in or headed toward Pakistan, counterterrorism officials think.

That was December 2001. Only two months later, Bush decided to pull out most of the special operations troops and their CIA counterparts in the paramilitary division that were leading the hunt for bin Laden in Afghanistan to prepare for war in Iraq, said Flynt L. Leverett, then an expert on the Middle East at the National Security Council.

"I was appalled when I learned about it," said Leverett, who has become an

outspoken critic of the administration's counterterrorism policy. "I don't know of anyone who thought it was a good idea. It's very likely that bin Laden would be dead or in American custody if we hadn't done that."

Several officers confirmed that the number of special operations troops was reduced in March 2001.

White House spokeswoman Michele Davis said she would not comment on the specific allegation. "Military and intelligence units move routinely in and out," she said. "The intelligence and military community's hunt for bin Laden has been aggressive and constant since the attacks."

The Pakistani intelligence service, notoriously difficult to trust but also the service with the best access to al-Qaeda circles, is convinced bin Laden is alive because no one has ever intercepted or heard a message mourning his death. "Al-Qaeda will mourn his death and will retaliate in a big way. We are pretty sure Osama is alive," Pakistan's interior minister, Aftab Khan Sherpao, said in a recent interview with The Washington Post.

Pakistani intelligence officials also say they think bin Laden remains actively involved in al-Qaeda activities. They cite the interrogations of Ahmed Khalfan Ghailani, a key planner of the bombings of two U.S. embassies in East Africa in 1998, and Abu-Faraj al-Libbi, who served as a communications conduit between bin Laden and senior al-Qaeda operatives until his capture last year.

Libbi and Ghailani, who was arrested in Pakistan in July 2004, were the last two people taken into custody to have met with and taken orders from Zawahiri and to hear directly from bin Laden. "Both Ghailani and Libbi were informed that Osama was well and alive and in the picture by none other than Zawahiri himself," one Pakistani intelligence official said.

Two Pakistani intelligence officials recently interviewed in Karachi said that the last time they received firsthand information on bin Laden was in April 2003, when an arrested al-Qaeda leader, Tawfiq bin Attash, disclosed having met him in the Khost province of Afghanistan three months earlier.

Attash, who helped plan the 2000 USS Cole bombing, told interrogators that the meeting took place in the Afghan mountains about two hours from the town of Khost.

By then, Pakistan was the United States' best bet for information after an infusion of funds from the U.S. intelligence community, particularly in the area of expensive NSA eavesdropping equipment.

"For technical intelligence ISI (Inter-Services Intelligence) works hand in hand with the NSA," a senior Pakistani intelligence official said. "The U.S. assistance in building Pakistan's capabilities for technical intelligence since 9/11 is superb."

Since early 2002, the United States has stationed a small number of personnel from the NSA and the CIA near where bin Laden may be hiding. They are embedded with counterterrorism units of the Pakistan army's elite Special Services Group, according to senior Pakistani intelligence officials.

The NSA and other specialists collect imagery and electronic intercepts that their CIA counterparts then share with the Pakistani units in the tribal areas and with the province of Baluchistan to the south.

But even with sophisticated technology, the local geography presents formidable obstacles. In a land of dead-end valleys, high peaks and winding ridge lines, it is

easy to hide within the miles of caves and deep ravines, or to live unnoticed in mud-walled compounds barely distinguishable from the surrounding terrain.

The Afghan-Pakistan border is about 1,500 miles. Pakistan deploys 70,000 troops there. Its army had never entered the area until October 2001, more than a half century after Pakistan's founding.

A Muslim country where many consider bin Laden a hero, Pakistan has grown increasingly reluctant to help the U.S. search. The army lost its best source of intelligence in 2004, after it began raids inside the tribal areas. Scouts with blood ties to the tribes ceased sharing information for fear of retaliation.

They had good reason. At least 23 senior anti-Taliban tribesmen have been assassinated in South and North Waziristan since May 2005. "Al-Qaeda footprints were found everywhere," Interior Minister Sherpao said in a recent interview. "They kidnapped and chopped off heads of at least seven of these pro-government tribesmen."

Pakistani and U.S. counterterrorism and military officials admit that Pakistan has now all but stopped looking for bin Laden. "The dirty little secret is, they have nothing, no operations, without the Paks," one former counterterrorism officer said.

Last week, Pakistan announced a truce with the Taliban that calls on the insurgent Afghan group to end armed attacks inside Pakistan and to stop crossing into Afghanistan to fight the government and international troops. The agreement also requires foreign militants to leave the tribal area of North Waziristan or take up a peaceable life there.

In Afghanistan, the hunt for bin Laden has been upstaged by the reemergence of the Taliban and al-Qaeda, and by Afghan infighting for control of territory and opium poppy cropland.

Lt. Gen. John R. Vines, who commanded U.S. troops in Afghanistan in 2003, said he thinks bin Laden kept close to the border, not wandering far into either country. That belief is still current among military and intelligence analysts.

"We believe that he held to a pretty narrow range of within 15 kilometers of the border," said Vines, who now commands the XVIII Airborne Corps, "so that if the Pakistanis, for whatever reason, chose to do something to him, he could cross into Afghanistan and vice versa."

He said he thinks bin Laden's protection force "had a series of outposts with radios that could alert each other" if helicopters were coming or other troop movements were evident.

Pakistani military officials in Wana, the capital of South Waziristan, described bin Laden as having three rings of security, each ring unaware of the movements and identities of the other. Sometimes they communicated with specially marked flashlights. Sometimes they dressed as women to avoid detection by U.S. spy planes.

Pakistan will permit only small numbers of U.S. forces to operate with its troops at times and, because their role is so sensitive politically, it officially denies any U.S. presence. A frequent complaint from U.S. troops is that they have too little to do. The same complaint is also heard from U.S. forces in Afghanistan, where there were few targets to go after.

Although the hunt for bin Laden has depended to a large extent on technology, until recently unmanned aerial vehicles (UAVs) were in short supply, especially

when the war in Iraq became a priority in 2003.

In July 2003, Vines said that U.S. forces under his command thought they were close to striking bin Laden, but had only one drone to send over three possible routes he might take. "A UAV was positioned on the route that was most likely, but he didn't go that way," Vines said. "We believed that we were within a half-hour of possibly getting him, but nothing materialized."

Faced with the most sophisticated technology in the world, bin Laden has gone decidedly low-tech. His 23 video or audiotapes in the last five years are thought to have been hand-carried to news outlets or nearby mail drops by a series of couriers who know nothing about the contents of their deliveries or the real identity of the sender, a simple method used by spies and drug traffickers for centuries.

"They are really good at operational security," said Ben Venzke, chief executive officer of IntelCenter, a private company that analyzes terrorist information and has obtained, analyzed and published all bin Laden's communiques. "They are very good at having enough cut-outs" to move videos into circulation without detection. "It's some of the simplest things to do."

Bureaucratic battles slowed down the hunt for bin Laden for the first two or three years, according to officials in several agencies, with both the Pentagon and the CIA accusing each other of withholding information. Defense Secretary Donald H. Rumsfeld's sense of territoriality has become legendary, according to these officials.

In early November 2002, for example, a CIA drone armed with a Hellfire missile killed a top al-Qaeda leader traveling through the Yemeni desert. About a week later, Rumsfeld expressed anger that it was the CIA, not the Defense Department, that had carried out the successful strike.

"How did they get the intel?" he demanded of the intelligence and other military personnel in a high-level meeting, recalled one person knowledgeable about the meeting.

Gen. Michael V. Hayden, then director of the National Security Agency and technically part of the Defense Department, said he had given it to them.

"Why aren't you giving it to us?" Rumsfeld wanted to know.

Hayden, according to this source, told Rumsfeld that the information-sharing mechanism with the CIA was working well. Rumsfeld said it would have to stop.

A CIA spokesman said Hayden, now the CIA director, does not recall this conversation. Pentagon spokesman Bryan Whitman said, "The notion that the department would do anything that would jeopardize the success of an operation to kill or capture bin Laden is ridiculous." The NSA continues to share intelligence with the CIA and the Defense Department.

At that time, Rumsfeld was putting in place his own aggressive plan, led by the U.S. Special Operations Command (SOCOM), to dominate the hunt for bin Laden and other terrorists. The overall special operations budget has grown by 60 percent since 2003 to $8 billion in fiscal year 2007.

Rows and rows of temporary buildings sprang up on SOCOM's parking lots in Tampa as Rumsfeld refocused the mission of a small group of counterterrorism experts from long-term planning for the war on terrorism to manhunting. The group "went from 20 years to 24-hour crisis-mode operations," one former special operations officer

said. "It went from planning to manhunting."

In 2004, Rumsfeld finally won the president's approval to put SOCOM in charge of the "Global War on Terrorism."

Today, however, no one person is in charge of the overall hunt for bin Laden with the authority to direct covert CIA operations to collect intelligence and to dispatch JSOC units. Some counterterrorism officials find this absurd. "There's nobody in the United States government whose job it is to find Osama bin Laden!" one frustrated counterterrorism official shouted. "Nobody!"

"We work by consensus," explained Brig. Gen. Robert L. Caslen Jr., who recently stepped down as deputy director of counterterrorism under the Joint Chiefs of Staff. "In order to find Osama bin Laden, certain departments will come together. . . . It's not that effective, or we'd find the guy, but in terms of advancing United States power for that mission, I think that process is effective."

But Lt. Gen. Stanley A. McChrystal, the JSOC commander since 2003, has become the de facto leader of the hunt for bin Laden and developed a good working relationship with the CIA to the extent that he recently was able to persuade the former station chief in Kabul to become his special assistant. He asks for targets from the CIA, and it tries to comply. "We serve the military," one intelligence officer said.

McChrystal's troops have shuttled between Afghanistan and Iraq, where they succeeded in killing al-Qaeda leader Abu Musab al-Zarqawi and killed or captured dozens of his followers.

Under McChrystal, JSOC has improved its ability to quickly turn captured documents, computers and cellphones into leads and then to act upon them, while waiting for more analysis from CIA or SOCOM.

Industry experts and military officers say they are being aided by computer forensic field kits that let technicians retrieve information from surviving hard drives, cellphones and other electronic devices, as was the case in the Zarqawi strike.

McChrystal, who has commanded JSOC since 2003, now has the authority to go after bin Laden inside Pakistan without having to seek permission first, two U.S. officials said.

"The authority," one knowledgeable person said, "follows the target," meaning that if the target is bin Laden, the stakes are high enough for McChrystal to decide any action on his own. The understanding is that U.S. units will not enter Pakistan, except under extreme circumstances, and that Pakistan will deny giving them permission.

Such was the case in early January, when JSOC troops clandestinely entered the village of Saidgai, two officials familiar with the operation said, and Pakistan protested.

A week later, acting on what Pakistani intelligence officials said was information developed out of Libbi's interrogation, the CIA ordered a missile strike against a house in the village of Damadola, about 120 miles northwest of Islamabad, where Pakistani and American officials thought Zawahiri to be hiding.

The missile killed 13 civilians and several suspected terrorists. But Zawahiri was not among them. The strike "could have changed the destiny of the war on terror. Zawahiri was 100 percent sure to visit Damadola . . . but he disappeared at

the last moment," one Pakistani intelligence official said.

Tens of thousands of Pakistanis staged an angry anti-American protest near Damadola, shouting, "Death to America!"

"Once again, we have lost track of Ayman al-Zawahiri," the Pakistani intelligence official said in a recent interview. "He keeps popping on television screens. It's miserable, but we don't know where he or his boss are hiding."

Contributing to this report were staff writers Bradley Graham, Thomas E. Ricks, Josh White, Griff Witte and Allan Lengel in Washington, Kamran Khan in Islamabad and John Lancaster in Wana, Pakistan, and staff researchers Julie Tate and Robert E. Thomason.

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**CORRECTION:** A Sept. 10 article incorrectly reported when U.S. special operations troops were reduced in the effort to find Osama bin Laden. The date was March 2002.

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# New Spy **Satellite** Debated On Hill; Some Question Price and Need

**BYLINE: Dana Priest,** Washington Post Staff Writer

**SECTION:** A Section; A01

**LENGTH:** 1295 words

The United States is building a new generation of spy **satellites** designed to orbit undetected, in a highly classified program that has provoked opposition in closed congressional sessions where lawmakers have questioned its necessity and rapidly escalating price, according to U.S. officials.

The previously undisclosed effort has almost doubled in projected cost -- from $5 billion to nearly $9.5 billion, officials said. The National Reconnaissance Office, which manages spy **satellite** programs, has already spent hundreds of millions of dollars on the program, officials said.

The stealth **satellite,** which would probably become the largest single-item expenditure in the $40 billion intelligence budget, is to be launched in the next five years and is meant to replace an existing stealth **satellite,** according to officials. Non-stealth **satellites** can be tracked and their orbits can be predicted, allowing countries to attempt to hide weapons or troop movements on the ground when they are overhead.

Opponents of the new program, however, argue that the **satellite** is no longer a good match against today's adversaries: terrorists seeking small quantities of illicit weapons, or countries such as North Korea and Iran, which are believed to have placed their nuclear weapons programs underground and inside buildings specifically to avoid detection from spy **satellites** and aircraft.

The National Reconnaissance Office and the CIA declined to comment. Lockheed Martin Corp., which sources said is the lead contractor on the project, issued a statement saying, "As a matter of policy we do not discuss what we may or may not be doing in regards to classified programs."

The **satellite** in question would be the third and final version in a series of spacecraft funded under a classified program once known as Misty, officials said.

Concerned about the latest **satellite's** relevancy and escalating costs, the Senate Select Committee on Intelligence has twice tried to kill it, according to knowledgeable officials. The program has been strongly supported, however, by Senate and House appropriations committees; by the House intelligence committee, which was chaired by Rep. Porter J. Goss (R-Fla.) until he recently became CIA director; and by his predecessor, George J. Tenet.

"With the amount of money we're talking about here, you could build a whole new CIA," said one official, who, like others, talked about the program and the debate on the condition of anonymity because of the project's sensitivity.

The debate over the secret program has been carried out in closed session on Capitol Hill, and no legislator has publicly acknowledged the existence of the program. Echoes of the heated discussion, however, have begun to emerge in public.

Earlier this week, four Democratic senators refused to sign the "conference sheets" used by the House-Senate conference committee working on the 2005 intelligence authorization bill. Sources said that was meant to protest inclusion once again of the **satellite** program.

A statement by conference managers said only that four Democratic senators -- John D. Rockefeller IV (W.Va.), vice chairman of the intelligence committee; Carl M. Levin (Mich.); Richard J. Durbin (Ill.); and Ron Wyden (Ore.) -- objected to a classified item in the bill "that they believe is unnecessary and the cost of which they believe is unjustified." It continued: "They believe that the funds for this item should be expended on other intelligence programs that will make a surer and greater contribution to national security." Some Republican lawmakers have concerns about the program as well, as do some senators on the Armed Services Committee, sources said.

In an attempt to verbalize frustration while abiding by classification constraints, Rockefeller made an unusual reference to his protest on the Senate floor.

"My decision to take this somewhat unprecedented action is based solely on my strenuous objection -- shared by many in our committee -- to a particular major funding acquisition program that I believe is totally unjustified and very wasteful and dangerous to national security," Rockefeller said. "Because of the highly classified nature of the programs contained in the national intelligence budget, I cannot talk about them on the floor."

Rockefeller added that the committee has voted "to terminate the program" for the past two years, "only to be overruled" by the appropriations committees.

A small firestorm followed, with at least one radio talk show host and callers to Rockefeller's office charging that he had divulged classified information. On Thursday, spokeswoman Wendi Morigi issued what she called a clarification. "Any assertion about classified intelligence programs based on Senator Rockefeller's statement is wholly speculative," the statement said. It said Rockefeller's floor statement had been "fully vetted and approved by security officials."

That statement illustrates the constraints faced by members of Congress as they work to adjust or terminate even multibillion-dollar programs that are hidden from public scrutiny and debate. There have been other hints of problems in **satellite** programs in the last year.

Several months ago, Sen. Dianne Feinstein (D-Calif.), a member of the intelligence committee, made a cryptic reference to the value of expensive **satellite** programs during testimony on her intelligence reform proposal.

"I can't go into this, but when we look at **satellites,** one or the other of us has questions," she told her colleagues. "I'm concerned these are tens-of-billions-of-dollar items and we sure as heck better know what we're doing."

Stealth technology has been used to cloak military aircraft such as the F-117A fighter and the B-2 bomber.

When radar searches for a stealth craft, it records a signature that is much smaller than its size should indicate. Thus a stealth plane or **satellite** could appear to radar analysts as airborne debris.

Advanced nations routinely patrol the skies with radar and other equipment to detect spy planes, **satellites** and other sensors.

About 95 percent of spycraft are detected by other nations, experts say. But "even France and Russia would have a hard time figuring out what they were tracking" if they were to pick up the image of a stealth **satellite,** said John Pike of GlobalSecurity.org, an expert on space imagery.

The idea behind a stealth **satellite** is "so the evildoers wouldn't know we are looking at them," Pike said. "It's just a fundamental principle of operational security that you know when the other guy's **satellites** are going to be overhead and you plan accordingly."

But, Pike said, "the cover and deception going on today is more systematic and continual. It's not the 'duck and cover' of the Soviet era."

The existence of the maiden stealth **satellite** launched under the Misty program was first reported by Jeffrey T. Richelson in his 2001 book "The Wizards of Langley: Inside the CIA's Directorate of Science and Technology." Richelson said that first craft was launched from the space shuttle Atlantis on March 1, 1990.

Amateur space trackers in England and Canada were able to detect it at points after that, Richelson reported.

A second Misty **satellite** was launched nearly a decade later and is in operation, sources said.

Circumstantial evidence of that **satellite's** existence was outlined in the April issue of a Russian space magazine, Novosti Kosmonavtiki. According to a translation for The Washington Post, the article suggested that a **satellite** launched from Vandenberg Air Force Base in California in 1999 may be the second-generation Misty craft and noted that the **satellite** was put into orbit along with "a large number of debris," a likely deception method.

Researcher Julie Tate contributed to this report.

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# CIA Killed U.S. Citizen In Yemen Missile Strike; Action's Legality, Effectiveness Questioned

**BYLINE: Dana Priest,** Washington Post Staff Writer

**SECTION:** A SECTION; Pg. A01

**LENGTH:** 955 words

A U.S. citizen was among the people killed in the pilotless missile strike on suspected al Qaeda terrorists in Yemen Sunday, administration officials confirmed yesterday, adding a new element to an attack that reflects the evolving nature of the U.S. war on terrorism around the world.

Ahmed Hijazi and five other suspected al Qaeda operatives were killed by a five-foot long Hellfire missile launched from a remote controlled CIA Predator aircraft as they rode in a vehicle 100 miles east of the Yemeni capital, Sanaa.

Hijazi held U.S. citizenship and was also a citizen of an unidentified Middle Eastern country, a senior administration official confirmed. He was not born in the United States, but resided here for an unknown period of time, the official said.

With him in the vehicle, said Yemeni and U.S. government officials, was a senior al Qaeda leader, Abu Ali al-Harithi, who is suspected of masterminding the October 2000 attack on the destroyer USS Cole.

Hijazi's citizenship highlights the different approaches pursued simultaneously by the administration as it wages its war on terror. In some cases since Sept. 11, American citizens have been arrested and afforded traditional legal rights in the criminal justice system. In others, they have been captured and held indefinitely in military brigs as "enemy combatants." Now, at least in Hijazi's case, a citizen has been killed in a covert military action.

What's more, Hijazi was killed in a country considered at peace with the United States, although U.S. officials say the strike was carried out with the approval and cooperation of Yemen's government.

It was unclear whether the CIA operatives who fired the missile knew that an American citizen was among their targets. It also was unclear whether that would have made any difference.

Even in war, the U.S. government affords greater legal protections to U.S. citizens than foreigners and, in peacetime, the CIA is restricted in the kinds of surveillance and operations it can conduct against U.S. citizens at home and abroad.

The administration, working with the authority of a presidential finding that permits covert actions against Osama bin Laden's al Qaeda terrorist network, considered al-Harithi and his traveling party a military target -- "combatants" under international law.

Officials further contend that Sunday's missile strike was an act of self-defense, which is also permitted under the international laws of war, because al-Harithi already had allegedly attacked the United States in October 2000 when he helped blow up the USS Cole, killing 17 sailors.

Administration officials, intelligence operatives and military analysts, frustrated with the slow, torturous pace of locating and capturing individual terrorists in lawless areas of countries such as Yemen, praised the CIA strikes as an innovative way to get the job done.

"This is an extraordinary change of threshold," said one former intelligence operative who praised the tactic as particularly effective.

The CIA strikes are also a reflection, they say, of how slow the U.S. military, even its Special Operations forces, have been to adapt to the ad hoc, ever-changing tactics of smaller and smaller cadres of terrorists now operating without much of a command structure. The CIA, in fact, has become a much more central tactical military tool in the terrorism war than in any previous conflict, largely because it has a much less cumbersome bureaucracy.

The CIA's separate targeting process, which was used in Sunday's Predator strike, is quicker, more fluid and involves fewer decision-makers in its "trigger-pulling" chain of command than even the nimblest military operation, intelligence experts said.

But while the lethality of the CIA Predator attack was considered successful, it also raises a host of new questions about the legality, effectiveness and ethics of using a tactic outwardly akin to assassination. Assassination is banned by a presidential executive order.

"This ought to be a last resort for the United States," said Jeffrey H. Smith, former general counsel at the CIA. The preferable route, he said, would be to capture and try terrorists, and share the evidence of guilt with the world.

"To the extent you do more and more of this, it begins to look like it is policy," Smith said. "It is not clear that that is an effective tool." Israel, for example, has asserted it has targeted individual Palestinians whom it considers combatants. But the tactic has not stopped suicide attacks and other violence; some analysts suggest it has only outraged the Palestinian community and fueled the violence.

After a while, Smith said, such pinpoint targeting of individuals might "suggest that it's acceptable behavior to assassinate people. . . . Assassination as a norm of international conduct exposes American leaders and Americans overseas."

State Department spokesman Richard Boucher said yesterday that the government did not yet have enough information to verify Hijazi's U.S. citizenship but may learn more from Yemeni authorities. Yemeni officials said yesterday that personal documents, weapons and **satellite** telephones had been found in the burned-out car.

Yemen is bin Laden's ancestral home, and U.S. intelligence officials describe the country as one of the key refuges for al Qaeda operatives pushed out of Afghanistan by the war there. U.S. Special Forces trainers were sent to Yemen after Sept. 11, 2001.

The U.S. military has been preparing more intensive operations in Yemen. But military operations have proven highly risky. In December, an attempt to force militant Islamic tribal forces on the Saudi border to turn over suspected al Qaeda members ended with the deaths of 13 Yemeni soldiers.

