Symposium: Secret Evidence and the Courts in the Age of National Security

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SYMPOSIUM:  
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INTRODUCTION  

Ellen Yaroshefsky*  

On December 5 and 6, 2005, the Benjamin N. Cardozo School of Law held a conference, “Secret Evidence and the Courts in the Age of National Security,” to explore the use of secret evidence throughout the legal process—in investigative stages, in Foreign Intelligence Surveillance Act courts, in civil and criminal cases, in Article III courts, in immigration and military courts, and in Combatant Status Review Tribunals. Sponsored by the Floersheimer Center and the Jacob Burns Ethics Center at the Cardozo School of Law, the conference explored critical issues concerning the appropriate balance between national security and bedrock principles of our legal system: access to information to conduct an investigation, the ability to contest facts and present a defense, and the right of the press and public to scrutinize legal proceedings. Panelists addressed the extent to which these tribunals can accommodate legitimate national security concerns and whether alternative models are necessary and advisable.

The conference also confronted issues beyond proceedings in the courts. Journalists and lawyers explored a broad range of First Amendment issues related to journalists’ access to information, privilege, and privacy, where the government asserts national security interests. International lawyers from Israel, Ireland and the United States government provided comparative perspectives on the use of secret evidence in the tribunals of other countries.

Two weeks after the conference, the press exposed the government’s secret program that authorized the National Security Agency’s warrantless surveillance program. This exposure catapulted the discussion of secret evidence to the fore of public debate. Most recently, secret evidence was the subject of congressional debate and public discussion in the detainee treatment bill passed by Congress in September 2006.

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The conference was organized into five panels, each of which was moderated by a leading scholar in the field. The panelists offered a wide range of viewpoints and inspired lively interchange among participants and with the audience. Summaries of each panel are contained within this volume, along with a number of articles prepared in conjunction with the symposium.

The keynote address was delivered by noted journalist Adam Liptak, of the New York Times. His remarks are reprinted in full in this volume.

The full proceedings are available from the Floersheimer Center online at http://www.cardozo.yu.edu/floersh/conference.asp.

The conference’s first panel, Secret Evidence in the Investigatory Stage, moderated by Professor Peter Swire and summarized herein by panelist Jameel Jaffer, focused upon the government’s increased use of foreign intelligence surveillance, notably within the United States. Panelists traced the history of the Foreign Intelligence Surveillance Act, explored its constitutional and statutory framework and discussed the extent to which such surveillance is justified. It considered the privacy implications of the various forms of surveillance including national security letters, administrative subpoenas and electronic surveillance orders. Congressman Jerrold Nadler addressed Patriot Act provisions (which were subject to reauthorization by Congress at the time of the conference) and cases challenging various aspects of secret surveillance. The discussion focused upon the extent to which foreign intelligence surveillance should be subject to judicial oversight and increased public transparency. Jaffer notes that Congress’s subsequent reauthorization of the Patriot Act raises new constitutional challenges that will fuel this debate.

Panel Two, Military Tribunals, Status Review Tribunals and Immigration Courts, was a thorough and lively interchange of issues that, shortly after the conference, became the center of national and international public debate: the nature of legal proceedings for Guantánamo detainees designated “enemy combatants.” The presentations and discussions foreshadowed the congressional enactment of the Detainee Treatment Act of 2005, the Supreme Court’s decision in Hamdan v. United States, and the continuing questions about constitutionality of tribunals outside the Article III context. The panelists did not challenge the fact of the “radical expansion” of the use of secret evidence in these
proceedings and in the immigration context. Rather, the discussion centered upon the extent to which such procedures were essential to national security and the consequences to constitutional democracy. As the panel noted, these issues will continue to be in the forefront for the foreseeable future. Professor Bobby Chesney moderated the panel of nationally recognized experts and summarizes their presentations and discussion herein.

The third panel, Secret Evidence in Article III Courts, grappled with the implications of the use of classified evidence in both criminal and civil cases. Aptly summarized by its moderator Professor Debra Livingston, secret evidence in this context raises questions about the "very character of Article III courts." The panelists discussed the "extremely daunting" issues raises by the procedures for the use of classified information, the impact upon the trial process, and the implications for the respective roles of the prosecutor, defense lawyer, and courts. This panel considered the fundamental question raised by former government attorney, Andrew McCarthy, as to whether Article III courts were the appropriate venue for the trial of terrorism-related cases that implicate national security concerns. Judge Gerald Rosen, defense attorney Joshua Dratel, and Nancy Hollander discussed the careful manner in which Article III courts accommodated the government's national security concerns and the appropriate balance between those concerns and our constitutionalized adversary system. No doubt, these questions will continue to arise more frequently as classified information is implicated in an expanding array of cases before the federal courts.

