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National Security Courts: Star Chamber or Specialized Justice?

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NATIONAL SECURITY COURTS: STAR CHAMBER OR SPECIALIZED JUSTICE?

*Mark R. Shulman**

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In the absence of governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.¹

-Justice Potter Stewart

In October 2008, the author moderated a panel discussion addressing the utility of establishing a new national security court system for administering the detention and trial of terrorist suspects. The discussion featured comments by five lawyers with significant research and practical experience in the field. Richard Zabel is a partner and co-chair of the Litigation Group at Akin Gump Strauss Hauer & Feld LLP. Mr. Zabel served previously as an Assistant U.S. Attorney and is co-author of *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*.² Glenn L. Sulmasy is an Associate Professor of Law at the United States

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1. *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring). *Accord* STEPHEN DYCUS, ARTHUR L. BERNEY, WILLIAM C. BANKS & PETER RAVENHANSSEN, *NATIONAL SECURITY LAW* 3 (4th ed. 2007) (citing *Id.* and observing that the “failure of courts to give authoritative answers to many questions of national security law suggests to some that public opinion is what ultimately counts in this field”).

2. *See* RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., *HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS* (2008), available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf> (last visited Feb. 5, 2009).

Coast Guard Academy and author of the forthcoming book, *The National Security Court System: A Natural Evolution of Justice in an Age of Terror*.³ Hina Shamsi is a Staff Attorney in the American Civil Liberties Union's National Security Project and author of various works on torture and "extraordinary rendition." Gabor Rona serves as International Legal Director at Human Rights First and has written extensively on the application of international human rights and humanitarian law to terrorism.⁴ Matthew C. Waxman served as the first Deputy Assistant Secretary of Defense for Detainee Affairs and is now an Associate Professor at Columbia Law School and author of *Detention As Targeting: Standards of Certainty and Detention of Suspected Terrorists*.⁵ The panel discussion was frank and wide-ranging; it contributed to the objective of ensuring an "informed and critical public opinion" the likes of which Justice Potter Stewart endorsed in his *New York Times* concurrence quoted above.⁶ Completed in the closing hours of the Bush Administration, the following article presents some of the salient points from that discussion. It reflects the perspectives of its author and not necessarily those of the panelists.

I. A FEARFUL NEW WORLD?

During the years since the attacks of September 11, 2001, the United States has grappled publicly with questions about how to detain, interrogate, and try those accused of plotting to harm national security. More than other episodes in recent American history, the rise of a transnational threat from violent Islamists has raised a series of interrelated policy issues that define a generation's understanding of the meaning of its republic. Some of the issues resurrect long-standing constitutional debates such as the substance of presidential emergency powers, the proper separation of war powers between Congress and the Executive, and the appropriate roles of the

3. GLENN L. SULMASY, *THE NATIONAL SECURITY COURT SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR* (forthcoming 2009) [hereinafter Sulmasy 2009]. See also Glenn Sulmasy, *This Way to Exit Gitmo*, NAT'L REV. ONLINE (NRO), July 6, 2006, available at <http://article.nationalreview.com/?q=YzU5YjZlZWZhOWRhNWE1MzI4ZjQzYTAxOGQ4MzczZWY=> (last visited Feb. 7, 2009).

4. See Gabor Rona, *A Bull in the China Shop: The 'War on Terror' and International Law in the United States*, 39 CAL. W. INT. L. J. 101 (2008); Gabor Rona, *An Appraisal of U.S. Practice Relating to 'Enemy Combatants'*, 10 Y.B. INT'L HUMANITARIAN L., 232-50 (2008); Gabor Rona, *Enemy Combatants in the 'War on Terror': A Case Study of how Myopic Lawyering Makes Bad Law*, 30, No. 1, ABA NAT'L SEC. L. REP. (2008).

5. Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365 (2008).

6. *New York Times Co.*, 403 U.S. 713.

judiciary in adjudicating these disputes and in regulating foreign policy. These constitutional questions have been subjected to lively debate since the beginning of the republic. Other issues arise mostly due to the transformational effects of globalization. Al Qaeda's reach is global—as are the interests, assets, and vulnerabilities of the United States. Likewise, global supply chains, jet-age travel systems, the World-Wide Web, and universal human rights treaties collectively weave a global community in which the effects of perturbations are wide-spread and magnified. Many of these issues arise because the United States is confronting a large-scale, non-state threat that extends to the homeland and does so in an age in which individual rights and responsibilities are much more fully articulated than they had been in previous generations. The United States has confronted other large, non-state threats to domestic security before, most notably during the post-Reconstruction Era when white supremacists sought to undo the political outcome of the Civil War.⁷ But the emergence over the past sixty years of relatively robust norms and law protecting civil, political, and human rights has reshaped the power of states over individuals. Now these newly articulated rights are constantly being weighed against concerns for national security.⁸ Globalization is rapidly transforming the norms and the means of national security and lawyers within the government and without have been working hard to ensure that the rule of law continues to play a relevant and constructive role as the environment in which it is situated undergoes revolutionary changes. Unsurprisingly, the cutting edge of this transformation is at the place where a state's interest in survival abuts that of an individual.

The putative tension between national security and individual rights emerges in several areas but nowhere as dramatically as in the detention and trial of accused terrorists.⁹ Since 2001, the United States has detained

7. See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (Ann Finlayson ed., 1988) (1984); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (2d rev. ed., 1966); STANLEY KANTROWITZ & BEN TILLMAN, THE RECONSTRUCTION OF WHITE SUPREMACY (2000).

8. Another important area where national security confronts individual rights that has not received as much attention is in military targeting. What due process is owed to suspected al Qaeda members in the Federally Administered Tribal Areas of Pakistan when U.S. forces target and attack them?

