



MARGOT ADLER: This is Justice Talking from the University of Pennsylvania's Annenberg Public Policy Center. I'm Margot Adler. Intelligence reports suggest Al Qaeda is growing in strength and President Bush has repeatedly called for expansive powers to fight this threat. But his critics and some members of Congress say the White House has failed to get it right when it comes to national security. Today on Justice Talking we take a look at the national debate on how to preserve civil liberties and fight terrorism.

John Yoo is a controversial figure on this question. He is a law professor at the University of California at Berkeley. But from 2001 to 2003 he served as a deputy assistant attorney general in the office of legal counsel at the U.S. Department of Justice. He authored what is known as the "Torture Memo" in 2002. It provided a narrow definition of torture. Critics have said it gave legal cover to harsh interrogation practices. Yoo has staunchly defended his legal analysis and defended the administration's policies as the best way to fight terrorism. Welcome to the program, John.

JOHN YOO: Thank you, Margot. It's good to be back.

MARGOT ADLER: John, besides interrogation while at the Department of Justice you also worked on other important areas of national security policy: The Patriot Act, warrantless surveillance. It's six-and-a-half years since 9/11. A lot has happened, a lot has not happened. Have you changed your views about any of these policies?

JOHN YOO: No, I haven't. But I think one thing it's important to keep in mind is that they, uh, were more appropriate or worked best in a time of emergency which I think characterized the response of the government in the first few years after the 9/11 attacks. As time has gone on I think two things have changed. One is, uh, most importantly I think the administration has become the victim of its own success. It has successfully stopped follow-on attacks to 9/11 and so I think the people feel, in the country feel less urgency or less immediate threat from terrorism. And I think the second thing, which is only natural, is that as time has gone on the other branches of government have wanted to become more involved in, uh, the core decisions on terrorism.

MARGOT ADLER: Among critics of the Bush administration, your legal opinions are seen as justifying torture. Do you think your views have been misrepresented, even demonized?

JOHN YOO: Yeah, I don't ... first of all, one of the things I try to be clear about is that I don't and wasn't at that time advocating for torture in any way or for any other particular interrogation method. Um, instead we have a statute which at that time there was only one statute, a criminal law prohibiting torture. And I think our effort in the Justice Department was to try to interpret that in the best way possible in light of the lack they had never been applied and a lack of judicial opinions and so on. But I think that, um, I think there's been a lot of exaggeration by critics and by the media about exactly what was happening and exactly what those memos said.

MARGOT ADLER: There's tremendous controversy about what to define as torture, whether current surveillance programs are necessary or abusive, whether half the people at Guantanamo

belong there or were picked up by bounty hunters. These are pretty divisive questions today and I would love to get a little specific. For example, do we really need to be able to subject, uh, suspects to waterboarding? Do we really need to spy on people without a warrant?

JOHN YOO: Well, I guess I'd say this: I think that the war on terrorism, because of its unconventional nature, um, has caused the government to have to consider interrogation methods or surveillance methods which we would not normally use in a war against another nation state with a uniform military. And the problem is because the enemy we have, uh, you know, that attacked us is one that refuses to follow any of the rules of war. They refuse to wear uniforms and they break the core rule of the law of war which is they deliberately attack civilians by surprise. And so it means that the only way we're going to stop them is really to get information about the attacks that they're thinking of. I think it's very reactive. I don't think it's people came into the government and said this is a chance to do this or that. I think these are ideas and policies that were developed by the career bureaucracy, the national security bureaucracy, that deals with these terrorists and had been dealing with them for a long time. And the 9/11 attacks and the destructiveness of them, I think, naturally caused the government to consider, um, new options to prevent another attack like that from happening.

MARGOT ADLER: You wrote in your book, "War By Other Means," that the Bush administration has often failed to explain clearly to the public the difficult decisions Al Qaeda has forced upon us. Are you saying that many of the controversies can be mostly blamed on a PR failure?

JOHN YOO: First let me say there ... I think there will always be controversies, uh, about the powers of the executive branch in wartime. If you look at World War II, World War I, the Civil War there are always, uh, controversies about what the President was doing. At the same time, wartime places the greatest demands in our system, on the presidency. It's sort of, it's almost like the reason the presidency was created was to handle problems like this. So I wouldn't be the first one to say that we would have, you know, all of a sudden a warm and chummy consensus over everything. On the other hand, I think that the administration has had, uh, problems and sometimes being too, worried too much about secrecy and not enough about explaining to the public why, um, some of these policies were developed. I think when people, uh, understand the context and the hard questions that the government had to face, I think they'll be more understanding of why the administration chose to do what it has done.

