DUE PROCESS IS A STRATEGIC CHOICE: LEGITIMACY AND THE ESTABLISHMENT OF AN ARTICLE III NATIONAL SECURITY COURT

KEVIN E. LUNDAY* & HARVEY RISHIKOF**

For the past seven years, the United States has employed a strategy for combating Al Qaeda and other transnational terrorist threats by framing the issue as a Global War on Terror (GWOT), an ideological struggle by the forces of freedom, liberal democracy, and the rule of law against the tyranny and oppression of an Islamic extremist ideology.[1] It is obvious that all of the instruments of U.S. power, including military force when appropriate, are required to combat the continuing significant threat of terrorist attacks by Islamic extremists and other non-state actors.[2] However, this is not a conventional war in which terrorism—a tactic—will eventually surrender or be eliminated.[3] Rather, terrorism is a permanent national

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* Kevin E. Lunday is a Captain and judge advocate in the U.S. Coast Guard. The views expressed in this article are those of the author and do not reflect the official policy or position of the Commandant or Judge Advocate General, the U.S. Coast Guard, the Department of Homeland Security, or the U.S. Government.

** Harvey Rishikof is a professor of law and former chair of the Department of National Security Strategy, National War College. The views expressed in this article are those of the author and do not reflect the official policy or position of the National Defense University, the National War College, the U.S. Department of Defense, or the U.S. Government.

1. *See* EXECUTIVE OFFICE OF THE PRESIDENT, NATIONAL STRATEGY FOR COMBATING TERRORISM 1 (2006) [hereinafter NATIONAL STRATEGY].

2. *Id.*

3. Audrey Kurth Cronin, *Rethinking Sovereignty: American Strategy in the Age of Terrorism*, 44 SURVIVAL, Summer 2002, at 119, 132 [hereinafter Cronin, *Rethinking Sovereignty*]. Terrorism is the threat or use of violence by non-state

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security threat which, through sustained efforts and commitment of the full spectrum of U.S. resources, can at best be reduced to an acceptable and manageable level of risk.[4] Although the current

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actors against innocents to achieve a political purpose. Audrey Kurth Cronin, *Behind the Curve: Globalization and International Terrorism,* 27 INT'L SECURITY, Winter 2002/2003, at 30, 33 [hereinafter Cronin, *Behind the Curve*]. These three key characteristics—violence by non-state actors, targeting of innocents, and political purpose—distinguish terrorism from other forms of violence (*e.g.*, war, law enforcement, insurgency). *See id.* Transnational terrorism describes terrorism that has effects or activities across a state's boundaries. Cronin, *Rethinking Sovereignty, supra,* at 121-22. Achieving agreement within the international community on a definition of "terrorism" has been a significant challenge. *Id.* One factor contributing to the difficulty in defining the term is the historically piecemeal approach to international conventions prohibiting terrorist acts, and the difficulty of applying objective criteria to distinguish illegitimate from legitimate acts of violence. *See, e.g.*, UN.org, *International Instruments to Counter Terrorism,* http://www.un.org/terrorism/ instruments/html (last visited Sept. 17, 2008) (summarizing the major international conventions and protocols addressing the issue of terrorism). The United Nations has made some recent progress in encouraging states to agree in principle to the need for a comprehensive convention on counterterrorism. *See* United Nations Global Counter-Terrorism Strategy, G.A. Res. 60/288, U.N. Doc. A/RES/60/288 (Sept. 20, 2006), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N05/504/88/PDF /N0550488.pdf?OpenElement. An accepted definition of terrorism remains elusive. The solution requires a more targeted legal definition focused on transnational terrorism and limited to violent acts intentionally targeting civilians for political effect. Cronin, *Behind the Curve, supra,* at 33.

4. *See* Cronin, *Behind the Curve, supra* note 3, at 53. The current primary terrorist threat to the United States is from Al Qaeda and other associated extremists. Press Release, Dir. of Nat'l Intelligence, National Intelligence Estimate: The Terrorist Threat to the US Homeland (July 17, 2007), *available at* http://www.dni.gov/press_releases/20070717_release.pdf [hereinafter National Intelligence Estimate]. Within the Muslim world, Al Qaeda and other Islamic extremists employ terrorism to further radical religious and ideological objectives. Christopher Henzel, *The Origins of al Qaeda's Ideology: Implications for US Strategy*, PARAMETERS, Spring 2005, at 69, 75-76. The term 'Al Qaeda' originally described an organized movement under the leadership of Osama bin Laden and Ayman al-Zawahiri, whose goal is to establish a radical pan-Islamic caliphate in the Muslim world. *Id.* Al Qaeda seeks popular Muslim support for its vision by attempting to unite Muslims in a holy war against secular governments. *Id.* at 76. Al Qaeda employs catastrophic terrorist attacks against the United States and other Western civilians either to force Western withdrawal from Muslim regions or to provoke the West to kill Muslims in order to unite and mobilize the Muslim masses. *Id.* at 76-78. As a result of the success of Al Qaeda terrorist attacks over the past

strategy has arguably succeeded in the short term in improving efforts to prevent and disrupt terrorist attacks within the United States,[5] it has also produced undesired consequences that threaten the legitimacy of U.S. efforts over the long term.

I. BACKGROUND

Legitimacy of action is a vital strategic weapon against terrorism. Sovereign states within the international system provide and safeguard the legitimate means of political power and the use of force. Non-state actors who employ terrorism in an attempt to achieve political goals by "terrorizing" innocent civilians are illegal actors or criminals, undeserving of special status or recognition in the international system. Maintaining this legal "legitimacy supremacy" over the long term is essential to denying terrorism's recognition as an acceptable means of influence, reinforcing the sovereign state's role as the guardian of political power, and advancing liberal democracy and the rule of law.

Terrorist movements rely on a broad base of popular support and sympathy in order to survive.[6] These movements garner support

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decade, and Western and Islamic government reactions to those attacks, other Islamic extremists have increasingly identified themselves with Al Qaeda, even though many of these Islamic extremists do not necessarily coordinate their efforts or resources and may have more focused, regional aims. *See* Scott Atran, *The Moral Logic and Growth of Suicide Terrorism*, 29 WASH. Q., Spring 2006, at 127, 135. Yet their association with Al Qaeda has transformed it from a terrorist group into a broader, loose network or conglomeration of Islamic extremist groups and actors who share anti-Western motivations and employ terrorism as their primary means. *See* Audrey Kurth Cronin, *How al-Qaida Ends: The Decline and Demise of Terrorist Groups*, 31 INT'L SECURITY, Summer 2006, at 7, 41-42 [hereinafter Cronin, *How al-Qaida Ends*].

5. As of the date of this article, there have been no successful terrorist attacks in the United States since September 2001. However, Islamic extremists continue to attempt and carry out terrorist attacks to inflict massive casualties on civilian victims, and some have demonstrated intentions to acquire weapons of mass destruction (WMD) to utilize in terrorist attacks against the United States. *See* Nat'l Intelligence Estimate, *supra* note 4 ("We assess that [Al Qaeda] will try to acquire and employ chemical, biological, radiological, or nuclear material in attacks and would not hesitate to use them . . . .").

6. Cronin, *Behind the Curve*, *supra* note 3, at 54; Cronin, *Rethinking Sovereignty*, *supra* note 3, at 132.

despite employing ruthless violence because the tactic of terrorism provokes reaction and modifies behaviors of targeted governments and populations, thereby providing perceived legitimacy from a broader audience that seeks similar political changes but lacks the power or influence to carry them out.[7] Popular support and perceived legitimacy are centers of gravity for a movement that employs terrorism.

The United States may undermine the perceived legitimacy of terrorist campaigns by characterizing and treating those that use such a tactic as dangerous aberrations operating outside the existing political and legal framework.[8] Discrediting and marginalizing terrorists from the broader population is crucial to undermining their popular support.[9] Lacking popular support, terrorists' power will diminish and terrorism will increasingly lose attractiveness as a preferred means for non-state actors to effect political change.[10] This approach does not mean turning away from necessary military action to disrupt and defeat terrorists in the near term. Combating terrorism, however, where and when appropriate, requires "strategic patience" and a more nuanced analysis and understanding of long-term consequences of policy decisions.[11]

The evolving and murky U.S. policy governing the detention, treatment, and trial of suspected terrorists has damaged U.S. legitimacy in the fight against transnational terrorism.[12] At the writing

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7. Cronin, *How al-Qaida Ends*, *supra* note 4, at 27. Cronin argues that undermining popular support is one way to bring an end to a terrorist movement. *Id.* at 27-29. Some thinkers, however, are skeptical about the historical nexus between transnational terrorism and popular support, arguing that in historical cases terrorism eventually erodes its own popular support. *See, e.g.*, BARD O'NEIL, INSURGENCY & TERRORISM 103-04 (2d ed. 2005).

8. *See* NATIONAL STRATEGY, *supra* note 1, at 9-11.

9. DENNIS ROSS, STATECRAFT AND HOW TO RESTORE AMERICA'S STANDING IN THE WORLD 158-60 (2007).

10. Terrorist groups end in a variety of ways, many unrelated to government efforts to defeat them. *See* Cronin, *How al-Qaida Ends*, *supra* note 4, at 27-29.

11. Cronin, *Behind the Curve*, *supra* note 3, at 55-56.

12. Although framing the fight against Islamic extremists who employ terrorism as a war on terror may have been necessary to mobilize the national will, it has also unwittingly elevated the status of these arch-criminals to recognized

of this article, controversy continues to swirl around the issues of the detention, the trying of detainees, and the writ of habeas corpus in the war against terrorism.

In June 2008, the U.S. Supreme Court decided *Boumediene v. Bush*, a sharply divided 5-4 decision holding that non-U.S. citizens detained at Guantanamo Bay as enemy combatants have the right to petition for writs of habeas corpus.[13] On July 21, in the wake of the *Boumediene* decision, the Attorney General of the United States, Michael B. Mukasey, announced the government's desire for Congress to pass legislation setting the rules and procedures for the habeas hearings.[14] For Attorney General Mukasey, *Boumediene* left open three important issues that he hoped the Congress would address: "First, will a federal court be able to order that enemy combatants detained at Guantanamo Bay be released into the United States? . . . Second, how should the courts handle classified information in these unprecedented court proceedings? . . . and third, what are the procedural rules that will govern these court proceedings?"[15]

Also in late July, a detainee, Salim Ahmed Hamdan, Osama bin Laden's reputed former driver, began a trial for war crimes at Guantanamo Bay under the rules and regulations established by the Military Commissions Act.[16] The trial was allowed to proceed because a district court trial judge refused to stay the hearings under *Boumediene* by distinguishing the facts of the *Hamdan* case and the court held that the right of habeas corpus would attach post trial.[17] In the first day of the *Hamdan* trial, the military judge barred some of the

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political actors within the international arena. Cronin, *How al-Qaida Ends*, *supra* note 4, at 47.

13. Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008). The case affects approximately 207 detainees. *See id.*

14. Michael B. Mukasey, U.S. Att'y Gen., Remarks Prepared for Delivery at the American Enterprise Institute for Public Policy Research (July 21, 2008), *available at* http://www.usdoj.gov/ag/speeches/2008/ag-speech-0807213.html.

