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IS IT TIME FOR A FEDERAL TERRORIST COURT? TERRORISTS AND PROSECUTIONS: PROBLEMS, PARADIGMS, AND PARADOXES

Harvey Rishikof¹

Robert King Merton, the noted American sociologist, was renowned for posing a devilishly simple question whenever investigating social phenomena: "How did this come to be so?"² In the academic-legal world, this seven-word question usually spawns oceans of ink and competing constitutional frameworks. Congress' recent passage of the "USA Patriot Act,"³ the proposed passage of the Domestic Security Enhancement Act of 2003,⁴ the President's decision (in the wake of the Joint Resolution⁵ for the authorization of the use of force against terrorism) to establish military commissions to prosecute "non-citizens in the war against terrorism,"⁶ and the subsequent issuance of trial procedures,⁷ have similarly produced a torrent of public legal commentary and constitutional debate in an attempt to answer the Merton query.⁸

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² Robert Merton, *THE ECONOMIST*, March 15-21, 2003, at 81.

³ See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terror Act*, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of titles 8 and 50 U.S.C.).

⁴ See Domestic Security Enhancement Act of 2003, - -, 108th Cong. (2003) (draft legislation not yet introduced), at www.pbs.org/now/politics/patriot2-hi.pdf; see also Matthew Brzezinski, *Fortress America: The Homeland Security State, How Far Should We Go?*, *NEW YORK TIMES MAGAZINE*, February 23, 2002, at 38.

⁵ See S.J. Res. 23, 107th Cong., 115 Stat. 224 (2001) (authorizing use of U.S. armed forces against those responsible for September 11, 2001 attacks).

⁶ See Military Order of November 13, 2001 – Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,831-36 (November 16, 2001) [hereinafter *Military Order of November 13, 2001*].

⁷ See Military Commission Order No. 1, March 21, 2002, at <http://www.dtic.mil/whs/directives/corres/mco/mco1.pdf> (copy on file with the *Suffolk Journal of Trial & Appellate Advocacy*) [hereinafter *Military Commission Order*].

⁸ See Alfred P. Rubin, *Focus: September 11, 2001 - Legal Response to Terror*, 43 HARV. INT'L. L.J. 65 (2002); Matthew Brzezinski, *Fortress America: The Homeland Security State, How far should we go?*, *NEW YORK TIMES MAGAZINE*, February 23, 2002, at 38.

As a general matter, responses to the September 11, 2001 attacks have spawned two intertwined dialogues. Both a domestic civil rights dialogue and an international terrorist dialogue exist. In academic literature and public debate, these two dialogues have at times merged and produced four generally related corresponding schools of thought. It is in contemplation of creating a new federal terrorist court that these dialogues will be examined.

The domestic USA Patriot Act dialogue frames the issue as whether or not current domestic security measures impinge too far upon the liberty and civil rights of U.S. citizens. One of the critical domestic rights affected by the USA Patriot Act involve the amending of the Foreign Intelligence Surveillance Act.⁹ In this instance, the long-time distinction between criminal and intelligence matters began to merge, and the distinction between foreign and domestic arenas transformed. Following from this domestic dialogue, two schools of thought have emerged and are best characterized as the "Political Order" school versus the "Fundamental Rights" school. Interestingly, this dialogue is underscored by the fact that the most controversial provisions of the USA Patriot Act have "sunset provisions," thereby requiring the Congress to revisit the issues in five years. Most commentators agree on the creation of a balance between fundamental

Notably, Professor Ruth Wedgewood has also weighed in. Professor Wedgewood is the Edward B. Burling Professor of International Law and Diplomacy at John Hopkins University and a Professor of Law at Yale University. Her articles include: *Agora: Military Commissions*, 96 AM. J. INT'L. L. 328 (2002); *The Law's Response to September 11*, 16 ETHICS AND INT'L AFFAIRS No. 1 (2002); *The Case for Military Tribunals*, WALL ST. J., December 3, 2001, at A18; *The Rules of War Can't Protect Al Qaeda*, NEW YORK TIMES, December 31, 2001, available at 2002 WL 3304951; *Why They're Outlaws, Not POWs*, TIME MAGAZINE, February 4, 2002, at 35; *Prisoners of a Different War*, FT.COM, January 30, 2002 (copy on file with the *Suffolk Journal of Trial & Appellate Advocacy*); *Tribunals and the Events of September 11th*, ASIL INSIGHTS, December 21, 2001, at <http://www.asil.org/insights/insight80.htm> (copy on file with the *Suffolk Journal of Trial & Appellate Advocacy*); *Jihad and the Right to Counsel*, TIME MAGAZINE, April 2, 2002, at <http://www.time.com/time/world/printout/0,8816,221488.00.html> (copy on file with the *Suffolk Journal of Trial & Appellate Advocacy*). Other thoughtful and relevant discussions include: Robinson O. Everett & Scott L. Stilliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509, 515 (1994); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); Juan R. Torruella, *On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power*, 4 U. PA. J. CONST. L. 648 (2002); Harold Hongju Koh, *Against Military Tribunals*, 10/1/02 DISSENT 5862 (Fall 2002) (derived from Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L. L. 337 (April 2002)); Jennifer Elsea, *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions*, Congressional Research Service, updated Dec. 11, 2001 (copy on file with the author); LAWYERS COMMITTEE FOR HUMAN RIGHTS, *IMBALANCE OF POWERS: HOW CHANGES TO U.S. LAW & POLICY SINCE 9/11 ERODE HUMAN RIGHTS & CIVIL LIBERTIES* (March 11, 2003), at <http://www.lchr.org>.

⁹ See USA Patriot Act, Pub. L. No. 107-56, § 206, 115 Stat. 272, 282 (amending 50 U.S.C.A. § 1805(c)(2)(B) (West. Supp. 2001)).

rights and political order so as to manage the risk of future attacks. The disagreement, however, is usually on “how” and “where” the balance should be struck.

The international terrorist dialogue encompasses the international arena and the current debate as to the constitutionality of a presidential order creating a military commission to prosecute terrorists. This debate focuses more on the presidential power in times of war or national emergency to assert his authority in order to ensure the safety of the United States. This legal debate pits the “Article II President” school against the “Article I Congressional” school. Natural elective affinities connect certain schools of thought between the international terrorist dialogue and the domestic civil rights dialogue. For example, it is clear that elective affinities exist between the “Political Order” school and “Article II President” school. There are also a number of elective affinities between the “Fundamental Rights” school and the “Article I Congressional” school.

The creation of military commissions to deal with the detention and trial of “certain non-citizens” in the war against terrorism has sparked controversy not only at home but with our most trusted allies. Great Britain’s decision not to deliver its captives into our custody during the Afghan conflict – because of some differences in interpretation of the Geneva Conventions – is only the most prominent of what could be many disagreements with allies over the legal process for prosecution. In the military commission debate, however, given the nature of a military order, it is the President who will determine length of the order. Since such an order is part of the prosecution against the war on terrorism, it is assumed that when the war is completed, the order will be rescinded – no “sunset provisions” therefore.¹⁰

The new emerging legal paradigm evolves across various areas of the law – international law, the law of armed conflict, criminal law, civil law, and immigration law. Pursuant to the Joint Resolution of September 14, 2001 (for the authorization of the use of force against terrorism under Section 2 (a)):

the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determined planned, authorized, committed, or aided the ter-

¹⁰ See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *IMBALANCE OF POWERS: HOW CHANGES TO U.S. LAW & POLICY SINCE 9/11 ERODE HUMAN RIGHTS & CIVIL LIBERTIES* 69 (March 11, 2003), at <http://www.lchr.org> (noting that three Afghans and one Pakistani were released from Camp X-Ray in late October 2002 since they “no longer posed a threat to U.S. security”); see also Marc Kaufman & April Witt, *Returning Afghans Talk of Guantanamo*, WASHINGTON POST, March 26, 2003, A12. The article reports the release of 18 Afghans on March 25, 2003 after months of detention, all claiming not to have been terrorists; some acknowledged they had fought with the Taliban, but not by choice; others claimed to have been “snatched” from ordinary lives as farmers, students, or taxi drivers.

rorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.

The Resolution is germane to September 11, 2001, and reflects a "prevention" component that relates to the Bush Administration's National Security Strategy favoring a preemption policy.¹¹

Additionally, the Military Order of November 13, 2001 was specifically restricted to the "detention, treatment, and the trial of certain *non-citizens* in the war against terrorism."¹² The Bush Administration clearly made a sharp distinction between citizens and non-citizens since the process contemplated for detention, treatment, and trial would not be governed by the rules and procedures accorded in federal court. As events began to unfold in the investigation, however, U.S citizens were accused of having been involved in the September 11 attack and were brought to federal court rather than the military commissions. These cases have generated a series of legal issues for the federal trial courts and have forced those courts to confront the Bush Administration on the procedures to be followed when trying citizens as terrorists.¹³ Conversely, non-citizen detainees, under the same military order who objected to the terms of their confinement in Cuba, have attempted to seek legal redress but were rebuffed and suspended in a "legal-limbo."¹⁴

In short, an argument can be made that individuals who comprise the enemy do not fit into our traditional legal classifications.¹⁵ The current approach has been to improvise an approach which may compromise our federal criminal procedures and alienate our allies. The question arises: how can we demonstrate our commitment to the rule of law by creating an

¹¹ See National Security Strategy of the United States, September 2002, at <http://www.whitehouse.gov/nsc/nss.pdf> (copy on file with the *Suffolk Journal of Trial & Appellate Advocacy*).

¹² See Military Order of November 13, 2001, *supra* note 6, §§ 2-4, at 57,834-35 (stating antiterrorism policy and granting authority to detain and try foreign suspects).

¹³ Our federal court system performed admirably both in the Oklahoma bombing case and again after the first bombing of the World Trade Center. But that system was not built to try such cases, and the effort is taking a toll. The stresses have been evident in the sparing over use of a secret witness in the John Walker Lindh case. Perceived dangers to the grand jury system motivated Judge Shira A. Scheindlin in New York to dismiss perjury charges against Osama Awadallah, a student who knew one of the Sept. 11 hijackers, while the charging of attorney Lynne Stewart for conspiring to help her client, Sheik Omar Abdel Rahman, threatened the right to counsel. In short, the war on terror has already challenged the normal federal trial-court processes.

¹⁴ See *Odah v. United States*, 321 F.3d 1134, 1141-45 (D.C. Cir. 2003) (affirming district court's dismissal of complaints and denial of *habeas* petitions).

¹⁵ The following paragraphs are based on, Harvey Rishikof, *A New Court for Terrorism*, NEW YORK TIMES, op-ed, June 8, 2002, at A15.

institution that can handle new challenges, without damaging our constitutional principles and forcing a choice among the different schools of thought? What could a federal trial court devoted to national security cases do? Such a court could craft procedures that would allow for the administration of secret evidence without exposing the sources and methods employed by U.S. intelligence. The court would have jurisdiction over matters involving citizens and non-citizens who operate in a loose network for terrorist purposes – whether here or abroad (as in the embassy attacks in Kenya and Tanzania in 1998). Such a court would spur the creation of an appropriately trained defense bar – with appropriate security clearances – employed in much the way federal public defenders are.

A specialized federal security court could accommodate the particular challenges of prosecuting terrorism cases without undermining constitutional principles. We already have specialized courts in the federal system for bankruptcy, tax matters, and international trade. In fact, we already have a specialized court in the arena of national security – the Foreign Intelligence Surveillance Court – that under the USA Patriot Act has been expanded from seven to eleven members.¹⁶ Currently, that court's main function is to review requests from federal agencies for electronic surveillance or physical searches of foreign powers (or their agents), including American citizens.¹⁷ Similarly, a national security court, with its trials as open as possible, would give our allies needed reassurance (though the court would need to forego the death penalty in order to ensure that our allies would extradite terrorists). Having a specialized court would also make it possible for us to designate and fortify an existing federal courthouse to hold terrorism trials, which would improve security for all participants. A specialized judicial bench could also travel to locations like Guantanamo Bay, Cuba, to conduct hearings. Critical questions loom, however, over any proposal for a new terrorist court for national security: Can we properly create such a court? What would be the costs for *not* doing it? Finally, should we create such a court?

I. DEFINING TERRORISM AND SELECTING FORUMS: A FOOL'S ERRAND OR A DEMOCRATIC STATE DILEMMA

One of the principal issues in deciding whether to have a special terrorist court turns on the need for a shared international definition of "terrorism." Adam Roberts, the noted Oxford scholar of international rela-

¹⁶ See USA Patriot Act, Pub. L. No. 107-56, § 208, 115 Stat. 272, 283 (amending 50 U.S.C. § 1803(a) (West. Supp. 2001)).