MARGOT ADLER: John Yoo is a law professor at the University of California at Berkeley. He served as deputy assistant attorney general in the office of legal counsel at the U.S. Department of Justice between 2001 and 2003. Thank you so much for coming on our show.

JOHN YOO: It's a real pleasure Margot. Thanks for having me.

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MARGOT ADLER: Security hawks like Yoo emphasize the danger of taking American security for granted. But critics counter that it's our civil liberties that are in danger. Wendell Belew is a lawyer for an Islamic charity in the United States accused of having financial ties to terrorists.

Belew says he has hard evidence that proves the government spied on him and his client. His case is one of some 40 challenges to the National Security Agency's warrantless wiretapping program and it's the only challenge that claims to have proof. Welcome to Justice Talking.

WENDELL BELEW: Glad to be here.

MARGOT ADLER: You are suing the government because you say your telephone calls were illegally monitored by the National Security Agency without a warrant in 2004. I want to get to how you came by that evidence but first briefly, why is having this proof important to your case?

WENDELL BELEW: Well, it's important because I can prove that I was actually injured by the government's action, and other plaintiffs have brought similar lawsuits have suspected that their conversations have been intercepted. I mean we know that there was a warrantless wiretap program because it's been written about and admitted by the President and the former attorney general. But to get into court you have to be able to demonstrate something called "standing" which means that you've actually been injured by an action and other parties, uh, have trouble proving that they were actually affected. In my case we have documentary evidence.

MARGOT ADLER: Let's talk about how you got this evidence. You were representing a now defunct charity, the Al-Haramain Islamic Foundation. In 2004, the U.S. Treasury Department accused Al-Haramain of having terrorist ties and then what?

WENDELL BELEW: I was assisting another law firm and trying to navigate through the designation process that the, uh, the Office of Foreign Assets Control had frozen Al-Haramain's assets pending investigation. And the problem was that we did not know what the organization was accused of doing. And so there was a great exchange of information between the Treasury Department and between Al-Haramain's attorneys. The Al-Haramain attorneys were trying on the one hand to provide all of the exculpatory material that they could find and give it to the government. They, at the same time, were supplying information pursuant to the attorney's request about why they thought the organization might have had ties to terrorism. And included in this submission of material from the Treasury Department was the document which is, started the lawsuit that I'm a plaintiff in, and which has been described as an account of conversations between attorneys including myself and a client in Saudi Arabia. And we believe that that was obtained without a warrant.

MARGOT ADLER: But I gather that the FBI came knocking to your door. Right? And so I guess ...

WENDELL BELEW: They came ... it took them a couple of months. The disclosure was made in August and they came by in October and asked if they could have it back, if I had it, and I said, yes, I do. And, um, they said can we have it back? And I said sure. And then they asked if, um, if I'd given anyone a copy of the document and I said, uh, yeah, the Washington Post and I mentioned a congressional oversight committee as well. And so they called up those folks and got the documents back and I was warned that now I was on notice that this was, had been inadvertently disclosed and that it was classified and it was property of the government. And that if I came across any more copies I had to give them back or destroy them and that, uh, I

would be subject to criminal prosecution if I disclosed the contents, the document. And that I was to attempt not to refresh my recollection with respect to the contents of the document. That's a legal term of art.

MARGOT ADLER: What convinces you that, that the warrantless wiretapping program, at least in your case, is illegal and hurts you and your clients?

WENDELL BELEW: Well, the Foreign Intelligence Surveillance Act convinces me that it's illegal. The Congress in the '70s enacted a law that said if ... you can intercept conversations but you need a warrant.

MARGOT ADLER: What are the broader implications at stake in your case?

WENDELL BELEW: You know a test for any nation doesn't come when times are easy and times are good. In national security, the hardest test comes in wartime. And this isn't a conventional war here but I mean there's a notion that we have to give up civil liberties and basic rights as Americans because we're threatened and I feel that's wrong-headed. I don't feel that way just because I believe in due process and civil liberties but I also take that position because I believe that taking these shortcuts actually harm the United States. They damage our stature abroad and they also result in finding the wrong information.

MARGOT ADLER: Wendell Belew is a lawyer in Washington, D.C. Thank you so much for coming on Justice Talking.

WENDELL BELEW: Thanks for the opportunity to talk about this.

MARGOT ADLER: The warrantless surveillance program is the subject of numerous lawsuits. The White House and others have pushed hard to give the telephone companies legal immunity for their participation in the program. Supporters say cooperation from telephone companies is crucial. But civil liberties groups say why should the telephone companies get a free pass if they broke the law? Stay with us.

