THE BOSTON PHOENIX

Scientific uncertainty:

Romney's death-penalty plan leaves much room for doubt. Plus, no due process for 'enemy combatants.'

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May 7, 2004

THE HEART OF the 29-page report issued Monday by Mitt Romney's Governor's Council on Capital Punishment is its proposal that any Massachusetts death-penalty scheme contain "a requirement of scientific evidence to corroborate guilt." While the most reliable proof in this category would be DNA evidence, other forms of scientific physical evidence would suffice as well, such as "photographs, video- and audiotapes, fingerprints, and certain impression evidence (*e.g.*, some footwear impressions, tire impressions, tool marks, firearms-related impressions, and other physical pattern matches)."

If this is the best the council can do, then it has failed to achieve the Romney administration's stated goal — a system where there is "no doubt" as to the defendant's guilt and where (here the weasel words creep in) the result is "as accurate as *humanly possible*" (emphasis added). Rather than pursue this unattainable objective, we should continue to ban capital punishment, while improving the criminal-justice system generally by establishing an Innocence Commission to examine how each wrongful conviction has come about and seek to prevent recurrences. (See "Blinded with Science," News and Features, October 10, 2003; "What Have We Learned?", News and Features, November 14, 2003; and "Let Us Now Praise Framed-Up Men," News and Features, April 9.)

Unfortunately for pro-death-penalty forces in the Commonwealth, the council's proposal suffers from an obvious flaw. DNA can provide powerful evidence for exonerating a suspect (and has revealed numerous wrongful convictions in Massachusetts and across the country), but it is considerably less reliable as surefire evidence of guilt. The council implicitly recognizes this when it notes that DNA must "connect the defendant to either the location of the crime scene, the murder weapon, or the victim's body" in a way "that strongly corroborates the defendant's guilt" if it is to provide the "conclusive scientific evidence" that will support the death penalty. The report gives an example of a situation where DNA evidence that "links" a

person to a murder victim might not establish guilt of a crime: "For example, in a case where the defendant and the victim were spouses or otherwise intimates, a link between the defendant and the victim's body may be virtually inevitable, and, therefore, may not 'strongly corroborate' the defendant's guilt."

Let's consider the most obvious case where this might be problematic: the rape-murder of a married woman. Suppose the victim's husband's DNA is found in semen in the deceased's vaginal canal. This would *not* link the husband to the rape-murder, since he and his spouse would have been "intimates" and the presence of his semen in her body would be "virtually inevitable." But suppose that the DNA of the next-door neighbor were also found in the victim. Such evidence might indeed be seen as a strong "link" between the neighbor and the murder — so the husband walks and the neighbor fries.

In this case, Romney's death penalty nails the right person if the neighbor actually committed the murder. But consider a fairly common alternate scenario: the wife was having an affair with the next-door neighbor, with whom she had just been intimate when the husband came home from work early. The neighbor fled, but, in a rage, the husband murdered his wife. Under Romney's "perfect" death-penalty scenario, the neighbor could still be indicted, convicted, and sentenced to death because the presence of his DNA in the victim was less readily explained than that of the husband.

As for the council's suggestion that other forms of scientific and forensic evidence can also offer an unfailingly accurate basis for conviction, the example of fingerprint evidence indicates that the council is suffering from either excess chutzpah or a very short memory. It was just four months ago that Stephan Cowans (convicted, based on a thumbprint, of shooting a cop) was, after six and a half years in prison, exonerated by DNA evidence. After the DNA evidence cleared Cowans, the Suffolk County District Attorney's Office re-analyzed the prints at the crime scene and found that — contrary to expert testimony given at trial — the prints actually did *not* belong to Cowans. A judge threw out the conviction, Cowans is now free, and that case is currently under investigation to find out what went wrong. But if Romney and his "experts" had had their way, would the defendant still be alive to enjoy his own vindication?

So much for the scientifically infallible death penalty.

LAST WEEK, the Supreme Court heard back-to-back oral arguments in two landmark "war on terror" cases — *Rumsfeld v. Padilla* and *Hamdi v. Rumsfeld* — examining President Bush's asserted power to snatch American citizens abroad or in this country, and hold them indefinitely in a military brig, without charge and with no access to lawyers, a trial, or a hearing.

