

Summer 2007

## Guantanamo and Beyond: Dangers of Rigging the Rules

Brian J. Foley

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

Brian J. Foley, Guantanamo and Beyond: Dangers of Rigging the Rules, 97 J. Crim. L. & Criminology 1009 (2006-2007)

This Criminal Law is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

## GUANTANAMO AND BEYOND: DANGERS OF RIGGING THE RULES

BRIAN J. FOLEY\*

*Supporters of the U.S. antiterrorism policy of indefinitely imprisoning “enemy combatants” captured in the “War on Terrorism” claim that it gives the Executive needed flexibility for incapacitating potentially dangerous terrorists and interrogating them with harsh methods to uncover plans for terrorist attacks. The policy has been widely criticized from its inception, mostly on the grounds that it is illegal and immoral. Bracketing these critiques, this Article argues that this policy is ineffective. The policy impedes the government’s ability to conduct the investigations necessary to prevent terrorist attacks because it fosters indiscriminate dragnets, imprisonment, and coercive interrogations of people who are not terrorists. Given that innocent people are likely to confess falsely when subjected to coercion, the policy risks proliferating false confessions and false leads that inundate and mislead investigators. Unfortunately, the U.S. government has failed to understand this link among detentions, interrogations, and investigations, and the need for reliable judicial process to sort terrorists from non-terrorists. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Supreme Court ruled that prisoners had only limited rights to challenge that they were “enemy combatants,” and the Bush administration used that ruling to create the Combatant Status Review Tribunal (“CSRT”). The CSRT, however, is rigged to rubberstamp the government’s case. The CSRT applies a broad definition of “enemy combatant” that inevitably ensnares innocent people; applies a presumption of guilt; has no juries; disables prisoners from gathering exculpatory evidence; prohibits prisoners*

---

\* Visiting Associate Professor of Law, Drexel University College of Law (2007-2008); Associate Professor of Law, Florida Coastal School of Law. J.D., University of California, Berkeley. A.B., Dartmouth College. I thank Drexel University, where I presented these ideas at a symposium marking the fifth anniversary of the opening of Guantanamo Bay on January 12, 2007; Bill Fisher, who interviewed me about Guantanamo for InterPress Service in July, 2005; and Bernard Hibbitts, who invited me to write about Guantanamo for *JURIST* in Fall, 2005, where I first developed these ideas in a series of commentaries. I thank Roger Clark, Joe Margulies, M.G. Piety, Chris Roederer, Brian Slocum, and Helen Struck for reviewing earlier drafts, and Jeremy Salter for excellent research assistance. I thank Dean Peter Goplerud for the research grant that helped me write.

*from having lawyers; and relies on hearsay, coerced confessions, and secret evidence to reach its judgment that a prisoner should be detained indefinitely. Also rigged are the “military commissions” created by the administration to try “enemy combatants” for terrorism and war crimes. Military commissions may rely on coerced testimony and hearsay and use soldiers for jurors. But, unlike the CSRT, military commissions can impose death sentences, which cause innocent prisoners facing what they believe is certain execution to “cooperate” by confessing or falsely accusing others. Rigged rules also undermine investigative abilities. Knowing they can win trials by simply coercing confessions and relying on hearsay, investigators may feel little need to risk their lives infiltrating terrorist groups and developing sources. Such skimping can cause investigators’ skills to atrophy and prevent their building an accurate database over time. This Article argues that U.S. policymakers should forge an effective detention and interrogation policy that recognizes the link to accurate investigations and suggests some guidelines for creating a tribunal designed to reach accurate conclusions about whether a prisoner is even a terrorist at all.*

## I. INTRODUCTION

### A. OVERVIEW

Why are U.S. officials imprisoning and interrogating people about terrorism who are unlikely to know anything about terrorism? Why have U.S. officials created an entirely new justice system, which is now in effect at the prison for “enemy combatants” at the U.S. Naval Base at Guantanamo Bay, Cuba, rigged to perpetuate this practice? These questions are rhetorical, to point out what at bottom is occurring at Guantanamo.<sup>1</sup> This Article will show that this new justice system<sup>2</sup> does not work to reduce the risk of terrorist attacks, which is presumably the purpose of Guantanamo and the “War on Terrorism.” Instead, it does just the opposite.

---

<sup>1</sup> See Steven N. Kleinman, *KUBARK Counterintelligence Interrogation Review: Observations of an Interrogator—Lessons Learned and Avenues for Further Research*, in NATIONAL DEFENSE INTELLIGENCE COLLEGE, INTELLIGENCE SCIENCE BOARD, EDUCING INFORMATION: INTERROGATION: SCIENCE AND ART—FOUNDATIONS FOR THE FUTURE 107 (2006) [hereinafter EDUCING INFORMATION].