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April 3, 2002 Wednesday
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# 'Team 555' Shaped a New Way of War; Special Forces and Smart Bombs Turned Tide and Routed Taliban

**BYLINE: Dana Priest,** Washington Post Staff Writer

**SECTION:** A SECTION; Pg. A01

**LENGTH:** 3976 words

Two darkened helicopters rocked through a nighttime storm that had smothered the Panjshir Valley in clouds. The MH-53J Pave Lows -- the largest choppers in the Air Force inventory -- suddenly felt like tin to the soldiers riding in back. One helicopter was flying blind, its electronic sensors having failed.

"Pull up! Pull up!" someone shouted from the cockpit as a mountainside appeared out of the black.

As the chopper surged upward, Chief Warrant Officer David Diaz hung on in back and worried. He and the 11 other soldiers split between the two helicopters constituted Team 555 of the U.S. Army Special Forces. Rough weather had already foiled their mission twice -- and it was a once-in-a-lifetime mission.

Team 555 had been chosen to be the first A-team infiltrated into Afghanistan during the war, the vanguard of a small, nearly invisible U.S. ground presence that helped topple the Taliban with stunning speed and tested a new template for warfare.

Shortly after midnight on Oct. 19, Diaz's helicopter thudded to the ground. But like many war scenarios, this one began off-script: Both choppers had landed in the wrong place. On a moonless night, the two halves of 555 were separated by several miles and one small mountain. With each man responsible for 300 pounds of gear and with huge, uneven rocks underfoot, exploration was out of the question.

Up ahead, Diaz saw little lights dancing toward him. "This is bad," he thought. They were flashlights, and their illumination rendered his night vision goggles useless, suggesting this wasn't the reception party he was expecting.

"I'm going to try to talk to these guys," Diaz told his men. "If I hit the ground, I expect you guys to start shooting." He began walking, a machine gun in his hands and a Beretta strapped to his thigh.

Before long, a huge silhouette loomed into view -- "a monster of a man," in Diaz's reckoning -- and stretched out his hand.

"Hi! I'm Hal!" the monster roared in thoroughly American English. "Damn glad to meet you!"

Thus did the Central Intelligence Agency welcome the U.S. Special Forces into Afghanistan, setting in motion a war plan that would blend intelligence and ordnance in novel ways.

The Special Forces have been quietly carrying the military's banner for unconventional warfare for five decades. At the height of their involvement in Vietnam, 3,750 Special Forces soldiers -- known then as Green Berets -- trained paramilitary and South Vietnamese strike forces, conducted raids and led a hearts-and-minds campaign. In the 1980s, they advised Central American militaries fighting leftist guerrillas. In the 1991 Persian Gulf War, they hunted Iraqi Scud launchers, conducted long-range reconnaissance and accompanied Kuwaiti resistance fighters back into Kuwait City.

But not until last fall's drive to oust the Taliban from power in Afghanistan did the Special Forces play the central role in a conflict. And they did it with just over 300 soldiers.

The Special Forces teams executed three missions: synchronizing the unorganized forces of ethnic Uzbek and Tajik Afghan opposition groups in the north; building small armies out of Pashtun tribesmen in the south; and providing the targeting information that enabled Navy and Air Force pilots to fire guided bombs at al Qaeda and Taliban fighters and equipment, most of the time with devastating precision.

These missions depended on a new relationship between U.S. military and intelligence personnel, and a highly improvisational partnership between U.S. soldiers on the ground and their Afghan counterparts. But under the pressures of war, these relationships were forged quickly.

Before the war began, on Oct. 7, top-ranking U.S. military officials cautioned that it would take until summer to break the Taliban's five-year hold on power.

It took 49 days, from the 555's debut on Oct. 19 until the Taliban fell to the Northern Alliance in the southern city of Kandahar on Dec. 6.

Moreover, it took just 316 Special Forces soldiers: 18 A-teams, four company-level units and three battalion-level commands, all reporting to a Joint Special Operations Task Force at the Khanabad Air Base in Karshi, Uzbekistan, 100 miles north of the Afghan border. Nearly every team also included one or two CIA operatives and an Air Force Special Operations combat controller, expert at guiding high-flying aircraft to targets.

As the fighting in Afghanistan continues, much of what the Special Forces and their partners did in Afghanistan remains obscured by the unit's culture of secrecy and Defense Department decisions not to publicize their actions.

But Team 555's experience in the effort that led to the taking of the Afghan capital of Kabul highlights the emerging relationships between the Pentagon and the CIA, and between the Special Forces and the Afghan armies they assisted. This article is drawn from interviews with more than 30 Special Forces officers and soldiers, most of them from the 5th Special Forces Group based at Fort Campbell, Ky. Some team members asked to be identified only by rank and first name.

Team 555 (the Triple Nickel) won the right to be the first one in through a competitive vetting process. Diaz, 38, had spent seven months on the Afghan-Pakistan border on a CIA-led mission training members of the Afghan resistance to the Soviets in 1987; some members of his team had seen combat in Iraq and Somalia, and others had trained Arab armies in the Persian Gulf.

Hal and his partner, Phil -- names the members of 555 assumed were pseudonyms -- were among the CIA operatives that had been inserted into Afghanistan beginning Sept. 27 to designate landing zones, secure safe houses, vet anti-Taliban commanders and supply their troops with weapons, communications gear, medical supplies and clothing.

For weeks, Hal and Phil had been promising Northern Alliance commanders working around Bagram air base that U.S. air power was coming to defeat the Taliban.

Once Team 555 arrived, the CIA operatives had something more concrete to offer.

After 555's helicopters hit the ground, Hal, a former Navy SEAL and part of the CIA's growing paramilitary unit within its Special Activities Division, reunited the separated halves of the team at a safe house in the village of Astana in the lush north-central Panjshir Valley. The area had been home to opposition leader Ahmed Shah Massoud, who had retained control even during the Soviet occupation during the 1980s, up through his assassination, by operatives linked to al Qaeda, on Sept. 9.

At the safe house, the team met Phil, from the CIA's analytical branch. Fluent in Russian, he wore a beige jacket and seemed to have long-term relationships with the Afghan commanders the team would be paired with.

Phil gave a briefing on the mission: The next day, the team would join up with commanders allied with Massoud's successor, Gen. Mohammed Fahim, the Northern Alliance's defense minister. (He is now defense minister in the interim government.) They would work mainly with Gen. Bismullah Khan and two other subcommanders, including Gen. Babajan, who had commanded troops in a three-year standoff with the Taliban at Bagram.

First, they were to help U.S. warplanes destroy the Taliban front line around that airfield. Then, they were to search for and destroy Taliban and al Qaeda targets in the 35-mile stretch south to Kabul. Finally, they were to help the alliance seize Kabul, a triumph they hoped would demoralize Taliban troops in the south.

The team's movements were tracked by Special Forces soldiers 1,500 miles away in a Combined Air Operations Center at the Prince Sultan Air Base outside Riyadh, the capital of Saudi Arabia. That group also analyzed pictures and other intelligence on the A-teams' targets.

When Phil introduced Diaz and the others to Bismullah Khan at their next safe house, in the village of Taqhma, he said, "Here's the Special Forces team I've been promising you."

"Okay," said Khan, friendly but reserved. "Show us what you can do."

"All you have to do is show me where to start," Diaz replied.

At 7 the next morning, a four-man survey team snuck as close to the Taliban front lines as they could to fix their position and look for targets.

The view was startling. The Taliban had added 2,000 troops to its force of 5,000 in the days since Massoud's assassination. With the naked eye, they could see Taliban tanks, artillery, troops, command posts, vehicles and ammunition bunkers. Targets. More than 50 of them.

The scouting team called back to Diaz, who had gone to the Bagram airfield control tower, which overlooked the carcasses of several rusted Soviet MiG fighters and offered the best view of the front line, 1,000 meters away. Diaz radioed Sgt. 1st Class J.T. at the safe house in Taqhma. "Bring the CAS equipment, fast!" he said, meaning the binoculars, laser designator and Global Positioning System used to identify and plot target coordinates. He asked Tech Sgt. Calvin, an Air Force Special Operations combat controller, to see if he could redirect aircraft already in the air to bomb immediately.

J.T. lugged the 90-pound equipment backpack up to the control tower just about the time the aircraft started showing up. Gen. Babajan, a stout, jovial man, had arrived by then, too, along with an entourage that filled the 20-by-20-foot tower.

"Look over there," Diaz told Babajan, handing him the binoculars. "That's the target." He pointed toward the Taliban front line, at a buried antiaircraft artillery gun sticking up from what looked like a mound of mud and at a command-and-control shack identified by a protruding antenna.

The first aircraft, an F/A-18 Hornet off the USS Theodore Roosevelt, demolished it with a blast that flung dry dirt and fiery shards of metal three stories into the air.

The fireworks were immediately upstaged by cheers and laughter from the commanders. Babajan shook the team members' hands and hugged Diaz. From the base of the tower, his security force erupted in cheers and applause.

Babajan scribbled in his notebook, listing targets struck and targets he wanted struck.

After an hour, the Taliban hit back -- artillery shells whizzed by, exploding in front of and behind the tower. Calvin crouched, Phil hit the floor. Two Special Forces soldiers scrambled down the rickety staircase.

It was clear, Diaz would say later, that the team's predeployment chest-beating had given way to fear. "Everybody stop where you're at and get back up here!" he yelled. "Here's the deal. We will not be effective if we leave. Don't even bother to duck. The Taliban are bad shots."

The team stayed seven hours, until dusk, directing a continuous flow of warplanes onto the Taliban front lines until there were no more aircraft available.

The tremendous roar of invisible warplanes flying at 15,000 feet overhead forced the Taliban forces to scatter into trenches and walled compounds as giant blasts of fire leapt up around them.

That night, back at the safe house, the Afghans honored the Americans with a huge feast and a long list of targets for the next day.

For nearly a week, 555 was one of only two Special Forces teams inside Afghanistan, so it had the entire range of Air Force and Navy planes at its call; F-18, F-14 and F-15 fighters, B-52 and B-1 bombers, AC-130 gunships. The Taliban troops made themselves easy targets too by returning to Bagram from Kabul in truck convoys most nights to snuggle close to the Northern Alliance front line.

Team 555's work with Fahim north of Kabul set a pattern for three more A-teams that infiltrated beginning in the second half of October: 553 in the central Bamian province, 585 around Kunduz and 595 in Dara-e Suf, a remote mountain village and headquarters for their new partner, Gen. Abdurrashid Dostum, the ethnic Uzbek warlord renowed for his ruthlessness and Machiavellian alliance shifts.

For 18 days those four teams, plus two 15-person battalion-level units -- only 78 soldiers in all -- accounted for the entire Special Forces presence in Afghanistan, according to the U.S. Army Special Forces Command. Yet they set the stage for the fall of the northern two-thirds of the country.

With such small numbers, most of the A-teams split into four detachments of three men each to cover more territory.

Some subteams went for weeks without seeing other Americans, maintaining contact via **satellite** radio. One was ferried into place in a beat-up, Soviet-made MI-8 HIP helicopter that "barely cleared some of the highest peaks" of the Hindu Kush mountains, according to the team's report. One three-man detachment of Team 595 worked in a dug-in observation post on a hilltop, an 18-hour horseback ride from the closest U.S. soldier.

Horses, in fact, were briefly an unfortunate fact of life for the Americans. Only two of 595's men

had ever ridden before their first hours in Afghanistan; suddenly, the burly soldiers found themselves atop wiry mountain ponies, in stiff wooden saddles with stirrups so short their knees were jammed into their armpits.

The grizzled Northern Alliance commanders, for their part, had to come to terms with the Americans' relative inexperience and fresh faces. Dostum was one of many Afghan commanders who insisted at first that the Americans remain at headquarters, out of harm's way, which was too far from the action to direct airstrikes. Dostum, said Mark, the Special Forces captain assigned to him, worried that the death of one U.S. soldier might weaken the U.S. commitment to the war.

The soldiers convinced him otherwise, even though they were unsure themselves. "The problem we have as soldiers is, we don't make policy," said the team sergeant, Paul. "We can say, 'We're committed,' and the next day Congress can say, 'No, we're not.' We end up being very vague on those statements."

Air Force and Navy pilots made crucial adjustments, too.

Air power experts had disdained "tank-plinking," or hitting small numbers of troops or a few tanks and artillery pieces -- until this war. The pilots and their commanders, sitting at the operations center in Saudi Arabia, had been trained in the efficacy of destroying large sites with high "strategic" value, such as top military command centers and government ministries. But these targets were missing in Afghanistan. Only after spirited, daily debates over the radios with the Special Forces teams did they learn to hit mud huts, jeeps and villages, targets that often looked civilian in nature but that troops said had been taken over by the Taliban.

Special Forces teams kept and filed reports on the number of casualties the U.S. airstrikes inflicted, but the Defense Department has refused to release the number of civilians believed killed, and has acted defensive about admitting mistakes. Finally, air planners cut their traditional 72-hour targeting cycle to as little as 12 hours. For still greater flexibility, they divided the country into 30 "kill boxes," in which pilots could loiter, waiting to be given targets.

In early November, 1st Sgt. J.T. was hunting for targets with an Afghan commander in the turret of a building southeast of Bagram when the sandbags in front of them began popping with the impact of machine gun rounds. The laser target designator was knocked to the ground.

J.T. radioed for help. "Is there anything out there?" he asked. "Please, anything." He got no response. They began to climb down a ladder propped against the building. The Afghan commander was handing the radio down to J.T. when it squawked. After they scurried back up, a familiar, if frantic, dialogue ensued during which J.T. talked the pilot onto targets.

Over the next hour, 45 bombs rained on a 300-by-100-meter area around them.

"Shack on target!" J.T. yelled to indicate a direct hit. "Shack on target!"

"It was beautiful," he recalled. "The whole area was laden with machine guns and mortars. We completely smoked everything."

They also were now within days of Kabul.

On Nov. 3, Lt. Col. Max Bowers, a 5th Group battalion commander, and seven others arrived at Dara-e Suf, joining Team 595. His job was to coordinate the battles of three major Northern Alliance commanders, including Dostum. Their goal was Mazar-e Sharif, the northwestern city that Dostum had controlled between 1992 and 1997 and that held strategic value because it could open a supply pipeline to allied forces elsewhere in the north.

By then Dostum had allied himself with his former enemies Attah Mohammed and Mohammed Mohaqiq to take the city. They were eager for Bowers's communications capability, which could

link up and keep track of each.

Bowers carried a 4-by-6-foot laminated map that they marked with X's and O's and arrows as they designed the offensive. Dostum would take the plans to his war council, where Bowers would sit silently with him. Dostum and Bowers's plan was to encircle Mazar-e Sharif. There was great concern that Taliban forces would resist and turn the battle into a house-by-house fight, "absolutely the worst kind of fight you can be in," Bowers said.

As they approached Mazar-e Sharif, Bowers's toughest job was to figure out how to get the forces of all three commanders into the city without fratricide. When they started squabbling, he would pull out from his chest pocket a piece of the World Trade Center he had been given and would say, "This is why we're here." Their squabbles, he said, were brief.

Each commander was given an Inmarsat **satellite** phone to speak to the others and to Bowers. Bowers also had his own line of communication with the A-teams attached to each commander. The night before the battle, with Dostum and the other commanders' troops arrayed on the ridges overlooking Mazar-e Sharif, they watched convoys of Taliban troops flee. Bowers's men called in fierce airstrikes. Troops on the hilltops, he said, "were simply ecstatic."

"We saturated the battlefield with small close-air-support cells and we hit the Taliban if they were engaging us, if they were trying to maneuver in a favorable position," he said. "We engaged them while they were moving and if they tried to retreat. They simply could not move."

The Taliban front line collapsed nearly immediately on the night of Nov. 9. Taliban soldiers ran away, abandoning trenches, leaping from tanks and scrambling into trucks and jeeps for a getaway. Hundreds fled to Samangan and Kunduz provinces. U.S. forces used aircraft to attack some of the fleeing fighters but did not ask the Afghans to intercept them on the ground, Bowers said.

Dostum immediately set his sights on Kabul and Kunduz. But so did Fahim and the other commanders. For weeks Washington had been urging the Northern Alliance leadership not to move on the capital, trying to buy time to negotiate a power-sharing agreement among Afghanistan's ethnic blocs. But the fighting was about to overtake the diplomacy.

The competition for Kabul did not rest solely with the commanders. Leading Team 555, Diaz did not want to have another A-team's general beat his general into Kabul. Fahim had led Massoud's triumphant forces into the capital in 1992, on the heels of the Soviet retreat, and Massoud had held the city for four years, before the Taliban swept into power.

"I tried to play him against Dostum by saying, 'Hey, we don't want to be last. Why aren't we starting?' " said Diaz, who was still near Bagram, trying to push Fahim's troops to begin their march south to Kabul.

Fahim agreed to ready his troops if Diaz would request strikes on a final list of targets whose destruction would make their offensive easier. Beginning Nov. 10, Team 555 called in 25 strikes that, by the team's official estimates, killed 2,200 enemy soldiers and destroyed 29 tanks and six command posts over two days. Reporters in the area soon after saw no evidence of such destruction.

Fahim's troops put on brand new Chinese-made uniforms, readied their weapons for the offensive, and stayed in garrison. Fahim had agreed to give Diaz 24 hours' notice before his troops began their move south. Diaz estimated that it would take Fahim's foot soldiers 10 days to reach the capital.

But on Nov. 12, Diaz's team sergeant, Greg, radioed with news: "They're moving out in two hours."

"We tried to stay ahead of them with the bombings," said Greg, "but at some point we did have to stop, because they were moving faster than we could calculate where they were at. We knew their objective was Kabul, and they weren't going to be slowed down by our bombing."

Fahim, said Diaz, resorted to a time-honored practice to get several subcommanders to slow down so he could take the city. "He paid them off to stop," he said.

As they moved south, the Northern Alliance allowed thousands of Afghan Taliban members to switch sides. Several suicide bombers among the instant defectors blew themselves up in an effort to kill those who were switching.

"There was a lot of handshaking involved, especially between Afghani and Afghani," said Greg. But the opposite was true for the non-Afghan fighters, the Arabs, Pakistanis, Chechens and others in Afghanistan to fight alongside the Taliban and al Qaeda. "The Pakis and other foreigners, they couldn't care less about; they were going to kill them," Greg said.

And they did. In one case, after hand-to-hand combat in Estelef, a village on the way to Kabul that Fahim's subcommanders would not allow the Americans to bomb, the Taliban surrendered on Nov. 11. The Afghans within the Taliban forces there began killing the Arabs and Pakistanis in their own ranks. "In a lot of cases, the native Afghanis in the Taliban unit were killing them themselves," said Diaz.

"We absorbed the native Afghanis; the Arabs and Pakistanis were all killed trying to escape, supposedly," added Greg.

During the last day of the offensive, the team came under heavy fire, said J.T. One Afghan guard, afraid the Americans might get hurt, laid his body across two of them as they crouched behind a barrier and continued to call in aircraft.

"They saw us as an asset, but they also saw that if one of us got hurt, [Washington] might pull us out. We didn't have to get in the trenches and fight with them. They didn't want us there," J.T. said.

By dawn the next day, Taliban forces were fleeing south from Kabul. Fahim, with Team 555 not far behind, was surrounded by a crush of cheering Afghans as he approached the capital.

The team made its way to the U.S. Embassy, which had been closed since 1989. Marines, who guard U.S. embassies around the world, would open the doors and raise the flag in front of the international media corps, but first, it fell to 555 to check the building for booby traps. They found the embassy frozen in time, the ambassador's desk still brimming with papers.

As they looked around the compound, opening drawers and peering in closets and the refrigerator, they found four soda cans wrapped in brown paper and labeled "bomb." A map of Kabul clung to the wall. Open drink bottles sat behind the Marine Corps bar, a standard recreation room in many embassy compounds.

In Kabul, the members of Team 555 moved into another safe house and befriended a couple of young shoeshine boys, whom the team outfitted in clothes and soccer equipment. They also opened the Kabul airfield, which immediately became the hub of international relief efforts.

Diaz's team was twice visited by the Afghan commanders they had worked with. They came bearing coordinates and asked Diaz to call in his bombers and fighters to an area just south of Kabul. Enemy territory, they insisted.

Calvin, the Air Force combat controller, sent the request into the base at Karshi, which passed it to the operations center in Saudi Arabia. The response, Calvin recalled, came back quickly: The target request was not Taliban, but a rival alliance faction. "It is a problem between them," the

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# In War, Mud Huts And Hard Calls; As U.S. Teams Guided Pilots' Attacks, Civilian Presence Made Task Tougher

**BYLINE: Dana Priest,** Washington Post Staff Writer

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**LENGTH:** 1640 words

When the soldiers of U.S. Army Special Forces Team 555 went to work in Afghanistan, they found no shortage of targets for U.S. warplanes to strike: mud huts where Taliban soldiers slept, rusted jeeps they drove, shacks with suspicious antennas pointing toward the sky.

But to Navy and Air Force pilots flying thousands of feet above, they didn't look like military targets, and in the initial days of the war, the fliers were reluctant to attack. So "we started to play this terminology game," said Chief Warrant Officer Dave Diaz, who led Team 555.

He told the nine soldiers and one Air Force Special Operations combat controller with him: "Yes, it is a civilian village, mud hut, like everything else in this country. But don't say that. Say it's a military compound. It's a built-up area, barracks, command and control. Just like with the convoys -- if it really was a convoy with civilian vehicles they were using for transport, we would just say, hey, military convoy, troop transport."

The pilots quickly came to trust Team 555's judgment -- In their 25 days of round-the-clock target-spotting, the team directed 175 aircraft sorties -- but the early episode recounted by Diaz highlights the complexity of identifying targets in the Afghan war.

The U.S. military's targeting practices have come under question as Afghan villagers have reported civilian casualties from U.S. airstrikes. Pentagon officials have disputed the reports and insisted that the vast majority of airstrikes hit Taliban and al Qaeda targets. Other military leaders have noted that in a war like the one in Afghanistan, enemy forces may intermingle freely with noncombatants.

Team 555 infiltrated into Afghanistan on Oct. 19 and remained until Jan. 4; identifying targets was its primary mission. The team's experience, recounted in extensive interviews with several members, illuminates how they chose and checked targets, and how, in certain circumstances, civilians could find themselves in harm's way.

From the night they infiltrated, Team 555 members began working with the CIA and with Northern Alliance commanders to select targets for airstrikes. First, they were to destroy the Taliban front line around the Bagram airfield, where the alliance and the Taliban had faced off for three years. After that, the team was to send planes to destroy Taliban and al Qaeda strongholds in the 30-mile swath of barren land stretching south to the capital, Kabul. Finally, they were to

help the alliance seize Kabul.