15. *Id.*

16. William Glaberson & Eric Lichtblau, *Guantanamo Detainee's Trial Opens, Ending a Seven-Year Tangle*, N.Y. TIMES, July 22, 2008, at A12.

17. *See* Memorandum Order at 11-13, Hamdan v. Gates, No. 04-1519 (D.D.C. July 17, 2008), *available at* https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2004cv1519-108 (denying Hamdan's motion for a preliminary injunction to stop his trial by military commission).

confessions made in Hamdan's six-year confinement and allowed others, therefore restricting Hamdan's right to a broad interpretation of the privilege against self-incrimination.[18] Hamdan was convicted on August 6, 2008, by the military commission and was subsequently sentenced to sixty-six months of confinement.[19] Given that Hamdan had already served sixty-one months at Guantanamo at the time of his conviction, he will complete service of the sentence in December 2008. However, it remains unclear whether the administration intends to continue to detain Hamdan beyond that term as an enemy combatant.

To cloud the picture even more, a series of appellate cases have provided more jurisprudential commentary relating to the rights of detainees. A divided and fragmented Fourth Circuit sitting *en banc*, decided two issues concerning Ali Saleh Kahlah Al-Marri.[20] The court upheld the President's wartime power to hold enemy combatants who are captured in the United States (so-called sleeper agents) without trial, and simultaneously ruled that the accused had the right to petition a civilian court for a writ of habeas corpus to review the government's allegations and evidence in the hearsay declaration against him since he had not been given sufficient process to challenge his designation as an enemy combatant.[21] Meanwhile, the Court of Appeals for the District of Columbia found insufficient evidence to sustain a Combatant Status Review Tribunal (CSRT) determination that Huzaifa Parhat, a Guantanamo Bay detainee, was

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18. Glaberson & Lichtblau, *supra* note 16.

19. *See* Jerry Markon, *Hamdan Guilty of Terror Support: Former Bin Laden Driver Acquitted of Aiding Attacks*, WASH. POST, Aug. 7, 2008, at A1; *Bin Laden Driver Given 66 Months*, BBC NEWS, Aug. 7, 2008, *available at* http://news.bbc.co.uk/2/hi/americas/7547261.stm.

20. The court was divided 5-4 on both of its holdings, with four judges voting in the affirmative on the first issue and the same four voting in the negative on the second issue. Judge Traxler represented the fifth affirmative vote on each issue siding once with each group of four justices. Al-Marri v. Pucciarelli, 534 F.3d 213, 216 (4th Cir. 2008).

21. *Id.* at 216; R. Jeffrey Smith & Del Quentin Wilber, *Terrorism Suspect May Petition Civilian Court*, WASH. POST, July 16, 2008, at A6.

an "enemy combatant."[22] The court ordered the government to release, transfer, or hold a new CSRT for Parhat.[23]

Most recently, on November 20, 2008, a district court ordered the release of five detainees from Guantanamo Bay, including Lakhdar Boumediene himself.[24] Responding to their habeas corpus petitions, the court found that there was insufficient evidence for the United States to lawfully detain the individuals as "enemy combatants."[25]

To some, this thicket of cases, executive assertions, and Congressional rebuffs may seem like a system working. But to many it seems that after seven years and two wars, the executive, legislative, and judicial branches have yet to design a constitutional process or framework to detain, try, or hold individuals captured in the struggle against terrorism. The current policy has generated increased domestic concerns about maintaining the delicate constitutional balance between national security, traditional civil liberties, and our commitment to international conventions. The current approach has raised international objections by allies that the U.S. rhetoric with respect for the rule of law appears to be hypocritical.[26] Finally, escalating legal challenges, corresponding shifts in policy by the executive branch, potential parallel legal procedures under the Detainee Treatment Act and the writ of habeas corpus, and statutory adjustments by Congress have resulted in a confused legal landscape with uncertain prospects for the future.[27]

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22. Parhat v. Gates, 532 F.3d 834, 850 (D.C. Cir. 2008).

23. *Id.* at 851. In response to the government's argument that certain assertions were reliable because they appeared in three documents, the court stated "the fact that the government has 'said it thrice' does not make an allegation true." *Id.* at 848-49 (quoting LEWIS CARROLL, THE HUNTING OF THE SNARK 3 (1876)).

24. Boumediene v. Bush, No. 04-1166, 2008 WL 4949128 (D.D.C. Nov. 20, 2008).

25. *Id.*

26. *See, e.g.*, Neil Lewis, *Red Cross Criticizes Indefinite Detention in Guantanamo Bay*, N.Y. TIMES, Oct. 10, 2003, at A1; FRANCIS T. MIKO & CHRISTIAN FROELICH, CONG. RES. SERVICE, GERMANY'S ROLE IN FIGHTING TERRORISM: IMPLICATIONS FOR U.S. POLICY 16 (2004).

27. *See* DAVID E. GRAHAM, FOUND. FOR LAW, JUSTICE AND SOC'Y, COURTS AND THE MAKING OF PUBLIC POLICY: THE U.S. JUDICIAL RESPONSE TO POST-9/11 EXECUTIVE TEMERITY AND CONGRESSIONAL ACQUIESCENCE (2008).

II. THE ARGUMENT FOR A NATIONAL SECURITY COURT

With the threat of transnational terrorism a permanent one, and the essential issue of legitimacy of action to long-term success, the United States must build a more stable, permanent legal institution to address the issue of terrorism. Congress and the President should create a National Security Court within the Article III judicial system to provide an effective means for detention, treatment, and trial of suspected terrorists for both U.S. citizens and aliens.[28] We now have over seven years of experience in the post-9/11 fight against transnational terrorists. The legal challenges have highlighted many of the key issues requiring deliberate consideration and resolution. And although the debate within the United States on particular issues, such as indefinite detention and use of coercive interrogation, has not been resolved, the problems have matured to the point that reasoned policy decisions that better address long-term consequences are now possible.

The concept of an Article III National Security Court (NSC) or some form of hybrid court is gathering wide political support. A significant number of legal experts and commentators have advanced various arguments for creating an Article III National Security Court.[29] Commenting on the range of proposals for creation of such a forum, Judge (now Attorney General) Mukasey stated:

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28. The term "aliens" includes all non-U.S. citizens: those persons lawfully admitted as immigrants for permanent residence in the United States (immigrants), those persons lawfully admitted to the United States for a temporary, specific purpose (non-immigrants), and all other persons wherever located, including persons in the United States without legal authorization (undocumented aliens). *See* 8 U.S.C. § 1101 (2008); Cynthia Juarez Lange, *State Enactment of Immigration Laws*, *in* PRACTISING LAW INSTITUTE CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES 87, 105, PLI Order No. 11436 (Oct. 2007).

29. *See, e.g.*, Harvey Rishikof, *A Federal Terrorism Court*, PROGRESSIVE POLICY INSTITUTE POLICY REPORT (Nov. 2007); Michael Mukasey, *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15, *available at* http://www.opinionjournal.com/extra/?id=110010505; Jack L. Goldsmith & Neal Katyal, *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19; Stuart Taylor, Jr., *The Case for a National Security Court*, NAT'L J., Feb. 27, 2007, *available at* http://www.theatlantic.com/doc/200702u/nj_taylor_2007-02-27; Andrew C. McCarthy & Alykahn Velshi, *We Need a National Security Court*, *in* OUTSOURCING AMERICAN LAW (Am. Enter. Inst., forthcoming 2007), *available at*

These proposals deserve careful scrutiny by the public, and particularly by the U.S. Congress. It is Congress that authorized the use of armed force after Sept. 11—and it is Congress that has the constitutional authority to establish additional inferior courts as the need may be, or even to modify the Supreme Court's appellate jurisdiction.[30]

This article expands on the arguments for the creation of a national security court by providing a strategic rationale for a specialized Article III mechanism, advancing specific proposals for jurisdiction and procedures of a National Security Court, and addressing the most prominent criticisms of the concept.

A. Evolution of U.S. Policy Prior to Boumediene

U.S. law and policy governing the detention, treatment, and trial of suspected terrorists has evolved since the terrorist attacks on September 11, 2001.[31] Soon after the attacks, Congress passed the

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http://www.defenddemocracy.org/images/stories/national%20security%20court.pdf; Glenn M. Sulmasy, *The Legal Landscape After Hamdan: The Creation of Homeland Security Courts*, 13 NEW ENG. J. INT'L & COMP. L. 1 (2006); Andrew C. McCarthy, *Abu Ghraib & Enemy Combatants: An Opportunity to Draw Good Out of Evil*, NAT'L REV., May 11, 2004, *available at* http://article.nationalreview.com/?q=NTZjNWFjNmEzYzA5ZDlhZWIwMDU2MTc0YmEwODFjY2U=; BENJAMIN WITTES, LAW AND THE LONG WAR 177 (2008); Benjamin Wittes, *Wrenching Choices on Guantanamo*, WASH. POST, Nov. 21, 2008, at A23; Anthony Dworkin, *The Supreme Court's Guantanamo Ruling and the Future of the War on Terror*, CRIMES OF WAR PROJECT, July 2, 2008, http://www.crimesofwar.org/print/onnews/habeas-print.html (setting forth the option of an "emergency paradigm"); Harvey Rishikof, *Is It Time For a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes*, 8 SUFFOLK J. TRIAL & APP. ADVOC. 1 (2003); Harvey Rishikof, *A New Court for Terrorism*, N.Y. TIMES, June 8, 2002, at A15.

30. Michael Mukasey, *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15, *available at* http://www.opinionjournal.com/extra/?id=110010505.

31. A statutory scheme for detention and deportation of alien terrorists from the United States has existed since 1996. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 401, 110 Stat. 1258-68 (codified as amended at 8 U.S.C. §§ 1531-37 (2006)).

USA PATRIOT Act,[32] which included a provision authorizing the detention of suspected alien terrorists within the United States for seven days, with extended detention for deportable aliens renewable for six-month periods upon certification of the Attorney General.[33] In November 2001, the President issued Military Order No. 1,[34] an executive order that relied on his constitutional commander-in-chief power and the recent Congressional Authorization for Use of Military Force (AUMF).[35] Consistent with the presidential determination that the United States was now involved in a "war on terror,"[36] the order adopted a law of armed conflict framework, relying on U.S. Supreme Court precedent from cases involving military tribunals during World War II and the Civil War.[37] Suspected terrorists and supporters captured abroad by U.S. forces were designated as unlawful enemy combatants, placed in indefinite detention under military control at the U.S. Naval Station at Guantanamo Bay, Cuba, and made subject to trial by military commission.[38]

Employing a law of armed conflict paradigm was not only a philosophical approach, it was intended to be a pragmatic solution to the classification conundrum of how to treat non-state actors fighting against the state. Holding captured suspected terrorists and supporters

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32. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 was enacted on October 26, 2001. *See* Pub. L. No. 107-56, 115 Stat. 272 (2001).

33. USA PATRIOT Act § 412(a), 8 U.S.C. § 1226a (2006).

34. Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter Military Order No. 1].

35. *See* Authorization for Use of Military Force, S.J. Res. 23, 107th Cong., Pub. L. No. 107-40, 115 Stat. 224 (2001).