¹⁷ The Foreign Intelligence Surveillance Act in 1978 established as its main function to review requests from federal agencies for electronic surveillance or physical searches of foreign powers or their agents, including American citizens. See generally Pub. L. No. 95-511, 92 Stat. 1783 (codified in scattered sections of titles 8, 18, 47 and 50 U.S.C.).

tions, concluded that terrorism is a concept “easier to condemn than to define . . . or a box with a false bottom.”¹⁸ Should formal definitions of terrorism include those activities for financial profit, or should terrorism be reserved for acts of a political nature alone? Generally, the term includes the indiscriminate use of violence – particularly against civilians – to further a political aim.¹⁹

The shared notions among those committing terrorist attacks are the same: attacks on politicians, policemen, local officials, or in hostage-takings, hijackings, and bombing of buildings are justified because the rules of armed conflict governing state violence can “be ignored for a higher cause,” albeit, revolutionary, nationalistic, and or religious in origin. The problem, therefore, can be that one person’s terrorist is another person’s freedom fighter. Moreover, the series of international conventions outlawing terrorism (arising from the 1960s proscription of aircraft hijacking to diplomatic hostage-taking) do not contain a general definition of terrorism.²⁰ Similar to Justice Stewart’s definitional problems with pornography, terrorism was a problem that “one knows when one sees it.” After much debate, the Legal Committee of the United Nations General Assembly issued a report in November 2001 with the following statement:

[The Assembly] reiterates that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be used to justify them.²¹

As suggested by Professor Roberts, is the reliance on terror the essential criterion distinguishing a movement from its political opponents? Indeed, when a movement is composed of many different wings and factions, is it appropriate to label the entire movement as terrorist?²² Clearly there will be different answers to these questions. From the perspective of the democratically-constituted target-state, do these complications and issues result in a policy stalemate, or are the procedures designated by the democratic state indeed the test of its democratic definition? Are Czarist

¹⁸ See Adam Roberts, *Can We Define Terrorism?*, OXFORD TODAY FEATURES, at http://www.oxfordtoday.ox.ac.uk/archive/0102/14_2/14.shtml (copy on file with the *Suffolk Journal of Trial & Appellate Advocacy*).

¹⁹ *Id.* (quoting Sir Jeremy Greenstock, Chairman of the UN Security Council’s Committee on Terrorism).

²⁰ See *id.*

²¹ See *id.* (citing U.N. GAOR 6th Comm., 56th Sess., Supp. No. 37, at 10, U.N. Doc. A/56/593 (2001)).

²² See *id.*

Russia, National Socialist Germany, or pre-Nelson Mandela South Africa the same form or type of state as the post-World War II United States? Surely the answer must be no. Where citizens enjoy the classic democratic freedoms of protesting, voting, free assembly, speech, and movement, is the use of terror ever legitimate in the name of a freedom fighter? Where civil disobedience can be an effective tool, until this form of protest is exhausted or denied how can one politically justify civilian targets as a legitimate domestic tactic for citizens of the target state?

Based on the new international order of democratically protected participation, terrorism can be defined. If we can define terrorism, then the next issue which arises is: what is the appropriate forum to prosecute such acts? One of the more powerful political arguments for a terrorism court, that would be perceived as legitimate in the eyes of the world community, turns on the current U.S. position concerning the International Criminal Court.²³ U.S. courts seem to procedurally assert a world jurisdiction for the detention and capture of terrorists in the name of justice, but the U.S. government concurrently rejects the creation of an International Criminal Court ("ICC"). In an exercise of pragmatic power, the United States has rejected a regime that would hold strong and weak states equally accountable.²⁴ Powerful states have been reluctant to delegate authority to an independent body. When the United States signed the Rome Statute of the International Criminal Court in 1999 ("Rome Statute"), creating the ICC, it expressed general reservations on a number of points that can be summarized as follows: (1) opposition to universal jurisdiction of any state whether signatory to the statute or not;²⁵ (2) opposition to the term "crime of aggression" without a more clear definition, since use of nuclear weapons may be included under the current definition;²⁶ (3) opposition to the power of the prosecutor to investigate without a specific complaint or request for single member Security Council veto power;²⁷ and (4) opposition

²³ This paragraph on the ICC is drawn from my forthcoming article in the Chicago Law Forum 2003.

²⁴ See generally Christopher Rudolph, *Constructing an Atrocities Regime: The Politics of War Tribunals*, 55 INT'L. ORG. 655 (2001). The following discussion draws from his analysis.

²⁵ See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, art. 4(2), 37 I.L.M. 999 (1998) (relating to ICC legal status and powers) [hereinafter Rome Statute].

²⁶ See Rome Statute, *supra* note 25, art. 5(1)(d) (defining crimes within ICC jurisdiction).

²⁷ See Rome Statute, *supra* note 25, art. 13(c) (concerning prosecutor's exercise of ICC jurisdiction), art. 15(1) (setting prosecutor's authority to instigate investigation of crimes within ICC's jurisdiction). The United States is a permanent member of the Security Council along with four other permanent members: France, Russia Federation, United Kingdom, and China. There are fifteen members in the Security Council, and the other ten countries are elected by the General Assembly for two-year terms.

to U.S. military personnel being subject to ICC jurisdiction regarding an official military action.

What has been feared by U.S. interests is a politically motivated ICC prosecution under the guise of a legal proceeding that will not afford U.S. military and citizens appropriate due process. Ironically, part of the legal issue concerning military tribunals rests on a critique raising similar due process concerns. There are clear differences between federal courts and military commissions although both strive to have fair and impartial proceedings.

As a purely technical matter, what are the essential differences between a federal court and the military commissions as a matter of law and procedure? Ultimately, there are five areas of critical difference that most commentators emphasize: (1) the right to counsel; (2) the composition of the jury; (3) the vote required to convict; (4) the general rules of evidence; and (5) the process of appeal. In federal court the accused chooses her own lawyer or has one provided if she can not afford it, the jury is composed of 12 members drawn at random, a unanimous decision from the jury is required to impose a sentence, there are strict rules of evidence (particularly concerning the custody chain of evidence), and finally, appeals move from the trial court to the appellate court (and ultimately, if *certiorari* is granted, to the Supreme Court). Conversely, under the military commissions, a military lawyer is provided and the accused can pay for a civilian attorney, the jury is composed of three to seven military officers appointed by the military (seven members are required for death penalty cases), two-thirds of the jury are required for a conviction (and a unanimous verdict for death penalty), evidence can be admitted if it "would have probative value to a reasonable person," and for review a panel is appointed by the Secretary of Defense – which may include civilians.²⁸

As has been stressed by the Bush Administration, that the reason for convening these commissions has been to safeguard classified information, provide security for court personnel, remain flexible as the war evolved, and accommodate the broad range of evidence gathered.²⁹ Clearly military justice provides a due process protection for the military. In the context of the war on terrorism and the adjudication of foreign defendants, however, the lack of any non-military dependent officials in the process presents the appearance of a lack of independence. Although these criticisms are considered illegitimate by most military justice defenders, the *appearance* of independence is the critical issue for third parties. The question that has taken center stage for constitutional theorists, however, is whether the

²⁸ See Katharine Q. Seelye, *A Nation Challenged: Military Tribunals; Government Sets Rules for Military on War Tribunals*, NEW YORK TIMES, March 21, 2002, at A1; see also Military Commission Order, *supra* note 7.

²⁹ See Seelye, *supra* note 28.

President has the power to create these commissions. On the general jurisdiction questions, two schools of thought have emerged: the “Article II President” school and the “Article I Congressional” school.

II. THE ARTICLE II PRESIDENTIAL SCHOOL VERSUS THE ARTICLE I CONGRESSIONAL SCHOOL

A. *The Article II Presidential Approach*

The Article II President school is closely tied to the fact that military commissions grow out of a war declared on terrorism – that is, the global war on terrorism (“GWOT”).³⁰ The basic argument supporting the military commissions is as follows. First, terrorism is an act of war whose objective is the destruction of “western globalization” and America’s liberal democratic way of life. It is error to otherwise characterize these acts of violence as merely a type of criminal behavior. Moreover, the American response in attacking Afghanistan, and now Iraq, project force and use military resources as the instrument of policy. In fact, the international community (immediately after 9/11 and through the United Nations Security Council) declared unanimously that an armed attack had taken place and that under article 51, America had the right to use armed force in self-defense.³¹ Moreover, the North Atlantic Treaty Organization, in an unprecedented decision, concluded that *if* the events of 9/11 were orchestrated from abroad, then they constituted an armed attack and called upon

³⁰ Although there are a number of thoughtful arguments for this position, for the sake of brevity I rely predominantly on Professor Ruth Wedgewood. Professor Wedgewood has been both elegant and forceful in her defense of the commission approach. See, e.g., *Agora: Military Commissions*, 96 AM. J. INT’L L. 328 (2002); *The Law’s Response to September 11*, 16 ETHICS AND INT’L AFFAIRS No. 1 (2002); *The Case for Military Tribunals*, WALL ST. J., December 3, 2001, at A18; *The Rules of War Can’t Protect Al Qaeda*, NEW YORK TIMES, December 31, 2001, available at 2002 WL 3304951; *Why They’re Outlaws, Not POWs*, TIME MAGAZINE, February 4, 2002, at 35; *Prisoners of a Different War*, FT.COM, January 30, 2002 (copy on file with the *Suffolk Journal of Trial & Appellate Advocacy*); *Tribunals and the Events of September 11th*, ASIL INSIGHTS, December 21, 2001, at <http://www.asil.org/insights/insight80.htm> (copy on file with the *Suffolk Journal of Trial & Appellate Advocacy*); *Jihad and the Right to Counsel*, TIME MAGAZINE, April 2, 2002, at <http://www.time.com/time/world/printout/0,8816,221488.00.html> (copy on file with the *Suffolk Journal of Trial & Appellate Advocacy*).

³¹ See U.N. SCOR, 56th Sess., 4370th mtg. at 1, U.N. Doc. S/RES/1368 (2001), 40 I.L.M. 1277 (2001) (condemning the September 11, 2001 attacks, calling on international community to combat terrorism, and expressing readiness to take all necessary steps to respond to the attacks); U.N. SCOR, 56th Sess., 4385th mtg. at 1, U.N. Doc. S/RES/1373 (2001), 40 I.L.M. 1278 (2001) (calling on member states to halt financial or other support of terrorist activities, and encouraging greater international cooperation in combating global terrorism).

members to assist the United States.³² In short, America had war declared upon it by al Qaeda, and this was recognized by the international community.

These acts of terror that are violations of the laws of armed conflict fall outside the traditional forum of the federal court and for reasons of security require a military approach. The President, as Commander-in-Chief under Article II³³ and as delegated to him by the Congress under 10 U.S.C. § 821, has the power to convene military commissions. Moreover, 10 U.S.C. § 836 grants the authority to establish rules of procedure. Generally, under the Uniform Code of Military Justice ("UCMJ"), the President has implicit authority to convene military commissions; articles 18 and 21 of the UCMJ recognize the concurrent jurisdiction of commissions to try "offenders or offenses designated by statute or the law of war."³⁴ Moreover, this procedural decision to use a military commission conforms to both domestic and international law and does not constitute any usurpation of civilian authority.

Historic precedents of military commissions stem from cases involving occupied territory, such as the Mexican War of the 1840s, the U.S. Civil War (involving approximately 2,000 cases, including the trial of the co-conspirators involved in President Lincoln's assassination), the Modoc Indian murder trials of 1864, and the cases stemming from World War II.³⁵ Based on a set of critical domestic legal precedents stemming from *Ex Parte Quirin*,³⁶ *In re Yamashita*,³⁷ and *Johnson v. Eisentrager*,³⁸ the U.S. Supreme Court has recognized the constitutionality of the President to establish military commissions to adjudicate war crimes. These cases establish the judicial fact that military commissions have been used throughout

³² See Press Release, North Atlantic Treaty Organization, Statement by the North Atlantic Council (12 September 2001), 40 I.L.M. 1267 (2001).

³³ U.S. CONST. art. II, § 2.

³⁴ See 10 U.S.C. § 821 (2000) (preserving jurisdiction of military commissions, provost courts, or other military tribunals of concurrent jurisdiction with military courts-martial); 10 U.S.C. § 904 (2000) (defining aiding the enemy under federal law); 10 U.S.C. § 906 (2000) (defining spying under federal law); see also Robinson O. Everett & Scott L. Stillman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509, 515 (1994); Jennifer Elsea, *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions*, Congressional Research Service, at 17, Updated Dec. 11, 2001 (copy on file with the author). For further research, I suggest investigation into cases that interpret the Articles of War that are identical to similar sections of the UCMJ.

