
Volume 42 | Issue 1

2009

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Recommended Citation

Glenn M. Sulmasy and Andrea K. Logman, *A Hybrid Court for a Hybrid War*, 42 Case W. Res. J. Int'l L. 299 (2009)
Available at: <https://scholarlycommons.law.case.edu/jil/vol42/iss1/15>

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A HYBRID COURT FOR A HYBRID WAR

Glenn M. Sulmasy* & Andrea K. Logman†

With the pending closure of the detention facility at Guantánamo Bay, Cuba, and the recent decision to try Khalid Sheikh Mohammad in the United States District Court for the Southern District of New York, many questions remain. One key decision is how to adjudicate detainees at the facility, and where they will be held once the facility is closed. Several options are being considered by the Obama Administration. Included among these are the continued use of the military commissions, as well as use of Article III courts. However, neither of these existing paradigms—the military law model or the law enforcement model, respectively—are properly equipped to appropriately strike the delicate balance of military law, intelligence needs, human rights obligations, and the need for justice in this hybrid war. A third approach—a court dedicated to hear cases of international terrorism—is needed: the National Security Court System (NSCS). Legislatively tailored to meet the unique nature of the current conflict, the NSCS not only would address the hybrid nature of this conflict, but would strike a needed balance between the competing interests of U.S. national security and our human rights obligations to the detainees.

I. INTRODUCTION

Over the past eight years, the military commissions originally ordered by President Bush in 2001, as well as the detention facility at the naval base at Guantánamo Bay, have come under immense scrutiny and criticism as a matter of law as well as policy. Once viewed as the beacon of human rights on the southeastern tip of communist Cuba, Guantánamo Bay has become a lightning rod of criticism both domestically and internationally. On January 22, 2009, President Obama, as promised in his election cam-

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paign, ordered the closure of the detention center in Guantánamo Bay to occur in one year.¹

The Congress, however, in a bi-partisan vote on the May 20, 2009, dealt the President's plan to close the facility a major setback by denying him the eighty-million dollars he had requested in order to close the facility.² On May 21, 2009, President Obama responded to the lack of political will for change and delivered an eloquent speech, "Protecting our Security and Our Values" at the National Archives.³ In the speech he outlined a multi-faceted approach for dealing with the detainees: (1) diplomatic repatriation; (2) use of federal courts to try some; (3) use of military commissions to try some; and (4) vaguely mention of another option for the seventy-five to one-hundred detainees who were, for various reasons, determined to be unable to have their cases tried in either the federal courts or by military commissions—presumably this was a placeholder for potential "indefinite detention."⁴

While the initiatives put forth by President Obama (and remain under active consideration) are a step in the right direction, it seems the administration needs to go a step further. Just as the nation has reacted and updated its response to 9/11 in so many other areas, it must do so in the legal arena as well. Strategically we have created the Department of Homeland Security, broken the "wall" between the CIA and FBI intelligence arms, and created the Director of National Intelligence. Tactically, we have applied the surge in Iraq—and now in Afghanistan—by using new methods to carry out the war(s). It seems logical that we now must update our legal regime to best meet the relatively new threat of international terror posed by al-Qaeda and likeminded affiliates.

As we continue to be mired in the same debates that have occurred since 9/11 about whether or not to apply either of the two prevailing paradigms—the law enforcement model or the law of war model—it is now clear to many that a pragmatic, politically acceptable new system to address the detainee issue is needed.

The unique nature of this conflict requires a unique disposition; not only is the war itself novel, but the al-Qaeda fighters are unique as

¹ Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 27, 2009).

² David M. Herszenhorn, *In Shift, Leaders Of Senate Reject Guantanamo Aid*, N.Y. TIMES, May 19, 2009, at A1, available at <http://www.nytimes.com/2009/05/20/us/politics/20detain.html>.

³ President Barack Obama, Speech at the National Archives Museum: Protecting Our Security and Our Values (May 21, 2009), available at http://futurefastforward.com/images/stories/featurearticles/Remarks_of_President_Barack_Obama.pdf.

⁴ *Id.*

well—neither warrior nor criminal.⁵ The detention and adjudication of these individuals needs to be similarly tailored to the current circumstances by utilizing a court that neither embraces the law enforcement model or the law of war model, but rather a hybrid of these two prevailing paradigms. The National Security Court System (NSCS) provides for the appropriate disposition of Guantánamo detainees called for in President Obama’s Executive Order and speech at the National Archives by addressing not only the detention concerns, but also provides a means for prompt adjudication of cases. This proposal provides a framework for the Obama administration to “further the national security and foreign policy interests of the United States and the interests of justice.”⁶

II. THE NEED FOR A NEW SYSTEM: A HYBRID WAR

Within the U.S., the two existing paradigms—the law enforcement model and the military law model—are not suited for the unique nature of the country’s current conflict. As mentioned earlier, using the existing Article III courts is not appropriate for confronting this relatively new threat of international terrorism. The military commissions, while initially employed in 2001 as the best means available for trying the detainees, now appear unworkable or unmanageable for dealing with the alleged al-Qaeda fighters.

Almost seven years after the attacks of 9/11, it is critical to move the debate on detention forward. To date, the advocacy has essentially been divided into two camps: (1) those who view the conflict with al-Qaeda as requiring a law enforcement response and thus civilian courts and the due process ordinarily accorded U.S. citizens; and (2) those who view the conflict as an armed conflict, believing the law of war paradigm to be appropriate for handling the detainees. Unfortunately, neither solution is working effectively. To say the least, this is an extremely difficult problem to address. This new armed conflict of the twenty-first century has shattered all previous notions of traditional warfare. Thus, neither paradigm fits neatly. Components of each paradigm are ideal to implement while others could never be successfully applied in the context of the al-Qaeda detainees.

The armed conflict we are fighting is truly a mix of law enforcement and warfare, and the al-Qaeda fighter is a mix of international criminal and traditional warrior. Viewing the conflict in this fashion—as a hybrid—both of the prevailing paradigms alone is ineffective as a framework for detention and prosecution. While military commissions are firmly grounded

⁵ See GLENN SULMASY, *THE NATIONAL SECURITY COURT SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR* 158 (2009).