9. See Jeremy Waldron, *Safety and Security*, 85 NEB. L. REV. 454 (2006) (analyzing the definitions of security implied by a liberty/security balance to enlighten any discussion of tradeoffs); Irwin Cotler, *Terrorism, Security and Rights: The Dilemma of Democracies*, 14 NAT'L J. CONST. L. 13, 13 (2002) (rejecting the zero sum analysis of national security versus civil liberties); William W. Burke-White, *Human Rights and National Security: The Strategic Correlation*, 17 HARV. HUM. RTS. J. 249, 249 (2004) (arguing that “subordination of human rights to national security is both unnecessary and strategically questionable”).

individuals in jails,¹⁰ prisons,¹¹ and military brigades in the United States,¹² in secret “black sites” abroad, in various facilities in Iraq¹³ and Afghanistan,¹⁴ and a special purpose facility at the U.S. naval base in Guantánamo Bay, Cuba.¹⁵ The government has also utilized a system of renditions and “extraordinary renditions” to detain and interrogate terrorist suspects in facilities operated by other states.¹⁶ The government has also sponsored trials in immigration¹⁷ and district courts and an evolving system of military tribunals.¹⁸ This patchwork of detention and trial has been shaped by many factors, some express and others that lay unstated. Sometimes existing facilities, such as immigration courts proved reasonably convenient. In other circumstances, the Bush Administration found reasons to craft new institutions, sometimes with the support of Congress.¹⁹ Because people’s lives and liberty are at stake, these policies and practices have been highly contentious.

10. HUMAN RIGHTS FIRST, ENDING SECRET DETENTIONS 13 (2004), available at http://www.humanrightsfirst.org/us_law/PDF/EndingSecretDetentions_web.pdf (last visited Feb. 7, 2009) (documenting the widespread detentions).

11. See Press Release, Office of the Press Secretary, President Discusses Creation of Military Tribunals to Try Suspected Terrorists (Sept. 6, 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/print/20060906-3.html> (last visited Feb. 28, 2009) [hereinafter President Bush Speech].

12. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 596 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426, 432 (2004).

13. See, e.g., Amnesty Int’l, Iraq: Beyond Abu Ghraib: Detention and Torture in Iraq, Mar. 2006, available at <http://www.amnesty.org/en/library/asset/MDE14/001/2006/en/dom-MDE140012006en.html> (last visited Feb. 7, 2009); HUMAN RIGHTS WATCH, THE NEW IRAQ? TORTURE AND ILL-TREATMENT OF DETAINEES IN IRAQI CUSTODY 2 (Jan. 2005), available at <http://www.hrw.org/sites/default/files/reports/iraq0105.pdf> (last visited Feb. 7, 2009).

14. See, e.g., HUMAN RIGHTS WATCH, ENDURING FREEDOM 3 (Mar. 2004), available at <http://www.hrw.org/sites/default/files/reports/afghanistan0304.pdf> (last visited Feb. 7, 2009).

15. Press Release, Office of the Press Secretary, Status of Detainees at Guantánamo (Feb. 7, 2002), available at <http://www.us-mission.ch/press2002/0802fleischerdetainees.htm> (last visited Feb. 28, 2009).

16. See *Torture By Proxy: International And Domestic Law Applicable To “Extraordinary Renditions,”* in THE IMPERIAL PRESIDENCY AND THE CONSEQUENCE OF 9/11 (Silkenat & Shulman eds., 2007).

17. See William Glaberson, *A Nation Challenged: The Law; U.S. Asks to Use Secret Evidence In Many Cases Of Deportation*, N.Y. TIMES, Dec. 9, 2001, at 1B (noting the use of immigration courts).

18. See President Bush Speech, *supra* note 11 (describing post-9/11 military tribunals).

19. See Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-06, 119 Stat. 2742 (2005); Military Commissions Act of 2006, Pub. L. No. 109-336, 120 Stat. 2600 (2006).

II. THE CURRENTS RUNNING BELOW GUANTÁNAMO

For seven years, opinions have varied widely about how to characterize the contemporary security environment; this lack of consensus has led to bitter disagreements about policy. In this way, 9/11 differs dramatically from the 1941 attack on Pearl Harbor. On December 8, 1941, every American agreed that the United States was at war with Japan and many policy prescriptions flowed axiomatically from that observation. In contrast, the current situation has failed to produce a clear consensus, leaving people to hold highly divergent opinions about the policies that should be implemented. These opinions reflect different views of reality, not just empirical facts, but also more essential characterizations about the dynamics of interactions among humans and among states. The following section identifies seven such disagreements that help explain the legal and policy debates surrounding post-9/11 detention, interrogation, and trial policies. Each illustrates the acute juxtaposition a government faces in meeting transnational and serious threats in the “Age of Rights.”²⁰ Already alluded to, the first goes directly to the overall characterization of the situation: that the United States is and ought rightly to be engaged in a “Global War on Terrorism.” The second reflects long-standing national security concerns: that intelligence sources and methods must by all means be protected in order to ensure their continued utility for promoting security. The third is relatively new and hotly contested: some people must be tortured or otherwise subjected to “enhanced interrogation techniques” and then tried. The fourth is less often discussed but of growing legal significance: some detainees are actually dangerous, but not to the United States or its allies. Fifth, there might be certain people in captivity who intend to harm U.S. interests but have not entered into a criminal conspiracy or committed an act for which a criminal court could convict them. Sixth, distrust of the Executive or the Bush Administration itself became increasingly evident and material in shaping policy. The seventh, and final, cluster of issues is the nature of the relationship between the detention policies and national security. Each of these seven assumptions has complicated U.S. policies and practices of detaining, interrogating, and trying people thought to be part of a terrorist enterprise. Each of these issues merits some further discussion, offered below.

