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Creating a Domestic Terror Court

Amos N. Guiora*

I. INTRODUCTION

President Barack Obama has clearly stated that among his initial priorities as commander-in-chief is closing the United States detention facility in Guantanamo Bay, Cuba.[1] In fact, one of his first actions after taking office was to suspend all legal proceedings in Guantanamo so that "the newly inaugurated president and his administration [can] review the military commission's process, generally, and the cases currently pending before military commissions, specifically."[2] To that end, on January 22, 2009, President Obama signed an executive order requiring the closure of the Guantanamo Bay detention facility within one

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This article was initially presented at the Washburn Law School symposium entitled, "The Rule of Law and the Global War on Terrorism: Detainees, Interrogations, and Military Commissions" on November 14, 2008. To that end, I would like to thank Dean Tom Romig and the editors of the *Washburn Law Journal* for graciously inviting me to participate in the conference and to include this article in the symposium issue. I would like to also thank conference participants—speakers and audience members alike—for the candid feedback regarding my proposal. Based on the many comments I received both during and after my presentation, subsequent communications, and numerous media interviews (as an example, see Aaron Wiemer, *TWI Reporter Talks Gitmo on Al Jazeera*, WASH. INDEPENDENT, Dec. 12, 2008, http://washingtonindependent.com/21994/twi-reporter-talks-gitmo-on-al-jazeera), I am well aware that my proposal has been the subject of much discussion and criticism. I am grateful to Washburn Law School because that is exactly the point of academic debate. Finally, many thanks to Jeff Lowe (JD 2009), S.J. Quinney College of Law, University of Utah for his critical contributions to this article.

1. *See* Peter Finn, *Guantanamo Closure Called Obama Priority*, WASH. POST, Nov. 12, 2008, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/story/2008/11/12/ST2008111200035.html. According to this article, the Obama Administration faces several unique challenges in prosecuting the detainees held at Guantanamo Bay and future terrorist suspects if it follows through with its desire to close the Guantanamo detention facility. *Id.* One of the most difficult issues to be addressed is how the prosecution will build effective cases without using evidence obtained by torture. *Id.* In particular, the article highlights the importance of handling serious terrorist cases without sacrificing the government's need to protect sensitive material while also protecting the defendants' rights. *Id.* Additional problems addressed by this article include where the cases would be prosecuted and how the incoming administration intends to house the detainees awaiting trial. *Id.* Currently, no decisions have been made by the new administration about where and how to try the detainees. *Id.*

2. *See* Peter Finn, *Obama Seeks Halt to Legal Proceedings at Guantanamo*, WASH. POST, Jan. 21, 2009, at A02, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/01/20/AR2009012004743.html?hpid=topnews.

Electronic copy available at: http://ssrn.com/abstract=1401982

year.[3] While this executive order is a significant departure from the policies of President George W. Bush's administration, the possibility of closing the facility undoubtedly creates "a thicket of legal, diplomatic, political and logistical challenges."[4] These "challenges" raise numerous, highly problematic questions including: What do we do with the current detainees? Where will they go? How will they be tried? Will they be tried? What shall be done with future terrorism suspects? Although President Obama has made his intentions clear, he has not, as of yet—according to media reports—determined what is the most effective manner to go forth with this enormously complex issue. President Obama has, however, taken the initial step of halting proceedings while executive task forces address specific issues.[5] Therefore, *now* is clearly the time to develop a working strategy to resolve the fundamental questions of *where* and *how* thousands of post-9/11 detainees are tried. For the reasons articulated below, I recommend establishing a domestic terror court (DTC) in the United States.

This article will detail the specific processes and procedures of such a court and seek to answer many of these difficult questions. In doing so, it is my hope that this article will act as a "guide" for policy makers in articulating, developing, and implementing a process from detention to trial of individuals suspected of involvement in terrorism. A lawful civilian process, subject to independent judicial review, is the constitutional, intellectual, and philosophical underpinning of this proposal.

In detailing the nuts and bolts of the proposed DTC, it is my intention to build on previous articles that have addressed the principle of establishing an alternative judicial paradigm.[6] Though I will briefly address why the DTC proposal should be adopted, the primary emphasis in this article is to fill in the blanks as to the workings of the court. While fully aware of the controversy surrounding the various proposals, I am of the opinion that there is a need to discuss the more procedural aspects of such a court. To that end, this article will largely focus on the

3. *See Obama Signs Order to Close Guantanamo Bay Facility*, CNN POLITICS, Jan. 22, 2009, http://www.cnn.com/2009/POLITICS/01/22/guantanamo.order/.

4. *See* Finn, *Guantanamo Closure Called Obama Priority*, *supra* note 1.

5. *See* Finn, *Obama Seeks Halt to Legal Proceedings at Guantanamo*, *supra* note 2.