⁶ Exec. Order No. 13,492, *supra* note 1, § 2(b).

in history, statute, and Supreme Court jurisprudence,⁷ they are not the most appropriate forum to address al-Qaeda for many reasons.

Taking into account the history of military commissions in wartime, as well as the use of federal courts to try terrorist cases throughout the latter half of the twentieth century, the proposed system described below offers a delicate mix of the two prevailing systems in order to achieve justice in the generational war most anticipate. Jim Benjamin and Rich Zabel have produced an excellent book supporting the use of civilian courts for trying terrorists for Human Rights First,⁸ but they have mainly concentrated on cases prior to the attacks of 9/11. The civilian courts alone cannot possibly, as it seems the Obama administration understands, adequately handle the al-Qaeda cases and still achieve the balance between national security and the rule of law. Just as solely using the military commissions has failed, the U.S. must resist the temptation for the pendulum to swing too far back in the other direction. The reality is that the military commissions and the civilian system have failed to best meet the needs of policy makers and the political branches. They are not equipped to properly strike the balance of military law, intelligence needs, human rights obligations, and the need for justice—both perceived and actual.

Critics of the military commissions and the detention of combatants at Guantánamo have increased dramatically over the past five years. Until 2008, we did not have a single prosecution in the seven years since the order establishing military commissions in 2001.⁹ Allegations about the harsh treatment of detainees in the detention center—such as the claim by Amnesty International in 2005 that Guantánamo is the “gulag of our time”—have had a major impact on how the commissions are viewed internationally.¹⁰ Reports that the detainees were tortured—particularly after the Abu Ghraib incident in Iraq—added to concerns of government leaders about Guantánamo both domestically and internationally. Greater focus was placed on the operations at the detention center by nongovernmental organizations, the media, and the U.S. government. Some of these allegations were accurate;

⁷ See SULMASY, *supra* note 5, at 164.

⁸ See JAMES J. BENJAMIN JR. & RICHARD B. ZABEL, *IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS* (May 2008). See also JAMES J. BENJAMIN JR. & RICHARD B. ZABEL, *IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 2009 UPDATE AND RECENT DEVELOPMENTS* (2009).

⁹ See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that the military commissions established by the Bush administration violate the Geneva Conventions and the Uniform Code of Military Justice).

¹⁰ AMNESTY INTERNATIONAL REPORT 2005, available at <http://www.amnesty.org/en/library/info/POL10/001/2005>; Irene Khan, Speech at Foreign Press Association (2005), available at <http://www.amnesty.org/en/library/info/POL10/014/2005>.

others were hyperbolic or exaggerated. Indeed, several of the more inflated allegations have been used as propaganda tools by al-Qaeda.¹¹

Regardless of whether the allegations have merit or are exaggerations, the impression gained by most people, both domestically and internationally, is that Guantánamo has been tainted and in many ways is irrevocably flawed as a matter of policy. Other studies by nongovernmental organizations have consistently claimed that detainees experience poor treatment, lawlessness, and even torture.¹²

III. THE NATIONAL SECURITY COURT SYSTEM

As discussed above, neither military commissions nor Article III courts are properly equipped to strike the delicate balance of military law, intelligence needs, human rights obligations, and the need for justice. Rather, a combination of the two paradigms, a NSCS, a court dedicated to hear cases of international terrorism, offers a reasonable, pragmatic solution out of the conundrum the Obama administration inherited. The system must function as one that achieves justice, attains deterrence, satisfies our human rights obligations, ensures civil liberties protections, maintains the support of our international partners, and gains national consensus.

The system created would be separate from existing Article III federal courts and the military commission process. These Article III hybrid courts would co-exist with the traditional federal courts and the military commissions, and the courts-martial system. “We already have specialized courts in the federal system of particularly complex issues requiring unique knowledge, including bankruptcy, patents, copyrights, taxation, and international trade. In short, we have ample precedent for a security-oriented court dedicated to complicated issues requiring the development of substantive and procedural expertise.”¹³ Taking into account the history of military

¹¹ See *Video from al Qaeda's No. 2 Slams Obama, Threatens Attacks*, CNN, October 5, 2009, <http://www.cnn.com/2009/WORLD/meast/10/05/mideast.al.qaeda.video/index.html> (quoting a video message from Ayman al-Zawahiri as stating “Obama claims to respect human rights and condemn torture I will not ask him about his decision not to release the detainee abuse photos and will not ask him about the program to hand over detainees to other countries to be tortured”) (last visited October 21, 2009).

¹² Deborah Pearlstein, *Advantage, Rule of Law*, AM. PROSPECT, June 30, 2006, available at http://www.prospect.org/cs/articles?article=advantage_rule_of_law. It should be noted that as of February 2009 a thirty-day review by the Obama administration has found that the detention facility itself is in conformity with the provisions of the Geneva Conventions. See Dep't of Def., *Review of Department Compliance with President's Executive Order on Detainee Conditions of Confinement*, at 4 (Feb. 2009), available at http://www.defenselink.mil/pubs/pdfs/REVIEW_OF_DEPARTMENT_COMPLIANCE_WITH_PRESIDENTS_EXECUTIVE_ORDER_ON_DETAINEE_CONDITIONS_OF_CONFINEMENTa.pdf.

¹³ Harvey Rishikof, *A National Security Court*, PROGRESSIVE POL'Y INST., Jan. 15, 2009, <http://www.ppionline.org/ndol/print/cfm?contentid=254869>.

commissions in wartime as well as the use of federal courts to try terrorist cases throughout the latter half of the twentieth century, the new system offers a delicate mix of the two prevailing systems in order to achieve justice in the generational war most anticipate.

A. Presumptively Adjudicatory

The NSCS would be a court of trials. It must be presumptively adjudicatory in order to ensure we properly support the rule of law. Contrary to proposals set forth by others,¹⁴ preventative detention is not part of this proposal. Although such proposals argue passionately for a preventative detention component to any such system, we strongly believe the system must be adjudicatory. The administration should resist making preventative detention part of its handling of the detainees for both those detained at Guantánamo Bay and Bagram, but also for those inevitable future captures in the conflict. To codify such a scheme would be to essentially bring the numerous Guantánamo Bay problems into the U.S. The presumption should be to try all detainees captured. For those detainees who the President or military determine cannot (or should not) be tried for various reasons must be reserved as the exception to the norm rather than being an integral part of any new system.