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MARGOT ADLER: This is Justice Talking, the public radio show about law, justice, and American life. I'm Margot Adler. On today's Justice Talking we're exploring the balance between national security and civil liberties. Polls show that Americans are less nervous about an imminent attack by terrorists and they are less satisfied with the progress of the U.S. war on terrorism than in the past. Intelligence reports continue to suggest the threat is very real. The Bush Administration has vigorously defended its anti-terrorism policies including the National Security Agency's warrantless surveillance program. This program relies on access to telephone data to track terrorism suspects and their contacts. Congress has argued over whether or not the program is constitutional though much of it remains a closely guarded secret. One particularly contentious issue has been the question of offering legal immunity to the telecommunications industry for their participation in the program.

With me today to debate what impact immunity would have is Kate Martin, a director of the Center for National Security Studies, an organization that monitors national security policy and its effect on civil liberties. And Kim Taipale, the executive director of the Center for Advanced Studies in Science and Technology Policy, an organization which focuses on technology and national security policy. Let's start with you Kate. You argue that the telecommunications companies should not get immunity. Why? Didn't they act in good faith doing what the government requested to stop future acts of terrorism?

KATE MARTIN: Well, we know very little about what they did because the government has refused to say and the Congress hasn't discovered that. The reason why the original FISA law made the telephone companies liable if they violated the law, was to say we need to have a check in between the government going to the phone companies. And saying, hey, let us have access to American's communications. And the check was that the telephone companies had to be presented with a court order. If they were presented with a court order they would be immune from lawsuits. If they had no court order, they weren't supposed to just say, oh sure to the government, you can have access to American's communications as you please. And so that's the check that somehow government, not for 30 days and not for two months or even six months after September 11th, but apparently for six years after September 11th somehow persuaded the telephone companies to violate the law.

MARGOT ADLER: Well, let me just push you a little further. If immunity is not granted to these telecom firms, there's been a lot of argument that they would be reluctant to aid U.S. intelligence agencies in the future. What about that?

KATE MARTIN: Well, all of the bills that are now before the Congress grant them prospective immunity.

MARGOT ADLER: And what does that mean?

KATE MARTIN: That means that from here on they have immunity. And I am very skeptical. There isn't any claim that any telephone company has quit helping the government. In some ways it's impugning their integrity or their patriotism to say that they would quit helping with a lawful request because they're worried about being sued in the future. And the basic law governing this says the telephone companies are prohibited by law from turning over the contents of people's communications unless they're presented with a lawful order giving them permission to do so. And that's what was violated in the past. That's still the law. We want that to be the law. We don't want companies that violated the law to be given amnesty.

MARGOT ADLER: Kim, these telecom companies handed over the private information of their companies to the government. Those people could be you or me. No warrants were involved. They broke the law at the time, so why should they get a free pass?

KIM TAIPALE: Well, I, I think I have to take issue with both you and Kate, uh, characterizing that they broke the law at the time. That's not clear. What they did was respond to a request by the President backed up by an opinion of the attorney general that the President had the inherent power to conduct the terror surveillance program. And they responded to that under procedures

that were not under FISA. Um, it's not clear that that's a violation of the law. The point that Kate made earlier about the prospective immunity that's contained in the bills actually highlights what's going on here. The fact is that the cooperation of the telecoms in these kinds of programs, and again remember that by a partisan majority of both the House and Senate have passed bills that, uh, that essentially sanction this kind of a program. By providing prospective immunity they make clear that the issue of immunity is not the issue. The issue of retroactive immunity here is clearly a political, uh, leverage point to hold this administration accountable for what they did. And again I'm not, I'm nonpartisan in this debate and I'm not making excuses for, or I'm not justifying what the administration did in this particular case. But it's very clear that what's going here is a political fight between the Congress and the President over who had the power to order these programs between 2001 and now.

MARGOT ADLER: So you're saying it's really, uh, you're saying it's really a fight between executive and legislative power?

KIM TAIPALE: Well, I think it was originally a fight between executive and legislative and it's now become somewhat of a fight between the Democrats and the Republicans. You know, you look at the statements of any of the people who are arguing against immunity and it's quite clear. I mean, look at, read all the editorials and read the statements by some of the people involved in the lawsuits and it's very clear that they're trying to use this issue, these lawsuits as leverage to find out what happened. Now I'm all in favor of finding out what happened and I'm all for oversight but I do think it's a bit dangerous to, uh, to use the telecommunication companies essentially as hostage to this political fight. And try to use civil suits, 40 civil suits ... civil suits are not really the forum that we want to use, I don't think, to determine national security law or constitutional legal principles.