The fourth panel, A Comparative Perspective from Israel and Ireland, began with the recognition that many countries, including Ireland and Israel, have grappled with the criminal justice system's accommodation of national security concerns in cases involving people accused of acts of terrorism. The panelists offered valuable insights for many key questions that face and will continue to confront our legal system. The panelists discussed the foundation of fairness of their legal systems: disclosure of evidence to defense counsel, including special procedures for secret evidence, and the right to a public trial. Panelists also discussed proposals to establish alternative courts for cases implicating national security. The discussion focused upon the respective roles of the court, prosecution, and defense counsel. The moderator noted that there was "surprising congruence" among the panelists and audience that security-
Nicholas Lemann, Dean of the Columbia School of Journalism and noted journalist, moderated the fifth panel, Investigative Journalism and National Security. Arising on the heels of Dana Priest's *Washington Post* revelation of secret prisons outside the United States, the panel explored what Stephen Hayes of the *Weekly Standard* called the "culture of secrecy" of the Bush Administration. It examined the government's legitimate national security concerns and the media's role in obtaining information to assure a measure of transparency about the government. The panel discussed the practices of various government agencies, notably the intelligence community, and the underlying policies and laws in the ongoing tension between the government and the press.

Scott Armstrong and Dana Priest presented an insider's knowledge of how the press works with intelligence agencies and provided insight as to a journalist's decision-making on whether, when, and how to divulge sensitive information.

Eve Burton, lawyer for the Hearst Corporation, described cases involving classic First Amendment/national security clashes and offered a framework for a viable federal shield law. Dean Lemann posed pointed questions to each panelist and sharpened what no doubt will be ongoing issues as the media struggles with its historical role of providing transparency and accountability.

Adam Liptak's stimulating keynote speech focused upon the appropriate balance between the government's legitimate national security concerns and the First Amendment. Arguing that the government should be required to "play fair," Mr. Liptak provided noted examples of post-September 11 governmental actions that were and continue to be carried out without requisite procedural measures to ensure fairness. He offered a vision of a balanced approach to protecting essential First Amendment concerns in the context of national security issues.

The articles in this volume reflect and expand upon many of the secret evidence issues addressed at the conference. Joshua Dratel expands upon his presentation in his article, *Sword or Shield? The Government's Selective Use of Its Declassification Authority for Tactical Advantage in Criminal Prosecutions*. He argues that the government's unilateral au-
authority to decide whether to disclose secret evidence violates the Fifth and Sixth Amendment and ultimately allows the government to gain an unfair tactical advantage at trial. Dratel proposes reforms to the Classified Information Procedures Act, Foreign Intelligence Surveillance Act and Federal Rule 16 of the Federal Rules of Criminal Procedure.

In a similar vein, I argue in *CIPA and FISA in the Courts: How Secret Evidence is Eroding the Adversary System* that the current interpretation of certain provisions under CIPA and the practice under FISA deny defense counsel its appropriate role in criminal cases. Because of the government’s overclassification of documents and the broad definition of national security, secret evidence is seeping into a wide range of prosecutions and threatens to erode underpinnings of our adversary system. I propose that security-cleared defense counsel play a necessary role in the examination of evidence.

Judge Gerald E. Rosen presided over the country’s first post-September 11 terrorism trial, *United States v. Koubriti*. In *The War on Terrorism in the Courts*, Judge Rosen discusses challenges that face the justice system as it reviews actions by the Executive and Legislative branches in their desire to protect the United States. He urges his fellow judges to consider seriously the fine line that sometimes lies between protecting the constitutionally-guaranteed rights of individual defendants and protecting national security. Judge Rosen argues that the courts must maintain their traditional independence from the political branches in their role as “the final gatekeeper” of individual rights.

In *Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantánamo*, Jonathan Hafetz analyzes the legal rationale used by the United States Government to justify secretly and indefinitely detaining prisoners at Guantánamo. Hafetz then explores the Guantánamo detainee cases and how, post-*Rasul v. Bush*, habeas corpus bars the government from running secret jail “black sites.”

Ami Kobo, in *Privileged Evidence and State Security under the Israeli Law: Are We Doomed to Fail?*, expands upon his presentation at the conference. His article examines the implications of Israeli Evidence Ordinance sections 44 – 46, which establish a balancing test to determine whether disclosure to “do justice” is necessary in a criminal case. Through a discussion of Israeli cases, Kobo argues that this balancing test, as interpreted by the courts, has not been sturdy enough to prevent the wrongful exclusion of information essential to a defendant’s case. Kobo ends with suggestions on how to reform the system.
In *U.S. Sentencing Guidelines and Export Control Laws: How to Equate a Credit Card Transaction with a Violation of National Security Controls or Selling 400 Grams of Heroin*, J. Triplett Mackintosh and Danielle R. Voorhees highlight concerns with the relationship between trade embargoes and the U.S. Sentencing Guidelines. According to the authors, the Department of Justice, as well as courts, inappropriately classify many regulations as premised on national security. The Article argues that criminal violations of these OFAC regulations, in trials for which public access to evidence can be restricted, do not merit a sentence so severe as that directed by the Guidelines.

While the use of secret evidence was not a novel issue before 2001, it has assumed greater prominence in the past five years. This conference explored wide-ranging issues related to secret evidence that resonated in legislation, litigation, and public discussion in the months following the conference. No doubt, the issue will remain a significant one in the public discourse for the foreseeable future and will raise ongoing concerns about whether we have struck the appropriate balance between national security and liberty.