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The Need for a National Security Court System

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THE NEED FOR A NATIONAL SECURITY COURT SYSTEM

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Thank you Professor, and special thanks to the Journal as well as Chris Borgen for his kind invitation to have me here to speak – and to his expert organization of this conference. The use of military commissions in the war on al Qaeda has been, to say the least, unsuccessful and disastrous as a matter of policy. Although some now advocate for the use of the Article III court system to try terror suspects, such a policy would be equally unsuccessful and potentially more problematic. Our ability to successfully—and humanely—detain and prosecute those who wish to undermine our ideals will inevitably be an issue upon which history will judge the great "American experiment." It now is clear that the best approach is to reject the two prevailing rigid paradigms and pursue a more flexible, realistic approach – a "third way" is needed. An alternative, hybrid court system will be required to successfully deal with these suspects in the future. In doing so, we remain on the right side of history, restore our reputation abroad, and continue to make progress in the war on al Qaeda.

THE CURRENT SITUATION

The West, whether we accept this reality or not, is fighting and engaged in an armed conflict against violent, international terrorists. This is exemplified by the current situation in Afghanistan, Iraq, parts of Pakistan, numerous other areas of the world, and even in the homeland. Coalition military forces have been largely successful on the battlefield against al Qaeda and other terrorist organizations, however, the current war involves

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so much more than victory on the battlefield. Winning the war against al Qaeda means the defeat of an ideology of hate, the removal of state sponsors of terror, and the spread of democracy in new regions of the world. We must also remember that defeating terrorists does not just mean victory in combat, but victory for the rule of law, and the adjudication of terror suspects within these very same processes of law. Again, although the West has been largely militarily successful in action(s) against al Qaeda, the road to justice in the courtroom has been a strategic shortfall.

The administration has long advocated,[1] and it has now become exceedingly clear, that this conflict is dissimilar to those wars fought by previous generations of Americans. Indeed, it is an armed conflict of some sort, but again, not a traditional one. Al Qaeda fighters do not wear uniforms, do not fight under a flag, and they certainly are not parties to any of the conventions related to warfare that America and the rest of the civilized world are bound by. America's enemies hide among civilian populations, roam along international borders, target innocent civilian populations with indiscriminate weapons of slaughter and chaos, and vow to fight until the end. The military is constantly changing tactics and adapting to be able to best combat the enemy. Although the fight against al Qaeda and international terrorism involves the use of the American military, unlike prior conflicts, the so called "war on terror" now involves the FBI, the CIA, and even local law enforcement. The terrorist attacks of September 11, as well as the ensuing fight against al Qaeda and other terrorist organizations abroad, contributed to the largest reorganization of the Federal government since the National Security Act of 1947,[2] resulting in the creation of the Department of Homeland Security.[3]

Rather than sitting in a "war room," planning the movement of large brigades of tanks, plotting wide-scale aerial bombardment of enemy territory, planning to control strategic areas on the high seas, and other traditional tactics, today's war is being fought through use of the Terrorist Surveillance Program, large scale intelligence operations, and even the training of local police. Thus, the current military approach implements a

[1] Donald H. Rumsfeld, *A New Kind of War*, N.Y. TIMES, Sept. 27, 2001 *available at* http://www.defenselink.mil/speeches/speech.aspx?speechid=440 (describing the ways in which the realities and resulting tactics employed in the global war on terror will amount to "a war like none other our nation has faced").

[2] National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (1947) ("In establishing this legislation, it [was] the intent of Congress to provide a comprehensive program for the future security of the United States . . . .").

[3] Homeland Security Act of 2002 6 U.S.C.S. § 111 (2002) (establishing "a Department of Homeland Security, as an executive department of the United States").

hybrid model, one that involves both a military and a law enforcement response. While these tactical changes have resulted in a great deal of military success abroad, in particular the troop "surge" in Iraq,[4] parallel strategic adaptations have not taken place in America's legal approach to fighting this war. Seven years later, America is using a universally discredited military commission system to adjudicate suspected terrorists held in Guantanamo. Simply put, perceptions matter in 21st century warfare, or "fourth generation conflicts." The longer this system continues, the more harm comes to America's reputation and credibility abroad on other critical, humanitarian issues.