³⁵ See Jennifer Elsea, *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions*, Congressional Research Service, at 18-25, Updated Dec. 11, 2001 (copy on file with the author) for additional background and historic examples.

³⁶ 317 U.S. 1 (1942).

³⁷ 327 U.S. 1 (1945).

³⁸ 339 U.S. 763 (1950).

the history of the republic: from its inception, through the Civil War, and up to modern conflicts. Whenever the Congress has revised military codes, (for example, the original standing Articles of War or the current UCMJ), it acknowledged the right of the President to establish military commissions to enforce the law of war.

For Professor Wedgewood, as a jurisdictional matter, only recently did Congress, with passage of the War Crimes Act of 1996,³⁹ decree that federal courts had jurisdiction to try international war crimes. In doing so, Congress restricted this jurisdiction to “grave” breaches of the Geneva Conventions and violations of common Article III and The Hague rules.⁴⁰ Under this view, crimes under customary law of armed conflict should remain outside federal criminal jurisdiction. This is particularly important for the U.S. armed forces, because their violation of the War Crimes Act could be tried in a military court or a federal civilian court. Under a Memorandum of Agreement between the Department of Justice (“DOJ”) and the Department of Defense (“DOD”), however, violations by U.S. armed forces of the War Crimes Act of 1996 will be adjudicated in a military forum. In fact, prior to 1996, the military forum was proper for violation of the laws of war; according to the U.S. Attorney General during the American Civil War, “The civil courts have no more right to prevent the military, in time of war, from trying an offender against the laws of war than they have a right to interfere with or prevent a battle.”⁴¹ The historic, legal, and policy reasons could not be stronger. The President, in times of war, has the authority to create military commissions to try violations of the laws of war.

What of the laws of war and the Geneva conventions? From the perspective of the international terrorism dialogue, this Article II presidential school demonstrates that al Qaeda members do not enjoy the protection of the Geneva Conventions as prisoners of war.⁴² Members of al Qaeda are considered “unlawful” and “unprivileged” combatants because of the failure to follow the code of armed conflict. In order to fall under the Third Geneva Convention, pursuant to article 4, combatants must have a responsible commander, distinctive and visible insignia, the open bearing

³⁹ See War Crimes Act of 1996, Pub. L. No. 104-316, 110 Stat. 3841 (codified at 50 U.S.C. App. § 2017(d) (2000)).

⁴⁰ See Ruth Wedgewood, *Agora: Military Commissions, Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT’L L. 328, 333 (2002).

⁴¹ See Wedgewood, *supra* note 40, at 334 n.16 (quoting Opinion of Attorney General James Speed, 11 OP. ATT’Y. GEN. 297, 315 (1865)).

⁴² See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter Third Geneva Convention], art. 84 (consented to with reservations by the United States Senate on July 6, 1955). Under this convention the default approach under article 84 is to have POWs tried by military courts unless the Detaining Powers have granted jurisdiction to civil courts to adjudicate similar offenses for Detaining Power armed forces.

of arms, and a general observation of the laws and customs of war.⁴³ Members of al Qaeda have forfeited these rights since they have been sanctioned by United Nations Security Council Resolution 1373 for their tactics and have not pursued the rules of a “regular” army as envisioned by the 1874 Brussels Declaration and the 1907 Hague Rules of Land Warfare. Al Qaeda’s failure to conform to the laws of armed conflict exempt them from the procedures and guarantees of process as stipulated by the Third Geneva Convention.

As to whether article 5 Hearings under the Third Geneva Convention should be convened to determine the status of individuals detained in the conflict, defenders of military commissions contend that article 5 Hearings envisioned “unknown” or “unaffiliated subjects” who have lost any identification or committed belligerent acts.⁴⁴ These panels were not intended to resolve knotty legal questions of interpretation nor provide for the analysis of international law. It is conceded by this school of thought that under the 1977 Additional Protocol I to the Geneva Convention, that the requirements for lawful belligerents and POW status have been “diluted,” so that lack of uniform may not end the privilege of a POW.⁴⁵ Since neither the United States nor Afghanistan have ratified the protocol, it is not applicable. Nevertheless, even the 1977 Protocol requires that the belligerents generally observe the laws of war to be considered an “armed force.” As a consequence, at Guantanamo Bay there are no attorneys, no reading of legal rights, and interrogations do not fall under restrictions of criminal law or the law of armed conflict. This is detention without Geneva Convention application. This is not to say that the United States is therefore acting “lawlessly.” What the United States is doing, however, is shaping a legal forum for terrorists and a military jurisdictional forum.

Critics of this approach have raised the question that if the American state is going to create a new military forum for unlawful belligerent detention, why not use a different legal structure for experimentation, such as the federal courts or an international commission? The response to this suggestion is multi-layered and pragmatic. The federal courts are flawed for a variety of reasons. First, on the issue of protecting the sources and methods for gathering sensitive evidence, the current 1980 Classified Information Procedures Act is flawed because sensitive intelligence information ultimately enters into the public domain.⁴⁶ Secondly, the federal rules of evidence are too restrictive: hearsay, the exclusionary rule, rules for

⁴³ See Third Geneva Convention, *supra* note 42, art. 4.

⁴⁴ See Third Geneva Convention, *supra* note 42, art. 5.

⁴⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I], art. 44.

⁴⁶ See Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. §§ 1-16 (2000)).

chain of custody and authentication, and others require the court to have a more "latitudinarian" approach to create a broader record. Such an approach is well recognized: under the Third Geneva Convention, hearsay evidence can be weighed, there are *in camera* proceedings for state security, and a right of appeal is adequate.⁴⁷ Thirdly, although the World Trade Center Bombing I trial with the "Blind Sheik" took place in the federal courthouse in Foley Square, New York, the judge (and now the jurors) will require protection. Increased costs associated to protect all participants and buildings is not a cost-effective use of the federal courts. The military commissions fit the bill, do not unnecessarily stress the federal courts, and respect due process as established by the international system.

International forums also suffer from similar problems and domestic prosecution often runs counter to the need to safeguard critical information on intelligence matters. An *ad hoc* tribunal, as established by the Security Council of the United Nations in the cases of Yugoslavia or Rwanda, will not work because the problem of prosecuting terrorism is neither local, confined, nor complete as it is in other war crime cases. The ongoing nature of the GWOT would require illogical disclosure of secret sources and methods. In addition, the recent Hague experience of an international trial for the downing of Pan Am Flight 103 under Scottish rules of evidence was not successful from the American perspective. Given the United States' historic position on the ICC, it would not be an appropriate forum since such a use would legitimize a flawed institution. Although 120 states approved the Treaty of Rome in 1998, thus far only eighty-nine have joined the ICC. The United States has already criticized the selection process for the eighteen judges.⁴⁸ From a political perspective, the ICC is not a feasible alternative in the near term because of the United States' current position in the war with Iraq, and the failure of the United Nations Security Council to act in a coordinated fashion with the United States' interpretation of global security.

Finally, the trial procedures for the military commissions provide due process rights and truly mirror many of the protections afforded under U.S. criminal law.⁴⁹ Proponents of military commissions indicate that the proceedings will be as open as possible and that the procedures will be as generous as feasible in a combat context: procedures will include the guarantee of the presumption of innocence, the right to remain silent, the right against self-incrimination, the burden of proof on the government, the choice of civilian defense counsel to serve alongside military defense

⁴⁷ See Third Geneva Convention, *supra* note 42, art. 105 and art. 106.

⁴⁸ See *First Judges at the New Global Court*, Human Rights Watch, March 11, 2003, at <http://globalpolicy.org/global/law/intlaw/2003/0311icc.htm> (copy on file with the *Suffolk Journal of Trial & Appellate Advocacy*); Darin R. Bartram & David B. Rivkin, Jr., *The ICC's First False Step*, WALL ST. J. EUR., February 17, 2003, at A9.

⁴⁹ See Military Commission Order, *supra* note 7.

counsel, the right of cross-examination and presentation of proof by the defense, proof beyond a reasonable doubt, unanimity by the jury for any capital sentence, a right of petition to an appellate review panel with autonomous power to reverse any conviction, and the right of participation of civilians on the review panel (though the civilian will be nominally commissioned as officers during their service).⁵⁰

At the end of the day, the decision to have military commissions as a policy choice by the President is defensible as a matter of constitutional interpretation, historic precedent, the international laws of armed conflict, and legal procedure. The GWOT is a new kind of war, and we are adapting our traditional legal structures appropriately. The Constitution can accommodate military commissions and has historically done so. The risk of a catastrophic event involving weapons of mass "destruction" or "disruption" ("WMD") is possible due to the approach of terrorists groups who have access to nuclear, biological, chemical, radiological, and explosive material ("NBCRE"), and who do not differentiate between combatants and noncombatants. War measures, therefore, are required.

B. *The Article I Congressional Approach*

For the Article I congressional approach supporters, (given the inherent tension between the broad Presidential military authority and the desire to avoid unwarranted deprivations of liberty) the role of Congress on these matters becomes essential.⁵¹ The argument from this school of thought is that under the Constitution, it is only Congress that has the power to: declare war and "make rules concerning the captures on land and water,"⁵² define and punish violations of the "Law of Nations,"⁵³ make regulations governing the armed forces,⁵⁴ make all laws "necessary and proper" for the execution of constitutional powers,⁵⁵ regulate the jurisdiction of the courts,⁵⁶ establish such inferior tribunals as necessary,⁵⁷ and finally, to suspend the writ of *habeas corpus*.⁵⁸ Congressional critics of the military commissions have reasoned that as a matter of constitutional interpretation, and as a matter of policy, the military commission war ap-

⁵⁰ See Wedgewood, *supra* note 40, at 336 n.55.

⁵¹ Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1267 (2002).

⁵² U.S. CONST. art. I, § 8, cl. 11.

⁵³ U.S. CONST. art. I, § 8, cl. 10.

⁵⁴ U.S. CONST. art. I, § 8, cl. 14.

⁵⁵ U.S. CONST. art. I, § 8, cl. 18.

⁵⁶ U.S. CONST. art. III, § 2, cl. 2.

⁵⁷ U.S. CONST. art. I, § 8, cl. 9.

⁵⁸ U.S. CONST. art. I, § 9, cl. 2.

proach is not the appropriate legal procedure to follow without express congressional involvement.⁵⁹

In general, the congressional view centers on four related propositions of constitutional jurisprudence that are drawn from the Constitution itself and other germane case law: (1) the Constitution by its terms established limited enumerated powers for each branch that reinforces a separation of powers; (2) where Congress has not specifically authorized executive action and has passed legislation on the subject matter, the President has no authority to proceed in a manner inconsistent with the will of Congress; (3) where Congress has specifically legislated on subject matter, the courts should be reluctant to override the Congress in favor of executive action that departs from the legislative solution; and finally, (4) although military commissions are part of U. S. legal and constitutional history, they are considered an "extraordinary" action, and modern courts have only approved of such a forum when authorized by a formal declaration of war.⁶⁰ The argument is that currently there has been no formal declaration of war and the current Joint Resolution of September 14, 2001, when read carefully, does not authorize the commissions.⁶¹

The critics of the Article II presidential approach are, in essence, deeply concerned on three major constitutional grounds. The first concern involves Equal Protection issues, because the commission order singles out "non-United States citizens" for unequal treatment. Secondly, critics are concerned that there would be a violation of the modern Due Process Clause of the Fifth Amendment and the criminal procedural protections under the Fourth, Fifth, and Sixth Amendments without any legislative authority or rationale. Finally, critics contend that there is a failure to follow a writ of *habeas corpus*, both substantively and procedurally, so that the critical distinction between lawful and unlawful belligerents can be reviewed by federal courts.⁶² It is argued that these actions, when invoked by Presidential fiat, unhinge the balance of power in the Constitution.

This major set of criticisms reflect a specific procedural attack on the findings and procedures established by the executive orders of November and December 2001 (those that established the GWOT and military

⁵⁹ There have been numerous publications on this point, but the pieces that are most useful for this discussion are: Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); Juan R. Torruella, *On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power*, 4 U. PA. J. CONST. L. 648 (2002); Harold Hongju Koh, *Against Military Tribunals*, 10/1/02 DISSENT 5862 (Fall 2002) (derived from Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337 (April 2002)).

