

Submission for AEI

We Need a National Security Court

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Introduction

Even in the chaotic aftermath of the attacks of September 11, 2001, one thing was abundantly clear: the American counter-terrorism strategy of the 1990s, which had made prosecution in the criminal justice system the primary method for responding to the international terrorist threat, had failed. A new approach was needed. It was essential that any new paradigm involve not only a strategy for taking the fight to the terror network by militarily attacking its overseas redoubts, but a rethinking of how captured terrorists should be handled.

There was reason for optimism that a thorough-going reevaluation was underway when, on November 13, 2001, President Bush issued an executive order providing for trials by military commission for captured alien enemy combatants.² But hope has long since faded. Notwithstanding the administration's directive, Zacarias Moussaoui, then the only person in American custody believed to be directly complicit in the 9/11 attacks, was indicted and tried in the criminal justice system. Moreover, in the more than five years since the executive order, the military justice system has charged only a handful of the hundreds of combatants it has detained and has not completed a single military commission trial. The cases in which charges were filed have proceeded fitfully, breaking down in procedural confusion and due to stays for litigation in the civilian courts over their propriety. This extraordinary delay – which culminated in the Supreme Court's rejection of the Commissions in June 2006 and new legislation to validate and move them forward in October 2006 – has given momentum to the vigorous arguments leveled against military tribunals by human rights activists. Regrettably, those arguments have

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² 66 Fed. Reg. 57,833.

not been rebutted by what would have been the most convincing answer of all: completed commissions that demonstrated the system's inherent fairness.

While the legislation in 2006 and late 2005 has been a significant improvement over the uncertainty that reigned before it was enacted, it is an incomplete solution. Primarily, it focuses on processing the approximately 435 alien enemy combatants still detained at Guantanamo Bay, Cuba. To be sure, it was urgent that these detainees be addressed. Nevertheless, the war on terror is likely to ensue for many years, perhaps decades. Going forward it is certain to involve many more enemy combatants, apprehended both overseas and in the United States. We must have a long-range plan.

Congress should use its authority under Article I, Section 8, of the Constitution to create a new National Security Court. Such a court could subsume, and expand on the jurisdiction and duties of, the existing federal Foreign Intelligence Surveillance Court. This new tribunal would be responsible for terrorism trials, as well as the review and monitoring of the detention of alien enemy combatants. It would inject judicial participation into the process to promote procedural integrity and international cooperation, but would avoid the perilous prospect of judicial micromanagement of the executive branch's conduct of war on terror.

Why is a National Security Court Needed?

1993-2001: The Emerging Threat

The United States has been under an onslaught of militant Islamic terrorism since February 26, 1993, when the World Trade Center was bombed, killing six Americans.³ From that time through the suicide hijacking attacks of September 11, 2001, our government regarded international terrorism as a law enforcement issue to be addressed by criminal prosecution in federal court.

It was appropriate to take this tack at the beginning. The intentions and capacity of our enemies did not fully reveal themselves in the first instance. The WTC bombing,

³ This is not to suggest that the WTC bombing was the first attack by militant Islam against American interests. During the 1970's and 80's there were numerous acts of terrorism and other violence, most notably the Iranian Hostage Crisis of 1979 and Hezbollah's destruction of the marine barracks in Lebanon in 1983. *See, e.g.,* Norman Podhoretz, "World War IV: How It Started, What It Means, and Why We Have to Win," *Commentary Magazine* (Sept. 2004 ed.); Timothy Naftali, *Blindspot: The Secret History of American Counterterrorism* (Basic Books 2005). The WTC attack, however, marked an important turning point in that it was the most significant domestic strike by a foreign enemy since Pearl Harbor and it ushered in the era of prosecution in the federal courts as America's principal counterterrorism strategy.

though best understood now as a declaration of war, appeared at the time as a crime – among the most heinous ever committed on American soil, but still a crime, not an act of war. It was thus investigated aggressively and competently, most (though not all) of the perpetrators were quickly apprehended, and by a little over a year after the attack, four bombers stood convicted after a seven-month trial.

Nevertheless, it became apparent in short order that the WTC bombing had in fact been a declaration of war against the United States by a global network of jihad organizations, of which al Qaeda was a major, but by no means the only, propelling force. By late spring 1993, only a few months after the bombing, it emerged that the same elements were plotting an even more spectacular campaign: bombings of the United Nations complex, the Lincoln and Holland Tunnels, and the Javits Federal Building that houses the FBI's New York Field Office – a plot that was thwarted only because the FBI infiltrated the terror conspiracy with an informant.

In 1994 and 1995, Ramzi Yousef (the technical mastermind of the WTC bombing who had successfully fled the United States), Khalid Sheik Mohammed (who would later become the operations chief of al Qaeda and design the 9/11 attacks), and others developed an overseas scheme that, among other things, contemplated murdering President Clinton, as well as carrying out near-simultaneous bombings of a dozen U.S. airliners while in flight over the Pacific (sometimes referred to as the “Manila Air” or the “Bojinka” plot). They were stopped principally because an alert Filipino police officer noticed smoke coming from an apartment where Yousef and an accomplice had had an accident experimenting with explosives – a mishap that led to Yousef's flight and eventual capture in Pakistan.

The following year featured attacks against American interests in Saudi Arabia, most notoriously the Khobar Towers bombing in which nineteen U.S. airmen lost their lives. These operations are currently thought to have been the work of Hezbollah, although the 9/11 Commission has suggested the possibility of an al Qaeda role.⁴ Also in 1996, al Qaeda leader Osama bin Laden issued his "Declaration of Jihad Against the

⁴ See *The 9/11 Commission Report* (Norton 2004) at 60 & n.48. Although Hezbollah is primarily a Shiite organization while al Qaeda affiliates are overwhelmingly Sunni, they have cooperated together against the U.S. in other contexts. See, e.g., *id.* at 68 (Hezbollah training of al Qaeda's top military committee members and several operatives who were involved with its Kenya cells prior to the 1998 embassy bombings).

Americans Occupying the Land of the Two Holy Mosques [*i.e.*, Saudi Arabia]," calling on militant groups to pool resources to better accomplish a single goal: killing Americans. Bin Laden's directives were echoed in the United States, where Sheikh Omar Abdel Rahman, the blind Islamic cleric who led both a nascent jihadist movement in the New York area and the brutal Egyptian terror organization *Gama'at al Islamia* (the Islamic Group), had been sentenced to life imprisonment after his conviction for terrorist crimes related to the 1993 World Trade Center bombing. Of Americans, Abdel Rahman decreed from federal prison in 1996, "Muslims everywhere [should] dismember their nation, tear them apart, ruin their economy, provoke their corporations, destroy their embassies, attack their interests, sink their ships, . . . shoot down their planes, [and] kill them on land, at sea, and in the air. Kill them wherever you find them."⁵

In February 1998, bin Laden issued his better known fatwa, calling for Muslims to kill Americans, including civilians, anywhere in the world where they could be found. That spring, the U.S. filed a sealed indictment against bin Laden, but he was not apprehended. On August 7, 1998, al Qaeda carried out simultaneous bombings against the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, killing over 220 people (including 12 Americans) and injuring thousands.

Shortly before the Millennium celebration in late 1999, Ahmed Ressay was apprehended attempting to enter the U.S. from Canada in possession of explosives that he and several conspirators were planning to deploy in a bombing of the Los Angeles International Airport. A few weeks later, in early January 2000, two critical events sowed the seeds for later devastation.

First, al Qaeda attempted to bomb the U.S.S. *The Sullivans* as it was docked in Aden, Yemen. The plot failed because the transport vessel sunk from the weight of the explosives, but the terrorists learned from the experience. Ten months later, on October 12, 2000, they succeeded, bombing the U.S.S. *Cole* as it docked in Aden, killing 17 U.S. naval personnel. Second, a group of conspirators met in Kuala Lumpur, Malaysia, in what

⁵ See *United States v. Ahmed Abdel Sattar*, Indictment 02 Cr. 395 (S.D.N.Y. Nov. 19, 2003) (available at <http://news.lp.findlaw.com/hdocs/docs/terrorism/uslstwrt111903sind.html>) at 4, para. 7.

is believed to have been the first planning session for what became the 9/11 attacks, which killed nearly 3000 Americans in New York, Virginia and Pennsylvania.⁶

The Folly of Criminal Prosecution

It is rare indeed for those who support approaching terrorism as primarily a criminal-justice problem to note that the leader of al Qaeda has actually been under indictment in this country for eight years – *i.e.*, throughout an unprecedented and undeterred spree of savage attacks from the embassy bombings, through the Cole, and finally through 9/11 and its aftermath. Nevertheless, the brief overview above outlines the steady emergence of a military enemy dedicated in the short term to forcing changes in U.S. foreign policy and ultimately – albeit fantastically – to posing an existential threat to the United States in pursuit of establishing a worldwide Caliphate. Al Qaeda and its affiliated organizations do not have a standing army, navy or air force in the conventional sense (although they have managed to carry out ground, marine and air attacks). But they have proved to be a highly capable adversary for a variety of reasons that go to the heart of matters under our present consideration.

1. *Criminal prosecution, by itself, is a grossly inadequate response to the military challenge of international terrorism.* First, while the actual size and expanse of the al Qaeda network is the subject of dispute,⁷ it is obvious that in the eight years

⁶ See *The 9/11 Commission Report* at 156-60.

⁷ The Council on Foreign Relations, for example, while acknowledging that “[i]t’s impossible to say precisely” how large al Qaeda is, estimates that membership ranges “from several hundred to several thousand[.]” CFR Backgrounder: al-Qaeda (July 7, 2005) (<http://www.cfr.org/publication/9126/#5>). The *Los Angeles Times*, purporting to rely on hearsay accounts of debriefings of captured terrorists (such as Khalid Sheik Mohammed), has reported that the core group never had more than a couple of hundred members. “How menacing is Al Qaeda?” (July 17, 2005) (<http://www.latimes.com/news/opinion/commentary/la-op-burningquestion17jul17.0.6336790.story?coll=la-news-comment-opinions>). But as it concedes, formal membership has never necessarily been a prerequisite to participation in terrorist acts. (Khalid Sheik Mohammed himself, for example, is reported to have admitted to being involved in terrorism well before formally joining; Mohamed Daoud al-`Owhali, one of the embassy bombers, claimed that he never formally joined). On the higher end, the State Department has estimated that al Qaeda has several thousand members, *Patterns of Global Terrorism 2002*, at 119, and, in 2003, the Congressional Research Service acknowledged estimates that somewhere between 20,000 and 60,000 people – some unknown percentage of which actually joined the terror network – had received paramilitary training in al Qaeda camps. Audrey Kurth Cronin (CRS), “Al Qaeda After the Iraq Conflict” (May 23, 2003) (<http://fpc.state.gov/documents/organization/21191.pdf>).

between the WTC bombing and 9/11, the international ranks of militant Islam swelled, and its operatives successfully attacked U.S. interests numerous times, with steadily increasing audacity and effectiveness. Cumulatively, in an age when weapons of mass destruction have become more accessible than ever before, militant Islam may actually pose an existential threat to the United States. At a minimum, it constitutes a formidable strategic threat. And in any event, this threat is manifestly more menacing than such quotidian blights as drug trafficking and racketeering, which a strong society can afford to manage without forcibly eradicating. Simply stated, international terrorism is not the type of national challenge the criminal justice system is designed to address.

Yet, during the eight-year period under consideration, the virtually exclusive U.S. response was criminal prosecution. This proved dismally inadequate, particularly from the perspective of American national security. The period resulted in less than ten major terrorism prosecutions. Even with the highest conceivable conviction rate of 100 percent, *less than three dozen terrorists* were neutralized – at a cost that was staggering and that continues to be paid, as several of these cases remain in appellate or habeas litigation.⁸

Stopping less than three dozen terrorists is a patently insufficient bottom line in dealing with a global threat of such proportions. Nonetheless, equally alarming from the standpoint of what may reasonably be expected from criminal prosecutions, the system could not have tolerated many more terrorism cases.⁹

⁸ The WTC bombing resulted in three related prosecutions: the 1993-94 trial of the four originally captured bombers, the 1995 seditious conspiracy case against Sheik Omar Abdel Rahman and eleven others, and a 1997 trial of Ramzi Yousef and another former fugitive. The Manila Air plot resulted in a 1996 trial of Ramzi Yousef and two others. Only six of the numerous defendants indicted in connection with the embassy bombings have appeared in the U.S. after arrest and/or extradition; of these, one pled guilty, four were convicted at trial, and one, Mamdouh Mahmud Salim (a/k/a Abu Hajer al Iraqi) – who was the most important terrorist charged given his high rank in al Qaeda – was severed after a barbaric escape attempt in 2000, during which he plunged several inches of a shiv through the eye of a prison guard, nearly killing him. He was later convicted of this attempted murder, but whether he will ever be tried for the embassy bombings is unknown. The Millennium plot resulted in the convictions of three terrorists. The attacks on the *Cole* and on Khobar Towers finally resulted in indictments – each many years after the fact (and the *Cole* long after 9/11) – but no American prosecutions. One defendant, Zacarias Moussaoui, was convicted in the U.S. for participation in the 9/11 plot. His trial and sentencing (to life imprisonment after the jury could not agree on the death penalty) took nearly five years to complete due to interminable delays over discovery issues (of the type we shall address shortly), and, in fact, might still be unresolved today but for the fact that he elected to plead guilty (and bray about his anti-American terrorism) rather than put the government to what promised to be a lengthy, complex trial.

