

## DEBATE

### LIGHT AT THE END OF THE PIPELINE?: CHOOSING A FORUM FOR SUSPECTED TERRORISTS

Despite the fact that six years have passed since 9/11, the Pentagon's recent decision to try six Guantanamo detainees for capital crimes such as "terrorism and support of terrorism" made national headlines. William Glaberson, "U.S. Charges 6 With Key Roles in 9/11 Attacks," N.Y. TIMES, Feb. 11, 2008, at A1. In this Debate, Professors Amos N. Guiora, of the University of Utah, and John T. Parry, of Lewis & Clark Law School, attempt to settle the question of what sort of forum is most appropriate to try the thousands of individuals in U.S. custody who are suspected of terrorism.

Professor Guiora considers three forum options: treaty-based international terror courts, traditional Article III courts, and a "hybrid" option he calls domestic terror courts. Ultimately, Professor Guiora argues in favor of domestic terror courts, which he describes as being able to "balance[] the legitimate rights of the individual with the equally legitimate national security rights of the state." He considers this option to be the most practical and expedient policy solution, necessitated by an untenable tension between the understanding "that some of the detainees present a genuine threat to American national security," and an awareness "that indefinite detention violates constitutional principles and fundamental concepts of morality."

Professor Parry agrees that current U.S. policy toward detainees has been "misguided," but does not believe that innovations of the sort proposed by Professor Guiora are necessary. Rather, he suggests "that policymakers should choose Article III courts rather than hybrid courts for trials of suspected terrorists, with military courts as a fall-back option." Professor Parry points to research that shows that "the federal government is often able to prosecute suspected terrorists in federal court," and therefore considers alternative proposals to Article III courts to be "solution[s] in search of a problem." Professor Parry realizes that "trial in federal court will not be possible for every suspected terrorist," and concludes that, "[f]or people who pose a risk but whose conduct may not violate federal criminal law, prolonged preventive detention is the best choice."

OPENING STATEMENT

*Suspected Terrorists: Domestic Terror Courts Are Waiting!*

Amos N. Guiora<sup>†</sup>

Six years after 9/11, and more than a year and a half after *Hamdan v. Rumsfeld* and the Military Commissions Act (MCA) one of the critical questions of the post-9/11 world has still gone unanswered: where do we try terrorists? More accurately, where do we try the 25,000 individuals held worldwide either by the United States—or on behalf of the United States—who are *suspected* of terrorism? I deliberately italicize the word “suspected” because it is important to recall that the individual in question is no more than that—a suspect. He or she may be the “worst of the worst” (per then-Secretary of Defense Rumsfeld’s outrageous description of all individuals held at Guantanamo Bay), or he or she might be like the hundreds of detainees released from Guantanamo Bay who the United States had no reason to detain in the first place.

The question Professor Parry and I are addressing—where to try suspected terrorists—encompasses a range of complex definitional problems. For example, how do we define the individual detainee? Who is he? What has he done? Why did we detain him? What are his rights? The following questions are also pertinent: when may an individual be detained? Under what conditions (and how) may he be interrogated? What evidence may be introduced into a court of law and by what process? May he know the charges against him (and when)? And, if convicted, where may he appeal?

Let’s begin with the basics: The individual presently or in the future is, I suggest, not a criminal, nor is he a prisoner of war (POW), but he is *something*. That *something* has defied definition to date. Because this individual’s status defies definition, articulating a rights-based regime for that individual has frustrated the Bush administration’s post-9/11 efforts. At the same time, articulating a rights-based regime has *defined* the Bush administration’s efforts. If the individual is neither a criminal nor a POW, what is he? Various terms have been bandied about including enemy combatant, illegal combatant, illegal belligerent, and enemy belligerent. None has led to the establishment of a workable rights-based regime. To get there, the starting point

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must be that all individuals have rights, and all individuals must be defined.

In numerous decisions (*Rasul v. Bush*, *Rumsfeld v. Padilla*, *Hamdan v. Rumsfeld*, *Hamdi v. Rumsfeld*), the U.S. Supreme Court has failed to articulate what legal term of art is appropriate for the detainees and what their rights are. Congress has completely failed in its constitutionally granted oversight powers. Checks and balances and separation of powers have largely fallen by the wayside. The result is an amorphous and vague legal regime. The bottom line is a *lack of* a bottom line.

Into that vacuum, I present the following proposal: the post-9/11 detainees are a “hybrid”—neither POW nor criminal. What does that mean? A “hybrid” suggests taking a bit from here and a bit from there in an effort to articulate a workable model. This model would enable a fair trial for those detained post-9/11; it would stand as a dramatic improvement over the status quo since, to date, no fair process has been developed by the Bush administration.

Let us examine the efforts to date: The military commissions, whether in their original construction or their revamped construction after *Hamdan* and the Military Commissions Act, have not proven successful. Thus far, only one detainee has been convicted. Recently the Legal Advisor to the Convening Authority for the Office of Military Commissions, Brigadier General Thomas W. Hartmann, testified before Congress that evidence obtained from a detainee subjected to waterboarding could be admitted—this, despite universal condemnation of waterboarding as torture. These facts speak resoundingly to the military commission’s inadequate and ineffective safeguards for suspected terrorists. It is clear that, even in their revamped format, these efforts are, in a word, nonstarters.