⁶⁰ See Juan R. Torruella, *On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power*, 4 U. PA. J. CONST. L. 648, 663, 684 (2002).

⁶¹ See S.J. Res. 23, 107th Cong., 115 Stat. 224 (2001) (authorizing use of U.S. armed forces against those responsible for September 11, 2001 attacks).

⁶² See Katyal & Tribe, *supra* note 51, at 1298-1308.

commissions). Concerns include: the vague definition of the term "international terrorist;" the number of individuals subject to the orders; the range of issues and infractions triable under the orders; the choice of Guantanamo Bay as a potential "offshore" Constitution-free adjudication zone; the definition of "prisoner of war" or "unlawful combatant;" and the rules of evidence and criminal procedure that deviate from the rules of evidence and criminal procedure required in federal court and under the Uniform Code of Military Justice for courts-martial convened pursuant to article 22. Such deviations include the process by which judicial panels are selected, the role of a jury, the right to challenge the judicial officers selected, the right to a counsel of one's own choosing for all aspects of the trial, the right of cross examination, the right of depositions, the right of no compulsory self-incrimination, and the right of no double jeopardy.⁶³

Finally, critics argue that the analogy of war is fundamentally the wrong framework in which to fight and prosecute terrorism. For these critics the appropriate forum is federal criminal court. The argument is composed of two parts. The first line of logic is that Congress has already legislated in this area and created a series of statutes to prosecute and define terrorism as a federal crime: for example, the 1984 Act to Combat International Terrorism,⁶⁴ the Antiterrorism Act of 1990,⁶⁵ the Anti-Terrorism and Effective Death Penalty Act of 1996,⁶⁶ and, most recently, the USA Patriot Act.⁶⁷ In particular, the Antiterrorism Act of 1990, includes all "persons" whether U.S. citizens or not. This Act also anticipates that the terrorist acts will "transcend national boundaries," and therefore it criminalizes any violent action intended to intimidate or coerce a civilian

⁶³ See 10 U.S.C. § 822 (2000) (UCMJ art. 22) (defining those authorized to convene courts-martial); 10 U.S.C. § 826(b) (2000) (UCMJ art. 26(b)) (providing qualifying criteria for military judge); 10 U.S.C. § 851 (2000) (UCMJ art. 51) (establishing voting and ruling procedures for courts-martial); see also Robinson O. Everett, *The Law of War: Military Tribunals and the War on Terrorism*, FED. LAW. (Nov.-Dec. 2001); Gordon Forester, Jr. & Kevin J. Barry, *Military Commissions*, FED. LAW. (Feb. 2000).

⁶⁴ See 1984 Act to Combat International Terrorism, Pub. L. No. 98-533, 98 Stat. 2706 (codified at 18 U.S.C. §§ 3071-77 (2000)); see also 18 U.S.C. § 2331(1) (2000) (providing broad definition of "international terrorism"); 18 U.S.C. § 2332b(g)(5) (2000) (defining term "federal crime of terrorism" as offense intended to affect the conduct of government by intimidation or coercion, or to retaliate against government conduct); 18 U.S.C. § 2339B(g)(6) (2000) (defining "terrorist organization" as organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act); 18 U.S.C. § 3077(1) (2000) (defining "act of terrorism" to be domestic or international as defined under 18 U.S.C. § 2331); 18 U.S.C. § 1182(a)(3)(B)(iii) (2000) (defining "terrorist activity" under federal immigration law).

⁶⁵ See Antiterrorism Act of 1990, Pub. L. No. 101-519, 104 Stat. 2250 (codified at 18 U.S.C. §§ 2331-38 (2000)).

⁶⁶ See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of titles 8, 18, 28 and 42 U.S.C.).

⁶⁷ See USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of titles 8 and 50 U.S.C.).

population or alter the policy of a government, or affect the conduct of government by assassination.⁶⁸ Stated another way, until Congress delegates this power clearly to the President, the federal courts are the appropriate forum. The second prong of the argument rests on the successful prosecutions for the 1993 bombing of the World Trade Towers, the Oklahoma federal building attack, and the current prosecutions of John Walker Lindh, Richard Reid (the shoe bomber), and Zacarias Moussaoui.⁶⁹

As is to be expected, the Article I congressional approach refers to the same set of cases as the Article II presidential approach, but reaches a different set of conclusions. The congressional school emphasizes the new doctrine that has developed since 1945, that dissenters in those cases better grasped the issues involved, and that precedents reinforcing Congressional power are more faithful to the constitutional framework. For this line of reasoning, *Youngstown Sheet & Tube Co. v. Sawyer* (the "Steel Seizure Case") is the touchstone for analysis.⁷⁰ *Youngstown* is critical because it occurred during a "war / police" action in Korea. Though there was no formal declaration of war by Congress, there was an existing statutory framework established in order to deal with a labor conflict. Justice Jackson's concurrence established the model tri-partite framework to evaluate executive action in the face of legislative action.⁷¹ The *Youngstown* case for this school becomes the lens through which the classic historic military tribunal cases are to be viewed – *Ex parte Mulligan*,⁷² *Ex parte Quirin*,⁷³ *In re Yamashita*,⁷⁴ *Duncan v. Kahanamoku*,⁷⁵ and *Johnson v. Eisentrager*.⁷⁶

Although Justice Black's majority opinion in *Youngstown* focused on the fact that such a seizure was within the ambit of congressional – not Presidential – power, the concurring and dissenting opinions have led to different views as to the clear rule of the case.⁷⁷ For some, the issue turned on the failure of President Truman to request prior congressional approval in order to trigger the Just Compensation Clause of the Fifth Amendment.⁷⁸

⁶⁸ See Antiterrorism Act of 1990, Pub. L. No. 101-519, 104 Stat. 2250 (codified as amended at 18 U.S.C. §§ 2331-38 (2000)).

⁶⁹ See *United States v. Yousef*, 261 F.3d 271 (2d Cir. 2001); *United States v. Bin Laden*, 156 F. Supp. 2d 359 (S.D.N.Y. 2001); *United States v. McVeigh*, 940 F. Supp. 1571 (D. Colo. 1996).

⁷⁰ 343 U.S. 579 (1952) (resolving President Truman's seizure of U.S. steel mills by executive order); see also MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* (1977) (providing historical and factual context surrounding the *Youngstown* case).

⁷¹ See *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

⁷² 71 U.S. (4 Wall) 2 (1866).

⁷³ 317 U.S. 1 (1942).

⁷⁴ 327 U.S. 1 (1945).

⁷⁵ 327 U.S. 304 (1946).

⁷⁶ 339 U.S. 763 (1950).

⁷⁷ See Katyal & Tribe, *supra* note 51, at 1273-74 n.59.

⁷⁸ See *Youngstown*, 343 U.S. at 631 (Douglas, J., concurring).

For others, the President can act when Congress is silent and there is a grave emergency.⁷⁹ Finally, critics conclude that the principle is that when fundamental rights are concerned, congressional silence alone is not enough to warrant presidential action.⁸⁰

In contrast, proponents of the fundamental rights school draw on the dissents from Justices Murphy and Rutledge in *Yamashita*.⁸¹ General Yamashita, unlike the unlawful combatants in *In re Quirin*, was in uniform, but war had been declared by Congress. The majority on the Supreme Court recognized the concurrent jurisdiction of courts-martial, military commissions, and other military tribunals under article 15 of the then Articles of War.⁸² For the dissenters, however, the restriction of the Due Process Clause of the Fifth Amendment made the procedure unconstitutional, and the rejection of the Geneva Convention as applicable doctrine would be adverse to our own POWs that might be captured.⁸³ Jurisprudentially, it was the denial of the universal tenet of the Fifth Amendment "any person" concept that animated the dissents and continues to animate the current critics of the 2001 presidential order creating the military commissions. Revenge and vindictiveness on the international level should play no role when the "rights of man" are involved, reasoned the dissenters, because to do otherwise was to allow our ideals of justice to be compromised. As underscored by Justice Rutledge, in addition to the philosophical error, a number of procedural processes smacked of constitutional infirmity, including: the denial of a reasonable amount of time to prepare a defense, the vagueness of the charge, the proof and findings of the court, and the rejection of the existing international conventions.⁸⁴ Part of the argument is that the whole world is watching how the conqueror handles the prosecution of the defeated enemy. Questions, therefore, arise as to whether the conqueror's laws are applied or new processes are developed that curtail the procedures normally afforded an accused. Is it victor's justice or is it universal justice?

For the congressional supporters, the legacy of the World War II military tribunals undermines the separation of powers doctrine and robs the trial process of bestowing legitimacy of an independent review. In the analysis of one critic, trials promote four values that are different from pure vengeance: holding the perpetrators accountable for their crimes

⁷⁹ See *id.* at 637, 662, 683-84 (Jackson, J. and Clark, J., concurring individually, Vinson, C.J., dissenting).

⁸⁰ See Katyal & Tribe, *supra* note 51, at 1273-74 n.59.

⁸¹ See *In re Yamashita*, 327 U.S. 1, 26, 41 (1945) (Murphy, J. and Rutledge, J., dissenting individually).

⁸² See *id.* at 19-20.

⁸³ See *id.* at 26-7, 45-9 (Murphy, J. and Rutledge, J., dissenting individually).

⁸⁴ See *id.* at 47-50 (Rutledge, J., dissenting); see also Tourella, *supra* note 60, at 673-82.

against humanity; telling the world the truth about those crimes; reaffirming the norms of civilized society; and demonstrating that law-abiding societies, unlike terrorists, respect human rights by channeling retribution into criminal punishment for even the most heinous outlaws.⁸⁵ This view is that the default approach should be the civilian criminal courts for heuristic ideological purposes.

The deeply enshrined principle that the Supreme Court reads the Constitution differently for citizens, non-citizens, and military personnel (even in war) was established by *Duncan v. Kahanamoku*.⁸⁶ In *Duncan*, despite an Act of Congress authorizing the President and the Governor of Hawaii to declare martial law, the Supreme Court required the issuance of the writs of *habeas corpus* for a military trial of civilians accused of embezzlement of civilian funds and brawling with two Marine sentries.⁸⁷ Even under the declared martial law then in effect for Hawaii, the Court reinvigorated the principle stemming from the Civil War and *Ex parte Mulligan* – that martial law can not exist when civilian courts are open.⁸⁸ For such sweeping military jurisdiction, Congress would have to clearly act and find that “such great and imminent public danger exists” as to justify the authorization of military tribunals.⁸⁹ This constitutional need for congressional action was reinforced by Justice Jackson’s view in *Youngstown* that the President is not an “absolute” power even in a military context.⁹⁰ In Justice Jackson’s widely accepted formulation, the President’s power is the most legitimate when it is enacted pursuant to an expressed or implied authorization by the Congress. In the face of silence by the Congress, presidential action is less legitimate and presidential authority is at its nadir when the actions taken are incompatible with the expressed or implied will of the Congress. Although there is a sense of a “crisis constitution” that envisions legitimate presidential action to restrict core rights in an emergency, for the congressional school it is constitutionally significant that even President Lincoln, after unilaterally suspending the writ of *habeas corpus*, went back to Congress for (and obtained) retroactive approval for his exercise of such power.⁹¹

⁸⁵ See Harold Hongju Koh, *Against Military Tribunals*, 10/1/02 DISSENT 5862 (Fall 2002) (derived from Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT’L L. 337 (April 2002)).

⁸⁶ See *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

⁸⁷ See *id.* at 308-11.

⁸⁸ See *id.* at 313-14 (citing *Ex parte Mulligan*, 71 U.S. (4 Wall) 2, 125-26 (1866)).

⁸⁹ See *Ex parte Mulligan*, 71 U.S. (4 Wall) 2, 140 (Chase, C.J., concurring). Military tribunals have been held to be able to try civilians only in “conquered territory” such as in *Madsen v. Kinsella*, 343 U.S. 341 (1952) (murder case in Germany following World War II). See Katyal & Tribe, *supra* note 51, at 1293-94.

⁹⁰ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645-46 (1952) (Jackson, J., concurring).

⁹¹ See Katyal & Tribe, *supra* note 51, at 1273 n.57, 1309 n.186; see also Act of Aug.

III. LEGAL RESPONSES TO THE TWO SCHOOLS OF POLITICAL ORDER VERSUS FUNDAMENTAL RIGHTS: A KAFKAESQUE WORLD FOR LITIGANTS?⁹²

The two schools of legal thought heretofore discussed – Article II Presidential and Article I Congressional – have been raised by litigants and the federal courts have been required to analyze the underpinnings of the legal arguments. From the perspective of the litigants, the resolution of this debate will in turn determine whether or not a fundamental rights analysis will overcome the search for political order in war paradigm under the domestic dialogue.