⁹ Most of the trials alluded to in the preceding note took many months to complete (*e.g.*, the blind sheik case took nine months, the embassy bombing and the first WTC trial took seven months), often at the

2. Terrorism prosecutions confound importantly distinct governmental roles.

The sheer numbers, while arresting, are themselves merely a symptom of what has been a wrongheaded counterterrorism philosophy that, not surprisingly, has numerous harmful consequences. Essentially, we have shifted what are national-security (as opposed to police) functions from the ambit in which executive discretion to respond to threats is necessarily broad to the ambit in which executive action is heavily regulated and the federal courts, by performing their ordinary functions, actually empower our enemies.

In the constitutional license given to executive action, a gaping chasm exists between the realms of law enforcement and national security. In law enforcement, as former U.S. Attorney General William P. Barr explained in October 2003 testimony before the House Intelligence Committee, government seeks to discipline an errant member of the body politic who has allegedly violated its rules. That member, who may be a citizen, an immigrant with lawful status, or even, in certain situations, an illegal alien, is vested with rights and protections under the U.S. constitution. Courts are imposed as a bulwark against suspect executive action; presumptions exist in favor of privacy and innocence; and defendants and other subjects of investigation enjoy the assistance of counsel, whose basic job is to put the government to maximum effort if it is to learn information and obtain convictions. The line drawn here is that it is preferable for the government to fail than for an innocent person to be wrongly convicted or otherwise deprived of his rights.

Not so in the realm of national security. There, government confronts a host of sovereign states and sub-national entities (particularly international terrorist organizations) claiming the right to use force. Here the executive is not enforcing American law against a suspected criminal but exercising national defense powers to

conclusion of, literally, *years* of pretrial discovery and court proceedings. Typically, the appeals also take years to complete. (*E.g.*, the embassy bombing trial, completed over six years ago, is still on direct appeal, no doubt with years of habeas challenges ahead assuming the convictions are upheld.) Moreover, even assuming *arguendo*, and against all indications, that there were appreciably more than three dozen terrorists (a) who could practically have been captured and rendered to the U.S. for trial; (b) as to whom evidence existed that could have been used without irresponsibly compromising national security; and (c) as to whom such evidence would have been sufficient to satisfy the demanding proof hurdles for prosecution; there would of course remain the problem of securing courthouses, jail facilities, and trial participants throughout the United States.

protect the nation against external threats. Foreign hostile operatives acting from without and within are generally not vested with rights under the American constitution – and treating them as if they were can have disastrous consequences.¹⁰ The galvanizing concern in the national security realm is to defeat the enemy, and as Mr. Barr puts it, “preserve the very foundation of all our civil liberties.” The line drawn here is that government cannot be permitted to fail.

3. *Terrorism prosecutions create the conditions for more terrorism.* The treatment of a national security problem as a criminal justice issue has consequences that imperil Americans. To begin with, there are the obvious numerical and motivational results. As noted above, the justice system is simply incapable, given its finite resources, of meaningfully countering the threat posed by international terrorism. Of equal salience, prosecution in the justice system actually increases the threat because of what it conveys to our enemies. Nothing galvanizes an opposition, nothing spurs its recruiting, like the combination of successful attacks and a conceit that the adversary will react weakly. (Hence, bin Laden’s well-known allusion to people’s instinctive attraction to the “strong horse” rather than the “weak horse,” and his frequent citation to the U.S. military pullout

¹⁰ The discovery issues are addressed below. The problem of letting the guilty terrorist (as opposed to, say, the guilty tax cheat) go free because of insufficient evidence is obvious. One other example is noteworthy. In 2000, a superb district judge in New York, the Hon. Leonard B. Sand, came extremely close to suppressing the confession of Mohammed Daoud al-`Owhali, the bomber of the U.S. embassy in Nairobi responsible for well over 200 murders and untold other injuries and damage. In originally ordering the confession excluded, Judge Sand ruled that although al-`Owhali’s admissions had been voluntary, federal agents had failed to give al-`Owhali *Miranda* warnings. In truth, al-`Owhali had no rights under the U.S. Constitution. He was a Saudi (pretending at the time to be a Yemeni) who was in the custody not of the U.S. but of Kenya (which does not follow *Miranda* or, for example, guarantee counsel at public expense during custodial interrogation), and whose only contact with the U.S. was to bomb our embassy. He had never set foot in this country or made application of any kind under the immigration laws. Even if one were, not unreasonably, to conclude that American agents minimally owe due process when they act overseas, this would mean only that they owed the process that is due under the circumstances that obtain. Moreover, it is clear that the American presence actually afforded al-`Owhali *more* protections than he would have had if only the Kenyan authorities had been interested in him. (Here, it is worth pausing to note that he killed many more Kenyans than Americans.) But Judge Sand initially concluded that al-`Owhali had a Fifth Amendment privilege against self-incrimination and thus – reasoning from the Supreme Court’s then-recent decision in *Dickerson v. United States*, 530 U.S. 428 (2000) – that this privilege included a right to compliance with *Miranda*, which was utterly unrealistic in Kenya. The judge ultimately reversed himself and permitted the confession to be admitted – albeit in an opinion that dangerously assumes foreign alien combatants have rights under the Fifth Amendment. See *United States v. Bin Laden (al-`Owhali)*, Dkt. No. 98 Cr. 1023 (LBS) (Feb. 13, 2001, as amended Feb 16, 2001) (available at <http://cryptome.org/usa-v-ubl-mwo.htm>). That ruling is currently on appeal. Without the confession, al-`Owhali would almost certainly have been acquitted.

from Lebanon after Hezbollah's 1983 attack on the marine barracks, and from Somalia after the 1993 "Black Hawk Down" incident). For militants willing to immolate themselves in suicide-bombing and hijacking operations, mere prosecution is a provocatively weak response. Put succinctly, where they are the sole or principal response to terrorism, trials in the criminal justice system inevitably cause more terrorism: they leave too many militants in place and they encourage the notion that the nation may be attacked with relative impunity.

4. Prosecutions in the criminal justice system arm international terrorist organizations with a trove of intelligence that both identifies methods and sources of information and improves their ability to harm Americans. Equally perilous to national security as the general philosophy of combating terror by trials are the nuts-and-bolts of trial practice itself.

Under discovery rules, the government is required to provide to accused persons, among many other things, any information in its possession that can be deemed "material to preparing the defense."¹¹ Moreover, under current construction of the *Brady* doctrine, the prosecution must disclose any information that is even arguably material and exculpatory,¹² and, in capital cases, any information that might induce the jury to vote against a death sentence, whether it is exculpatory or not (imagine, for example, the government is in possession of reports by vital, deep-cover informants explaining that a defendant committed a terrorist act but was a hapless pawn in the chain-of-command).¹³ The more broadly indictments are drawn, the more revelation of precious intelligence due process demands – and, for obvious reasons, terrorism indictments tend to be among the

¹¹ Rule 16(a)(1)(E), Fed. R. Crim. P.

¹² *Brady v. Maryland*, 373 U.S. 83 (1963); see also *United States v. Bagley*, 473 U.S. 667, 682 (1985) (discussing materiality as information with potential to undermine confidence in the outcome); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) ("showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal"); and see *id.*, at 437 (even when the prosecutor's office and the investigating agency do not know of exculpatory information, they have an obligation to seek out and disclose any such information that may be in the wider government's possession).

¹³ *Brady v. Maryland*, 373 U.S. at 87; see also *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972).

broadest.¹⁴ The government must also disclose all prior statements made by witnesses it calls,¹⁵ and, often, statements of even witnesses it does not call.¹⁶

This is a staggering quantum of information, certain to illuminate not only what the government knows about terrorist organizations but the intelligence community's methods and sources for obtaining that information. When, moreover, there is any dispute about whether a sensitive piece of information needs to be disclosed, the decision ends up being made by a judge on the basis of what a fair trial dictates, rather than by the executive branch on the basis of what public safety demands.

Finally, the dynamic nature of the criminal trial process must be accounted for. The discovery typically ordered, virtually of necessity, will far exceed what is technically required by the rules. As already noted, terrorism trials are lengthy and expensive. The longer they go on, the greater is the public interest in their being concluded with finality. The Justice Department does not want to risk reversal and retrial, so it tends to bring close questions of disclosure to the presiding judge for resolution. The judge, in turn, does not wish to risk reversal and, of course, can never be reversed in our system for ruling against the government on a discovery issue. Thus, the incentives in the system press on participants to disclose far more information to defendants than what is mandated by the (already broad) rules. These incentives, furthermore, become more powerful as the trials proceed, the government's proof is admitted, it becomes increasingly clear that the defendants are probably guilty, and the participants become

¹⁴ A terrorist who is acquitted due to insufficient evidence is not a person who will simply return to the commission of crimes; he is a danger to return to acts of war and indiscriminate mass homicide. The incentive for the Justice Department is thus to use every appropriate means to ensure conviction. One of the most appropriate is to present elaborate proof of the dangerousness of the terrorist enterprise of which the defendant is an operative. This approach has the dual benefit of placing acts in their chilling context while expanding the scope of evidentiary admissibility (particularly by resort to liberal rules for the admission of co-conspirator statements under Rule 801(d)(2)(E) and background evidence). While focus on the enterprise greatly enhances the prospects for conviction, however, it exponentially expands the universe of what may be discoverable.

¹⁵ 18 U.S.C. Sec. 3500.

¹⁶ Rule 806, Fed. R. Evid.

even less inclined to put a much-deserved conviction at risk due to withheld discovery – even if making legally unnecessary disclosure runs the risk of edifying our enemies.¹⁷

It is freely conceded that this trove of government intelligence is routinely surrendered along with appropriate judicial warnings: defendants may use it only in preparing for trial, and may not disseminate it for other purposes. To the extent classified information is implicated, it is also theoretically subject to the constraints of the Classified Information Procedures Act.¹⁸ Nevertheless, and palpably, people who commit mass murder, who face the death penalty or life imprisonment, and who are devoted members of a movement whose animating purpose is to damage the United States, are certain to be relatively unconcerned about violating court orders (or, for that matter, about being hauled into court at all). Our congenial rules of access to attorneys, paralegals, investigators and visitors make it a very simple matter for accused terrorists to transmit what they learn in discovery to their confederates – and we know that they do so.¹⁹

5. The discovery requirements endanger national security by discouraging cooperation from our allies. As illustrated by the recent investigations conducted by Congress, the Silberman/Robb Commission, and the 9/11 Commission regarding pre-

¹⁷ The burdens of post-trial litigation factor in here as well. Virtually *any* information that emerges post-trial but which was not disclosed at trial will become grist for a new trial claim based on allegedly “newly discovered evidence.” See Rule 33, Fed.R.Crim.P.; see also 28 U.S.C. Sec. 2255 (permitting collateral challenge based on alleged errors in the proceedings leading to conviction). While most of these motions are frivolous, they are almost always resource-intensive – frequently coming years later and forcing the prosecutor’s office (and sometimes the court) to assign new personnel who must master these voluminous records in order to demonstrate why the newly revealed information would not have made a difference in the outcome of the trial.

¹⁸ 18 U.S.C. App. 3 (Pub.L. 96-456, Oct. 15, 1980, 94 Stat. 2025).

¹⁹ A single example here is instructive. In 1995, just before trying the aforementioned seditious conspiracy case against the blind sheik and eleven others, one of the authors duly complied with Second Circuit discovery law by writing a letter to defense counsel listing 200 names of people and entities who might be alleged as unindicted co-conspirators – *i.e.*, people who were on the government’s radar screen but whom there was insufficient evidence to charge. Six years later, that letter became evidence in the trial of those who had bombed our embassies in Africa. Within a short time of its being sent, the letter had found its way to Bin Laden in Sudan. It had been fetched for him by al-Qaeda operative Ali Mohammed who, upon obtaining it from one of his associates, forwarded it to al Qaeda operative Wadih El Hage in Kenya for subsequent transmission to bin Laden. Mohammed and El Hage were both convicted in the embassy bombing case. (See excerpts from Mohammed’s guilty plea allocution made available by the State Department at http://usinfo.state.gov/is/Archive_Index/Ali_Mohamed.html.)

9/11 intelligence failures, the United States relies heavily on cooperation from foreign intelligence services, particularly in areas of the world from which threats to American interests are known to stem and where our own human intelligence resources have been inadequate. It is vital that we keep that pipeline flowing. Clearly, however, foreign intelligence services (understandably, much like our own CIA) will necessarily be reluctant to share information with our country if they have good reason to believe that information will be revealed under the generous discovery laws that apply in U.S. criminal proceedings.

6. Forcing the criminal justice system to deal with the non-criminal-justice problem of international terrorism reduces the quality of justice the system accords to ordinary Americans accused of crimes and presumed innocent. Finally, there is a profound but often undetected corrosion of our justice system when we force the square peg of terrorism into its round hole. Our reluctance to treat terrorists as criminals, far from being caused by disdain for the rigorous demands of criminal justice, is instead a reflection of abiding reverence for our system's majesty.