KATE MARTIN: I fundamentally disagree. The lawsuits were filed by nonpartisan civil liberties groups. As Kim acknowledges, you know, there's an argument about whether or not the telephone companies broke the law. The fundamental principle in our system is that when Americans think their constitutional rights have been violated they can go to court to find out and to vindicate those rights. That's what those lawsuits are about. It's not a dispute between Congress and the President except to the extent that the Congress hasn't found out what's happening. And so the lawsuits are one way of having that information come out. And the question of the court is the place to decide whether or not the President had any constitutional authority to ignore and violate the statutes. It is not true that both Houses have passed a bill that essentially, uh, legalizes what the President's program was. The bill that was passed by the House of Representatives called the Restore Act is fundamentally different in basic constitutional ways from what the President claimed the power to do after September 11th.

MARGOT ADLER: Well, let me broaden this out a little bit ...

KIM TAIPALE: And it would have passed ...

MARGOT ADLER: Let me broaden this out a little bit. Instead of ... let's talk about the minutiae of Congress because, you know, it's unclear exactly what's going to happen here.

Ultimately the Bush Administration is looking for broader spying powers to update the nation's 30-year-old surveillance law known as the "Foreign Intelligence Surveillance Act" or FISA. Kim, what do you think is outdated about FISA?

KIM TAIPALE: Well, I ... FISA, as it, as it's written, the old law, clearly didn't contemplate certain circumstances. The old law was triggered and has been triggered which is essentially what created the problem this past year with one of the FISA judges requiring a warrant for interception of purely foreign conversations. This is where a communication between, for instance, Pakistan and the Sudan which might go through a switch in the United States and the interception was done physically in the United States was held to require a warrant under FISA. Now, that's clearly not the kind of situation that FISA contemplated when it was enacted. It was not part of the political compromise that led to FISA. And is probably not the way the law should work.

MARGOT ADLER: Members of the Bush Administration and the intelligence community have argued that the FISA process moves too slow and is cumbersome. Kate, does FISA handcuff law enforcement?

KATE MARTIN: Well, I think there's not any evidence that it really does. If you look at what's actually happened since September 11th, remember that the administration came to Congress at least four, if not more times, and asked for amendments to FISA. Each time they came, Congress amended the FISA in the way that the administration asked for it. In all of those instances, two of which were part of the Patriot Act debates, the President himself assured the Congress and the American people that FISA worked fine. And that if the government was listening to American's conversations it was getting a warrant. Now that turned out to be a lie.

KIM TAIPALE: That's not quite accurate, Kate.

KATE MARTIN: That is completely accurate. The transcripts are there and the amendments are there. After The New York Times published the story saying that in fact they had been listening to Americans here talking to people overseas without a warrant, the next day the President went on the radio, and said, yes, we have been doing that in that instance but we're not going to detail all of the other instances. And the question of does FISA need to be updated? Many members of Congress since the disclosures by The New York Times have proposed bills which clarify any ambiguity in the law and say any conversation between two people overseas is totally outside the FISA. Even if that conversation is routed through the U.S. and even if it's picked up in the U.S. When you look at what the bills in the Congress are about and when you look at the actual testimony of the administration's officials before the Congress, what they want now is they want the ability to go to the telephone companies inside the United States without a warrant and say give us access to communications between Americans in the U.S. and people who are overseas.

KIM TAIPALE: What the terrorist surveillance program is aimed at, these international calls that we're talking about that terminate or originate in the United States, then Kate is right to some extent. But what we're really talking about is when you're targeting a foreign intelligence target someone in, let's say, Pakistan or Afghanistan. If that person calls the United States or someone in the United States calls that person or they exchange email, the question is, how do you handle

that situation? Obviously you can't get a warrant beforehand to listen to that conversation because you don't know that there's going to be a communication with the United States. So when that situation occurs there is a problem. This is the collateral intercept problem and it is ... and it is problem in this ... and it's problematic in this context, in this context of foreign intelligence surveillance not law enforcement surveillance. All of these bills address that problem. They address it slightly differently and Kate is right that the House bill, uh, takes a slight different approach than the Senate bill. Both involve the foreign intelligence surveillance court. The Senate bill requires that the administration go to the foreign intelligence court after beginning a surveillance program. The House requires it beforehand. There are some other procedural decisions ...

MARGOT ADLER: Well, Kim, how long does it take, how long does it take to get a court order?