By the terms of the most recent executive order, the following four categories of persons are subject to detention and trial by the military commissions: (1) POWs captured in Afghanistan; (2) “unlawful combatants” arrested in Afghanistan or elsewhere in the world outside the United States (including Iraq); (3) illegal aliens in the United States or aliens who came to the United States legally (student or visitor visas) but with the intention of committing terrorist acts; and (4) legal aliens with permanent resident status who are accused of committing terrorist acts.⁹³ Under international law the POWs and “unlawful combatants” fall under the Third Geneva Convention, ratified by the United States in 1955. Although as “unlawful combatants” their rights diminish substantially, captives still enjoy due process rights as stipulated by the 1977 First Additional Protocol to the Geneva Convention – a Protocol that the United States has not ratified. This Protocol under article 75 includes such rights as the right not to “be compelled to testify against himself,” and “all necessary rights and means of defense,” rights we would recognize under our Fifth and Sixth Amendments.⁹⁴ Unlike our criminal code, however, neither the 1977 First Additional Protocol nor the Third Geneva Convention address the quality and type of evidence that may be used at trial.

The combination of the President’s order and the choice of location for detention has created a legal conundrum for detainees.⁹⁵ In a sweeping decision by the Court of Appeals for the District of Columbia in *Odah v.*

6 1861, ch. 63, 12 Stat. 326 (1861). For a comprehensive examination on the issue of presidential power, see WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WAR TIME* (1998).

⁹² See Stuart Taylor, *Opening Argument*, NATIONAL JOURNAL, March 15, 2003, at 785 (describing detainee’s plight as a “Kafkaesque maze”).

⁹³ See Arveh Neier, *The Military Tribunals on Trial*, NEW YORK REVIEW OF BOOKS, February 14, 2002 (defining categories of persons subject to military commission jurisdiction).

⁹⁴ Compare Protocol I, *supra* note 45, art. 75, with U.S. CONST. amend. V, and U.S. CONST. amend. VI.

⁹⁵ See Military Order of November 13, 2001, *supra* note 6, at 57,831-36; see also *Odah v. United States*, 321 F.3d 1134, 1139-40 (D.C. Cir. 2003).

*United States*⁹⁶ the court reasoned that as consequence of their detention in Guantanamo Bay, Cuba, the approximate 650 detained foreign nationals have no legal rights enforceable in U.S. courts.⁹⁷ The plaintiffs involved in the action included twelve Kuwaiti nationals, two Australians, and two British nationals.⁹⁸ The legal claims run the gamut, including: violations of Article I because of the President's alleged suspension of the writ of *habeas corpus*; due process violations under the Fifth and Fourteenth Amendments, international law and military regulations; violation of the War Powers Clause; tortuous conduct in violation of the law of nations and treaties of the United States; arbitrary and unlawful government conduct; and violations of the Alien Tort Act.⁹⁹ The major relief sought by the parties includes the writ of *habeas corpus*; the right to be informed of the charges against them; the right to consult with counsel; the right to meet with their families; the end to interrogations; release from unlawful custody, and a legally sufficient due process to establish the legality of the detention.¹⁰⁰

The trial court dismissed all claims citing *Johnson v. Eisentrager* for the principle that no court has jurisdiction to issue writs of *habeas corpus* for aliens detained outside of the sovereign territory of the United States.¹⁰¹ In *Eisentrager*, decided in the aftermath of World War II, twenty-one German POWs were captured in China while assisting the Japanese and prior to the end of the war. They were tried in a Nanking military tribunal.¹⁰² The Supreme Court reasoned that the Germans, as "enemy aliens," had no privilege of litigation since "these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offenses, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of any court in the United States."¹⁰³ Noting that trials would hamper the war effort, bring aid to the enemy, and be impractical from the standpoint of witnesses travel, the Court underscored the point that judicial proceedings would create a "conflict between judicial and military opinion" and would "di-

⁹⁶ 321 F.3d 1134 (D.C. Cir. 2003).

⁹⁷ See *Odah*, 321 F.3d at 1139-40.

⁹⁸ See *id.* at 1136-37. The Kuwaiti detainees claimed to be humanitarian aid volunteers. One Australian detainee claimed to have been living in Afghanistan and captured by the Northern Alliance while the other claimed to have been in Pakistan to seek employment and school for his children. As for the British detainees, one claimed to have traveled to Pakistan for an arranged marriage while the other claimed to be in Pakistan visiting relatives and studying computers.

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ See *Rasul v. Bush*, 215 F. Supp. 2d 55, 56, 72-73 (D.D.C. 2002) (consolidated in *Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003)).

¹⁰² *Johnson v. Eisentrager*, 339 U.S. 763, 765-66 (1950).

¹⁰³ See *Eisentrager*, 339 U.S. at 778.

minish the prestige of" field commanders "to account in his own civil courts" and "divert his efforts and attention from the military offensive abroad to the legal defensive at home."¹⁰⁴

As part of its analysis in *Odah*, the circuit court went to great lengths to distinguish among "enemy aliens," "enemy soldiers," "guerrilla fighters," and "foreign nationals," reasoning that nationals of countries that the United States is at war with are, *ipso facto*, "enemies." Since we are not at war with Kuwait, Australia, or the U.K., one might argue that *Eisen-trager* would not govern. The circuit court, however, concluded that other factors characterizing the detainees were more critical than being "nationals" of an enemy state.¹⁰⁵ In particular, the circuit court noted that the detainees are aliens, were captured during military operations in a foreign country, are abroad under military custody, and have never been in the United States.¹⁰⁶ But the appellate court went further to state that the essential principle of its understanding of the case law is that non-resident aliens, or foreign entities without property or presence in the U.S., have no constitutional rights to due process. Since the detainees have no critical nexus with the "territorial jurisdiction" of the United States, the circuit court, citing *Eisen-trager* approvingly, concluded that there is no jurisdiction for any federal court, and therefore, as a matter of jurisprudence, can not entertain an argument on the merits.¹⁰⁷

Needless to say, at this point the position of the court takes a "meta-physical property turn" that will remind jurists why first-year law students still shudder at the prospect of revisiting the Rule Against Perpetuities.¹⁰⁸ Although the United States has occupied Guantanamo Bay since 1903, where Camp X-Ray / Camp Delta was built, the original lease agreement indicates that the "ultimate sovereignty" of the naval base resides with the "Republic of Cuba." Subsequent leases have not disturbed this fundamental property relation.¹⁰⁹ Although, there have been criminal cases involving aliens and U.S. citizens at Guantanamo Bay, these cases have fallen under special maritime and territorial jurisdiction.¹¹⁰

In the court's analysis, the U.S. military has a form of "control and jurisdiction" over Guantanamo, but the United States does not exercise sovereignty over this land. Similar to our military bases in Germany, the

¹⁰⁴ *Id.* at 779.

¹⁰⁵ *Odah v. United States*, 321 F.3d 1134, 1140 (D.C. Cir. 2003).

¹⁰⁶ *See id.*

¹⁰⁷ *See id.* at 1140-41.

¹⁰⁸ JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* 191 (Roland Gray ed., 4th ed. 1942). Gray states the rule thusly, "[n]o interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest."

¹⁰⁹ *See Odah*, 321 F.3d at 1142.

¹¹⁰ *See* 18 U.S.C. § 7 (2000); 18 U.S.C. § 3228 (2000).

United States does not have sovereignty in the sense of “territorial jurisdiction,” and there is no “supreme dominion exercised by a nation” as required for there to be true sovereignty. Therefore, Guantanamo is neither a United States territory, nor an insular possession, nor held in trust as in the Trust Territory of Micronesia.¹¹¹ Finally, the Alien Tort Act is unavailable to the detainees because under *Eisentrager* they are under “military custody” where the United States is not sovereign, and therefore have lost “the privilege of litigation.”¹¹² This has created a Kafkaesque legal situation for the detainees since they are under U.S. military authority but not U.S. sovereignty. In an ironic twist, arguably the “Republic of Cuba” has *habeas corpus* authority to challenge the detention of the detainees on sovereign Cuban soil as the sovereign. In fact, however, the naval base is more of a “legal black hole” from a civil rights perspective.¹¹³ A British court of appeals describing the situation of British detainee Feroz Abassi, concluded that individuals are “subject to indefinite detention in territory over which the United States has exclusive control, with no opportunity to challenge the legitimacy of his detention before any court or tribunal”¹¹⁴

The contrast of due process and civil rights vis-à-vis the logic of political order could not be more striking. Non-citizens captured anywhere outside the United States and held under U.S. authority as defined by U.S. courts for national security purposes will be denied fundamental rights under an “emergency” or “war” paradigm without legal review. As the *Odah* Court of Appeals made quite explicit, these government actions are taking place pursuant to both a congressional resolution as well as the presidential declaration of a national emergency. The resolution authorizes the President to “use all necessary and appropriate force against those na-

¹¹¹ See *Odah*, 321 F.3d at 1144 (citing *Ralph v. Bell*, 569 F.2d, 607 (D.C. Cir. 1977) and describing United States as administrator of the Trust Territory of Micronesia).

¹¹² See *id.* at 1144-45 (citing Alien Tort Act, 28 U.S.C. § 1350 (2000)). In a separate and concurring opinion to his own majority opinion, Judge Randolph opined on the meaning of the Alien Tort Act (“ATA”) and posited that it should not be understood to create a cause of action for violations of the “law of nations” as part of our federal law. In his discussion he also analyzes the Torture Victim Act and its efficacy but concentrates on his view that rejects the analysis that the ATA confers jurisdiction over suits by aliens for violations of treaties and the law of nations. In so doing, he specifically criticizes the Second Circuit’s approval of such an approach as stated in *Filartiga v. Pena-Irala*, 630 F.2d, 876 (2d Cir. 1980) (allowing a Paraguay plaintiff suing a Paraguay defendant for torts committed in Paraguay under the ATA and holding customary international law is part of federal law). See *Odah*, 321 F.3d 1145-50 (Randolph, J., concurring). As one can see, the implications of this debate go far beyond this case and raise the question of a form of universal jurisdiction for civil rights cases in U.S. courts. See Harvey Rishikof, *Soft Power with a Janusism Edge – A Neo-Institutionalist View – Foreign Policy, Class Action, and Human Rights*, April 2003 (unpublished manuscript, on file with the University of Chicago Legal Forum).

¹¹³ See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 10, at 70.

¹¹⁴ See *Abbasi & Anor. v. Sec. of State*, Neutral Citation Number: [2002] EWCA Civ. 1598, 2002 WL 31452052, para. 66 (C.A. 2002).

tions, organizations, or persons he determines planned, authorized, committed, or aided" the 9/11 attack. The resolution further recognizes the President's authority "under the Constitution to take any action to deter and prevent acts of international terrorism against the United States."¹¹⁵ Additionally, the President's declaration triggers special authority, in addition to his power as Commander-in-Chief, and the compelling state interest to do so.¹¹⁶ As is well known by constitutional theorists, the standard to suspend fundamental rights is a "compelling state interest."¹¹⁷

The paradigm of political order is clear and powerful: we are at war, perhaps World War IV, and we must take emergency measures to suspend certain rights to gather information to protect the homeland and American citizens.¹¹⁸ How far can we go in this paradigm? Recently the Department of Defense released draft instructions for the Military Commissions setting forth establishing crimes and elements for prosecution of violations of the laws of war pursuant to the President's Military Order of November 13, 2001, and the Defense Secretary's Military Commission Order No. 1 of March 21, 2002.¹¹⁹ What has been more disturbing, though, are the allegations of mistreatment of detainees at Guantanamo and the U.S. base at Bagram, Afghanistan.¹²⁰ These allegations include the use of foreign intelligence services from countries such as Jordan, Egypt, and Morocco who are not restrained by our military codes, and the use of "stress and duress" techniques (allegations include standing or kneeling for hours; binding in awkward and painful positions; beatings; denying pain control medicines; "smacky-face" slapping; standing hooded, arms raised and chained to ceiling, feet shackled unable to move for hours and freed only to eat, pray, or go to the bathroom; and removing of fingernails). One U.S. law-enforcement official stated that as long as the pain and suffering are not

¹¹⁵ See *Odah*, 321 F.3d at 1136 (citing Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)).

¹¹⁶ See *id.* (citing Proclamation No. 7453, Declaration of a National Emergency by Reason of Certain Terrorist Attacks, 66 Fed. Reg. 48,199 (Sept. 14, 2001)). Through his proclamation, the President stated he "determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that the issuance of this order is necessary to meet the emergency."