To best understand the administration's decision to try these suspects by military commissions, however, it remains critical to remember the perspective held by the vast majority of Americans immediately after September 11, 2001. The American people and the administration were not worried if another attack would happen, rather, it seems as though everyone was more worried about when and where the next attack would take place. The Bush administration and Congress acted quickly to authorize a military response against the Taliban and al Qaeda in Afghanistan.[5] The administration, Congress, and the American people, it seems, were more concerned with preventing the next attack against innocent Americans and shutting down al Qaeda operations in Afghanistan, than with the details concerning how those members of al Qaeda would eventually be tried. With the swift defeat of Taliban forces, and the concurrent detention of terror suspects in Afghanistan and in other parts of the world, it quickly became an issue as to how best to try those terror suspects held in the custody of U.S. forces fighting a war abroad.[6]

Rather than take the internationally unprecedented move of trying these suspected "war criminals" or "enemy combatants" from other nations in our own domestic federal courts, possibly along with the full panoply of

4 *See* Max Boot, *The 'Surge' Is Working*, L.A. TIMES, Sept. 8, 2007, *available at* http://www.latimes.com/news/opinion/la-oe-boot8sep08,0,1085443.story?coll=la-opinion-center (noting that "there is no denying that events in Iraq have been moving in the right direction since the surge started"). *See also* Alissa J. Rubin, *Pointing to New Era, U.S. Steps Back as Iraqis Vote*, N.Y. TIMES, Feb. 1, 2009, at A1 (reporting that "Iraqis across the country voted Saturday [January 31, 2009]" and that "Iraqi soldiers now handle all Green Zone checkpoints.").

5 *See* Authorization for Use of Military Force Against Terrorists, Pub. L. No. 107-40, 115 Stat. 224 (a) (2001). "[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States . . . ." *Id.*

6 *See* Tim Golden, *After Terror, A Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at 1 (discussing the decision making process of key members of the administration in determining how best to fight terrorism).

rights that our judicial system affords (rights that would not be afforded to POW's), the Bush administration made the determination that the best approach to actually trying terror suspects was through the use of military commissions.[7] Given this country's long history of using military commissions—originating from the time of the Revolution,[8] the relative inexperience in dealing with the detention of large numbers of non-state actor warriors, as well as the existing Supreme Court jurisprudence on military commissions,[9] such a determination seemed, and to a large extent still seems, reasonable. Some critics, however, have portrayed this decision as having been concocted in the back room of the White House by administration lawyers and policy makers. Nothing could be further from the truth. The administration, along with those in the military, was searching to find some means to move these cases forward and actually try the detainees. In fact, the Executive Order of 2001,[10] with all its faults, provided more rights in many respects than did the orders of FDR for the military commissions he implemented during the Second World War. The decision to use military commissions, given the historical context, seemed correct, and at the very least, reasonable to most serving within the Bush administration.

While one can arguably understand the initial decision by the administration to try these terror suspects in military tribunals, given the context of the post 9/11 world, seven years later, it is hard to assert that this approach has been successful. As a matter of policy it has been nothing short of an unintended disaster. The use of military commissions has become a lightning rod of criticism for the administration[11] and the nation

7 *Id.* "Determined to deal aggressively with the terrorists they expected to capture, the [Bush administration] officials bypassed the federal courts and their constitutional guarantees, giving the military the authority to detain foreign suspects indefinitely and prosecute them in tribunals not used since World War II." *Id.*

8 *See* Michael O. Lacey, *Military Commissions: A Historical Survey*, 2002 ARMY LAW. 41, 42 (2002). In 1775, the Continental Congress "drafted the Articles of War for the Continental Army in 1775 . . . . [In part, this action] implemented the established tradition of the military commission with a court of inquiry to try British officer and suspected spy – Major John Andre." *Id.* at 42.

9 *See, e.g., Ex parte* Quirin, 317 U.S. 1, 40 (1942) (concluding that "§ 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission"); *In re* Yamashita, 327 U.S. 1, 8 (1946) ("If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on decided facts. Correction of their errors of decision is not for the courts but for the military authorities which alone are authorized to review their decisions.").