KIM TAIPALE: It's different in different circumstances. The problem is not just a court order. It's not just like you call a judge and say we need a court order. The problem is that when it's a routine part of a surveillance program where you're talking about a number of targets, foreign targets being surveilled and they may or may not be talking to people in the United States. The issue is whether the burden of doing the paperwork essentially to get a warrant works in that circumstance. And, quite frankly, the problem is that you don't know ahead of time necessarily that you're going to intercept one of these calls. And you may need to listen to that collateral call in order to determine, quite frankly, if it is suspicious enough to keep listening to those conversations or not.

KATE MARTIN: I think it's interesting that the President and the administration intelligence officials had described the program in terms that are not truly reflective of what it is. Which is basically, you know, as if, yeah, the FBI was sitting there listening to a foreign target and didn't know who they were going to call in advance.

MARGOT ADLER: Kim, you've called the expectation of privacy an "unexamined mythology" particularly when it comes to electronic data. What do you mean by that?

KIM TAIPALE: You know, as we move into a society that's more and more information-based and electronically mediated we have to think about some rules that we use in the real world. Rules that are there for a very good reason. I mean I'm not arguing that we should do away with the rationales for the rules, but we need to think about how those rules apply in this new space. In the real world there's lots of information that's available, technically available, at local court houses or in, you know, in local records or even in newspaper archives that essentially was not recoverable easily after the fact. And that you would ... by aggregating that you sort of have an additional privacy implication. And as we move to a society where all that information is more available instantly and online all the time, that creates a problem.

MARGOT ADLER: So let me push this a little further by just asking both of you, and I'll start with you, Kate, what degree of privacy should citizens have a right to expect in today's society?

KATE MARTIN: Well, I think that they should have the same degree of privacy in their private communications with others. As Americans we grew up to expect which is that the government may not know your thoughts, and your beliefs, and your conversations with your intimates unless it has a court order or unless it has probable cause or some demonstrable emergency. And that it doesn't matter that instead of writing letters, as we used to do, we now email. And that that's where the privacy debate needs to start. And the whole question of video scans of people at football fields and correction of marketing data is a separate and important question but less fundamental than the question of the government getting what you and I talk about.

MARGOT ADLER: Kim, what degree of privacy should citizens have a right to expect today?

KIM TAIPALE: Well, I think they should have a very high expectation to privacy. Probably the same one that they have as Kate said, you know, that we've had historically in this country. And I'm not suggesting that that has to change but I'm suggesting that in the context of ... you know, you have to remember, I mean, Kate keeps saying and she, you know, as much as, you know, she can say this as much as she wants but we're not really talking about intercepting, you know, domestic conversations between Kate and her grandmother.

KATE MARTIN: Unless my grandmother is in Pakistan.

KIM TAIPALE: Well, it may be. But I mean we're talking ... but this, this comes back to the thing. So you're right. You need some oversight of what the original targeting is. You need to have a process where if you have a legitimate foreign intelligence target, and I completely agree with you Kate, some process that oversights and, and reviews how that goes about. I'm not ... you know, I'm not defending this administration. What I'm talking about is that we need to address the fundamental fact that some of our rules, uh, that we have used in the past don't work well in this new environment. And that's not to say that we open it up and let people just willy-nilly listen to private conversations between two U.S. citizens in the United States. It is, however, to recognize that those conversations may be going through the same switches as the conversations between the Sudan, uh, Sudan and Pakistan or whatever. And we need to figure out some rules that work to sort that out.

MARGOT ADLER: Kim Taipale is the executive director of the Center for Advanced Studies in Science and Technology Policy. Kate Martin is the director of the Center for National Security Studies. Thank you both for coming on Justice Talking.

KATE MARTIN: Thank you.

KIM TAIPALE: Thank you for having us.

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MARGOT ADLER: Surveillance is just one of the tools the government is using to enhance national security. Prosecutors have been aggressive about going after potential threats on U.S. soil but these cases have been failing in front of juries.

UNIDENTIFIED MALE: People have really begun to question the tactics of the Justice Department. Even some people within the Justice Department that I talk to, um, you know, are raising eyebrows about the results.

MARGOT ADLER: And an army interrogator talks about learning how to do his job.

UNIDENTIFIED MALE: I figured you sat down, you talked to 'em. I figured ... I don't know, maybe I thought there was more yelling involved than there is.

MARGOT ADLER: Stay with us.