6. *See, e.g.*, BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR (2008); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1081 (2008); Amos Guiora & John T. Parry, *Debate, Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists*, 156 U. PA. L. REV. PENNUMBRA 356 (2008); Gregory S. McNeal, *Beyond Guantanamo, Obstacles and Options*, 103 NW. U. L. REV. COLLOQUY 29 (2008); Harvey Rishikof, *Is It Time for a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes*, 8 SUFFOLK J. TRIAL & APP. ADVOC. 1 (2003); Glenn M. Sulmasy, *The Legal Landscape After Hamdan: The Creation of Homeland Security Courts*, 13 NEW ENG. J. INT'L & COMP. L. 1 (2006); Andrew C. McCarthy & Alykhan Velshi, *We Need a National Security Court* 2 (2006), http://www.defenddemocracy.org/images/stories/national%20security%20court.pdf; THE CONSTITUTION PROJECT: A CRITIQUE OF THE NATIONAL SECURITY COURTS 1 (2008), www.constitutionproject.org/pdf/Critique_of_the_ National _Security_Courts1.pdf.

"hows," rather than the "whys." Explaining procedural safeguards is critical to the debate. If properly established and convened, the proposed court will effectively protect the rights of thousands of individuals presently awaiting some resolution of their status.

As an absolutely critical first step, President Obama *must* articulate criteria for determining—via a person-specific vetting process—which of the detainees presents a current or future threat to America's national security. Those deemed to present a threat must be brought to trial; those deemed not, must be released. Although the logistics of releasing thousands of detainees is a daunting task, it must not—under any circumstances—justify their continued detention. As the former President of the Israeli Supreme Court, Aharon Barak, once commented, "logistical requirements should never stand in the way of personal freedom."[7]

There is one important caveat to this ironclad rule that requires careful consideration: what is the correct decision when the *only* information available against a particular detainee is classified information and therefore no judicial process is feasible. There are, I suggest, three options: (1) outright release of the individual in spite of the available information; (2) continued, indefinite detention thereby prolonging violation of constitutional rights; or (3) creation of an administrative detention paradigm, borrowing from the United Kingdom or Israeli models, subject to statutorily mandated periodic review by an independent judiciary.

Frankly, all three options are—for lack of a better phrase—enormously problematic. Nevertheless, justice, morality, and policy demand resolution of this human and security conundrum. With great discomfort—having been involved in the process as prosecutor, judge, and legal advisor—I recommend the third option, though I am well aware of the dangerous pitfalls and pratfalls. My recommendation—tentative at this stage—is "softened" by a demand that the intelligence community in such cases (where the sole basis for detention is classified information) be "all but forced" by the reviewing judiciary to declassify portions of the information, thereby enabling initiation of criminal law proceedings in front of the proposed DTC.

In proposing such a DTC, certain assumptions are necessary. First, this proposal assumes that President Obama intend*s* to make good on his declared intention to close Guantanamo Bay but will do so only *after* determining where to try the detainees. Simply put, closing without having a solution in hand is impractical and irresponsible. In addition, this article presumes, for reasons subsequently articulated, that both

7. *See* HCJ 3239/02 Marab v. IDF West Bank Commander [2002] IsrSC 57(2) 349, 372-73, translation available at http://elyon1.court.gov.il/files_eng/02/390/032/A04/02032390.a04.pdf (discussing how judicial intervention for detainees is a necessary right that should not be delayed).

traditional Article III courts[8] and international treaty-based terror courts are impractical and inapplicable to the unique circumstances of trying individuals suspected of terrorism. Finally, this article assumes—actually states—that the term "Guantanamo Bay" is generic and not geographically specific to one detention center in Cuba. That is, when I use the term "Guantanamo Bay" it includes the detainees held in Baghram, Abu Ghraib, and other post 9/11 detention centers.

With these three assumptions as the basis for our road map, section II addresses why a DTC is the most effective judicial structure for trying suspected terrorists. Section III then discusses and analyzes the rights to be granted the detainee prior to initiating a judicial process. Section IV answers the many jurisdictional questions raised by a new terror court and proposes a formal vetting process for releasing detainees that pose no threat to national security. This criteria-predicated vetting process is mandatory to determine which detainees are to be tried and which are to be released. Section V outlines specific rules and procedures for detaining suspects deemed to pose a real threat to national security, and outlines the rights given to those detainees. Section VI discusses the limited interrogation methods allowed under this regime, and section VII outlines the details of the formal charging procedure, the establishment and constitution of the actual terror court, and addresses specifics of the suspected terrorists' rights as well as the actual trial, appellate, and sentencing structure of the DTC.