Islamic militants are significantly different both in make-up and goals from run-of-the-mill citizens and immigrants accused of crimes. They are not in it for the money; they desire neither to beat nor cheat the system, but rather to subvert and overthrow it; and they are not about getting an edge in the here and now – their aspirations, however grandiose they may seem to us, are universalist and eternal, such that the pursuit is, for the terrorist, more vital than living to see them attained. They are a formidable foe, and, as noted above, the national security imperatives they present are simply absent from the overwhelming run of criminal cases.

As a result, when we bring them into our criminal justice system, we have to cut corners – and hope that no one, least of all ourselves, will discern that with the corners we are cutting important principles. Innocence is not so readily presumed when juries, often having been screened for their attitudes about the death penalty, see intense courtroom security around palpably incarcerated defendants and other endangered trial participants. The legally required showing of cause for a search warrant is apt to be loosely construed when agents, prosecutors, and judges know denial of the warrant may

mean a massive bombing plot is allowed to proceed. For reasons already elaborated on, key government intelligence that is relevant and potentially helpful to the defense – the kind of probative information that would unquestionably be disclosed in a normal criminal case – may be redacted, diluted, or outright denied to a terrorist's counsel, for to disseminate it, especially in wartime, is to educate the enemy at the cost of civilian and military lives.

Since we obdurately declare we are according alleged terrorists the same quality of justice that we would give to the alleged tax cheat, we necessarily cannot carry all of this off without ratcheting down justice for the tax cheat – and everyone else accused of crime. Civilian justice is a contained, zero-sum arrangement. Principles and precedents we create in terrorism cases generally get applied across the board. This, ineluctably, effects a diminution in the rights and remedies of the vast majority of defendants – for the most part, American citizens who in our system are liberally afforded those benefits precisely because we presume them innocent. It sounds ennobling to say we treat terrorists just like we treat everyone else, but if we really are doing that, everyone else is necessarily being treated worse. That is not the system we aspire to.

Worse still, this state of affairs incongruously redounds to the benefit of the terrorist. Initially, this is because his central aim is to undermine our system, so in a very concrete way he succeeds whenever justice is diminished. Later, as government countermeasures come to appear more oppressive, it is because civil society comes increasingly to blame the government rather than the terrorists. In fact, the terrorists – the lightning rod for all of this – come perversely to be portrayed, and to some extent perceived, as symbols of embattled liberal principles, the very ones it is their utopian mission to eradicate. The ill-informed and sometimes malignant campaigns against the Patriot Act and the NSA's terrorist surveillance program are examples of this phenomenon.

In sum, trials in the criminal justice system don't work for terrorism. They work for terrorists.

Detention and Trial of Foreign Enemy Combatants

1. Introduction. Following the 9/11 attacks, the United States drastically and aptly revised its counterterrorism strategy. It began to regard al Qaeda and its affiliates as a military threat worthy of a comprehensive government response (not merely a criminal justice response), including military action. The new approach addressed a number of the difficulties – *e.g.*, the growing number of terrorists, their enhanced motivation due to our previously weak response, and the threat terror organizations can pose when they are allowed to have relatively undisturbed command-and-control structures. Nevertheless, the new enforcement paradigm also gave rise to a new set of serious problems.

The most urgent of these was the intrusion of the federal courts into the management of military operations – specifically the detention and interrogation of enemy combatants captured overseas. Much of this initially came to a head in June 2004, when the Supreme Court decided both *Hamdi v. Rumsfeld*²⁰ and *Rasul v. Bush*.²¹ For present purposes, the more significant of these is *Rasul*, in which the Court held for the first time that foreign enemy combatants captured by the U.S. military overseas had a right, even as the war proceeds, to challenge their detention in federal habeas corpus proceedings.

The driving force behind the breathtaking *Rasul* decision, and, indeed, behind the broader movement to vest our enemies with rights even as they attack our forces and plot against our civilians, has been the contention that no one can say with certainty when the war on terror will end; that detention of any captives is thus “indefinite”; and that such indefinite detention, absent a judicial determination that adequate grounds exist to detain, is at least un-American, if not flatly unconstitutional and a violation of human rights. Simply stated, this is absurd.

Under the laws and customs of war, which long predate our Republic, it has always been appropriate to capture and hold enemy combatants. This is reflective of common sense as much as law. Enemy combatants are often in a position to be killed or captured. Capturing them is the more merciful option, and making it more difficult or costly would almost certainly effect an increase in the number killed – a strange result

²⁰ 542 U.S. 507 (2004).

²¹ 542 U.S. 466 (2004).

given that the civilizing impulse of international compacts such as the Geneva Conventions dictates *minimizing* carnage.

Capture, moreover, is permitted to prevent the captives from rejoining the enemy, which would endanger our forces, prolong war, and increase casualties; and to gather intelligence, which also protects our forces, makes it more likely they will attack enemy targets of military significance rather than civilian infrastructure, and, again, ends war more quickly and with less damage and death.

Further, while a war on a stateless terror network is obviously different in significant ways from conventional state-on-state wars, no war ever has a definite end date. The fact that the combatants at issue do not have an expectation about precisely how long they will be detained puts them in the same position as virtually all captured combatants in history, including American service personnel (who, when captured, have never been able to resort to the courts, if any, of our enemies).²²

The intrusion of the regular U.S. civilian courts created structural and practical problems analogous to those addressed above with respect to terrorist trials. To observe that this was inevitable is not to besmirch the judiciary or the justice system. The primary task of the judiciary is not to vouchsafe the national security of the United States. That, instead, is a byproduct of what the judiciary accomplishes, on a daily basis, by vindicating the rule of law in the domestic setting. In sum, judges principally have a duty to ensure that justice is done for the parties who come before the court.

In the international arena, to the contrary, our national priority is not to do justice for individual litigants; it is to protect the public welfare of the American body politic. This is a function committed primarily in our system to the executive branch. Thus, for example, did Justice Oliver Wendell Holmes Jr. write for a unanimous Supreme Court in 1909, “When it comes to a decision by the head of the State upon a matter involving its

²² Indeed, the entire theory of permitting a challenge to detention works only, and perversely, to the advantage of terrorists. Lawful combatants, who bear that privileged distinction because they follow the laws and customs of war, will virtually never be able to challenge the appropriateness of their capture and detention because *they wear uniforms*. As the Hague Convention requires, they distinguish themselves from the civilian (*i.e.*, non-combatant) population, and thus the adversary and the world know that they are military personnel who may properly be held until the war is concluded. Terrorists, to the contrary, eschew uniforms and by so doing conduct their operations in a way that gravely endangers the civilian population. Because they are without uniforms, they are in a position to claim, falsely, that they were not really combatants. This is the charade at the root of this issue.

life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process.”²³

The handling of detainees captured in international military operations is precisely such a national security matter, and it has long been deemed part of the conduct of war, which is a predominantly executive branch function,²⁴ supported and given structure by Congress in the coordinate exercise of its Article I regulatory authority.²⁵ The judicial function here is counterintuitive, and especially undesirable in matters of national security is the sort of free-wheeling judicial rule-making that commonly – and often, but by no means always, beneficially – fills in the procedural interstices of the domestic criminal justice system.

This does not mean that there could be no conceivable, valuable role for Article III courts in national security matters. But the post-*Rasul* experience demonstrates that any such role would have to be heavily regulated (*i.e.*, it would leave little room for judicial creativity). The presumptions intentionally favoring the accused in the criminal justice system would be utterly inappropriate in a system designed to deal with alien enemy combatants. The latter system would not exist for the benefit of those vested with constitutional protections and, more centrally, would be conceived for the purpose of providing the minimum of due process necessary to ensure integrity in the outcome – not, as is the case in the judicial system, to ensure that the guilty go free to the extent necessary to avoid a single wrongful conviction. Such a reversal of the presumptions would be antithetical to the everyday practice of judging, and would consequently have to be spelled out with rigor.

The *Rasul* experiment in judicial oversight of the executive’s wartime decisions regarding enemy detentions has largely, and thankfully, been undone by Congress. At the close of 2005, the Detainee Treatment Act was signed into law, essentially removing the detainee challenges from the federal district courts. Subsequently, Congress passed, and

²³ *Moyer v. Peabody*, 212 U.S. 78, 85 (1909).

²⁴ *Yamashita v. United States*, 327 U.S. 1, 11 (1946).

²⁵ *See, e.g.*, 10 U.S.C. 821 and 836 (codifying military commissions); *see also Ex Parte Quirin*, 317 U.S. 1, 28-29 (1942) (upholding military commission based, in part, on Congress’s codification of same). *See also Hamdan v. Rumsfeld* 126 S. Ct 2749 (2006) and Military Commissions Act of 2006.

the President signed, the Military Commissions Act of 2006, that further restricted the ability of federal courts to interfere in wartime detention policies. Regrettably, however, this has not brought closure to the issue of combatant-detention, which continues to reverberate politically and diplomatically. Despite an imperative to demonstrate to national and international audiences that it was capable of dealing fairly and expeditiously with alien combatants, the executive branch has failed to bring a single military commission to conclusion in the nearly five years since President Bush's executive order.

While there remains a good argument that military proceedings are the optimal way to address wartime prisoners, that would best have been demonstrated by having them and proving they work. Given the stakes involved, it can no longer be taken as an article of faith. In addition, while the Military Commissions Act and the Detainee Treatment Act are improvements, they principally address the challenges attendant to processing detainees at Guantanamo Bay. They are not a comprehensive solution to legal issues sure to arise in the future in a struggle against militant Islam that may last for decades. Thus, the time has come for Congress to consider the creation of a national security court for the war on terror.

2. While alien enemy combatants, who are neither U.S. citizens nor lawful aliens, have no rights under the U.S. constitution, judicial oversight of their cases without thoughtful consideration of the standards and procedures under which those cases should proceed, is a prescription for turning those cases into full-blown criminal trials. Even the *Rasul* decision recognized the inarguable point that persons who are neither citizens nor aliens lawfully resident in the United States do not enjoy the protections of our Constitution, including its habeas corpus provision. The majority argued that the alien combatants' right of access to U.S. courts for the purpose of challenging their detention under habeas corpus was statutory (*i.e.*, derived from the federal habeas statute, 28 U.S.C., 2241 *et seq.*).²⁶

²⁶ This contention was convincingly rebutted in Justice Scalia's dissent. Justice Stevens's majority opinion argued that cases post-dating *Johnson v. Eisentrager*, 339 U.S. 763 (1950) supported an inference that a statutory habeas challenge to detention might be available even if aliens could not claim a constitutional entitlement. The dissent, however, demonstrated that those cases are easily distinguishable, and that *Eisentrager*, which is directly on point, expressly rejected *both* the constitution and the habeas statute as bases for aliens outside U.S. territory to seek habeas relief.

This distinction, though seemingly salient, proved in the event to be of little moment. Regardless of their lack of constitutional entitlements, experience shows that once alien combatants are permitted access to our courts, judges, under the rubric of due process, will effectively treat them as if they are every bit as vested as citizens with substantive and procedural protections – even in wartime and regardless of the what this portends for national security. Only firm instructions to the contrary could have bucked this inevitability. The Supreme Court’s decision in *Rasul* failed to provide any guidance to lower courts, and the guidance provided in this regard by Congress since late 2005 has been insufficient.

Some explanation is in order here. In the other 2004 Supreme Court case noted above, *Hamdi v. Rumsfeld*, at issue was the very different scenario of the rights of *American citizens* captured and detained in the course of fighting against the U.S. in wartime. The Justice Department did not dispute that such citizen combatants had a constitutional right to file habeas claims. To the contrary, at issue were the questions whether they could compel a judicial review of the executive’s decision to detain, and how searching that review should be. The case is instructive for present purposes because the court, in holding that judicial review was available, also indicated that the habeas proceedings in connection with U.S. citizens would be very deferential to the executive branch, to the point of indicating that a military determination would be accepted by the court as long as the citizen combatant had received adequate notice and a meaningful opportunity in the military proceeding to contest his detention.²⁷

Of course, the entitlement of *alien* enemy combatants – assuming they have any rights (other than the right not to be tortured, which is provided by both U.S. and international law²⁸) – should be dramatically less substantial than the very limited rights the Supreme Court accorded to American citizens in *Hamdi*. Predictably, however, that is not what developed in the district courts when they considered alien combatants detained at Guantanamo Bay on the basis of a decision, *Rasul*, which opened the courthouse doors

²⁷ *Hamdi*, 542 U.S. at 533-534.

²⁸ See 18 U.S.C. Sec. 2340 *et seq.*; see also United Nations Convention Against Torture and Cruel, Inhuman and Degrading Treatment (ratified in 1994) and Sen. Exec. Rpt. 101-30, Resolution of Advice and Consent to Ratification, (1990).

but gave district judges no substantive or procedural guidance. Until Congress finally stepped in and put a stop to the experiment, the trajectory was toward an array of judicially fashioned rights approximating not merely those of citizens but, indeed, those accorded to American criminal defendants.