10 Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

11 *See, e.g.*, Thomas L. Friedman, *A Travesty of Justice*, N.Y. TIMES, Nov. 16, 2001, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C05E1DE143BF935A25752C1A9679C8B63 ("President Bush's plan to use secret military tribunals to try terrorists is a dangerous idea, made even worse by the fact that it is so superficially attractive. In his effort to defend America from terrorists, Mr.

at large, hurting both our reputation and our ability to lead in other critical areas internationally. To those who grew up in Navy or Coast Guard families, the current reputation of the Guantanamo Naval Base is particularly painful. Guantanamo, even as a military base, is severely tarnished in the year 2008. During my youth in the 1980's, I vividly remember my father speaking about Guantanamo as a beacon of human rights within the totalitarian regime of Cuba and the Soviet Union. During the Cold War, the Naval Station at Guantanamo Bay was looked upon as being a base of freedom—as a base representing the nobility and strength of the United States. It is both unfortunate and ironic that the international community and much of the American public now views Guantanamo as anything but a representation of the once embraced "shining city on a hill." The criticisms have been vicious. Some of the criticisms are well founded, but many are mired in hyperbole and exaggeration. Unfortunately, even the well-respected non-governmental organization, Amnesty International, termed Guantanamo in 2005 as "the gulag of our times."[12] The United States of America simply cannot permit the military commissions process in Guantanamo to continue adjudicating war crimes against al Qaeda.

ARTICLE III COURTS

There are some, many of whom are here today at St. John's Law School for this symposium, who advocate the use of the current civilian court system to try these suspects.[13] The civilian court system as established in Article III of the Constitution, however, is not the appropriate system to adjudicate these hybrid cases. There are numerous substantive and procedural problems with trying terror suspects in Article III courts.

Bush is eroding the very values and principles he seeks to protect, including the rule of law."); William Safire, *Seizing Dictatorial Powers*, N.Y. TIMES, Nov. 15, 2001, *available at* http://query.nytimes.com/gst/fullpage.html?res=9802E6DF163BF936A25752C1A9679C8B63 ("Intimidated by terrorists and inflamed by a passion for rough justice, we are letting George W. Bush get away with the replacement of the American rule of law with military kangaroo courts."); Michael B. Mukasey, *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, *available at* http://www.opinionjournal.com/extra/?id=110010505 ("[W]hen it is examined closely, [the trial of Jose Padilla] shows why current institutions and statutes are not well suited to even the limited task of supplementing what became, after Sept. 11, 2001, principally a military effort to combat Islamic terrorism.").

12 Irene Khan, Speech Before the International Press Club, Amnesty International Report 2005 (May 25, 2005), *available at* http://www.amnesty.org/en/library/asset/POL10/014/2005/en/dom-POL100142005en.html.

13 *See* David Scheffer, *What to do about America's Military Commissions*, CHICAGO TRIBUNE, July 9, 2006 at 1. The problem of bringing alleged terrorists to justice after the Supreme Court shut down the Guantanamo military commissions can, in part, be solved in two steps. First, "[w]e should use a court-martial to prosecute the small number of prisoners of war at Guantanamo whose cases can withstand the scrutiny of a fair trial. If a court-martial cannot be used, then we should bring prisoners to the U.S. and prosecute them in federal criminal court as terrorists under U.S. anti-terrorism laws." *Id.*

Constitutional Criminal Procedure

Applications of the Fourth and Fifth Amendments to the War on al Qaeda are prime examples of reasons why this construct is as unworkable as the military commissions have been (albeit for very different reasons). Combat officers in Afghanistan and Iraq are not police officers – nor should they ever be required to function in this capacity. They are there overseas to fight and win wars. It is unreasonable to expect soldiers to issue Miranda warnings to detainees, or require them to obtain search warrants before searches or seizing evidence. Simply, such law enforcement requirements are not issues on the mind of soldiers fighting stateless enemies in Iraq and Afghanistan who have evidence that could be used for prosecutions later. Although these concerns would be unthinkable seven years ago, since the Court's *Boumediene*[14] decision, it is debatable whether other Constitutional rights would be afforded to these suspects. American soldiers should be concerned with combating the enemy, not with providing Miranda statements upon the initiation of battle, or storming an al Qaeda safe house and the subsequent detention of suspected terrorists. Such notions are ludicrous.

Juries

Furthermore, consider the jury issues associated with trying the alleged international terrorists in our Article III courts. Imagine the attempts made to empanel an unbiased jury for any of these cases. A "jury of your peers" in accordance with U.S. jurisprudence for trying Khalid Sheik-Mohamed would be impossible within the continental United States. Additionally, any juries would require lifetime protective details.