On the other hand, as the United States is either directly or indirectly responsible for the detainees it holds, the country must develop a workable judicial process quickly. Given that some of the detainees present a genuine threat to American national security and that indefinite detention violates constitutional principles and fundamental concepts of morality, this is a must.

There are, I suggest, three workable legal-judicial models for the “post-9/11 detainees” (Guantanamo Bay is no longer a workable model):

- 1) Treaty-based international terror court;
- 2) Traditional Article III courts;
- 3) Domestic terror courts.

## I. TREATY-BASED INTERNATIONAL TERROR COURT

While attractive-sounding in light of globalization trends, the concept of a treaty-based international terror court is not the answer to our problem. The reason is simple: in order to establish such a court, the nations of the world (at least those who would be party to such an institution) would need to agree upon a definition of the term “terrorism.” As has been documented elsewhere, agreeing upon a definition of terrorism eludes the FBI and the State and Defense Departments. The United Nation’s role post-9/11 has been at best—speaking politely—extraordinarily limited as member nations similarly cannot agree upon a definition of terrorism.

Supposing that this enormous stumbling block could be overcome, member nations would then need to address a laundry list of issues. To mention a few: imposition of the death penalty, jurisdiction over domestic terrorism (of another nation), cooperation regarding intelligence gathering and sharing, rules of evidence, and prison conditions. While this is only a partial list, the point is clear: the establishment of a treaty-based international terror court, though perhaps worthwhile, will not be an immediate development. In the meantime, there are detainees awaiting trial.

## II. ARTICLE III COURTS

While I dare not put words in Professor Parry’s mouth, my assumption is that he will articulate in a most convincing manner why Article III courts are the favored course. As the best offense is a good defense, bringing post-9/11 detainees to a traditional criminal trial is, to be blunt, a fantasy.

The trial of Zacarias Moussaoui—held out by some as an example justifying the effectiveness of Article III courts for terrorists—highlights the many problems attendant with trying suspected terrorists in an Article III court. Moussaoui, often referred to as “the 20th hijacker,” was suspected of training with al-Qaeda in preparation for the 9/11 attacks and later pled guilty to six counts of conspiracy. While initially denying involvement, he ultimately confessed that he was supposed to fly a fifth plane into the White House. Grandstanding throughout the process, Moussaoui largely turned the trial into a farce. The court—particularly when Moussaoui chose to represent himself—was largely unequipped to respond to or prevent his antics, which significantly affected public perception of the judicial process.

Furthermore, Moussaoui's trial raised Sixth Amendment compulsory due process concerns. See Hon. Shira A. Scheindlin & Matthew L. Schwartz, *With all Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFSTRA L. REV. 795 (2004). Preparing his defense, Moussaoui asked for "access to alleged terrorist ringleader Ramzi bin al-Shibh," *id.* at 835, who at the time was in federal custody, because Moussaoui believed bin al-Shibh could provide exculpatory evidence. The government, however, argued that giving Moussaoui such access would compromise national security. *Id.* The court "agreed with Moussaoui, holding that the Sixth Amendment right to compulsory process is not outweighed by claims that the government's intelligence-gathering efforts would be undermined." *Id.* at 835-36. "Moussaoui would be given access to, and could present to the jury, a compilation of summaries of reports of bin Al-Shibh's statements taken by the government." *Id.* at 837. The court's decision highlights the ongoing conflicts between a suspected terrorist defendant's rights and the government's security concerns.

The fundamental deficiencies with using Article III courts in a terrorist context are inherent. First, much of the evidence available against suspected terrorists is predicated on intelligence information. Article III courts, however, must abide by certain constitutional rights, including the Sixth Amendment right to confront one's accuser. This right places an explicit limitation on the prosecution. It deprives the prosecutor of the ability to go forth with *all* available (and confidential) intelligence information, since the defendant would not be able to confront it.

In addition, a defendant in an Article III court has a right to trial by a "jury of his peers." See *Carter v. Jury Comm'n*, 396 U.S. 320, 330 (1970) (defining "peers" as "his neighbors, fellows, associates, [and] persons having the same legal status in society as that which he holds" (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879))). Put simply, if Osama bin Laden were detained today and brought before a court of law, would it be possible to find a "jury of his peers"? Would it be possible to find 12 members of the community willing to sit in judgment of the most wanted terrorist on the planet?

While an instinctual, reflexive, revenge-based answer is yes, closer scrutiny suggests that fears of retribution from bin Laden supporters would drive the overwhelming majority of potential jurors literally "underground." Two principal staples of Article III courts are, in essence, incompatible with terrorism-related trials: the right to confront one's accusers, and the right to a trial by a jury of one's peers.