<sup>2</sup> See John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765, 766 (2007) (arguing that “the ‘war on terror’ has accelerated the development of a new criminal process and that this new process has increasingly displaced traditional methods of investigating, prosecuting, and punishing people who have engaged in conduct that is subject to criminal penalties—whether or not that conduct is considered ‘terrorism’”).

Rigging the rules to make it easier for tribunals at Guantanamo to conclude that people are terrorists paradoxically makes it harder to investigate terrorism and capture terrorists. That is, rigging the rules in favor of the hunters actually helps the hunted avoid capture. The reason is straightforward: people commit terrorist acts. In order to prevent a terrorist attack, the people planning it must be identified and interdicted. A system that fails to identify these people fails to prevent terrorist attacks.<sup>3</sup>

But what have gone unrecognized are the dangers that come from *undisciplined* information gathering, that is, from *wrongly* identifying people as terrorists (“false positives”). Fundamentally, identifying the wrong people can lead investigators away from the right people and make it more likely that any actual terrorists will be able to carry out their plans.<sup>4</sup>

This Article directly challenges the effectiveness of the Guantanamo policy for thwarting terrorist attacks by challenging the general proposition that loosening judicial standards for detaining and convicting suspected terrorists helps prevent terrorism. Part II of the Article sets forth the necessary background showing how the rules at Guantanamo are rigged. I

---

<sup>3</sup> See Memorandum from Alberto R. Gonzales to the President of the United States, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban 2 (Jan. 25, 2002) [hereinafter Gonzales Memo] (“As you have said, the war against terrorism is a new kind of war. It is not the traditional clash between nations adhering to the laws of war that formed the backdrop for GPW [Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135]. The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians, and the need to try terrorists for war crimes such as wantonly killing civilians.”). This Memorandum was written at the time Guantanamo opened as a prison. See also John M. McCain, *Respecting the Geneva Conventions*, in *TORTURE: DOES IT MAKE US SAFER? IS IT EVER OK?—A HUMAN RIGHTS PERSPECTIVE* 156-57 (Kenneth Roth, Minky Worden & Amy D. Bernstein eds., 2005) [hereinafter *TORTURE: DOES IT MAKE US SAFER?*] (arguing the United States “face[s] a new enemy in the global war on terror, and much of our ability to disrupt attacks and destroy terrorist cells depends on the quality of the intelligence we gather from detainees”). Gathering information is the *raison d’être* of Guantanamo. JOSEPH MARGULIES, *GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER* 39 (2006).

<sup>4</sup> I have raised these points in op eds. See *Guantanamo Process as a Public Danger*, JURIST—FORUM, Oct. 11, 2005, available at <http://jurist.law.pitt.edu/forumy/2005/10/guantanamo-process-as-public-danger.php>; see also Brian J. Foley, Op-Ed., *Policy in Guantanamo Won’t Thwart Terrorism*, PHILA. INQUIRER, July 23, 2007, at A13 (criticizing proposals to close Guantanamo as ineffective based on their failure to revamp the tribunals to limit the dangers they cause to investigations). There has been little discussion of the dangers of false positives. Instead, focus has been on the dangers of false negatives—where the government fails to identify a terrorist as a terrorist. The Guantanamo system is built around limiting false negatives by erring on the side of increasing false positives. The burden is seen as falling on the innocent people detained. John Ip, *Comparative Perspectives on the Detention of Terrorist Suspects*, 16 *TRANSNAT’L L. & CONTEMP. PROBS.* 773, 869 (2007).

examine the rules of the Combatant Status Review Tribunal (“CSRT”), which purportedly provides a forum for prisoners to challenge the government’s case that they are “enemy combatants” (a term that, for the purposes of this Article, I will use interchangeably with “terrorist”<sup>5</sup>), to show that the CSRT cannot be relied upon for accurate findings. Instead, it can be relied on only to ensure that anyone detained will remain detained. I also explain how the U.S. Supreme Court, in *Hamdi v. Rumsfeld*,<sup>6</sup> unfortunately helped lay the groundwork for the CSRT’s rigged rules. I examine the rigged rules for the Administrative Review Board (“ARB”), which is set up to review annually a prisoner’s dangerousness, and the rules for the military commissions, which the Bush Administration has created to make it easy to convict enemy combatants for particular war- and terrorism-crimes.

Part III is the heart of the Article. I show how these rigged rules are dangerous because they negatively impact the accuracy of terrorism investigations. The CSRT and military commissions actually foster the gathering of false confessions and other false information from suspected prisoners, which can mislead investigators. Part of the problem is the aforementioned fact that coercive interrogation techniques are applied to prisoners who lack relevant knowledge of terrorism. There are other problems as well. A system designed to help the government win its cases can lead investigators to apply less rigor than they would need to win in a regular court system. Consequently, they learn less about the terrorist networks they must disrupt.

Part IV proposes that new rules dedicated to reaching accurate determinations of terrorist status and individualized guilt for terrorist crimes be designed and implemented as a productive tool in the War on Terrorism. I make some suggestions for the form some of those rules should take.