36. *See* President George W. Bush, Address to a Joint Session of Congress and the American People at the United States Capitol (Sept. 20, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html (last visited Sept. 25, 2008).

37. *See* The President's Constitutional Authority to Conduct Military Operations Against Terrorists and the Nations Supporting Them, 25 Op. Off. Legal Counsel part III, (Sept. 25, 2001), *available at* http://www.usdoj.gov/olc/warpowers925.htm.

38. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. at 57,833, 57,834; Military Commissions Act of 2006 § 3(a), 10 U.S.C. §§ 948c-48d (2006).

in military custody beyond the border enabled greater secrecy of operations by the executive branch, tighter security, and a more permissive atmosphere to gather intelligence from detainees to prevent future attacks. Implicit in the approach was the assumption that the existing Article III court system and the Uniform Code of Military Justice (UCMJ)[39] would be unable to manage the challenges of terrorist detention and trial, and would interfere with the key objective of exploiting the detainees for intelligence value. This approach has raised significant international law issues that continue to bedevil the system of military commissions.

Despite the policy's pragmatic intent, implementation proved difficult. Outside groups challenged the legality of the U.S. detention and treatment policy, asserting the detainees' rights to humane treatment under the Geneva Conventions and right to petition for habeas corpus review in Article III courts. In 2004, the U.S. Supreme Court in *Rasul v. Bush* held that alien terrorist suspects detained at Guantanamo Bay were entitled to the right of habeas corpus by Article III courts.[40] In 2006, the Supreme Court, in a plurality opinion in *Hamdan v. Rumsfeld*, held that the military commissions created by the President in 2001 to try detainees at Guantanamo Bay were unlawful because they unjustifiably deviated from the rules for court-martial as required by Article 36(b) of the UCMJ.[41] Both rulings eroded the legal foundations of the original U.S. policy based on the law of armed conflict approach. In response to growing political furor over the administration's inhumane treatment of detainees at Guantanamo Bay by the military, Congress passed the Detainee Treatment Act of 2005 (DTA).[42] The DTA set minimum standards for treatment of detainees at Guantanamo Bay and restricted the jurisdiction of federal courts to hear detainee habeas corpus claims.[43] Following the *Hamdan* decision, Congress passed the Military Commissions Act of 2006 (MCA), to reinforce the legal sufficiency of

39. 10 U.S.C. §§ 801-946 (2006).

40. Rasul v. Bush, 542 U.S. 466, 484 (2004).

41. Hamdan v. Rumsfeld, 548 U.S. 557, 620-24 (2006).

42. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, 2739-44 (2006).

43. *See id.*

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the military commissions under Article 36(b) of the UCMJ and Common Article 3 of the Geneva Conventions.[44] In 2007, the Secretary of Defense promulgated the Manual for Military Commissions (MMC) pursuant to the MCA, establishing detailed, public rules of evidence and procedure governing the conduct of military commissions that were closely aligned with the accepted norms governing U.S. courts-martial under the UCMJ.[45]

Complicating the landscape was the executive branch's treatment of two U.S. citizens suspected of terrorist activities: Jose Padilla and Yaser Hamdi. Jose Padilla was arrested by federal law enforcement agents inside the United States in May 2002 on suspicion of planning a terrorist attack.[46] The President designated Padilla an enemy combatant and transferred him to military custody, where he was held within the United States for over three years without judicial process.[47] Following legal challenges to his continued detention, the United States returned him to civilian control in 2006.[48] Padilla was tried and convicted in federal district court in 2007 on terrorism charges.[49]

Yaser Hamdi was captured on the battlefield against U.S. forces in Afghanistan in late 2001, initially transferred to Guantanamo Bay, then moved to military control within the United States once his citizenship was discovered.[50] The military held Hamdi for over two years under military control before freeing him in return for his agreement to renounce his citizenship and leave the United States.[51]

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44. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 10 U.S.C. §§ 948a-50w (2006)).

45. OFFICE OF THE SEC'Y OF DEF., U.S. DEP'T OF DEF., THE MANUAL FOR MILITARY COMMISSIONS (2007), *available at* http://www.defenselink.mil/pubs/pdfs/The%20Manual%20for%20Military%20Commissions.pdf.

46. Rumsfeld v. Padilla, 542 U.S. 426, 430-33 (2004); Padilla v. Hanft, 423 F.3d 386, 388 (4th Cir. 2005).

47. Padilla v. Hanft, 423 F.3d at 388.

48. Padilla v. Hanft, 423 F.3d 386, 388 (4th Cir. 2005), *cert. denied*, 547 U.S. 1062 (2006).

49. Abby Goodnough & Scott Shane, *Padilla Is Guilty On All Charges In Terror Trial*, N.Y. TIMES, Aug. 17, 2007, at A1.

50. Hamdi v. Rumsfeld, 542 U.S. 507, 509-11 (2004).

51. Jerry Markon, *U.S. to Free Hamdi, Send Him Home*, WASH. POST, Sept. 23, 2004, at A1.

In *Rumsfeld v. Padilla* and *Hamdi v. Rumsfeld*, the U.S. Supreme Court reviewed the power of the executive to detain citizens as enemy combatants within the United States and to restrict or deny the detained citizens access to Article III courts.[52] The state of the law today regarding executive detention of citizens within the United States as enemy combatants is more developed, but by no means settled, as reflected by *Al-Marri.*[53]

Since 2002, the Supreme Court has helped to set the parameters of the law regarding detention and trial of suspected terrorists, but has left the lower courts to repeatedly tackle the substantive issues, unresolved by the Court, that continue to arise in new detainee litigation. This is resulting in expected variance among the circuits on substantive issues, with persistent uncertainty in the law as the cases make their eventual appellate march to the Court's jurisdiction.

Yet, the increased involvement of the judicial and legislative branches in this matter has resulted in a more considered and balanced policy approach. The current CSRTs[54] and military commissions established under the MCA and the MMC are a marked distinction from where the United States began in 2001. However, heavy suspicion remains at home and abroad over the new structure.[55] U.S. legitimacy as the champion of the rule of law remains linked to its

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52. Rumsfeld v. Padilla, 542 U.S. 426 (2004) (holding that the U.S. district court did not have jurisdiction for habeas corpus over a U.S. citizen arrested and detained within the United States because the petition was not specifically addressed to the military custodian of Padilla); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (holding that a U.S. citizen captured on the battlefield under arms against the United States could be properly detained under the laws of war, but that due process required that an enemy combatant be given meaningful opportunity to contest the factual basis for his detention).

53. *See* Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008). Although *Hamdi* provided some clarity that the President has authority to declare citizens captured on the battlefield as enemy combatants, the limits of this authority, such as how it applies to persons captured in the United States, as Padilla was, remain unclear. The MCA does not apply to U.S. citizens. Military Commissions Act of 2006 § 3, 10 U.S.C. § 948c (2006).

54. *See* Memorandum from Paul Wolfowitz, U.S. Deputy Sec'y of Def., Order Establishing Combatant Status Review Tribunals, at 3 § *h* (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

55. For example, the question of how evidence obtained from coercive interrogation will be treated remains unanswered.

diminishing standing over the issue of detention, treatment, and trial of suspected terrorists. As reflected in *Boumediene*, key procedural issues remain unresolved.[56] The significant security and procedural challenges of trying U.S. citizens suspected of terrorism in U.S. district courts have not been adequately addressed. The continued "preventive detention" of suspected terrorists at Guantanamo Bay has become a strategic lightning rod for those challenging U.S. legitimacy in the fight against terrorism and jeopardizes the United States' relationship with its allies. The problems at Guantanamo Bay will not abate until the United States finds an alternative permanent policy solution.[57] Such a solution necessarily requires a stronger constitutional balance, with increased participation by the legislative and judicial branches in concert with the executive.

B. Necessity of an Appropriate Detention Regime

A detention regime that appropriately balances government interests in public security against individual interests in liberty is a necessary tool to combat terrorism, provided that the purpose and scope of such detentions are well defined and clearly support national security objectives, rather than undermine them. The proper balance requires an articulation of the purposes of detention (*e.g.*, incapacitation, intelligence gathering, and prosecution), adherence to accepted legal norms, a process to challenge the government's detention, and an understanding of the consequences of the policy in domestic and international contexts.

Detention is a government's use of authority and force to restrict the liberty and movement of an individual for a specific purpose and

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56. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008).

57. Former Secretary of State Colin Powell has called for the closure of the detainee operations at Guantanamo Bay. Gary Thomas, *U.S. Detainee Policy Comes Under Fire*, VOICE OF AMERICA (June 14, 2007), *available at* http://www.voanews.com/english/archive/2007-06/2007-06-15voa5.cfm?CFID=35712101&CFTOKEN=20977929. This should not prevent the temporary use of Guantanamo Bay for other detention operations under extreme circumstances. For example, the temporary detention at Guantanamo Bay of migrants interdicted and rescued at sea pending repatriation has enabled the United States to deter and respond to maritime mass migrations and the corresponding catastrophic loss of life that would entail. *See* Exec. Order No. 13,276, 67 Fed. Reg. 69985 (Nov. 15, 2002).

duration in furtherance of public interests.[58] Government detention of persons is universally accepted as legitimate under a variety of circumstances, including pre-trial investigation, criminal prosecution, post-prosecution punishment, incapacitation of mentally diseased and dangerous persons for public safety, and detention of enemy combatants captured on the battlefield.[59] The legitimacy of such detention rests on due process; whether it accords with standards and values embodied in accepted norms of domestic and international law governing concepts of fairness and justice. Due process rests on factors such as the degree of government self-restraint, the reasons for detention, the duration and conditions of detention, and the existence of some form of neutral judicial review. The United States has a history of employing these types of detention based on an established body of law governing their use.[60]

The purpose of the current preventive detention regime, based primarily on a law of armed conflict approach, appears to be twofold: to incapacitate unlawful enemy combatants for the duration of hostilities, and to obtain intelligence information from those detainees. However, the benefit of indefinite—perhaps permanent—incapacitation through detention under the GWOT framework is outweighed by the damage the policy causes to U.S. legitimacy. Further, it is unclear that lengthy detention and interrogation of suspected terrorists provides greater intelligence value than other options.[61] The value of intelligence, particularly operational details, held by a detainee without access to associates or means of communication typically diminishes with time.[62] These realities

58. *See* BLACK'S LAW DICTIONARY 480 (8th ed. 2004).

59. *See* United States v. Salerno, 481 U.S. 739, 748-49 (1987) (discussing various exceptions to the general prohibition against detention prior to judgment in a criminal trial).

60. *See, e.g.*, Bail Reform Act of 1984, 18 U.S.C. §§ 3141-50, 3156; United States v. El-Hage, 213 F.3d 74 (2d Cir. 2002); United States v. Walker, 808 F.2d 1309 (9th Cir. 1986).

61. *See* Mark Mazzetti, *C.I.A. Still Awaiting Rules on Interrogating Suspects*, N.Y. TIMES, Mar. 25, 2007, at A14.