Others raise similar concerns. For example, Jack Goldsmith and Neal Katyal suggest that criminal prosecutions are “not always feasible.” Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, at A19. For instance, “some alleged terrorists have not committed overt crimes and can be tried only on a conspiracy theory that comes close to criminalizing group membership.” *Id.* Also, the standard of proof for evidence collected in Afghanistan “might not meet every jot and tittle of American criminal law.” *Id.* Goldsmith and Katyal argue that instead, Congress should “establish a comprehensive system of preventive detention that is overseen by a national security court composed of federal judges with life tenure.” *Id.*

### III. THE SOLUTION: DOMESTIC TERROR COURTS

Domestic terror courts address the principal issues associated with Article III courts. By enabling the government to introduce available intelligence information, domestic terror courts create a forum for the government to present its case in full. Does this affect the rights of the defendant? In full candor, the answer is yes. But, the proposed court will protect the defendant by ensuring that the court will not automatically accept the introduced intelligence into the record. That is, the government will have to show that the intelligence information is *valid, viable, relevant, and corroborated*. Strict scrutiny that balances the legitimate rights of the individual with the equally legitimate national security rights of the state is one of the significant advantages of the proposed domestic court.

Under my proposal, intelligence information would be presented in camera by the prosecutor and a representative of the intelligence services who would be subject to rigorous cross-examination by the court. The judges who would sit on the domestic terror courts would be trained in understanding intelligence information. In addition, the bench would be expected to fulfill a “double role”—that of fact-finder and defense counsel alike. As the latter will be barred from attending the hearings when intelligence information is submitted, the domestic terror courts *would have to* proactively engage the prosecutor. The burden on the court would be enormously significant because the defendant, who would not be present, would not have counsel representing him with respect to the submission of intelligence information into the record.

This is a major stumbling block regarding domestic terror courts. Based on my experience sitting as a judge in administrative detention hearings where the only evidence relevant to the detainee was intelligence information, the burden on the judge is significant. However, it is the *only* manner in which intelligence information can be submitted. In analyzing terrorism-related cases, it is critical that the role of intelligence information be fully understood: it is all but impossible to conduct a terrorism-related case without it. That is, without making intelligence information available, no court can fully understand or appreciate the role a particular defendant has played in a terrorist cell. Without that information, a court cannot understand the inner workings of a terrorist cell, its goals, missions, and motivations. Without that information, a court will be, in essence, groping in the dark.

Some in favor of Article III courts suggest that

[t]he difficulties involved in using classified evidence in terrorism prosecutions do not provide compelling support for an argument that the criminal justice system should be abandoned in terrorism cases; these difficulties are entirely self-imposed. . . . If the government determines that it is more important to national security that a piece of information remain secret than to prosecute the terrorist, it can simply choose not to use that information or not to charge that terrorist until some unclassified evidence of his guilt can be presented. If the government determines that it is more important to national security to prosecute the terrorist than to keep the information in question secret—perhaps to prevent him from carrying out a terrorist attack—it can simply declassify the information and use it as evidence against him.

Michael German, *Trying Enemy Combatants in Civilian Courts*, 75 GEO. WASH. L. REV. 1421, 1426-27 (2007).

While this argument is true—the government can choose whether to prosecute a terrorist based on whether they want to disclose intelligence information—it is inherently limiting. The government is caught in an all-or-nothing situation: either it keeps intelligence information secret, or it prosecutes terrorists. This highlights both the importance of intelligence information (essential in order to try terrorists) and the Article III courts' inability to properly account for its importance. Domestic terror courts, on the other hand, allow the government both to maintain the secrecy of intelligence information *and* to try suspected terrorists. As George Washington wrote in 1777,

The necessity of procuring good Intelligence, is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprises of the kind, and for want of it, they are generally defeated, however well planned and promising a favourable issue.

Nathan Alexander Sales, *Secrecy and National Security Investigations*, 58 ALA. L. REV. 811, 811 (2007) (internal quotation marks omitted) (quoting from a Letter from George Washington to Col. Elias Dayton (July 26, 1777), in 8 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, at 479 (John C. Fitzpatrick ed., 1931)).

#### FINAL THOUGHT

Domestic terror courts are not problem-free—far from it. However, the suggested proposal would make it possible to try an individual suspected of terrorism in a court of law while simultaneously balancing his legitimate rights with the state's equally legitimate national security rights. The other available models—Guantanamo Bay, a treaty-based international terror court, and Article III courts—would not and do not meet this requirement.



## REBUTTAL

*Managing Suspected Terrorists*John T. Parry<sup>†</sup>

Guantanamo Bay currently houses 275 people designated as “enemy combatants,” many of whom may have engaged in war crimes or “terrorist” activities. Fourteen of these prisoners are “high value detainees” formerly held by the CIA at other locations. Some of the more than 600 people held by U.S. forces at Bagram, Afghanistan—and perhaps people in other locations as well—may have committed similar acts. Beginning shortly after 9/11, a fierce debate has been raging in U.S. legal and policy circles about where to hold these people, how to treat them, whether to put them on trial and, if they are to be tried, where and for what.