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MARGOT ADLER: This is Justice Talking, where we make the connection between law, justice, and American life. I'm Margot Adler. Since 9/11, the government has pursued a policy of pre-emption against terrorism on U.S. soil. The Department of Justice is aggressively going after potential threats and pressing charges on smaller scale offenses. Eric Lichtblau has been covering national security for The New York Times and he has a new book, "Bush's Law: The Remaking of American Justice." Eric, the Justice Department can point to a few strong cases of potential plots. There was a case in New Jersey. Several men were allegedly plotting to get on to Fort Dix and open fire. That case is still in the courts. But other important cases have failed, ending in hung juries or acquittals. I'm thinking of a case in Dallas where the government alleged a Muslim charity was funneling money to terrorists. That ended in a hung jury. There was another hung jury in Miami on an alleged plot to blow up the Sears Tower. Prosecutors are having serious trouble convincing juries in some of these cases. Why?

ERIC LICHTBLAU: Well, you mention a couple of the big ones. In the Dallas case, that was one of the Justice Department's, probably their single biggest terrorist financing case, where they alleged that, uh, an Islamic charity, Holy Land, uh, was essentially responsible for funneling major amounts of money to Middle Eastern terrorists groups. And the case really blew up on the Justice Department. To have a case go on for that long after an extensive trial and have all the defendants cleared was really a major embarrassment for the Justice Department. So we've had enough of these that people have really begun to question the tactics of the Justice Department. Even some people within the Justice Department that I talk to, you know, are raising eyebrows about the results. You have to remember that the Justice Department is the most powerful group of prosecutors in the world arguably. They're used to getting convictions, you know. Their conviction rate normally is upwards of 90 percent. Now, we've seen the success rate in terrorism cases go way down since 9/11 because they are casting such a wide net. That is the price that they pay really for that policy. It was a risk they knew that they were taking by declaring that if anyone posed any danger of a terrorist attack, the One Percent Doctrine, it's been called by Dick Cheney, that the government was going to after them. And lock them up before they could do anything wrong. The risk, of course, is that you're going to lock up a lot of people who really had no connection to terrorism.

MARGOT ADLER: So, does that mean that the juries in all these cases are seeing weak cases and that's why they're not convicting?

ERIC LICHTBLAU: Yeah, I, I think there's no other way to look at it than the fact that juries are treating many of these cases very, very skeptically. When juries return hung verdicts, when juries return acquittals on cases that are brought to much fanfare, often announced in press conferences in Washington, that sends a definite message from these juries that they just don't think the Justice Department has the evidence.

MARGOT ADLER: So does that mean there are no big fish to get? Or it's just that our intelligence is not very good enough to get the big fish that do exist?

ERIC LICHTBLAU: Well, you get arguments on both sides. I would probably lean towards the latter. You know, I think most people in law enforcement agree that, you know, there are still serious threats to the United States, uh, probably on U.S. soil now. But I don't know that we have the system in place at the FBI or the intelligence community to really find those people. And they have cast such a wide net that it's difficult to tell, you know, the wheat from the chaff a lot of the times.

MARGOT ADLER: I've heard actually that prosecutions right now have gone way back down almost to pre-9/11 levels. Is that correct?

ERIC LICHTBLAU: I have seen some numbers last year suggesting, yes, that they were, um, returning down to pre-9/11 levels. There were certainly in 2002 and 2003, there was an enormous spike in the number of terrorism prosecutions that were being brought and they have been heading back down the last couple of years.

MARGOT ADLER: Do you think that these defeats in the courts mean that the way the government is going to go about its policies and prosecutions is going to change?

ERIC LICHTBLAU: Uh, not in the immediate future. I mean I think that the pre-emptive strategy that they've adopted is still a mindset at the Justice Department and throughout the Bush Administration. And in some ways you can't be blamed for thinking after the horrific attacks of 9/11 that they're going to do everything they can. I mean the way John Ashcroft put it after 9/11 was that they're going to adopt Bobby Kennedy's philosophy when he was attorney general, of locking up a suspect for spitting on sidewalks, for any offense they could. Immigration fraud, etc. There's a downside to that. There's a clear risk that you're going to get people who really did nothing except for spit on sidewalks and you're going to treat them as terrorists.

MARGOT ADLER: Eric Lichtblau covers national security and law enforcement for The New York Times. His soon to be published book is, "Bush's Law: The Remaking of American Justice." Thank you so much for coming on our show.

ERIC LICHTBLAU: Well, thanks for having me.

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MARGOT ADLER: The case of the Liberty City Seven is an example of the Justice Department's wide net policy to go after amateurs who are more "aspirational than operational" as one law enforcement agent put it. But in December, a federal judge in Miami declared a mistrial in that case. After acquitting one of the men involved in the alleged plot to blow up the Sears Tower in Chicago, a hung jury could not agree to convict or acquit the other six. Jeffrey Agron served as the jury foreman for the two months of testimony and nine days of deliberation. Welcome to Justice Talking.