In *Odah v. United States*,²⁹ for example, the district court held that enemy combatants should be given counsel at the expense of the American taxpayer (putting them actually in a better position than the vast majority of *American* habeas petitioners, who have no right to counsel and who must pursue their claims *pro se*). Without authority in the habeas statute, the court broadly construed the All Writs Act and the Criminal Justice Act to sanction it, reasoning that it was exceedingly important for these particular petitioners to have publicly-subsidized lawyers because they had “clearly presented a nonfrivolous claim.”³⁰ In the Court’s view, what rendered these claims “non-frivolous” was the fact that the detainees “have been detained virtually incommunicado for nearly three years without being charged with any crime.” Such a standard – bereft of any fact-specific circumstance that actually rendered the captures or detentions at issue unusually complex – could embrace any enemy combatant held in any war.

Further exercising its discretion to elevate the purported rights of alien enemy combatants over national security, the court invalidated a number of Defense Department guidelines, including the monitoring of combatant-counsel communications, adopted to ensure that detainees were not communicating with enemy forces on the outside.³¹

²⁹ No. 02-828 (D.C. Oct. 20, 2004) (<http://www.dcd.uscourts.gov/02-828a.pdf>).

³⁰ *Ibid.*, op. 7-12 (finding the claim “nonfrivolous,” and discussing both the All Writs Act, 28 U.S.C. Sec. 1651, and the power of the court to direct the appointment of counsel at public expense under the Criminal Justice Act, 18 U.S.C. Sec. 3006).

³¹ Many of the detainees had lawyers volunteering to represent them. The monitoring entailed observing meetings and examining the content of written materials brought in or out of the holding facility by lawyers. The protective measures were carefully designed to avoid compromising the ability of the detainees and their counsel to communicate meaningfully: all of the aforementioned monitoring and examination was to be carried out by military personnel who were walled-off from participation in any litigation and whose sole purpose was to ensure that enemy communications during wartime were not passed out of the holding facility. Op. 13-16. The safeguards were similar to special administrative measures commonly applied in civilian prisons to convicted terrorists who have various legal reasons, including the preparation of habeas petitions, for meeting with counsel. *See United States v. Ahmed Abdel Sattar*, Indictment 02 Cr. 395 (S.D.N.Y. Nov. 19, 2003) (available at <http://news.lp.findlaw.com/hdocs/docs/terrorism/uslstwr111903sind.html>) at 10-11, para. 25-26 (describing special administrative measures imposed on inmate convicted of terrorist crimes).

Notwithstanding that the alien combatants at issue were not entitled to counsel (under either the Sixth Amendment or the habeas statute), the court found that the attorney-client privilege not only applied but overrode wartime security concerns, and reasoned that monitoring would undermine the administration of justice, chill meaningful communication, and deprive attorneys of the “certain degree of privacy” that was “essential” to their work.³²

Notably, the right to counsel for alien enemy combatants, as permitted and expanded on in *Odah* and other rulings,³³ was a core part of the Congress’s impetus to remove the cases from the district courts. Senators John Kyl and Lindsey Graham, two of the principal sponsors of the eventual Detainee Treatment Act, have described how catastrophic the provision of counsel to enemy combatants was to vital intelligence collection. As Senator Kyl observed:

Keeping war-on-terror detainees out of the court system is a prerequisite for conducting effective and productive interrogation, and interrogation has proved to be an important source of critical intelligence that has saved American lives.... Giving detainees access to federal judicial proceedings threatens to seriously undermine vital U.S. intelligence-gathering activities. Under the new *Rasul*-imposed system, shortly after al-Qaida and Taliban detainees arrive at Guantanamo Bay, they are informed that they have the right to challenge their detention in Federal court and the right to see a lawyer. Detainees overwhelmingly have exercised both rights. The lawyers inevitably tell detainees not to talk to interrogators.... Effective interrogation requires the detainee to develop a relationship of trust and dependency with his interrogator. The system imposed last year as a result of *Rasul* – access to

³² The court permitted the detainees unmonitored communications with counsel, and placed the lawyers on their honor not to disclose the substance of communications to third parties, leaving it up to the lawyers to report – if they chose to – any communications indicating that future terrorist acts were being planned. Op. 16-22. It bears emphasizing here that in *Hamdi*, a majority of the Supreme Court – Justice O’Connor’s four-judge plurality and, inferentially, perhaps all the dissenters except Justice Thomas – indicated that an *American citizen* combatant would have a right to counsel in a proceeding to challenge his detention. See *Hamdi*, 542 U.S. at 539 (Opinion of Justice O’Connor). That right to counsel, of course, is rooted in the protections of the Constitution, to which American citizens are entitled. In contrast, the district court in *Odah*, a case involving enemy aliens with no claim on constitutional protections who were actively at war with the United States, not only invented a right to counsel but appears to have made it more muscular than anything conceived of by the high court for U.S. citizens in *Hamdi*.

³³ See, e.g., *In re Guantanamo Detainee Cases*, Nos. 02-0299, etc., Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba (D.D.C. Nov. 8, 2004) (Joyce Hens Green, U.S.D.J.) (available at http://www.globalsecurity.org/security/library/policy/national/02-299a_08nov2004.pdf) (outlining counsel’s access to classified national security information and noting the “well-reasoned opinion addressing counsel access procedures” in *Odah*) (Ord. 9).

adversary litigation and a lawyer – completely undermines these preconditions for successful interrogation.^[34]

Senator Graham’s responsive comments, directed to the actual practice at Guantanamo Bay, were startling in their account of the brazenness of detainee counsel:

I agree entirely. If I could add one thing on this point: perhaps the best evidence that the current *Rasul* system undermines effective interrogation is that even the detainees’ lawyers are bragging about their lawsuits’ having that effect. Michael Ratner, a lawyer who has filed lawsuits on behalf of numerous enemy combatants held at Guantanamo Bay, boasted in a recent magazine interview about how he has made it harder for the military to do its job. He particularly emphasized that the litigation interferes with interrogation of enemy combatants:

The litigation is brutal [for the United States]. We have over one hundred lawyers now from big and small firms working to represent these detainees. Every time an attorney goes down there, it makes it that much harder [for the U.S. military] to do what they’re doing. You can’t run an interrogation . . . with attorneys. What are they going to do now that we’re getting court orders to get more lawyers down there?^[35]

Perhaps more alarming than the district court’s enemy-friendly procedures for access to counsel and other discovery was its treatment of the military commissions prescribed by the President’s executive order. *Hamdan v. Rumsfeld*³⁶ involved a habeas petition filed by Salim Ahmed Hamdan, a Yemeni national captured in Afghanistan and detained in Guantanamo Bay. Hamdan was so trusted a member of al Qaeda’s inner circle that he served as the personal driver of Osama bin Laden (who, for years, has had a multi-million dollar bounty on his head but has successfully evaded capture by exercising extreme care in ensuring the devotion and terrorist credentials of those with access to him).

³⁴ Congressional Record, S14260 (Dec. 21, 2005).

³⁵ Congressional Record, S14261 (Dec. 21, 2005); Michael Ratner heads the radical Center for Constitutional Rights. The interview to which Senator Graham referred occurred on March 21, 2005, and was published in *Mother Jones*. (<http://www.motherjones.com/news/qa/2005/03/ratner.html>).

³⁶ *Hamdan v. Rumsfeld* 126 S. Ct 2749 (2006).

Like other detainees, Hamdan was confirmed by a U.S. military “combatant status review tribunal” (CSRT) to be an enemy combatant who had taken up arms against the United States in the war on terror. He was designated for trial by military commission and ultimately charged with serving as the al Qaeda leader’s bodyguard, transporting him to training camps and safe havens, delivering weapons for the terror network, and training to commit terrorist acts.

Hamdan’s commission, however, has been long delayed. On November 8, 2004, after the detainee took up *Rasul*’s invitation to file a habeas corpus petition challenging the proceedings against him, the district court issued an astounding decision, inconsistent with over half a century of Supreme Court precedent supporting the use of military commissions to try and punish enemy combatants accused of war crimes.³⁷ It held that Hamdan was presumptively entitled to prisoner-of-war protections under the 1949 Geneva Conventions, that the CSRT’s contrary determination was not competent, and that the military commission was thus impermissible.³⁸ This ruling was sweepingly reversed a year later by the D.C. Circuit. The panel was particularly emphatic in rejecting the grant of prisoner-of-war Geneva Convention protections, reserved in this instance to honorable soldiers, to an obviously unprivileged combatant in the form of an al Qaeda operative.³⁹ The Supreme Court took certiorari in Hamdan’s case and reversed the Court of Appeals on June 29, 2006.⁴⁰

³⁷ See *Yamashita v. United States*, 327 U.S. 1, 11 (1946); 10 U.S.C. Sections 821, 835(a). See also *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942) (upholding use of military commission for enemy combatants, including a U.S. citizen, based on the predecessor of Section 821).

³⁸ *Hamdan v. Rumsfeld*, No. 04-1519 (Nov. 8, 2004) (<http://www.dcd.uscourts.gov/04-1519.pdf>), rev’d, 415 F.3d 33 (D.C. Cir. 2005).

³⁹ Reviewing the relevant authorities the district court had misconstrued or ignored, the appellate court bluntly concluded that appeal to the Geneva Conventions was unavailable for several reasons. First was the bedrock principle that international agreements do not generally create private, judicially enforceable rights. As the panel elaborated, alleged treaty violations are resolved by “international negotiations and reclamation,” not by lawsuits. *Hamdan*, 415 F.3d at 39-40. The court added that even if Hamdan were not foreclosed from litigating his Geneva Convention-related claims, the treaty would not help him. First, Hamdan did not fit Geneva Conventions’ definition of a privileged combatant because al Qaeda members do not wear uniforms and fail to “conduct their operations in accordance with the laws and customs of war.” Second, al Qaeda obviously is not a party to the Geneva Conventions, nor does it fall into either of two recognized exceptions to that requirement. *Id.* at 40-43.

⁴⁰ Only eight Justices considered the *Hamdan* case, with Chief Justice John G. Roberts having recused himself because he was on the D.C. Circuit panel whose decision was being reviewed.

The Supreme Court reasoned that the Constitution allocated to Congress the principal authority to set up military commissions.⁴¹ The leading opinion held that in the absence of authorization by a separate statute, military tribunals were to be governed by Article 21 of the Uniform Code of Military Justice. Because, the Court reasoned, neither the Authorization for Use of Military Force nor the Detainee Treatment Act contemplated the kind of military commissions to which Hamdan was being subjected, Article 21 of the Uniform Code of Military Justice governed. Under this analysis, the military commissions were illegal because they did not conform to the full panoply of procedures contemplated by Article 21, which, according to the Court, includes recourse to Common Article 3 of the Geneva Conventions.⁴²

3. Congress should use its regulatory authority to avoid the development of any system which, like Rasul, converts American courts into part of the arsenal used against our forces by the enemy in wartime. The U.S. Constitution is a compact between a primary source of power, the people of the United States, and the government they created. It is not a treaty between the United States and the rest of the world – indeed, it explicitly presumes that the rest of the world will include enemies of the United States who must be brought to heel.⁴³ In the Framers’ construct, the courts of the United States are supposed to be a bulwark protecting members of the uniquely American community – *i.e.*, citizens of the United States and those aliens who, by their lawful participation in our national life, have immersed themselves into the fabric of American society⁴⁴ – from the excesses of an oppressive executive or a legislature insufficiently heedful of their rights.

⁴¹ *Hamdan*, 126 S. Ct 2749 at 2774 n.21. *See also*, *Hamdan* at 2799 (Kennedy, J., concurring).

⁴² Common Article 3 proscribes “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.” The Court questioned whether the military commissions prescribed by the president were “regularly constituted court[s],” and whether the judicial guarantees afforded were sufficient – at least in the absence of more specific congressional approval.

⁴³ The only federal crime spelled out in the Constitution is treason, defined, in Article III, Section 3, to include conduct that “adher[es] to” or gives “Aid and Comfort” to “Enemies” of the United States.

⁴⁴ *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990); *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950).

It is the institution that ensures the law and order a free people must have in order to thrive.

Nevertheless, in the role initiated by *Rasul* and dramatically expanded thereafter by the district courts, the judiciary was no longer a neutral arbiter in place to ensure that Americans got a fair shake from their government and its laws. Instead, until the Military Commissions Act of 2006 intervened, the judiciary was morphing into an *international* arbiter, ensuring that the world – including that part of it energetically trying to kill Americans – had a free-flow forum in which to press its case against the United States. This was as irrational as the afore-described incongruity of treating a war against international terrorists as a criminal justice issue.

The federal courts are a crucial component of the United States government. That government, and the American people, are at war with al Qaeda and its affiliated organizations. Indeed, a week after the 9/11 attacks, the Congress overwhelmingly passed the aforementioned Authorization for the Use of Military Force, authorizing the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”⁴⁵ Congress plainly took that drastic step because it is vital for the United States to achieve victory in this struggle.⁴⁶ It makes no sense for the political branches to be pressing for the successful conduct of the war while the judicial branch is made available to the enemy to frustrate the decision of the executive branch to detain enemy forces – an outcome curbed but by no means eliminated in the Detainee Treatment Act and the Military Commissions Act.