Professor Guiora’s contribution to this debate ably sets out the case for using hybrid courts for trials of suspected terrorists who are not U.S. citizens. He rejects both military commissions and criminal trials in Article III courts as unworkable. A hybrid approach, he suggests, will allow policymakers to pick the best of both models while avoiding the vices of each. We can have the “war on terror” equivalent of guns and butter: criminal trials that will satisfy concerns about classified information and allow the conviction of terrorists while also respecting due process values.

I will begin my response by considering what is at stake in the controversy over trying suspected terrorists. Based on that discussion, I will suggest that policymakers should choose Article III courts rather than hybrid courts for trials of suspected terrorists, with military courts as a fall-back option. I will also suggest that critics of U.S. policy should abandon the idea of trials in many cases and instead support a straightforward policy of preventive detention combined with continued transfer of prisoners to other countries.

## I. PRACTICAL ISSUES IN THE TRIAL OF SUSPECTED TERRORISTS

A number of commentators have advanced proposals for dealing with suspected terrorists. Many reject the idea that Article III courts can handle the job, but that rejection comes too easily. Kelly Moore,

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the former Chief of the Violent Crimes and Terrorism Section of the U.S. Attorney's Office in the Eastern District of New York, argued in a recent article that a proactive investigation and prosecution policy after the 9/11 attacks resulted in significant intelligence information as well as successful prosecutions. See Kelly Moore, *The Role of Federal Criminal Prosecutions in the War on Terrorism*, 11 LEWIS & CLARK L. REV. 837, 847-48 (2007). Writing in the same issue of the journal, Professor Robert Chesney contended that federal prosecution of terrorism offenses should be seen as a "narrative of success." Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data in Light of the "Soft-Sentence" and "Data-Reliability" Critiques*, 11 LEWIS & CLARK L. REV. 851, 889 (2007). Finally, a September 2007 A.B.A. *Journal* article reported that the federal government has won thirty-one out of thirty-eight terrorism cases, and some of the cases scored as losses still resulted in convictions. See Edward A. Adams, *31 Wins, 6 Losses & 1 Tie*, A.B.A.J., Sept. 2007, at 24-26.

In short, the federal government is often able to prosecute suspected terrorists in federal court. The success of terrorism prosecutions suggests that in many instances proposals for military commissions and hybrid courts are a solution in search of a problem.

Legitimate issues do exist, however. Attorney General and former federal district court judge Michael Mukasey insists that terrorism prosecutions strain resources and "risk disclosure to our enemies of methods and sources of intelligence." Michael B. Mukasey, *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15. Kelly Moore admits that applying the rules of evidence to materials obtained in combat operations can be difficult, while in a forthcoming *Stanford Law Review* article Professors Chesney and Jack Goldsmith express concerns about hearsay and classified information. See Robert M. Chesney & Jack L. Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. (forthcoming 2008).

To the extent that Attorney General Mukasey's concern about resources is simply an issue of cost, the obvious solution is more resources, including shifting federal resources from areas that state prosecutors and courts are competent to handle. As for concerns about evidence, Moore suggests answers to chain of custody and authentication issues. At least some hearsay concerns are addressed by Federal Rule of Evidence 807, which permits introduction of hearsay that has "circumstantial guarantees of trustworthiness." Classified information is addressed to some extent by the Classified Information Procedures Act (CIPA). Terrorism prosecutions raise difficult CIPA

issues, but, as Moore notes, some information can be declassified, while Professors Chesney and Goldsmith admit that courts have found ways to give information to defendants without compromising national security. Some information may be released by mistake, which appears to be Attorney General Mukasey's primary evidentiary concern. But the mistakes he cites, while serious, have been few and do not appear to have caused significant harm. Thus, unless one believes that no mistakes are tolerable in a war on terror, Article III courts are more than capable of handling classified information issues.

Professor Guiora raises some of these concerns, and I suspect he will not be satisfied with my handling of them. He also notes that Zacarias Moussaoui turned his trial into a spectacle. Certainly, high profile terrorism trials are likely to be spectacles. But many "ordinary" criminal trials are spectacles (O.J., anyone?), and many terrorism prosecutions have ended in plea bargains. Problems with grandstanding defendants are neither limited to terrorism (remember the Chicago 7 or 8?) nor characteristic of it (José Padilla did not engage in it). At the end of the day, courts can address practical issues of the kind raised by Professor Guiora and others in the majority of cases. For some terrorism trials judges will have to be more creative than in ordinary trials, but I suspect they are up to the task.

Solutions to these concerns also will not generalize across the criminal law in most cases. That is to say, borrowing from Bill Stuntz, many of these solutions are not "transsubstantive." William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2140 (2002). At least two issues may require solutions that generalize, however. First, Professor Guiora suggests that Confrontation Clause doctrine will impair some judicial efforts to allow introduction of probative and reliable evidence. He is correct, unless doctrine changes. Any change in Confrontation Clause doctrine, however—such as a move towards more balancing of interests—likely would apply to all criminal trials.