Judges

Also, it appears ill advised to use traditional Article III judges to make determinations on such matters of nuanced and niche areas of the law, such as the law of armed conflict, intelligence law, human rights law, etc. In other areas of so called "niche law" – immigration, bankruptcy – we have created separate court systems with specialized judges presiding. The reality is that not all U.S. district court judges have the experience in the law of war, intelligence law, international law, human rights, etc., that would be required to properly conduct a trial for an alleged enemy of the

[14] Boumediene v. Bush, 128 S. Ct. 2229 (2008).

United States (and part of an ongoing armed conflict). If we are serious about using a civilian system to try the detainees, we need judges that are versed in these areas of the law to preside.

Protective Details

Also, like the jury issues, the impractical reality of protecting judges has emerged. The issues of judge protection may sound mundane right now, but they are considerable in terms of cost and time, becoming more important within the realistic framework of 21st century jurisprudence. Few would contend with the fact that judges trying these suspects would be targets for future terrorist attacks. Using the existing district courts across the country would require the adoption of new security procedures, massive structural overhauls, additional security personnel, and the expenditure of large amounts of money that the federal government does not have.

Civilian Prisons

Not only would the trial of these suspects in district courts present major problems, the actual physical detention of these suspects using domestic prisons is also highly problematic. It seems unlikely that many members of Congress would actually volunteer to have these detainees moved from Guantanamo Bay to their legislative districts. In fact, in July of 2007, the Senate voted 94 to 3 to not move the detainees into the United States.[15]

With all of the potential downsides of the current system and the impracticalities of using the civilian court system, some wonder if there is another way forward. Several scholars, from multiple sides of the political spectrum, have continued to argue for creating some sort of a new terrorist court – a national security court if you will. Those who desire the actual trial of these suspects, the closing of Guantanamo, the protection of state secrets, and the most efficient use of government resources—while still upholding the Rule of Law and promoting human rights—can take comfort in knowing that there is an effective alternative available.

THE WAY FORWARD

The President, Secretary Gates and Secretary Rice have all declared that

15 John M. Donnelly, *Senate to Resume War Debate*, CQ TODAY, Sept. 16, 2007, *available at* http://public.cq.com/docs/cqt/news110-000002584790.html. "In July [of 2007], the Senate passed, by a vote of 94-3, a non-binding 'sense of the Senate' resolution declaring that detainees housed at Guantanamo should not be transferred to facilities in the United States." *Id.*

Guantanamo must close.[16] Virtually 80% of the members of Congress have also declared that Guantanamo must close. Both major presidential candidates have called for its closure.[17] The problem we face, however, is what to do once we close the facility. It is easy now in hindsight to be critical of the decision initially made by the administration and the way that things are currently being handled, but America's next true challenge is to devise a way in which to deal with these terror suspects that will garner respect and admiration both domestically and abroad. Similar to changes in military strategy to win the war in Iraq and the war against al Qaeda, where the recognition was made that this new type of conflict required new tactics, the legal approach to handling terror suspects must change as well.

The solution is best seen through the lens of an evolutionary process, developing over time from the period of the Revolution, through the Civil War, through the First and Second World Wars and now into the realities we face in 21st century warfare. The Order of November 13, 2001, with all it warts and hairs, was undertaken with good intentions, but was later struck down by the Supreme Court. Recognizing the importance of trying these individuals, the President went to Congress for assistance, and subsequently Congress passed the Military Commissions Act of 2006,[18] with warts and hairs of its own, but again making progress. A National Security Court System seems to be the next logical step in the natural progression of this "maturity" of justice. As we are fighting hybrid warriors, in a hybrid war—a mix of law enforcement and combat—a hybrid court should be created to adjudicate the alleged war crimes committed by these hybrid warriors.

Obviously, the key is to balance the needs of national security and to

16 *See, e.g.*, Reuters, *Bush Speaks of Closing Guantanamo Prison*, N.Y. TIMES, May 8, 2006, *available at* http://www.nytimes.com/2006/05/08/washington/08bush.html (noting that "President Bush said yesterday that he would like to close the United States-run prison at Guantanamo Bay"); Thom Shanker & David E. Sanger, *New to Job, Gates Argued for Closing Guantanamo*, N.Y. TIMES, Mar. 23, 2007, *available at* http://www.nytimes.com/2007/03/23/washington/23gitmo.html ("In his first weeks as defense secretary, Robert M. Gates repeatedly argued that the detention facility at Guantanamo Bay, Cuba, had become so tainted abroad that legal proceedings at Guantanamo would be viewed as illegitimate, according to senior administration officials. He told President Bush and others that it should be shut down as quickly as possible.").