First, is the United States in a “Global War on Terror” (GWOT) and ought it to be? As I have argued more extensively elsewhere, the problematic concept of a “Global War on Terror” has distorted detention and

20. LOUIS HENKIN, *THE AGE OF RIGHTS* (1989) (arguing that in an era characterized by formal consensus recognizing universal claims to human dignity, state practices vary too widely).

trial policies by biasing decision-making toward military solutions.²¹ The traditional concept of war has been state-centered. Two or more states put men in uniform, arm and train them, and then deploy them on a battlefield with orders to fight to achieve legitimate objectives. Over the centuries, two bodies of law have developed to regulate warfare. *Jus ad bellum* sets the chronological and geographic boundaries of war. It requires that wars begin and end, and it protects the rights of neutrals. *Jus in bello* embodies the constraints on the conduct of war. It limits war with a calculus that military objectives may be achieved only by means that are necessary, proportional, and discriminate. It protects non-combatants.²² By labeling the current situation vis-à-vis al Qaeda and its affiliates as a “war,” the Bush Administration appears inadvertently to have invoked a law of war paradigm that has frequently proven itself inapt and unhelpful. For these reasons, many people have been seeking to move away from the term “Global War on Terror.” In fact, Secretary of Defense Robert Gates has forsaken the phrase in a post-election essay on U.S. strategy in *Foreign Affairs*.²³ However, because it is hard to replace something with nothing, President Bush, among others, has argued that abandoning the Global War on Terror (GWOT) would leave the United States and its allies with criminal law enforcement mechanisms as the only meaningful tool for addressing the terrorist threat.²⁴ In place of the GWOT, I would restore Franklin Roosevelt’s articulation of the Four Freedoms to the centerpiece of U.S.

21. Mark R. Shulman, *The Four Freedoms as Good Law and Grand Strategy in an Age of Insecurity*, 77 FORDHAM L. REV. 555 (2008) (arguing that the so-called “Global War on Terror” skews national decision—and policy-making toward military solutions when a more balanced strategy would reflect human rights and development policies as well).

22. Traditionally *jus in bello* has been called the “Law of War.” Since the U.N. Charter outlawed war, this body of law has been renamed the “Law of Armed Conflict” by war-fighters and “International Humanitarian Law” by civilian jurists. For historical background, see MICHAEL HOWARD, GEORGE J. ANDREOPOULOS & MARK R. SHULMAN, *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* (1994).

23. Robert M. Gates, *A Balanced Strategy: Reprogramming the Pentagon for a New Age*, 88 FOREIGN AFF. 28–29 (2009) (“What is dubbed the war on terror is, in grim reality, a prolonged, worldwide irregular campaign—a struggle between the forces of violent extremism and those of moderation.”). *Id.*

24. See VETERANS OF FOREIGN WARS OF THE U.S., VFW NATIONAL CONVENTION: BUSH SUMS UP VET, WAR ACCOMPLISHMENTS (Aug. 20, 2008), <http://www.vfw.org/index.cfm?fa=news.newsDtl&did=4681> (last visited Feb. 28, 2009) (quoting President George W. Bush “We’re at war against determined enemies, and we must not rest until that war is won. This war cannot be won, however, if we treat terrorism primarily as a matter of law enforcement.”). *Id.* See also IAN SHAPIRO, *CONTAINMENT: REBUILDING A STRATEGY AGAINST GLOBAL TERROR* 4 (2007) (arguing for a strategy of containment because the U.S. faces real threats that are not subsumable into a war and that “you can’t beat something with nothing.”).

grand strategy. They offer a short-hand for an appealing, balanced, and principled decision-making.

Second, the real need to protect intelligence sources and methods has also complicated detention and trial policy. Traditional distinctions between

- 1) war and peace;
- 2) foreign and U.S. persons; and
- 3) national intelligence and domestic criminal investigations

have led to different legal regimes protecting individuals from surveillance and investigation. These distinctions emerged in eras characterized by strong notions of state sovereignty. Typically, only states possessed the assets to wage war. People were citizens or subjects to only one sovereign and the constitutional rights of U.S. persons generally sufficed to insulate them from invasive surveillance or investigation by banning intelligence surveillance of them²⁵ or by requiring police to obtain a warrant from an independent court before proceeding.²⁶ These protections guarded not only U.S. persons but also the intelligence agencies in that they are not required to go to trial and disclose their sources or methods in order to ensure a criminal defendant's right to confront the evidence used against him.²⁷ In the GWOT, however, these three traditional distinctions have blurred, putting strain on detention and trial practices. Non-state actors can access weapons of mass destruction. They can cross borders quickly and without detection, and they can abuse constitutional protections to cause catastrophic harm. At the same time, government claims about the need to protect sources and methods are inevitably opaque and may potentially be offered in bad faith (for instance to protect officials from embarrassment).²⁸

25. Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 2.3(b) (1981) (Agencies within the Intelligence Community may not undertake surveillance activities "for the purpose of acquiring information concerning the domestic activities of United States persons.").

26. See U.S. CONST. amend. IV; The Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801–1811 (1978) (statute establishing FISA court).

27. See U.S. CONST. amend. VI; Crawford v. Washington, 541 U.S. 36, 68 (2004) (holding that, under the Confrontation Clause, out-of-court statements by witnesses that are testimonial are barred, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by a court); see also Brady v. United States, 397 U.S. 742, 748 (1970) (concluding that a defendant has the right to be informed of the charges against him).

28. Br. for American Civil Liberties Union as *amici curiae* supporting appellees, ACLU v. Dep't of Def., No. 06-3140-cv, 543 F.3d 59, 64 (2008) (in which plaintiffs alleged the Freedom of Information Act requests for release of photographs of Abu Ghraib were denied not to protect national security but to protect government officials from political or personal embarrassment).