B. Civilian Oversight

The Department of Justice needs to be the lead agency overseeing the prosecutions within the NSCS. This shift in oversight from the Department of Defense to the Department of Justice will help remove some of the allegations of unlawful command influence (UCI) raised by both military defense counsel as well as the government prosecution team(s).¹⁵ It is critical that the Department of Defense no longer oversee the detention process. Having civilian oversight by Article III judges will send a strong signal of change.

¹⁴ See Jack L. Goldsmith & Neal Katyal, *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19. See, e.g., BEN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE WAR ON TERROR* (2008); ANDREW C. MCCARTHY, *WILLFUL BLINDNESS: A MEMOIR OF THE JIHAD* (2008).

¹⁵ See Morris D. Davis, *AWOL Military Justice*, L.A. TIMES, Dec. 10, 2007, available at <http://articles.latimes.com/2007/dec/10/news/OE-DAVIS10> (last visited October 21, 2009); Ross Tuttle, *Unlawful Influence at Gitmo*, THE NATION, March 28, 2008, <http://www.thenation.com/doc/20090414/tuttle> (last visited October 21, 2009).

C. *Jurisdiction*

The NSCS will have jurisdiction over citizens and noncitizens alike. Similar to the Katyal-Goldsmith model,¹⁶ it is important for the system to not distinguish between citizen and noncitizen when handling alleged al-Qaeda fighters. If the court system is properly constructed by Congress, the need for any distinction should not be necessary. The NSCS will incorporate sufficient due process to satisfy any constitutional concerns. Since preventive detention is not part of the NSCS, the alleged terrorists, regardless of citizenship, will be tried in rapid fashion. Any decreased expectation of constitutional protections would likely be *de minimus*.

Ensuring that the NSCS retains jurisdiction over citizens and noncitizens alike removes the unintended inequality that alleged U.S. citizen al-Qaeda fighters would have greater rights than al-Qaeda fighters from other nations. For example, suppose two suspected al-Qaeda members' communications are intercepted by U.S. intelligence agents. One suspected al-Qaeda member is a U.S. citizen and the other Canadian. The intercept reveals that the two suspects are conspiring to plant explosives in and around the White House and are assisting in coordinating assassinations of key members of the administration staff. Under the existing process, the U.S. citizen would be granted full access to U.S. courts of justice while the Canadian would be subject to the NSCS. This seems unintentionally unfair. Worse yet, envision the ramifications internationally if a Yemeni and a U.S. citizen were involved in a situation similar to the one presented above. To avoid such inequity, NSCS jurisdiction should extend to both citizens and noncitizens regardless of nationality.

Similarly, legislation creating the NSCS should be clear that persons subject to the court, regardless of citizenship, are those alleged to be current or former members of al-Qaeda or affiliated groups that engaged or plan to engage in acts of international terrorism. Congress needs to clarify that the NSCS's jurisdiction does not cover "any terrorist," but only those who engage in international terrorism. This removes the fear of some that the court would have jurisdiction over any group or entity that engages in terrorism. The limited jurisdiction of the NSCS would serve as a check on any arbitrary use of the court system.

D. *Judges*

The NSCS has life-tenured Article III judges with law of armed conflict expertise to preside over the trials. The judges will be appointed by the President with the advice and consent of the Senate in the same manner that all federal judges are appointed. As with all Article III judges, this en-

¹⁶ See Goldsmith & Katyal, *supra* note 14.

sures that the specialized court is composed of different jurisprudential philosophies depending upon the President in office. These judges, however, will be expected to possess the educational background necessary to determine the legality of intelligence gathering, terrorist surveillance, and other necessary areas in the field of terrorism and national security. Several scholars advocating against judicial intervention in the war correctly note that those who are making such decisions now are not necessarily versed in this unique area of the law.¹⁷ As Andy McCarthy has noted, judges hearing cases within the existing federal criminal justice system:

Tend to elevate individual rights at the expense of public safety (which is to say, at the expense of the public's collective rights). When opportunities for creativity present themselves—which frequently happens due to a pervasive elasticity in the rules governing judicial proceedings, over which judges have a degree of supervisory authority—judges are hard wired to err on the side of providing more process.¹⁸

This is completely appropriate for the criminal justice system in which the stakes are not nearly as high as within the national security arena. Specific deterrence in a national security context, however, is often essential in protecting the citizenry. Congress, when drafting the legislation for the court, must be specific as to the importance of the system as well as the limited authority of the court. As McCarthy and Velshi note, the legislation needs to limit the creativity of the court.¹⁹

There will be nine judges at any given time assigned to the court. As a result of the inordinate amount of resources needed and problems with empanelling a jury, bench trials would be the only option available to adjudicate the cases against the alleged war criminals. Juries, in many ways unmanageable in the national security context, will not be available to the accused. Empanelling a “jury of peers” for international terrorists is impractical and unlikely. The proceedings will have three-judge panels, and the system envisions two panels available or operating at any given time. In order to convict, a simple majority will be required (two to one) and unanimity of the panel will be necessary for any capital cases brought by the prosecution. The three judges “out of the court rotation” will be used for all habeas appeals which will remain confined within the national security court system apparatus. Additionally, such special judges will be used for Foreign Intelligence Surveillance Act (FISA) warrant applications. The duties of the judges would include the following: (1) the judges would have

¹⁷ See John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 587–91 (2005).

¹⁸ Andrew C. McCarthy & Alykhan Velshi, *Outsourcing American Law: We Need a National Security Court* 30 (Am. Enter. Inst. for Pub. Policy Research, Working Paper No. 156, 2009), available at www.aei.org/paper/100038.