A second issue—also noted by Professor Guiora—involves the definition of criminal offenses. To the extent that terrorism prosecutions rely on ordinary criminal statutes, such as conspiracy, prosecutors may push for broader definitions of the offense which, if upheld by courts, can be applied in other contexts as well. Thus, while most issues surrounding the use of Article III courts are solvable, terrorism trials—much like the war on drugs—could produce doctrinal changes that many people would find undesirable.

## II. MILITARY COURTS AND HYBRID TRIALS AS POLICY INSTRUMENTS

Not all proposals to bypass Article III courts derive from concerns about procedure and doctrine. Avoiding questions about detention conditions and interrogation practices appears to be a goal as well, though I should note that Professor Guiora explicitly does not rely on this goal. Having chosen a parallel system of detention and interrogation after 9/11, policymakers now face the prospect of revealing details about their treatment of specific individuals—as happened to some extent in the trial of José Padilla. Some of the claims that courts will release too much intelligence information may be a cover for this concern as well. New forums and procedures make it easier to insulate investigation practices from public view.

Similarly, some of the concern about expending resources on terrorism trials in Article III courts comes down to the cost of trial rights. Since 9/11, the United States has adopted a policy of capturing terrorists, interrogating them, and then detaining them for a very long time. Implementing that policy in an effective way requires executive control. Courts, defense lawyers, and trial rights make that policy less effective by raising its cost and introducing risk. New forums and procedures, by contrast, will make the policy more efficient.

The capture-interrogate-detain pipeline also requires public support, particularly the support of legal, media, and policy elites. Support, in turn, derives to a large extent from perceptions of legitimacy. Criminal trials can add legitimacy, but they also risk undermining the policy by disrupting the pipeline. Policymakers might conclude that the obvious solution is enough trial process to add legitimacy, but with restrictions that ensure convictions in the vast majority of cases.

A final reason for concern over criminal trials is the belief that terrorism presents more than an ordinary crime control challenge. For people who hold this view, the “war on terror” is a real war, which means that the kinds of responses that sufficed for the “war on drugs” do not go far enough. Ideas of necessity and emergency power play a role here, as does the simple assertion that rules of war and military institutions should take precedence.

## III. CRIMINAL TRIALS, COURTS-MARTIAL, AND PREVENTIVE DETENTION

Aspects of the war model for responding to terrorism make sense; the laws of war should apply when military invasions and occupations are involved. Much of the response to terrorism has little to do with

military action, however, and traditional criminal law methods should remain the presumptive choice, precisely because they provide familiar restraints on government action. Mark Tushnet has suggested that the kind of permanent emergency presupposed by an open-ended war on terror risks “the end of the rule of law itself.” Mark Tushnet, *Emergencies and the Idea of Constitutionalism*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* 39, 45 (Mark Tushnet ed., 2005). I would prefer to say that the war model risks changing the way the rule of law is produced and maintained, but his basic point holds. Creating special courts and procedures for people who could be tried in ordinary courts is an unnecessary step in most cases.

Still, the concern I mentioned about transsubstantive rules should give pause. Broad doctrinal change, or acceleration of change already underway, alters the way the rule of law operates. Or, if doctrine holds firm, people may be acquitted and freed despite the fact that they pose a risk of criminal behavior. Requiring criminal trials across the board thus may not produce the most desirable set of results.

As I suggested earlier, one set of transsubstantive concerns derives from evidentiary issues, including efforts to admit classified information without violating the Confrontation Clause. When those efforts create too much tension with existing doctrine, courts-martial or even military commissions might be more appropriate forums if the defendant’s alleged conduct violates the laws of war. But the decision to use military courts should not be reserved for the executive. Congress should provide that charges be filed in federal court, and if the government wishes to move the proceeding to a military court it must convince the court that transfer is appropriate. In addition, any person tried before a military court, whether a court-martial or military commission, should be able to appeal any conviction to an Article III court. This structure is better than a hybrid court because it uses two institutions—the federal courts and the military justice system—that are well established and capable, rather than creating an entirely new institution. Indeed, the problem with the post-9/11 military commissions has been not only that they risk being unfair, but also that they have been difficult to create while under the watchful eyes of interest groups that are seeking to tug the commissions in conflicting directions. I suspect the same issues would plague the domestic terror courts that Professor Guiora proposes.

The other set of transsubstantive concerns applies directly to the capture-interrogate-detain pipeline. The pipeline policy can be one component of a larger response to terrorism, so long as officials abandon torture and allow meaningful judicial review. Criminal trials are

consistent with this policy to the extent that imprisonment is seen as a punitive response to terrorism, and the risk of acquittal in such cases is likely to be small. But, where the goal is preventing future terrorism, criminal trials are less likely to be an effective tool. Indeed, the preventive goals of the Bush administration's "war on terror" explain why terrorism trials put pressure on the definition of conspiracy: because the aim is to secure and legitimize the detention of people who are guilty by association, and thus pose some degree of risk, but who may have taken few concrete actions. Detention, rather than trial, is a reasonable option for people in this category, as Jack Goldsmith and Neal Katyal have also suggested, *see* Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19, and it is a better option than hybrid courts.