17 *See, e.g.*, Elizabeth White, *Obama Says Gitmo Facility Should Close*, WASH. POST, June 24, 2007, *available at* http://www.washingtonpost.com/wpdyn/content/article/2007/06/24/AR2007062401046.html (quoting Senator Obama as saying "'While we're at it we're going to close Guantanamo'"); Philip Sherwell, *Straight-Talking McCain Vows to Fix World's View of the 'Ugly American'*, TELEGRAPH, Mar. 19, 2007, *available at* http://www.telegraph.co.uk/news/worldnews/1545925/Straight-talking-McCain-vows-to-fix-world%27s-view-of-the-%27ugly-American%27.html (reporting Senator McCain's statement that "'I would immediately close Guantanamo Bay, move all the prisoners to Fort Leavenworth . . . and truly expedite the judicial proceedings in their cases.'").

18 Military Commissions Act of 2006, Pub.L. No. 109-366, 120 Stat. 2600 (2006).

achieve our simultaneous goal of promoting human rights. Attaining that delicate balance is certainly critical. The success of this proposed new court system will depend upon its acceptance by Congressional and administration leaders who truly want to strike a balance between security and the rule of law. Clearly, the devil will be in the details in creating such a court through statutes.

The political branches have tough decisions to make in the next Congress and Presidency when it comes time for the actual closing of Guantanamo and the inevitable transfer of detainees. The most practical way of detaining and adjudicating these cases is to locate the National Security Court system on a number of military bases across the country. Detention and physical security issues would still exist, but these bases would be better suited to handle these situations than courts in downtown districts in major cities within Congressional districts.

While the detention and trial of these suspects would take place on American military bases, the key distinction from the existing military commissions system is that military oversight of the process would be transferred to civilian control. The Department of Justice would replace the Department of Defense in this new system, and specialized Article III judges would try the cases. The Justice Department would develop a pool of litigators out of their national security division branch to prosecute the suspects. Current military JAGs would defend the suspects with funding provided by outside sources. Having the civilian Department of Justice oversee the national security court is crucial to the success of the system and would help restore America's image abroad. The new proposed system would also remove the tainted impression that the rest of the world receives by watching U.S. military officers in a U.S. military courtroom adjudicate cases against quasi-warriors.

In this new system, the President would appoint the system's judges with the advice and consent of the Senate. The judges would be life tenured Article III judges, selected for possessing specialized knowledge of the substantive law surrounding issues of terrorism and a high level of practical experience.

Most importantly, the new system needs to be created as an adjudicatory system rather than part of a preventative detention scheme. Others, including my friend Ben Wittes, have argued in favor of using a national security court for detention and preventative detention schemes. I oppose this completely because using a national security court in this way would only transport the familiar problems from Gitmo into the United States. Trying the detainees in a properly constructed National Security Court,

within a reasonable time frame, is the best means for the U.S. to regain some moral authority in world affairs. The United States must be active in ensuring that the cases go forward. The only way that the United States is going to gain credibility within the international legal community is to demonstrate that it is dedicated to the administration of justice and to upholding the rule of law.

Additionally, the death penalty must be modified. Although not prohibiting its use outright, the new system must be conscious of other nations' views of this punishment. The system must, at least in some fashion, recognize the laws of the home country of the person being sentenced. Thus, if a citizen of Great Britain, where the death penalty is illegal, is tried within the National Security Court, the death penalty would not be a sentencing option. However, if a citizen of China, where the death penalty is authorized, were within the system, such a sentence would be available to the court. There are many other details about such a system that could be elaborated upon, however, we must first acknowledge that the current system is broken and make a conscious effort to move forward with an alternative measure.

CONCLUSION

A new, statutorily created National Security Court system would afford an opportunity for U.S. policy makers to respond forcefully and effectively to both domestic and international calls for a way out of the myriad problems associated with the current system. Rather than have no credible solution, or merely engaging in attacks against the existing structure, policy makers need to emerge with fresh new ways to look at the proper detention and adjudication of captured al Qaeda fighters. It is time for the United States to regain the initiative and reaffirm our leadership in the humane prosecution of terrorists, a group that wishes to undermine the ideals of democracy. There is no better way to protect the ideals of democracy than to prosecute terrorists in a manner that is consistent with the democratic ideals that they seek to destroy. At a minimum, the next administration and Congress needs to create a commission to examine the possibilities that such a National Security Court system might afford.