II. THE FEASIBILITY OF A DOMESTIC TERROR COURT OVER THE OTHER ALTERNATIVES

As mentioned above, this article assumes that both traditional Article III courts and international treaty-based courts are inadequate to try suspected terrorists. With respect to Article III courts, the reasons are primarily two-fold. First, constituting jury trials for thousands of detainees who have been held in detention for years awaiting trial would take an additional, substantial period of time, unnecessarily prolonging the pre-trial detention period (not to mention, all the inherent problems—if not impossibilities—of convening a "jury of your peers" for detainee trials). Second, terrorism trials necessarily involve unique and confidential intelligence information in a manner qualitatively different from that envisioned in the Classified Information Protection Act,[9] and how such information is used as evidence in trial clearly affects national

8. U.S. CONST. art. III. Article III of the United States Constitution outlines the powers given to the judicial branch of government. *Id.* "Article III courts" referred to in this article are the traditional criminal courts established under the authority of this constitutional provision. *Id.*

9. *See* Classified Information Protection Act, 18 U.S.C. § 798 (2006).

security concerns.[10]

To that end, as subsequently explained, introduction of classified information—necessary to prosecuting terrorists—will be most effectively facilitated by a DTC. Although advocates of Article III courts suggest the success of previous trials proves their claims regarding the efficacy of their approach, I suggest the mere handful of cases tried (including the highly problematic Moussaoui trial) does not strengthen the argument in the least.[11] Perhaps the opposite; for by highlighting success of trials before juries in an extraordinarily limited number of cases, the proponents suggest—inadvertently—that the logistical nightmare of the sheer number of potential trials is something they have not fully internalized.

This was abundantly clear to me when I testified before the Senate Judiciary Committee,[12] where the proponents of Article III courts repeatedly emphasized how well the process had worked in one particular case. My response was: We are talking about thousands of trials, not *one*. Jury trials and traditional processes are not going to provide defendants with speedy trials, but in fact, quite the opposite. Bench trials—with judges trained in understanding and analyzing intelligence information—will much more effectively guarantee terrorism suspects their rights. That is, the traditional Article III courts will be *less* effective in preserving the rights and protections of thousands of detainees than the proposed DTC. I predicate this assumption on a "numbers analysis": *not* establishing an alternative judicial paradigm will all but ensure the *continued* denial of the right to trial to thousands of detainees.

A recent report published by Human Rights First defends traditional Article III courts' abilities to try individuals suspected of terrorism.[13] The authors demonstrate confidence in the courts' abilities to maintain a balance between upholding defendants' rights while simultaneously keeping confidential information secure.[14] Nevertheless, the report recognizes the limitations inherent in trying terrorist suspects in

10. *See* Gregory S. McNeal, *supra* note 6, at 41-49. The author discusses the difficulty faced by our current system in charging and bringing to trial suspected terrorists due to the need to protect intelligence information. *Id.* Professor McNeal contends that the current system fails to effectively prosecute suspected terrorists and suggests that reforms must be made to address this intelligence protection concern. *Id.* In fact, he argues that these challenges in protecting confidential intelligence information contribute to what he terms the "nonprosecution paradox" in which suspects are being indefinitely detained because of the difficulties in introducing confidential evidence. *Id.*

11. *See* United States v. Moussaoui, No. 01-455, 2003 WL 21263699 (E.D. Va. Mar. 10, 2003); *see infra* notes 15-19 and accompanying text.

12. *See Improving Detainee Policy: Handling Terrorism Detainees Within the American Justice System*, *Hearing before the S. Judiciary Comm.*, 110th Cong. 9, 34, (2008) (statement of Amos Guiora, Professor of Law at the S.J. Quinney College of Law, University of Utah).

13. *See* Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, HUMAN RIGHTS FIRST, May 2008, http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf.

14. *Id.* at 93-95.

traditional courts as illustrated by the discussion concerning Zacarias Moussaoui's trial.[15]

Moussaoui was brought to trial in the United States District Court for the Eastern District of Virginia after he was suspected of training with al-Qaeda in preparation for the terrorist attacks of September 11, 2001.[16] Although Moussaoui eventually pled guilty and admitted that he intended to fly a fifth plane into the White House, the trial itself reached a standstill when Moussaoui refused to proceed unless given access to "notorious terrorism figures who were in government custody."[17] Because of its constitutional obligations to criminal defendants, the court was faced with an irreconcilable choice: either allow national security to be compromised or violate Moussaoui's guaranteed constitutional rights. Despite the fact that the United States Court of Appeals for the Fourth Circuit determined that "carefully crafted summaries of interviews"[18] would satisfy constitutional requirements, the fact that the terror suspects in federal custody are even allowed to give deposition testimony could alone compromise security.[19]

Regardless of the attempted solution, because of the special nature of prosecuting terrorist suspects, traditional Article III courts will always either compromise at least some national security or violate defendants' constitutional rights. My proposed DTC bridges the gap in that it allows the introduction of classified intelligence in conjunction with traditional criminal law evidence. This, then, meets confrontation clause requirements. The intelligence information can only be used to bolster the available evidence for conviction purposes but cannot—under any circumstances—be the sole basis of conviction.

An international terror court, while perhaps attractive to some, is a nonstarter primarily for the reason that the international community is unable—or perhaps unwilling—to agree on a definition of terrorism. The failure of the international community to agree on a definition is the clearest indication of how differently other nations view terrorism. While the adage "one man's terrorist is another man's freedom fighter" is over-played, it reflects a principle reality of fundamental disagreement. Such inherently diametrically opposed viewpoints regarding terrorism suggest a definition of "terrorism" would present enormous challenges. If the critical term, "terrorism," is undefined, then—asking rhetorically—how can a court be convened specifically for trying individuals whose crime, or alleged crime, has not been defined? While it

15. *See generally id.*
16. *Id.* at 93.
17. *Id.*
18. Zabel & Benjamin, *supra* note 13, at 93; *see* United States v. Moussaoui, 382 F.3d 453, 479 (4th Cir. 2004).
19. Zabel & Benjamin, *supra* note 13, at 93.

has been suggested that this is a "resolvable" issue, predicated on the thirteen UN Resolutions addressing terrorism,[20] those resolutions have not uniformly defined terrorism primarily because the international community is—seemingly—incapable of deciding what terrorism "is."