¹¹⁷ See *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

¹¹⁸ See Maureen Dowd, *Dances With Wolves*, NEW YORK TIMES, April 9, 2003 at A21. Former C.I.A. Director James Woolsey has argued that to reshape the Middle East, the United States would have to spend years and perhaps decades waging World War IV (World War III was the Cold War). America's enemies in this war include the Islamist Shia who control Iran, the Iranian-supported Hezbollah, the Baathists in Iraq and Syria, the Islamist Sunnis of al Qaeda, and other affiliated terrorists groups such as Hamas.

¹¹⁹ See U.S. Department of Defense, Draft Military Commission Instructions: Crimes and Elements for Trials by Military Commissions, February 28, 2003, at <http://www.defenselink.mil/news/Feb2003/d20030228dmci.pdf>.

¹²⁰ See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 10, at 71-80.

“severe,” it is permissible to employ physical force to cause “discomfort.”¹²¹ The U. S. commander of the coalition forces in Afghanistan has denied many of these allegations, and those practices are forbidden and punishable under international conventions, to which the United States is a party. These procedures are also forbidden under domestic law, even if committed outside the United States.¹²² Even the rendering of prisoners to third party countries known to engage in torture is prohibited.¹²³

The issue of “torture” in confronting dangerous terrorists has sparked a heated and controversial side-debate in legal circles.¹²⁴ The debate over when torture is permissible was joined with the capture of Khalid Shaikh Mohammed, the Al Qaeda leader who allegedly directed the 9/11 conspiracy and other terrorist attacks on U.S. citizens. Alan Dershowitz, in analyzing the issue, reasoned that although there is a privilege against self-incrimination under the Fifth Amendment, once immunity is granted by a judicial decree, that individual can be compelled to speak at the risk of contempt. For example, the removal of blood samples from drunk drivers to test for alcohol content has been held to be constitutional.¹²⁵ Given these precedents, Dershowitz concluded that in rare cases where the defendant possessed information “of an imminent large-scale threat” (a ticking

¹²¹ Jess Bravin and Gary Field, *How Do Interrogators Make A Captured Terrorist Talk?*, WALL ST. J., March 4, 2003, at B1.

¹²² Denial by Lt. Gen. Daniel K. McNeill. See Carlotta Gall, *Threats and Responses: Prisoners; U.S. Military Investigating Death of Afghan in Custody*, NEW YORK TIMES, March 4, 2003, at A14. International conventions include: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by unanimous agreement of the U.N. General Assembly, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force as to the United States Nov. 20, 1994 and signed April 18, 1988) [hereinafter CAT]; International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, S. Treaty Doc. 95-2, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, entered into force for the United States Sept. 8, 1992) [hereinafter ICCPR]. Domestic law includes 18 U.S.C. § 2340A (2000) (defining torture under federal law).

¹²³ See ICCPR, *supra* note 122, art. 7; Third Geneva Convention, *supra* note 42, art. 17; CAT, *supra* note 122, art. 16. For the view of the European Court of Human Rights forbidding torture even in the fight against terrorists, see *Selmouni v. France*, 1999-V Eur. Ct. H.R. 149, and *Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2260.

¹²⁴ See Taylor, *supra* note 92, at 713-14; Eyal Press, *In Torture We Trust*, THE NATION, March 31, 2003, at 11. Attorney Alan M. Dershowitz has also participated in this discourse. His work includes: ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* (2002); *When All Else Fails, Why Not Torture?*, AMERICAN LEGION MAGAZINE, July 2002, Vol. 153, Issue 1, available at http://www.legion.org/publications/pubs_2002/pubs_july02print.htm; *Is There a Torturous Road to Justice?*, LOS ANGELES TIMES, November 8, 2001, at B19. But see Richard A. Posner, *The Best Offense*, NEW REPUBLIC, September 2, 2002, at 28 (reviewing ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE TREAT, RESPONDING TO THE CHALLENGE* (2002)).

¹²⁵ See *Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (holding extraction of blood sample permitted incident to suspect's lawful drunk driving arrest).

bomb or a kidnapped child in a buried box with two hours of oxygen), for reasons of accountability, transparency, and compliance with the rule of law, a judicially approved “torture warrant” should be established.¹²⁶ Dershowitz, in defending his view, has argued that “torture warrants” were part of British law 500 years ago for cases involving grave threats to the crown or empire and were issued at a rate of one a year while in use. If such a procedure were established, he argues, it would require “compelling evidence” since it would be such a radical departure from constitutional norms. Given such a standard, state officials would be reluctant to pursue the practice unless they had such compelling evidence. Dershowitz portends that the number of requests would be few. Moreover, defendants would be better protected since once immunity was offered and rejected, torture would be “state sanctioned” (e.g., a needle under the nail), and the victims would understand that the perpetrator was not breaking any domestic law.¹²⁷

Richard Posner, in analyzing Dershowitz’s argument for the regularized use of torture through a judicial warrant, contends that Dershowitz undervalues the powerful institutional argument for leaving such extraordinary measures to executive discretion.¹²⁸ Posner’s fear is that if rules are promulgated permitting torture in defined circumstances, some officials are bound to want to explore the outer limits of the rules. In short, if the practice of torture is regularized, the practice will become regular.

Given Posner’s view of executive authority, it is better to leave in place the formal and customary prohibitions, but with the understanding that they will not be enforced in extreme circumstances. As an example, Posner is quick to point out that Abraham Lincoln suspended *habeas corpus* during the early months of the Civil War, although the Constitution almost certainly does not authorize the President to suspend *habeas corpus*.¹²⁹ Lincoln did it anyway, and for Posner, Lincoln was probably right to do so. Grave threats require grave measures: the Union was in desperate straits, and its survival was more important than complying with a provision of the Constitution. But it is better not to amend the Constitution to allow such action by the President. For Posner, once power is given, it will be used. Following the same logic, it is not necessary to enact a statute authorizing torture – better to leave it to the executive, because if the stakes are high enough, it will be used. Posner flatly states that anyone who

¹²⁶ See Alan M. Dershowitz, Editorial, *Is There a Torturous Road to Justice?*, LOS ANGELES TIMES, November 8, 2001, at B19.

¹²⁷ Alan Dershowitz, *When All Else Fails, Why Not Torture?*, AMERICAN LEGION MAGAZINE, July 2002, Vol. 153, Issue 1, available at http://www.legion.org/publications/pubs_2002/pubs_july02print.htm.

¹²⁸ See Posner, *supra* note 124.

¹²⁹ See Posner, *supra* note 124.

doubts this proposition for the use of torture should “not be in a position of responsibility.”¹³⁰

As one can see, the argument of when to use the legal process, when to distinguish among classifications for citizens or foreigners, when to vest individuals with basic due process and criminal rights (e.g., a right to a lawyer or “Miranda warnings”) or how to classify an “enemy combatant” has created a host of problems and paradoxes for our traditional paradigms. Even Kafkaesque debates over legal limbos and how “torture” is best approached by a democratic state committed to due process requires a debate to decide whether a legal forum should be part of such a practice.

The final twist to explore has been provided by *Padilla v. Bush*¹³¹ where a Brooklyn-born U.S. citizen, arrested at Chicago’s O’Hare airport upon arrival from Pakistan, based on information garnered from an interrogation of an al Qaeda operative.¹³² After being held for one month as a material witness, Padilla was transferred to military custody based on an executive determination that he was “an enemy combatant” collaborating with terrorist organizations to detonate a “dirty bomb.”¹³³ Until this decision, most legal theorists had thought that the executive could not confine citizens simply on grounds of suspected danger.¹³⁴ At issue here is nothing less than the power of the President to classify a U.S. citizen as “enemy combatant” and then deny the individual fundamental rights of due process. At the outset of the *Padilla* case, the district court upheld the principle that the executive has the power to classify a U.S. citizen as an “enemy combatant” and hold the individual indefinitely without specific criminal charges and without the due process criminal rights usually afforded.¹³⁵ The trial court disagreed with the government, however, on the issue that the court has no authority to review the evidence that the government proffers for its determination of enemy combatant status, or that the court can not allow the defendant to engage an attorney.

At stake in *Padilla* is not simply the issue of the right to an attorney, but rather by what standard may the executive determine that a U.S. citizen

¹³⁰ See Posner, *supra* note 124. Other theorists have reach a different conclusion: Martha Nussbaum and David Cole conclude that due to the uncertainty of the real world of never knowing, they favor a bright line banning the practice. See Press, *supra* note 124, at 12. The Supreme Court of Israel, after much anguish and pain, has concluded that torture and democracy are not compatible. See H.C. 5100/94, Judgment Concerning the Interrogation Methods Applied by the General Security Services (Isr. September 6, 1999), at http://62.90.71.124/files_eng/94/000/051/a09/94051000.a09.pdf.

¹³¹ 233 F. Supp. 2d 564 (S.D.N.Y. 2002)

¹³² See *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (“*Padilla I*”).

¹³³ See *id.*

¹³⁴ See George P. Fletcher, *The Cliché that “The Constitution Is Not a Suicide Pact:” Why it is Actually Pro-, not Anti-, Civil Liberties*, FINDLAW’S WRIT, January 7, 2003, at http://writ.news.findlaw.com/commentary/20030107_fletcher.html.

¹³⁵ See *Padilla I*, 233 F. Supp. 2d at 572-73.

apprehended in the United States may be detained as an “enemy combatant.” Furthermore, once classified as such, he may then be stripped of due process rights based on “some evidence” proffered by the government that he “could potentially provide information” on a dozen subjects, general terrorist training, and the assertion that the information is “time sensitive and perishable.”¹³⁶

The location of detention has become critical since the Fourth Circuit’s decision in *Hamdi v. United States*.¹³⁷ Yasser Hamdi, an American citizen, was detained in the course of the war in Afghanistan, and the district court, as was the case in *Padilla*, questioned the conclusory manner of the government’s statements concerning his “enemy combatant” status.¹³⁸ The Fourth Circuit, however, in rejecting the *habeas corpus* petition and vacating the trial court’s orders requiring more evidence for the classification status, reasoned that given the fact that Hamdi was in the “zone of active combat in a foreign country,” the Executive, under his authority as Commander-in-Chief, and following the Supreme Court’s decision in *Ex parte Quirin*, has the authority to make these determinations.¹³⁹ Although under *Quirin* there was a military trial, *Padilla* presented no specific time frame for trial.¹⁴⁰ The *Padilla* court has a defendant apprehended in Chicago pursuant to a material witness warrant, and questions the government’s position that the potential impact of granting Padilla counsel after seven months will destroy the interrogation process based on the government’s proffers to date.¹⁴¹ The *Padilla* court, unlike the *Hamdi* court, continues to contend that when U.S. citizens are involved, more than “some evidence” otherwise lacking a certain “concreteness,” is required for detention.¹⁴² The court has the obligation to evaluate the credibility of the evidence or request “indicia of reliability” to ensure that the confinement is not arbitrary given the rights at stake. Liberty, when deprived, must be based on more than the assertion of executive prerogative.¹⁴³

Padilla and *Hamdi* demonstrate the stark contrast between the strong presidential prerogative to assert classifications based on uncontested proffered evidence and location, with the federal judicial requirement to test evidence through the adversarial system and the *habeas corpus* petition. Three distinct scenarios have arisen through this series of cases. The first scenario envisions a U.S. citizens who have been apprehended on both foreign and domestic battlefields, and who have been clas-

¹³⁶ See *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42, 54-58 (S.D.N.Y. 2003) (“Padilla II”).

¹³⁷ 316 F.3d 450 (4th Cir. 2003).

¹³⁸ See *Hamdi*, 316 F.3d at 459.

¹³⁹ See *id.* at 465.

¹⁴⁰ See *id.*

¹⁴¹ See *Padilla II*, 243 F. Supp. 2d at 44.

¹⁴² See *id.* at 54.

¹⁴³ See *id.* at 53-57.

sified as "enemy combatants" and denied criminal protections by the government. A second scenario describes non-citizens arrested in the United States, accused of being affiliated with al Qaeda, and tried in federal court and afforded criminal protections contested by the government.¹⁴⁴ A final scenario depicts non-citizens apprehended outside of the United States, both on and off the battlefield, who have been brought to U.S. military bases only to be denied any right of *habeas corpus* based on lack of U.S. sovereignty. In short, different civilian courts, military tribunals, and commissions, each engaged in waging the global war against terrorism and the gathering of relevant information to protect the homeland. Moreover, each forum possess differently trained judges and different rules of procedure.¹⁴⁵

Surely, there is a better institutional solution given the potential constitutional morass, the conflicting nature of the cases, the bizarre debates concerning "torture," the opinions on sovereignty, and the significant due process equities involved. Is the answer a unified terrorist court?