#### CONCLUSION

In sum, Article III courts should be the primary option for non-citizens whose conduct fits within traditional and reasonable interpretations of federal criminal law. In some cases, evidentiary or other issues might justify transferring the proceedings to a military court. For people who pose a risk but whose conduct may not violate federal criminal law, prolonged preventive detention is the best choice. Importantly, however, policymakers should be clear about their goals and the processes that serve those goals. Detention is not for everyone swept up by U.S. troops or federal agents. The only people eligible for preventive detention should be those who cannot easily be tried in Article III or military courts, and who qualify as prisoners of war or who have been found to pose a risk of criminal activity after a hearing. These hearings should be consistent with the standards *Hamdi v. Rumsfeld* imposed for the detention of citizens, except that the government should bear the burden of proof and prisoners should have counsel and an opportunity for meaningful federal court review. In addition, prisoners held in preventive detention should receive periodic assessment of their status and conditions of confinement, followed by federal court review.

I have no illusions that the detention process would be free of error, and I do not think anyone should pretend that it would be. A policy and process of this kind can be legitimate only if officials are transparent about the reasons for its adoption and the kinds of factors that are at play, and are also willing to modify those reasons and factors when necessary. Transparency allows federal courts to look over the executive's shoulder and also ensures that Congress and others know

how the policy is operating and can make informed choices about whether to continue it. Further, preventive detention should be reserved for people who really pose a risk; it should not be an excuse to warehouse suspicious people. But unless federal law is going to criminalize risk, trial in federal court will not be possible for every suspected terrorist who more probably than not poses a risk of violent criminal activity.

Everyone else should be set free, placed into a program of supervised release, placed under surveillance, or sent elsewhere. Indeed, one way to address the situation of many of the people in U.S. custody is simply to return them to their home countries or extradite them to countries interested in prosecuting them. Here, too, meaningful federal court review is necessary, including review of the treatment people are likely to receive in the other country.

My proposal is far from perfect. Indeed, it is arguably a hybrid approach as well, because I add detention and military courts to a traditional criminal justice approach. Yet to the extent my proposal is a hybrid, it is less disruptive than Professor Guiora's and is therefore, I think, worth considering.

## CLOSING STATEMENT

Amos N. Guiora

Professor Parry raises several well-articulated and thoughtful responses to my domestic terror court proposal. As a matter of fact, Professor Parry all but endorses my hybrid paradigm proposal.

## I. ARTICLE III AND MILITARY COURTS AS “FALL BACKS”

Professor Parry argues that suspected terrorists should be tried in Article III Courts, using military courts as “fall backs,” rather than turning to my proposed domestic terror courts. Professor Parry suggests that Article III courts have been successful with respect to terrorism, and that the creation of a hybrid court is a “solution in search of a problem.” However, in the same breath Professor Parry acknowledges concerns surrounding both the admission of intelligence information into evidence and providing the defendant with the right to confront his or her accuser.

As a solution, Professor Parry suggests that “when those efforts create too much tension,” a court-martial or military court may be used as a fall back. That way, two existing institutions—federal courts and military courts—can be used in lieu of creating an entirely new court.

To me that sounds strikingly familiar—it is a re-articulated version of my proposed domestic terror court. There is one difference: rather than creating a new court, Professor Parry suggests either bringing the individual to trial before a military commission or a court-martial.

Neither proposition is satisfactory or appropriate. Courts-martial are for soldiers; military commissions, as established by the Bush administration in the aftermath of 9/11, do not afford the necessary due process. Their legitimacy was effectively destroyed when Brigadier General Hartmann testified that information received from an individual subjected to waterboarding could be introduced in a military commission trial. Professor Parry correctly states that my proposal does not seek to insulate investigation practices. Quite the opposite—my proposal aims to protect the individual both during investigation and trial. In addition, it seeks to balance that interest with the state’s need to bring forth information that *otherwise* could not be introduced.



However, unlike Professor Parry's proposal, my proposal seeks to do this balancing in a civil context, rather than a military one. By relying on civilian judges instead of military judges, my proposal ensures that the defendant will be brought to trial before an independent trier of fact. Professor Parry's suggestion that the suspect be brought before a military trier of fact is but the militarization of my proposal. His proposal keeps the process "all in the family"—the executive detains, interrogates, and prosecutes. Does it also sit on appeal? Either way, justice is neither served nor rendered.

## II. THE SPECTACLE CONTINUES: EVIDENTIARY CONCERNS

Professor Parry acknowledges concerns about introducing intelligence information into evidence. He seeks to allay those concerns by pointing to the Confidential Information Procedures Act. Unquestionably, terrorism prosecutions raise difficult evidentiary issues. But why suggest that resolution is best accomplished only by declassifying information or somehow "giv[ing] information to defendants without compromising national security"? Why even travel that route? Why declassify vital intelligence information? Why run the risk of making a mistake when domestic terror courts would allow for in camera presentation of intelligence information?