62. *See id.*

undermine the justification for indefinite administrative detentions for broader intelligence purposes.[63]

The current preventive detention regime also damages the strategic legitimacy of the United States because it applies a legal double standard for treatment and interrogation of detainees, depending not upon the status of the detainee but the agency affiliation of the government custodian. The DTA established a minimum standard for detainee treatment and interrogation for all persons detained under the control of the Department of Defense (DoD), requiring that no person under DoD control may be subjected to a list of specific interrogation techniques not authorized by the standing U.S. Army Field Manual on interrogation.[64] For non-DoD agencies however, the DTA applies only a minimum constitutional standard, prohibiting "cruel, inhuman or degrading treatment or punishment" that, considered under a totality of the circumstances, violates the Fifth, Eighth, or Fourteenth Amendments.[65] This dichotomy allows non-DoD personnel to conceivably engage in coercive interrogation methods that may be otherwise prohibited for use by DoD personnel.[66] The MCA not only reaffirmed this dual

63. A common hypothetical emergency situation posits a terrorist who is captured and detained, and who possesses detailed knowledge of an imminent terrorist attack. The issue is whether the government, considering moral, ethical, and legal dimensions, should employ coercion and perhaps torture against the detainee in order to obtain the vital intelligence and stop the attack. Such hypothetical situations are fortunately rare other than in cinema and law school examinations. But if they do occur, the urgency of interrogating the suspect to rapidly obtain the intelligence and prevent the attack makes lengthy detention for intelligence purposes irrelevant. An alternate theory argues that detention of suspected terrorists may harm intelligence efforts. This theory suggests that if government authorities identify a suspected terrorist, they should evaluate acceptable risk and if possible delay arrest, permitting the suspect greater freedom of action under continuing government surveillance. Although heavily reliant on an accurate risk calculus and successful intelligence efforts, this approach would provide greater opportunities for collecting valuable intelligence to disrupt or prevent attacks.

64. Detainee Treatment Act of 2005, H.R. 2863, 109th Cong. § 1002 (2005); *see also* GRAHAM, *supra* note 27, at 5.

65. Detainee Treatment Act § 1003, 42 U.S.C. § 2000dd (2006).

66. GRAHAM, *supra* note 27, at 5. There are practical reasons offered for such a dual standard. For example, the lower training and experience levels of military

standard for detainee treatment, but also specifically authorized the use of a detainee's coerced testimony before a military commission.[67]

Despite the arguments against the current detention policy, there are legitimate purposes for detention that further both short- and long-term national security objectives. A detention regime should serve the purpose of temporary incapacitation when necessary to prevent a suspected terrorist from conducting or aiding an imminent or looming attack and should provide the government reasonable time to complete pre-trial investigation and preparations in advance of criminal prosecution. Such a detention policy must consider such factors as the degree and nature of the threat posed by the individual and the progress of the government in investigating and prosecuting criminal charges. Additionally, it should provide the detainee a right to challenge the basis for the state's detention and the conditions of the detention facility. These purposes are consistent with domestic and international legal norms and do not undermine U.S. strategic legitimacy.

Some have argued for stronger executive authority to employ indefinite preventive detention of suspected terrorists, including U.S. citizens, with restricted judicial review, such as the initial approach used to detain Padilla or Hamdi.[68] However, such a preventive detention scheme would require compelling emergency circumstances that Congress has not determined currently exist. Although the United States faces a significant threat of terrorist attacks by Islamic extremists, there has been insufficient evidence to warrant providing the executive with this authority. The U.S. Constitution provides Congress with the "suspension power" to address such circumstances,[69] and the sweeping but general language of the 2001

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interrogators compared to non-DoD interrogators necessitates a more restrictive policy on interrogations by DoD personnel.

67. *Id.* at 6. For a discussion of proposed admissibility of evidence from coerced confessions, see *infra* Part III.D.

68. *See, e.g.*, Brief of Citizens for the Common Defence as Amicus Curiae in Support of Respondents at 5, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 683613.

69. U.S. CONST. art. I, § 9. The "Suspension Clause" prohibits Congress from suspending the privilege of the writ of habeas corpus unless the public safety requires it. *Id.*

Authorization for the Use of Military Force (AUMF) fails to provide the executive with that emergency authority.[70]

Given the constant potential for government overreaching to achieve security interests, and a need for appropriate balancing of governmental and individual interests, a detention regime should include greater participation by Article III courts. Article III judges are uniquely qualified and positioned to perform this interest balancing.[71] But detention of terrorist suspects also requires judges with specialized national security expertise and an appropriate forum that ensures government interests in security of the proceedings and information.

C. Universal Minimum Standards for Due Process

Whether by criminal trials, military commissions, or international tribunals, employing the rule of law to achieve "legitimacy supremacy" over terrorists for the long term requires the state to adhere to minimum standards of due process that meet domestic and international legal norms. Whether a state's actions in detaining and trying suspected terrorists are sufficient to meet such "universal minimum standards" is not only a question of legal review, but one of public understanding and perception that the state's application of power through legal instruments is just and fair. Thus, the state's actions must not only be legally legitimate, but perceived as politically legitimate as well.

Of course any U.S. legal regime for detention, treatment, and trial of suspected terrorists must address minimum U.S. constitutional due process requirements. This is not to argue for expansion of constitutional protections currently afforded suspected terrorists, but the need for a careful examination and distinction between those

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70. *See* Authorization for Use of Military Force, S.J. Res. 23, 107th Cong., Pub. L. No. 107-40, 115 Stat. 224 (2001); *see also* 18 U.S.C. § 4001(a) (2006) ("No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.").

71. Audio tape: Honorable Leonie Brinkema, Keynote Address at the Conference on Terrorists and Detainees: Do We Need National Security Court?, held by the Brookings Institution and American University School of Law (Feb. 1, 2008), *available at* http://www.wcl.american.edu/podcast/podcast.cfm?uri= http://www.wcl.american.edu/podcast/audio/20080201_WCL_TAD.mp3.

statutory and regulatory protections and the minimum due process required under the Constitution.[72] Although establishing United States constitutional due process standards is the first step, whether those standards are truly accepted as universal minimum standards requires a broader assessment of international norms embodied in codified and customary international law.

Determining universal minimum standards of due process presents a daunting challenge, yet the Court's opinion in *Hamdan v. Rumsfeld* has supplied a starting point in Common Article 3[73] and Article 75 of Protocol I to the Geneva Conventions.[74] In *Hamdan*, a majority of the Court held that the military commissions established in 2001 violated Article 36 of the UCMJ because the President's determination for variances between military commissions and courts-martial was insufficient.[75] The Court also held that the military commissions violated Common Article 3 of the Geneva Conventions, and thus required the United States to afford those persons detained and tried as suspected terrorists the protections under Common Article 3, including the prohibition on "the passing of sentences and the carrying out of executions without previous judgment pronounced by a *regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples*."[76]

In a plurality opinion, Justice Stevens reached beyond the broad language of Common Article 3 to find greater explanation of its due process guarantees. Justice Stevens determined that the "judicial guarantees which are recognized as indispensable by civilized peoples" described in Common Article 3 incorporate "at least the

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72. *Compare* 18 U.S.C. § 3161; Zedner v. United States, 547 U.S. 489 (2006) (describing the application of the statutory protections for speedy trial under the Speedy Trial Act, 18 U.S.C. § 2161(c)(1)) *with* Barker v. Wingo, 407 U.S. 514 (1972) (establishing a four-part constitutional test to determine whether the government has violated an individual's Sixth Amendment right to speedy trial).

73. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention].

74. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75, June 8, 1977, 1125 U.N.T.S. 30 [hereinafter Protocol I], *available at* http://www2.ohchr.org/english/law/protocol1.htm.

75. Hamdan v. Rumsfeld, 548 U.S. 557, 628-35 (2006).

76. Geneva Convention, *supra* note 73, art. 3 ¶ 1(d) (emphasis added).

barest of those trial protections that have been recognized by customary international law," and that "[m]any of these are described in Article 75 of Protocol I to the Geneva Conventions"[77] Article 75 provides for humane treatment of all persons held by a contracting party, prohibits certain criminal or otherwise inhumane acts upon persons, and provides certain requirements for due process for persons arrested, detained, interred, or tried by the party.[78] Justice Stevens

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77. *Hamdan*, 548 U.S. at 633.

78. The United States is not a signatory to Article 75 of the First Additional Protocol (Protocol I) to the Geneva Conventions. Article 75 provides:

> 1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.
> 2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
> (a) Violence to the life, health, or physical or mental well-being of persons, in particular:
> (i) Murder;
> (ii)Torture of all kinds, whether physical or mental;
> (iii) Corporal punishment; and
> (iv) Mutilation;
> (b) Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
> (c) The taking of hostages;
> (d) Collective punishments; and
> (e) Threats to commit any of the foregoing acts.
> 3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.
> 4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly

constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

(a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

(b) No one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) Anyone charged with an offence is presumed innocent until proved guilt according to law;

(e) Anyone charged with an offence shall have the right to be tried in his presence;

(f) No one shall be compelled to testify against himself or to confess guilt;

(g) Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(h) No one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgment acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

(i) Anyone prosecuted for an offence shall have the right to have the judgment pronounced publicly; and

(j) A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

recognized that although the United States has not ratified Protocol I, the principles articulated in Article 75 are "indisputably part of the customary international law."[79] Though the majority did not join Justice Stevens in his reliance on Article 75 as the basis for invalidating the military commissions, making the precedential value of that part of the holding doubtful, both Common Article 3 and Article 75 nevertheless provide standards of due process that are widely accepted by the international community.[80]

In addition to Article 75, the International Covenant on Civil and Political Rights (ICCPR)[81] provides a similar framework of due process standards that serve as universally accepted minimums.[82]

> 7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:
>
> (a) Persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and
>
> (b) Any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.
>
> 8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.

Protocol I, *supra* note 74, art. 75.

79. *Hamdan*, 548 U.S. at 634.

80. *See* Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 431, 432 n.360 (2004).

81. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 172.

82. *See* Cristian Defrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381, 1393 (2001). Article 14 provides:

> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of

Notably, the ICCPR also provides for flexibility in due process by permitting tribunals to make limited exceptions to certain due process

> justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
>
> 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
>
> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
>
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> (c) To be tried without undue delay;
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
>
> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
>
> (g) Not to be compelled to testify against himself or to confess guilt.
>
> 4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
>
> 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
>
> 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
>
> 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

International Covenant on Civil and Political Rights, *supra* note 81, art. 14.

principles in "public emergencies."[83] The U.S. Congress ratified the ICCPR in 1992, but excepted the United States from many of its provisions for domestic criminal proceedings.[84] Nevertheless, the ICCPR also serves as customary international law and like Article 75, provides an important foundation for due process and sustaining legitimacy in applying the rule of law against terrorists.[85]

III. ESTABLISHING AN ARTICLE III NATIONAL SECURITY COURT

The United States should create a specialized Article III National Security Court to provide an effective, constitutionally balanced means for detention, treatment, and trial of suspected terrorists and provide for sufficient due process under domestic and international legal standards. The NSC would not only establish a comprehensive, permanent system to consistently address the problem by employing accepted legal standards and processes, it would also provide a strategic departure from the current course that has diminished the United States' standing on rule of law in the fight against terrorism. It would enable the United States to transfer the remaining alien detainees from Guantanamo Bay to secure custody in the United States with appropriate due process, and the United States would be able to close Camp Delta at Guantanamo Bay. [86]

There is constitutional authority and precedent for Congress to create specialized Article III courts with limited jurisdiction to address

83. International Covenant on Civil and Political Rights, *supra* note 81, art. 4 ¶ 1.

84. *See* Hain v. Gibson, 287 F.3d 1224, 1243 (10th Cir. 2002).