For nearly a week in late October, 555 was one of only two Special Forces teams inside Afghanistan, so it had the entire range of Air Force and Navy planes at its call: F-18, F-14 and F-15 fighters, B-52 and B-1 bombers, AC-130 gunships. To service all the targets, the team split into two groups and used one of three observation posts within two miles of one another.

From those and other positions, they could see through high-powered binoculars a plethora of targets: small columns of men walking ridge lines, cooking fires burning near trench lines, artillery and mortar pieces and tanks glistening in the afternoon sun, mortars embedded in courtyards. Sometimes they saw black-shrouded figures, which they took to be al Qaeda members.

To verify targets, pilots and targeteers working in a command center in Saudi Arabia had an unprecedented array of information: CIA intelligence from the ground, pictures from **satellites,** P-3 spy planes and, in some cases, live feeds of video shot by unmanned Predator surveillance aircraft hovering over the battlefield.

In the early going, when a pilot expressed reluctance to hit a certain target, members of Team 555 sometimes stopped their terminology game to plead their case explicitly.

"Yes, it's a mud hut," went the argument of one sergeant, who asked to be identified only as J.T. "We live in mud huts. They live in mud huts. We fight out of mud huts. They fight out of mud huts. There are no good guys there anymore."

A number of Taliban troops would spend their days in Kabul but return to Bagram for the night, believing it was safer there. Northern Alliance intelligence in Kabul kept track of nearly everyone who left on these evening treks. Sometimes the convoys included civilians.

"We knew the only people who were going to travel from here to Kabul were combatants, and in some cases, their family members," said Diaz. Although Team 555 members worked hard with the Air Force to avoid striking civilians, there were occasions when they saw a few women and children mixed in with Taliban forces they needed to strike at that moment. Then, Diaz said, "the guidance I gave my team, and the guidance from higher [headquarters], is that they are combatants."

Rear Adm. Craig R. Quigley, a Pentagon spokesman, said that war planners developed rules of engagement for Special Forces soldiers and pilots that took into account "the very unsettled and unconventional conditions that our forces would find themselves in in Afghanistan" to include times when the Taliban and al Qaeda kept families near them. As is standard, he would not describe the rules of engagement but said they "allowed clarity for forces on the ground." To date, Quigley added, "we have not taken any action against any of our forces for noncompliance with the rules of engagement."

International law requires that military forces take "all feasible precautions" to avoid civilian casualties, attack only military objects and weigh the value of military targets when some civilian casualties are likely to occur if they are struck. That is what Diaz and the other members of Team 555 believe they did.

By law, unarmed civilians can never be considered combatants, said Kenneth Roth, director of Human Rights Watch, which is sending investigators to Afghanistan to assess civilian casualties. "But we don't criticize things that are close calls," he added.

In unconventional warfare, he said, commanders have an obligation to weigh the value of hitting targets that will likely result in civilian deaths. "They need to make the argument, is that a trade-off that can be justified?"

Sgt. 1st Class Tom Rosenbarger, a 14-year Special Forces veteran, vetted the requests for strikes that Team 555 called in. He sat 1,500 miles away in the space-age Combined Air Operations Center (known as the CAOC, or "KAY-ok") at Prince Sultan Air Base outside Riyadh. From there, he tracked the movement of every Special Forces team in Afghanistan, monitored the teams' radios and helped analyze all kinds of data on the targets that the teams requested be struck.

Rosenbarger was also the mediator between high-tech, high-precision aviation and seat-of-the-pants, in-the-dirt unconventional warfare. At the start of the war, many CAOC staffers had no idea what the Special Forces teams' capabilities were.

"Understand, this is UW," he recalled telling one skeptical Air Force officer, using the abbreviation for "unconventional warfare," which is what Special Forces are expressly trained to wage.

"What's UW?" the Air Force officer asked.

"Unconventional war, it was something we have practiced, but we had not seen in a long time," said one high-ranking Air Force official with experience in the CAOC. "The trust we had in the military people on the ground" built as the days passed.

Team 555's Air Force representative, a Special Operations combat controller from the 720th Special Tactics Group, taught the team how to call in close air support using binoculars, a laser target designator, Global Positioning System devices and other equipment. But with a 15,000-foot minimum altitude imposed on pilots for their safety, it was sometimes impossible for pilots in the cockpits to see what the team saw from the ground. Some would fly near the target, use their own binoculars to peer down, and talk about what they saw with the Special Forces team members.

"The general lay of the land, it's brown and dusty mud," said J.T. "So a lot of the lower fighting positions, they really couldn't see. It's really hard to pick up the contrast, or the lack of it. They'd say, 'I see a city. I see a town.' I would say, well no, you see a cluster of five buildings. In one of these buildings you'll see a cluster of vehicles. While they may look like Toyota Land Cruisers, they are used to move troops and ammunition. This area here is all bad guys."

Some pilots refused to drop munitions if they weren't convinced. But, Rosenbarger said, his Air Force colleagues adapted quickly, especially after he sneaked them copies of initial bomb damage assessment reports showing ample amounts of military equipment destroyed in "villages" occupied by Taliban forces.

Sometimes, the nature of the war made targeting easier. Many Afghan Taliban and Northern Alliance soldiers were friends who had found themselves drafted into opposing armies. They would communicate over rudimentary radios, sometimes taunting each other in the heat of battle.

"Your bomb missed us," one would say, recalled members of Team 555.

"Where did it land?" a Northern Alliance officer would respond with some coaching from the Americans.

Five hundred meters to the north, would come the answer. Or 1,000 meters to the south. The combat controller would immediately recalculate the coordinates and pass them to the nearest aircraft, which could restrike the target within minutes. Team 555 members said that in a week, they killed many Taliban commanders this way and destroyed much of their communications network.

Military planners at the U.S. Central Command in Tampa had calculated that it would take five months before conditions would be ripe to begin an offensive against Kabul. After the airstrikes directed by Team 555, Northern Alliance forces began their march on the capital in 20 days, and

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# U.S. Decries Abuse but Defends Interrogations; '**Stress and Duress**' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities

**BYLINE: Dana Priest** and Barton Gellman, Washington Post Staff Writers

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Deep inside the forbidden zone at the U.S.-occupied Bagram air base in Afghanistan, around the corner from the detention center and beyond the segregated clandestine military units, sits a cluster of metal shipping containers protected by a triple layer of concertina wire. The containers hold the most valuable prizes in the war on terrorism -- captured al Qaeda operatives and Taliban commanders.

Those who refuse to cooperate inside this secret CIA interrogation center are sometimes kept standing or kneeling for hours, in black hoods or spray-painted goggles, according to intelligence specialists familiar with CIA interrogation methods. At times they are held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights -- subject to what are known as "**stress and duress**" techniques.

Those who cooperate are rewarded with creature comforts, interrogators whose methods include feigned friendship, respect, cultural sensitivity and, in some cases, money. Some who do not cooperate are turned over -- "rendered," in official parlance -- to foreign intelligence services whose practice of torture has been documented by the U.S. government and human rights organizations.

In the multifaceted global war on terrorism waged by the Bush administration, one of the most opaque -- yet vital -- fronts is the detention and interrogation of terrorism suspects. U.S. officials have said little publicly about the captives' names, numbers or whereabouts, and virtually nothing about interrogation methods. But interviews with several former intelligence officials and 10 current U.S. national security officials -- including several people who witnessed the handling of prisoners -- provide insight into how the U.S. government is prosecuting this part of the war.

The picture that emerges is of a brass-knuckled quest for information, often in concert with allies of dubious human rights reputation, in which the traditional lines between right and wrong, legal and inhumane, are evolving and blurred.

While the U.S. government publicly denounces the use of torture, each of the current national security officials interviewed for this article defended the use of violence against captives as just and necessary. They expressed confidence that the American public would back their view. The CIA, which has primary responsibility for interrogations, declined to comment.

"If you don't violate someone's human rights some of the time, you probably aren't doing your job," said one official who has supervised the capture and transfer of accused terrorists. "I don't think we want to be promoting a view of zero tolerance on this. That was the whole problem for a long time with the CIA."

The off-limits patch of ground at Bagram is one of a number of secret detention centers overseas where U.S. due process does not apply, according to several U.S. and European national security officials, where the CIA undertakes or manages the interrogation of suspected terrorists. Another is Diego Garcia, a somewhat horseshoe-shaped island in the Indian Ocean that the United States leases from Britain.

U.S. officials oversee most of the interrogations, especially those of the most senior captives. In some cases, highly trained CIA officers question captives through interpreters. In others, the intelligence agency undertakes a "false flag" operation using fake decor and disguises meant to deceive a captive into thinking he is imprisoned in a country with a reputation for brutality, when, in reality, he is still in CIA hands. Sometimes, female officers conduct interrogations, a psychologically jarring experience for men reared in a conservative Muslim culture where women are never in control.

In other cases, usually involving lower-level captives, the CIA hands them to foreign intelligence services -- notably those of Jordan, Egypt and Morocco -- with a list of questions the agency wants answered. These "extraordinary renditions" are done without resort to legal process and usually involve countries with security services known for using brutal means.

According to U.S. officials, nearly 3,000 suspected al Qaeda members and their supporters have been detained worldwide since Sept. 11, 2001. About 625 are at the U.S. military's confinement facility at Guantanamo Bay, Cuba. Some officials estimated that fewer than 100 captives have been rendered to third countries. Thousands have been arrested and held with U.S. assistance in countries known for brutal treatment of prisoners, the officials said.

At a Sept. 26 joint hearing of the House and Senate intelligence committees, Cofer Black, then head of the CIA Counterterrorist Center, spoke cryptically about the agency's new forms of "operational flexibility" in dealing with suspected terrorists. "This is a very highly classified area, but I have to say that all you need to know: There was a before 9/11, and there was an after 9/11," Black said. "After 9/11 the gloves come off."

According to one official who has been directly involved in rendering captives into foreign hands, the understanding is, "We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them." Some countries are known to use mind-altering drugs such as sodium pentathol, said other officials involved in the process.

Abu Zubaida, who is believed to be the most important al Qaeda member in detention, was shot in the groin during his apprehension in Pakistan in March. National security officials suggested that Zubaida's painkillers were used selectively in the beginning of his captivity. He is now said to be cooperating, and his information has led to the apprehension of other al Qaeda members.

U.S. National Security Council spokesman Sean McCormack declined to comment earlier this week on CIA or intelligence-related matters. But, he said: "The United States is treating enemy combatants in U.S. government control, wherever held, humanely and in a manner consistent with the principles of the Third Geneva Convention of 1949."

The convention outlined the standards for treatment of prisoners of war. Suspected terrorists in CIA hands have not been accorded POW status.

Other U.S. government officials, speaking on condition of anonymity, acknowledged that interrogators deprive some captives of sleep, a practice with ambiguous status in international

law.

The U.N. High Commissioner for Human Rights, the authoritative interpreter of the international Convention Against Torture, has ruled that lengthy interrogation may incidentally and legitimately cost a prisoner sleep. But when employed for the purpose of breaking a prisoner's will, sleep deprivation "may in some cases constitute torture."

The State Department's annual human rights report routinely denounces sleep deprivation as an interrogation method. In its 2001 report on Turkey, Israel and Jordan, all U.S. allies, the department listed sleep deprivation among often-used alleged torture techniques.

U.S. officials who defend the renditions say the prisoners are sent to these third countries not because of their coercive questioning techniques, but because of their cultural affinity with the captives. Besides being illegal, they said, torture produces unreliable information from people who are desperate to stop the pain. They look to foreign allies more because their intelligence services can develop a culture of intimacy that Americans cannot. They may use interrogators who speak the captive's Arabic dialect and often use the prospects of shame and the reputation of the captive's family to goad the captive into talking.

In a speech on Dec. 11, CIA director George J. Tenet said that interrogations overseas have yielded significant returns recently. He calculated that worldwide efforts to capture or kill terrorists had eliminated about one-third of the al Qaeda leadership. "Almost half of our successes against senior al Qaeda members has come in recent months," he said.

Many of these successes have come as a result of information gained during interrogations. The capture of al Qaeda leaders Ramzi Binalshibh in Pakistan, Omar al-Faruq in Indonesia, Abd al-Rahim al-Nashiri in Kuwait and Muhammad al Darbi in Yemen were all partly the result of information gained during interrogations, according to U.S. intelligence and national security officials. All four remain under CIA control.

Time, rather than technique, has produced the most helpful information, several national security and intelligence officials said. Using its global computer database, the CIA is able to quickly check leads from captives in one country with information divulged by captives in another.

"We know so much more about them now than we did a year ago -- the personalities, how the networks are established, what they think are important targets, how they think we will react," said retired Army general Wayne Downing, the Bush administration's deputy national security adviser for combating terrorism until he resigned in June.

"The interrogations of Abu Zubaida drove me nuts at times," Downing said. "He and some of the others are very clever guys. At times I felt we were in a classic counter-interrogation class: They were telling us what they think we already knew. Then, what they thought we wanted to know. As they did that, they fabricated and weaved in threads that went nowhere. But, even with these ploys, we still get valuable information and they are off the street, unable to plot and coordinate future attacks."

In contrast to the detention center at Guantanamo Bay, where military lawyers, news reporters and the Red Cross received occasional access to monitor prisoner conditions and treatment, the CIA's overseas interrogation facilities are off-limits to outsiders, and often even to other government agencies. In addition to Bagram and Diego Garcia, the CIA has other secret detention centers overseas, and often uses the facilities of foreign intelligence services.

Free from the scrutiny of military lawyers steeped in the international laws of war, the CIA and its intelligence service allies have the leeway to exert physically and psychologically aggressive techniques, said national security officials and U.S. and European intelligence officers.

Although no direct evidence of mistreatment of prisoners in U.S. custody has come to light, the

prisoners are denied access to lawyers or organizations, such as the Red Cross, that could independently assess their treatment. Even their names are secret.

This month, the U.S. military announced that it had begun a criminal investigation into the handling of two prisoners who died in U.S. custody at the Bagram base. A base spokesman said autopsies found one of the detainees died of a pulmonary embolism, the other of a heart attack.

Al Qaeda suspects are seldom taken without force, and some suspects have been wounded during their capture. After apprehending suspects, U.S. take-down teams -- a mix of military special forces, FBI agents, CIA case officers and local allies -- aim to disorient and intimidate them on the way to detention facilities.

According to Americans with direct knowledge and others who have witnessed the treatment, captives are often "softened up" by MPs and U.S. Army Special Forces troops who beat them up and confine them in tiny rooms. The alleged terrorists are commonly blindfolded and thrown into walls, bound in painful positions, subjected to loud noises and deprived of sleep. The tone of intimidation and fear is the beginning, they said, of a process of piercing a prisoner's resistance.

The take-down teams often "package" prisoners for transport, fitting them with hoods and gags, and binding them to stretchers with duct tape.

Bush administration appointees and career national security officials acknowledged that, as one of them put it, "our guys may kick them around a little bit in the adrenaline of the immediate aftermath." Another said U.S. personnel are scrupulous in providing medical care to captives, adding in a deadpan voice, that "pain control [in wounded patients] is a very subjective thing."

The CIA's participation in the interrogation of rendered terrorist suspects varies from country to country.

"In some cases [involving interrogations in Saudi Arabia], we're able to observe through one-way mirrors the live investigations," said a senior U.S. official involved in Middle East security issues. "In others, we usually get summaries. We will feed questions to their investigators. They're still very much in control."

The official added: "We're not aware of any torture or even physical abuse."

Tenet acknowledged the Saudis' role in his Dec. 11 speech. "The Saudis are proving increasingly important support to our counterterrorism efforts -- from making arrests to sharing debriefing results," he said.

But Saudi Arabia is also said to withhold information that might lead the U.S. government to conclusions or policies that the Saudi royal family fears. U.S. teams, for that reason, have sometimes sent Saudi nationals to Egypt instead.

Jordan is a favored country for renditions, several U.S. officials said. The Jordanians are considered "highly professional" interrogators, which some officials said meant that they do not use torture. But the State Department's 2001 human rights report criticized Jordan and its General Intelligence Directorate for arbitrary and unlawful detentions and abuse.

"The most frequently alleged methods of torture include sleep deprivation, beatings on the soles of the feet, prolonged suspension with ropes in contorted positions and extended solitary confinement," the 2001 report noted. Jordan also is known to use prisoners' family members to induce suspects to talk.

Another significant destination for rendered suspects is Morocco, whose general intelligence service has sharply stepped up cooperation with the United States. Morocco has a documented history of torture, as well as longstanding ties to the CIA..

The State Department's human rights report says Moroccan law "prohibits torture, and the government claims that the use of torture has been discontinued; however, some members of the security forces still tortured or otherwise abused detainees."

In at least one case, U.S. operatives led the capture and transfer of an al Qaeda suspect to Syria, which for years has been near the top of U.S. lists of human rights violators and sponsors of terrorism. The German government strongly protested the move. The suspect, Mohammed Haydar Zammar, holds joint German and Syrian citizenship. It could not be learned how much of Zammar's interrogation record Syria has provided the CIA.

The Bush administration maintains a legal distance from any mistreatment that occurs overseas, officials said, by denying that torture is the intended result of its rendition policy. American teams, officials said, do no more than assist in the transfer of suspects who are wanted on criminal charges by friendly countries. But five officials acknowledged, as one of them put it, "that sometimes a friendly country can be invited to 'want' someone we grab." Then, other officials said, the foreign government will charge him with a crime of some sort.

One official who has had direct involvement in renditions said he knew they were likely to be tortured. "I . . . do it with my eyes open," he said.

According to present and former officials with firsthand knowledge, the CIA's authoritative Directorate of Operations instructions, drafted in cooperation with the general counsel, tells case officers in the field that they may not engage in, provide advice about or encourage the use of torture by cooperating intelligence services from other countries.

"Based largely on the Central American human rights experience," said Fred Hitz, former CIA inspector general, "we don't do torture, and we can't countenance torture in terms of we can't know of it." But if a country offers information gleaned from interrogations, "we can use the fruits of it."

Bush administration officials said the CIA, in practice, is using a narrow definition of what counts as "knowing" that a suspect has been tortured. "If we're not there in the room, who is to say?" said one official conversant with recent reports of renditions.

The Clinton administration pioneered the use of extraordinary rendition after the bombings of U.S. embassies in Kenya and Tanzania in 1998. But it also pressed allied intelligence services to respect lawful boundaries in interrogations.

After years of fruitless talks in Egypt, President Bill Clinton cut off funding and cooperation with the directorate of Egypt's general intelligence service, whose torture of suspects has been a perennial theme in State Department human rights reports.

"You can be sure," one Bush administration official said, "that we are not spending a lot of time on that now."

Staff writers Bob Woodward, Susan Schmidt and Douglas Farah, and correspondent Peter Finn in Berlin, contributed to this report.

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# Plan Would Let U.S. Deport Suspects To Nations That Might Torture Them

**BYLINE:** **Dana Priest** and Charles Babington, Washington Post Staff Writers

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The Bush administration is supporting a provision in the House leadership's intelligence reform bill that would allow U.S. authorities to deport certain foreigners to countries where they are likely to be tortured or abused, an action prohibited by the international laws against torture the United States signed 20 years ago.

The provision, part of the massive bill introduced Friday by House Speaker J. Dennis Hastert (R-Ill.), would apply to non-U.S. citizens who are suspected of having links to terrorist organizations but have not been tried on or convicted of any charges. Democrats tried to strike the provision in a daylong House Judiciary Committee meeting, but it survived on a party-line vote.

The provision, human rights advocates said, contradicts pledges President Bush made after the Abu Ghraib prisoner-abuse scandal erupted this spring that the United States would stand behind the U.N. Convention Against Torture. Hastert spokesman John Feehery said the Justice Department "really wants and supports" the provision.

Justice Department spokesman Mark Corallo said, "We can't comment on any specific provision, but we support those provisions that will better secure our borders and protect the American people from terrorists."

The provision is one of several items in the bill that Democrats say are unrelated to intelligence reform but Republicans say are important tools for fighting terrorists. The Senate is debating its own intelligence reform bill that does not include the provision, and the House bill is being marked up in several committees.

Human rights groups and members of Congress opposed to the provision say it could result in the torture of hundreds of people now held in the United States who could be sent to such countries as Egypt, Saudi Arabia, Yemen, Jordan and Pakistan, all of which have dubious human rights records.

Supporters say the measure would provide a much-needed change to U.S. laws.

"Our laws are not up to date with the war we're fighting," Feehery said. In many cases, he said, the Justice Department "can't keep [terror suspects] in detention, they can't convict them, they don't want to try them. . . . If you can't detain them indefinitely, you sure don't want them in America."

The international anti-torture law prohibited the deportation of individuals to countries where there is a reasonable expectation that they will be tortured, abused or persecuted. U.S. immigration law permits non-U.S. citizens to seek political asylum to avoid such persecution and prohibits deportation or removal to countries likely to commit torture or abuse unless the government seeks assurance the country will not do so.

In 2002, the Justice Department, in a case that has earned international condemnation, approved the expedited removal of a Syrian-born Canadian citizen, **Maher Arar**, to Syria, a country whose long record of torture has been criticized publicly by Bush.

Arar, who U.S. authorities have said they suspect of links to a terrorist group, alleges that his Syrian captors tortured him during his 375 days in prison. He disputes U.S. claims. Freed last year by Syria, he lives in Canada with his family and has never been arrested or charged with a crime by Canada or the United States.

"Is it an inconvenience if we can't send people back to torturers? Sure," said Tom Malinowski of Human Rights Watch. "But since Abu Ghraib, everyone from the president to the Defense Department to Congress has said the United States does not have a policy of torture. If this passes, we will have a policy of tolerating torture."

Under the Hastert bill, U.S. authorities could send an immigrant to any country, regardless of the likelihood of torture or abuse. The measure would shift to the deportee the burden of proving "by clear and convincing evidence that he or she would be tortured" -- a burden that human rights activists say is impossible to satisfy. It would bar a U.S. court from reviewing the regulations, which would fall under the secretary of homeland security.

The provision would apply retroactively, to people now in detention and those who may have already been secretly deported under classified procedures to countries with well-documented histories of torture and human rights violations.

It also would allow U.S. authorities to deport foreigners convicted of any felony or suspected of having links to terrorist groups to any country -- even somewhere that is not a person's home country or place of birth, contrary to current practice. The CIA already has such authority, under a secret presidential finding first signed by President Bill Clinton and expanded by Bush after Sept. 11, 2001. The CIA has taken an unknown number of suspected terrorists apprehended abroad to third countries for interrogation.

Also in the Judiciary Committee meeting, GOP members defeated other Democratic-sponsored attempts to strike provisions that would make it easier to deport or track terrorist suspects.

GOP leaders scrambled to appease disgruntled Republicans who said the chamber was moving too quickly -- and ignoring rank-and-file members -- in pushing the 335-page bill.