¹⁹ *Id.*

oversight of the trials; (2) single-judge panels, when in rotation, would hear habeas petitions; (3) the judges would have oversight of the detention and any legal issues arising or emerging from such detentions; (4) the three judges not in the trial rotation would handle all issues surrounding FISA applications/warrants and serve on the FISA court; and (5) the judges would hear any cases or trials determined initially by the D.C. Federal District Court to be of a national security nature and that deal with issues of the war with al-Qaeda or other international terrorist organizations.

Other proposals for security courts argue against civilian judicial involvement in the proceedings. They argue that such involvement will limit the effectiveness of the Commander-in-Chief during war operations.²⁰ Whether one agrees or disagrees about having civilian judges in this process, the nature of this war seems to necessitate some form of judicial intervention more than has been custom or standard in previous U.S. military war and operations. The strictly military law system (UCMJ courts-martial or the military commissions) or many of the antiquated norms expressed in the Geneva Conventions or the ever-evolving customary international law do not necessarily apply to the cases against al-Qaeda fighters. The key is to balance, and legislatively guide, national security judges to equate justice in this arena as distinct from that of military criminal law or ordinary federal courts. The stakes in the national security courts are much greater than they are in standard federal courts. As it is currently constructed, the existing system allows for judges who have no background in warfare or national security to intervene, hear, and decide cases when they have little or no understanding of the issues which are beyond the scope of the judges' expertise.²¹ The legislation creating the NSCS must be specific and make clear to the judges that the NSCS is not an ordinary criminal court and, as such, the judges should refrain from making analogies to the civilian system in deciding their cases. The threat we face demands these enhanced requirements for specialized judges on this specialized court.

E. Prosecution Team

Prosecutors assigned by the Department of Justice National Security Division would represent the government and exercise prosecutorial discretion over whether to proceed in cases. Direct supervision of the NSCS would be conducted by the chief, Criminal Division of the Department of Justice and ultimately the Associate Attorney General of the U.S. The pow-

²⁰ See, e.g., John Yoo, *The KSM Trial Will be an Intelligence Bonanza for al Qaeda*, WALL ST. J., Nov. 16, 2009, at A23, available at <http://online.wsj.com/article/SB20001424052748704431804574537370665832850.html>.

²¹ See *Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981) (overruling a three-judge panel and deferring to Congress' judgment regarding military decisions).

ers of these prosecutors, as in other nations that employ separate systems of justice for detaining and prosecuting terrorists would be great, but the prosecutors would still operate under the ethical rules governing all U.S. attorneys. Different from other security courts implemented in foreign nations during the later part of the twentieth century, such as those used in France, their powers would not be unlimited and they would certainly not serve as judges.

Moving to a Department of Justice sponsored system helps guarantee that seasoned civilian practitioners would carry these vital caseloads. Active duty military Judge Advocates (JAGs), however, would still be assigned—or what is known as being “detailed” in military parlance—to the court system to provide their expertise, particularly in military matters and the law of armed conflict, to the Department of Justice lawyers conducting these prosecutions. This has already begun, as the Hamdan military commission had Department of Justice lawyers working alongside the active duty military lawyers. This should become the norm in the NSCS.

F. Defense Team

Active duty JAGs would serve as government-provided defense counsel. This group would be similar to those provided for the detainees in the military commissions. The JAGs would be made available by the Department of Homeland Security²² and the Department of Defense. Initially, a pool of ten JAGs would serve on defense teams. If desired, the accused may employ, at his expense, civilian counsel as long as the civilian counsel has requisite classified document clearance. In being able to access civilian counsel (as is currently the case) the defense can secure some of the best legal minds and litigators in the country, if desired. The funds to support civilian counsel would likely be generated by NGOs, advocacy groups, and philanthropists interested in supporting a fair trial. In the spring of 2008, a fund such as this emerged known as the John Adams fund.²³ Its specific intention is to ensure adequate representation for the five high-value detainees held, and in June 2008 arraigned, at Guantánamo.²⁴ Also, the government should provide additional funds to the defense team to ensure access to civilian counsel. Affording such opportunities ensures alleged interna-

²² The U.S. Coast Guard is one of the five armed services and its lawyers are Judge Advocates. It is the only armed service not within the Department of Defense. The U.S. Coast Guard falls under the Department of Homeland Security.

²³ The John Adams Project is a fund/program created and jointly run by the ACLU and the National Association of Defense Lawyers. It was formally launched on April 3, 2008. It is intended to assist the detainees in Guantánamo Bay by providing funds and support for defense counsel representing the accused. See <http://www.aclu.org/safefree/detention/johnadams.html>.

²⁴ See *id.*

tional terrorists with a defense team more than capable of handling their cases. Further, this would help satisfy some of the international concern about any perceived lack of adequate representation. The international community often refers to the military commissions as “shams.”²⁵ In part, this is because they strongly believe the “trials” are heavily weighted against the accused.²⁶ The NSCS again would respond to those concerns by ensuring that the top civilian lawyers could be retained by the accused.

G. *Presumptively Open Trials*

The NSCS will conduct open hearings. However, as a result of the sensitive nature of intelligence gathering (means and methods employed) as well as the desire to ensure that such hearings do not become propaganda tools for the enemy,²⁷ NSCS judges would be permitted to close the proceedings to the public when necessary. Statements, evidence, witness testimony, and other courtroom activity could all be exploited by the enemy for future attacks. Certainly, it is important to maintain the openness of our procedures and to showcase the NSCS’s benefits. However, when drafting the proposed legislation, Congress cannot be blind to the potential ramifications of complete transparency or “openness.” Naïveté will be no excuse for facilitating the next attacks on U.S. soil. As Judge Posner has astutely noted, adherence to our constitution is not a suicide pact.²⁸ This need to ensure that the trials could be closed at times is not to create a “star chamber,” expand executive power, or to exert the State Secrets Doctrine into areas where it was never intended to be used,²⁹ but rather to protect the military members and government agents fighting in the ongoing armed conflict against al-Qaeda.