IV. A TERRORIST COURT: WHAT ARE THE CHOICES?

From a pure public policy standpoint, policy makers have a number of options to prosecute the GWOT. One commentator has suggested nine possible legal forums: (1) U.S federal courts; (2) military courts; (3) military commissions; (4) foreign national courts; (5) a U.N. Security Council *ad hoc* international criminal tribunal; (6) a U.N. General Assembly *ad hoc* international criminal tribunal; (7) a coalition treaty-based criminal tribunal; (8) a special Islamic court; and (9) a UN-administered court in Afghanistan.¹⁴⁶

As one would expect, the United States has been reluctant to cede authority to an outside sovereign on the issue of prosecuting terrorists. Some ceding of authority is required because a critical component of wag-

¹⁴⁴ See, e.g., *United States v. Reid*, No. CR.A. 02-10013-WGY (D. Mass. filed Dec. 28, 2001) (the "shoe bomber" case); *United States v. Moussaoui*, No. C.R. 01-455-A (E.D. Va. filed Dec. 27, 2001) (the dirty bomb case).

¹⁴⁵ The other part of this story of information gathering also includes the Foreign Intelligence Surveillance Court as created by the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. §§ 1801-1862 (2002), and its role in granting surveillance of agents of foreign powers and the collecting of foreign intelligence information. Note the recent decision by the appellate Foreign Intelligence Service Court of Review interpreting Congress' recent amendment to the FISA, revising the "purpose" language to "a significant purpose," and thereby removal of the "wall" between foreign intelligence information gathering and the ability to consult with federal criminal law officials. See *In re Sealed Case*, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002).

¹⁴⁶ David Scheffer, *Special Report, Options for Prosecuting International Terrorists*, United States Institute of Peace, November 14, 2002, at <http://www.usip.org/pubs/specialreports/sr78.html> (copy on file with the *Suffolk Journal of Trial & Appellate Advocacy*).

ing the GWOT requires cooperation with and from allies, as law enforcement networks worldwide work together in tracking down terrorists cells. This requirement for international cooperation should and will affect the U.S. choice of forum. If our allies come to the conclusion that the U.S. forum is not fair and just, there will be a reluctance to render alleged terrorists to the United States for prosecution. Whether or not the military commissions can establish this legitimate and effective forum, which is credible to our allies, is a critical question for the GWOT.

Are there constitutional barriers to establishing a special terrorist court? Article III, § 1 of the Constitution states:

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.¹⁴⁷

Additionally, the Constitution empowers Congress, “[t]o constitute tribunals inferior to the Supreme Court.”¹⁴⁸ In short, the Congress, as a constitutional matter, has the power to create a Terrorist Court as either an Article I court or an Article III court. Arguments on either side turn on balancing legislative Article I courts versus independent Article III courts, and the role in balancing judicial power and legislative prerogative.¹⁴⁹ For some theorists, it is the Congress that controls federal jurisdiction, and has the power to structure the case and controversy jurisdiction.¹⁵⁰ Others ar-

¹⁴⁷ U.S. CONST. art. III, § 1.

¹⁴⁸ U.S. CONST. art. I, § 8, cl. 9.

¹⁴⁹ See Craig A. Stern, *What's a Constitution Among Friends? – Unbalancing Article III*, 146 U. PA. L. REV. 1043 (1998). The author engages in a critical examination of contemporary theories supporting Congress' grant of jurisdictional authority to legislative courts. First, that necessity and history created a set of exceptions to the text of Section 1. Second, the appellate review theory, which states that decisions of legislative courts do not conflict with Article III values provided their decisions are reviewed by Article III courts. And finally, the balancing theory, which looks at the cost to Article III values relative to the advancement of Article I values, and holds such jurisdictional grants to be constitutionally valid if Congress' interests outweigh that of the judiciary. Stern argues that the text of Section 1 itself creates an algorithm for determining what matters must come before judges, and dissects Section 1 into three distinct parts (i.e., the (1) “judicial Power” “of (2) “the United States” vested in (3) “Courts” composed of “Judges” with life terms and salaries that cannot be diminished). These three parts are analyzed against the courts-martial and the public rights doctrine, the issue of territorial courts, and the adjunct theory.

¹⁵⁰ See Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990). Meltzer provides a comprehensive description of approaches comprising the “Hart” school of Article III interpretation. Professor Hart argued in 1953 that Congress has near plenary control over defining federal jurisdiction. Hart's theory is commonly referred

gue that the power to confer jurisdiction is more akin to a balancing of respective powers between the courts and the Congress.¹⁵¹ Still others argue that review by Article III judges is the essential part of the constitutional framework.¹⁵² Although there is always a danger in creating a court of specialized jurisdiction as it may become "captured" by the interests it is overseeing, there are ways to guard against such a tendency.¹⁵³ Although political motivations can make a strong argument for an Article III Terror-

to as the congressional control model, and rests generally on two grounds. First, the Court's holding in *Ex parte McCordle*, 74 U.S. (7 Wall) 506 (1868) (interpreting Congress' power to make "Exceptions" and "Regulations" to the Court's appellate jurisdiction), and second, the Court's reading of Congress' authority to establish inferior courts to imply absolute control over federal jurisdiction. See, e.g., *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850). But see Robert J. Pushaw, Jr., *Congressional Power Over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 B.Y.U. L. REV. 847 (1997).

¹⁵¹ See Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990). Friedman suggests that the responsibility for defining federal court jurisdiction, rather than arising from strict congressional control, actually results from an interactive process between Congress and the Court. Friedman bases his "dialogic approach" on over 200 years of judicial and congressional action defining the contours of federal jurisdiction, and argues that this approach is preferable to the congressional control model because it provides greater flexibility to address the ever changing demands and conceptions of the federal court system.

¹⁵² See Lawrence Gene Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981). Sager presents an analysis of the constitutional boundaries of Congress' power to enact jurisdictional limitations on the federal courts, with particular emphasis on several bills then pending to strip the federal district courts of jurisdiction to hear particular types of cases (i.e., selective depravation). Such bills included legislation depriving federal courts, including the Supreme Court, from hearing cases involving state antiabortion laws, voluntary prayer in public schools, school assignments based on race, and school bussing, among others. See William M. Millard, *Eroding the Separation of Powers: Congressional Encroachment on Federal Judicial Power*, 53 BROOK. L. REV. 669 (1987). Millard presents a comparison of the competing structural and functional theories employed by the Court in reviewing grants of federal judicial power by Congress. The author argues that the Court's adoption of the functional approach in *CFTC v. Schor*, 478 U.S. 833 (1986), could facilitate a greater judicial intrusion by Article I courts into what should be the exclusive jurisdictional realm of Article III courts. The doctrines of separation of powers and checks and balances should impel each branch of the federal government to resist encroachment by the others, and specifically, that the functional approach in *Schor* places an independent judiciary at risk. See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988). Fallon proposes an "appellate review" theory setting forth the use of non-Article III courts to adjudicate cases that could have been assigned to Article III courts. Specifically, Fallon argues that appellate review by an Article III court will protect the constitutional structure envisioned by the framers while addressing the pressures exerted on the federal court system with the rise of the administrative state.

¹⁵³ See Randall R. Rader, *Specialized Courts: The Legislative Response*, 40 AM. U. L. REV. 1003 (1991). Judge Rader, of the United States Court of Appeals for the Federal Circuit, analyses the creation of the Federal Circuit as an Article III court with broad subject matter jurisdiction. Rader argues that it is precisely this broad jurisdictional grant which serves to discount the arguments of detractors that the docket would be dominated by patent cases, thus avoiding some of the problems encountered by specialized courts.

ist Court, there are important equities motivating the executive to maintain such a tribunal under Article I. The essential characteristic of the court, wherever placed, must be an independent forum where all individuals accused of a "terrorist affiliation" – citizen or non-citizen, unlawful or lawful combatant – would receive due process and a civilian judicial review. With respect to the ongoing debate over the "torture warrant," a specialized court with unique expertise deeply steeped in the issues of terrorism should be the forum. Given the importance of the issues, a congressional commission should be established to review the different alternatives and make recommendations on the process for creating basic due process rights for apprehension, interviewing, interrogating, reviewing evidence, and providing counsel. Some have suggested a limited period of *incommunicado* interrogation followed by a fair hearing from an impartial tribunal to contest the allegations and the appointment of an attorney to assist the process of fact-finding.¹⁵⁴

Jurisprudentially, terrorist prosecutions present a complex form of litigation. In response to the proliferation in recent years of complex litigation cases and the myriad issues they raise, complex litigation has evolved to deal with the issues in a more just, fair, and efficient system. The legal system has responded to the phenomenon of multiparty, multi-forum lawsuits – litigation that often includes a multiplicity of individual actions arising out of the same transaction or course of conduct but prosecuted in different forums – and offers innovative proposals for mitigating the difficulties these cases pose.¹⁵⁵ The Judicial Panel on Multidistrict Litigation ("JPML") is a perfect example of how to consolidate multi-defendant cases involving the same subject matter into a single proceeding. Formed in 1968, the JPML was a response to the more than 2,000 related antitrust conspiracy cases that were pending before thirty-five separate courts simultaneously.¹⁵⁶ The panel is composed of seven federal court judges, and determines whether cases with common issues pending before separate judges should be consolidated for pre-trial purposes. The benefits are both procedural and substantive.¹⁵⁷ Procedurally, all consolidation approaches

¹⁵⁴ See Taylor, *supra* note 92, at 714.

¹⁵⁵ See Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Chief Justice of the United States and to the Judicial Conference of the United States, Report on Mass Tort Litigation, 187 F.R.D. 293 (4th Cir. 1999); AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS (1994). Examples of such complex litigation cases include mass products liability litigation (e.g., asbestos and Dalkon Shield), common disaster cases (e.g., commercial airliner crashes and hotel fires), and certain kinds of contract and commercial cases.

¹⁵⁶ See An Interview with Judge John F. Nagle: Chair of the Judicial Panel on Multidistrict Litigation (December 1995), at <http://www.uscourts.gov/ttb/decttb/nagle.htm>.

¹⁵⁷ See Errol B. Taylor & Joshua I. Rothman, *How to simplify Your Complex Litigation*, MANAGING INTELLECTUAL PROPERTY, February, 2003, available at www.managingip.com (discussing the logic of consolidation for patent cases).

have a variety of benefits including the reduction of duplicative efforts; resolution of scheduling issues that arise with complex and overlapping cases; streamlining the process of discovery; centralizing fact and expert witnesses; and removing the potential for inconsistent pre-trial and evidentiary decisions by competing trial courts. Substantively, there will be one place to resolve the multiple and inconsistent arguments, and create a body of terrorist law that consistently crafts an appropriate due process of law with an independent civilian imprimatur. Since an important theory of the case in terrorism is a "terrorist conspiracy" (analogous to a "criminal enterprise" under RICO),¹⁵⁸ one court with its corresponding set of judges with the appropriate experience and clearances, similar to the FISA court, makes judicial sense. Such a court, however, should not be a "Star Chamber" working outside the boundaries of judicial review and accountability.¹⁵⁹

There is a natural and sound tendency to avoid specialized courts, and recent recommendations for a "cyber court" by the Gilmore Commission has met with criticism that such expertise is unwarranted since the traditional model for granting warrants can accommodate the new technol-

¹⁵⁸ See Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, Title IX, § 901(a) (codified at 18 U.S.C. §§ 1961-68 (2000) (RICO Act)). The RICO Act was designed to provide prosecutors with a new tool against organized crime. When applicable, RICO not only allows the prosecution to convict a criminal defendant but also to obtain forfeiture of property used in the course of racketeering.