As several House committees addressed various portions of the bill, Republicans generally defeated Democratic efforts to sidetrack it. But in some cases, GOP members were the sharpest critics.

In the intelligence committee, three senior Republicans opened a daylong markup by attacking the bill. "It is a cobbled-together bill," said Rep. Ray LaHood (R-Ill.). "It is a rush to judgment."

Rep. Randy "Duke" Cunningham (R-Calif.) said, "We're fools to rush forward and pass something that has been worked on for only so short a time." Rep. Jim Gibbons (R-Nev.) said, "This Congress appears to be rushing to implement reform on an election-year timetable."

With House Majority Whip Roy Blunt (R-Mo.) taking the unusual step of temporarily filling a committee vacancy for the day, members soothed tempers, in part by accepting a handful of amendments. One, offered by Gibbons and backed by the panel's Democrats, would authorize a

newly appointed national intelligence director to shift unlimited amounts of money from one purpose to another within agencies under the director's purview.

Hours later, Gibbons voted to send the amended bill to the House floor. Cunningham did, too, saying he had learned that the House Appropriations Committee was content with the bill's spending provisions. Most Democrats also endorsed the bill. Only two members of the intelligence committee -- LaHood and Rep. Rush D. Holt (D-N.J.) -- voted against the measure.

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May 11, 2004 Tuesday
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# Secret World of U.S. Interrogation; Long History of Tactics in Overseas Prisons Is Coming to Light

**BYLINE: Dana Priest** and Joe Stephens, Washington Post Staff Writers

**SECTION:** A Section; A01

**LENGTH:** 3005 words

Last of three articles

In Afghanistan, the CIA's secret U.S. interrogation center in Kabul is known as "The Pit," named for its despairing conditions. In Iraq, the most important prisoners are kept in a huge hangar near the runway at Baghdad International Airport, say U.S. government officials, counterterrorism experts and others. In Qatar, U.S. forces have been ferrying some Iraqi prisoners to a remote jail on the gigantic U.S. air base in the desert.

The Abu Ghraib prison in Iraq, where a unit of U.S. soldiers abused prisoners, is just the largest and suddenly most notorious in a worldwide constellation of detention centers -- many of them secret and all off-limits to public scrutiny -- that the U.S. military and CIA have operated in the name of counterterrorism or counterinsurgency operations since the Sept. 11, 2001, attacks.

These prisons and jails are sometimes as small as shipping containers and as large as the sprawling Guantanamo Bay complex in Cuba. They are part of an elaborate CIA and military infrastructure whose purpose is to hold suspected terrorists or insurgents for interrogation and safekeeping while avoiding U.S. or international court systems, where proceedings and evidence against the accused would be aired in public. Some are even held by foreign governments at the informal request of the United States.

"The number of people who have been detained in the Arab world for the sake of America is much more than in Guantanamo Bay. Really, thousands," said Najeeb Nuaimi, a former justice minister of Qatar who is representing the families of dozens of prisoners.

The largely hidden array includes three systems that only rarely overlap: the Pentagon-run network of prisons, jails and holding facilities in Iraq, Afghanistan, Guantanamo and elsewhere; small and secret CIA-run facilities where top al Qaeda and other figures are kept; and interrogation rooms of foreign intelligence services -- some with documented records of torture -- to which the U.S. government delivers or "renders" mid- or low-level terrorism suspects for questioning.

All told, more than 9,000 people are held by U.S. authorities overseas, according to Pentagon figures and estimates by intelligence experts, the vast majority under military control. The detainees have no conventional legal rights: no access to a lawyer; no chance for an impartial

hearing; and, at least in the case of prisoners held in cellblock 1A at Abu Ghraib, no apparent guarantee of humane treatment accorded prisoners of war under the Geneva Conventions or civilians in U.S. jails.

Although some of those held by the military in Iraq, Afghanistan and Guantanamo have had visits by the International Committee of the Red Cross, some of the CIA's detainees have, in effect, disappeared, according to interviews with former and current national security officials and to the Army's report of abuses at Abu Ghraib.

The CIA's "ghost detainees," as they were called by members of the 800th MP Brigade, were routinely held by the soldier-guards at Abu Ghraib "without accounting for them, knowing their identities, or even the reason for their detention," the report says. These phantom captives were "moved around within the facility to hide them" from Red Cross teams, a tactic that was "deceptive, contrary to Army doctrine, and in violation of international law."

CIA employees are under investigation by the Justice Department and the CIA inspector general's office in connection with the death of three captives in the past six months, two who died while under interrogation in Iraq, and a third who was being questioned by a CIA contract interrogator in Afghanistan. A CIA spokesman said the hiding of detainees was inappropriate. He declined to comment further.

None of the arrangements that permit U.S. personnel to kidnap, transport, interrogate and hold foreigners are ad hoc or unauthorized, including the so-called renditions. "People tend to regard it as an extra-judicial kidnapping; it's not," former CIA officer Peter Probst said. "There is a long history of this. It has been done for decades. It's absolutely legal."

In fact, every aspect of this new universe -- including maintenance of covert airlines to fly prisoners from place to place, interrogation rules and the legal justification for holding foreigners without due process afforded most U.S. citizens -- has been developed by military or CIA lawyers, vetted by Justice Department's office of legal counsel and, depending on the particular issue, approved by White House general counsel's office or the president himself.

In some cases, such as determining whether a U.S. citizen should be designated an enemy combatant who can be held without charges, the president makes the final decision, said Alberto R. Gonzales, counsel to the president, in a Feb. 24 speech to the American Bar Association's Standing Committee on Law and National Security.

Critics of this kind of detention and treatment, Gonzales said, "assumed that there was little or no analysis -- legal or otherwise -- behind the decision to detain a particular person as enemy combatant."

On the contrary, the administration has applied the law of war, he said. "Under these rules, captured enemy combatants, whether soldiers or saboteurs, may be detained for the duration of hostilities."

Because most of the directives and guidelines on these issues are classified, former and current military and intelligence officials who described them to The Washington Post would do so only on the condition that they not be identified.

Along with other CIA and military efforts to disrupt terrorist plots and break up al Qaeda's financial networks, administration officials argue that the interrogations are a key component of their global counterterrorism strategy and counterinsurgency operations in Iraq. As the CIA's deputy director, John McLaughlin, recently told the commission investigating the Sept. 11 attacks: "The country, with all its capabilities, is now much more orchestrated into an offensive mix that is relentless."

Abu Ghraib -- where photographs were taken that have enraged the Arab world and rocked U.S.

political and military leadership -- held 6,000 to 7,000 detainees at the time of the documented abuse. Today, it and other sites in Iraq hold more than 8,000 prisoners, U.S. and coalition officials said. They range from those believed to have played key roles in the insurgency to some who are held on suspicion of petty crimes.

Until the current scandal cast some hazy light, little has been publicly known about the Iraq detention sites, their locations and who was being held there. That has been a source of continuing frustration for international monitoring groups such as New York-based Human Rights Watch, which has repeatedly sought to visit the facilities. Even the military's investigative report on abuses at Abu Ghraib remains classified, despite having become public through leaks.

Far better known has been the Defense Department's facility at Guantanamo Bay. The open-air camps there house about 600 detainees, flown in from around the world over the past two years. Secrecy there remains tight, with detainees and most of the facilities off-limits to visitors.

The U.S. Supreme Court is deciding whether detainees held there, whom the Pentagon has declared "enemy combatants" in the war against terrorism, should have access to U.S. courts.

Last week, the U.S. military acknowledged that two Guantanamo Bay guards had been disciplined in connection with use of excessive force against detainees. And U.S. defense officials confirmed the existence of a list of approved interrogation techniques, dating to April 2003, that included reversing sleep patterns, exposing prisoners to hot and cold, and "sensory assault," including use of bright lights and loud music.

The treatment of prisoners in Afghanistan has received less public attention.

The U.S. military holds 300 or so people at Bagram, north of the capital of Kabul, and in Kandahar, Jalalabad and Asadabad. Human Rights Watch estimates that at least 700 people had been released from those sites, most of them held a few weeks or less. Special Forces units also have holding centers at their firebases, including at Gardez and Khost.

In December 2002, two Afghans died in U.S. custody in Afghanistan. The U.S. military classified both as homicides. Another Afghan died in June 2003 at a detention site near Asadabad.

"Afghans detained at Bagram airbase in 2002 have described being held in detention for weeks, continuously shackled, intentionally kept awake for extended periods of time, and forced to kneel or stand in painful positions for extended periods," said a report in March by Human Rights Watch. "Some say they were kicked and beaten when arrested, or later as part of efforts to keep them awake. Some say they were doused with freezing water in the winter."

Before the U.S. military was imprisoning and interrogating people in Afghanistan and Iraq, the CIA was scooping up suspected al Qaeda leaders in such far-off places as Pakistan, Yemen and Sudan. Today, the CIA probably holds two to three dozen captives around the world, according to knowledgeable current and former officials. Among them are al Qaeda leaders Khalid Sheik Mohammed and Ramzi Binalshibh in Pakistan and Abu Zubaida. The CIA is also in charge of interrogating Saddam Hussein, who is believed to be in Baghdad.

The location of CIA interrogation centers is so sensitive that even the four leaders of the House and Senate intelligence committees, who are briefed on all covert operations, do not know them, congressional sources said. These members are given periodic reports about the captives, but several members said they do not receive information about conditions under which prisoners are held, and members have not insisted on this information. The CIA has told Congress that it does not engage in torture as a tactic of interrogation.

"There's a black hole on certain information such as location, condition under which they are held," said one congressional official who asked not to be identified. "They are told it's too sensitive."

In Afghanistan, the CIA used to conduct some interrogations in a cluster of metal shipping containers at Bagram air base protected by three layers of concertina wire. It is unclear whether that center is still open, but the CIA's main interrogation center now appears to be in Kabul, at a location nicknamed "The Pit" by agency and Special Forces operators.

"Prisoner abuse is nothing new," said one military officer who has been working closely with CIA interrogators in Afghanistan. A dozen former and current national security officials interviewed by The Washington Post in 2002, including several who had witnessed interrogations, defended the use of stressful interrogation tactics and the use of violence against detainees as just and necessary.

The CIA general counsel's office developed a new set of interrogation rules of engagement after the Sept. 11 attacks. It was vetted by the Justice Department and approved by the National Security Council's general counsel, according to U.S. intelligence officials and other U.S. officials familiar with the process. "There are very specific guidelines that are thoroughly vetted," said one U.S. official who helps oversee the process. "Everyone is on board. It's legal."

The rules call for field operators to seek approval from Washington to use "enhanced measures" -- methods that could cause temporary physical or mental pain.

U.S. intelligence officials say the CIA, contrary to the glamorized view from movies and novels, had no real interrogation specialists on hand to deal with the number of valuable suspects it captured after Sept. 11. The agency relied on analysts, psychologists and profilers. "Two and a half years later," one CIA veteran said, "we have put together a very professional, controlled, deliberate and legally rationalized approach to dealing with the Abu Zubaidas of the world."

U.S. intelligence officials say their strongest suit is not harsh interrogation techniques, but time and patience.

Much larger than the group of prisoners held by the CIA are those who have been captured and transported around the world by the CIA and other agencies of the U.S. government for interrogation by foreign intelligence services. This transnational transfer of people is a key tactic in U.S. counterterrorism operations on five continents, one that often raises the ire of foreign publics when individual cases come to light.

For example, on Jan. 17, 2002, a few hours before Bosnia's Human Rights Chamber was to order the release of five Algerians and a Yemeni for lack of evidence, Bosnian police handed them over to U.S. authorities, who flew them to Guantanamo Bay.

The Bosnian government, faced with public outcry, said it would compensate the families of the men, who were suspected of making threats to the U.S. and British embassies in Bosnia.

The same month, in Indonesia, Muhammad Saad Iqbal Madni, suspected of helping Richard C. Reid, the Briton charged with trying to detonate explosives in his shoe on an American Airlines flight, was detained by Indonesian intelligence agents based on information the CIA provided them. On Jan. 11, without a court hearing or a lawyer, he was hustled aboard an unmarked U.S.-registered Gulfstream V jet parked at a military airport in Jakarta and flown to Egypt.

It was no coincidence Madni ended up in Egypt. Egypt, Morocco, Jordan and Saudi Arabia are well-known destinations for suspected terrorists.

"A lot of people they [the U.S.] are taking to Jordan, third-country nationals," a senior Saudi official said. "They can do anything they want with them, and the U.S. can say, 'We don't have them.' "

In the past year, an unusual country joined that list of destinations: Syria.

Last year U.S. immigration authorities, with the approval of then-acting Attorney General Larry Thompson, authorized the expedited removal of **Maher Arar** to Syria, a country the U.S. government has long condemned as a chronic human rights abuser. Maher, a Syrian-born Canadian citizen, was detained at JFK International Airport in New York as he was transferring to the final leg of his flight home to Canada.

U.S. authorities say Arar has links to al Qaeda. Not wanting to return him to Canada for fear he would not be adequately followed, immigration officials took him, in chains and shackles, to a New Jersey airfield, where he was "placed on a small private jet, and flown to Washington D.C.," according to a lawsuit filed recently against the U.S. government. He was flown to Jordan, interrogated and beaten by Jordanian authorities who then turned him over to Syria, according to the lawsuit.

Arar said that for the 10 months he was in prison, he was beaten, tortured and kept in a shallow grave. After much pressure from the Canadian government and human rights activists, he was freed and has returned to Canada.

CIA Director George J. Tenet, testifying earlier this year before the commission investigating the Sept. 11 attacks, said the agency participated in more than 70 renditions in the years before the attacks. In 1999 and 2000 alone, congressional testimony shows, the CIA and FBI participated in two dozen renditions.

Christopher Kojm, a former State Department intelligence official and a staff member of the commission, explained the rendition procedure at a recent hearing: "If a terrorist suspect is outside of the United States, the CIA helps to catch and send him to the United States or a third country," he testified. "Though the FBI is often part of the process, the CIA is usually the main player, building and defining the relationships with the foreign government intelligence agencies and internal security services."

The Saudis currently are detaining and interrogating about 800 terrorism suspects, said a senior Saudi official. Their fate is largely controlled by Saudi-based joint intelligence task forces, whose members include officers from the CIA, FBI and other U.S. law enforcement agencies.

The Saudi official said his country does not participate in renditions and today holds no more than one or two people at the request of the United States. Yet much can hinge on terminology.

In some interrogations, for example, specialists from the United States and Saudi Arabia develop questions and an interrogation strategy before questioning begins, according to one person knowledgeable about the process. During interrogation, U.S. task force members watch through a two-way mirror, he said.

"Technically, the questioning is done by a Saudi citizen. But, for all practical purposes, it is done live," he said. The United States and Saudis "are not 'cooperating' anymore; we're doing it together."

He said the CIA sometimes prefers Saudi interrogation sites and other places in the Arab world because their interrogators speak a detainee's language and can exploit his religion and customs.

"As hard as it is to believe, you can't physically abuse prisoners in Saudi Arabia," the Saudi official said. "You can't beat them; you can't electrocute them."

Instead, he said, the Saudis bring radical imams to the sessions to build a rapport with detainees, who are later passed on to more moderate imams. Working in tandem with relatives of the detainees, the clerics try to convince the subjects over days or weeks that terrorism violates tenets of the Koran and could bar them from heaven.

"According to our guys, almost all of them turn," the Saudi official said. "It's like deprogramming

them. There is absolutely no need to put them through stress. It's more of a therapy."

The Saudis don't want or need to be directed by American intelligence specialists, who have difficulty understanding Arab culture and tribal relations, he said. "We know where they grew up," he said of the detainees. "We know their families. We know the furniture in their home."

Research editor Margot Williams contributed to this report.

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November 20, 2003 Thursday
Final Edition

# Man Was Deported After Syrian Assurances

**BYLINE: Dana Priest,** Washington Post Staff Writer

**SECTION:** A Section; A24

**LENGTH:** 404 words

U.S. officials said yesterday that they decided to send a Syrian-born Canadian citizen to Syria last year only after the CIA received assurances from Syria that it would not torture the man.

**Maher Arar,** recently freed from prison, said he pleaded with U.S. authorities not to send him to Syria precisely because he believed he would be tortured. Arar has said he was tortured with cables and electrical cords during his 10-month imprisonment.

U.S. law strictly prohibits sending people -- even on national security grounds -- to a country where it is likely they will be tortured. Yesterday, a Justice Department spokesman confirmed that the Syrian assurances allowed them to legally send Arar to Syria.

Syrian has said it did not torture Arar. "We welcome statements by the Syrian Embassy, as it is fully consistent with the assurances the U.S. government received prior to his removal" from the United States, the Justice Department spokesman said.

In a Nov. 7 speech, President Bush said Syria has left its people "a legacy of torture, oppression, misery and ruin." Spokesmen at the Justice Department and the CIA declined to comment on why they believed the Syrian assurances to be credible.

Arar, who holds Canadian and Syrian citizenship, was en route to Canada, where he lives, from Tunisia when he was detained on Sept. 26, 2002, at John F. Kennedy International Airport in New York because he was on a terrorism watch list. That Oct. 7, Larry D. Thompson, then acting attorney general, ordered his deportation to Syria on national security grounds.

Canadian Solicitor General Wayne Easter said publicly for the first time yesterday that Canada contributed information that led to Arar's arrest. Easter discussed the case yesterday in a meeting in Washington with Attorney General John D. Ashcroft. After the meeting, Easter told reporters: "This information didn't just come from Canada alone. The information comes from sources globally."

Arar's arrest and deportation have been heavily criticized in Canada, where government opposition leaders have demanded an investigation. Some Canadians have said the case has raised fears and outrage that a Canadian traveling through the United States could be deported to a country known for torture.

Canadian officials said last month that they did not take part in the decision to send Arar to Syria.

Correspondent Deneen L. Brown in Toronto contributed to this report.

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November 19, 2003 Wednesday
Final Edition

# Top Justice Aide Approved Sending Suspect to Syria

**BYLINE: Dana Priest,** Washington Post Staff Writer

**SECTION:** A Section; A28

**LENGTH:** 539 words

A senior Justice Department official personally approved sending a Syrian-born Canadian citizen suspected of terrorist links to Syria last year after consulting with CIA officials, according to U.S. officials.

Then-Deputy Attorney General Larry D. Thompson, in his capacity as acting attorney general, signed the highly unusual order, citing national security and declaring that to send the man, **Maher Arar,** home to Canada would be "prejudicial to the interests of the United States," according to the officials, who spoke on the condition of anonymity.

Arar, who holds dual Canadian and Syrian citizenship, was en route to Canada, where he lives, from a trip to Tunisia when he was detained on Sept. 26, 2002 by immigration officials at John F. Kennedy International Airport in New York. Arar, who was questioned at the airport because his name appeared on a government watch list, was kept in a New York jail for more than 10 days and then sent to Syria via Jordan.

One U.S. official said yesterday that when apprehended at the airport, Arar had the names of "a large number of known al Qaeda operatives, affiliates or associates" in his wallet or pockets.

While in custody in New York, Arar said, he repeatedly pleaded with U.S. officials not to send him to Syria, a country with a record of torturing prisoners that has been well documented by the State Department, because he believed he would face such treatment.

Arar, who was released last month after an aggressive campaign by Canadian officials to free him, is back in Canada. He has described in graphic detail how he was tortured with cables and electrical cords and kept in a small cell he described as a "grave" during his 10 months in prison.

The U.S. immigration law used to carry out the "expedited removal" of Arar strictly prohibits sending anyone, even on national security grounds, to a country where "it is more likely than not that they will be tortured," said a U.S. official familiar with the law applied in the Arar case.

Justice Department officials would not comment on why Thompson would have signed the order if Arar said he would be tortured in Syria and if U.S. authorities had identified him to the Syrians as an al Qaeda member.

In response to questions, a Justice Department spokesman said "the removal of Mr. Arar was accomplished after interagency consultation and in full compliance with the law and with all relevant international treaties and conventions."

Attorney General John D. Ashcroft is scheduled to meet today with his Canadian counterpart, Solicitor General Wayne Easter. The case has become a political issue in Canada, where opposition parties have accused the government of buckling to U.S. pressure. Prime Minister Jean Chretien last week officially protested Arar's treatment, and Canadian Foreign Minister Bill Graham has asked Secretary of State Colin L. Powell for an explanation.

Imad Moustafa, the charge d'affaires at the Syrian Embassy in Washington, has denied Arar was tortured. But he said Syria had no reason to imprison Arar. He said U.S. intelligence officials told their Syrian counterparts that Arar was an al Qaeda member. Syria agreed to take him as a favor and to win goodwill of the United States, he said.

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**ORGANIZATION:** AL-QAEDA (55%)

**PERSON:** JEAN CHRETIEN (50%); JOHN F KENNEDY (56%)

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November 5, 2003 Wednesday
Correction Appended
Final Edition

# Deported Terror Suspect Details Torture in Syria; Canadian's Case Called Typical of CIA

**BYLINE:** DeNeen L. Brown and **Dana Priest,** Washington Post Staff Writers

**SECTION:** A Section; A01

**LENGTH:** 1068 words

**DATELINE:** TORONTO Nov. 4

A Canadian citizen who was detained last year at John F. Kennedy ▽ International Airport in New York as a suspected terrorist said Tuesday he was secretly deported to Syria and endured 10 months of torture in a Syrian prison.

**Maher Arar,** 33, who was released last month, said at a news conference in Ottawa that he pleaded with U.S. authorities to let him continue on to Canada, where he has lived for 15 years and has a family. But instead, he was flown under U.S. guard to Jordan and handed over to Syria, where he was born. Arar denied any connection to terrorism and said he would fight to clear his name.

U.S. officials said Tuesday that Arar was deported because he had been put on a terrorist watch list after information from "multiple international intelligence agencies" linked him to terrorist groups.

Officials, speaking on condition of anonymity, said that the Arar case fits the profile of a covert CIA "extraordinary rendition" -- the practice of turning over low-level, suspected terrorists to foreign intelligence services, some of which are known to torture prisoners.

Arar's case has brought repeated apologies from the Canadian government, which says it is investigating what information the Royal Canadian Mounted Police gave to U.S. authorities. Canada's foreign minister, Bill Graham, also said he would question the Syrian ambassador about Arar's statements about torture. In an interview on CBC Radio, Imad Moustafa, the Syrian chargé d'affaires in Washington, denied that Arar had been tortured.

Arar said U.S. officials apparently based the terrorism accusation on his connection to Abdullah Almalki, another Syrian-born Canadian. Almalki is being detained by Syrian authorities, although no charges against him have been reported. Arar said he knew Almalki only casually before his detention but encountered him at the Syrian prison where both were tortured.

Arar, whose case has become a cause celebre in Canada, demanded a public inquiry. "I am not a terrorist," he said. "I am not a member of al Qaeda. I have never been to Afghanistan."