In my proposed domestic terror court, unlike traditional Article III courts, if there is a need to introduce classified information, the court would review the intelligence information and rigorously question either the source or the state representative regarding reliability and corroboration. The information would assist the court in determining the defendant's guilt or innocence. However, a conviction could not be based solely on classified information and the court would be required to state that its decision to convict was primarily (i.e., more than 50%) based on evidence submitted to the court, thereby preserving the defendant's right to confront his accuser.

If convicted, the defendant could appeal to the U.S. Supreme Court regarding conviction and/or the severity of punishment. That is the essence of an independent judiciary. Professor Parry's reliance on a "military only" process is the very antithesis of the independent judiciary so critical to the paradigm I propose.

Professor Parry correctly highlights my deep concern regarding spectacles in terror cases. Zacarias Moussaoui is the poster child for such concerns and spectacles. Such spectacles also occur—Professor Parry reminds us of the O.J. Simpson trial—in nonterror cases. My response? Exactly. Remember the O.J. Simpson trial? Is *that* how we

want to try terrorists? Is *that* the process we want for individuals who commit heinous acts of terrorism, attacking and killing innocent civilians? Is *that* the dignity the process deserves? Clearly, Article III courts are not the forum to try high-profile terrorism cases.

### III. PREVENTIVE DETENTION

Professor Parry additionally suggests that in order to prevent future acts of terrorism, preventive detention is a “reasonable option” for people who pose a “risk”—people who are guilty by association—but who have not broken any federal criminal law. This is but a rearticulation of the two-tiered judicial model Israel has developed and implemented over the past few decades. In this problematic paradigm, an individual is not brought to trial. Rather, he is administratively detained based on reliable, corroborated classified information suggesting his involvement in future acts of terrorism. I have extensive professional experience—as prosecutor, judge and legal advisor—with the administrative detention process. That experience leads me to one unequivocal conclusion: the process must be, if at all possible, avoided.

Under the Israeli paradigm, an individual is administratively detained if the sole basis for his detention is intelligence information. In other words, there is no criminal evidence. The proposed hybrid paradigm resolves that tension by enabling the state to bring such an individual to trial, provided criminal evidence also exists. That course of action is far preferable to administrative process.

### FINAL THOUGHT

Professor Parry prefers an Article III process to a hybrid one. Or does he? Is not the fall-back position he articulates nothing but a recantation of the domestic court I recommend? It appears to me that it is, but with one major difference. Rather than establish domestic terror courts, Professor Parry recommends falling back on military courts with no independent judicial review. Regarding the possibility of spectacles—an issue of great concern to me—Professor Parry sanguinely reminds us of O.J. To that I reply, terrorism and the justice it demands are too important for show.

These cases require sobriety and seriousness. They also frequently require the introduction—unfortunately—of classified information. The domestic terror court paradigm I propose addresses all these issues. Is it perfect? No. Does the present system require renovation?

Yes. Do we require a judicial system specifically for terrorism? Yes. Is terrorism going away? No. Therefore, we need to—quickly—adopt the domestic terror court paradigm. Justice must be both rendered and seen. Judicial independence is critical to the process. Civilian, not military, courts are the appropriate route. My proposal is not “problem seeking,” it is “problem solving”!

CLOSING STATEMENT

John T. Parry

According to Professor Guiora, the United States and those acting on its behalf hold as many as 25,000 people suspected of involvement in activities defined in some way as “terrorist.” Our debate is about what to do with these people. Professor Guiora argues that hybrid courts are the best option. I agree that some innovation is warranted given the situation in which we find ourselves. That is to say, neither Professor Guiora nor I can do much about the often misguided policy choices that have produced the situation we both are trying to address.

Nonetheless, our proposals, both in the ways they overlap and in the ways they differ, offer more than ideas for getting out of a bad situation. They also reflect our views on those policy choices and the concerns that drove them. Professor Guiora, I think, is searching for a new set of structures to address what he sees as a new situation or challenge, one that does not fit into familiar criminal law or war models for deploying and restraining state violence. I am less convinced that the situation is so new or that new approaches are necessary. As a result, I would prefer to use traditional models as much as possible and to innovate only around the edges. In particular, I would rely as much as possible on criminal trials in Article III courts and save hybrid approaches for relatively rare cases. I worry that departing from familiar legal processes, and in particular creating hybrid courts of the kind Professor Guiora proposes, inevitably will bring too much of the war model into the mix.

Thus, although my version of a hybrid approach would mix criminal trials in Article III courts with military proceedings and preventive detention for some of the people currently in custody, my strong preference is for putting suspects on trial in Article III courts or releasing them (perhaps with conditions, monitoring, or surveillance). I am far less enthusiastic about military courts and detention. I include military courts in my proposal because I take seriously the concerns that Professor Guiora and others raise about Article III criminal trials. I include preventive detention because I take seriously the claims of government officials and policy makers that large numbers of people, including many of the people currently in detention, pose a serious risk of engaging in terrorist activities. It follows, for me, that military

courts and preventive detention should be available when those concerns and claims bear fruit; they should not be automatic or easy choices. That is why prosecutors should have to obtain permission from an Article III court to transfer a case to a military proceeding. Likewise, no one should be held in preventive detention without a real hearing at which the government bears the burden of proof, the prisoner has counsel, and appeal to a federal court is available. Indeed, I would not object to having the initial hearing itself in federal court. Meaningful periodic review that either takes place in federal court or is reviewable by federal courts should also be a requirement.