The *third* major assumption remains highly contentious: the extent to which various Bush Administration initiatives were shaped to facilitate torture or other “enhanced interrogation techniques.” Torture violates U.S.²⁹ and international law.³⁰ Senior Bush Administration officials claimed “the United States does not torture” because its interrogation practices do not constitute torture.³¹ However, the Bush Administration has also acknowledged use of water-boarding and other so-called “enhanced interrogation techniques” which others conclude does indeed constitute torture.³² Presumably, the U.S. government would be embarrassed and any criminal prosecutions would be jeopardized if it were shown to have tortured prisoners and attempted to introduce into open court information obtained during the course of that torture. Moreover, those responsible for torture might be subject to criminal prosecution themselves. Finally, the United States would lose even more credibility and support from abroad if policies of torture were acknowledged. Therefore, the government may have numerous motivations to avoid releasing information that would expose evidence of torture. These incentives conflict with the government’s interest in using all available tools to obtain conviction of individuals suspected of plotting or committing terrorist acts.

The *fourth* assumption shaping the climate for interrogating and trying accused terrorists is the fact that the U.S. Government has detained

For a wise discussion of the basic problem, see DANIEL PATRICK MOYNIHAN, *SECRECY: THE AMERICAN EXPERIENCE* (1998).

29. 18 U.S.C. §§ 113(c), 2340(1).

30. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (the United States signed the Convention on Apr. 18, 1988 and ratified it on Oct. 21, 1994).

31. See President Bush Speech, *supra* note 11. During this speech President Bush stated, “I want to be absolutely clear with our people, and the world: The United States does not torture. It’s against our laws, and it’s against our values.” *Id.*

32. See Interview with Vice President Richard B. Cheney, former Vice-President of the United States, by Jonathan Karl, ABC News, available at <http://abcnews.go.com/print?id=6464697> (last visited Feb. 28, 2009) (Vice President Cheney admitting that he believes water-boarding to be an “appropriate” method of interrogation) and Susan Crawford’s remarkable admission that the United States did torture Mohammed al-Qahtani. Bob Woodward, *Detainee Tortured, Says U.S. Official*, WASH. POST, Jan. 14, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html?hpid=topnews> (last visited Feb. 28, 2009) (convening authority of the military commissions stating “‘His treatment met the legal definition of torture. And that’s why I did not refer the case’ for prosecution.”); see also David Stout, *Holder Tells Senator Waterboarding is Torture*, N.Y. TIMES, Jan. 16, 2009, available at <http://www.nytimes.com/2009/01/16/us/politics/16holdercnd.html> (last visited Feb. 28, 2009), for the testimony of Eric Holder before Senate Judiciary Committee on January 14, 2009 and for a scholarly evaluation of water-boarding. See Evan Wallach, *Drop By Drop: Forgetting The History Of Water Torture In U.S. Courts*, 45 COLUM. J. TRANSNAT’L L. 468 (2007) (arguing that water-boarding is torture as defined by U.S. courts).

some people who do not pose and have not posed a threat to American interests.³³ Some are innocent of crimes or criminal intentions but were detained because of an honest mistake, because of sloppy procedures, or because a third-party intentionally misled U.S. forces into accepting custody of them. Without being able to determine who among them is innocent, the government jeopardizes national security by releasing them. Others intend no harm to the United States but do plausibly pose a danger to other countries if released. This complex situation—along with the arduous and perhaps impossible task of sorting them out accurately—has further complicated the United States' position. On the other hand, and to paraphrase Oliver Wendell Holmes, hard cases should not be permitted to make bad law. The new Obama Administration has the opportunity to develop policies that will produce individualized determinations of innocence and guilt without being bound by imprudent Bush precedent.

The *fifth* assumption is that there are some people who intend to harm U.S. national security but who have not committed any acts that would result in a criminal conviction. The government has alleged that certain people have expressed dangerous intentions but cannot be charged with crimes, either because doing so would compromise sources and methods or because they have not had the opportunity yet to attack American interests. Once again, developing a factual account of these individuals and their intentions is complicated both by the need to protect intelligence resources and by the fact that the crimes are at most inchoate. The assumption that some people would harm the United States if set free, gave rise to proposals for the establishment of civil or “administrative” detention schemes such as that proposed by panelist Matthew Waxman.³⁴ On the other hand,

33. For a useful survey, see MARK DENBEAUX ET AL., PROFILE OF RELEASE GUANTÁNAMO PRISONERS: THE GOVERNMENT'S STORY THEN AND NOW (2008), available at http://law.shu.edu/center_policyresearch/reports/detainees_then_and_now_final.pdf (last visited Feb. 28, 2009). The New York Times has compiled another useful index of prisoners in The Guantánamo Docket, *The Detainees*, N.Y. TIMES, available at <http://projects.nytimes.com/Guantanamo> (last visited Feb. 28, 2009). For one of the most controversial examples, see *In re Guantánamo Bay Detainee Litigation*, 2008 WL 4725712 (D.D.C. Oct. 24, 2008) (17 Chinese national Uighurs were ordered to be released by Judge Richard Urbina).

34. See Matthew C. Waxman, *Administrative Detention: The Integration of Strategy and Legal Process*, (The Brookings Institute, Working Paper, July 24, 2008), available at http://www.brookings.edu/~media/Files/rc/papers/2008/0724_detention_waxman/0724_detention_waxman.pdf (last visited Feb. 28, 2009) (addressing the question “in combating terrorism, why administratively detain, and detain whom?”); John Farmer, *A Terror Threat in the Courts*, N.Y. TIMES, Jan. 13, 2008 (former U.S. Attorney favoring a preventive detention scheme to clarify rules and prevent attacks); Jack L. Goldsmith & Neal Katyal, *The Terrorists' Court*, N.Y. TIMES, July 11, 2007 (one conservative and one liberal law professor jointly proposing that specialized Article III judges administer a preventive detention system that Congress would define); BENJAMIN WITTE, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR (2008) 151.

prosecutions for inchoate crimes or even use of the material witness statute may obviate the need for such a radical new system. After all, federal prosecutors have had notable success over the years prosecuting individuals for other crimes (such as money laundering or fraud) or criminal conspiracy. It may well be that zealous U.S. attorneys could obtain convictions of the guilty. Because the Bush Administration so often avoided presenting their arguments and evidence before the Article III courts, we do not know how professional prosecutors would fare. Once again, this factual indeterminacy leaves open a variety of policy choices. At this point the decision to prosecute should remain within the discretion of the prosecutor (working as appropriate with the law enforcement and intelligence communities) while the need for a new preventive detention scheme remains unproven and would overturn the fundamental constitutional principle that an individual is innocent before the law until proven guilty.