He said he was flying home to Montreal via New York on Sept. 26, 2002, from a family visit to

Tunisia.

"This is when my nightmare began," he said. "I was pulled aside by immigration and taken [away]. The police came and searched my bags. I asked to make a phone call and they would not let me." He said an FBI agent and a New York City police officer questioned him. "I was so scared," he said. "They told me I had no right to a lawyer because I was not an American citizen."

Arar said he was shackled, placed on a small jet and flown to Washington, where "a new team of people got on the plane" and took him to Amman, the capital of Jordan. Arar said U.S. officials handed him over to Jordanian authorities, who "blindfolded and chained me and put me in a van. . . . They made me bend my head down in the back seat. Then these men started beating me. Every time I tried to talk, they beat me."

Hours later, he said, he was taken to Syria and there he was forced to write that he had been to a training camp in Afghanistan. "They kept beating me, and I had to falsely confess," he said. "I was willing to confess to anything to stop the torture."

Arar said his prison cell "was like a grave, exactly like a grave. It had no light, it was three feet wide, it was six feet deep, it was seven feet high. . . . It had a metal door. There was a small opening in the ceiling. There were cats and rats up there, and from time to time, the cats peed through the opening into the cell."

Steven Watt, a human rights fellow at the Center for Constitutional Rights in Washington, said Arar's case raised questions about U.S. counterterrorism measures. "Here we have the United States involved in the removal of somebody to a country where it knows persons in custody of security agents are tortured," Watt said. "The U.S. was possibly benefiting from the fruits of that torture. I ask the question: Why wasn't he removed to Canada?"

A senior U.S. intelligence official discussed the case in terms of the secret rendition policy. There have been "a lot of rendition activities" since the Sept. 11, 2001, terrorist attacks in the United States, the official said. "We are doing a number of them, and they have been very productive."

Renditions are a legitimate option for dealing with suspected terrorists, intelligence officials argue. The U.S. government officially rejects the assertion that it knowingly sends suspects abroad to be tortured, but officials admit they sometimes do that. "The temptation is to have these folks in other hands because they have different standards," one official said. "Someone might be able to get information we can't from detainees," said another.

Syria, where use of torture during imprisonment has been documented by the State Department, maintains a secret but growing intelligence relationship with the CIA, according to intelligence experts.

"The Syrian government has provided some very useful assistance on al Qaeda in the past," said Cofer Black, former director of counterterrorism at the CIA who is now the counterterrorism coordinator at the State Department.

One senior intelligence official said Tuesday that Arar is still believed to have connections to al Qaeda. The Justice Department did not have enough evidence to detain him when he landed in the United States, the official said, and "the CIA doesn't keep people in this country."

With those limitations, and with a secret presidential "finding" authorizing the CIA to place suspects in foreign hands without due process, Arar may have been one of the people whisked overseas by the CIA.

In the early 1990s, renditions were exclusively law enforcement operations in which suspects were snatched by covert CIA or FBI teams and brought to the United States for trial or questioning. But CIA teams, working with foreign intelligence services, now capture suspected

terrorists in one country and render them to another, often after U.S. interrogators have tried to gain information from them.

Renditions are considered a covert action. Congress, which oversees the CIA, knows of only the broad authority to carry out renditions but is not informed about individual cases, according to intelligence officials.Priest reported from Washington. Staff writers John Mintz and Glenn Kessler in Washington contributed to this report.

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**LOAD-DATE:** November 5, 2003

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**CORRECTION:** A Nov. 5 article about the deportation of a Canadian citizen to Syria misstated the location of the Center for Constitutional Rights. It is based in New York.

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# Policies on Terrorism Suspects Come Under Fire; Democrats Say CIA's Covert Prisons Hurt U.S. Image; U.N. Official on Torture to Conduct Inquiry

**BYLINE: Dana Priest** and Josh White, Washington Post Staff Writers

**SECTION:** A Section; A02

**LENGTH:** 1003 words

The Bush administration's policies for holding and detaining suspected terrorists came under sharp scrutiny and criticism yesterday after disclosure that the CIA had set up covert prisons in several Eastern European democracies and other countries.

The U.N. special rapporteur on torture said he would seek more information about the covert prisons, referred to in classified documents as "black sites." Congressional Democrats and human rights groups warned that the secret system would damage the U.S. image overseas.

House Democrats said they plan to introduce a motion as early as today to endorse language in the defense spending package written by Sen. John McCain (R-Ariz.), which would bar cruel and inhuman treatment of prisoners in U.S. custody, including those in CIA hands. The motion would instruct House conferees to accept McCain's precise measure.

Rep. John P. Murtha (Pa.), ranking Democrat on the Appropriations defense subcommittee, urged the United States to adopt a doctrine of "no torture, no excuses," and said Congress needs to speak on the issue. "The United States of America and the values we reflect abhor human rights violators and uphold human rights," Murtha said in a statement.

McCain's amendment was endorsed last month by the Senate, 90 to 9, over the objections of the White House, which said it would restrict the president's ability to protect the country. The House Democrats said they already have 15 GOP supporters for their motion, and Republicans have told the White House they expect it to pass, an Appropriations Committee spokesman said.

The CIA and the White House are seeking language that would exempt prisoners held by the agency, which would include the 30 or so al Qaeda figures that sources said are being held in the black sites. Neither the White House nor the CIA will officially comment on the secret prison system, but intelligence officials have said in interviews that the arrangement is essential to gaining information about possible terrorist activities.

The Washington Post reported Wednesday that the CIA's covert detention system has at times established facilities in eight countries, including, among others, Thailand, Afghanistan and **Guantanamo Bay,** Cuba. Those facilities are now closed. The Post did not publish the names of Eastern European countries involved in the program, at the request of senior U.S. officials. They argued that doing so could damage counterterrorism efforts in those countries and elsewhere,

and could lead to retaliation by terrorists.

The governments of Russia and Bulgaria issued statements saying no such facility existed in their countries, Reuters reported. Thailand also denied hosting such a facility.

Yesterday, administration officials were buffeted by questions about the black sites.

"The fact that they are secret, assuming there are such sites, does not mean" torture would be tolerated there, national security adviser Stephen J. Hadley told reporters.

"Some people say that the test of your principles [is] what you do when no one's looking," he said. "And the president has insisted that whether it is in the public or it is in the private, the same principles will apply and the same principles will be respected. And to the extent people do not meet up, measure up to those principles, there will be accountability and responsibility."

State Department spokesman Sean McCormack also declined to talk specifically about the sites, saying, "These are difficult issues. And we have ongoing discussions on a variety of different fronts with countries around the world about these issues, because the threat from terrorism . . . is a common threat to democracies and peace-loving nations."

Human rights groups said the al Qaeda prisoners should be brought to trial, rather than held indefinitely in covert prisons in which they have no recognized legal rights. "We think these people should be prosecuted and punished fully for the murders of thousands of people," said Tom Malinowski of Human Rights Watch. "What is really clear is that this is a dead-end policy and they are close to the dead end."

John D. Rockefeller IV (D-W.Va.), vice chairman of the Senate Select Committee on Intelligence, has been pushing for more than a year to conduct a review of the CIA's interrogation and detention practices. Yesterday, he lashed out at the administration for not being more forthcoming.

"They have made it clear that anyone who suggests that oversight is needed should be labeled as unpatriotic," he said.

Manfred Nowak, the U.N. special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, said he had heard allegations of secret detention facilities sponsored by the United States, but had not heard of any in Eastern Europe before yesterday.

"Every secret place of detention is usually a higher risk for ill treatment, that's the danger of secrecy," Nowak said in a telephone interview from Austria, adding that he wants to pursue access to all U.S. detention facilities outside its territory.

Nowak and his predecessor have been trying to gain access to the U.S. military detention facility at **Guantanamo Bay** since it opened in early 2002.

Last week, the Bush administration invited U.N. experts to Guantanamo but offered a one-day visit with no ability to talk to detainees. Nowak said he would not accept because a "guided tour" would not allow him to probe allegations of abuse.

"I have many allegations that detainees have been abused while in Guantanamo," he said. "If I didn't have plenty of allegations, I wouldn't bother the United States government with trying to visit."

A senior U.S. official, speaking anonymously yesterday, said the administration is unlikely to budge: "The offer they have is the final offer. We are not prepared to open Guantanamo up to just anyone who wants to come in and talk to detainees."

Staff writers R. Jeffrey Smith and Jonathan Weisman and researcher Julie Tate contributed to this

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# Detainees Accuse Female Interrogators; Pentagon Inquiry Is Said to Confirm Muslims' Accounts of Sexual Tactics at Guantanamo

**BYLINE:** Carol D. Leonnig and **Dana Priest,** Washington Post Staff Writers

**SECTION:** A Section; A01

**LENGTH:** 1348 words

Female interrogators repeatedly used sexually suggestive tactics to try to humiliate and pry information from devout Muslim men held at the U.S. military prison at **Guantanamo Bay,** Cuba, according to a military investigation not yet public and newly declassified accounts from detainees.

The prisoners have told their lawyers, who compiled the accounts, that female interrogators regularly violated Muslim taboos about sex and contact with women. The women rubbed their bodies against the men, wore skimpy clothes in front of them, made sexually explicit remarks and touched them provocatively, at least eight detainees said in documents or through their attorneys.

A wide-ranging Pentagon investigation, which has not yet been released, generally confirms the detainees' allegations, according to a senior Defense Department official familiar with the report. While isolated accounts of such tactics have emerged in recent weeks, the new allegations and the findings of the Pentagon investigation indicate that sexually oriented tactics may have been part of the fabric of Guantanamo interrogations, especially in 2003.

The inquiry uncovered numerous instances in which female interrogators, using dye, pretended to spread menstrual blood on Muslim men, the official said. Separately, in court papers and public statements, three detainees say that women smeared them with blood.

The military investigation of U.S. detention and interrogation practices worldwide, led by Vice Adm. Albert T. Church III, confirmed one case in which an Army interrogator took off her uniform top and paraded around in a tight T-shirt to make a Guantanamo detainee uncomfortable, and other cases in which interrogators touched the detainees suggestively, the senior Pentagon official said.

The official, who spoke on the condition of anonymity because the report has not yet been made public, said the fake blood was used on Muslim men before they intended to pray, because some Muslims believe that "if a woman touches him prior to prayer, then he's dirty and can't pray." Muslim men also believe that contact with women other than their wives diminishes religious purity.

Defense Department officials said they have reprimanded two female interrogators for such

tactics. It is unclear whether military personnel, employees of other agencies or private contractors were involved.

The attorney interviews of detainees are the result of a Supreme Court decision last summer that gave the captives access to lawyers and the opportunity to challenge their incarceration in U.S. courts.

In previous documents, detainees have complained of physical abuse, including routine beatings, painful shackling, and exposure to extremes of hot and cold. Defense Secretary Donald H. Rumsfeld insisted then that detainees were treated "humanely," and Pentagon officials said terrorists were trained to fabricate torture allegations.

Some of the accounts resemble the sexual aspects of the humiliation of Iraqi prisoners at the U.S. prison at Abu Ghraib. Photographs that became public last year showed a servicewoman there holding naked prisoners on a leash and posing next to a pile of naked prisoners.

Pentagon officials said yesterday that wearing skimpy clothing or engaging in provocative touching and banter would be inappropriate interrogation techniques.

"I don't see that as being authorized by secretary of defense's approved interrogation techniques for Guantanamo," said Col. David McWilliams, a spokesman for the U.S. Southern Command in Miami, which oversees operations at **Guantanamo Bay.**

McWilliams said it is premature to comment on whether the detainee allegations are credible until a second military investigation that focuses on **Guantanamo Bay** abuse allegations is complete. The inquiry, which began in early January after the release of documents in which FBI agents said they witnessed abuse, is scheduled to be completed this month.

"That's exactly why we're doing an investigation," McWilliams said. "We're going to establish the facts and the truth."

Church's report found that interrogators used sexually oriented tactics and harassment to shock or offend Muslim prisoners, the senior Pentagon official said. The official said that the military would not condone "sexual activity" during interrogation, but that good interrogators "take initiative and are a little creative."

"They are trying to find the key that will get someone to talk to them. Using things that are culturally repulsive is okay as long as it doesn't extend to something prohibited by the Geneva Conventions."

Attorneys for detainees scoffed at the Pentagon's insistence that the military can fairly investigate its own personnel. They noted that the Defense Department last fall initially dismissed torture allegations, insisting that detainees were trained at terrorist camps to lodge false claims.

Even detainee lawyers doubted that interrogators would spread menstrual blood on prisoners when a recently released British detainee first made the allegation in early 2004. A month ago, a Pentagon spokesman confirmed it had verbally reprimanded one female interrogator who, in early 2003, had smeared red dye from a marker on a detainee's shirt and told him it was blood.

In a yet-to-be-published book, former Army translator Erik Saar said he saw a female interrogator smear red dye on a Saudi man's face, telling him it was blood. Saar's account was first reported by the Associated Press last month. And Mamdouh Habib, an Australian man released from **Guantanamo Bay** last month, said he was strapped down while a woman told him she was "menstruating" on his face.

One lawyer, Marc Falkoff, said in an interview that when a Yemeni client told him a few weeks ago about an incident involving menstrual blood, "I almost didn't even write it down." He said: "It seemed crazy, like something out of a horror movie or a John Waters film. Now it doesn't seem

ludicrous at all."

Some of the newly declassified accounts of detainees evoke scenes from a rock music video. German detainee Murat Kurnaz told his lawyer that three women in lacy bras and panties strutted into the interrogation room where he was sitting in chains. They cooed about how attractive he was and suggested "they could have some fun," he said.

When Kurnaz averted his eyes, he said, one woman sat on his lap, another rubbed her breasts against his back and massaged his chest and a third squatted near his crotch. He head-butted the woman behind him, he said, knocking her off him. All three ran out and a team of soldiers stormed in and beat him, he said.

Detainee lawyers likened the tactics to Nazis shaving the beards of orthodox Jews or artists dunking a crucifix in urine to shock Christians. "They're exploiting religious beliefs to break them down, to destroy them," said Michael Ratner of the Center for Constitutional Rights, which represents several dozen detainees. "What they're doing, it reminds me of a pornographic Web site -- it's like the fantasy of all these S&M clubs."

Falkoff said some of his clients have also been threatened with rape by male interrogators.

One soldier told another detainee, Muktar Warafi, that he had to start telling the truth or he would be raped, according to Falkoff's notes of the interview. When he left the room, another person immediately came into the room and told Warafi: "That interrogator is new and doesn't know the rules. We apologize on his behalf. Now let's talk."

Yasein Esmail, a Yemeni detainee, said he had been interrogated more than 100 times since being "kidnapped" in a marketplace in Kabul, Afghanistan, and brought to **Guantanamo Bay.** He recounted to his lawyer that when he refused to talk in one interview, a female soldier entered wearing a tight T-shirt.

"Why aren't you married?" she reportedly asked Esmail. "You are a young man and have needs. What do you like?"

Esmail said "she bent down with her breasts on the table and her legs almost touching" him. "Are you going to talk," she asked, "or are we going to do this for six hours?"

Researcher Julie Tate contributed to this report.

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# At Guantanamo, a Prison Within a Prison; CIA Has Run a Secret Facility for Some Al Qaeda Detainees, Officials Say

**BYLINE: Dana Priest** and Scott Higham, Washington Post Staff Writers

**SECTION:** A Section; A01

**LENGTH:** 1190 words

Within the heavily guarded perimeters of the Defense Department's much-discussed **Guantanamo Bay** prison in Cuba, the CIA has maintained a detention facility for valuable al Qaeda captives that has never been mentioned in public, according to military officials and several current and former intelligence officers.

The buildings used by the CIA are shrouded by high fences covered with thick green mesh plastic and ringed with floodlights, officials said. They sit within the larger Camp Echo complex, which was erected to house the Defense Department's high-value detainees and those awaiting military trials on terrorism charges.

The facility has housed detainees from Pakistan, West Africa, Yemen and other countries under the strictest secrecy, the sources said. "People are constantly leaving and coming," said one U.S. official who visited the base in recent months. It is unclear whether the facility is still in operation today. The CIA and the Defense Department declined to comment.

Most international terrorism suspects in U.S. custody are held not by the CIA but by the Defense Department at the **Guantanamo Bay** prison. They are guaranteed access to the International Committee of the Red Cross (ICRC) and, as a result of a U.S. Supreme Court ruling this year, have the right to challenge their imprisonment in federal courts.

CIA detainees, by contrast, are held under separate rules and far greater secrecy. Under a presidential directive and authorities approved by administration lawyers, the CIA is allowed to capture and hold certain classes of suspects without accounting for them in any public way and without revealing the rules for their treatment. The roster of CIA prisoners is not public, but current and former U.S. intelligence officials say the agency holds the most valuable al Qaeda leaders and many mid-level members with knowledge of the group's logistics, financing and regional operations.

The CIA facility at the **Guantanamo Bay** prison was constructed over the past year as the agency confronted one of its toughest emerging problems: where to hold terrorists for interrogations that could last for years.

During the 1990s, the CIA typically had custody of half a dozen terrorists at any time and usually kept them in foreign prisons, mostly in Egypt and Jordan. But just two months after the attacks of

Sept. 11, 2001, CIA paramilitary teams working with foreign intelligence services had arrested dozens of people thought to have knowledge of upcoming attacks on the United States.

The CIA is believed to be holding about three dozen al Qaeda leaders in undisclosed locations, U.S. national security officials say. Among them are pivotal Sept. 11 plotters Khalid Sheik Mohammed, Ramzi Binalshibh and Abu Zubaida and the leader of Southeast Asia's Islamic terrorist movement, Nurjaman Riduan Isamuddin, who is also known as Hambali.

CIA detention facilities have been located on an off-limits corner of the Bagram air base in Afghanistan, on ships at sea and on Britain's Diego Garcia island in the Indian Ocean.

Maintaining facilities in foreign countries is difficult, however, said current and former CIA officials. Binalshibh and Abu Zubalda were believed to have been taken to Thailand immediately after capture. The Thai government eventually insisted that they be transferred elsewhere.

"People are willing to help but not to hold," said one CIA veteran of counterterrorism operations.

The U.S. base at **Guantanamo Bay** thus provided the CIA with an isolated venue devoid of the sensitive international politics. But it came with strings attached.

The U.S. military, which controls the base, required the agency to register all detainees, abide by military detention standards and permit the ICRC some level of access.

"If you're going to be in my back yard, you're going to have to abide by my rules" is how one defense official explained it.

Army officials investigating the Abu Ghraib prison scandal concluded that the CIA had held "ghost detainees" at the prison, inmates who were not registered or officially acknowledged, a violation of military rules.

Asked about the arrangement with the CIA at **Guantanamo Bay,** Pentagon spokesman Bryan Whitman said he could not comment on operations of other agencies. "As we have stated since the beginning of detention operations at Guantanamo, the ICRC has access to detainees at Guantanamo and is permitted to meet with them, consistent with military necessity," Whitman said in a statement. Pentagon policy "is that all [Defense] detainees, including those at Guantanamo, are treated humanely, and in accordance with applicable law," the statement continued.

One U.S. official knowledgeable about the arrangement with the ICRC considered it a positive step forward. "There is no one in Gitmo who is not identified," he said, using **Guantanamo Bay's** nickname.

Red Cross officials declined to say where they had been permitted to visit, or whom. "We have been granted broad access to the camp," the ICRC said in a prepared statement. "We are confident we have visited all of the people detained at Guantanamo, in all of the places they are being detained."

The CIA has worked at **Guantanamo Bay** since the early days of the prison camps, which opened in January 2002 when the first men captured in the Afghan war were transferred to a collection of chain-link cages called Camp X-Ray. The CIA has kept an office at the Navy base and takes part in interrogation sessions of Defense Department detainees alongside FBI agents, military intelligence officers and others in what are called Tiger Teams.

Many of the interrogations have been conducted inside trailers set up within the perimeter of Camp Delta, a more permanent compound of steel cages that took the place of Camp X-Ray by the end of 2003.

The facility used by the CIA is in Camp Echo, which also houses high-value military detainees.

The camp consists of more than a dozen single-story concrete-block huts built away from the main prison complex. Each hut is divided in half. Inside is a steel cage, a restroom, and a table for interviews and interrogations, according to sources familiar with the facility.

The CIA's facility has been "off-limits to nearly everyone on the base," said one military official familiar with operations at **Guantanamo Bay.**

One of the huts at Camp Echo has been occupied by a detainee named Mohamedou Oulad Slahi, according to one source familiar with the new compound. Slahi, a Mauritanian businessman, acted as the liaison between a group of Islamic radicals living in Hamburg and al Qaeda leader Osama bin Laden, according to the Sept. 11 commission.

According to statements given by the key plotter, Binalshibh, Slahi persuaded the men to go to Afghanistan, rather than Chechnya, to fight.

He arranged their travel and for them to meet al Qaeda operatives in Pakistan, who in turn arranged a meeting between Binalshibh and bin Laden.

Slahi was arrested by secret police in Mauritania during the night on Sept. 27, 2001, members of his family told local media at the time. By December, he was in U.S. custody.

Researcher Julie Tate contributed to this report.

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Army officials investigating the Abu Ghraib prison scandal concluded that the CIA had held "ghost detainees" at the prison, inmates who were not registered or officially acknowledged, a violation of military rules.

Asked about the arrangement with the CIA at **Guantanamo Bay,** Pentagon spokesman Bryan Whitman said he could not comment on operations of other agencies. "As we have stated since the beginning of detention operations at Guantanamo, the ICRC has access to detainees at Guantanamo and is permitted to meet with them, consistent with military necessity," Whitman said in a statement. Pentagon policy "is that all [Defense] detainees, including those at Guantanamo, are treated humanely, and in accordance with applicable law," the statement continued.

One U.S. official knowledgeable about the arrangement with the ICRC considered it a positive step forward. "There is no one in Gitmo who is not identified," he said, using **Guantanamo Bay's** nickname.

Red Cross officials declined to say where they had been permitted to visit, or whom. "We have been granted broad access to the camp," the ICRC said in a prepared statement. "We are confident we have visited all of the people detained at Guantanamo, in all of the places they are being detained."

The CIA has worked at **Guantanamo Bay** since the early days of the prison camps, which opened in January 2002 when the first men captured in the Afghan war were transferred to a collection of chain-link cages called Camp X-Ray. The CIA has kept an office at the Navy base and takes part in interrogation sessions of Defense Department detainees alongside FBI agents, military intelligence officers and others in what are called Tiger Teams.

Many of the interrogations have been conducted inside trailers set up within the perimeter of Camp Delta, a more permanent compound of steel cages that took the place of Camp X-Ray by the end of 2003.

The facility used by the CIA is in Camp Echo, which also houses high-value military detainees.