85. For a proposal arguing for employment of Protocol II of the Geneva Conventions as a source of fundamental due process guarantees, see Michael W. Meier, *A Treaty We Can Live With: The Overlooked Strategic Value of Protocol II*, ARMY LAW., Sept. 2007, at 28.

86. Camp X-Ray, a temporary facility hastily erected in 2001, was closed in early 2002 and the detainees transferred to Camp Delta, a more permanent facility located at the U.S. Naval Station at Guantanamo Bay, Cuba. *See* WashingtonPost.com, Guantanamo Bay Timeline, http://projects.washingtonpost.com/guantanamo/timeline/ (last visited Oct. 13, 2008). Guantanamo Bay is occupied pursuant to a lease agreement with the Republic of Cuba that grants the United States jurisdiction and control of the premises so long as the site is not abandoned. *See* Rasul v. Bush, 542 U.S. 466, 471 (2004).

unique legal and policy issues.[87] Congress has in fact already created specialized Article III courts with jurisdiction and competence to manage national security matters. The Foreign Intelligence Surveillance Court (FISC), established in 1978, reviews applications from the Department of Justice and, when appropriate, grants authorization for electronic surveillance or physical searches against agents of a foreign power within the United States, including those suspected of foreign intelligence or international terrorism.[88] The Alien Terrorist Removal Court (ATRC), established in 1996, has jurisdiction to review *ex parte* applications from the Department of Justice to order removal of terrorist aliens from the United States.[89]

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87. The U.S. Constitution empowers the Congress with the authority "[t]o constitute Tribunals inferior to the supreme Court[.]" U.S. CONST. art. I, § 8. This power is further articulated in Article III, where judicial powers are vested in "such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. Article III courts of specialized jurisdiction include the District Bankruptcy Courts and Court of International Trade.

88. Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-62 (2006); *see also In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002).

89. *See* Antiterrorism and Effective Death Penalty Act of 1996 § 401, 8 U.S.C. §§ 1531-37. The Department of Justice has not brought one case before the ATRC since its creation. *See* Steven R. Valentine, *Flaws Undermine Use of Alien Terrorist Removal Court*, LEGAL BACKGROUNDER, Feb. 22, 2002, at 1. This may be because administrative immigration proceedings to remove suspected terrorist aliens provide an easier and more secure venue for removal of suspected terrorist aliens. *See* Stephen Townley, *The Use and Misuse of Secret Evidence in Immigration Cases: A Comparative Study of the United States, Canada, and the United Kingdom*, 32 YALE J. INT'L L. 219, 234-35 (2007). Specifically, under the ATRC, the government may employ secret evidence *in camera* and *ex parte* with the court, but must disclose to the alien's counsel an unclassified summary of the evidence. *Id.* at 227. However, the government may also remove an alien pursuant to administrative immigration proceedings, which also permit the use of classified evidence but without the requirement to disclose an unclassified summary. *See id.* at 228. Other commentators have suggested that the ATRC may be unconstitutional. *See, e.g.*, STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 856 (4th ed. 2007) (stating that "constitutional doubts" about the ATRC may be a reason the government has never used it); Jennifer A. Beall, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism*, 73 IND. L.J. 693, 705-09 (1998) (arguing that the removal procedures of the ATRC are unconstitutional). For recommendations for incorporating the ATRC jurisdiction into the NSC, see *infra* notes 104-09 and accompanying text.

An NSC would have specialized jurisdiction over the detention and trial of suspected terrorists within the United States, providing for adherence to appropriate substantive and procedural due process standards while also adequately addressing the government's needs to ensure the security of information and personnel.

A. Court Personnel and Facilities

The NSC judges would be experienced district court judges nominated by the President and confirmed by the Senate to serve limited terms on the NSC.[90] The NSC would be permanently convened at a secure U.S. government installation, with provisions to be temporarily convened at other facilities within or outside of the United States as needed to ensure appropriate physical and personnel security. The Department of Justice would be responsible for representing the United States before the NSC. Defense counsel would be detailed from a cleared pool of government attorneys (*i.e.*, national security public defenders) and appropriately screened members of the defense bar with approved access to classified national security information.[91] Grand and petit juries, when required, would be drawn from a cleared pool of citizens with appropriate access to national security information.[92]

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90. This would require district court judges, already confirmed for that position, to undergo a second confirmation to serve on the NSC. Secondary confirmation is not required for judges to serve on other specialized courts, such as the Foreign Intelligence Surveillance Court. *See* 50 U.S.C. § 1803 (2008). This additional requirement for NSC judges would ensure greater participation by the executive and legislative branches in assessing the national security expertise of those serving on the National Security Court.

91. Establishing a pool of defense attorneys who are eligible for access to classified national security information will address the government's interest in protecting intelligence and other sensitive information from disclosure that may harm the United States. Further, it may be necessary to include tighter restrictions on the ability of attorneys and defendants to disclose both classified and sensitive unclassified information to the public, with stronger criminal and civil penalties for such disclosure.

92. Establishing a pool of potential jurors who are eligible for access to classified national security information will also address government interests in protecting such information from unauthorized disclosure.

B. Jurisdiction

The National Security Court would have exclusive subject matter jurisdiction over the preventive detention, treatment, and trial of any person:

(a) In the custody of the United States and located outside the territory of the United States;
(b) In the custody of the United States, located inside the territory of the United States, and designated by the Attorney General as suspected of terrorist activity;
(c) Charged with one or more enumerated terrorism offenses under the United States Code; or
(d) Upon transfer of a case to the NSC by order of a district court or military commission.[93]

The extraterritorial custody provision would provide sweeping jurisdiction for the NSC to review the legal sufficiency of persons detained by the government outside U.S. territory as indicated by *Boumediene*.[94] As pointed out by commentators, *Boumediene* challenges two distinctions that cannot stand when international legitimacy is in question: the distinction between the constitutional rights of U.S. citizens and those of alien prisoners; and the distinction between the rights of prisoners in the United States and those outside of the United States.[95] In short, the common law principle—*the law follows the jailer*—must be enforced.[96] This broad jurisdiction is

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93. The issue of the different categories of captured and held detainees is outlined in Stephen I. Vladeck, *Due Process and Terrorism*, Post-Workshop Rep., (A.B.A. Standing Committee on Law and National Security, Wash., D.C.) Nov. 2007, at 7, *available at* http://www.nationalstrategy.com/Portals/0/Due_Process_and_Terrorism_Dec_2007.pdf. The report noted six potential categories of detainees: (1) U.S. citizens captured and held on the battlefield; (2) U.S. citizens captured and held elsewhere; (3) U.S. citizens seized not on a battlefield and held elsewhere; (4) non-U.S. citizens captured and held on battlefield; (5) non-U.S. citizens captured and held elsewhere; (6) non-U.S. citizens seized not on a battlefield and held elsewhere. *Id.*

94. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2259-63 (2008).

95. Ronald Dworkin, *Why It Was a Great Victory*, N.Y. REV. OF BOOKS, Aug. 14, 2008, at 20, *available at* http://www.nybooks.com/articles/21711 [hereinafter Dworkin, *Great Victory*].

96. *See* Rasul v. Bush, 542 U.S. 466, 473-85 (2004). *See also* Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and*

necessary to provide a consistent, efficient, and adequate Article III review of the basis for and the conditions of detention and treatment of any persons beyond the domestic criminal justice context. Jurisdiction would extend to review of persons detained following capture in hostilities against the United States, determinations by military authorities of a person's status as "enemy combatant" (such as through the CSRTs), and review of military commission actions conducted under the MCA (replacing the current appellate jurisdiction of the D.C. Circuit Court of Appeals). Jurisdiction would also extend to persons held by the United States but not under military authority, such as those in custody as part of a special activity (*i.e.*, covert action) conducted under presidential finding and authorization, so-called extraordinary rendition.[97]

The involvement of an Article III court in review of actions traditionally reserved almost entirely to the discretion of the executive raises concerns about interference with the President's constitutional commander-in-chief and foreign relations powers to direct military operations under the laws of war or the statutory authority to direct special activities such as covert actions.[98] However, the executive's authority is not plenary. Article I of the Constitution provides Congress with the power to make rules for capture on land and sea.[99] Additionally, Congress is granted authority by statute to conduct general oversight of certain special activities.[100] The NSC's

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American Implications, 94 VA. L. REV. 575, 700 (2008) (arguing that the focus of the common law jurisprudence on the writ of habeas corpus is on the power of the jailer rather than the rights of those detained).

97. *See* Gen. Michael Hayden, Director, Central Intelligence Agency, Remarks at the Chicago Council on Global Affairs (Oct. 30, 2007), *available at* https://www.cia.gov/news-information/speeches-testimony/2007/chicago-council-on-global-affairs.html; *Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations: Joint Hearing Before the Subcomm. on Int'l Orgs., Human Rights, and Oversight and the Subcomm. on Europe of the H. Comm. on Foreign Aff.*, 110th Cong. 28 (2007) (statement of Michael Scheuer, Former Chief, Bin Laden Unit, Central Intelligence Agency); Michael Mukasey, *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15, *available at* http://www.opinionjournal.com/extra/?id=110010505.

98. *See* U.S. CONST. art. II, § 2; 50 U.S.C. §§ 413a-b (2006).

99. U.S. CONST. art. I, § 8, cl. 11.

100. 50 U.S.C. § 413 (2006).

jurisdiction provides a constitutional balance between these grants of authority, without interfering with the President's prerogative to direct military operations as commander-in-chief, nor Congress' authority to make laws and provide oversight in order to ensure political accountability.[101]

The primary triggering mechanism for establishing NSC jurisdiction would fall within the discretion and control of the Attorney General. Through certification and charging provisions, the Attorney General could invoke NSC jurisdiction by certifying that persons in custody inside the United States are suspected of terrorist activity, or by charging persons in custody outside the United States with one or more specific terrorism offenses. However, the NSC would provide the government with a preferred venue to manage terrorism cases and proceedings, reducing the risk of the NSC being sidelined like the current ATRC.[102] Further, the NSC could review challenges to the executive certification or charging decisions,[103] transferring those cases in which the government has improperly attempted to employ the NSC for non-terrorism cases to the appropriate district court. This review power will reduce government incentives to dress up any case in terrorism clothing to obtain the advantages of the NSC procedures. The review power would not prevent the government from pursuing a terrorism matter in district court instead of the NSC. However, even without an executive action triggering NSC jurisdiction, if a district court determines that it is unable to adequately manage a terrorism case, it would be permitted to *sua sponte* transfer the case to NSC jurisdiction.

The NSC would incorporate the ATRC jurisdiction to order removal of terrorist aliens and align existing procedures before the ATRC and administrative immigration courts to ensure a consistent

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101. Andrew McCarthy has urged that review of executive branch designation of persons captured outside the United States as lawful or unlawful enemy combatants, such as those designations made through the CSRTs, should be subject to exclusive review by a specialized national security appellate court rather than the D.C. Circuit Court of Appeals. *See* McCarthy & Velshi, *We Need a National Security Court*, *supra* note 29, at 25-26.