JEFFREY AGRON: Thank you.

MARGOT ADLER: Jeffrey, what did the jury learn about who these men were and how they came to be caught in a government sting operation? The government had them on tape swearing an oath to jihad and looking to finance a terrorist attack. I take it you heard two stories. One from the defense and one from the government.

JEFFREY AGRON: Well, from the prosecution's standpoint, they were men who followed Narseal Baptiste who harbored anger at the United States government and sought to do harm to the United States government. And specifically had plans to take down the Sears Tower in Chicago. That was from the prosecution's standpoint. But from the defense standpoint, they were a group of struggling men trying to make ends meet who followed this man as a religious leader, but had no feelings against the United States, had no wish to do the United States harm, but were looking for money to support their, what they called "The Temple," their organization. And they had been introduced to a man who was a confidential informant for the FBI and they were led to believe that he was a man who might have ties to some Middle East organizations, possibly terrorist related organizations. But they were just trying to get money out of this guy ...

MARGOT ADLER: And it, it seems as if both of these accounts didn't quite become believable for the jury because in the end the jury couldn't accept either one.

JEFFREY AGRON: Well, I think that, uh, the jury saw that they, um, were struggling just to put food on the table for their families and the defense's main argument was that this was all a scam. Like I said that they were pretending to go along with this supposed plot and just doing a lot of what they called "street talking." And what the jury was looking for was some corroborating evidence. In other words there were, um, quite a few meetings that were taped both visually and audio and there were quite a few wiretaps, thousands of wiretaps, on two different phones. And the jury was looking for some evidence of this supposed scam.

MARGOT ADLER: Did, did a lot of the jurors, uh, feel that this was a case of entrapment? That the government was guilty of sort of pushing these, uh, these men into these actions?

JEFFREY AGRON: There were, I would say, four jurors who just saw this as entrapment. That these guys were underprivileged people from a bad neighborhood who were caught up in this plot by the FBI to try and make a case out of nothing. There were one or two who held very fast to the position that these guys were terrorists or at least if given enough time they would have at least tried to commit terrorist acts. And then there were a number of jurors in between, um, to varying degrees.

MARGOT ADLER: What was missing from the government's case in your opinion that might have convinced a jury to convict?

JEFFREY AGRON: I think going further in the plot. In other words, there was never anything found, no plans of any buildings, no schematics, no books dealing with dynamite or plastic explosives or anything else. Really there was very little that was, that was found that was incriminating in any way. So I think some of the jurors were looking for more evidence. Looking for what you would think you would find when you went after terrorists.

MARGOT ADLER: Having sat through two and a half months on this case, you've had quite a close look at the government in action, how it's using its resources to go after threats early. From what you've seen do you feel safer?

JEFFREY AGRON: I couldn't say specifically that I feel safer because of anything they've done. You know, they put a lot of resources. They had their top prosecutor in the District, on this case. They had four attorneys at trial. But I can't say that, uh, that I feel safer because of this.

MARGOT ADLER: Jeffrey Agron was the jury foreman in the Liberty City Seven terrorism case in Miami. A retrial is underway. Thank you so much for coming on Justice Talking, Jeffrey.

JEFFREY AGRON: Oh, you're welcome.

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MARGOT ADLER: The mission to ensure America's safety has led authorities to seek new tools and expanded powers in the war on terror. Interrogation practices have been among the most controversial issues of national security. The prisoner abuses at Abu Ghraib and stories of harsh interrogations conducted by U.S. forces in Iraq and Afghanistan have sparked a debate on when interrogation becomes torture. Independent producer Dan Epstein is a former Army interrogator. He says when this debate began to unfold he found himself asking troubling questions.

DAN EPSTEIN: When the stories of harsh interrogations in prisoner abuse began to come out, I was surprised, angry, and embarrassed. Torture and humiliation just aren't things Army interrogators are trained to do. Even in the early '80s when I served, we were taught to abide by the Geneva Conventions, that torture is illegal, and if we were ever caught violating these rules we'd be prosecuted and sent to the military prison at Fort Leavenworth. And the manual from that time supported this position in no uncertain terms. So what had gone wrong? I decided to talk to interrogators who had been in Iraq or Afghanistan. Terry Karney is a staff sergeant with the 223rd military intelligence battalion of the California Army National Guard. "Insight through inquiry" is the 223rd's motto and Sergeant Karney served as one of his battalion's interrogation team leaders in Iraq in 2003. We talked about a lot of things, including the notions we held about being an army interrogator before we'd taken the training.