A frightening example of the potential harm in keeping the courts open occurred when the “blind sheik” Omar Abdel Rahman was tried in the U.S. District Court for the Southern District of New York for his participation in the 1993 World Trade Center bombing. The prosecution team, in the

²⁵ See Cynthia Banham, *Amnesty Attacks Hicks Trial as Sham Justice*, SPRING MORNING HERALD, Feb. 15, 2005, available at <http://www.smh.com.au/news/Global-Terrorism/Amnesty-attacks-Hicks-trial-as-sham-justice/2005/02/14/1108229936602.html#> (describing the Guantanamo Bay Military commissions as a “broken process”) (last visited Oct. 21, 2009).

²⁶ See *id.*

²⁷ See JOHN C. YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT ON THE WAR ON TERROR* 198 (2006) (“Abu Ghraib has become a propaganda bonanza for America’s enemies and critics . . .”).

²⁸ See generally RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006).

²⁹ See Louis Fisher, *State Your Secrets*, LEGAL TIMES, June 26, 2006, available at <http://www.pogoarchives.org/m/gp/gp-Fisher-06262006.pdf>.

federal civilian court, complied with ordinary rules of discovery and turned over two-hundred possible co-conspirators.³⁰ Within days, this detailed account of which entities the U.S. law enforcement were pursuing and why they were thought to be affiliated with al-Qaeda was produced and shared with the defense team. It was, essentially, a blueprint of U.S. counterterrorism operations. Without question, national security officials throughout the country were concerned. We later found out, within days of being turned over to the defense legal team, that the entire list was in bin Laden's hands. He was able to see who had yet to be discovered as part of the al-Qaeda network. Certainly such knowledge impacts the national security of the U.S. Further, the information could be studied by al-Qaeda to determine important aspects of U.S. counterterrorism activities: who might be "leaking" al-Qaeda information; current trends of the CIA and FBI intelligence collection programs; informants' names and addresses; and other critical, sensitive means of gathering intelligence.

Congress should be mindful of these considerations when drafting the new legislation. The NSCS statute should offer specific lists and guidelines detailing when judges are permitted to close the trials. Such legislation detailing when the trials can be closed by the judges should include (1) the court's discussion of specifics on the means and methods of intelligence collection; (2) the risk of mentioning nations involved in supporting U.S. efforts at combating terrorism; (3) identification of informants; (4) information that would impact ongoing military operations or covert intelligence operations; and (5) other items deemed by the court to be of such a sensitive nature as to overcome the Western legal tradition's time-honored presumption of an open court for trials.

Another legitimate concern of an open court can be the use of the courtroom as a propaganda platform for al-Qaeda. In addition to the case in the trials of the perpetrators of the World Trade Center bombings in 1993 and the Moussaoui case,³¹ such antics have been employed most recently during the arraignments of the five al-Qaeda members suspected of coordinating, plotting, or planning the attacks on 9/11, including Khalid Sheik Mohammad.³² As distasteful and harmful as it may be, this outrageous behavior should generally be permitted within the NSCS. Open access to the media and the public should remain as much as practicable. The presiding judge, however, shall be granted liberal discretion to limit such use of the court's resources for actions that are deemed, by the judge, as nothing more

³⁰ See generally MCCARTHY, *supra* note 14, at 41–50; McCarthy & Velshi, *supra* note 18, at 3.

³¹ See YOO, *supra* note 27, at xi, 128.

³² See Michael Isikoff & Mark Hosenball, *Disorder in the Court: Inside the Gitmo Arraignment of Khalid Sheikh Mohammed*, NEWSWEEK, June 5, 2008, available at <http://www.newsweek.com/id/140159>.

than propaganda. This diminution of the accused rights is so *de minimus* as to not impact the proceedings or his due process rights but rather to ensure that the courtroom does not become a circus.

It is critical to note that even when the NSCS judge determines that the court must be closed for security reasons, some outside observers will still be permitted to attend and observe. This is important for both appearance and reality. Such “observers” will include representatives from several appointed NGOs (Amnesty International, Human Rights Watch, Human Rights First), representatives from the U.N., and select members of the media to ensure the fairness of the trial and to witness the procedural protections expected of a nation dedicated to upholding the rule of law. Each observer, however, would have to maintain appropriate security clearance prior to the trial’s commencement. At any point during the trial, if the judge believes the conduct of the “observers” during or after the trial goes beyond the authority to “observe,” the judge will have the authority to remove such an observer from the trial. The legislation will mandate that ten “observers” may attend the closed session: three from NGOs, three from the U.N., and four from the media. Keeping observers in the courtroom, even during closed sessions, will ensure that there is outside oversight of the process and will validate the proceedings as in conformity with our human rights obligations. Within the U.S. and internationally, such transparency will be critical to support these trials and the NSCS.

H. Detention on Military Bases Within the U.S.

The detention and trials of alleged terrorists will be conducted on military bases located within the continental U.S. This move would help satisfy most Congressional concerns and ensure the closing of Guantánamo once and for all. To some, the holding in *Boumediene*³³ was officially the beginning of the end of Guantánamo as a detention center in the war on al-Qaeda. Even avid supporters of military commissions conceded that the commissions were now doomed. Former Assistant Secretary of Defense for Detainee Affairs, and current Fellow at the Heritage Foundation Cully Stimson, declared, “This signals the end of Gitmo.”³⁴ We strongly agree. Important to U.S. foreign policy, the closing of the camp will have major significance to the world. Correctly or incorrectly, over the past seven years the base has come to signify the alleged evils of the U.S.-led war on terror. Combined with Abu Ghraib, the public relations damage caused by allegation of human rights abuse at Guantánamo has tainted U.S. efforts there

³³ See 128 S. Ct. 2229 (2008).