In the case of Jose Padilla (the US citizen arrested at Chicago O'Hare International Airport, jailed in New York, and then classified an "enemy combatant" based on his alleged involvement in a "dirty bomb" plot), Deputy Solicitor General Paul Clement obviously made a strategic decision, as Solicitor General Ted Olson did in the Guantánamo cases the previous week (see "Could the Gulag's Future Hang on a Real-Estate Deal?", This Just In, April 30), to steer the discussion away from substance and toward legal technicalities. Clement used more than half his allotted 30 minutes to argue that Padilla had filed his case in the wrong geographic district.

Padilla has been held in a South Carolina military brig since June 10, 2002, when military authorities transported him there from New York. Padilla's lawyer — Donna Newman, the New York criminal-defense attorney appointed to represent him during his Manhattan detention — filed Padilla's habeas corpus petition in New York the following day, and the Second Circuit Court of Appeals (which has jurisdiction over New York) eventually ruled his detention unlawful. Last week, Clement argued that, when the military moved Padilla to South Carolina, jurisdiction should have moved with him — so Newman should have filed the petition in South Carolina instead.

If the high court agrees with Clement and dismisses Padilla's case on jurisdictional grounds, then any future US-citizen "enemy combatants" — regardless of where they are*initially* arrested — would be able, once moved to the brig in South Carolina, to raise challenges only in the Fourth Circuit Court of Appeals, the most pro-government federal-appellate court in the country. Such a procedural requirement would put the government at a significant advantage in all future cases.

In *Hamdi*, this is not an issue, because the case has been in the Fourth Circuit all along. This case presents facts somewhat more favorable for the government; although Yasser Hamdi is also a US citizen, he was captured in Afghanistan. Few Americans would feel directly threatened by the indeterminate detention of someone — even a fellow citizen — whom the government captured on a foreign battlefield. More of us, on the other hand, would identify with a fellow citizen who, like Padilla, was picked up in Chicago.

At oral argument, Clement's answers on the merits showed just how breathtaking the Bush administration's position is. In response to questions probing the limits of the authority claimed by the president, Clement asserted that the military could lock up a citizen indefinitely and, to facilitate interrogation, deny that person access to a lawyer or anyone else. When Justice Stephen Breyer asked why Hamdi could not be given a hearing before a neutral arbiter, Clement said, "It may not seem what you think of as traditional due process ... but the interrogation process itself provided an opportunity for an individual to explain that this has all been a mistake." Thus, the neutral arbiter is the interrogator!

This effrontery peaked after Justice Anthony Kennedy commented, "I'm taking away from the argument the impression, and please correct me if I'm wrong, that you think there is a continuing role for the courts to examine the reasonableness of the period of detention." Clement quickly responded, "Well, I wouldn't take that away, Justice Kennedy," and explained that "the continuing but modest role" of the court is just to hear the administration's own reasons for continued detention. Hence, the Supreme Court that stopped the Florida recount and put George W. Bush in the White House was told that it could not even limit the length of an American citizen's stint in Bush's nascent American gulag.

Padilla's lawyer, Stanford Law professor Jennifer Martinez, seemed to have trouble explaining just how revolutionary the president's claim to near-absolute power was. Her relative inexperience in the trenches may have been a factor; the 1997 Harvard Law graduate and former clerk to Justice Breyer replaced Newman (Padilla's long-time court-appointed trial lawyer) at the last minute based on, in Newman's words, Martinez's "stellar résumé." The disadvantage of inexperience did not apply, however, to Hamdi's older, battle-hardened trial lawyer, federal public defender Frank W. Dunham Jr. He used his three-minute rebuttal to tell the justices and the nation what is really at stake in these cases — probably the most important civil-liberties actions to come before the Supreme Court since the WWII-era Japanese-American internment cases. "One citizen," Dunham said, got "caught up in a problem in Afghanistan. Is it better to give him rights, or is it better to start a new dawn of saying there are circumstances where you can't file a writ of habeas corpus ... [or] get due process? I think not. And I would urge the court not to go down that road. I would urge the court to find that citizens can only be detained by law."

The court is expected to decide both cases before its summer recess begins in June.

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