In addition, I would suggest that the sharing of confidential information among different nations—critical to the functioning of an international terror court—is problematic at best. Far-fetched is perhaps a better description. Simply put, ensuring the confidentiality of intelligence information is particularly problematic among nations with competing agendas. The implications for failing to keep "sacrosanct" intelligence evidence confidential are so significant that they make an international terror court largely a nonstarter.

III. DEFINING THE CONFLICT AND THE DETAINEE'S RIGHTS

In proposing an alternative paradigm, definitions are critical. Otherwise, significant violations of civil and political rights are all but inevitable. Defining the present conflict facilitates defining "detainee" and the rights such detainees are to be granted. Otherwise, the definitional inconsistency that has largely characterized the past seven years will continue. To cut to the chase, I suggest the present conflict be defined as "armed conflict short of war" and the detainees in question as "post-9/11 detainees."

While neither term is completely satisfactory, they are starting points. They reflect, frankly, the inherent ambiguity of the present conflict, which is neither a war nor traditional crime. It is a hybrid, and the definition—"armed conflict short of war"—effectively illustrates that lack of "absoluteness." In attempting to define the conflict itself, I propose using the term adopted by the Israeli government in its ongoing conflict with Palestinians: "armed conflict short of war."[21] Just as my proposed term to define detainees, used below, reflects the hybrid nature of the individual, "armed conflict short of war" reflects the nature of the current conflict. It is neither a war between two states nor a traditional criminal law conflict. The hybrid is reflected in the principle thesis of this paper; a domestic terror court is itself a hybrid.

"Post-9/11" refers to an enormously large pool of detainees initially detained in the immediate aftermath of 9/11. This pool has only contin-

20. *See* Israel Democracy Institute conference on "The War on Terror and Restrictions on Free Speech," February 17-18, 2009, http://www.idi.org.il/sites/english/events/Other_Events/Pages/FreedomofExpressionandtheWaronTerrorAnInternationalConference.aspx (last visited Feb. 22, 2009).

21. *See* REPORT OF THE SHARM EL-SHEIKH FACT-FINDING COMMITTEE 18 (2001), http://www.jordanembassyus.org/Report.pdf; Isr. Ministry of Foreign Affairs, Sharm El-Sheikh Fact-Finding Committee: First Statement of the Government of Israel, at Part I.E.i (2000), http://www.mfa.gov.il/NR/exeres/FCFDA57E-15AB-4F50-AFBD-BDCE6A289FA8.htm ("The scale and intensity of these attacks has been such as to amount to an armed conflict short of war.").

ued to grow precisely because the "armed conflict of war" continues, whether in Iraq, Afghanistan, or elsewhere. That is, the poolis in a constant state of flux reflecting the inevitable ebb and flow of the conflict.

Detainees present a definitional challenge primarily because they are neither traditional criminal defendants nor prisoners of war as defined by international law. It is important, however, to define "detainee" not only to ensure their established rights,[22] but also to articulate additional rights. I propose that "post-9/11 detainees" are "individuals suspected of involvement in terrorism." This term gives us a starting point toward creating a hybrid paradigm.[23] This hybrid paradigm will contribute to resolving the difficult task of balancing legitimate national security concerns with the equally legitimate rights of the individual suspects.

In the landmark United States Supreme Court case, *Boumediene v. Bush*,[24] the Court held that detainees have certain constitutional rights.[25] Specifically, the issue in *Boumediene* was whether detainees have the right to habeas corpus.[26] Granting habeas corpus as the Court did—while critical—is but the first step in defining what rights detainees are to be granted.[27] Defining such rights is vital to using the DTC in the initial vetting process for these detainees.

IV. JURISDICTION OF THE DOMESTIC TERROR COURT AND THE INITIAL VETTING PROCESS

American citizens and non-citizens alike suspected of involvement in terrorism will be subject to the jurisdiction of the proposed DTC. The United States Code defines terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."[28] While I define terrorism as "individuals, who in an effort to advance a cause (religious, political, social, or economic) kill innocent individuals, injure innocent individuals, cause

22. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2271-77 (2008).

23. *See* Amos N. Guiora, *Interrogation of Detainees: Extending a Hand or a Boot?*, 41 U. MICH. J.L. REFORM 375, 381-84 (2008); Amos N. Guiora, Quirin *to* Hamdan*: Creating a Hybrid Paradigm for the Detention of Terrorists*, 19 FLA. J. INT'L L. 511, 514-19 (2007); Amos N. Guiora, *Where Are Terrorists to Be Tried—A Comparative Analysis of Rights Granted to Suspected Terrorists*, 56 CATH. U. L. REV 805, 808 (2007).