TERRY KARNEY: I figured ... I don't know, maybe I thought there was more yelling involved than there is.

DAN EPSTEIN: Like Sergeant Karney, I thought there'd be some yelling and probably some verbal and psychological tricks for getting people to talk to you. My faculty advisors in high school said I had the ability to adapt easily to different situations. I figured that would help. And Sergeant Karney had something going for him, too.

TERRY KARNEY: I like people.

DAN EPSTEIN: No. That's probably not what you'd expect to hear from an Army interrogator. Movies and T.V. shows usually portray interrogation as a brutal test of wills between two heartless adversaries. But in reality, an interrogation is something that happens between two human beings. And the interrogator must be able to establish a relationship with his subject. In my conversations with Sergeant Karney, we realized this is an aspect of interrogation that's generally misunderstood.

TERRY KARNEY: The guy on the other side of the table is a person. He's not some abstract evil poured into flesh. If you can keep that in mind you don't have to like him but if you can remember that he is a person you can get the information. To commit torture you have to forget he's a person. At which point you have no empathy. Without empathy you can't notice what he wants to talk about. You can't spot what he's willing to talk about and you can't find the weaknesses that you can exploit to get him to talk about the things he doesn't want to talk about.

DAN EPSTEIN: So you're saying the empathy is a critical skill, a critical feature that an interrogator has to have in order to do their job?

TERRY KARNEY: Yeah, you have to. You have to be able to sit there and say this is what he feels. You don't have to like him. You can hate him six ways from Sunday. You can, you can want to kill him. You can't, however, let that affect what you're doing in the booth.

DAN EPSTEIN: Can America trust its military interrogators?

TERRY KARNEY: Based on the interrogators I know, which is a fair number, yes.

DAN EPSTEIN: Why? I'm hearing all these stories about abuse. Why are you saying I can trust these guys? Why are you saying you can trust us, you and me?

TERRY KARNEY: Right now, right now you can trust them because the idea is a few bad apples is certainly true right now. Whether or not those apples are at the top or the bottom of the food chain, I don't know. Based on what I do know that the enhanced interrogation techniques have to be authorized pretty high up. The folks at the bottom aren't driving the bus. And I know that the folks I went to Iraq with didn't torture. I am certain they didn't torture.

DAN EPSTEIN: So what you're saying is that America can trust its military interrogators but maybe they can't trust the leadership of those interrogators.

TERRY KARNEY: That's a tougher question and it's not one I can really answer because ...

DAN EPSTEIN: Well, what do you feel? After you, you have, you obviously have an opinion on it and ...

TERRY KARNEY: The policies that allow for enhanced interrogation I think are wrong. I'd like to think if someone ordered me to do that, that I'd refuse and that I'd be willing to take whatever level of punishment comes with refusing that order.

DAN EPSTEIN: Altogether Terry Karney and I have discussed interrogation and the current controversy for more than 10 hours face-to-face. We talked about how the training we received really does work. And that's based on Sergeant Karney's own experiences and on comments from interrogators he knows at Guantanamo. We talked about how torture is ineffective, even dangerous, because the lies a prisoner tells to stop being tortured can lead to decisions that get our soldiers killed. And we talked about the debate itself. I know it may seem self-evident to you or me, I hope it does, but why is this debate on interrogation so important?

TERRY KARNEY: Because it's about who we are. It's about being the good guys. It's about saying, yeah, maybe you want to knock us off our perch or destroy us or you hate us, whatever it is that's driving you to want to attack us. But, you know what? We're not going to give up us to beat you.

DAN EPSTEIN: I was talking with an interrogator I knew from the '80s. And Chris, I said, isn't okay to torture people who have information that could save American lives? Oh, Dan, he said, do I really need to answer that for you? Yes, you do, I said. Of course not, we're the Americans was his reply. In the global war on terror, some might call that a naïve or even a quaint notion. But in my opinion it's exactly the idea responsible and influential people should keep in mind as they promote so-called enhanced interrogation techniques. Clearly our interrogators get it and I trust them. For Justice Talking, I'm Dan Epstein.

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MARGOT ADLER: National security and civil liberties. How can we strike the right balance? Tell us what you think at [justicetalking.org](http://justicetalking.org). You can post on our message boards, learn more about our guests, and sign up for our free podcast. And check out our blog where many of the nation's leading commentators give their views on law and American life. Thanks for listening. I hope you'll tune in next week. I'm Margot Adler.

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