

On National Security and the Rule of Law - from 9/11 to Today

By Mark R. Shulman

Mark R. Shulman was Chair of the City Bar's Task Force on National Security and the Rule of Law.

With the City Bar's Task Force on National Security and the Rule of Law being reconstituted into a new Task Force with a wider mandate, called the Task Force on the Rule of Law, we offer this retrospective on the work of the former.

For many years – and particularly since 2001 – the New York City Bar Association has played a key role as a watchdog, checking government overreach in its national security policies and programs. Much like the free press, an independent bar ensures that the government does not discard important rule of law constraints in the face of crises. As Benjamin Franklin wisely observed when exiting the Constitutional Convention in 1787, the new order would not be self-actuating or self-correcting. “Democratic republics are not merely founded upon the consent of the people, they are also absolutely dependent upon the active and informed involvement of the people for their continued good health,” he said. Because terrorist networks operate in the gaps of governance, governments often also feel compelled to conduct counter-terrorism operations clandestinely. But these secret programs must also remain subject to the scrutiny of Congress, the courts, and ultimately the people if government is to remain accountable to the rule of law.

Never have these challenges been so great as during the so-called “Global War on Terror,” when the government assumed unprecedented new powers to conduct massive, warrantless surveillance programs, conduct wars and other military operations in Afghanistan, Iraq, and many other places around the world, and to disappear, torture, or kill suspects in secrecy and in violation of human and Constitutional rights. And since 2001, the City Bar’s **Task Force on National Security and the Rule of Law** has been investigating, analyzing, and reporting on these programs to ensure that the people do remain active and informed.

The horrific attacks of September 11, 2001, shook the nation to its core, and the entire nation resolved to overcome the threat posed by al Qaeda and affiliated groups. Indeed, much of the world rallied in support of America. The following day, the UN Security Council adopted Resolution 1368, condemning the attacks and stating that it “regards such acts, like any act of international terrorism, as a threat to international peace and security” and expressing “its readiness to take all necessary steps

to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations.” The U.S.-led invasion of Afghanistan soon followed, with widespread support and sound legal basis in international and U.S. law.

Other American responses to the attacks, however, undermined that support, as the Presidential Administration of George W. Bush launched a number of unilateral and arguably lawless initiatives to wage its “Global War on Terror.” Within the U.S., the government detained, interrogated, and subjected to deportation hundreds of individuals, subjecting many to unwarranted abuse. The government established or greatly expanded electronic and other surveillance systems with little regard for the constraints commanded by the Constitution or other laws. Abroad, the Department of Defense and elements of the intelligence community detained, interrogated, and even tortured untold numbers of individuals suspected of being terrorists or other enemies.

Even as the City Bar provided relief and legal support for the victims of the attacks on the World Trade Center, its members were also organizing to defend the rule of law. As one leader, **Scott Horton**, describes the situation:

Early in the Bush administration’s Global War on Terror, it suddenly became apparent that many of the legal rules that had previously governed U.S. military, intelligence, and police actions both abroad, at the border, and within the United States were not being observed any more and that something new had taken their place. This had occurred for the most part furtively, without public announcements, congressional hearings, or publicly accessible legal acts. Indeed, frequently the administration insisted that nothing had changed, but actions suggested that was not so. At this point, a large number of bar committees began acting on these changes, and it eventually became plain to all of us that some sort of overarching effort was needed to avoid duplication of effort and insure that there was some uniformity of voice to the positions that the bar took, while holding on to our well-proven model of committee work as the basis for action.

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Around 2003, to ensure that uniformity and effectiveness, Horton, who chaired the [Committee on International Human Rights](#) at the time, paired up with the representatives of the [Committees on Military Affairs and Justice](#) (Miles Fischer), [Civil Rights](#) (Sidney Rosdeitcher), and [Federal Courts](#) (Thomas Moreland) to create an *ad hoc* group with the support of then-City Bar President **E. Leo Milonas**.

Among the first of the City Bar's important statements had been the hard-hitting "[Inter Arma Silent Leges: In Times of Armed Conflict, Should Laws Be Silent? A Report on the President's Military Order of November 13, 2001, Regarding 'Detention, Treatment, and Trial of Non-Citizens in the War Against Terrorism'](#)" issued by the Committee on Military Affairs and Justice in December 2001. This report constituted one of the earliest and most substantial challenges to the creation of military commissions, leading to the challenges upheld in *Rasul v. Bush* and subsequent Supreme Court cases.

In addition to unlawful detention policies and plans for illegal tribunals, the U.S. government was soon discovered to be subjecting detainees to torture. Working in conjunction with New York University Law School's Center for Human Rights and Global Justice, the Committee on International Human Rights examined the secret program in which U.S. officials sent suspects to other countries for purpose of interrogation, aware that those individuals would likely be subject to torture. Their joint report of October 1, 2004, "[Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions'](#)" made news with its sobering findings that the U.S. was illegally complicit in torture.

In addition to heavily researched reports such as these, the *ad hoc* group guided other City Bar responses to abuses. The Association – often acting through its many committees – convened public meetings, issued amicus briefs, and wrote letters and reports intended to inform the public and guide the government back to lawful policies more in line with Constitutional principles. Finally, in 2006, the *ad hoc* group was more formally chartered as the Task Force on National Security and the Rule of Law, initially led by Rosdeitcher and succeeded by **James Benjamin**, **Jonathan Hafetz**, and ultimately by this author. Over the ensuing terms, the Task Force has convened public programs on the same list of issues, mostly focusing on the U.S. Detention Facility at Guantanamo and the prospects for fair trials or release for the detainees. The Task Force has issued periodic reports and letters to successive Administrations and Congress asking for a return to lawful policies for detainees, mass surveillance, and/or decisions to use armed force.

Among key themes, the Task Force has consistently noted that the regular rule of law remains one of the most powerful tools in the U.S. national security arsenal and that deviations from

that system, like that at Guantanamo Bay, degrade U.S. security. It argues that since 9/11, certain U.S. detention policies have disregarded the norms and values enshrined in our Constitution and have drawn wide public opprobrium upon our nation, ultimately undermining our nation's security. The detention facility at Guantanamo Bay has earned condemnation from allies and continues to serve as a recruiting tool for forces hostile to the United States. History tells us that this facility weakens the United States. Its costs – in terms of money, reputation, and motivating enemies of the United States – far outweigh any benefits derived from isolating a few individuals thought to wish us harm and who could be incapacitated in the United States consistent with our security interests.

Likewise, the Task Force has long been concerned when Presidents claim unilateral authority to engage the nation's armed forces absent a threat that is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation." Since 2001, U.S. use of force against non-state actors in the Middle East, Arabian Peninsula, and East Africa has further complicated the situation. And President Donald Trump's various threats to utilize military force against North Korea and/or Iran raise this issue with a new urgency. As we noted in a [2017 letter to President Trump](#), the President is required to seek prior Congressional authorization for military action against North Korea notwithstanding the hostility and power of the North Korean regime.

While many of these concerns remain real, other threats to the regular rule of law system have emerged over the past couple of years. In order to better address this wider range of issues – while maintaining vigil over the terrorism-related topics – City Bar President **Roger Juan Maldonado** recently reconstituted the task force with a new title and mission: the **Task Force on the Rule of Law**. Fortunately, as this author rotates out of the chair, one of the Association's most experienced and distinguished members, **Stephen L. Kass**, agreed to step up to lead it.

For nearly 150 years, this Association has worked as a watchdog, striving to uphold the rule of law. With time, the threats and challenges have changed. But the mission remains the same. And with this new mandate, the Task Force is well positioned to do its part to protect the vitality of our republic. ■