Finally, separation of powers principles must weigh heavily. The fact that the courts may be the final arbiter of what the Constitution says does not make them the proper source for resolving matters far removed from their institutional competence.⁴⁷

⁴⁵ Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001), 50 U.S.C.A. Sec. 1541 nt.

⁴⁶ Compare *Ex Parte Quirin*, 317 U.S. 1, 28 (1942) (“the adoption of measures by the military command ... to repel and defeat the enemy” are among the principal purposes of the “conduct of war”).

⁴⁷ See, e.g., *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) (“the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a

Battlefield commanders are in a far better position to judge who should be detained: they are on the scene; they have the best sense of what is needed to fight effectively; they have the best sources of information (including from foreign intelligence services who will be reluctant to continue cooperating with us if they believe what they tell us may be revealed in U.S. court proceedings); they must have the confidence of our forces (for chain-of-command is weakened if subordinates come to believe their commanders will be second-guessed); and – a much missed point – they have no incentive to take prisoners unless there are strong military reasons for doing so.⁴⁸ Especially since this is not a situation where constitutional rights are implicated, there is no reason to believe federal judges are in a better position to assess the propriety of detention than the executive branch officials charged with the conduct of the war.

Again, this does not mean there can be no proper role for the judicial branch in the detention and trial of alien enemy combatants. Such a role, however, must emphasize the judicial strengths of fact-finding and procedural discipline and remove the judicial tendencies toward creative justice and a regard for burdens on the executive branch as floors to be built upon rather than ceilings to be heeded. Consequently, to be worth having, a system that provides a role for the courts must be heavily regulated – *i.e.*, Congress must actually ask and answer the difficult questions about what rights we are

kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry”).

⁴⁸ Keeping captives is a resource-intensive proposition. It detracts from the assets and personnel available for other missions, including fighting. There is no logical basis to believe our military holds combatants absent a very good reason to believe they have worthwhile intelligence or, even more likely, would rejoin the battle if released. Particularly in light of the negative press the Defense Department has received over detentions at Guantanamo Bay and elsewhere, it has every incentive to release captives – and, indeed, under this pressure it has released combatants who, the press has reported, have promptly taken up arms again against our troops. (*See, e.g.*, “Freed Gitmo detainees back in rebel ranks, officials say” (Washington Times, July 6, 2004, <http://www.washingtontimes.com/national/20040706-125552-4477r.htm>.) The military vets captives at the time of capture and periodically thereafter. It has winnowed down the number captured from over 10,000, to approximately 800 who were held at one point at Guantanamo, to a current number of approximately 435. (*See* Global Security, “Gunatanamo Bay Detainees,” http://www.globalsecurity.org/military/facility/guantanamo-bay_detainees.htm) (accessed Nov. 6, 2006). It bears noting that 38 individuals were recently found not to be combatants based on CSRT findings. (*See* Defense Department Press Release, April 19, 2005 (<http://www.defenselink.mil/releases/2005/nr20050419-2661.html>); “38 Guantanamo Detainees to Be Freed After Tribunals, *Armed Forces Information Service*, March 30, 2005 (http://www.defenselink.mil/news/Mar2005/20050330_368.html)). There is simply no reason to believe that the military is detaining innocent aliens mistakenly apprehended in a war zone. It would be irrational to do so.

willing to extend to the enemy and what burdens we are willing to impose on the military, and at what points in an ongoing conflict those rights and obligations should be triggered. Congress has begun this task with the Military Commissions Act by, for example, disallowing alien enemy combatants from invoking the Geneva Conventions in habeas corpus and other civil actions and proceedings, and explicitly recognizing that the Constitution grants the President the authority to interpret the meaning and applicability of the Geneva Conventions.

A new system, furthermore, should proceed on the presumption that, because the judicial role would be an innovation not a reflection of the natural order, judicial powers would be enumerated and limited – the courts would not be at liberty, as they may be in the civilian courts when construing the constitutional entitlements of citizens, to expand their own role, the rights of detainees, or the duties of the executive.

4. *An appropriate regulatory scheme would avoid burdens for the war-fighter that are irreconcilable with the imperative of achieving military advances and ultimate victory.* Any comprehensive system for handling alien combatant cases must account for the fact that combat operations and law enforcement are significantly different. Expectations must be adjusted accordingly. The burdens of stopping to collect evidence and write incident reports, the bread-and-butter of police officers, can be counterproductive, to say the least, to battlefield success – where the priority national interest is victory and the protection of the American people, not the maintenance of evidentiary integrity for future legal proceedings. Of course the military do perform evidentiary collection and recording now – after all, it is much in their interest correctly to sort out whom to hold and whom to release. Until *Rasul*, however, those tasks did not call for the rigor of anticipation that *judicial litigation* impels. The military justice system can be expected to appreciate the burdens on our forces and the need to rely on and protect intelligence sources, particularly the intelligence services of cooperating nations. The civilian judiciary cannot. And the potential problems are not adequately anticipated and addressed in the Detainee Treatment Act and the Military Commissions Act which, as further discussed momentarily, permit detainees to challenge the outcome of military proceedings by appeal to the D.C. Circuit, but provide little guidance to that court.

It is not enough to say, hopefully but naively, that the reviewing court will doubtless understand the reasons why a military record of the basis for detaining and trying an enemy combatant may not resemble the record developed at a domestic criminal trial following an extensive FBI criminal investigation. As we have seen, courts, which have no innate expertise in this area, have not demonstrated great sensitivity to national security concerns when deprivations of liberty are at issue – even the liberty of alien enemy combatants captured in battle against our country.

Empirically, judicial demands on executive branch procedural compliance, if unchecked, become steadily more demanding over time. The executive naturally responds by being more internally exacting to avoid problems. Progressively, executive compliance, initially framed and understood as a reasonably modest set of burdens to promote the integrity of judicial proceedings, becomes instead a consuming priority and expenditure, which, if permitted in the context of warfare, would inevitably detract from the military mission that is the bedrock of our national security.

In the fore here, plainly, are such matters as discovery and confrontation rights. If the courts were given final authority, while hostilities are ongoing, to second-guess the executive's decision to detain a combatant by scrutinizing reports that summarize the basis for detention, it is only a short leap to the court's asking follow-up questions or determining that testimony, perhaps subject to cross-examination, is appropriate. Are we to make combat personnel available for these proceedings? Shall we take them away from the battle we have sent them to fight so they can justify to the satisfaction of a judge the capture of an alien enemy combatant that has already been approved by military commanders? Given the fog and anxiety of war, shall we expect them to render events as we would an FBI agent describing the circumstances of a domestic arrest?

Nor is that the end of the intractable national security problems. What if capture was effected by our allies rather than our own forces (as was the case, for example, with the jihadist who was the subject of the *Hamdi* case)? Shall we try to compel affidavits or testimony from members of, say, the Northern Alliance? What kinds of strains will be put on our essential wartime alliances if they are freighted with requests to participate in American legal proceedings, and possibly compromise intelligence methods and sources

– all for the purpose of providing heightened due process to the very terrorists who were making war on those allies?

These are lines that Congress must draw . Leaving them for the courts themselves to sort out would place us on a path toward full-blown civilian trials for alien enemy combatants – the very outcome the creation of a new system was intended to avoid.

5. The Detainee Treatment Act (DTA), Military Commissions Act (MCA) and the Combatant Status Review Tribunal (CSRT) procedures, though a valuable start, do not adequately address either the pressing or the long-term challenges of the war on terror. In enacting the DTA on December 30, 2005, and the MCA on October 17, 2006, Congress sharply curtailed, although it did not eliminate, the national security catastrophe wrought by the unguided missile that was *Rasul*. As described above, that unprecedented decision opened the courthouse doors to the nation’s enemies – namely, alien combatants who were members or affiliates of al Qaeda and were being detained at the naval base in Guantanamo Bay, Cuba – but gave district courts no instructions regarding what to do with the resulting cases. Bound only by the nigh-boundless discretion permitted them by the federal rules for the conduct of habeas corpus proceedings⁴⁹ – which, of course, had been conceived for civilian prisoners who had had full-blown judicial trials and appeals, not alien enemy combatants in wartime – the district court set those cases on a course toward a wartime cognate of judicial trials, with all the constitutional protections for defendants and discovery obligations for the government that implies.

The combined effect of the DTA and MCA was that jurisdiction was removed from the district courts. Instead, they permit the military to proceed with CSRTs for purposes of determining the status of alien enemy combatants and military commissions for purposes of trying offenses against the laws of war.

With respect to CSRTs, the DTA authorizes judicial review by the United States Court of Appeals for the District of Columbia Circuit (the D.C. Circuit), and, ultimately, the Supreme Court. That review is limited to (a) whether the status determination was consistent with the standards and procedures for CSRTs established by the Secretary of

⁴⁹ Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. 2254, note. Pub.L. 94-426, Sept. 28, 1976, 90 Stat. 1334.

Defense, and (b) whether those procedures are consistent with the Constitution and laws of the United States “to the extent the Constitution and laws of the United States are applicable.”⁵⁰

In the case of military commissions, the MCA directs that guilty verdicts are referred to a Court of Military Commission Review. The D.C. Circuit, which has exclusive appellate jurisdiction over the military commission process, is limited in what it can review. The scope of review is analogous to that for CSRTs: whether the commission was consistent with the standards and procedures prescribed by the President and the Secretary of Defense for military commissions, as well as “the Constitution and laws of the United States.”⁵¹ Those standards and procedures afford combatants considerable protection, including the right to present evidence in his defense, to cross-examine witnesses, and to receive the assistance of counsel.⁵²

Plainly, the DTA and MCA are significant improvements over *Rasul*. They are not, however, a comprehensive solution to the manifold difficulties in dealing with enemy combatants that the war on terror portends for the nation in the years ahead. To begin with, the problem of unguided direction for the U.S. courts (the main flaw of *Rasul*), while greatly mitigated, is not eliminated. To be sure, Congress was careful to caveat that “[n]othing in [the DTA’s judicial review provisions] shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States.”⁵³ The legislature, however, did not positively and unambiguously convey that such aliens have no such rights. As related above, the judicial review provisions for both the CSRTs and commissions anticipate that the D.C. Circuit will consider the validity of the attendant military procedures under the Constitution and laws of the United States. (By contrast, when Congress itself prescribes procedures for the U.S.

⁵⁰ DTA, Sec. 1005(e)(2)(C), 119 Stat. 2743. The current CSRT procedures are established by a July 7, 2004 memorandum from former Deputy Secretary of Defense Paul D. Wolfowitz to the Secretary of the Navy (<http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>), which is expanded on and implemented by the Secretary of the Navy’s memorandum, dated July 29, 2004 (<http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>).

⁵¹ MCA, Sec. 950g, (c), 1, 2.

⁵² MCA, Sec. 949a, (b).

⁵³ DTA, Sec. 1005(f), 119 Stat. 2743.

courts, it does not typically suggest that those procedures may be infirm and provide for their challenge; it tacitly assumes their validity.) It is certainly conceivable (although less so than with the district courts under *Rasul*) that the D.C. Circuit could construe these review provisions as a green-light to freight the military proceedings with the due process requirements the Constitution and federal law have been construed to impose on civilian judicial proceedings.

More problematically, the military commissions system – although framed in language that is not geographically limited – was principally designed to address the problem of those already in custody in Guantanamo Bay. This is a matter of great urgency, particularly on the diplomatic front, given the immense and generally unfair criticism these detentions have generated, even among American allies. Nonetheless, these detainees form only a portion of those currently in custody and, in light of the expectation that the war on terror may continue for many years, a fraction of those who will eventually be captured. The DTA and MCA, moreover, do not address the two central complaints about the processing of war-on-terror detainees through the military justice system rather than the criminal justice system: (a) the limited judicial role, and (b) the sclerosis of the military proceedings to date.

The first of these complaints has profound diplomatic resonance even if its legal validity is limited at best. Legally, the DTA and MCA should answer the dubious contention that unfairness inheres in any system in which the executive branch alone is prosecutor, judge, jury, jailer and, occasionally, executioner.⁵⁴ The DTA and MCA provide for review by the federal judiciary of the military proceedings. That review is limited, as it should be. After all, the Constitution and the laws of the United States presumptively do not have extraterritorial application to any non-Americans, much less to alien enemy combatants captured outside the jurisdiction of the U.S. courts;⁵⁵ the

⁵⁴ It is worth observing that this is a very ahistorical criticism. Military commissions in the United States extend back to Washington's use of them during the Revolutionary War, and they have always been nearly exclusively executive in nature. And, of course, in many of the world's governments in which separation of powers is an alien concept, unchecked executive power is a staple of even what passes for the civilian justice system, let alone in the treatment of captured enemy combatants in wartime.

⁵⁵ *Eisentrager*, 339 U.S. at 777-785; accord, *Rasul*, 542 U.S. at 478; *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders"); *Verdugo-Urquidez*, 494 U.S. at 269.