102. *See* Valentine, *supra* note 89, at 3.

103. The proposed certification and review provisions are modeled on those under the ATRC. *See* 8 U.S.C. § 1226a.

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legal regime for detention and removal of suspected terrorist aliens. The Immigration and Nationality Act (INA) provides for non-Article III administrative courts and procedures for managing entry, discretionary relief, and removal proceedings for aliens.[104] These administrative proceedings permit the government to present, without examination by the alien, secret evidence relating to the inadmissibility or deportability of aliens.[105] Congress created the ATRC to specifically address the removal of terrorist aliens, and authorized the Attorney General in 8 U.S.C. § 1226a to automatically detain alien terrorist suspects for prescribed periods upon certification of the alien's risk to national security.[106] Despite these statutory mechanisms, however, the government continues to favor immigration courts because they are less burdensome.[107] Although Congress clearly intended the ATRC as the principal means to detain and remove terrorist aliens, it never amended the INA to align with these tailored mechanisms. The NSC would have exclusive jurisdiction to review the status of aliens designated by the Attorney General as suspected terrorists and detained pursuant to 8 U.S.C. § 1226a. The statute would amend the ATRC procedures to eliminate the automatic requirement that the government provide the alien with an unclassified summary of evidence employed in the proceedings, restoring the ATRC regime as a viable tool for the government. Under the revised construct, the government would only be required to provide an unclassified summary in cases in which the NSC judge determined that such disclosure would not cause undue harm to national security. Current immigration law would be revised to align it with the revised NSC jurisdiction to ensure consistent due process regimes for removal of suspected terrorist aliens.

The NSC's jurisdiction could be broadened to include the current jurisdictional and procedural standards of the Foreign Intelligence Surveillance Court (FISC).[108] It is likely that many cases that would

104. 8 U.S.C. §§ 1101(b)(4), 1229a (2006).

105. 8 U.S.C. § 1229a(b)(4)(B); *see also* DYCUS ET AL., *supra* note 89, at 855-56.

106. 8 U.S.C. § 1226a.

107. *See* DYCUS ET AL., *supra* note 89, at 856.

108. *See* 50 U.S.C. § 1803 (2006).

otherwise fall under NSC jurisdiction may initiate with government surveillance authorized by the FISC and incorporating the FISC jurisdiction within the NSC would therefore provide important efficiencies. However, the practical mechanics of such a transfer during a continuing time of unprecedented workload by the FISC risks disrupting that court's functions. Additionally, providing for separation of the functions of the NSC and the FISC would ensure more independent review of government actions by requiring the government, when pursuing terrorism cases, to appear before two separate Article III mechanisms; one to authorize surveillance activities and the other to subsequently hear administrative and criminal proceedings.[109]

NSC jurisdiction would not include the power to authorize the use of torture or coercive interrogation short of torture in specific cases under any circumstances. Alan Dershowitz has made a provocative argument for an Article III judge to issue "torture warrants" or otherwise grant authorization to employ coercive techniques short of torture upon a compelling showing by the executive that such measures are absolutely necessary under the circumstances to obtain vital intelligence and prevent a terrorist attack.[110] Torture is clearly prohibited by United States and international law;[111] however, there remains substantial debate over what conduct constitutes torture and the morality of employing coercive techniques to gather intelligence.[112] Notwithstanding this ongoing and important debate,

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109. The NSC jurisdiction could conceivably be broadened to include trial of persons suspected of espionage. Espionage cases share characteristics and challenges similar to terrorism cases. Although espionage cases have been successfully tried in district courts, the NSC could provide a possible alternative venue to address the unique informational, physical, and personnel security needs of espionage cases. However, the need for the NSC is premised on the current threat of terrorism, and its original jurisdiction should be limited to that purpose.

110. *See* Alan M. Dershowitz, *Want to Torture? Get a Warrant*, S.F. CHRON., Jan. 22, 2002, at A19, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2002/01/22/ED5329.DTL.

111. *See* Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (1984); 18 U.S.C. §§ 2340-40A (2006).

112. *See* Harvey Rishikof, *Morals, Ethics, and Law in the Global War on Terrorism (The Long War)*, *in* COUNTERING TERRORISM AND INSURGENCY IN THE

the decision to employ coercive techniques in an emergency, balancing the interests of the individual against the state, is fundamentally a political decision reserved for Congress and the President, not the judiciary. This will ensure that the accountability for such determinations is placed on those branches most responsive to the people.

C. Protection of Classified and Sensitive Information

The NSC would employ current laws and evidentiary privileges to safeguard classified and other sensitive intelligence information from public disclosure during trials, with minor modifications.[113] Current trials of persons charged in terrorism cases in district courts are challenging and costly because of the need to employ classified information as evidence, protect the identity of witnesses, and provide adequate physical and personnel security for the proceedings. Existing mechanisms to manage handling of classified evidence and protection of intelligence sources and methods, such as the state secrets privilege[114] and Classified Information Procedures Act (CIPA),[115] are far from ideal from either the government or defense perspectives.

The possible inadequacies of the CIPA are open to dispute. As noted by Attorney General Mukasey, much of the information supporting the detention of enemy combatants is drawn from highly classified and sensitive intelligence and any judicial proceedings relating to such detentions cannot become "a smorgasbord of

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21ST CENTURY: INTERNATIONAL PERSPECTIVES VOLUME 1: STRATEGIC AND TACTICAL CONSIDERATIONS, 106 (James J.F. Forest ed., 2007).

113. The laws and evidentiary privileges referred to are the Classified Information Procedure Act, and the government secrets privilege, and are discussed in the succeeding text of this section. *See infra* notes 114-18 and accompanying text.

114. *See* United States v. Reynolds, 345 U.S. 1, 7-8 (1953). On January 22, 2008, Sen. Kennedy (D-MA) introduced a bill (State Secrets Protection Act) to limit the government's ability to assert the state secrets privilege for national security cases. *See* S. Rep. No. 110-442 (2008), *available at* http://frwebgate.access.gpo.gov /cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s2533rs.txt.pdf (last visited Oct. 15, 2008).

115. 18 U.S.C. app. 3 §§ 1-16 (2006).

classified information for our enemies."[116] The Attorney General underscored the importance of protecting such information:

> [In one terrorism case,] the government was required by law to turn over to the defense a list of unindicted co-conspirators—a list that included Osama bin Laden. This was in 1995, long before most Americans had ever heard of Osama bin Laden. As we learned later, that list found its way into bin Laden's hands in Khartoum, tipping him off to the fact that the United States Government was aware not only of him but also of the identity of many of his co-conspirators.[117]

Others argue that the CIPA provides adequate procedures to balance the protection of national security information with the due process rights of the accused, and although managing that balance raises substantial substantive and procedural challenges for trial in Article III courts, experienced federal judges are uniquely qualified to perform that balancing function.[118] Moreover, despite any perceived inadequacies, these mechanisms have arguably achieved a workable balance between preserving government interests and safeguarding the rights of the individual. These procedures would be retained for the NSC's criminal proceedings, with expanded provisions to protect sensitive but unclassified information from unauthorized disclosure.

D. Substantive and Procedural Rights

The NSC statute would provide for minimal standards of due process, consistent with Article 75 and the ICCPR. Detention of suspected terrorists would be authorized to achieve the objectives of temporary incapacitation and pretrial investigation and prosecution. The approach would be similar to the framework of the Federal Rules of Criminal Procedure (FRCP) governing arrest and appearance,[119] and the provisions of the United States Code governing pretrial

116. Michael B. Mukasey, U.S. Att'y Gen., Remarks Prepared for Delivery at the American Enterprise Institute for Public Policy Research (July 21, 2008), *available at* http://www.usdoj.gov/ag/speeches/2008/ag-speech-0807213.html.

117. *Id.*

118. Audio tape: Honorable Leonie Brinkema, *supra* note 71.

119. FED. R. CRIM. P. 4, 5.

detention,[120] but with modifications to account for the significance of the state's interests in protecting the public from potential violent attacks and the existence of any unique practical circumstances regarding the accessibility of judicial proceedings to persons detained outside the United States.

The President, acting directly or indirectly through the Attorney General or Secretary of Defense, would be authorized to detain any person determined to be a suspected terrorist for up to seven days.[121] This would provide the executive with a fixed period to detain suspected terrorists in an emergency to protect against the threat of an imminent terrorist attack, allowing sufficient time to pass prior to the mandated judicial review of the determination. At the expiration of the seven-day period, without unnecessary delay, the government would be required to either release the person or cause them to appear before an NSC judge to obtain judicial authorization for further detention. The NSC judge would determine whether there was sufficient basis to continue the detention of the suspected terrorist, based either on the need to temporarily incapacitate the person to prevent a terrorist attack or for the purpose of pretrial investigation and prosecution before the NSC. The judge could authorize continued detention for thirty days, renewable upon certification by the Attorney General that there is sufficient basis for further detention and after additional NSC review of the basis for and conditions of the detention.

This framework would provide necessary authority for the government to detain a suspected terrorist to achieve temporary incapacitation to prevent an attack, and would enable the government to gather information needed to determine whether to proceed before the NSC with criminal proceedings or removal proceedings in the case of an alien. It would also provide a practical alternative to the current

120. 18 U.S.C. §§ 3141-42 (2006).

121. The United Kingdom has a statutory preventive detention regime that authorizes extended detention of terrorist suspects upon judicial review. For a comparison of American and British detention regimes for terrorist suspects, see John Ip, *Comparative Perspectives on the Detention of Terrorist Suspects*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 773 (2007).

use of the material witness statute[122] to detain suspected terrorists for lengthy periods during investigations.[123]

Criminal prosecution before the NSC would include key modifications to substantive and procedural rights; one possible version might specifically look as follows:

Speedy Trial – The statutory speedy trial limitation of seventy days provided in 18 U.S.C. § 3161 would be extended to 120 days to accommodate the unique security challenges involved in prosecuting terrorism cases.

Public Trial – Public access to trial proceedings and provisions for closure would be modified from existing law to provide a lower burden for the government to meet to show a need for closure of the proceedings to prevent unauthorized disclosure of classified and sensitive information.

Standard of Proof – Although constitutional due process requires a unanimous verdict of proof beyond a reasonable doubt for criminal prosecution, a guilty verdict before the NSC would require concurrence by at least two-thirds of members of the jury of proof of guilt beyond a reasonable doubt, consistent with the standard applied to trial verdicts by courts-martial and findings of military commissions.[124]

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122. *See* 18 U.S.C. § 3144 (2006) ("If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title [governing release on bond and requirement for a judicial hearing]. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.").

123. Robert Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 35 (2005) (discussing the role of material witness detentions in terrorism investigations); Ricardo J. Bauscas, *The Unconstitutionality of "Hold Until Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 VAND. L. REV. 677, 682-95 (2005).

124. *See* 10 U.S.C. §§ 852, 949*l*-49m (2006).