The camp consists of more than a dozen single-story concrete-block huts built away from the main prison complex. Each hut is divided in half. Inside is a steel cage, a restroom, and a table for interviews and interrogations, according to sources familiar with the facility.

The CIA's facility has been "off-limits to nearly everyone on the base," said one military official familiar with operations at **Guantanamo Bay.**

One of the huts at Camp Echo has been occupied by a detainee named Mohamedou Oulad Slahi, according to one source familiar with the new compound. Slahi, a Mauritanian businessman, acted as the liaison between a group of Islamic radicals living in Hamburg and al Qaeda leader Osama bin Laden, according to the Sept. 11 commission.

According to statements given by the key plotter, Binalshibh, Slahi persuaded the men to go to Afghanistan, rather than Chechnya, to fight.

He arranged their travel and for them to meet al Qaeda operatives in Pakistan, who in turn arranged a meeting between Binalshibh and bin Laden.

Slahi was arrested by secret police in Mauritania during the night on Sept. 27, 2001, members of his family told local media at the time. By December, he was in U.S. custody.

Researcher Julie Tate contributed to this report.

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# Memo Lets CIA Take Detainees Out of Iraq; Practice Is Called Serious Breach of Geneva Conventions

**BYLINE: Dana Priest,** Washington Post Staff Writer

**SECTION:** A Section; A01

**LENGTH:** 1700 words

At the request of the CIA, the Justice Department drafted a confidential memo that authorizes the agency to transfer detainees out of Iraq for interrogation -- a practice that international legal specialists say contravenes the Geneva Conventions.

One intelligence official familiar with the operation said the CIA has used the March draft memo as legal support for secretly transporting as many as a dozen detainees out of Iraq in the last six months. The agency has concealed the detainees from the International Committee of the Red Cross and other authorities, the official said.

The draft opinion, written by the Justice Department's Office of Legal Counsel and dated March 19, 2004, refers to both Iraqi citizens and foreigners in Iraq, who the memo says are protected by the treaty. It permits the CIA to take Iraqis out of the country to be interrogated for a "brief but not indefinite period." It also says the CIA can permanently remove persons deemed to be "illegal aliens" under "local immigration law."

Some specialists in international law say the opinion amounts to a reinterpretation of one of the most basic rights of Article 49 of the Fourth Geneva Convention, which protects civilians during wartime and occupation, including insurgents who were not part of Iraq's military.

The treaty prohibits the "[I]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory . . . regardless of their motive."

The 1949 treaty notes that a violation of this particular provision constitutes a "grave breach" of the accord, and thus a "war crime" under U.S. federal law, according to a footnote in the Justice Department draft. "For these reasons," the footnote reads, "we recommend that any contemplated relocations of 'protected persons' from Iraq to facilitate interrogation be carefully evaluated for compliance with Article 49 on a case by case basis." It says that even persons removed from Iraq retain the treaty's protections, which would include humane treatment and access to international monitors.

During the war in Afghanistan, the administration ruled that al Qaeda fighters were not considered "protected persons" under the convention. Many of them were transferred out of the country to the naval base in **Guantanamo Bay,** Cuba, and elsewhere for interrogations. By contrast, the U.S. government deems former members of Saddam Hussein's Baath Party and military, as well as insurgents and other civilians in Iraq, to be protected by the Geneva Conventions.

International law experts contacted for this article described the legal reasoning contained in the Justice Department memo as unconventional and disturbing.

"The overall thrust of the Convention is to keep from moving people out of the country and out of the protection of the Convention," said former senior military attorney Scott Silliman, executive director of Duke University's Center on Law, Ethics and National Security. "The memorandum seeks to create a legal regime justifying conduct that the international community clearly considers in violation of international law and the Convention." Silliman reviewed the document at The Post's request.

The CIA, Justice Department and the author of the draft opinion, Jack L. Goldsmith, former director of the Office of Legal Counsel, declined to comment for this article.

CIA officials have not disclosed the identities or locations of its Iraq detainees to congressional oversight committees, the Defense Department or CIA investigators who are reviewing detention policy, according to two informed U.S. government officials and a confidential e-mail on the subject shown to The Washington Post.

White House officials disputed the notion that Goldsmith's interpretation of the treaty was unusual, although they did not explain why. "The Geneva Conventions are applicable to the conflict in Iraq, and our policy is to comply with the Geneva Conventions," White House spokesman Sean McCormick said.

The Office of Legal Counsel also wrote the Aug. 1, 2002, memo on torture that advised the CIA and White House that torturing al Qaeda terrorists in captivity abroad "may be justified," and that international laws against torture "may be unconstitutional if applied to interrogations" conducted in the war on terrorism. President Bush's aides repudiated that memo once it became public this June.

The Office of Legal Counsel writes legal opinions considered binding on federal agencies and departments. The March 19 document obtained by The Post is stamped "draft" and was not finalized, said one U.S. official involved in the legal deliberations. However, the memo was sent to the general counsels at the National Security Council, the CIA and the departments of State and Defense.

"The memo was a green light," an intelligence official said. "The CIA used the memo to remove other people from Iraq."

Since the Sept. 11, 2001, attacks, the CIA has used broad authority granted in a series of legal opinions and guidance from the Office of Legal Counsel and its own general counsel's office to transfer, interrogate and detain individuals suspected of terrorist activities at a series of undisclosed locations around the world.

According to current and former agency officials, the CIA has a rendition policy that has permitted the agency to transfer an unknown number of suspected terrorists captured in one country into the hands of security services in other countries whose record of human rights abuse is well documented. These individuals, as well as those at CIA detention facilities, have no access to any recognized legal process or rights.

The scandal at Abu Ghraib, and the investigations and congressional hearings that followed, forced the disclosure of the Pentagon's behind-closed-doors debate and classified rules for detentions and interrogations at **Guantanamo Bay** and in Afghanistan and Iraq. Senior defense leaders have repeatedly been called to explain and defend their policies before Congress. But the CIA's policies and practices remain shrouded in secrecy.

The only public account of CIA detainee treatment comes from soldier testimony and Defense

Department investigations of military conduct. For instance, Army Maj. Gen. Antonio M. Taguba's report on Abu Ghraib criticized the CIA practice of maintaining "ghost detainees" -- prisoners who were not officially registered and were moved around inside the prison to hide them from Red Cross teams. Taguba called the practice "deceptive, contrary to Army doctrine and in violation of international law."

Gen. Paul J. Kern, who oversaw another Army inquiry, told Congress that the number of CIA ghost detainees "is in the dozens, to perhaps up to 100."

The March 19, 2004, Justice Department memo by Goldsmith deals with a previously unknown class of people -- those removed from Iraq.

It is not clear why the CIA would feel the need to remove detainees from Iraq for interrogation. A U.S. government official who has been briefed on the CIA's detention practices said some detainees are probably taken to other countries because "that's where the agency has the people, expertise and interrogation facilities, where their people and programs are in place."

The origin of the Justice Department memo is directly related to the only publicly acknowledged ghost detainee, Hiwa Abdul Rahman Rashul, nicknamed "Triple X" by CIA and military officials.

Rashul, a suspected member of the Iraqi Al-Ansar terrorist group, was captured by Kurdish soldiers in June or July of 2003 and turned over to the CIA, which whisked him to Afghanistan for interrogation.

In October, White House counsel Alberto R. Gonzales asked the Office of Legal Counsel to write an opinion on "protected persons" in Iraq and rule on the status of Rashul, according to another U.S. government official involved in the deliberations.

Goldsmith, then head of the office, ruled that Rashul was a "protected person" under the Fourth Geneva Convention and therefore had to be brought back to Iraq, several intelligence and defense officials said.

The CIA was not happy with the decision, according to two intelligence officials. It promptly brought Rashul back and suspended any other transfers out of the country.

At the same time, when transferring Rashul back to Iraq, then-CIA Director George J. Tenet asked Defense Secretary Donald H. Rumsfeld not to give Rashul a prisoner number and to hide him from International Red Cross officials, according to an account provided by Rumsfeld during a June 17 Pentagon news conference. Rumsfeld complied.

As a "ghost detainee," Rashul became lost in the prison system for seven months.

Rumsfeld did not fully explain the reason he had complied with Tenet's request or under what legal authority he could have kept Rashul hidden for so long. "We know from our knowledge that [Tenet] has the authority to do this," he said.

Rashul, defense and intelligence officials noted, had not once been interrogated since he was returned to Iraq. His current status is unknown.

In the one-page October 2003 interim ruling that directed Rashul's return, Goldsmith also created a new category of persons in Iraq whom he said did not qualify for protection under the Geneva Conventions. They are non-Iraqis who are not members of the former Baath Party and who went to Iraq after the invasion.

After Goldsmith's ruling, the CIA and Gonzales asked the Office of Legal Counsel for a more complete legal opinion on "protected persons" in Iraq and on the legality of transferring people out of Iraq for interrogation. "That case started the CIA yammering to Justice to get a better memo," said one intelligence officer familiar with the interagency discussion.

Michael Byers, a professor and international law expert at the University of British Columbia, said that creating a legal justification for removing protected persons from Iraq "is extraordinarily disturbing."

"What they are doing is interpreting an exception into an all-encompassing right, in one of the most fundamental treaties in history," Byers said. The Geneva Convention "is as close as you get to protecting human rights in times of chaos. There's no ambiguity here."

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Final Edition

# CIA Puts Harsh Tactics On Hold; Memo on Methods Of Interrogation Had Wide Review

**BYLINE: Dana Priest,** Washington Post Staff Writer

**SECTION:** A Section; A01

**LENGTH:** 1581 words

The CIA has suspended the use of extraordinary interrogation techniques approved by the White House pending a review by Justice Department and other administration lawyers, intelligence officials said.

The "enhanced interrogation techniques," as the CIA calls them, include feigned drowning and refusal of pain medication for injuries. The tactics have been used to elicit intelligence from al Qaeda leaders such as Abu Zubaida and Khalid Sheik Mohammed.

Current and former CIA officers aware of the recent decision said the suspension reflects the CIA's fears of being accused of unsanctioned and illegal activities, as it was in the 1970s. The decision applies to CIA detention facilities, such as those around the world where the agency is interrogating al Qaeda leaders and their supporters, but not military prisons at **Guantanamo Bay,** Cuba, and elsewhere.

"Everything's on hold," said a former senior CIA official aware of the agency's decision. "The whole thing has been stopped until we sort out whether we are sure we're on legal ground." A CIA spokesman declined to comment on the issue.

CIA interrogations will continue but without the suspended techniques, which include feigning suffocation, "stress positions," light and noise bombardment, sleep deprivation, and making captives think they are being interrogated by another government.

The suspension is the latest fallout from the abuse scandal at Abu Ghraib prison in Iraq, and is related to the White House decision, announced Tuesday, to review and rewrite sections of an Aug. 1, 2002, Justice Department opinion on interrogations that said torture might be justified in some cases.

Although the White House repudiated the memo Tuesday as the work of a small group of lawyers at the Justice Department, administration officials now confirm it was vetted by a larger number of officials, including lawyers at the National Security Council, the White House counsel's office and Vice President Cheney's office.

The memorandum was drafted by the Justice Department's Office of Legal Counsel to help the CIA determine how aggressive its interrogators could be during sessions with suspected al Qaeda members. The legal opinion was signed by Jay S. Bybee, then head of the office and now a federal judge. The office consists mainly of political appointees and is considered the executive

branch agencies' legal adviser. Memos signed by the head of the office are given the weight of a binding legal opinion.

A Justice Department official said Tuesday at a briefing that the office went "beyond what was asked for," but other lawyers and administration officials said the memo was approved by the department's criminal division and by the office of Attorney General John D. Ashcroft.

In addition, Timothy E. Flanigan -- then deputy White House counsel -- discussed a draft of the document with lawyers at the Office of Legal Counsel before it was finalized, the officials said. David S. Addington, Cheney's counsel, also weighed in with remarks during at least one meeting he held with Justice lawyers involved with writing the opinion. He was particularly concerned, sources said, that the opinion include a clear-cut section on the president's authority.

That section of the memo has become among the most controversial within the legal community that has analyzed the opinion since it was made public by The Washington Post. During Tuesday's briefing, White House counsel Alberto R. Gonzales called the commander in chief section "unnecessary."

The Justice Department, he said, "will make a decision as to whether or not that is something that should continue to remain in the opinion." Justice Department officials said it would be scrapped.

The commander in chief section of the opinion said laws prohibiting torture do "not apply to the President's detention and interrogation of enemy combatants" in his role as commander in chief. Congress, which has signed international laws prohibiting torture, "may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield," according to the August memorandum.

Another element of the opinion criticized by outside lawyers is that it defines torture as pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." That standard would allow a variety of tactics that would be considered cruel and inhumane under international law, legal experts have said.

At a briefing Tuesday, Gonzales declined to answer repeated questions about how the legal opinion, or the upcoming review of it, affected the CIA. But, he added, "As far as I'm told, every interrogation technique that has been authorized throughout the government is lawful and does not constitute torture."

Asked yesterday about the memo's circulation to a wider group of officials than previously known, White House spokeswoman Erin Healy replied in an e-mail: "It would not be uncommon for the Department of Justice to discuss issues with lawyers throughout the administration. Regardless, the President's policy is very clear. He expects detainees to be treated in a manner consistent with our laws, treaties and values. The President has spoken out against torture, he has never authorized it, nor will he. As we have said, portions of the memo are overbroad and the Department of Justice is reviewing it."

The legal debate over CIA interrogation techniques had its origins in the battlefields of Afghanistan, secret counterterrorism operations in Pakistan and in President Bush's decision to use unconventional tools in going after al Qaeda.

The interrogation methods were approved by Justice Department and National Security Council lawyers in 2002, briefed to key congressional leaders and required the authorization of CIA Director George J. Tenet for use, according to intelligence officials and other government officials with knowledge of the secret decision-making process.

When the CIA and the military "started capturing al Qaeda in Afghanistan, they had no interrogators, no special rules and no place to put them," said a senior Marine officer involved in

detainee procedures. The FBI, which had the only full cadre of professional interrogators from its work with criminal networks in the United States, took the lead in questioning detainees.

But on Nov. 11, 2001, a senior al Qaeda operative who ran the Khaldan paramilitary camp in Afghanistan was captured by Pakistani forces and turned over to U.S. military forces in January 2002. The capture of Ibn al-Shaykh al-Libi, a Libyan, sparked the first real debate over interrogations. The CIA wanted to use a range of methods, including threatening his life and family.

But the FBI had never authorized such methods. The bureau wanted to preserve the purity of interrogations so they could be used as evidence in court cases.

Al-Libi provided the CIA with intelligence about an alleged plot to blow up the U.S. Embassy in Yemen with a truck bomb and pointed officials in the direction of Abu Zubaida, a top al Qaeda leader known to have been involved with the Sept. 11 plot.

In March 2002, Abu Zubaida was captured, and the interrogation debate between the CIA and FBI began anew. This time, when FBI Director Robert S. Mueller III decided to withhold FBI involvement, it was a signal that the tug of war was over. "Once the CIA was given the green light . . . they had the lead role," said a senior FBI counterterrorism official.

Abu Zubaida was shot in the groin during his apprehension in Pakistan. U.S. national security officials have suggested that painkillers were used selectively in the beginning of his captivity until he agreed to cooperate more fully. His information led to the apprehension of other al Qaeda members, including Ramzi Binalshibh, also in Pakistan. The capture of Binalshibh and other al Qaeda leaders -- Omar al-Faruq in Indonesia, Rahim al-Nashiri in Kuwait and Muhammad al Darbi in Yemen -- were all partly the result of information gained during interrogations, according to U.S. intelligence and national security officials. All four remain under CIA control.

A former senior Justice Department official said interrogation techniques for "high-value targets" were reviewed and approved on a case-by-case basis, based partly on what strategies would work best on specific detainees. Justice lawyers suggested some limitations that were adopted, the former official said.

The former official, who spoke on the condition of anonymity because of the sensitivity of the issue, said the administration concluded that techniques did not amount to torture if they did not produce significant physical harm or injury. However, interrogators were allowed to trick the detainees into thinking they might be harmed or instructed to endure unpleasant physical tasks, such as being forced to stand or squat in stress positions.

"Clearly, that is not considered torture," the former Justice official argued. "It might be unpleasant and it might offend our sensibilities in most situations, but in these situations they were necessary and productive."

At the same time, the former official said, "we never had a situation where we said, 'You can do anything you want to.' We never, ever did that. We were aggressive, but our people were very scholarly and lawyerlike."

Staff writers John Mintz and Dan Eggen contributed to this report.

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June 24, 2004 Thursday
Final Edition

# U.S. Struggled Over How Far to Push Tactics; Documents Show Back-and-Forth on Interrogation Policy

**BYLINE: Dana Priest** and Bradley Graham, Washington Post Staff Writers

**SECTION:** A Section; A01

**LENGTH:** 1881 words

Newly released documents and interviews portray the civilian leadership at the Pentagon as urgently concerned that al Qaeda and Taliban detainees might have information that could prevent terrorist attacks and as searching intently for effective and "exceptional" interrogation techniques that would pass legal muster.

Defense Secretary Donald H. Rumsfeld and his senior aides emerge as central players in the government's struggle over nearly three years to decide how far it could go to extract information from those captured in Afghanistan and Iraq and others imprisoned at **Guantanamo Bay,** Cuba.

The result, seen in the documents and in the officials' statements, is a trail of fitful ad hoc policymaking in which interrogation tactics were authorized for a time, then rescinded or modified after the Pentagon's lawyers or others raised legal, ethical or practical objections. Some practices authorized in the field were pulled back at the Pentagon level, and decisions on how to treat detainees were sometimes made case by case.

Rumsfeld, for example, approved in December 2002 a range of severe methods including the stripping of prisoners at Guantanamo, and using dogs to frighten them. He later rescinded those tactics and signed off on a shorter list of "exceptional techniques" suggested by a Pentagon working group in 2003, even though the panel pointed out that, historically, the U.S. military had rejected the use of force in interrogations. "Army interrogation experts view the use of force as an inferior technique that yields information of questionable quality," and distorts the behavior of those being questioned, the group report noted.

Although the White House this week repudiated a Justice Department opinion that torture might be legally defensible, Pentagon general counsel William J. Haynes II in 2003 forced the Pentagon working group to use it as its legal guidepost. He did so over objections from the top lawyers of every military service, who found the legal judgments to be extreme and wrong-headed, according to several military lawyers and memos outlining the debate that were summarized for The Washington Post.

In Iraq, where White House and Pentagon lawyers say all prisoners are protected by the Geneva Conventions, Rumsfeld agreed to hide an Iraqi captive from the International Committee of the Red Cross because, he said, CIA Director George J. Tenet asked him to. Legal experts call it a clear violation of the conventions. "A request was made to do that, and we did," Rumsfeld said last week, even as his deputy general counsel, Daniel J. Dell'Orto, acknowledged from the same podium that "we should have registered him much sooner than we did."

Rumsfeld played a direct role in setting policies for detainee treatment in Afghanistan and Guantanamo, according to a list of Defense Department memos related to **Guantanamo Bay** obtained by The Post. He signed seven orders from January 2002 to January 2003 establishing the interrogation center, placing the Army in charge, allowing access by the Red Cross and foreign intelligence officials, and even deciding how detainee mail would be handled.

Unlike the CIA, which vetted and won approval from the Justice Department and National Security Council for its aggressive interrogation tactics after Sept. 11, 2001, the Pentagon has worked largely on its own in promulgating new questioning methods.

The White House and Justice Department were "completely uninvolved with" reviewing the interrogation rules in Afghanistan and Iraq, said a senior administration official involved in the process.

The Pentagon's chief spokesman, Lawrence T. DiRita, portrayed Rumsfeld as largely responding to requests from commanders and interrogators in the field rather than pushing a certain interrogation policy. "These things tended to come up through legal channels," he said in an interview.

Part of the Pentagon leadership's drive for more leeway in interrogations can be traced to a historic change during Rumsfeld's tenure: the military's dramatically enhanced role in collecting and analyzing intelligence that can be used to thwart terrorist networks worldwide. To accomplish this, Rumsfeld has begun an unprecedented drive to build a Pentagon-based human intelligence apparatus that could one day rival the CIA's clandestine case officer program.

This intelligence-gathering mission trumps most other priorities, including the desire to bring alleged wrongdoers to trial for their role in terrorist plots.

As Rumsfeld explained it in February to the Greater Miami Chamber of Commerce: "What we think about is keeping them off the battlefield so they can't go out and kill more people, immediately interrogating them so we can find out what they know that can prevent future acts of terror against our country . . . and only last is the issue of a crime and some sort of a process that would make a judgment about that crime."

The debate over tactics at Guantanamo appears to have begun in December 2002 when two Navy interrogators heard young military intelligence personnel talking about using techniques that they described to their superiors as "repulsive and potentially illegal."

Navy general counsel Alberto J. Mora brought the issue to the attention of Haynes. Mora's appeals were ignored, however, until he threatened to put his concerns in writing for Haynes, several senior Pentagon officials said. Mora's questions led to the discovery that among the list of "counter-resistance strategies" at Guantanamo were such tactics as using scenarios "designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family," according to an October 2002 memo, and wrapping detainees in wet towels or dripping water on them to make them believe they would suffocate.

Lt. Col. Diane E. Beaver, the legal counsel at Guantanamo then, ruled that those and other techniques -- including 20-hour interrogations, light and sound assaults, stress positions, exposure to cold weather and water -- were legal. She said they could be used with proper oversight and training of interrogators, as long as "there is an important governmental objective, and it is not done for the purpose of causing harm or with the intent to cause prolonged mental suffering."

Interrogators at the detention facilities were particularly interested in using the techniques against two prisoners -- one of them Mohamed al Qahtani, a Saudi detainee who some officials believed may have been the planned 20th hijacker on Sept. 11. Both detainees were considered

to have important information about potential future terrorist operations, defense officials have said.

Maj. Gen. Michael Dunlavey, the commander of Guantanamo, agreed, and sent the list of tactics to Gen. James T. Hill, head of the U.S. Southern Command, for approval.

Hill was not as convinced, and wondered in a memo about the legality of some of the techniques. He asked Gen. Richard B. Myers, chairman of the Joint Chiefs of Staff, for guidance. In December, Rumsfeld approved the use of dogs and stripping, but threw out other controversial items.

Rumsfeld also set up a working group of military lawyers and others to deliberate over the range of techniques that might be useful and appropriate. The group came up with 35 techniques. Among the most severe were 20-hour interrogations, face slapping, stripping detainees to create "a feeling of helplessness and dependence," and using dogs to increase anxiety.

The president's directive in February 2002 that ordered U.S. forces to treat al Qaeda and Taliban detainees humanely and consistent with the Geneva Conventions does contain a loophole phrase: "to the extent appropriate and consistent with military necessity."