24. 128 S. Ct. 2229 (2008).

25. *Id.* The Supreme Court held that detainees must be given the opportunity to present "reasonably available evidence" illustrating that their detention is unjustified. *Id.* at 2273. In other words, the majority found that the constitutionally guaranteed right of habeas corpus review applies to detainees. *Id.* at 2274-78. Additionally, it stated that it was unconstitutional for the Detainee Treatment Act to strip federal courts of jurisdiction to hear these claims. *Id.*at 2274; *see also* Rasul v. Bush, 542 U.S. 466, 485 (2004) ("[F]ederal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals [held at Guantanamo] who claim to be wholly innocent of wrongdoing.").

26. *Id.* at 2274-78.

27. *See id.*

28. 22 U.S.C. § 2656f(d)(2) (2006).

property damage to innocent individuals, or seek to intimidate the civilian population," the critical constant is innocent civilians as victims of individuals acting on behalf of a cause.

At present, there are approximately 25,000 detainees worldwide held directly or indirectly by or on behalf of the United States.[29] This number dramatically illustrates the overwhelming difficulty Article III courts would face if thousands of detainees—after the vetting process previously described—were deemed to present a threat to American national security. It is important to acknowledge the logistical nightmare involved in convening thousands of jury trials. Logistics are critical because they often directly affect when an individual's rights will be guaranteed. One of the primary advantages of the DTC proposal is that it would facilitate bringing detainees to trial more expeditiously. Considering the length of time many of the detainees have been deprived of their rights, the proposed alternative regime would be a direct response to former Israeli Supreme Court President Barak's comments regarding the price of logistics.[30]

Even more alarming is the fact that an unknown number of detainees do not present a current or future threat to national security. Indefinitely detaining any suspect, even those that may pose a continuing threat to national security, regardless of citizenship, is unconstitutional.[31] For this reason, the first step after establishing the DTC will be to implement a formal vetting process for the hundreds of detainees held in Guantanamo Bay[32] and the thousands held worldwide.

The primary purpose of this vetting process is to determine whether the individual detainees pose a continuing threat to the national security of the United States. The executive will determine the vetting criteria; however, requests to remand detainees to the DTC, made by the executive, are dependent on a judicial ruling before formal indictments are filed. That is, if the DTC is not convinced either with respect to the reliability of the evidence/intelligence information or that the individual presents a national security threat, the remand request

29. I base this number on discussions with senior U.S. military officials over the past two years. I have corroborated this number through additional conversations with intelligence officials as well.

30. *See supra* note 7.

31. *See Boumediene*, 128 S. Ct. at 2274-78 .

32. Andrew Selsky, *Pentagon Releases Gitmo Detainees' Names*, WASH. POST, May 15, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/05/15/AR2006051500 905.html. The Pentagon released a list of all of the detainees who have been held at Guantanamo Bay. *Id.* This list of names was previously kept classified because of "the security operation as well as the intelligence operation that takes place down there." *Id.* The Pentagon also stated that "releasing photos of current detainees would damage U.S. intelligence gathering . . . [and] make it easier for al-Qaida to retaliate against detainees suspected of cooperating with interrogators." *Id.* The article states that the release of names will help human rights groups investigate allegations of abuse of former detainees. *Id.* Additionally, the article reports that the Department of Defense has released the names of detainees who had a Combatant Status Review Tribunal (CSRT) hearing. *Id.* A CSRT reviews a detainee and decides if the detainee is an enemy combatant who should continue to be held. *Id.*

will be denied. Notwithstanding the incredible challenges inherent in developing such an infrastructure, this should not stand in the way of the preservation or restoration of individual rights.

V. DETAINING SUSPECTS

The establishment of a formal vetting process is critical to determine whether an individual poses an ongoing threat to national security. If the individual does pose a threat, then—and only then—can the prosecution request from the court that the detainee be further remanded. However, the remand is solely for the purpose of indicting the individual within a limited time period. That is, the remand process is purpose specific—submission of indictment and conducting of trial—rather than the indefinite, largely purposeless detention that has typified the past seven years.

To that end, it is imperative that the proposed court guarantee the rights of individuals detained by the United States government. Professor David Cole argues that the current legislative responses to terrorism regarding the ongoing detention policies of suspected terrorists are simply unconstitutional:

> The PATRIOT Act gives the Attorney General unprecedented power to lock up any immigrant that he certifies as a "suspected terrorist." Such persons are subject to potentially indefinite detention. While "suspected terrorists" may sound like a class that should be locked up, there are several problems with this measure. It applies to "suspected" terrorists, not "proved" terrorists. It allows the Attorney General to lock up individuals where he has "reasonable grounds to believe" that they have committed any of a wide range of immigration violations, without a hearing to determine whether they actually pose any real threat . . . The law further provides that such persons may be detained indefinitely, even if they are "granted relief from removal," and therefore have a legal right to remain here permanently.[33]

Despite the fact that counter-terrorism necessarily and inherently involves detention based on confidential intelligence sources, the DTC, through its formal vetting process and other protections, ensures that *only* those individuals who pose a real threat remain in detention.