Constitution and U.S. law recognize the supremacy of the executive branch in the conduct of war;⁵⁶ treaties such as the Geneva Convention, to the extent they speak to the treatment of captives, are not judicially enforceable;⁵⁷ and even if such treaties were enforceable, al Qaeda operatives would not qualify under Geneva's own terms, since the terrorist organization is not a High Contracting Party and it flouts the laws of war. Consequently, there should not be much for courts to review regarding the exercise of this quintessentially executive authority.

Still, the military commissions system does not address the objections other nations and some prominent former members of the U.S. foreign service have lodged against the military proceedings due to what they portray as the tribunals' lack of independence from the executive branch.⁵⁸ As a matter of diplomacy, that these objections mark a stark departure from the traditional use of military commissions to prosecute violations of the laws of war is quite beside the point.

Because al Qaeda and its affiliates are a stateless transnational terror network, and terrorist operatives thus have been and will continue to be apprehended outside American jurisdiction (indeed, throughout the world), the United States needs, and will continue to need, the cooperation of other nations in order to capture terrorists, to glean intelligence from them, and to neutralize them by lengthy periods of incarceration. If the extent of judicial participation in U.S. combatant proceedings is objectionable to our allies, that cooperation could be jeopardized. That much of the worldwide reaction to military commissions is visceral rather than logical is neither here nor there. If other nations, unwilling to prosecute and sufficiently punish terrorists themselves, become similarly unwilling to extradite them to the United States due to what they regard as a lack of fundamental fairness and independence in the prospective trial proceedings, it will be

⁵⁶ *Hamdi*, 542 U.S. at 518; *Eisentrager*, 339 U.S. at 788; *Yamashita*, 327 U.S. at 11; *Quirin*, 317 U.S. at 28, 30; 10 U.S.C. 821 & 836.

⁵⁷ *Head Money Cases*, 112 U.S. 580, 598 (1884); accord, e.g., *Charlton v. Kelly*, 229 U.S. 447, 474 (1913); *United States v. De La Pava*, 268 F.3d 157, 164 (2d Cir. 2001). The Supreme Court's recent decision in *Hamdan*, *supra*, is not contrary. The *Hamdan* majority found that Common Article 3 of the Geneva Conventions was applicable to military commissions not of its own force but because, the majority reasoned, it had been incorporated by Congress through the Uniform Code of Military Justice.

⁵⁸ See generally, e.g., *Hamdan v. Rumsfeld*, No. 05-184, Brief of Amicus Curiae Madeleine K. Albright and 21 Former Senior U.S. Diplomats in Support of Petitioner Salim Ahmed Hamdan (Jan. 6, 2006) (http://www.hamdanrumsfeld.com/Hamdan_AlbrightDiplomats_brief.PDF).

cold comfort indeed that those proceedings are perfectly adequate (even exemplary) under our Constitution and laws.

Finally, the poor performance of the executive branch, and its political fall-out, must be acknowledged. It is freely conceded that many delays – especially those related to appellate litigation – in the combatant status review and commission process have been beyond the military’s control, and, surely, the executive branch cannot be faulted for failing to anticipate that the Supreme Court would depart from its precedents and hold in *Rasul* that the naval station at Guantanamo Bay is within the jurisdiction of the U.S. courts after all, or in *Hamdan* that the combined effect of the AUMF and DTA, coupled with the President's independent authority over the conduct of war, were insufficient to authorize the contemplated military commissions. All that said, however, the long delay in charging any combatants – especially in the year following the 9/11 attacks, when opposition was muted – and the failure to complete even one commission after five years cannot be justified. The military commission procedures are comprehensive and exceedingly fair to combatants. Had they been carried out efficiently, we would by now have had completed commissions recognized by the U.S. courts and the international audience as models of integrity. The controversy in which we are currently embroiled, and the need for additional legislation, is in part traceable to the failure of the military courts to exhibit themselves as a viable alternative. It is a failure in execution, not in conception.

Proposal: Create a National Security Court

As detailed above, many problems have arisen both from our decade-plus of prosecuting international terrorism in the civilian court system and from the recent experiment of allowing enemy captives access to our courts to challenge their detention and military trial even as the war ensues. It is thus time for Congress to create a national security court for terrorism cases. Such a tribunal, under the stewardship of Article III judges but heavily regulated by Congress, would publicly reaffirm our national commitment to due process of law (and thus encourage other nations to cooperate with us in the apprehension and trial of terrorists) without materially harming our security or imperiling our armed forces.

1. ***Amending the Habeas Corpus Statute.*** The first and perhaps most important step to establishing a NSC has already been taken. In the MCA, Congress made clear that, "No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."⁵⁹ This effectively reverses the most pernicious aspects of the *Rasul* judgment. Although *Rasul's* interpretation of the habeas statute as extending to alien combatants ostensibly applied only to Guantanamo Bay, as Justice Scalia argued in dissent, the *Rasul* majority's rationale – based on the notion that Guantanamo Bay, though not under U.S. sovereignty, is under effective U.S. control – was not rooted in a sensible limiting principle; it could theoretically be enlarged to cover any place on the globe where the United States exercises de facto control (e.g., war zones where American forces have suppressed the enemy).⁶⁰ With the MCA, Congress has made clear that it does not intend habeas corpus to cover enemy forces making war against the United States.

The MCA does not, it bears emphasizing, amount to a suspension of the writ of habeas corpus under the Constitution.⁶¹ As already recounted, the Supreme Court has acknowledged that alien combatants do not have a constitutional right to habeas corpus relief under the Constitution. The MCA has no effect on persons constitutionally entitled to seek the writ, nor on persons in custody after convictions in the federal or state criminal justice systems – which is to say, no effect on those for whom the habeas statute was designed.

2. ***Creation of a National Security Court.*** Congress should establish a special national security court (NSC) with jurisdiction over cases involving international terrorism and other national security issues, including judicial review of enemy combatant detentions, within limits that respect the prerogatives of the political branches.

⁵⁹ MCA, Sec. 7(e)(1).

⁶⁰ *Rasul*, 542 U.S. at 498 (Scalia, J., dissenting).

⁶¹ See U.S. Const., Art. I, 9, cl. 2.

This NSC would be analogous to the court created by the Foreign Intelligence Surveillance Act of 1978, *i.e.*, the Foreign Intelligence Surveillance Court (or, as it is better known, the “FISA court”), which now hears government applications for national security wiretaps and searches.⁶² Like the FISA court, the NSC would have district and appellate court components, both drawn from the national pool of experienced federal judges.⁶³ The judges would be selected by the Chief Justice of the United States for renewable four-year terms. Renewal would be in the discretion of the Chief Justice, and judges could be removed from their assignment to the NSC for bad behavior or poor performance. The NSC could be centrally located in Washington, D.C., and/or could sit in other courthouses throughout the country that have been hardened in light of the terrorist threat – *i.e.*, districts which have court, prison, government office and storage facilities that the Justice Department’s Security Office, the U.S. Marshals Service and the federal Bureau of Prisons have secured to deal with classified information and the dangers unavoidably attendant to international terrorism matters.⁶⁴ As appropriate, it could also convene in safe facilities under the control of the Defense Department overseas, such as the naval base at Guantanamo Bay.⁶⁵

The new NSC’s appellate tribunal (not its district court) would have jurisdiction to review combatant status review tribunals – just as the D.C. Circuit, rather than a

⁶² See 50 U.S.C. 1801, et seq. Indeed, given the need to revamp FISA (which is beyond the scope of this paper but has been elucidated by the ongoing controversy regarding the National Security Agency’s Terrorist Surveillance Program), it might well be most efficient to subsume the FISA Court and its obligations within a new National Security Court. An important part of the justification for creating a specialized FISA court was the apparent need to create and husband judicial expertise in foreign intelligence matters. See *United States v. United States District Court (“Keith”)*, 407 U.S. 297, 323 (1972) (which influenced Congress in designing FISA). Clearly, foreign intelligence concerns would be pervasive in any judicial consideration of the detention and trial of enemy combatants. It would thus make sense to build on this reservoir of relevant experience.

⁶³ The use of the term *district court* here is colloquial. The court would have jurisdiction over a subject matter, not a geographical district, and the judges who served on it would continue to serve in their respective districts (and circuits), as is the case with FISA court judges.

⁶⁴ The FISA court convenes at Main Justice in Washington. That makes perfect security sense for the task of reviewing applications for eavesdropping and search authority. Because the NSC would be entertaining adversarial proceedings, including trials which the combatant and the public would presumptively be permitted to attend, secure courthouses would obviously be more appropriate for its work.

⁶⁵ To be clear, this is not to suggest that the jurisdiction of the NSC would be coextensive with the military’s international deployment. This is a provision related to safety and convenience, not substance. It would be an invitation to the Defense Department to create secure locations that better serve its needs.

district court, currently has it under the MCA.⁶⁶ The CSRT-review would be highly deferential to the executive branch (especially while war still ensues), there being no reason to believe it is not being performed in good faith by the military. Thus, one round of judicial review by an appellate court (empowered to remand the case back to the military for additional proceedings if necessary) is perfectly adequate – with the proviso that certiorari review may be sought in the Supreme Court.

The NSC would, in addition, be given concurrent original jurisdiction over offenses that by statute or under the laws of war may currently be tried by military commissions,⁶⁷ as well as jurisdiction over other statutory offenses common to international terrorism cases. It would have jurisdiction over any alleged offenders, regardless of where in the world they have been apprehended (including inside the United States), if those offenders qualify as alien enemy combatants upon the determination of a CSRT.

Designed in this manner, the NSC would ensure development of judicial expertise in the complex legal issues peculiar to this realm, including among others: classified information procedures (*see* the Classified Information Procedures Act, 18 U.S.C. Append. III), the laws and customs of war, international humanitarian law, the limited entitlements of aliens under U.S. law, and the strict construction of discovery rights in national security cases. Not only would this expertise enable the judges sitting on the NSC to dispense justice fairly and more efficiently; it would also result in the affected executive branch agencies (primarily, the Justice Department, the Defense Department,

⁶⁶ Depending on how burdensome the workload would be, and how much expertise had already been developed by the D.C. Circuit by the time an NSC was ready to be established, it might well be preferable to assign all appeals from the NSC district court to the D.C. Circuit, rather than create a separate NSC appellate division. Here, the FISA experience may be a poor frame of reference. While the Foreign Intelligence Court of Review has only rendered one ruling in the 28 years since it was established, *see In re Sealed Case*, 310 F.3d 717 (FIS Court of Review 2002), there is no doubt that, between CSRTs and appeals from terrorism trials, there would be much more work for a reviewing court in connection with the NSC as contemplated here. An obvious alternative to imposing all the burden on the D.C. Circuit would be to draw from the pool of jurists now serving on the Circuit Courts of Appeals (and, if necessary, to draft NSC district judges to sit by designation on cases in which they have had no involvement).

⁶⁷ Compare 10 U.S.C. 821. The creation of an NSC would not eliminate military commissions. Jurisdiction would thus be concurrent, although it would certainly be expected that, barring unforeseen and extraordinary circumstances, the NSC would become the forum of choice for prosecutions in the war on terror.

and the components of the intelligence community) having to adapt to but a single body of jurisprudence.

Symmetrically, the executive branch would form an NSC unit combining Justice Department attorneys who specialize in terrorism and other national security cases with military lawyers drawn from the services' Judge Advocate General's offices, selected by the Secretary of Defense (or, perhaps, the Defense Department's General Counsel). This unit would be the NSC's liaison with the affected executive branch agencies and would represent the government before the NSC. The NSC would also have its own panel of defense counsel, which would mirror what now exists in the military system: a chief defense counsel drawn from the Judge Advocate General's office of one of the armed services, and other judge advocates and qualifying civilian defense counsel who would have appropriate security clearances and experience in national security litigation. (Some, of course, would also have expertise in capital litigation).

Significantly, transferring these matters to a new NSC would also foster the salutary effects of disconnecting most international terrorists from the justice system that applies to ordinary Americans accused of crimes. On the other hand, although the new forum would not give detained terrorists the right to judicial enforcement of treaties, its existence, independence and the public interest in its proceedings would provide the U.S. government with a powerful incentive to honor its treaty obligations, and a stage on which to exhibit that it does so.⁶⁸

3. *Governing law in general.* The NSC's jurisdiction over CSRT-reviews and trials would extend only to alien combatants captured during the war on terror. It would not extend to American citizens.

⁶⁸ To be clear, this is not to suggest that the United States has not honored its treaty obligations. Indeed, it has, for example, correctly construed al Qaeda to be outside the Geneva prisoner-of-war standards. The point here is that a judicial tribunal, following the law publicly and faithfully from outside the executive branch, would do much to educate the public on what U.S. obligations actually are, would correct the misinformation which has been pervasive since military operations began after the 9/11 attacks, and would – in the same way criminal trials now do – provide a credible barometer for government to meet. Government's anticipated success in doing so would do much to enhance America's reputation for honoring its international commitments, which has been battered – for the most part, inaccurately and unfairly – for the past five years.

To be sure, some captured combatants (*e.g.*, John Walker Lindh, Yaser Esam Hamdi and, for a time, Jose Padilla), and an even greater number of terrorism defendants charged in civilian courts, have been U.S. nationals. Still, the vast majority of operatives waging war on behalf of, and facilitating, al Qaeda and its affiliates have been aliens. Many of these have had no plausible claim on U.S. legal protections. Because Americans are vested with such protections, fashioning procedures that would suffice for them yet be consistent with the minimalist approach of the NSC would be extremely challenging, to say the least.