The working group's report discussed when the "military necessity" exception might be invoked, citing two factors. One was when government officials felt certain that a particular detainee had information needed to prevent an attack. The other factor was a likelihood that a terrorist attack was about to occur and the attack's potential scale.

But the report also noted that "military courts have treated the necessity defense with disfavor and in fact, some have refused to accept necessity as a permissible defense." The rejections have come from judges who objected to the notion of weighing one evil against another, or who feared that acceptance of the necessity argument would open the door to "private moral codes" substituting for the rule of law, the report said.

Other cautionary flags were raised as well. The report warned that use of exceptional techniques could have "adverse effects" on the "culture and self-image" of the armed forces, recalling the damage done in the past by "perceived law of war violations."

It argued that use of such tactics in some cases but not others could create uncertainty among interrogators about the appropriate limits for interrogators. It also noted that, if the tactics became public, the disclosure could undermine confidence in the war on terrorism and in the military tribunal process that was developed for putting detainees on trial.

Rumsfeld eventually pared the list of 35 methods to 24. Most were part of standard military doctrine. Seven, however, went beyond that, including: removing a detainee from the standard interrogation setting and putting him in a less comfortable room; replacing hot rations with cold food or military Meals Ready to Eat; adjusting the temperature to uncomfortable levels or introducing an unpleasant smell; reversing sleep cycles from night to day; deceiving detainees into thinking they were being questioned by people from a country other than the United States.

"The secretary has placed great stock in the legal reviews that have taken place at every level, and has been persuaded each time that he has had to make decisions, that there were sufficient legal reviews along the way," DiRita said.

A suspected Iraqi member of the terrorist group Al Ansar did not receive such a thorough legal review, defense officials said. The man -- identified by U.S. News & World Report as Hiwa AbdulRahman Rashul -- was picked up by Kurdish soldiers in June or July of 2003 and taken outside Iraq by the CIA for interrogation. In October, the CIA's general counsel told the CIA's directorate of operations that it had to bring the man back to Iraq, since all Iraqi detainees were to be accorded treatment under the Geneva Conventions.

Tenet asked Rumsfeld not to give the prisoner a number and to hide him from international Red Cross officials. He became lost in the system for seven months and was not interrogated by CIA or military officials during that time.

In his investigation into the abuse of detainees at Iraq's Abu Ghraib prison, Army Maj. Gen. Antonio M. Taguba had criticized the CIA practice of maintaining such "ghost detainees" and called the practice "deceptive, contrary to Army doctrine and in violation of international law."

Rumsfeld was asked at a news conference last week, "How is this case different from what Taguba was talking about, the ghost detainees?"

"It is just different, that's all," Rumsfeld replied.

"But can you explain how and why?"

"I can't."

Staff writers Mike Allen and R. Jeffrey Smith contributed to this report.

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# Guantanamo List Details Approved Interrogation Methods

**BYLINE: Dana Priest** and Bradley Graham, Washington Post Staff Writers

**SECTION:** A Section; A13

**LENGTH:** 909 words

A still-classified list of 24 interrogation methods approved for use on **Guantanamo Bay** detainees includes placing prisoners in uncomfortable interrogation cells and deceiving them into thinking they are in the hands of Middle East interrogators who knew all about their culture, a U.S. government official said.

The list, approved April 16, 2003, after debate between Pentagon lawyers and political appointees, also allows interrogators to give uncooperative prisoners food that is cold or less palatable and to isolate them from their peers, the official said.

The existence of the Guantanamo list was previously known, and a few of its methods have been cited in The Washington Post, including allowing interrogators to subject detainees to irritatingly hot or cold temperatures and to reverse their normal sleep patterns. But the Pentagon has refused to release the list, citing its classified status, and most of the methods have been unknown until now.

The Guantanamo techniques -- including seven that go beyond standard U.S. military doctrine -- appeared on an unofficial list drawn up by an Army captain and posted on a wall of the Abu Ghraib prison outside Baghdad for use by interrogators there.

But the Guantanamo list does not include some of the more severe methods available to interrogators in Iraq if they got proper approval, including forcing detainees to sit or stand in stressful positions, using sleep or sensory deprivation, and using military dogs to intimidate. Nor do the Guantanamo methods approach the definitions of torture contained in recently revealed Justice Department and Pentagon legal reviews that argued such measures might be justified in certain circumstances.

Unlike in Iraq, where prisoners were accorded unambiguous prisoner-of-war status, prisoners in Guantanamo were given a newly designated "unlawful enemy combatants." They were suspected al Qaeda and Taliban fighters, captured on the Afghanistan battlefield. President Bush said they did not deserve prisoner of war status, but he ordered the military to treat them in accordance with the Geneva Conventions.

Pentagon spokesman Bryan Whitman declined to comment on specific interrogation techniques. Given that the detainees were believed to have intelligence about ongoing threats to the United States, Whitman said, "It was appropriate to ask the question: Should there be something else we should be doing to learn about potential attacks in the making?"

In fact, on Dec. 2, 2002, Defense Secretary Donald H. Rumsfeld approved a set of more

aggressive interrogation methods to be used on Mohamed al Qahtani, a Saudi detainee who some officials believed may have been the planned 20th hijacker in the Sept. 11, 2001, attacks. A naval psychologist at the base protested the use of some techniques meant to humiliate prisoners and sought help from the Navy's top civilian lawyer, Alberto J. Mora, to stop them, according to three defense officials knowledgeable about the debate.

Mora is the Navy's general counsel. Although previous reports have highlighted the concerns of senior military lawyers about employing more severe interrogation measures, the disclosure of Mora's role reveals that the worries extended to some high-ranking civilians in the Defense Department as well. Mora declined a request to be interviewed.

"The Navy's general counsel was the real hero," said one senior military lawyer who participated in the discussions.

The techniques approved by Rumsfeld were suspended Jan. 15, 2003, "out of concern for their effectiveness or appropriateness," Whitman said.

Rumsfeld then asked a working group of lawyers, intelligence officials and representatives of the Office of Special Operations and Low-Intensity Conflict to come up with permanent interrogation guidelines for Guantanamo. They looked at 35 techniques, including covering a suspect with wet towels to simulate drowning, and stripping detainees. Only 24 techniques survived, the result of a rancorous debate.

Seven of those approved techniques are not included in U.S. military doctrine, and are listed as: "change of scenery up; change of scenery down; dietary manipulation; environmental manipulation; sleep adjustment (reversal) ; isolation for 30 days"; and a technique known as "false flag," or deceiving a detainee into believing he is being interrogated by someone from another country.

The other 17 techniques are approved in standard military doctrine and carry these names: direct questioning; incentive/removal of incentive; emotional love/hate; fear up/harsh; fear up/mild; reduced fear; pride and ego up and down; futility; "we know all"; establish your identity; repetition; file and dossier; good cop/bad cop; rapid fire; and silence.

Four of the tactics required interrogators to notify commanders in advance of their use. They are: isolating a detainee from peers; pride and ego up or down, which means attacking someone's personal worth and sense of pride; and "fear up/harsh," in which interrogators could yell at prisoners, throw things around the interrogation room and convince a detainee that he has something to fear.

Rumsfeld's working group also considered a legal analysis by Pentagon and other government lawyers that said torture of detainees may be legally justifiable in some circumstances. But the 24 techniques approved by Rumsfeld were far less aggressive and severe than the types of methods contemplated in the legal review.

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# Memo Offered Justification for Use of Torture; Justice Dept. Gave Advice in 2002

**BYLINE:** **Dana Priest** and R. Jeffrey Smith, Washington Post Staff Writers

**SECTION:** A Section; A01

**LENGTH:** 1699 words

In August 2002, the Justice Department advised the White House that torturing al Qaeda terrorists in captivity abroad "may be justified," and that international laws against torture "may be unconstitutional if applied to interrogations" conducted in President Bush 's war on terrorism, according to a newly obtained memo.

If a government employee were to torture a suspect in captivity, "he would be doing so in order to prevent further attacks on the United States by the Al Qaeda terrorist network," said the memo, from the Justice Department's office of legal counsel, written in response to a CIA request for legal guidance. It added that arguments centering on "necessity and self-defense could provide justifications that would eliminate any criminal liability" later.

The memo seems to counter the pre-Sept. 11, 2001, assumption that U.S. government personnel would never be permitted to torture captives. It was offered after the CIA began detaining and interrogating suspected al Qaeda leaders in Afghanistan and elsewhere in the wake of the attacks, according to government officials familiar with the document.

The legal reasoning in the 2002 memo, which covered treatment of al Qaeda detainees in CIA custody, was later used in a March 2003 report by Pentagon lawyers assessing interrogation rules governing the Defense Department's detention center at **Guantanamo Bay,** Cuba. At that time, Defense Secretary Donald H. Rumsfeld had asked the lawyers to examine the logistical, policy and legal issues associated with interrogation techniques.

Bush administration officials say flatly that, despite the discussion of legal issues in the two memos, it has abided by international conventions barring torture, and that detainees at Guantanamo and elsewhere have been treated humanely, except in the cases of abuse at Abu Ghraib prison in Iraq for which seven military police soldiers have been charged.

Still, the 2002 and 2003 memos reflect the Bush administration's desire to explore the limits on how far it could legally go in aggressively interrogating foreigners suspected of terrorism or of having information that could thwart future attacks.

In the 2002 memo, written for the CIA and addressed to White House Counsel Alberto R. Gonzales, the Justice Department defined torture in a much narrower way, for example, than does the U.S. Army, which has historically carried out most wartime interrogations.

In the Justice Department's view -- contained in a 50-page document signed by Assistant

Attorney General Jay S. Bybee and obtained by The Washington Post -- inflicting moderate or fleeting pain does not necessarily constitute torture. Torture, the memo says, "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."

By contrast, the Army's Field Manual 34-52, titled "Intelligence Interrogations," sets more restrictive rules. For example, the Army prohibits pain induced by chemicals or bondage; forcing an individual to stand, sit or kneel in abnormal positions for prolonged periods of time; and food deprivation. Under mental torture, the Army prohibits mock executions, sleep deprivation and chemically induced psychosis.

Human rights groups expressed dismay at the Justice Department's legal reasoning yesterday.

"It is by leaps and bounds the worst thing I've seen since this whole Abu Ghraib scandal broke," said Tom Malinowski of Human Rights Watch. "It appears that what they were contemplating was the commission of war crimes and looking for ways to avoid legal accountability. The effect is to throw out years of military doctrine and standards on interrogations."

But a spokesman for the White House counsel's office said, "The president directed the military to treat al Qaeda and Taliban humanely and consistent with the Geneva Conventions."

Mark Corallo, the Justice Department's chief spokesman, said "the department does not comment on specific legal advice it has provided confidentially within the executive branch." But he added: "It is the policy of the United States to comply with all U.S. laws in the treatment of detainees -- including the Constitution, federal statutes and treaties." The CIA declined to comment.

The Justice Department's interpretation for the CIA sought to provide guidance on what sorts of aggressive treatments might not fall within the legal definition of torture.

The 2002 memo, for example, included the interpretation that "it is difficult to take a specific act out of context and conclude that the act in isolation would constitute torture." The memo named seven techniques that courts have considered torture, including severe beatings with truncheons and clubs, threats of imminent death, burning with cigarettes, electric shocks to genitalia, rape or sexual assault, and forcing a prisoner to watch the torture of another person.

"While we cannot say with certainty that acts falling short of these seven would not constitute torture," the memo advised, ". . . we believe that interrogation techniques would have to be similar to these in their extreme nature and in the type of harm caused to violate law."

"For purely mental pain or suffering to amount to torture," the memo said, "it must result in significant psychological harm of significant duration, e.g., lasting for months or even years." Examples include the development of mental disorders, drug-induced dementia, "post traumatic stress disorder which can last months or even years, or even chronic depression."

Of mental torture, however, an interrogator could show he acted in good faith by "taking such steps as surveying professional literature, consulting with experts or reviewing evidence gained in past experience" to show he or she did not intend to cause severe mental pain and that the conduct, therefore, "would not amount to the acts prohibited by the statute."

In 2003, the Defense Department conducted its own review of the limits that govern torture, in consultation with experts at the Justice Department and other agencies. The aim of the March 6, 2003, review, conducted by a working group that included representatives of the military services, the Joint Chiefs of Staff and the intelligence community, was to provide a legal basis for what the group's report called "exceptional interrogations."

Much of the reasoning in the group's report and in the Justice Department's 2002 memo overlap. The documents, which address treatment of al Qaeda and Taliban detainees, were not written to

apply to detainees held in Iraq.

In a draft of the working group's report, for example, Pentagon lawyers approvingly cited the Justice Department's 2002 position that domestic and international laws prohibiting torture could be trumped by the president's wartime authority and any directives he issued.

At the time, the Justice Department's legal analysis, however, shocked some of the military lawyers who were involved in crafting the new guidelines, said senior defense officials and military lawyers.

"Every flag JAG lodged complaints," said one senior Pentagon official involved in the process, referring to the judge advocate generals who are military lawyers of each service.

"It's really unprecedented. For almost 30 years we've taught the Geneva Convention one way," said a senior military attorney. "Once you start telling people it's okay to break the law, there's no telling where they might stop."

A U.S. law enacted in 1994 bars torture by U.S. military personnel anywhere in the world. But the Pentagon group's report, prepared under the supervision of General Counsel William J. Haynes II, said that "in order to respect the President's inherent constitutional authority to manage a military campaign . . . [the prohibition against torture] must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority."

The Pentagon group's report, divulged yesterday by the Wall Street Journal and obtained by The Post, said further that the 1994 law barring torture "does not apply to the conduct of U.S. personnel" at **Guantanamo Bay.**

It also said the anti-torture law did apply to U.S. military interrogations that occurred outside U.S. "maritime and territorial jurisdiction," such as in Iraq or Afghanistan. But it said both Congress and the Justice Department would have difficulty enforcing the law if U.S. military personnel could be shown to be acting as a result of presidential orders.

The report then parsed at length the definition of torture under domestic and international law, with an eye toward guiding military personnel about legal defenses.

The Pentagon report uses language very similar to that in the 2002 Justice Department memo written in response to the CIA's request: "If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate criminal prohibition, he would be doing so in order to prevent further attacks on the United States by the al Qaeda terrorist network," the draft states. "In that case, DOJ [Department of Justice] believes that he could argue that the executive branch's constitutional authority to protect the nation from attack justified his actions."

The draft goes on to assert that a soldier's claim that he was following "superior orders" would be available for those engaged in "exceptional interrogations except where the conduct goes so far as to be patently unlawful." It asserts, as does the Justice view expressed for the CIA, that the mere infliction of pain and suffering is not unlawful; the pain or suffering must be severe.

A Defense Department spokesman said last night that the March 2003 memo represented "a scholarly effort to define the perimeters of the law" but added: "What is legal and what is put into practice is a different story." Pentagon officials said the group examined at least 35 interrogation techniques, and Rumsfeld later approved using 24 of them in a classified directive on April 16, 2003, that governed all activities at **Guantanamo Bay.** The Pentagon has refused to make public the 24 interrogation procedures.

Staff writer Josh White contributed to this report.

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# Soldiers Face Neglect, Frustration At Army's Top Medical Facility

By Dana Priest and Anne Hull
Washington Post Staff Writers
Sunday, February 18, 2007; A01

Behind the door of Army Spec. Jeremy Duncan's room, part of the wall is torn and hangs in the air, weighted down with black mold. When the wounded combat engineer stands in his shower and looks up, he can see the bathtub on the floor above through a rotted hole. The entire building, constructed between the world wars, often smells like greasy carry-out. Signs of neglect are everywhere: mouse droppings, belly-up cockroaches, stained carpets, cheap mattresses.

This is the world of Building 18, not the kind of place where Duncan expected to recover when he was evacuated to Walter Reed Army Medical Center from Iraq last February with a broken neck and a shredded left ear, nearly dead from blood loss. But the old lodge, just outside the gates of the hospital and five miles up the road from the White House, has housed hundreds of maimed soldiers recuperating from injuries suffered in the wars in Iraq and Afghanistan.

The common perception of Walter Reed is of a surgical hospital that shines as the crown jewel of military medicine. But 5 1/2 years of sustained combat have transformed the venerable 113-acre institution into something else entirely -- a holding ground for physically and psychologically damaged outpatients. Almost 700 of them -- the majority soldiers, with some Marines -- have been released from hospital beds but still need treatment or are awaiting bureaucratic decisions before being discharged or returned to active duty.

They suffer from brain injuries, severed arms and legs, organ and back damage, and various degrees of post-traumatic stress. Their legions have grown so exponentially -- they outnumber hospital patients at

Walter Reed 17 to 1 -- that they take up every available bed on post and spill into dozens of nearby hotels and apartments leased by the Army. The average stay is 10 months, but some have been stuck there for as long as two years.

Not all of the quarters are as bleak as Duncan's, but the despair of Building 18 symbolizes a larger problem in Walter Reed's treatment of the wounded, according to dozens of soldiers, family members, veterans aid groups, and current and former Walter Reed staff members interviewed by two Washington Post reporters, who spent more than four months visiting the outpatient world without the knowledge or permission of Walter Reed officials. Many agreed to be quoted by name; others said they feared Army retribution if they complained publicly.

While the hospital is a place of scrubbed-down order and daily miracles, with medical advances saving more soldiers than ever, the outpatients in the Other Walter Reed encounter a messy bureaucratic battlefield nearly as chaotic as the real battlefields they faced overseas.

On the worst days, soldiers say they feel like they are living a chapter of "Catch-22." The wounded manage other wounded. Soldiers dealing with psychological disorders of their own have been put in charge of others at risk of suicide.

Disengaged clerks, unqualified platoon sergeants and overworked case managers fumble with simple needs: feeding soldiers' families who are close to poverty, replacing a uniform ripped off by medics in the desert sand or helping a brain-damaged soldier remember his next appointment.

"We've done our duty. We fought the war. We came home wounded. Fine. But whoever the people are back here who are supposed to give us the easy transition should be doing it," said Marine Sgt. Ryan Groves, 26, an amputee who lived at Walter Reed for 16 months. "We don't know what to do. The people who are supposed to know don't have the answers. It's a nonstop process of stalling."

Soldiers, family members, volunteers and caregivers who have tried to fix the system say each mishap seems trivial by itself, but the cumulative effect wears down the spirits of the wounded and can stall their recovery.

"It creates resentment and disenfranchisement," said Joe Wilson, a clinical social worker at Walter Reed. "These soldiers will withdraw and stay in their rooms. They will actively avoid the very treatment and services that are meant to be helpful."

Danny Soto, a national service officer for Disabled American Veterans who helps dozens of wounded service members each week at Walter Reed, said soldiers "get awesome medical care and their lives are being saved," but, "Then they get into the administrative part of it and they are like, 'You saved me for what?' The soldiers feel like they are not getting proper respect. This leads to anger."

This world is invisible to outsiders. Walter Reed occasionally showcases the heroism of these wounded soldiers and emphasizes that all is well under the circumstances. President Bush, former defense secretary Donald H. Rumsfeld and members of Congress have promised the best care during their regular visits to the hospital's spit-polished amputee unit, Ward 57.

"We owe them all we can give them," Bush said during his last visit, a few days before Christmas. "Not only for when they're in harm's way, but when they come home to help them adjust if they have wounds, or help them adjust after their time in service."

Along with the government promises, the American public, determined not to repeat the divisive Vietnam experience, has embraced the soldiers even as the war grows more controversial at home. Walter Reed is awash in the generosity of volunteers, businesses and celebrities who donate money, plane tickets, telephone cards and steak dinners.

Yet at a deeper level, the soldiers say they feel alone and frustrated. Seventy-five percent of the troops polled by Walter Reed last March said their experience was "stressful." Suicide attempts and unintentional overdoses from prescription drugs and alcohol, which is sold on post, are part of the narrative here.

Vera Heron spent 15 frustrating months living on post to help care for her son. "It just absolutely took forever to get anything done," Heron said. "They do the paperwork, they lose the paperwork. Then they have to redo the paperwork. You are talking about guys and girls whose lives are disrupted for the rest of their lives, and they don't put any priority on it."

Family members who speak only Spanish have had to rely on Salvadoran housekeepers, a Cuban bus driver, the Panamanian bartender and a Mexican floor cleaner for help. Walter Reed maintains a list of bilingual staffers, but they are rarely called on, according to soldiers and families and Walter Reed staff members.

Evis Morales's severely wounded son was transferred to the National Naval Medical Center in Bethesda for surgery shortly after she arrived at Walter Reed. She had checked into her government-paid room on post, but she slept in the lobby of the Bethesda hospital for two weeks because no one told her there is a free shuttle between the two facilities. "They just let me off the bus and said 'Bye-bye,' " recalled Morales, a Puerto Rico resident.

Morales found help after she ran out of money, when she called a hotline number and a Spanish-speaking operator happened to answer.

"If they can have Spanish-speaking recruits to convince my son to go into the Army, why can't they have Spanish-speaking translators when he's injured?" Morales asked. "It's so confusing, so disorienting."

Soldiers, wives, mothers, social workers and the heads of volunteer organizations have complained repeatedly to the military command about what one called "The Handbook No One Gets" that would explain life as an outpatient. Most soldiers polled in the March survey said they got their information from friends. Only 12 percent said any Army literature had been helpful.

"They've been behind from Day One," said Rep. Thomas M. Davis III (R-Va.), who headed the House Government Reform Committee, which investigated problems at Walter Reed and other Army facilities. "Even the stuff they've fixed has only been patched."

Among the public, Davis said, "there's vast appreciation for soldiers, but there's a lack of focus on what happens to them" when they return. "It's awful."

Maj. Gen. George W. Weightman, commander at Walter Reed, said in an interview last week that a major reason outpatients stay so long, a change from the days when injured soldiers were discharged as quickly as possible, is that the Army wants to be able to hang on to as many soldiers as it can, "because this is the first time this country has fought a war for so long with an all-volunteer force since the Revolution."

Acknowledging the problems with outpatient care, Weightman said Walter Reed has taken steps over the past year to improve conditions for the outpatient army, which at its peak in summer 2005 numbered nearly 900, not to mention the hundreds of family members who come to care for them. One platoon sergeant used to be in charge of 125 patients; now each one manages 30. Platoon sergeants with psychological problems are more carefully screened. And officials have increased the numbers of case managers and patient advocates to help with the complex disability benefit process, which Weightman called "one of the biggest sources of delay."

And to help steer the wounded and their families through the complicated bureaucracy, Weightman said, Walter Reed has recently begun holding twice-weekly informational meetings. "We felt we were pushing information out before, but the reality is, it was overwhelming," he said. "Is it fail-proof? No. But we've put more resources on it."

He said a 21,500-troop increase in Iraq has Walter Reed bracing for "potentially a lot more" casualties.

**Bureaucratic Battles**

The best known of the Army's medical centers, Walter Reed opened in 1909 with 10 patients. It has treated the wounded from every war since, and nearly one of every four service members injured in Iraq and Afghanistan.