¹⁵⁹ For a brief history of England's Star Chamber, see *The Court of Star Chamber 1487-1641*, available at <http://www.britainexpress.com/History/tudor/star-chamber.htm>:

The Court of Star Chamber was a court of law which evolved from meetings of the king's royal council. Although its roots go back to the medieval period, the court only became powerful as a separate entity during the reign of Henry VII. In 1487 the court became a judicial body separate from the king's council, with a mandate to hear petitions of redress Although the court was initially a court of appeal, Henry VIII and his councilors Wolsey and Cranmer encouraged plaintiffs to bring their cases directly to the Star Chamber, bypassing the lower courts entirely. Although the court could order torture, prison, and fines, it did not have the power to impose the death sentence. Under the Tudors Star Chamber sessions were public. The power of the court of Star Chamber grew considerably under the Stuarts, and by the time of Charles I it had become a byword for misuse and abuse of power by the king and his circle. James I and his son Charles used the court to examine cases of sedition, which, in practice, meant that the court could be used to suppress opposition to royal policies. It became used to trying nobles too powerful to be brought to trial in the lower courts. Court sessions were held in secret, with no right of appeal, and punishment was swift and severe to any enemy of the crown. Charles I used the Court of Star Chamber as a sort of Parliamentary substitute during the years 1628-40, when he refused to call Parliament. Finally, in 1641 the Long Parliament abolished the hated Star Chamber, though its name survives still to designate arbitrary, secretive proceedings in opposition to personal rights and liberty.

ogy.¹⁶⁰ A terrorist court's purpose would not be because regular federal courts or military commissions could not try these cases. Rather, its advantage would be that, as a matter of public policy, for example, when cyber-terrorists chose to use computer networks for terror purposes, one court would be the center of the expertise on terrorist networks. It is the terrorist alleged connections and relations which are the critical component for the proposed court, and the creation of a set of rules and procedures that generates confidence and credibility with the world community and our American conception of constitutional rights.

Other countries have taken the jurisdictional step of creating special terrorist courts or tribunals. In a study comparing how five countries (Canada, France, Germany, Israel and the United States) are organized to combat terrorism, it is clear that the most dominant approach is one of legislating special terrorism-related laws that allow for special investigations or prosecution mechanisms with increased penalties.¹⁶¹ For example, a special court was convened to conduct the Lockerbie Pan Am 103 prosecution in the Netherlands under Scottish law by Scottish judges.¹⁶² Another alternative is an international terrorist court established through a treaty by the "coalition of the willing," and including representation from Islamic countries to ensure world-wide support.¹⁶³

When special courts are created, however, care must be taken to ensure due process rights are respected. Examples of attempts to establish separate courts with special proceedings that came under criticism from the international community are the "Diplock Courts" for Northern Ireland under the U.K. Terrorism Bill.¹⁶⁴ The Diplock Courts were condemned for

¹⁶⁰ See Anita Ramasastry, *We Don't Need A Secret "Cyber Court" For Hackers: Why the Gilmore Commission's Recent Proposal Should Be Rejected*, FINDLAW'S WRIT, October 24, 2001, at <http://writ.news.findlaw.com/ramasastry/20011024.html>.

¹⁶¹ See U.S. General Accounting Office, *Combating Terrorism*, GAO/NSIAD-00-85 (April 2000). One should note that many of these countries are parliamentary regimes and are civil law systems. Nevertheless, the political legal systems have been reformed to allow for special national terrorist courts.

¹⁶² See Scheffer, *supra* note 146.

¹⁶³ See Scheffer, *supra* note 146. The precedent for a coalition court would be the Independent Special Court for Sierra Leone established by international treaty between the UN and Sierra Leone. Some of the more famous international courts include the Nuremberg and Tokyo tribunals. See Philip B. Heymann, *International Cooperation in Dealing with Terrorism: A Review of Law and Recent Practice*, 6 AM. U. J. INT'L L. & Policy 1 (1990) (analyzing need for international cooperation in gathering intelligence and extradition when prosecuting terrorists); Ali Khan, *A legal Theory of International Terrorism*, 19 CONN. L. REV. 945 (1987).

¹⁶⁴ See Amnesty International, United Kingdom: Briefing on the Terrorism Bill, April 2000, AI Index: EUR 45/043/2000, at [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/EUR450432000ENGLISH/\\$File/EUR4504300.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/EUR450432000ENGLISH/$File/EUR4504300.pdf); see also Anti-Terrorism, Crime and Security Act, 2001, c. 24 (Eng.) (empowering the Secretary of State to order indefinite administrative detention based on secret evidence, without charge or trial, and without judicial review of any non-UK national sus-

creating a "juryless" system with lower standards for the admission of confessional evidence under a single-judge.¹⁶⁵ Special courts with fewer safeguards tend to delegitimize the authenticity of the legal system.

V. CONCLUSION: TIME TO BEGIN THE DEBATE – MILITARY TRIBUNALS, FEDERAL COURTS, INTERNATIONAL TRIBUNALS, OR A FEDERAL TERRORIST COURT?

This is not an easy topic. As the preceding discussion has established, terrorist acts do not fit easily into traditional classification schemes. The acts are part criminal and part military, but one should not lose sight that the acts are fundamentally political. Being deeply political in nature, regardless of the legal procedure selected to prosecute the transgressions, the test of the procedure's efficacy will ultimately be a political one.¹⁶⁶ One should also not lose sight of the fact that this political evaluation will not be for the United States alone, but the world community will be the ultimate judge and jury.

Both the manner in which the United States prosecutes and adjudicates the GWOT will affect our own legal institutions and other world legal tribunals.¹⁶⁷ If the paradigm of war dominates, then U.S. citizens as well as foreigners captured in the United States will lose traditional rights. Treatment of prisoners will become an international question. If the criminal paradigm prevails, then issues over evidence and access to witnesses, and the rules governing secret proceedings may either undermine the traditional due process rights that make the United States a model for the rule of law, or hinder the prosecution of the GWOT and risk national security.¹⁶⁸

pected of being an international terrorist and a national security risk); REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL THE TERRORIST ACTIVITIES IN NORTHERN IRELAND, 1972, Cmnd. 5185 (Lord Diplock Report).

¹⁶⁵ See Amnesty International, *supra* note 164, at 1, 9.

¹⁶⁶ See Harvey Rishikof, ch. XXII Discussion-Bringing Terrorism to Justice, Conference on International Law & the War on Terrorism, June 26-28, 2002, U.S. Naval War College (unpublished manuscript, on file with author).

¹⁶⁷ This issue has arisen most recently with the capture of Abu Abbas by U.S. troops in Iraq. Abbas, a Palestinian terrorist, is accused of killing Leon Klinghoffer, a United States citizen, during the 1985 hijacking of the Italian cruise ship *Achille Lauro*. The Italian government is requesting extradition based on its sentencing of Abbas to life imprisonment in the 1980s. The U.S. government has yet to decide whether to prosecute Abbas in the United States or to extradite him to Italy. To complicate matters further, the Palestine Liberation Authority contends that Abbas enjoys amnesty for all alleged acts of terrorism committed before the 1993 and 1995 Oslo Accords. See Eric Lichtblau, *U.S. Considers Indicting Terrorist Arrested in Iraq On Achille Lauro Murder*, NEW YORK TIMES, April 17, 2003, at B7.

¹⁶⁸ See Jerry Markon, *Court Seeks Deal on Terror Witness Access*, WASHINGTON POST, April 16, 2003, at A12 (reporting Fourth Circuit's decision providing government opportunity to reconsider refusal to allow Zacarias Moussaoui access to key al Qaeda detainee Ramzi Binalshibh); see also *United States v. Moussaoui*, No. 03-4162, 2003 WL 1889018 (4th Cir. April 14, 2003).

A common intellectual chestnut that is usually raised when balancing the ideas of liberty and security is the view that the constitution is not a "suicide pact."¹⁶⁹ The term was first used in *Terminiello v. City of Chicago*¹⁷⁰ when Justice Jackson in dissent criticized the majority for protecting hate speech.¹⁷¹ Justice Jackson reasoned that the words under review had gone beyond the bounds of protected discourse and the state had the right to incarcerate the speaker. Years later, Justice Goldberg used the "suicide pact" concept in *Kennedy v. Mendoza-Martinez*¹⁷² to argue that the government did not have the right to strip citizenship from a U.S. citizen charged with departing the United States to evade the draft without due process and procedural safeguards.¹⁷³ Justice Goldberg was sensitive to the fact that in times of emergency, such as war, due process requires the most protection because that is when there is the greatest temptation by the state to dispense with fundamental constitutional guarantees.¹⁷⁴ The concept of the state's right to restrict civil rights for protection of political order is similar to the common-law concept of martial law under "peace, order, and good government," or the civil code idea of pardon for "raison d'état" or "reason of state." Order trumps liberty.

The tendency for order to trump rights when fighting terrorists is provided by the experience of Israel, who have been combating terrorism for decades. In an extraordinary case in 1984 the Israeli police killed two terrorists while in their custody.¹⁷⁵ The event, which became known as the "Affair of Hijacked Bus #300," involved two Palestinian terrorists who hijacked a bus and then were captured alive and unhurt. The two terrorists subsequently "died of wounds on the way to the hospital" while in police custody.¹⁷⁶ Under the restrictive Israeli publication laws then in force, the facts concerning the incident only came to light when pictures were published by the left-wing newspaper, HADASHOT. The pictures established the health of the terrorists at the time of capture. The Israeli Minister of Defense moved to suppress all pictures and stories for national security reasons and closed the paper for four days. HADASHOT, in turn, moved to challenge the suppression. The Supreme Court of Israel upheld the suppression. A commission was appointed to investigate the "Bus #300 Af-

¹⁶⁹ See David Corn, *The "Suicide Pact" Mystery: Who Coined the Phrase? Justice Goldberg or Justice Jackson?*, SLATE, January 4, 2002, at <http://slate.msn.com/id/2060342/>.

¹⁷⁰ 337 U.S. 1 (1949).

¹⁷¹ See *Terminiello*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

¹⁷² 372 U.S. 144 (1963).

¹⁷³ See *Mendoza-Martinez*, 372 U.S. at 160.

¹⁷⁴ See *id.* at 165-70.

¹⁷⁵ See H.C. 234/84 Hadashot v. Minister of Defense, 38(2) P.D. 477 (1984).

¹⁷⁶ See Pnina Lahav, *A Barrel Without Hoops: The Impact of Counterterrorism on Israel's Legal Culture*, 10 CARDOZO L. REV. 529 (1988) (describing the events and the case of Hadashot v. Minister of Defense, 38(2) P.D. 477 (Sup. Ct. 1984)). The following paragraphs of the "Affair of Bus #300" are drawn from this account.

fair," cover-ups ensued, and in the end, the President of the State of Israel pardoned the offenders who had confessed to the acts, but never tried for "raison d'état."

The pardon was challenged by a group of law professors. The majority of the court interpreted the pardon language broadly under the Israeli Constitution, the Basic Law, and upheld the pardon of the Israeli President. In dissent, Justice Barak argued that in the face of silence from the legislature, the President could not act with such non-democratic impact:

In a democratic constitutional regime . . . [t]he sovereignty there lies with the people, the ruler is no longer omnipotent, and the rule itself is divided among the different authorities. Each has to function within its own sphere, though in general synchronization with the others and subject to mutual checks and balances. It is not in keeping with the democratic character of the regime that any authority, be it the President himself, should hold a paramount power which enables it to change a decision of any of the other authorities.¹⁷⁷

Like all democracies the tension between the legislature and the executive comes to a crisis in a crisis, as the executive acts to promote order and security, and terrorism creates crisis conditions. Actions to promote order affect liberties, and how the state is perceived by its allies, enemies, and citizens. Justice Barak concluded his dissent on the misuse of executive pardon power by quoting Lord Edward Coke, the preeminent seventeenth century common law thinker, for the proposition that the executive often will choose political executive prerogative in these situations, but the common law would prefer that law should trump political state power:

Historians tell us that Chief Justice Coke, when he was unable to dissuade King James I from asserting authority in the judicial sphere, addressed these memorable words to the king: "[q]uod rex non debet homine sed sub deo et lege." (the king is subject not to men, but to God and the law).¹⁷⁸

Although the President of the United States may have the constitutional power to create the military commissions under the war paradigm, the political price and the cost to our legal system may be too high to justify. Similarly, the USA Patriot Act and other contemplated legislation – by expanding the Attorney General's power over non-citizens and resident

¹⁷⁷ See *id.* at 555 (quoting *Hadashot v. Minister of Defense*, 38(2) P.D. 477 (Sup. Ct. 1984)).

¹⁷⁸ See Lahav, *supra* note 176, at 555 (quoting H.C. 428/86, *Barzilzi v. Israel*, 40(3) P.D. 505 (Sup. Ct. 1986)).

aliens and by lowering the standards for judicial approval of surveillance – are likely to generate legal challenges that will last for years. Is there a better way to wage the political GWOT and protect our freedoms? What better forum is there to begin the debate on the efficacy of a Federal Terrorist District Court than a forum dedicated to Trial and Appellate Advocacy? Let the discussion begin on the Robert Merton question rephrased: “How *should* it become so?”