Thus far, thankfully, there have not been enough Americans associated with al Qaeda to make such an effort worthwhile – especially given how dramatically it would complicate otherwise straightforward procedures that are adequate for alien combatants. Furthermore, while not devoid of significance to our allies and other nations, the treatment of *Americans* by the U.S. government is not an animating concern for them; the concerns that disincentivize them from cooperating with our government, and thus which would drive the creation of the NSC, involve the treatment of *aliens* by the U.S. government.

By establishing the NSC and defining its jurisdiction to cover both violations of the laws of war and statutes relevant to civilian terrorism prosecutions, the NSC could handle any prosecution involving an alien enemy combatant in the war on terror, regardless of whether that combatant could be specifically tied to 9/11, and regardless of whether the prosecution was based on a traditional “war crime,” an offense traditionally triable by a military commission, or one of the statutory offenses commonly used to prosecute terrorists in the civilian courts.

4. *Detention of enemy combatants.* The NSC would oversee a new process for monitoring and reviewing the detention of alien enemy combatants captured by our military (and allied forces) outside U.S. territory and detained wherever the military chooses to detain them (including within the United States). The district court division of the NSC would perform, primarily, a monitoring function. As already noted, judicial review would principally proceed at the appellate level, as it now does under the DTA and MCA.

The process would work as follows. Within a reasonable time after capture, the Justice Department would report to the NSC the fact that an alleged unlawful combatant had been captured in a particular theater of combat and was being detained.⁶⁹

Presumptively within one year of capture, the military would hold a CSRT pursuant to the procedures currently in place.⁷⁰ Assuming the detainee is designated an alien enemy combatant, the appeal process would proceed, first in the military system and, ultimately, to the appellate tribunal of the NSC.

Review in the NSC would proceed in a manner similar to that envisioned by the MCA. In creating the NSC, Congress would (a) make a finding that aliens who are non-U.S. persons (*i.e.*, who are neither American citizens nor lawful permanent resident aliens of the United States) have no entitlements under the Constitution, and (b) provide that such aliens have no enforceable entitlements against detention during wartime under any U.S. statute or treaty if found by a properly constituted CSRT to be enemy combatants. Consequently, review in the NSC would be limited to challenging compliance at the appellant's CSRT with the military's standards and procedures for CSRTs. To avoid the

⁶⁹ If, in the unreviewable discretion of the president or his designate (for these purposes, the Attorney General or the Secretary of Defense), the national security of the United States required keeping the identity of a captured terrorist or the fact of his capture secret for some period of time, the Justice Department could make a sealed submission to that effect. The sealing would have to be reviewed every sixty days. While the capture would thus be reported to the court, there would be no public record of it until such time as the president or his designate permitted it.

⁷⁰ This one-year period recognizes that (a) the military does a fair amount of vetting captives before the CSRT ever takes place, (b) the vast majority of people detained are released in a short time, and (c) the military has great incentive not to bear the extraordinary burden of detaining and maintaining captives, so when it does determine that someone should be held, it will virtually always be because the individual is a threat to U.S. forces, and often a valuable potential source of intelligence. Removing threats, degrading the enemy's ability to threaten our forces, and obtaining intelligence are vital to achieving victory, and the complexities of creating a legal mechanism for dealing with the pressing issues surrounding detainees cannot cause us to lose sight of the radiant fact that achieving victory is our top national security objective.

As already noted, the CSRT procedures are spelled out in former Deputy Secretary Wolfowitz's memorandum and a more detailed memorandum by the Secretary of the Navy, dated July 7 and 29, 2004, respectively. The one-year limitation could be extended, in 30-day periods, at the express direction of the Secretary of Defense (or, of course, the President). It is expected that this would be exceedingly rare. There may, however, be circumstances where, for example, a high-level al Qaeda detainee was in a position to provide, or was providing, valuable intelligence, and where in the judgment of intelligence professionals the interruption of that process for a CSRT could result in shutting it down and potentially depriving the United States of life-saving information. There must be a mechanism to allow that debriefing to proceed but at the same time ensure that detainees are accounted for with integrity.

empirical problem of judicial activism, the Congress would make clear that the grounds it has set forth are the only available grounds for judicial review.⁷¹

In connection with each certified combatant, the Justice Department would also certify to the NSC (at the district court level) that hostilities were ongoing in the war on terror, that hostilities were ongoing in the theater of combat relevant to the particular enemy combatant (which, of course, will not necessarily be the place where the combatant was captured), and that it was in the national security interest of the United States that the combatant continue to be held because of the likelihood that he would resume operations against the United States if released. The CSRT determination would be reviewed annually, as would DOJ's certification.

The government's certification would be unreviewable as long as the executive branch represented that combat operations were still ongoing in the theater which was the predicate (or were the predicates) for finding the particular detainee an alien enemy combatant. Here, it is worth pausing to rehearse that, once prospects for useful intelligence have been exhausted, the sole justification for holding enemy combatants is to prevent them from rejoining the battle. While it is often observed that the global war on terror may go on indefinitely, this does not mean it will go on *throughout the world* indefinitely.

Of course, some detainees will be a credible threat to join the battle wherever it rages. However, the evidence that would make such a threat credible will frequently provide grounds for charging the terrorist-combatant with war crimes and prosecuting him – such that it will not be necessary to detain him interminably merely as an enemy combatant (which is the principal international objection to current U.S. policy). Other detainees will only be credible local threats, and will not be a continuing national security challenge for the United States once combat operations have been completed in the place where they were captured. Such combatants should be repatriated once combat operations in their region have wound down (and it bears mention here that the United States has, in

⁷¹ Plainly, this would not entirely eliminate the possibility of any constitutional or other legal challenge to the CSRTs. But it would create a higher hurdle to such a challenge than currently exists. That is, an appellant would have to demonstrate, not only in the teeth of considerable judicial precedent but also against the express intent of Congress, that he was entitled to be heard on such a challenge.

fact, released hundreds of combatants from Guantanamo Bay).⁷² Moreover, as progress is made in the war on terror, and particularly if functioning governments replace tyrannical regimes, it will increasingly be possible to repatriate combatants with the confidence that they will be treated appropriately (including by prosecution, if grounds exist) by the new governments in their home countries (or in countries where they have committed crimes). This should further reduce the need to detain those combatants who will not be subjected to trials in the NSC.

In any event, once the government could no longer certify that combat operations were ongoing in the relevant theater(s) for a particular combatant, it would be given six months either to release the combatant, charge him with crimes in the NSC, or show probable cause, to the satisfaction of an NSC judge, to believe the combatant, if released, would take up arms against the United States in another theater of combat.

The latter proceeding would be akin to a bail hearing in the federal courts. The combatant would be entitled to be present, and to have counsel drawn from the approved panel of NSC counsel. The government would be permitted to make its showing by proffer; it would be insufficient for the government merely to establish that combat operations were ongoing in some location; it would have to make a particularized showing of a basis to believe the combatant at issue would participate in the war there. The proceeding could be held under seal to the extent necessary to protect national security (and especially information about combat operations), and the government could introduce classified information on the same basis as is now done in CSRTs.

If the NSC found in favor of the government, the determination would be reviewed annually, just as original CSRT determinations were reviewed annually. The combatant would be permitted as of right to appeal a ruling in favor of the government. If the NSC ruled in favor of the combatant, the government would also be permitted, as of right, to appeal, during the pendency of which the combatant would continue to be detained. Upon a final appellate ruling against the government, it would have a period of one month either to charge the combatant in the NSC or release him. (Obviously, the one-month period could be extended as necessary if the government could demonstrate that it

⁷² Again, those deemed to be continuing threats despite the cessation of combat operations will likely be so considered due to the existence of information that provides grounds for war crimes prosecutions.

was making good faith efforts to repatriate the alien combatant but was having difficulty finding a country willing to accept him).

This system, among other things, would serve to blunt the resonant criticism that detainees could be held interminably because the war on terror may last, as Justice O'Connor surmised in *Hamdi*, for several generations.⁷³ Again, while that will no doubt be true of the generic war on terror as long as al Qaeda and its affiliates remain capable of projecting force internationally, it is not true of the war's component stages. Combat in Afghanistan, for example, is still ongoing, but appears to be winding down somewhat from prior levels. This, clearly, is why the Defense Department has already released so many Guantanamo Bay detainees. The proceedings described above would provide an oversight role for the independent judiciary without interfering in the conduct of the war; set a reasonable hurdle for the government to surmount if it is deemed necessary to hold combatants after hostilities have ended in the theater where they were operating; and prescribe a finite end-point at which it would be time to charge or release.

5. *Trial of Enemy Combatants.* Trials before the NSC would combine features of military commissions, which give pride of place to national security, with the stewardship of Article III judges independent of the executive branch. The combination would fairly address the tension between the competing national interest in public safety and in the public reputation of governmental processes for integrity and due process. The military commission system and the judiciary, moreover, each have strengths that would remediate their respective institutional weaknesses.

Because of their critical role in the criminal justice system as a bulwark against overbearing government, judges, as we have seen, tend to elevate individual rights at the expense public safety (which is to say, at the expense of the public's collective rights). When opportunities for creativity present themselves – which frequently happens thanks to a pervasive elasticity in the rules governing judicial proceedings, over which judges have a degree of supervisory authority – judges are hard-wired to err on the side of providing more due process. This is the appropriate default position in the criminal justice system, where defendants are generally U.S. persons deemed to stand as the equal

⁷³ *Hamdi*, 542 U.S. at 520 (Opinion of Justice O'Connor).

of government before the bar of justice, and where the system's operating assumption in doubtful cases is that the guilty should go free rather than the innocent be wrongfully convicted.

What is an asset in the criminal justice system, however, would be a liability in a system whose priority is not justice for the individual but the security of the American people. That liability, though, can be satisfactorily rectified by clear procedural rules which underscore that the overriding mission – into which the judicial function is being imported for very limited purposes – remains executive and military. The default position of the criminal justice system would not carry over to a system conceived for enemies of the United States – *i.e.*, terrorist operatives who would not be facing NSC trials in the first place absent a finding, tested by judicial review, that they were alien enemy combatants.

In such a system, the opportunities for judicial creativity would be limited by being plainspoken and unapologetic in enabling legislation about the fact that the defendants are not Americans but those who mean America harm; that the task of federal judges is not to ensure that defendants are considered as equals to our government before the bar of justice, but merely to ensure that they are not capriciously convicted of war crimes by the same branch of government that is prosecuting the war; that if credible and convincing evidence supports the allegations, the system's preference is that defendants be convicted and harshly sentenced; and that the authority of judges is enumerated and finite – if the rules as promulgated do not expressly provide for the defendant to have particular relief, the judge is powerless to direct it. In short, the system would curb judicial excess by the recognition, which underlies the military justice system, that prosecuting war remains a quintessentially executive endeavor; in the NSC, judges would be a check against arbitrariness but they would not have any general supervisory authority over the conduct of proceedings and they would not be at liberty to create new entitlements by analogizing to ordinary criminal proceedings.

Similarly, the demonstrated weaknesses in the military commission system would be ameliorated by the unique assets of federal judges. The commissions have developed at a snail's pace, and, in addition, been bogged down over procedural confusion, the need

to revise the rules, and allegations of conflicts of interest.⁷⁴ Federal judges routinely handle and bring to conclusion matters of greater complexity than war crimes tribunals, and we could with confidence entrust the Chief Justice to select jurists with demonstrated ability in this regard. Judges are expert at working through novel and complex procedural rules, and at ensuring that the rules are followed when they are clear. They are highly experienced at dealing with aggressive prosecutors and self-styled activist lawyers, both of which are wont to be drawn to national security cases. Most significantly, their independence would make them unstinting in the face of claimed conflicts. It would instantly mean decisions could be made, and the proceedings moved forward, unburdened by any appearance of impropriety. There would no longer be any colorable complaint that the authority advancing the allegations was the same authority determining the legal and factual validity of the allegations.

Essentially, NSC trials would add the Article III judges to the existing military commission format. The enabling legislation, as suggested above, would illuminate that their function is to preside over these legal proceedings, not take any action to expand or restructure them. In addition, the government would be given a right of interlocutory appeal, at any point in the proceedings, to challenge any order, discovery or otherwise, by which the court deviates from the procedural rules.