The outpatients are assigned to one of five buildings attached to the post, including Building 18, just across from the front gates on Georgia Avenue. To accommodate the overflow, some are sent to nearby hotels and apartments. Living conditions range from the disrepair of Building 18 to the relative elegance of Mologne House, a hotel that opened on the post in 1998, when the typical guest was a visiting family member or a retiree on vacation.

The Pentagon has announced plans to close Walter Reed by 2011, but that hasn't stopped the flow of casualties. Three times a week, school buses painted white and fitted with stretchers and blackened windows stream down Georgia Avenue. Sirens blaring, they deliver soldiers groggy from a pain-relief cocktail at the end of their long trip from Iraq via Landstuhl Regional Medical Center in Germany and Andrews Air Force Base.

Staff Sgt. John Daniel Shannon, 43, came in on one of those buses in November 2004 and spent several weeks on the fifth floor of Walter Reed's hospital. His eye and skull were shattered by an AK-47 round. His odyssey in the Other Walter Reed has lasted more than two years, but it began when someone handed him a map of the grounds and told him to find his room across post.

A reconnaissance and land-navigation expert, Shannon was so disoriented that he couldn't even find north. Holding the map, he stumbled around outside the hospital, sliding against walls and trying to keep himself upright, he said. He asked anyone he found for directions.

Shannon had led the 2nd Infantry Division's Ghost Recon Platoon until he was felled in a gun battle in Ramadi. He liked the solitary work of a sniper; "Lone Wolf" was his call name. But he did not expect to be left alone by the Army after such serious surgery and a diagnosis of post-traumatic stress disorder. He had appointments during his first two weeks as an outpatient, then nothing.

"I thought, 'Shouldn't they contact me?' " he said. "I didn't understand the paperwork. I'd start calling phone numbers, asking if I had appointments. I finally ran across someone who said: 'I'm your case manager. Where have you been?'

"Well, I've been here! Jeez Louise, people, I'm your hospital patient!"

Like Shannon, many soldiers with impaired memory from brain injuries sat for weeks with no appointments and no help from the staff to arrange them. Many disappeared even longer. Some simply left for home.

One outpatient, a 57-year-old staff sergeant who had a heart attack in Afghanistan, was given 200 rooms to supervise at the end of 2005. He quickly discovered that some outpatients had left the post months earlier and would check in by phone. "We called them 'call-in patients,' " said Staff Sgt. Mike McCauley, whose dormant PTSD from Vietnam was triggered by what he saw on the job: so many young and wounded, and three bodies being carried from the hospital.

Life beyond the hospital bed is a frustrating mountain of paperwork. The typical soldier is required to file 22 documents with eight different commands -- most of them off-post -- to enter and exit the medical processing world, according to government investigators. Sixteen different information systems are used to process the forms, but few of them can communicate with one another. The Army's three personnel databases cannot read each other's files and can't interact with the separate pay system or the medical recordkeeping databases.

The disappearance of necessary forms and records is the most common reason soldiers languish at Walter Reed longer than they should, according to soldiers, family members and staffers. Sometimes the Army has no record that a soldier even served in Iraq. A combat medic who did three tours had to bring in letters and photos of herself in Iraq to show she that had been there, after a clerk couldn't find a record of her service.

Shannon, who wears an eye patch and a visible skull implant, said he had to prove he had served in Iraq when he tried to get a free uniform to replace the bloody one left behind on a medic's stretcher. When he finally tracked down the supply clerk, he discovered the problem: His name was mistakenly left off the "GWOT list" -- the list of "Global War on Terrorism" patients with priority funding from the Defense Department.

He brought his Purple Heart to the clerk to prove he was in Iraq.

Lost paperwork for new uniforms has forced some soldiers to attend their own Purple Heart ceremonies and the official birthday party for the Army in gym clothes, only to be chewed out by superiors.

The Army has tried to re-create the organization of a typical military unit at Walter Reed. Soldiers are assigned to one of two companies while they are outpatients -- the Medical Holding Company (Medhold) for active-duty soldiers and the Medical Holdover Company for Reserve and National Guard soldiers. The companies are broken into platoons that are led by platoon sergeants, the Army equivalent of a parent.

Under normal circumstances, good sergeants know everything about the soldiers under their charge: vices and talents, moods and bad habits, even family stresses.

At Walter Reed, however, outpatients have been drafted to serve as platoon sergeants and have struggled with their responsibilities. Sgt. David Thomas, a 42-year-old amputee with the Tennessee National Guard, said his platoon sergeant couldn't remember his name. "We wondered if he had mental problems," Thomas said. "Sometimes I'd wear my leg, other times I'd take my wheelchair. He would think I was a different person. We thought, 'My God, has this man lost it?' "

Civilian care coordinators and case managers are supposed to track injured soldiers and help them with appointments, but government investigators and soldiers complain that they are poorly trained and often do not understand the system.

One amputee, a senior enlisted man who asked not to be identified because he is back on active duty, said he received orders to report to a base in Germany as he sat drooling in his wheelchair in a haze of medication. "I went to Medhold many times in my wheelchair to fix it, but no one there could help me," he said.

Finally, his wife met an aide to then-Deputy Defense Secretary Paul D. Wolfowitz, who got the erroneous paperwork corrected with one phone call. When the aide called with the news, he told the soldier, "They don't even know you exist."

"They didn't know who I was or where I was," the soldier said. "And I was in contact with my platoon sergeant every day."

The lack of accountability weighed on Shannon. He hated the isolation of the younger troops. The Army's failure to account for them each day wore on him. When a 19-year-old soldier down the hall died, Shannon knew he had to take action.

The soldier, Cpl. Jeremy Harper, returned from Iraq with PTSD after seeing three buddies die. He kept his room dark, refused his combat medals and always seemed heavily medicated, said people who knew him. According to his mother, Harper was drunkenly wandering the lobby of the Mologne House on New Year's Eve 2004, looking for a ride home to West Virginia. The next morning he was found dead in his room. An autopsy showed alcohol poisoning, she said.

"I can't understand how they could have let kids under the age of 21 have liquor," said Victoria Harper, crying. "He was supposed to be right there at Walter Reed hospital. . . . I feel that they didn't take care of him or watch him as close as they should have."

The Army posthumously awarded Harper a Bronze Star for his actions in Iraq.

Shannon viewed Harper's death as symptomatic of a larger tragedy -- the Army had broken its covenant with its troops. "Somebody didn't take care of him," he would later say. "It makes me want to cry. "

Shannon and another soldier decided to keep tabs on the brain injury ward. "I'm a staff sergeant in the U.S. Army, and I take care of people," he said. The two soldiers walked the ward every day with a list of names. If a name dropped off the large white board at the nurses' station, Shannon would hound the nurses to check their files and figure out where the soldier had gone.

Sometimes the patients had been transferred to another hospital. If they had been released to one of the residences on post, Shannon and his buddy would pester the front desk managers to make sure the new charges were indeed there. "But two out of 10, when I asked where they were, they'd just say, 'They're gone,' " Shannon said.

Even after Weightman and his commanders instituted new measures to keep better track of soldiers, two young men left post one night in November and died in a high-speed car crash in Virginia. The driver was supposed to be restricted to Walter Reed because he had tested positive for illegal drugs, Weightman said.

Part of the tension at Walter Reed comes from a setting that is both military and medical. Marine Sgt. Ryan Groves, the squad leader who lost one leg and the use of his other in a grenade attack, said his recovery was made more difficult by a Marine liaison officer who had never seen combat but dogged him about having his mother in his room on post. The rules allowed her to be there, but the officer said she was taking up valuable bed space.

"When you join the Marine Corps, they tell you, you can forget about your mama. 'You have no mama. We are your mama,' " Groves said. "That training works in combat. It doesn't work when you are wounded."

**Frustration at Every Turn**

The frustrations of an outpatient's day begin before dawn. On a dark, rain-soaked morning this winter, Sgt. Archie Benware, 53, hobbled over to his National Guard platoon office at Walter Reed. Benware had done two tours in Iraq. His head had been crushed between two 2,100-pound concrete barriers in Ramadi, and now it was dented like a tin can. His legs were stiff from knee surgery. But here he was, trying to take care of business.

At the platoon office, he scanned the white board on the wall. Six soldiers were listed as AWOL. The platoon sergeant was nowhere to be found, leaving several soldiers stranded with their requests.

Benware walked around the corner to arrange a dental appointment -- his teeth were knocked out in the accident. He was told by a case manager that another case worker, not his doctor, would have to approve the procedure.

"Goddamn it, that's unbelievable!" snapped his wife, Barb, who accompanied him because he can no longer remember all of his appointments.

Not as unbelievable as the time he received a manila envelope containing the gynecological report of a young female soldier.

Next came 7 a.m. formation, one way Walter Reed tries to keep track of hundreds of wounded. Formation is also held to maintain some discipline. Soldiers limp to the old Red Cross building in rain, ice and snow. Army regulations say they can't use umbrellas, even here. A triple amputee has mastered the art of putting on his uniform by himself and rolling in just in time. Others are so gorked out on pills that they seem on the verge of nodding off.

"Fall in!" a platoon sergeant shouted at Friday formation. The noisy room of soldiers turned silent.

An Army chaplain opened with a verse from the Bible. "Why are we here?" she asked. She talked about heroes and service to country. "We were injured in many ways."

Someone announced free tickets to hockey games, a Ravens game, a movie screening, a dinner at McCormick and Schmick's, all compliments of local businesses.

Every formation includes a safety briefing. Usually it is a warning about mixing alcohol with meds, or driving too fast, or domestic abuse. "Do not beat your spouse or children. Do not let your spouse or children beat you," a sergeant said, to laughter. This morning's briefing included a warning about black ice, a particular menace to the amputees.

Dress warm, the sergeant said. "I see some guys rolling around in their wheelchairs in 30 degrees in T-shirts."

Soldiers hate formation for its petty condescension. They gutted out a year in the desert, and now they are being treated like children.

"I'm trying to think outside the box here, maybe moving formation to Wagner Gym," the commander said, addressing concerns that formation was too far from soldiers' quarters in the cold weather. "But guess what? Those are nice wood floors. They have to be covered by a tarp. There's a tarp that's got to be rolled out over the wooden floors. Then it has to be cleaned, with 400 soldiers stepping all over it. Then it's got to be rolled up."

"Now, who thinks Wagner Gym is a good idea?"

Explaining this strange world to family members is not easy. At an orientation for new arrivals, a staff sergeant walked them through the idiosyncrasies of Army financing. He said one relative could receive a 15-day advance on the $64 per diem either in cash or as an electronic transfer: "I highly recommend that you take the cash," he said. "There's no guarantee the transfer will get to your bank." The audience yawned.

Actually, he went on, relatives can collect only 80 percent of this advance, which comes to $51.20 a day. "The cashier has no change, so we drop to $50. We give you the rest" -- the $1.20 a day -- "when you leave."

The crowd was anxious, exhausted. A child crawled on the floor. The sergeant plowed on. "You need to figure out how long your loved one is going to be an inpatient," he said, something even the doctors can't accurately predict from day to day. "Because if you sign up for the lodging advance," which is $150 a day, "and they get out the next day, you owe the government the advance back of $150 a day."

A case manager took the floor to remind everyone that soldiers are required to be in uniform most of the time, though some of the wounded are amputees or their legs are pinned together by bulky braces. "We have break-away clothing with Velcro!" she announced with a smile. "Welcome to Walter Reed!"

**A Bleak Life in Building 18**

"Building 18! There is a rodent infestation issue!" bellowed the commander to his troops one morning at formation. "It doesn't help when you live like a rodent! I can't believe people live like that! I was appalled by some of your rooms!"

Life in Building 18 is the bleakest homecoming for men and women whose government promised them good care in return for their sacrifices.

One case manager was so disgusted, she bought roach bombs for the rooms. Mouse traps are handed out. It doesn't help that soldiers there subsist on carry-out food because the hospital cafeteria is such a hike on cold nights. They make do with microwaves and hot plates.

Army officials say they "started an aggressive campaign to deal with the mice infestation" last October and that the problem is now at a "manageable level." They also say they will "review all outstanding work orders" in the next 30 days.

Soldiers discharged from the psychiatric ward are often assigned to Building 18. Buses and ambulances blare all night. While injured soldiers pull guard duty in the foyer, a broken garage door allows unmonitored entry from the rear. Struggling with schizophrenia, PTSD, paranoid delusional disorder and traumatic brain injury, soldiers feel especially vulnerable in that setting, just outside the post gates, on a street where drug dealers work the corner at night.

"I've been close to mortars. I've held my own pretty good," said Spec. George Romero, 25, who came back from Iraq with a psychological disorder. "But here . . . I think it has affected my ability to get over it . . . dealing with potential threats every day."

After Spec. Jeremy Duncan, 30, got out of the hospital and was assigned to Building 18, he had to navigate across the traffic of Georgia Avenue for appointments. Even after knee surgery, he had to limp back and forth on crutches and in pain. Over time, black mold invaded his room.

But Duncan would rather suffer with the mold than move to another room and share his convalescence in tight quarters with a wounded stranger. "I have mold on the walls, a hole in the shower ceiling, but . . . I don't want someone waking me up coming in."

Wilson, the clinical social worker at Walter Reed, was part of a staff team that recognized Building 18's toll on the wounded. He mapped out a plan and, in September, was given a $30,000 grant from the Commander's Initiative Account for improvements. He ordered some equipment, including a pool table and air hockey table, which have not yet arrived. A Psychiatry Department functionary held up the rest of the money because she feared that buying a lot of recreational equipment close to Christmas would trigger an audit, Wilson said.

In January, Wilson was told that the funds were no longer available and that he would have to submit a new request. "It's absurd," he said. "Seven months of work down the drain. I have nothing to show for this project. It's a great example of what we're up against."

A pool table and two flat-screen TVs were eventually donated from elsewhere.

But Wilson had had enough. Three weeks ago he turned in his resignation. "It's too difficult to get anything done with this broken-down bureaucracy," he said.

At town hall meetings, the soldiers of Building 18 keep pushing commanders to improve conditions. But some things have gotten worse. In December, a contracting dispute held up building repairs.

"I hate it," said Romero, who stays in his room all day. "There are cockroaches. The elevator doesn't work. The garage door doesn't work. Sometimes there's no heat, no water. . . . I told my platoon sergeant I want to leave. I told the town hall meeting. I talked to the doctors and medical staff. They just said you kind of got to get used to the outside world. . . . My platoon sergeant said, 'Suck it up!' "

*Staff researcher Julie Tate contributed to this report.*

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# EXHIBIT 19

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

AUG 29 2002

| | | |
|---|---|---|
| In the Matter of the New York Times Company and Eric Schmitt to Quash the Subpoena Issued by Brian Regan for use in: | ) | |
| UNITED STATES | ) | |
| v. | ) | Criminal No. 01-405-A |
| BRIAN PATRICK REGAN, | ) | |
| Defendant. | ) | |

**MEMORANDUM ORDER**

THIS MATTER is before the Court on the New York Times Company and Eric Schmitt's Motion to Quash the Subpoena issued by the Defendant Brian Patrick Regan, and/or for protective order. Defendant seeks to compel the testimony of Mr. Schmitt, a reporter for the New York Times who wrote a July 5, 2002, story entitled "U.S. Plans for Iraq is Said to Include Attack on Three Sides." ("Article"). The Defendant has subpoenaed Mr. Schmitt to question him about information concerning his confidential source(s) for the Article. Specifically, Defendant seeks information from Mr. Schmitt concerning whether the source(s) is a government official, under what circumstance the source(s) transmitted the information, whether the source(s) provided Mr. Schmitt documentation to support the war plans information, and the Government's investigation of the alleged "leak" of

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information.

For the reasons stated in open court on August 8, 2002, and supplemented below, the Motion to Quash is GRANTED. First, the information regarding Mr. Schmitt's confidential source(s) sought by the subpoena is irrelevant and immaterial under Rule 17(a) of the Federal Rules of Criminal Procedure because it has no bearing on the Defendant's innocence/guilt or punishment in this case. Second, the information is protected under the First Amendment because the balance of factors weigh in favor of Mr. Schmitt's and the public's interests in maintaining the confidentiality of Mr. Schmitt's source(s).

I.

Defendant's subpoena is barred under Rule 17(a) of the Federal Rules of Criminal Procedure. Under Rule 17(a), to withstand a motion to quash, the party serving the subpoena must show that the testimony sought is both relevant and material to his defense. *See Stern v. United States District Court for the District of Massachusetts*, 214 F.3d 4, 17 (1st Cir. 2000), *cert. denied*, 531 U.S. 114 (2001)(citing *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); *United States v. Campbell*, 874 F.2d 838 (1st Cir 1989)).

In this case, the Defendant has failed to show how Mr. Schmitt's testimony regarding his confidential source(s) is relevant or material to his innocence/guilt or his punishment.

This criminal matter deals with allegations that the Defendant attempted to disclose, among other things, sensitive information to the Iraqi government. Whether Government officials leaked information in the summer of 2002 concerning Iraqi war plans to the press has no bearing on the Defendant's alleged attempt to surreptitiously transmit equally sensitive but different information to Iraq for pecuniary gain over a year ago.

Nor does the information bear on the Defendant's punishment. The defense suspects, without any factual basis, that Government officials intentionally leaked war plans to the New York Times, or failed to vigorously investigate such a leak. The defense maintains that such information would assist the jury in assessing whether the Defendant should be sentenced to death. However, the Supreme Court has emphasized time and time again "what is important at the selection stage is an *individualized determination* on the basis of the character of the individual and the circumstances of the crime." *Tuilaepa v. California*, 512 U.S. 967, 973 (1994) (citations omitted). There is no evidence before the Court that the United States released sensitive information to the press concerning Iraq, or failed to adequately investigate such a leak. Even if there was such evidence, it does not speak to the character of the Defendant, nor the harm he allegedly caused. The evidence has no bearing on whether the Defendant, accused of attempting to sell top secret information

to various foreign powers, should face the ultimate penalty. Evidence that Government officials deliberately leaked war plans to the press does not mitigate the offense before the Court.

Further, Defendant relies heavily on what he *might* discover by issuing a subpoena for Mr. Schmitt. Courts frequently quash Rule 17(c) subpoenas seeking document production based on the "mere hope" that a subpoena may result in the discovery of exculpatory material. *See, e.g., United States v. Gika*, 112 F.R.D. 198, 201 (D. Mass. 1986)(citing *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981)). These principles are equally applicable to subpoenas seeking information under Rule 17(a) like the instant one. The Defendant has no evidence that the information in the Article was deliberately "leaked" by the Government or by a rogue official. Defendant's suspicions are based on conjecture and speculation, he simply thinks that Mr. Schmitt's testimony will provide such information. In other words, the Defendant wishes to embark on a fishing expedition in the hope that something may turn up to support his claims. Rule 17(a) is not a discovery tool for such inquiries. *See Cuthbertson*, 630 F.2d at 144.

II.

The motion to quash the subpoena is also granted because information concerning the reporter's confidential source(s) is protected from compelled disclosure in this case under the First

Amendment. Several circuit courts of appeals, including the Fourth Circuit, have held that a reporter holds a qualified First Amendment privilege against disclosing information acquired during news gathering activities through confidential sources. *See Larouche v. Nat'l Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986)). *See also Schoen v. Schoen*, 5 F.3d 1289, 1292 n. 5 (9th Cir. 1993) (citing cases).

In determining whether a reporter can shield his sources under the First Amendment, the court must engage in a balancing test to determine whether the reporter's constitutional protection is outweighed by society's need for the information. In doing so, a court must focus on three factors. First, "whether the information is relevant, [second] whether the information can be obtained by alternative means, and [third] whether there is a compelling interest in the information." *Larouche*, 780 F.2d at 1139 (citations omitted).

The Court emphasizes as a threshold matter that this case involves the disclosure of information concerning a confidential source(s). Defendant may not seek the identity of Mr. Schmitt's confidential source(s), but he does seek sensitive information concerning the source(s)' status as a government official and the circumstances of the disclosure of the information. These questions sufficiently trespass the confidential relationship between Mr. Schmitt and his source(s) to trigger the

constitutional protections necessary to preserving a free press. *See Ashcraft v. Conoco Inc.*, 218 F.3d 282, 287 (4th Cir. 2000) (recognizing that "if reporters were routinely required to divulge identities of their sources, the free flow of newsworthy information would be restrained and the public's understanding of important issues would be hampered in ways inconsistent with a healthy republic."). In balancing the interests at stake, the fact that Mr. Schmitt claims privilege with respect to a confidential source(s) places the thumb on the scale of protecting First Amendment interests at the onset. *See In Re Shain*, 978 F.2d 850, 852-84 (4th Cir. 1992) (emphasizing absence of confidentiality in affirming district court's finding that reporters had no qualified privilege under the First Amendment).

Further, the Court also emphasizes that Mr. Schmitt is not being subpoenaed to testify as an eyewitness to criminal activity that he has observed that might be relevant to the case at bar. Members of the press share the obligation of all citizens to give relevant testimony with respect to criminal conduct. *See In Re Shain*, 978 F.2d at 853. In numerous cases, courts have declined to quash subpoenas where the reporter is asked to testify about the observations of criminal activity. *See, e.g., id.* at 853 (holding that reporters did not have First Amendment privilege to refuse to testify to matters concerning the defendant learned during news gathering). Therefore, it would be a wholly

different matter if the Defendant sought Mr. Schmitt's testimony concerning the Defendant's own conduct. But he does not.

Turning to the balancing of interests in this case, the Court finds that the relevant factors weigh in favor of quashing the subpoena. As discussed above, the information sought from the reporter by the Defendant on its face is not relevant to this case. At best, there is the off-chance that the subpoena may arguably disclose some relevant evidence. But that is insufficient. "[T]here must be a showing of actual relevance; a showing of potential relevance will not suffice." *Shoen*, 48 F.3d at 416. In light of the Defendant's failure to demonstrate the relevance of the sought after information, the subpoena must be quashed. Defendant has failed to show any compelling need for compromising Mr. Schmitt's confidential source(s), much less a need that overrides Mr. Schmitt's and the public's interest in maintaining the confidentiality of his sources. The fact that the Government has not heretofore provided the Defendant with the information concerning the "leak" indicates that the Defendant may not be able to acquire the information from other avenues. However, this factor alone does not outweigh the fact that the information sought is ultimately irrelevant, having no bearing on either guilt or punishment.

III.

In sum, for the foregoing reasons, it is hereby

ORDERED that the New York Times and Mr. Schmitt's Motion to Quash Defendant's Subpoena is GRANTED.

The Clerk is directed to forward a copy of this Order to counsel for the Defendant, the Government and the New York Times and Mr. Schmitt.

Entered this 20th day of August, 2002.

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
08/20/02