The *sixth* element running throughout the discourse is a palpable distrust of the Executive and particularly of the Bush Administration. The distrust falls into several categories. There is a long-standing general distrust of the Executive held by some human rights and libertarian groups (and a small number of partisans of the Legislative branch). Their suspicions have inevitably been amplified by the muscular interpretation of executive authority exercised by the Bush Administration since the autumn of 2001, as well as by its particular brand of secretiveness. They were further amplified for some who had concluded that some of the secretiveness was intended to obscure laziness, incompetence, or venality rather than such legitimate governmental interests as intelligence sources and methods, or the need to act quickly or without attribution. By late 2008, the distrust had expanded even further, perhaps because of the perceived lack of democratic legitimacy of an administration that appears to have been rebuked in the national election. Presumably, much of this distrust will be allayed by the Obama Administration, giving the government some new space in which to devise solutions.

The *seventh* and most complicated set of issues arises out of the complex relationship between the Bush Administration's detention policies and actual national security. The Bush Administration consistently claimed that its policies were correctly designed and properly implemented in order to ensure security. Those detained were the worst of the worst, and their detention was both essential and effective. Conditions were appropriate. Methods of interrogation were both lawful and necessary. Any exceptions were aberrations attributable to a few bad apples. On the other hand, critics

argued that the detentions and interrogations were in great part unlawful and that they undermined national security by inflaming tensions and alienating the United States in the world court of public opinion. Most experts who are not currently serving in the Bush Administration conclude that torture does not produce useful information. And while the federal courts have resolved many of the legal questions³⁵ (at least for now), the security question may ultimately prove impossible to resolve. Justice Stewart's view that public opinion plays a critical role in assessing the legality of national security measures³⁶ can be extended to drawing conclusions about their effectiveness. Indeed, their effectiveness reinforces assessments of their legitimacy. However, Justice Stewart's concurrence addressed the relatively specific question of prior censorship and writing in 1971; he could not reasonably take into account only the opinion of the American public.³⁷ Today, the United States depends on global good will that in turn rests on its reputation for fairness. To the extent the United States is viewed as responsible for torture and other serious insults inflicted at Abu Ghraib and Guantánamo, it is alienating people and possibly fostering terrorism.³⁸ If this political/strategic conclusion is correct, then the question of whether to create national security courts should be approached with great caution. If they appear unfair—ad hoc, less lawful, discriminatory, or hypocritical—they may diminish America's soft power.

III. DO WE NEED NATIONAL SECURITY COURTS?

Buffeted by the powerful forces described above and frustrated by the nation's inability to find a one-stop shop for administering detentions and trials, some learned commentators have proposed the establishment of special purpose national security courts. These proposals suggest that such a system offers benefits in expediency and efficiency and enhanced security for the trial and for its participants and the community in which it is held. They also say that national security courts offer a sensible way of managing

35. See *Rumsfeld*, 542 U.S. 426 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). The literature examining these cases is vast and beyond the scope of this article.

36. *New York Times Co.*, 403 U.S. 713.

37. *Id.* at 832–33.

38. See Exec. Sum., *Senate Armed Services Committee Inquiry Into The Treatment Of Detainees In U.S. Custody*, (Dec. 11, 2008), available at <http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf> (last visited Feb. 28, 2009) (citing former Navy General Counsel Alberto Mora's testimony that "there are serving U.S. flag-rank officers who maintain that the first and second identifiable causes of U.S. combat deaths in Iraq—as judged by their effectiveness in recruiting insurgent fighters into combat—are, respectively the symbols of Abu Ghraib and Guantánamo."). *Id.*

the high stakes of releasing someone who should not have been. This might be a person who turns out to be dangerous or someone who would not have been dangerous if left alone but who has become radicalized as a byproduct of U.S. detention or treatment. Such a system also answers an unstated (but misguided) implication that a regularly established judicial system would not be harsh enough, i.e., the interrogation and trial ought themselves to be punishing. Finally, they propose that a national security court system could administer a system that would address the possibility that some of the detainees are only guilty of holding a status or aspiration not of any act for which one could be convicted within the existing legal system.

The most notable proposal came in the summer of 2007 shortly before its author was nominated to serve as Attorney General of the United States. In a widely cited op-ed piece in the *Wall Street Journal*, Michael Mukasey called on Congress to consider establishing special terror courts.³⁹ Mukasey did not propose anything that had not been suggested by others previously, but several factors made his proposal particularly notable. First, he was among the few people with directly relevant personal experience; as a one-time federal district court judge, Mukasey had presided over the trials and conviction of Omar Abdel Rahman and the first trial José Padilla.⁴⁰ Mukasey had first-hand experience with terrorist trials and could attest to their challenges. Second, he received his nomination shortly after publishing the high-profile op-ed piece, giving rise to speculation that the Bush Administration was endorsing the model of terror courts. Third, as Attorney General, Mukasey would have the capacity (perhaps even the obligation) to pursue this concept. And finally, as a smart and experienced lawyer, Mukasey makes a facially appealing argument. He argued that the U.S. record for trying accused terrorists is poor; too few trials were undertaken at too great a cost. They strained financial and security resources, jeopardized intelligence sources and methods, and may have forced unintended consequences such as relaxing procedural due process standards in ordinary criminal trials or pushing interrogation overseas to less “squeamish” jurisdictions.⁴¹ While the Mukasey op-ed piece contained few details, it did cite favorably to more extended treatments produced by Andrew C. McCarthy and Alykhan Velshi of the Center for Law &