³⁴ See Michael Abramowitz, *Critics Study Possible Limits to Habeas Corpus Ruling*, WASH. POST, June 14, 2008, at A5 (discussing Cully Simon’s assertion that Guantánamo Bay will close).

permanently. That, coupled with the realities of new Supreme Court precedence, makes the need for using some facility within the continental U.S. more logical. However, the political realities of using civilian prisons for detention of these prisoners must be measured as well. As discussed earlier, although there has been harsh criticism by many in Congress about Guantánamo and the commissions, we have witnessed great bi-partisan pushback by many of our policy makers against having these alleged terrorists brought back to main street U.S.A. The not-in-my-backyard syndrome will be in full swing. The U.S. electorate, even with its vast compassion and concern for fairness and justice, remains on high alert for future terrorist attacks. It is likely that many citizens would not be pleased with having alleged al-Qaeda fighters in their local federal prisons. Politically, in most parts of the country relocating the al-Qaeda fighters to cells where they would be mixed in with ordinary criminals will give pause to a number of members of Congress. It is unlikely that many politicians running for office will fight to bring the detainees into their own districts. However, bringing al-Qaeda fighters into military brigs on protected U.S. military bases should be more palatable to both the policy makers and the electorate. Although some still contend that the best scenario remains sending many of the detainees back to their countries of origin for prosecution, recent diplomatic efforts has shown that most of these countries will not accept them.³⁵

Furthermore, as leaders in this fight against international terrorism, it is the duty of the U.S. to take responsibility and try these detainees. Select military bases will be used as detention centers and the military courtrooms located on the base will be used for the actual prosecution. Military bases are ideal for several reasons: (1) They are secure; (2) there is room to house the detainees; (3) the professional military can oversee the detentions; (4) using military bases captures and reaffirms the notion that these are war criminals; (5) the military base can provide adequate safety for the civilian judges as they perform their work; and (6) using military bases will appropriately limit the access of those interested in attending the proceedings. This would keep the detainees held in a location that is secure (similar to the stated rationale for holding the al-Qaeda suspects at Guantánamo) but will incur less of the controversy associated with the U.S. holding citizens of other nations at a remote location. This would, in part, also remove some of the international concerns about the detention center having been previously located in Guantánamo. Under the NSCS, the detainees will now be located on U.S. soil. In using the military bases, the thousands of unlawful belligerents held in Afghanistan, and Iraq, could be brought to these bases to be

³⁵ See, e.g., Tarah Park, *Australia Officially Rejects US Request to Accept Guantanamo Detainees*, JURIST, January 4, 2009, <http://jurist.law.pitt.edu/paperchase/2009/01/australia-officially-rejects-us-request.php>.

detained and tried both now and in the future. Under the NSCS, alleged and convicted U.S. military criminals will be held at the same location as the international terrorist. Locating the alleged al-Qaeda fighters within the U.S. will answer myriad allegations of arbitrary treatment, and even suggestions of torture of the detainees will likely be mitigated. Such steps forward, in and of themselves, will help to reduce some international cynicism of U.S. intentions and actions regarding the detainees. Without question, sections of the brigades would have to be separated for only those convicted by the NSCS. Doing so would be for the safety of our own armed forces, but it would also distinguish the war criminals from ordinary military criminals. Keeping unlawful combatants or even POWs on a military base but separated from ordinary military criminals has been the practice in ordinary armed conflict for generations.

Military brigades are the most appropriate place to detain accused terrorists because they are secure and afford the same protection against abuse given to convicted U.S. service members who are tried, convicted, and sentenced under the UCMJ by courts-martial. Using military brigades is also a subtle reminder that this is a war and that the al-Qaeda fighter is a military detainee. Unquestionably, having the detainees alongside members of the U.S. military will go a long way toward reducing international concerns of torture and unfair tribunals. In doing so, some of the negative images of U.S. soldiers fostered by the events at Abu Grahیب, and the legitimate criticism following, are likely to be mitigated. Additionally, keeping the detainees within our nation provides an additional appearance of process and certainly removes much of the taint of having held the detainees in the base at Guantánamo for the past seven years. Locations such as Fort Leavenworth in Kansas seem appropriate as places to detain, try, and imprison persons accused of engaging in international terror. Since *Eisenstrager* has been essentially overruled by recent cases,³⁶ the extraterritoriality needs are no longer applicable and, in essence, are moot. Guantánamo, as a detention facility, must close.³⁷

I. Procedure, Evidence, and Burden of Proof

As in any proposed legislation, many changes are likely to occur during the ordinary legislative process. This is particularly so when Congress begins wrestling with many of the minute details of the NSCS procedure and evidence. It is recommended that the proposed legislation adopt virtually all procedural aspects of the Military Commissions Act of 2006 (MCA).³⁸ The rights afforded within the MCA greatly exceed those of most

³⁶ See *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

³⁷ See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

³⁸ Pub. L. No. 109-366, 120 Stat. 2600.

nations and virtually all international tribunals, including the International Criminal Court (ICC) codified in the Rome Statute. There will be five critical areas of distinction: (1) habeas appeals will be permitted but different from what was mandated in *Boumediene*; (2) the death penalty sentencing provisions will be altered; (3) there will be a right of interlocutory appeal at any point in the proceeding allowing the prosecution to challenge any court order regarding evidence, to be available if the judge deviates from the legislatively adopted rules of the new court;³⁹ (4) the appellate structure will be tailored specifically to the National Security Court System; and (5) statements obtained in violation of the Convention against Torture, the Army Field Manual, or Federal Law will be inadmissible.

The right to determine the status and propriety of detention are at the heart of Western traditions of law. Although it is critical to distinguish war criminals from ordinary criminals, there still must be some form of right for the detainees to challenge their detention. Contrary to many critics' assertions, there was a mechanism in place within the MCA. This mechanism was not the traditional habeas proceeding, but it did allow the detainees to challenge their detention. Prior to the *Boumediene* decision, the Detainee Treatment Act (DTA) of 2005 applied a two-level review process—the military review of the detention annually known as the Combat Status Review Tribunals (CSRTs), and, when appropriate, review by the D.C. Circuit (the second highest court in the land). *Boumediene* placed civilian judges into a position with oversight of military detention. Within the civilian law context, this is reasonable. However, during armed conflict such a decision can have major impacts on the security of the U.S.⁴⁰ It seems to me the Court was legitimately concerned about the process at Guantánamo and, as Justice Souter noted in his thoughtful and impassioned concurrence, the length of time the detainees have been in custody without charges.⁴¹ However, the Supreme Court may have overreacted to these perceived injustices. The Supreme Court has now formally given greater due process rights to the detainees than would be afforded to prisoners of war under the Geneva Conventions.⁴² This is simply not the best means to ensure the legality of the detainees' detention. The NSCS will ameliorate these suggested weaknesses contained within the Supreme Court's holding. The NSCS ensures a habeas corpus hearing is held before a civilian Article III federal judge but without necessarily granting constitutional rights to noncitizens captured outside the U.S. The system, once again, captures the middle ground.