Punishment – Convictions and determinations of sentencing upon conviction would require agreement of at least two-thirds of members of the jury. Confinement in excess of ten years would require a three-fourths member majority, and the death penalty, if authorized, would require a unanimous verdict.[125] This approach is consistent with U.S. procedures for trial by courts-martial and military commissions.[126]

Admissibility of Coerced Statements as Evidence – Congress and the President have prohibited the use of statements obtained by torture in trial by military commission.[127] However, under the MCA, statements "in which the degree of coercion is disputed" may be admitted only if the statements are reliable, probative, and the admission would best serve the interests of justice.[128] As required by the Detainee Treatment Act, statements obtained after December 30, 2005, must also have been obtained using interrogation methods that "do not amount to cruel, inhuman, or degrading treatment."[129] This construct expresses the intent that coerced testimony should be admissible in trial before military commission in some circumstances, yet leaves the balancing and determination of admissibility to the discretion of the military commission. Article III judges are well positioned to determine whether coerced statements violate U.S. law and international norms and under what circumstances, if any, they may be admitted. Given the statutory double standard for permissible methods of interrogation established by the DTA and the MCA

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125. Death penalty cases place greater duty on the government to disclose information to the defense, increasing the risk of damaging disclosures of intelligence information. This increased risk and cost may provide disincentive to try terrorism cases as capital cases. Further, the United States may gain significant cooperation from allies for extradition of terrorist suspects to the United States if it foregoes capital cases before the NSC. *See, e.g.*, Harvey Rishikof, *A New Court for Terrorism*, N.Y. TIMES, June 8, 2002, at A15.

126. 10 U.S.C. §§ 852, 949m (2006).

127. 10 U.S.C. § 948r(b) (2006); MIL. COMM'N R. EVID. 304(a)(1). "Torture" is defined under the Military Commission Rules of Evidence (MCRE) as "an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions) upon another person within the actor's custody or physical control." MIL. COMM'N R. EVID. 304(b)(3). "Severe mental pain or suffering" is further defined under the MCRE. *Id.*

128. 10 U.S.C. § 948r(c) (2006); MIL. COMM'N R. EVID. 304(c)(1).

129. 10 U.S.C. § 948r(d)(3) (2006); MIL. COMM'N R. EVID. 304(c)(2).

(depending on whether detainees are under the custody/control of DoD or non-DoD personnel)[130] and the resulting inconsistency of due process, it is doubtful that Article III judges will find coerced statements admissible into evidence before the NSC.

Hearsay Rule – Article VIII of the Federal Rules of Evidence (FRE)[131] governing hearsay evidence would be replaced with the broad standard described in Rule 809 of the Military Commission Rules of Evidence, permitting the introduction of hearsay provided that the statement is offered as evidence of a material fact, the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and the general purposes of the rules and the interests of justice would best be served by admission of the statement into evidence.[132] This incorporates the standards articulated in Military Commission Rules of Evidence 801 through 809.[133]

Authentication Rule – Article IX of the FRE governing authentication of documents would include an exception to permit an *ex parte* application to the judge when the government certifies that the normal requirements of authentication under the FRE for documentary evidence would risk disclosure of highly sensitive intelligence sources and methods. The judge would make an evidentiary ruling on the authenticity of the evidence based on the *ex parte* application. This incorporates the standards articulated in Military Commission Rule of Evidence 901.[134]

E. National Security Court of Review

A National Security Court of Review (NSCR), structured in a similar manner as the Foreign Intelligence Surveillance Court of Review, would handle appeals from rulings of the NSC. Persons seeking review of NSCR decisions could petition the Supreme Court

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130. The DTA restrictions on permissible methods of interrogation are limited to persons under the effective control of the DoD, but does not apply to persons under effective control of non-DoD agencies. 10 U.S.C. § 948r(d)(3).

131. FED. R. EVID. 801-07.

132. MIL. COMM'N R. EVID. 809.

133. *See* MIL. COMM'N R. EVID. 801-09.

134. MIL. COMM'N R. EVID. 901.

for grant of certiorari. Providing an exclusive avenue for appeal of NSC decisions would assist in focusing appellate expertise on national security cases and in limiting the precedential impact of NSCR decisions on other district court criminal proceedings or Article I immigration court administrative proceedings. NSCR proceedings would necessarily protect classified and sensitive information from disclosure to the public.

IV. CRITICISMS OF NATIONAL SECURITY COURT PROPOSAL

Critics of the concept of a National Security Court have raised a series of thoughtful and reasoned objections. These major objections, which can be classified based on political, legal, or practical concerns, include the following:

A. *Establishment of an Article III NSC Will Not Deter Terrorism*

A common objection to the establishment of an NSC is that because the primary purpose of criminal prosecution is general deterrence, and most terrorists are not deterrable, an Article III solution will be ineffective against terrorism.[135] However, the primary objective of establishing a permanent Article III NSC is not to increase general deterrence of terrorism. Extremists who seek to employ terrorism without regard to their own survival are not deterrable in the traditional sense and thus are equally undeterred by the threat of indefinite detention at Guantanamo Bay or trial by military commission. However, the strategic objective of establishing an NSC is strengthening U.S. legitimacy and authority for advancing the rule of law, while undermining the perceived legitimacy and political influence of terrorists in the international system. By establishing a specialized court within the judicial branch that employs a historical model and accepted legal norms, the United States will move away from the current policy that has diminished its

135. Abraham D. Sofaer, *Playing Games With Terrorists*, 36 NEW ENG. L. REV. 903, 905-06 (2002); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Military and Civilian Detention Models*, 60 STAN. L. REV. 1079, 1096 (2008).

legitimacy and standing and will move toward a system that is designed to strategically combat terrorism over the long term.

B. Current Laws Are Sufficient to Adequately Try Terrorism Cases

Others have suggested that an NSC is unnecessary because district courts are adequately equipped to try terrorism cases.[136] After all, the United States has successfully prosecuted a number of international terrorism cases in district courts under existing rules of evidence and procedure.[137] The most thorough defense of the federal courts has been made by Richard B. Zabel and James J. Benjamin, in the May, 2008 *Human Rights First* White Paper, *In Pursuit of Justice*.[138] The analysis covers 123 terrorist cases and makes a powerful argument that there are more than enough federal statutes to charge terrorists.[139] They argue that material witness warrants are effective tools, the CIPA is up to the task to handle secret material, *Miranda* and *Brady* obligations are not a problem, and the courts would provide a speedy trial.[140] In a very honest introduction, the authors admittedly agree that the criminal justice system by itself is not "the answer,"[141] and that the cases "have presented challenges—both legal and practical—that are virtually unprecedented."[142] Moreover, in discussing the scope of the work, the authors stated:

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136. THE CONSTITUTION PROJECT, A CRITIQUE OF "NATIONAL SECURITY COURTS" 1, 2 (2008), *available at* http://www.constitutionproject.org/pdf/Critique_of_the_National_Security_Courts.pdf [hereinafter CONSTITUTION PROJECT].

137. RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 1 (May 2008), http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf.

138. *Id.*

139. *Id.* at 6.

140. *Id.* at 7-11, 70.

141. *Id.* at 2.

142. *Id. See, e.g.*, United States v. Moussaoui, 483 F.3d 220 (4th Cir. 2007); U.S. v. Rahman, 189 F.3d 88 (2d Cir. 1999); *see also* Peter Whoriskey, *Jury Convicts Jose Padilla of Terror Charges*, WASH. POST, Aug. 17, 2007, at A1.

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> In approaching this project, we have confined our analysis to the legal and practical issues associated with handling international terrorism cases in the criminal justice system. While we have covered a broad array of issues presented in terrorism cases, we recognize that we have not covered everyone. Further, because it is beyond the scope of this White Paper, we have not sought to examine related issues such as the legality of capture, detention, interrogation, and trial of prisoners by the military or the CIA outside the civilian courts. Nor have we undertaken any comparative analysis of jurisdiction or procedure in civilian courts versus courts martial versus military commissions. Likewise, comparative analysis of other countries' legal systems lies outside our scope. Finally, we have avoided more abstract "policy" arguments such as whether terrorism prosecutions serve as an effective deterrent and whether open and fair civilian trials promote public confidence in the United States around the world. Although these arguments are provocative and important, they are difficult to resolve based on legal research or authority.[143]

Unfortunately, the issues of the "legality of capture, detention, interrogation, and trial" of suspected terrorists as well as the due process of the war on terrorism is an integral part of the need for a National Security Court. This due process need for terrorism cases requires unique skills and national security expertise on the part of both the judiciary and counsel. As noted, these cases invariably involve the use of sensitive intelligence and other classified information as evidence, introducing significant risk of damage to national security through inadvertent disclosures. Such disclosures threaten not only future intelligence efforts, but vital relationships with partner nations. The Zabel and Benjamin study focuses on the cases that have been brought.[144] But what of the cases that have not been brought due to this problem of "disclosure" or the need to provide material to the defendants? Of course it is hard to argue a null hypothesis, but the authors are at an empirical dead end for studying those cases.

Further, existing FRE hearsay and authentication requirements may frustrate the government by preventing it from introducing

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143. ZABEL & BENJAMIN, *supra* note 137, at 2.

144. *Id.* at 1.

otherwise relevant and reliable evidence at trial of suspected alien terrorists.[145] Critics of this view fear that a "lesser burden" on the government may create a "separate and unequal criminal justice system" and undercut the presumption of innocence.[146] First, this court would be for trial of both citizens and non-citizens. Moreover, the issue of burden would be dictated by the location of capture, reasons for detention, evidence of wrongdoing, and the nexus of the defendant to the alleged crime. The point would be to not separate the defendants into different judicial systems depending on nationality, but to create a group of judges with expertise in terrorism.

These cases present unique challenges. It was these challenges that led the executive branch in 2001 to favor a unitary law of armed conflict approach for detention, treatment, and trial of suspected terrorists.[147] An NSC would reduce the level of risk and provide incentives for the government to favor an Article III approach that supports strategic legitimacy. The NSC proposal would also provide an experienced pool of Article III judges, defense counsel, and support staff familiar with the complex issues involved in managing preventive detention, treatment, and trial of terror suspects.

C. Terrorist Threats to the United States Are Not Significant Enough to Justify the Creation of a Permanent Article III Solution

A recent argument against creating an NSC suggests that the current threat of terrorism to the United States is not sufficiently grave in intensity or anticipated duration to warrant creation of a permanent NSC.[148] On the contrary, there is a persistent, evolving threat of terrorist attacks against the United States and U.S. interests worldwide

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145. *See* Chesney & Goldsmith, *supra* note 135, at 1097.