As a practical matter, post-9/11 detainees held in Guantanamo or anywhere outside the United States will need to be immediately brought to the United States for further remand in order to fully ensure these protections. This is true regardless of the basis for detention: whether caught "red-handed" or held based on intelligence information. Because transporting detainees to the United States will involve significant measures, once a judge grants a remand request detainees must be brought to the U.S. within seven days of the judicial order. If opera-

33. DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION 156 (2002).

tional considerations exist (for example, if airline transportation is deemed "high risk"), a judicial officer of the United States Judge Advocate General Corps may grant a "stay" of the transportation for five additional days. To hold a detainee for longer than seven days before transporting that individual to the United States, the government would need to meet a strict exigent circumstances test.[34] This is the only time that the military would have judicial "access" over process, as a principle underpinning of the DTC is to "civilianize" the judicial process in its entirety.

For criminal defendants arrested in the United States, the United States Code requires that the arresting officer take the suspect to a judge or magistrate without unnecessary delay.[35] The same will be true for terrorism suspects detained within—or outside—the borders of the United States. Terrorism suspects, again regardless of whether they are caught in the act or arrested based on intelligence information, must be brought before a DTC judge without unnecessary delay. The United States Supreme Court has stated that the unnecessary delay requirement

> is part of the procedure devised by Congress for safeguarding individual rights without hampering effective and intelligent law enforcement . . . . [Unnecessary delay] contemplate[s] a procedure that allows arresting officers little more leeway than the interval between arrest and the ordinary administrative steps required to bring a suspect before the nearest available magistrate.[36]

In other words, although the requirement in a new DTC to bring the suspect before a judge without unnecessary delay is intended to protect the individual's rights, it necessarily allows for administrative measures. These administrative steps will likely be more complicated than those of an ordinary criminal defense court and will therefore likely demand that more time be permitted between detention and the initial appearance before a judge. Nevertheless, this proposal will not tolerate the type of indefinite detention practices that presently exist.

Similarly, a suspect's due process rights as guaranteed by the Fifth

34. Exigent circumstances, in a criminal law context, give police limited authority to use warrantless action. *See* Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, 39 HASTINGS L.J. 283, 287 n.20 (1988). The Supreme Court has also used the term to categorize

> events not falling into the other specific exceptions but nonetheless requiring immediate action. This exception allows for a warrantless search or seizure where there is a compelling need for immediate official action and time does not permit the procurement of a warrant. The Court considers the facts of each case to determine whether it is a "now or never" situation.

Id. Admittedly, an exigent circumstances test is extremely problematic as exigent circumstances might be used as an excuse to continue the unconstitutional indefinite detention of the current regime. Accordingly, the test must be extremely strict and subject to judicial affirmation.

35. FED. R. CRIM. P. 5(a)(1)(A).

36. Mallory v. United States, 354 U.S. 449, 453 (1957).

Amendment to the United States Constitution[37] provide limited safeguards against either delay before indictment, or delay between the time of the actual crime and initiation of prosecution.[38] Therefore, the time that a terrorism suspect can be detained before being formally charged will be governed by current Fifth Amendment jurisprudence.

Furthermore, because suspects who are deemed to pose a substantial threat to national security will need to be detained, in all likelihood, through trial, measures must be taken to protect against unnecessary post-accusation delay. Specifically, judges will be responsible for determining whether any delay in bringing a suspect to trial after he has been formally charged violates the defendant's rights.

The United States Supreme Court in *Barker v. Wingo*[39] outlined several factors for determining whether such a delay is improper. The Court held judges should decide whether the length of the delay and the justifications provided, given the fact-specific nature of the case involved, warrant additional time for the prosecution to bring its case.[40] Furthermore, suspected terrorists must not be detained to the point of impairing their defense, which is the essence of oppressive pretrial incarceration.[41]

VI. INTERROGATING SUSPECTED TERRORISTS

One of the primary lessons of the past seven years is the need to establish clear interrogation guidelines. As a bi-partisan United States Senate report makes abundantly clear, the interrogation policies implemented by the Bush Administration in the aftermath of 9/11 "disgraced the nation and undermined U.S. security."[42] The detainees must not be subjected to the unconstitutional interrogation methods advocated by the Bush Administration which are illegal, immoral, and do not contribute to "actionable intelligence."[43] There cannot be—*must not* be—any "ifs, ands, or buts" with respect to torture. The prosecutor—either in remand hearings or the actual trial—will be expressly prohibited from submitting to the court *any* criminal evidence or intelligence information that he suspects was gained through the use of illegal interrogation

37. *See* U.S. CONST. amend. V. The Fifth Amendment of the Constitution guarantees that "no person shall . . . be deprived of life, liberty, or property without due process of law." *Id.*

38. *See* United States v. Lovasco, 431 U.S. 783, 789 (1977).

39. 407 U.S. 514 (1972).