³⁹ McCarthy & Velshi, *supra* note 18, at 32.

⁴⁰ See *Boumediene v. Bush*, 128 S. Ct. 2229, 2291 (2008) (Thomas, J., dissenting).

⁴¹ *Id.* at 2278 (Souter, J., concurring).

⁴² See Geneva Convention Relative to the Treatment of Prisoners of War arts. 98–107, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

The National Security Judge, an impartial and detached magistrate (not in the in the trial rotation) would conduct the habeas hearings with military JAGs representing the government as well as the detainees. The strength of this process is that it includes the military's input and can be seen as overt recognition that this is a war requiring military expertise while still retaining civilian oversight of the process. This will respond, to some degree, to the recent concerns about habeas corpus rights for detainees while still remaining faithful to the Supreme Court's ruling in *Boumediene*.

The three-judge panels in the trials will use the "beyond a reasonable doubt" standard and require a two-thirds majority of the judges to convict any alleged detainee. Unanimity of the three judges will be required only for capital cases. The evidentiary standards will also be diminished from standard, civilian prosecutions—or military courts-martial for that matter. The NSCS offers the detainee great process and protections but, necessarily, a decreased expectation of the process ordinarily afforded U.S. citizens. No detainee should, by virtue of his or her status, have traditional U.S. constitutional rights attach. Specifically, the Fourth and Fifth Amendment rights so precious within our judicial system must necessarily be reduced in significance or removed altogether in the NSCS. To do otherwise would be to ensure acquittals in virtually all cases against the detainees. As some scholars have suggested, such actions would be absurd.⁴³ However, if al-Qaeda suspects are searched or questioned on U.S. territory and are U.S. citizens, such protections would still exist, although at a reduced level. The exclusionary rule (excluding evidence from being considered by a court when constitutional violations have occurred in obtaining it), which is court created and not necessarily envisaged by the Constitution per se, would not be applicable within the NSCS. To permit application of the exclusionary rule would undoubtedly wreak havoc on the proper adjudication of the detainees. The NSCS permits reasonable accommodations without unintentionally reducing standard constitutional protections afforded citizens of the U.S.

A "speedy trial" rule will be part of the NSCS. Again, the national security court system we propose would be presumptively adjudicatory while still providing sufficient opportunity for intelligence professionals to do their jobs and glean valuable, current information from those detained. Distinguishing the system from the military commissions and other proposals for a new security court, rules will regulate both the length of time before detainees are charged and the time required for commencement of a trial. The NSCS requires all detainees, from point of capture, to be charged

⁴³ Ruth Wedgwood, Op-Ed., *The Case for Military Tribunals*, WALL ST. J., Dec. 3, 2001, at A18. See also Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. REV., 329–37 (2002).

within three months. Further, all trials must be initiated within one year from the date of being charged. In this way, the system permits legitimate, lawful interrogation of suspects over a period of time but does not permit indefinite detention. It accounts for the needs of intelligence professionals and also promotes the rule of law.

J. Appeals

Appeals of decisions made by the NSCS shall be heard by the D.C. Circuit Court of Appeals and ultimately the Supreme Court. Deference shall be accorded to the holding of the NSCS in all cases that come before the D.C. Circuit Court. The cases, obviously, will not be tried *de novo* but will be based upon errors committed in applying the national security court legislation.

An alternative appeals process, if properly constructed, could utilize some of the already existing military law appellate courts. The first level of review of national security cases could be the already existing Courts of Appeals of the Armed Forces (CAAF).⁴⁴ This limited right of appeal would ensure that the cases were heard by an outside panel of judges well-versed in military law and the laws of war and who have some background in the procedural nuances of national security law. Appellate counsel would be provided by the Air Force, Coast Guard, Navy, Marine Corps, and Army. However, the CAAF judges are currently Article I judges. These judges are not life tenured, are created out of Article I of the Constitution, serve for specified periods of time (in the case of the CAAF judges, fifteen years), and are not viewed with the same prestige as Article III judges. Thus, if Congress embraces this alternative appeals process, it would have to ensure that the CAAF judges are reconstituted as Article III judges (those federal judges who are created out of the judicial branch, or the third article of the Constitution) with life tenure within any proposed legislation. In doing so, this alternative appeals process would make the CAAF the first level of review, the D.C. Circuit as the second level of review, and the Supreme Court as the court of last resort after a proper *writ of certiorari* has been issued.

K. Death Penalty

To make the death penalty acceptable to our international partners, the system envisions modifying the existing federal rules regarding it. Under this system, the death penalty would still be an authorized punishment, but only if the accused is a citizen of a country where such punishment is

⁴⁴ Currently, the Court of Appeals of the Armed Forces uses Article I judges who are the second layer of review for military appeals. They are an all-civilian panel that provides the necessary "check" from problems inherent within the military system as discussed herein.

authorized. For example, if a citizen of Great Britain is detained, life in prison would be the highest level of punishment authorized. Since the death penalty is viewed as a human rights violation within the European Union (EU), it is important in this global conflict to maintain support from our traditional allies.⁴⁵ One way of ensuring support would be to recognize the expectations and rights of citizens of other nations. The unique nature of this war demands that we be overtly conscious that the enemy we fight is not from one or two nations as in traditional armed conflict. Many detainees are from nations that are allies of the U.S. Every effort should be made not to alienate such allies and their citizens from the ongoing, generational struggle. Overt gestures such as the modification of the death penalty standard within the NSCS are not “the solution” but rather one step toward healing wounds incurred in relationships over the past seven years.

Even if deemed applicable in a particular case, the death penalty would be authorized only in those cases deemed sufficiently egregious to warrant it and those that severely impact the national security of the U.S. Certain aggravating factors would have to be developed and codified by Congress to distinguish between what cases are appropriate for life sentence and what could merit capital punishment. Recognizing that this would still cause concern among our European and other international colleagues, this proposal certainly requires further elaboration by the Congress and the White House prior to implementation.