⁷⁴ Plainly, much of this is not the fault of the commissions. Delays have often resulted from the intervention of the federal courts, which have stayed proceedings at various times. Still, the fact remains that only a fraction of detainees at Guantanamo Bay have been named as eligible to be tried by commission – notwithstanding that al Qaeda is a terrorist organization which intentionally targets civilians, such that many if not most of its combatants might be assumed complicit in war crimes of the type commissions are intended to address. Cf. 18 U.S.C. 2441 (defining and punishing war crimes). It was not until July 2003 that the first six combatants were found eligible (*i.e.*, nearly two years after the President’s executive order authorizing commissions). Another nine were finally added a year later (*i.e.*, nearly three years after the executive order). *See* Defense Department Press Release, July 3, 2003. Claims about structural flaws in the system induced the Secretary of Defense to make wholesale changes in August 2005, addressing, for example, confusion over such rudimentary matters as whether commissioners untrained in the law and responsible for deciding factual issues should also be determining legal questions. *See* “Secretary Rumsfeld Approves Changes to Improve Military Commission Procedures,” Defense Department Press Release, Aug. 31, 2005 (<http://www.dod.mil/releases/2005/nr20050831-4608.html>); “Military Injustice – Strike Two for Guantanamo Trials,” *Slate* (Sept. 21, 2005) (<http://www.slate.com/id/2126681/>). Further, conflict-of-interest claims have resulted in the removal of commissioners from proceedings, and create the specter of later attacks on the integrity of the proceedings where commissioners have not been removed. *See, e.g., id.*; *see also* “Muhammad Challenges the Commissions; His Lawyer Raises and Ethical Objection and Pleads the Fifth,” Human Rights Watch report (April 6, 2006) http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-040606-patel.asp; “Panel for Detainees’ Cases Cut in Half,” *Washington Post* (Oct. 22, 2004) (<http://www.washingtonpost.com/ac2/wp-dyn/A52680-2004Oct21>).

With Article III judges performing a valuable but appropriately harnessed role, trials would otherwise go forward much like they do under the current commission procedures. Juries would generally be comprised of five military officers, properly qualified as fair and impartial in *voir dire* by attorneys for the parties under the supervision of the NSC judge. Verdicts would be by majority vote (and, if a vote for conviction was only 3-2, that would be a mitigating factor to be taken into account in the imposition of sentence). Capital cases would require a jury of seven officers, and would require unanimity for imposition of the death penalty.

The current rules for the commissions have come under harsh criticism from human rights and defendants' advocacy groups.⁷⁵ Most of these criticisms, however, stem from basic assumptions that are simply invalid – *e.g.*, that the patent security threat faced by the nation in wartime cannot justify the use of classified information which is not disclosed to the enemy combatant or the public (but is disclosed to the combatant's lawyer);⁷⁶ or that there is no meaningful difference in American and international law between the entitlements of Americans and aliens, or between those of privileged and unprivileged combatants, and consequently that any trial procedure that provides less protection than an accused would receive under the Bill of Rights, the Federal Rules of Criminal Procedure, or the Uniform Code of Military Justice violates the Constitution and U.S. treaty obligations.

In fact, as we have seen, alien enemy combatants, who are unprivileged because they flout the laws of war, have no entitlements under the Constitution. That being the

⁷⁵ See, *e.g.*, Amnesty International (U.S. Amnesty), "Oppose Plans to Resume Military Commissions," (March 28, 2005) (<http://web.amnesty.org/pages/usa-250705-action-eng>); Human Rights Watch, "Briefing Paper on U.S. Military Commissions" (revised and updated August 2004) (<http://hrw.org/backgrounders/usa/2004/commission.pdf>); American Bar Association Task Force on Terrorism and the Law, "Report and Recommendations on Military Commissions" (Jan. 4, 2002) (<http://www.abanet.org/leadership/military.pdf>). For a more even-handed assessment of the commissions, see American College of Trial Lawyers, "Report on Military Commissions for the Trial of Terrorists" (March 2003) (http://www.jenner.com/files/tbl_s18News/RelatedDocuments147/624/C15D02.pdf) (supplemented in October 2005) (<http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=2152>).

⁷⁶ The Military Commissions Act resolves this dilemma by requiring defendant access to all evidence but making provision for the withholding of information about intelligence methods and sources. In our view, this is exceedingly generous to the alien enemy combatants. See Andrew C. McCarthy, "Trials of This Century," *National Review* (Oct. 9, 2006 ed.).

case, the current commission procedures are extraordinarily fair to the accused. To reiterate, they provide⁷⁷ for:

- the presumption of innocence;
- burden of proof on the prosecution;
- the right to be presented with the charges in advance of trial;
- access to evidence the prosecution intends to introduce and to any exculpatory evidence known to the prosecution;
- the right to a trial presumptively open to the public (except for portions sealed for national defense or witness security purposes);
- the choice to testify or decline to do so, and the right against any negative inference from a refusal to testify;
- access to reasonably available evidence and witnesses; access to investigative resources as “necessary for a full and fair trial”;
- the right to present evidence and to cross-examine witnesses;
- the right to interpreters if necessary;
- the right to be present at all stages of the proceedings except in connection with the presentation of information protected for national defense or witness security purposes (in which case at least military defense counsel and possibly civilian defense counsel may be present);⁷⁸
- access to sentencing evidence on the same basic terms as trial evidence; and
- the right to present evidence and address the court at sentencing.

These basic rights, moreover, have been supplemented by standard discovery procedures⁷⁹ which require the prosecution to disclose, well in advance of trial:

⁷⁷ MCA, Sec. 949.

⁷⁸ As previously noted, the Military Commissions Act provides for personal access of the defendant to all evidence introduced at trial. *See* note 76, *supra*.

⁷⁹ *See* Presiding Officers [sic] Memorandum (POM No. 7-1), “Access to Evidence and Notice Provisions” (Sept. 8, 2005) (<http://www.defenselink.mil/news/Sep2005/d20050911POM7-1.pdf>); *see also* *United States v. Sufyian Barhoumi*, Discovery Order (PO 2), incorporated in Email Memorandum of Keith Hodges, Assistant to the Presiding Officer (Dec. 21, 2005) (<http://www.defenselink.mil/news/Jan2006/d20060104Barhoumischedule.pdf>) (implementing discovery procedures).

- the names and contact information of all witnesses the prosecution intends to call at trial along with a synopsis of the witness’s anticipated testimony;
- a curriculum vitae of any expert witness the prosecution intends to call as a witness, in addition to any expert reports or examinations relevant to the expert’s opinion testimony, and a synopsis of that anticipated testimony;
- any statements of the accused in the government’s possession which the prosecution intends to offer at trial; any such statements if they were sworn to, written or signed, and any such statements in response to interrogation, whether or not the prosecution intends to offer them at trial;
- any prior statements by prospective prosecution witnesses that are relevant to the subject matter of the witness’s anticipated testimony and that are in the possession of, or known to, the prosecution;⁸⁰ and
- where an alternative to in-person trial testimony has been proposed, notice of the method, circumstances and persons present when the alternative was created, and an explanation for why the alternative should be permitted.

These rules bring the trial of alien enemy combatants so close to the standards for trials of American citizens in civilian courts that the complaints about them border on the frivolous. It is true, for example, that the standard for evidentiary admissibility – namely, whether, in the judgment of the court, “the evidence would have probative value to a reasonable person”⁸¹ – is slightly less rigorous than that which governs civilian trials and courts martial.⁸² As argued earlier, however, less rigor must be allowed for given the

⁸⁰ The accused must be provided with any such statements that have been signed, sworn to, or written by the witness, or adopted by the witness after having been written by someone else. In addition, if the witness has made any statement, written or oral, that contradicts his anticipated trial testimony, the substance of that inconsistent statement must be disclosed to the defense.

⁸¹ 32 C.F.R. 9.6(d)(1).

⁸² Rule 403, Fed. R. Evid., renders evidence admissible as long as its probative value is not substantially outweighed by its tendency toward unfair prejudice, confusion or delay. The UCMJ standard applicable to courts martial (Mil. R. Evid. 403, which, like most military court rules, is modeled on the civilian standard) is virtually the same. Clearly, since a reasonable person would find “probative” anything that tends more to enlighten than enrage, confuse or belabor him, there is not much practical difference between the commission standard and the others – and the suggestion that there might be a such a difference as to be of

drastic differences between evidence collection in combat and domestic law enforcement spheres; and the commission standard would pass constitutional muster if applied to citizens, let alone to alien enemy combatants. Similarly, discovery is somewhat more limited in the commission context than in civilian trials and courts martial.⁸³ But, again, the marginal difference is eminently justifiable and comfortably within constitutional norms – notwithstanding that it is being applied to those who have no constitutional rights.

The existing procedures, with Article III judges presiding but under circumstances where Congress had made clear the limits on their authority and provided liberally for the executive branch to seek immediate review of judicial excesses, would be more than adequate to provide trials that were models of fairness and integrity. A few additional provisions would also be helpful. For example, the statute of limitations for terrorist crimes should be eliminated (as it is for murder in many jurisdictions) so that trials could be delayed as necessary to avoid holding them – and risking disclosures helpful to the enemy – during combat in the pertinent theater.⁸⁴ It should also be made crystal clear that defendants are not permitted to represent themselves in NSC proceedings.⁸⁵

constitutional moment is downright risible. Cf. CRS 2005 Report on Commission Rules, *supra*, at 20 (claiming that the commission admissibility rule marks a “significant departure” from the military rule).

⁸³ The basic commission rules entitling the accused to the evidence the prosecution intends to use and any exculpatory evidence are more narrow than the civilian and UCMJ standards governed by Rule 16, Fed. R. Crim. P., and the *Brady* doctrine. Nevertheless, as described above, the basic commission rules have been greatly expanded by required disclosures regarding prior statements of witnesses. Indeed, to the extent they require pretrial synopses of the anticipated testimony of each witness, they are actually far more generous than what American citizens accused of crimes are entitled to in civilian trials. Cf. Rule 16 (no required pretrial disclosure even of reports of prior witness statements, much less synopses of expected testimony); 18 U.S.C. 3500 (prior statements of witnesses need not be disclosed until *after the witness’s direct testimony at trial*). Furthermore, any discovery standard that loosely permitted a combing through government files for “documents *related to the charges*” (*i.e.*, whether or not such information was material, exculpatory or intended by the government for use at trial) would simply be providing intelligence to the enemy – far beyond any command of the Constitution or any meaningful due process improvement. Cf. CRS 2005 Report on Commission Rules, *supra*, at 18 & n.106 (and 7 n.34) (suggesting a material difference in discovery standards in the absence of any discussion of the procedures for pretrial disclosure of witness statements, and in reliance on a law review article which theorizes that no armed conflict exists with respect to al Qaeda and therefore that the law of war is inapplicable) (Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 Wash. U. Global Stud. L. Rev. 135 (2004)).

⁸⁴ With narrower accusations implicating less expansive discovery (*i.e.*, anticipating charging instruments that take the form of commission charging sheets rather than typically voluminous grand jury terrorism indictments), and with the ability to protect sensitive information from disclosure, lengthy delays would not be likely in any event. It should be noted, nonetheless, that any such delay would not result in unwarranted incarceration because the defendant would already have been determined to be an alien enemy combatant

Finally, Congress should make clear that the *Brady* exculpatory evidence doctrine, in NSC cases, is intended to reflect the *Brady* doctrine as originally conceived rather than the elastic concept *Brady* has become in modern practice. As first promulgated, *Brady* was a due-process rule that required the government to reveal to the defense any material evidence in its possession that actually demonstrated the defendant was not guilty. In the ensuing decades, the doctrine has been enlarged to embrace much that is neither exculpatory, admissible, nor particularly germane but that might be thought helpful to the defense presentation. That may be a desirable development in the civilian system, but it has no place in matters of national security, and could, if not cabined, undermine the entire purpose of an NSC, which is to provide basic due process while contributing to the national security imperative of defeating the enemy.

Conclusion

Congressional action to create a National Security Court would strike a proper balance between the imperatives of public safety and military success, on the one hand, and our commitment to due process, on the other. It would provide an appropriate forum for fairly detaining and trying terrorists no matter how long the war on terror ensues, and would have the beneficial side-effect of removing from our criminal justice system cases for which it was not designed and the handling of which necessarily reduces the quality of justice afforded by the system. Finally, it would accomplish the admirable ends that the authorization of military commissions has been unable to achieve, while

properly detained regardless of any impending trial. The combatant, nevertheless, would be fully protected by the ability to move for dismissal of any charge as to which he can demonstrate that delay has caused incurable prejudice in the presentation of his defense.

⁸⁵ Where constitutional protections apply, the Supreme Court has held that defendants have a right to represent themselves, *Faretta v. California*, 422 U.S. 806, 821 (1975), and a qualified right to counsel of their choice. *Wheat v. United States*, 486 U.S. 153, 159-62 (1988). Obviously, this raises the troublesome legal questions (a) whether *pro se* defendants who are severe national security risks must be permitted access to classified information, (b) where defendants are represented by counsel, whether the court may properly order counsel not to share particular information with the defendant; and (c) whether the court must permit a defendant to be represented by counsel of his choice if that attorney does not have a security clearance adequate to be permitted access to relevant evidence. Alien enemy combatants, however, are not vested with constitutional rights pertaining to counsel, and thus the procedures outlined above, which provide them with counsel who can review all pertinent discoveries and permit them to supplement that with chosen counsel (as long as that attorney has the requisite security clearance to practice before the NSC), are more than adequate.

simultaneously providing a court system other nations would be far more likely to favor – dramatically increasing the likelihood that they would be willing to capture terrorists operating in their territories and extradite them to the United States.

Simply stated, a National Security Court, as outlined above, would promote the objectives and international cooperation that are essential to victory in the war on terror.