39. Michael B. Mukasey, *José Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15.

40. *United States v. Rahman*, 854 F. Supp. 254 (S.D.N.Y. 1994); *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

41. Mukasey, *supra* note 39.

Counterterrorism⁴² and by former Deputy Attorney General George J. Terwilliger.⁴³

The concept of a national security court has received support from a number of commentators, most, but not all of them, political conservatives. In addition to those produced by Terwilliger, McCarthy, and Velshi, the *National Review*'s Stuart Taylor published the "Case for a National Security Court" in *The Atlantic*.⁴⁴ Amos Guiora and John Parry published "Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists" in the *University of Pennsylvania Law Review*.⁴⁵ Also of note, former head of President George W. Bush's Office of Legal Counsel Jack Goldsmith teamed up with Salim Hamdan's Supreme Court lawyer Neil Katyal to write a *New York Times* op-ed, "The Terrorists' Court."⁴⁶ More recently, panelist Glenn Sulmasy completed the first major book-length treatment of this topic in his forthcoming *The National Security Court System: a Natural Evolution of Justice in an Age of Terror*.⁴⁷ All these proposals would establish a court to administer the trial of terrorist subjects. Some also recommend that such a court administer a preventive detention scheme.⁴⁸

42. Andrew McCarthy & Alykhan Velshi, The Foundation for Defense of Democracies' Center for Law & Counterterrorism, *We Need a National Security Court* (2006), <http://www.defenddemocracy.org/images/stories/national%20security%20court.pdf>; Mukasey, *supra* note 39.

43. George J. Terwilliger, Center for Law and Counterterrorism Symposium at the National Press Club on the "Lawfare" Debate (Jan. 24, 2007) (Panel event: Panel I-Is It a War? Legal Ramifications); Mukasey, *supra* note 39.

44. Stuart Taylor, Jr., *The Case for a National Security Court*, THE ATLANTIC, Feb. 27, 2007, available at http://www.theatlantic.com/doc/200702u/nj_taylor_2007-02-27 (last visited Jan. 29, 2009).

45. Amos N. Guiora & John T. Parry, *Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists*, 156 U. PA. L. REV. 356 (Feb. 2008).

46. Goldsmith & Katyal, *supra* note 34. Katyal represented Hamdan before the Supreme Court in *Hamdan*, 548 U.S. 557 (finding that the structures and procedures of the existing military commissions violate the Uniform Code of Military Justice and Common Article III of the Geneva Conventions). In response, Congress passed the Military Commissions Act of 2006 which created another form of military commission that subsequently convicted Hamdan for providing material support for terrorism. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006). Hamdan was sentenced to time served plus six months and was transferred to his native Yemen where he served out the remainder of his term. Katyal is now the Principal Deputy Solicitor General.

47. Sulmasy 2009, *supra* note 3. While I have not seen the book, I have read various shorter pieces by Professor Sulmasy and heard him present the topics on several occasions. I have also enjoyed a number of conversations with him addressing elements of the proposal.

48. See Wittes, *supra* note 34; Goldsmith & Katyal, *supra* note 34; see also Waxman, *supra* note 34. For a brief and sensible survey of the content of the various proposals to date, see Stephen I. Vladeck, *The Case Against National Security Courts*, 45 WILLAMETTE L. REV. (forthcoming 2009), available at <http://ssrn.com/abstract=1315337> (last visited Feb. 10, 2009).

Opposition to the creation of national security courts has in many ways mirrored the movement in favor of establishing them. Many of the arguments have appeared in human rights organization-sponsored reports⁴⁹ and newspaper op-ed pieces,⁵⁰ and the voices are mostly liberal. However, that last fact did not stop John C. Coughenour, a Reagan appointee on the federal bench in Seattle, from opining that “American courts, guided by the principles of our Constitution, are fully capable of trying suspected terrorists.”⁵¹ Much like Mukasey, Judge Coughenour based his conclusions in great part on his personal experience; he had overseen the trial and conviction of an Algerian national, Ahmed Ressay, the so-called “millennium bomber.”⁵² Coughenour also observed that the perceived fairness of regular district courts offers a strategic benefit as well. “For two years after his conviction [and sentencing to twenty-two years], thanks in part to the fairness he was shown by the court, Mr. Ressay provided useful intelligence to terrorism investigations around the world as German, Italian, French, and British authorities were willing to attest.”⁵³ For purposes of evaluating arguments based mostly on one judge’s first-hand observations, Coughenour’s op-ed appears to meet and cancel out that of Mukasey.

One major report collected the informed perspectives of a far larger sample set than the one or two experienced by Judges Mukasey and Coughenour. Former Assistant U.S. Attorneys James Benjamin and panelist

49. See, e.g., Zabel & Benjamin, *supra* note 2; A CRITIQUE OF “NATIONAL SECURITY COURTS,” THE CONSTITUTION PROJECT (2008), http://www.constitutionproject.org/pdf/Critique_of_the_National_Security_Courts.pdf (last visited Feb. 28, 2009).

50. See, e.g., Kelly Anne Moore, *Take Al-Qaeda to Court*, N.Y. TIMES, Aug. 21, 2007; David Laufman, *Terror Trials Work: Yes, Mr. Mukasey, Courts Can Handle National Security Cases*, LEGAL TIMES, Nov. 5, 2007; Mark R. Shulman, *Prosecutor’s Legacy is One to Consider*, ALB. TIMES UNION, May 23, 2008, at A11.