40. *Id.* at 530-33.

41. *Id.* at 532.

42. Joby Warrick & Karen DeYoung, *Report on Detainee Abuse Blames Top Bush Officials*, WASH. POST, Dec.12, 2008, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/12/11/AR2008121101969.html?hpid=moreheadlines.

43. *See* Letter from Rear Admiral Donald J. Guter (Ret.), Rear Admiral John D. Hutson (Ret.), Major General John L. Fugh (Ret.), & Brigadier General David M. Brahms (Ret.), Retired Judge Advocate General, to Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary, Nov. 2, 2007, *available at* http://static.crooksandliars.com/files/uploads/2007/11/jag_letter.pdf.

measures. The prosecutor has the obligation as an officer of the court and in accordance with professional ethical obligations to act proactively to ensure that such illegally obtained information is not submitted. Perhaps, by analogy—admittedly a tad awkward—this requirement can be equated with the "Brady rule."[44]

Despite the fact that waterboarding has been universally condemned as a method of torture,[45] the Legal Advisor to the Convening Authority for the Military Commissions, Brigadier General Thomas W. Hartmann, told Congress that "he cannot rule out the use of evidence derived from the CIA's aggressive interrogation techniques, including waterboarding, a tactic that simulates drowning."[46] Furthermore, to add to the definitional confusion created and perpetuated by the current regime, Brigadier General Hartman stated that "while 'torture' is illegal, he cannot say whether waterboarding violates the law."[47] This type of circular argument exemplifies both the problems with failing to define detainees' rights and the problems involved with the coercive interrogation methods employed by the CIA.

As one of the principle "lessons learned" both from actual interrogations of the past seven years and the failure of the Military Commissions Act[48] to specifically include the CIA in statutory language banning torture, the proposed DTC will require all interrogations to be conducted by agents of the Federal Bureau of Investigations (FBI). FBI agents, unlike CIA agents, are not exempt from the prohibitions against torture.[49] Citizens and non-citizens alike will be subject to the same interrogation methods. For example, in all cases, all suspects—regardless

44. The "Brady rule" originates from the case of *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. It stands for the proposition that a prosecutor must fully disclose to the accused in a criminal case all potentially exculpatory evidence against that defendant that is in the prosecutor's possession. *See id.* at 87-88. A recent report to the Federal Judicial Center discusses the Brady Rule and its current application in the United States District Courts. *See* REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, May 31, 2007, http://www.uscourts.gov/rules/BradyFinal2007.pdf. Numerous articles discuss the rule and its application. *See, e.g.*, Andrew Smith, Brady *Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 VAND. L. REV. 1935 (2008).

45. Press Release, Amnesty Int'l, Amnesty Int'l Calls for Criminal Investigation Following CIA "Waterboarding" Admission (Feb. 6, 2008), *available at* http://www.amnesty.org/en/for-media/press-releases/usa-amnesty-international-calls-criminal-investigation-following-cia-%E2%80%98wa.

46. *See* Josh White, *Evidence from Waterboarding Could Be Used in Military Trials*, WASH. POST, Nov. 12, 2007, at A04, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/12/11/AR2007121102110.html.

47. *See id.*

48. Military Commissions Act of 2006, Pub. L. No. 109-366, §§ 948r, 950v(11), 120 Stat. 2600, 2607, 2627 (codified at 10 U.S.C., Sections 948a-950w and other Sections of Titles 10, 18, 28, and 42).

49. *See* Eric Lichtblau, *Gonzales Says Humane-Policy Order Doesn't Bind C.I.A.*, INT'L HERALD TRIB., Jan 19, 2005, *available at* http://query.nytimes.com/gst/fullpage.html?res=9E00E6DA1338F93AA25752C0A9639C8B63&sec=&spon=&&scp=2&sq=CIA%20Called%20Exempt%20From%20Torture%20Ban&st=cse.

of citizenship status—will be granted Miranda rights,[50] thereby granting the detainee the same rights afforded a suspect in the traditional criminal law paradigm.

Some may question the reasoning behind affording constitutional rights to non-citizens. History, however, has taught us important lessons about the consequences of discriminating based on nationality. As Professor Cole notes:

> In World War I, we imprisoned dissidents for merely speaking out against the war, most of them immigrants. In 1919, the federal government responded to a politically motivated bombing of the Attorney General A. Mitchell Palmer's home in Washington, D.C. by rounding up more than 6,000 suspected immigrants in 33 cities across the country—not for their part in the bombings, but for their political affiliations . . . In World War II, we interned 110,000 persons, over two-thirds of whom were citizens of the United States, not because of individualized determinations that they posed a threat to national security or the war effort, but solely for their Japanese ancestry. And in the fight against Communism, which reached its height in the McCarthy era, we made it a crime even to be a member of the Communist Party, and passed the McCarran-Walter Act, which authorized the government to keep out and expel noncitizens who advocated Communism or other proscribed ideas . . . ."[51]

Professor Cole compellingly shows the dangers of repeating past mistakes and the necessity of instituting a formal vetting process as a precondition to proceeding with detention, interrogation, and trial *only* of those individuals deemed to pose a continuing security threat.