In his efforts to demonstrate that a hybrid domestic terror court provides a better way, Professor Guiora offers a series of criticisms to which I will attempt to respond. First, he seizes on my willingness to accept military courts and reiterates his claim that they are not a viable option. Again, I envision the use of military courts in rare cases, subject only to federal court approval and with full appeal rights to federal courts. Further, my goal was not to endorse the current military commission process that Congress approved in a rush following the Supreme Court's decision in *Hamdan v. Rumsfeld*, although it is certainly better than the previous version cooked up by the Bush administration alone. Nor do I think much of Brigadier General Hartmann's suggestion that information obtained by waterboarding could be admissible in a military commission proceeding. Military commissions should not be kangaroo courts.

Professor Guiora may be correct that any form of military commission will lack legitimacy. The Bush administration has made them an integral part of the capture-interrogate-detain pipeline, where both interrogation and detention are harsh and arbitrary at best, and where military commissions serve—or appear to serve—a legitimizing function rather than a checking function. Put more bluntly, in their current form and in the context of current policy, military commissions are a Potemkin village of process. A rational and effective policy for dealing with large numbers of suspected terrorists could employ military commissions, which is why they are part of my proposal, but that function may no longer be possible. Similarly, any other kind of military process may be equally as tainted.

Professor Guiora next raises the issue of classified information and suggests there is no need to risk disclosure of sensitive information because hybrid courts will provide a secure forum. The classified information concern is probably the most significant practical issue in the debate over bypassing Article III courts. And I should make clear my two-fold bias on this issue. First, I tend to believe that much classi-

fied information is simply not as sensitive as government officials claim, particularly not by the time it might be introduced into evidence at a criminal trial, which could be years after it was gathered. Second, I also suspect that reasonable people can resolve issues about classified information in a variety of ways, such as in camera hearings about admissibility and protection of information, the use of summaries and limited access, and even partial declassification. Compromises sometimes fail or fall apart, and people sometimes make mistakes, but those are not sufficient reasons, in my view, to abandon the Article III process entirely.

The next issue is spectacle. Here my claims are simple. I am not overly concerned about the dignity of the process so long as it is reasonably orderly and allows the presentation of issues and evidence in ways that assist fact-finders. If those things sometimes happen in an atmosphere of spectacle, so what? After all, the idea of the spectacular trial goes well beyond the often controllable shenanigans of criminal defendants. Nor are they simply “show” trials, as Professor Guiora suggests. To the contrary, Martha Umphrey has observed that spectacular trials mediate between formal and informal sources of law by providing “potential material for the articulation and elaboration of legal principle and procedure” and serving as “cultural texts for public consumption.” Martha Merrill Umphrey, *The Dialogics of Legal Meaning: Spectacular Trials, the Unwritten Law, and Narratives of Criminal Responsibility*, 33 LAW & SOC’Y REV. 393, 419-20 (1999). While that dynamic may not always be positive, defenders of transparency, democracy, and open societies can find a lot to like in the spectacle of the trial, even when it gets messy. When you hang your laundry out in public, people get to know a lot about you, both good and bad—but maybe that is the point.

Finally, Professor Guiora draws on his experience in Israel to reject the idea of preventive detention through administrative process. I agree we should avoid detention as a wholesale response to terrorism or consequence of counter-terrorist activities. I also agree that detention resulting from an administrative process is not ideal. That is why I want federal courts to be part of the process at least at the appeal stage, if not before, and why I would also make them part of a periodic review process. I would also urge policymakers to go a step further and place limits on the maximum amount of time a person may be detained. Detention for the duration of the “war on terror” is effectively a life sentence, and I do not support that kind of detention in the absence of a criminal conviction. Holding a person for a maximum of,

say, five years in decent conditions, by contrast, achieves protection against risk without destroying due process values. In other words, it strikes me as potentially a reasonable balance, which is what due process doctrine is all about (for better and for worse).

Although Professor Guiora objects to detention, his proposal is not very clear on the amount of time and money it would take to conduct domestic terror court trials of 25,000 people, not to mention what we do with them pending trial. Detention proceedings are likely to be less costly. The cost of holding people in a time-limited detention is also likely to be lower than imprisoning terror court convicts who presumably would receive long sentences. My point is not that cost and efficiency must carry the day—in my initial contribution I said they should not—but rather that they remain important factors.

The willingness to innovate and adopt hybrid approaches is admirable and important. In the context of trying suspected terrorists, however, I fear that Professor Guiora's solution raises more concerns than the problems he is trying to address. For that reason above all others, I prefer traditional approaches. If we are to make mistakes or run aground, better to do so in sight of land than in open and uncharted seas.

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