51. See John C. Coughenour, *How to Try a Terrorist*, N.Y. TIMES, Nov. 1, 2007. Accord Hon. Leonie Brinkema, U.S. Dist. Court for the E. Dist. of V.A. Judge, Keynote Address at the Washington College of Law at American University Symposium: Terrorists and Detainees: Do We Need a New National Security Court? (Feb. 1, 2008), http://www.wcl.american.edu/podcast/podcast.cfm?uri=http%3A//www.wcl.american.edu/podcast/audio/20080201_WCL_TAD.mp3 (last visited Jan. 23, 2009). The judge who oversaw the trial of Zacarias Moussaoui concluding that the existing federal district courts are absolutely capable of trying those accused of terrorist acts; “the system does in fact work.” *Id.* Judge Brinkema also presided over the trial in which Iyman Faris was found guilty of having provided material support for al-Qaeda in his plot to destroy the Brooklyn Bridge.

52. In 2005, Ressay was convicted of plotting to bomb Los Angeles International Airport on New Year’s Eve, December 31, 1999. Ressay’s post-sentencing history is long and fascinating; in the end it appears that Judge Coughenour’s decisions stand. See Associated Press, *Judge Affirms ‘Millennium Bomber’ Sentence*, MSNBC, Dec. 3, 2008, <http://www.msnbc.msn.com/id/28028799/> (last visited Feb. 28, 2009).

53. Coughenour, *supra* note 51.

Richard Zabel headed up a team of investigators at their law firm (Akin Gump) to research the experience of ordinary terrorist trials. The Akin Gump team worked closely with the professional staff at Human Rights First (led by panelist Gabor Rona) to develop the thoroughly researched *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*.⁵⁴ The premise of this White Paper is that special purpose national security courts should be established only if the extant and time-tested system of Article III courts is shown to be inadequate to the task. In this effort, the Akin Gump team pored over the “docket sheets, motion papers . . . judicial opinions [and] . . . press accounts” and interviewed prosecutors, defense lawyers, and judges with “firsthand [terrorism litigation] experience” in the 123 federal criminal cases involving Islamist terrorism.⁵⁵ Zabel and Benjamin concluded that:

The criminal justice system is reasonably well equipped to handle most international terrorism cases. Specifically, prosecuting terrorism defendants in the court system appears as a general matter to lead to just, reliable results and not to cause serious security breaches or other problems that threaten the nation’s security. Of course, challenges arise from time to time—sometimes serious ones—but most of these challenges are not unique to international terrorism cases.⁵⁶

They go on to note frankly what they could not discern, in particular, information about cases that were not brought for one reason or another.⁵⁷ Indeed, such instances have been darkly alluded to by other experienced prosecutors and government officials although never in sufficient detail for a non-participant to evaluate the claims.⁵⁸

Another important set of perspectives about special-purpose terror courts can be gained by reviewing the experience of other countries. The

54. Zabel & Benjamin, *supra* note 2.

55. *Id.* at 1, 5.

56. *Id.* at 2.

57. *See generally id.*

58. See an earlier panel discussion that I chaired at the Association of the Bar of the City of New York. Mary Jo White, former U.S. Attorney for the Southern Dist. of N.Y., Prosecuting Terrorists: The Prosecutors’ Perspectives—a Panel Discussion (Sept. 8, 2008), available at http://www.abcny.org/Committees/Pocasts_I.htm (last visited Feb. 28, 2009); see also Andrew C. McCarthy, former Assistant U.S. Attorney, Prosecuting Terrorists: The Prosecutors’ Perspectives—a Panel Discussion (Sept. 8, 2008), available at http://www.abcny.org/Committees/Pocasts_I.htm (last visited Feb. 28, 2009).

foreign experiences with such courts offer considerable insights into their strengths and weaknesses. Based on my understanding of these histories, I would tentatively conclude that these institutions have neither enhanced national security nor insulated ordinary domestic legal systems against the lowering of judicial standards for transparency, impartiality, and fundamental fairness to the accused.

National security or terrorist courts in other countries offer troubling lessons, mostly because of their implications for the respect for civil liberties generally—not only of the accused, but of the wider population. Existing proposals to create such a court in the United States inadequately account for this risk, or explain how it would be minimized or mitigated. Emergency systems in other countries have invariably reduced civil liberties for the general population. It is understandable that governments wish to be seen to be responding to the urgent threats posed by those who use violence to affect policy. However, it is important to recognize that these emergency systems in such diverse jurisdictions as Great Britain, Malaysia, and South Africa have diminished freedoms for society as a whole.

This principle lesson derived of foreign experiences is not particularly surprising. Examples abound of domestic emergency measures taken to promote national security that have undermined the base norm presumption of innocence that lies at the center of America's constitutional order. The large-scale internment of Japanese-Americans during the Second World War provides a notorious example.⁵⁹ In that case, the federal courts deferred to the Executive's misguided policy and thereby created a new and heinous rule allowing for internment, displacement, and forced sales of property based on no more than the notion that citizens of a given race might seek to harm the United States.⁶⁰ Although the United States has officially apologized for this shameful episode, *Korematsu* has not been overruled in the two generations since the Supreme Court handed down its 6-3 decision.⁶¹ The *Korematsu* precedent may have given some legal cover for the large scale detention of Americans of Moslem, Arab, or Middle-Eastern background in the months following September 11.⁶² These discriminatory

59. For a survey of this shameful episode, see DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR 1929-1945*, 748-60 (1999).

60. *Korematsu v. United States*, 323 U.S. 214 (1944).