146. CONSTITUTION PROJECT, *supra* note 136, at 3.

147. Military Order of November 13, 2001, Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, § 1(f) (Nov. 13, 2001).

148. Audio tape: John Bellinger, Remarks at the Conference on Terrorists and Detainees: Do We Need National Security Court?, Panel One—War or Crime? The Legal Framework for Detaining and Prosecuting Enemy Combatants, held by the Brookings Institution and American University School of Law (Feb. 1, 2008) (*available at* http://www.wcl.american.edu/podcast/podcast.cfm?uri=http://www.wcl.american.edu/podcast/audio/20080201_WCL_TAD1.mp3).

by violent Islamic extremists, including Al Qaeda and associated extremist groups.[149] Al Qaeda has been damaged by U.S. and international counterterrorism efforts over the past six years, and military, intelligence, and security forces have disrupted multiple plots since 2001.[150] However, as of July 2007, Al Qaeda had achieved a safe haven in the Pakistan Federally Administered Tribal Areas (FATA) and is reconstituting leadership and operational capabilities to conduct future attacks.[151] Al Qaeda continues attempts to acquire nuclear, biological, chemical, or radiological weapons to attack the United States and other Western targets.[152] This assessment, universally shared by U.S. and international intelligence experts and academics, reinforces the conclusion that terrorism is a permanent national security threat that will not be eliminated, but can at best be reduced to an acceptable and manageable level of risk.[153]

D. The Formalities and Procedural Requirements of Article III Courts Would Undermine U.S. Intelligence

Others have argued that providing legal due process to suspected terrorists through Article III courts undermines the necessity and ability of the United States to exploit them for intelligence information.[154] Although the ability to obtain timely intelligence from detained suspected terrorists is of vital importance, the value of evidence gathered from Guantanamo Bay detainees and citizens, such as Padilla and Hamdi, during their detentions is unclear. Leaving aside the debate over the utility, legality, and morality of employing coercive interrogation to obtain intelligence, there is historical evidence that in traditional criminal prosecutions the government is frequently able to secure crucial intelligence from defendants in

149. National Intelligence Estimate, *supra* note 4.

150. *Id.*

151. *Id.*

152. *Id.*

153. *See* Cronin, *Behind the Curve*, *supra* note 3, at 53.

154. *See* 151 Cong. Rec. S. 14256, 14261 (statement of Sen. Kyl) ("The bottom line is that keeping detainees out of court makes effective interrogation possible, and interrogation has proved to be an invaluable source of intelligence . . . .")

agreement for government concessions on punishment or administrative sanctions.[155] The position that judicial branch involvement in detainee issues will unduly frustrate the government's ability to obtain vital intelligence through coercive interrogation is increasingly unpersuasive.

E. The NSC Could Adversely Affect the Substantive and Procedural Rights Provided by the Existing Criminal Justice System

Due to the necessary modifications to criminal procedures for terrorism trials under the NSC, some have argued that this may create a spillover effect, damaging the existing criminal justice system by lowering standards in district court proceedings for all criminal prosecutions.[156] Although creating an NSC opens the door to the attractiveness of similar changes to improve the government's advantage in district court prosecutions, any proposals to alter the FRCP or FRE for regular trials would likely garner little support and face overwhelming political opposition over fears of unraveling longstanding norms of the criminal justice system applied in regular criminal proceedings. Further, the NSC would be structured to prevent the government from seeking to improperly employ it for proceedings that should be brought in the district courts. Restricting the jurisdiction of the NSCR to appeals from NSC judgments would limit the precedential impact of its holdings, and the enabling statute could contain jurisdictional language restricting district courts from relying on NSCR or NSC holdings as persuasive authority.

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155. *See, e.g.*, Ricketts v. Adamson, 483 U.S. 1, 9 n.5 (1987) (noting the intelligence benefits of plea agreements); *see also* Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 730 (2006); Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564 (1977).

156. Audio tape: Prof. Robert Chesney, Remarks at the Conference on Terrorists and Detainees: Do We Need National Security Court?, Panel Two—A National Security Court for Detention Decisions, held by the Brookings Institution and American University School of Law (Feb. 1, 2008) (*available at* http://www.wcl.american.edu/podcast/podcast.cfm?uri=http://www.wcl.american.edu/podcast/audio/20080201_WCL_TAD2.mp3).

F. The NSC Would Blur the Distinction Between the Traditional Criminal Justice System and the Law of Armed Conflict Approach

Some critics have argued that the NSC would create a judicial hybrid between district courts and CSRTs/military commissions, dangerously blurring the important distinctions that separate them from each other.[157] However, the proposed NSC is not a hybrid, but a distinct Article III tribunal with the same underlying objective as district courts, albeit with specialized jurisdiction, expertise, and rules to address the unique challenges involved in reviewing the detention, treatment, and criminal trial of terrorist suspects. The NSC would not preclude the President from detaining enemy combatants captured on the battlefield during hostilities or trying war criminals by military commission. Instead, it would provide a preferred policy alternative to the law of armed conflict approach that furthers both short- and long-term national security objectives to combat terrorism.

G. Mechanisms for Protecting Classified Information Would Be Inadequate to Safeguard Vital Intelligence Sources and Methods

Others argue that the existing statutory and evidentiary protections relating to classified information are insufficient, and applying them under the NSC could arguably result in unauthorized disclosure and risk damaging intelligence sharing relationships with key allies.[158] Granted, the CIPA and the government secrets privilege provide neither the ideal solution for the government to fully safeguard sensitive information from disclosure nor do they provide criminal defendants with full access to evidence desired for their defense. Rather, these standards strike an unhappy yet workable balance between those interests. In the end, when faced with the unavoidable

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157. Audio tape: Prof. David Cole, Remarks at the Conference on Terrorists and Detainees: Do We Need National Security Court?, Panel Two—A National Security Court for Detention Decisions, held by the Brookings Institution and American University School of Law (Feb. 1, 2008) (*available at* http://www.wcl.american.edu/podcast/podcast.cfm?uri=http://www.wcl.american.edu/podcast/audio/20080201_WCL_TAD2.mp3).

158. James Nicholas Boeving, *The Right to Be Present Before Military Commissions and Federal Courts: Protecting National Security in an Age of Classified Information*, 30 HARV. J.L. & PUB. POL'Y 463, 546 (2007).

risk of disclosure of vital secrets, the government would retain the discretion to halt criminal proceedings before the NSC to safeguard its security interests. An alternative solution to the existing mechanisms remains elusive.

H. U.S. Citizens Suspected of Terrorism Should Be Afforded Significantly Greater Due Process Rights than Non-U.S. Citizens

Concern over applying the same due process protections to all defendants appearing before the NSC is another criticism of the proposed NSC. Yet a single due process standard for proceedings before the NSC—applied regardless of whether the defendant is a U.S. citizen—is key to reinforcing the strategic legitimacy of a U.S. legal regime for detention and treatment of suspected terrorists.[159] Moreover, providing different due process protections for suspected terrorists based on their status may provide Al Qaeda with a stronger incentive to recruit U.S. citizens to conduct terrorist operations or support activities. Finally, applying a dual standard of due process presents practical problems and potential opportunities for legal challenges involving terrorist plots with both U.S. citizens and aliens.

V. CONCLUSION

Legitimacy remains a vital strategic weapon against terrorism; people must view and support the state as the legitimate guardian of political power, not those who employ terrorism. The United States must continue to employ all means of statecraft (*e.g.*, military, diplomatic, economic, intelligence, law enforcement) to combat the

159. The American Bar Association (ABA) has urged the President to conduct treatment and trial of suspected terrorists in a way that meets established principles of due process fundamental to U.S. concepts of justice. *See* Letter from William H. Neukom, President, Am. Bar Assoc., to President George W. Bush (Feb. 27, 2008), *available at* http://www.abanet.org/poladv/letters/antiterror/2008feb27_detainees_l.pdf; A.B.A. TASK FORCE ON TERRORISM AND THE LAW, REPORT AND RECOMMENDATIONS ON MILITARY COMMISSIONS (2002), *available at* http://www.abanet.org/leadership/military.pdf; AM. BAR ASSOC., GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf.

permanent threat of terrorist attacks by violent extremists. Although efforts to prevent attacks in the United States have succeeded in the short term, the evolving U.S. policy on detention, treatment, and prosecution of suspected terrorists is eroding domestic and international support for U.S. legitimacy and its position on respect for the rule of law.

What if an organized extremist group, made up of both U.S. and non-U.S. citizens located in the United States, Afghanistan, and a European state, launched a terrorist attack on the United States? If such an attack occurred, would we try the defendants in multiple forums (*e.g.*, military commission, civilian courts), under different procedures and rules depending on nationality and location of capture? That is our current legal framework. In the Attorney General's request to Congress post-*Boumediene*, he recommended that Congress should ensure that one district court take exclusive jurisdiction over habeas cases and should direct that common legal issues be decided by one judge in a coordinated fashion.[160] He further advised that:

> Congress should adopt rules that strike a reasonable balance between the detainees' rights to a fair hearing on the one hand, and our national security needs and the realities of wartime detention on the other hand. In other words, Congress should accept the Supreme Court's explicit invitation to make these proceedings, in a word repeated often in the *Boumediene* decision, practical—that is, proceedings adapted to the real world we live in, not the ideal world we wish we lived in. Such rules should not provide greater protection than we would provide to American citizens held as enemy combatants in this conflict. And they must ensure that court proceedings are not permitted to interfere with the mission of our armed forces. Our soldiers fighting the War on Terror, for example, should not be required to leave the front lines to testify as witnesses in habeas hearings; affidavits, prepared after battlefield activities have ceased, should be enough.[161]

In other words, Congress should create a National Security Court for habeas proceedings with special procedures, in a sense

160. Mukasey, *supra* note 14.

161. *Id.*

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complementing the MCA designation of the D.C. Circuit Court of Appeals from the CSRT decisions. To those critics who oppose new institutions, the Attorney General was pleading with Congress to create one.

The United States must make reasoned policy choices to address both current and prospective challenges regarding the detention, treatment, and trial of suspected terrorists. Resolving the problem of the remaining detainees at Guantanamo Bay presents unique challenges. As Benjamin Wittes notes, there are three major categories of detainees: (1) those persons subject to criminal trial; (2) those persons appropriate for release but likely subject to persecution or mistreatment by their own governments upon return; and (3) those persons not subject to criminal prosecution but too dangerous to be released.[162] Looking ahead, the policy choices must provide answers to key questions for suspected terrorists captured in the future: should the United States engage in preventive detention of terrorism suspects? If so, should it treat detainees as enemy combatants under the laws of war or under some other body of law? What due process rights should they have? What should the government have to prove about them, to what standard of proof, and in what sort of forum?[163] Following the recent holdings in *Boumediene* and *Parhat*, and the November 2008 order by the district court to release five detainees from Guantanamo Bay due to insufficient evidence for continued military detention, it is clear that the courts continue to be uncomfortable with the current policy framework.[164] One legal tribunal—the NSC—should be created to address these challenges.

A policy decision to establish an NSC should not be delayed until the hasty aftermath of the next catastrophic terrorist attack in the United States when careful policy deliberation is overwhelmed by urgency of action. The upcoming transfer of leadership of the executive branch provides a unique, but fleeting, opportunity for re-examination and change to the current U.S. policy. Congress and the

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162. Benjamin Wittes, *Wrenching Choices on Guantanamo*, WASH. POST, Nov. 21, 2008, at A23.

163. *Id.*

164. *See* Boumediene v. Bush, 128 S. Ct. 2229 (2008); Parhat v. Gates, 532 F.3d 834 (D.C. Cir. 2008); Boumediene v. Bush, No. 04-1166, 2008 WL 4949128 (D.D.C. Nov. 20, 2008).

new administration should rapidly seize the opportunity by creating an Article III National Security Court, setting a new course for this key aspect of the U.S. national security strategy.