L. Sunset Provisions

A legitimate concern of those opposed to such a court is the potential for abuse. In order to ensure that the system is working as intended, as well as not being abused by any future administration, the legislation creating the court must have a five year sunset provision. This is reasonable, and appears necessary to ensure prevention of any excess or perhaps a reduction in the need for this specialized court.

IV. THE WAY AHEAD

Prior to the anticipated closure of the Guantánamo Bay Detention Facility on January 22, 2010 many questions remain. To date, no decision has been made regarding the transfer of the detainees. In August 2009 it was reported that the Obama Administration is reviewing a proposal that would

⁴⁵ The European Union is strongly opposed to the death penalty and has become increasingly alarmed at the number of cases occurring in America. *See* Universal Declaration of Human Rights art. 3, G.A. Res 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) (“Everyone has the right to life . . .”).

bring the detainees to U.S. soil.⁴⁶ The reported proposal would transfer Guantánamo detainees to a U.S. federal prison facility, would allow for prosecution of detainees in either federal criminal courts or under military commissions, would co-locate a court facility with the prison facility, and would allow for preventive detention of detainees considered a threat to U.S. security interests.⁴⁷ The potential transfer of detainees to U.S. facilities is raising public concern and many in Congress have publicly resisted this notion.⁴⁸

This potential forum shopping is also problematic, sets a dangerous precedent, and will likely lead, if implemented, to numerous defense challenges. It is, however, a recognition of the hybrid nature of this war with al-Qaeda. There must be a dedicated process and forum for addressing the detention and adjudication of the detainees. Congress has made it clear that it will not approve the requested funding for transfer of prisoners from Guantánamo until there is a definite plan in place.

The NSCS is fundamentally a balance and a reasonable accommodation of many competing legal and policy interests. It is structured upon the foundations of the U.S. understanding of the rule of law. The NSCS exceeds the standards of most requirements of international law and embraces human rights by ensuring that the dignity of each alleged detainee is maintained. It is an outgrowth—or an evolution—of the military commissions. It provides the answer for policy makers to get us out of the quicksand we find ourselves in regarding detainees. We have been attempting to force the civilian justice model or the military justice model onto a new entity—the al-Qaeda fighter. Neither will work. The proposed system provides a delicate balance between the competing interests of U.S. national security and our human rights obligations to the detainees. The NSCS provides an adjudicatory system of justice that will answer the needs of policy makers for years to come. We simply cannot remain mired in the ways of the past or the ideals of our generation, but rather must step forward with pragmatic idealism as our guide and promote the rule of law while bringing unlawful combatants to justice.

⁴⁶ Lara Jakes, *Yemeni at Guantánamo: Prisoner Without a Country*, ABC NEWS, Aug. 2, 2009, available at <http://abcnews.go.com/Politics/wireStory?id=8233003>; Lara Jakes, *Administration May Set Up Military-Civilian Prison to Hold Guantánamo Inmates*, ABC NEWS, Aug. 2, 2009, <http://abcnews.go.com/Politics/wireStory?id=8232290>.

⁴⁷ See, e.g., Jakes, *Yemeni at Guantánamo: Prisoner Without a Country*, *supra* note 46.

⁴⁸ See, e.g., Ewen MacAskill, *White House Confirms Guantánamo Detainees May Go to Michigan or Kansas*, GUARDIAN ONLINE, Aug. 3, 2009, <http://www.guardian.co.uk/world/2009/aug/03/guantanamo-detainees-fort-leavenworth-michigan> (stating that “[Obama] is finding [closing Guantánamo] harder than initially anticipated and has met resistance from members of Congress opposed to having inmates transferred to their states, citing fears this make their states magnets for a terrorist attack.”) (last visited October 21, 2009).

The NSCS offers the U.S. and the Obama administration a “way out” of the Guantánamo fiasco.⁴⁹ The existing military law tribunal system is simply not meeting the needs of the nation or the West as we battle international terror. Similarly, the current federal civilian courts are not the appropriate forum for adjudicating “war crimes” either. The convergence of law enforcement and warfare embodied in the war on al-Qaeda presents new dilemmas and confusion for nations determining which scheme or system to employ. The situation is unprecedented. Not only is the war itself novel, but the al-Qaeda fighters are unique—neither warrior nor criminal. They commit, or conspire to commit, acts of international terror and other actions on a massive scale, seeking nothing less than the complete destruction of Western civilization. They do not wear uniforms, they do not carry weapons openly, they have no emblems that distinguish them as members of an organized army, and they flout the law of armed conflict as part of their established doctrine.⁵⁰ This routinely unlawful belligerency increases the level of threat these international terrorists pose to the world community and makes classification of their status extraordinarily difficult. Regulating their activities and trying the individuals in an appropriate forum has been confusing at best. Policy makers need a third way to adjudicate war crimes committed by these illegal combatants that will be supported, at least to some degree, by the international community. The NSCS is a legal system based upon this philosophy.

If properly constructed, the NSCS will help this country begin to regain its position of moral authority in world affairs. At the minimum, it will bolster national and international support for the U.S. which has eroded over the past few years. It would be a fresh start and one that demonstrates the country’s recognition that changes in how we fight our war on al-Qaeda are necessary. This new system would provide real justice, as well as the appearance of enhanced justice, to the detainees and resilience to an adjudication process that has been admittedly unsuccessful.

⁴⁹ See Glenn M. Sulmasy, *The Legal Landscape after Hamdan: The Creation of Homeland Security Courts*, 13 NEW ENG. INT’L & COMP. L. 10 (2006). See also Glenn Sulmasy, *Redeeming Gitmo*, NAT’L REV. ONLINE, July 28, 2005, <http://www.nationalreview.com/comment/sulmasy200507280838.asp> (last visited October 21, 2009).

⁵⁰ See al-Qaeda Training Manual, available at www.usdoj.gov/ag/manualpart1_1.pdf. See also Hassan Mneimneh & Kanan Makiya, *Manual for a Raid*, 49 N.Y. TIMES REV. BOOKS, Jan. 17, 2002, at 18, 20.