61. *Id.*

62. William Glaberson, *War on Terrorism Stirs Memory of Internment*, N.Y. TIMES, Sept. 24, 2001. See also *The Indefinite Detention of "Enemy Combatants": Balancing Due Process and National Security in the Context of the War on Terror*, (Feb. 6, 2004, rev'd Mar. 18, 2004) reprinted in *THE IMPERIAL PRESIDENCY*, *supra* note 16, at 91, 122.

policies undermine the soft power America otherwise derives from its role as a leader in promoting respect for human rights.

In other countries, emergency powers have had a similarly deleterious effect on civil liberties. In the United Kingdom, in order to address violence originating in troubled Northern Ireland, the government revoked the right to trial by jury for criminal offenses; denied access to legal counsel; held prisoners without charge; and allowed coercive interrogation techniques and admitted confessions elicited because of them, among other measures.⁶³ In Malaysia, the government transferred judges from their positions to avoid judicial review of its decisions or release of suspects arrested without even probable cause—in violation of well-established constitutional law.⁶⁴ In apartheid South Africa, judicial review was revoked for interrogation purposes. These extra-judicial detentions lasted weeks. In addition to radical nationalists, they swept up completely harmless nuns and pastors urging more widespread equality and access to education.⁶⁵ Three cases, of course, do not constitute a comprehensive survey or prove the point. Even the Akin Gump survey of 123 domestic cases can lead only to limited conclusions. However, these three examples do offer insights into the threats to liberty posed by special purpose terrorism courts.

IV. QUO VADIS?

Would a system of national security courts offer the kind of specialized justice necessary for addressing the threat posed by radical Islamists or others who seek to use terrorist means? Or, in a tragic parallel to the Stuart kings' infamous Star Chamber, would these courts ultimately undermine the nation's security by degrading both its legal system and the soft power derived from its cherished reputation as a model for justice? On the eve of the inauguration of Barack Obama, these critical questions remain unresolved in the court of "public opinion which alone can here protect the values of democratic government."⁶⁶

Over the seven years of trial and error, the Supreme Court and Congress have tackled many of the issues raised by the Bush

63. See Michael P. O'Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 *CARDOZO L. REV.* 1657, 1665–87 (2003); Fionnuala Ní Aoláin, *The Fortification of an Emergency Regime*, 59 *ALB. L. REV.* 1353, 1373, 78 (1996).

64. See Nicole Fritz & Martin Flaherty, *Unjust Order: Malaysia's Internal Security Act*, 26 *FORDHAM INT'L L. J.* 1345, 1412 (2002–03).

65. See Lennox S. Hinds, *The Gross Violations of Human Rights of the Apartheid Regime Under International Law*, 1 *RUTGERS RACE & L. REV.* 231, 271 (1999).

66. *New York Times Co.*, 403 U.S. 713.

Administration's programs for detaining, interrogating, and trying those alleged to be guilty of terrorism. But the willingness of Congress to take the back seat and the Court's parsimonious approach to interpreting rights in the context of national security has left unresolved many critical issues.⁶⁷ As a result, Barack Obama inherits approximately 240 detainees at Guantánamo along with the constraints that have developed—or been reconstituted—over the past several years.⁶⁸ Many of these people have been severely mistreated, leaving them injured, broken, embittered, and possibly incapable of being tried in a properly constituted court of law. Their mistreatment has alienated American allies and untold individuals on whose sympathies the nation might otherwise have relied. At the same time, no one has provided conclusive evidence that the existing legal systems are inadequate for trying those accused of terrorism. And while Congress, the courts, and the court of public opinion have not yet seriously begun to deal with the questions surrounding preventive detention of people not yet captured, little evidence has been produced to show that existing systems do not or cannot suffice. Despite the clear mandate for “change,” change in this instance may lie at the root of these problems. Based on the experience discussed above, I conclude that the United States would be better served by a return to normalcy: restoring time-tested assumptions of innocence until proven guilty, of freedom over detention, and the resort to war only as a last resort and constrained as to time, place, and means.⁶⁹

67. Owen Fiss, *The Perils of Minimalism*, 9 THEORETICAL INQUIRIES L. 643 (July 2008) (“minimalism has led to legislative enactments that deprive the prisoners of basic rights and that, as a practical matter, compromise the capacity of the Supreme Court ever to adequately address the prisoners’ claims.”). *Id.* See also Wittes, *supra* note 34, ch. 2.

68. See Benjamin Wittes et al., *The Current Detainee Population of Guantánamo: An Empirical Study*, BROOKINGS, December 16, 2008, available at http://www.brookings.edu/reports/2008/1216_detainees_wittes.aspx (last visited Mar. 29, 2009).

69. Numerous human rights groups have offered detailed suggestions to the Obama transition team. I have contributed to two such efforts and endorse their conclusions: Letter to President-Elect Barack Obama from Patricia M. Hynes, President of the Association of the Bar of the City of New York (Nov. 24, 2008), available at http://www.nycbar.org/pdf/TransitionLetter_President_Obama.pdf (last visited Feb. 28, 2009); Prepared Testimony to the Subcommittee on the Constitution Committee on the Judiciary United States Senate, Scholars’ Statement of Principles for a New President on U.S. Detention Policy: An Agenda for Change (Sept. 16, 2008, forthcoming in 47 COLUM. J. TRANSNAT’L L. (2009)), available at <http://feingold.senate.gov/ruleoflaw/testimony/scholars.pdf> (last visited Feb. 28, 2009). Another letter merits attention both for its laudable content and for its authors: Anthony D. Romero, Exec. Director, American Civil Liberties Union; Larry Cox, Exec. Director, Amnesty Int’l USA; Elisa Massimino, Exec. Director, Human Rights First; and Kenneth Roth, Exec. Director, Human Rights Watch, letter to President-Elect Obama (Dec. 18, 2008) (calling for “an unqualified return to America’s established system of justice for detaining and prosecuting suspects.”), available at http://www.aclu.org/safefree/detention/38140prs20081218.html?s_src=RSS (last visited Feb. 28, 2009).