VII. THE CONSTITUTION OF THE COURT AND THE TRIAL PROCEEDINGS

The DTC itself will be a restructured Foreign Intelligence Surveillance Act (FISA) court[52] thereby enabling it to adjudicate guilt and innocence in addition to its primary statutorily mandated responsibility of considering governmental wire tap warrants. This added responsibility obviously will require the appointment of a significant number of additional judges to the FISA bench. The current FISA structure is clearly inadequate to support the increased needs inherent in the establishment of a DTC. These judges will be drawn from the pool of sitting United States District Court judges, as is the current practice, and the president will need to nominate, subject to Senate confirmation, new judges who

50. *See* Miranda v. Arizona, 384 U.S. 436 (1966). The U.S. Supreme Court in *Miranda* held that the defendant's statements could not be used as evidence because when such statements were made the defendant had not been informed of his rights; namely, his right to remain silent and his right to an attorney. *Id.* at 444-45.

51. *See* COLE & DEMPSEY, *supra* note 33, at 150.

52. The Foreign Intelligence Surveillance Court is a U.S. federal court which was created as a result of the Foreign Intelligence Surveillance Act (FISA), enacted in 1978, for the primary purpose of issuing wire tap warrants for the surveillance of foreign intelligence information. *See* Foreign Intelligence Surveillance Act, 50 U.S.C. § 1803 (2000).

will sit on the DTC. The DTC will have, in addition to considering wire tap requests, three primary responsibilities: (1) to rule on remand requests, from detention to indictment; (2) to determine whether to hold the defendant for trial based on the charging documents and evidence presented at a preliminary hearing;[53] and (3) to adjudicate guilt or innocence.

One of the critical—and admittedly problematic—features of the DTC is the manner in which the government's interest in protecting legitimate national security concerns will be balanced against the obligation to simultaneously ensure the rights of individual suspects, particularly with respect to the right to confront an accuser. The DTC will not provide suspects with the same level of constitutional protection as traditional Article III courts.[54] This measure will enable the government to keep intelligence information classified. Nevertheless, significant measures will be taken to ensure that the information received by the DTC is weighed by the bench in a manner intended to benefit the defendant, precisely because he is absent.

Although the evidence is presented by the prosecution and a member of the intelligence community, by applying a strict four-part test in weighing the submitted information, the judge will wear two hats: one as the court and the other as defense counsel. The information—and the source—must be held to be: (1) reliable; (2) viable; (3) valid; and (4) corroborated. If the intelligence meets the four-part test, then and only then is it admissible and available for use against the defendant at trial. However, a defendant's conviction may not be based solely on confidential intelligence information. This evidence may only be used to support an existing body of evidence known to the defendant and his counsel and introduced in open court proceedings. In every case, the sitting judge will make all decisions as to the admissibility of evidence while viewing the evidence in a light most favorable to the defendant.[55]

Similarly, the sitting judge may determine through in camera review of intelligence evidence that introducing the information in open court proceedings does not pose a threat to national security. In these cases, the judge gives the prosecution the option of declassifying the information and presenting it in court or proceeding to trial without such evidence.

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53. The Fifth Amendment guarantees the right to a "Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." U.S. CONST. amend. V.

54. *See* U.S. CONST. amend. VI; *see also supra* Section II (comparison to Article III courts).

55. Despite the fact that Justice O'Connor stated in the Court's opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004), that "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided," it is my contention that a method in which the court views all evidence in favor of the defendant even when that defendant is unable to confront all the evidence against him is a much more reliable system for ensuring a defendant's right to a fair trial.

If a defendant is convicted in the DTC, sentencing will proceed just as in traditional courts with maximum and minimum sentencing terms. Furthermore, sentencing will not, under any circumstance, contemplate the death penalty. Appeals will be filed directly to the United States Court of Appeals.

VIII. CONCLUSION

Although the proposed DTC is not problem-free, it suggests an effective, process-based, rights-oriented paradigm for moving forward with the expected trials of thousands of post-9/11 detainees. Specifically, it will allow suspected terrorists to receive a trial in a legitimate court of law that will attempt to ensure as many rights as possible, while simultaneously respecting the United States' interest in protecting confidential intelligence information. This article is intended to detail the specific processes and procedures of the court and explicitly answer the difficult questions that face the incoming administration as it searches for solutions to the many issues involved in implementing any new system. President Obama's executive order—issued, literally, immediately upon his inauguration—unequivocally highlights both the extraordinary importance and urgency that is at the core of this issue. President Obama's order represents a clear break from President Bush's policy.[56] The question now is: What's next?

It is my hope that this article will act as an outline for policy makers to consider when formulating a process to determine what to do with individuals suspected of terrorism from the time they are detained through the entire trial process. A properly constituted DTC is the appropriate starting point to respond to judicial, legal, and policy challenges that are the essence of the post-9/11 world.

56. *See* Finn, *Obama Seeks Halt to Legal Proceedings at Guantanamo*, *supra* note 2.