#### B. BACKGROUND: WRONG DEBATE, WRONG PREMISES—NATIONAL SECURITY AND CIVIL LIBERTIES ARE NOT DICHOTOMOUS

The dangers I discuss were not exposed earlier because the debate about Guantanamo has been framed by the larger, venerable debate that sees the relationship between national security and civil liberties as dichotomous. Indeed, the U.S. Supreme Court in *Hamdi* consciously tipped this scale in a way it assumed would favor national security.<sup>7</sup>

---

<sup>5</sup> I use the term interchangeably because Guantanamo was designed as an interrogation chamber to extract information that could thwart terrorist attacks; U.S. officials believed that the U.S. Constitution did not apply there and that they could use coercive interrogation techniques. See Gonzales Memo, *supra* note 3.

<sup>6</sup> 542 U.S. 507 (2004).

<sup>7</sup> See discussion *infra* Part II.A.1.

One way of describing the logic of Guantanamo is that it reverses the longstanding view that it is better to let ninety-nine guilty men go free than it is to convict one innocent man.<sup>8</sup> The new thinking is to “play it safe” by casting a wide net that might, regrettably, ensnare innocent people along with legitimate terrorists. The CSRT helps ensure, however, that all of the people will remain ensnared. In this new thinking, false negatives are far more dangerous than false positives, and there is really no cost for imprisoning a false positive other than that borne by the prisoner.<sup>9</sup> This sentiment was expressed recently by Representative Dan Rohrabacher (R-CA) during a Congressional hearing into another aspect of the U.S. detention policy, “extraordinary rendition,” which entails kidnapping suspects and rendering them to foreign countries and secret prisons for the purpose of coercive interrogation: “[I]f 10 . . . people suffer . . . in order for us to take 90 other people off the street who are intent and involved in plans that would slaughter tens of thousands of our citizens, I’m afraid that’s the price we pay in a real world.”<sup>10</sup>

The dichotomous framing of civil liberties and national security is, I believe, why the main questions about Guantanamo until now have concerned the legality of the detentions,<sup>11</sup> the legality of the CSRT,<sup>12</sup> the

---

<sup>8</sup> This calculus has been applied with various numbers. For a sweeping look at what that number (“*n*”) has been set at by various courts, jurists, and thinkers, see Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173 (1997). I have chosen to use the ratio of one (*n*) out of 100 because it matches the level of the probability that the Bush Administration reportedly has used in creating its policies after 9/11. According to journalist Ron Suskind, the Bush Administration operated under the view that if there was at least a “one percent chance” that, for example, a terrorist attack might occur or that Saddam Hussein had weapons of mass destruction in Iraq, then the United States must treat that one percent as if it were a certainty and act accordingly, which of course means ignoring or contravening the remaining ninety-nine percent of relevant information. See RON SUSKIND, *THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA’S PURSUIT OF ITS ENEMIES SINCE 9/11* 62, 79, 123-24, 213-16 (2006) (describing this rule as the “Cheney Doctrine”).

<sup>9</sup> See Ip, *supra* note 4, at 869.

<sup>10</sup> House of Representatives, Committee on Foreign Affairs, Subcommittee on International Organizations, Human Rights, and Oversight, Subcommittee on Europe, Apr. 17, 2007. These comments do not appear in the transcript, but Rep. Rohrabacher can be seen making them on a C-SPAN2 video. Rep. Rohrabacher: “I Hope It’s Your Families That Suffer” from a Terrorist Attack, <http://thinkprogress.org/2007/04/24/rohrabacher-terrorists> (last visited Sept. 22, 2007).

<sup>11</sup> See, e.g., *Hamdi*, 542 U.S. at 533-35, 538-39 (holding that U.S. citizens may be detained indefinitely as “enemy combatants” but may challenge this detention on habeas corpus or in specially designed military hearings); *Rasul v. Bush*, 542 U.S. 466, 483-85 (2004) (holding that federal courts have jurisdiction to hear habeas corpus petitions filed under 28 U.S.C. § 2241 by non-citizens imprisoned by military as “enemy combatants”); Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT’L L.J. 503 (2003).

legality of the military commissions,<sup>13</sup> and the legality and morality of torture and coercive interrogation.<sup>14</sup> This frame is why the dominant

---

<sup>12</sup> See, e.g., *Boumediene v. Bush*, 476 F.3d 981, 1005-06 (D.C. Cir. 2007) (Rogers, J., dissenting) (asserting that the CSRTs and available limited review of CSRT proceedings by circuit court fail to accord the level of process that habeas corpus requires for testing the factual accuracy of detention by Executive), *cert. denied*, 127 S. Ct. 1478 (2007), *cert. granted*, 127 S. Ct. 3078 (2007); MARGULIES, *supra* note 3, at 159-70.

<sup>13</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) ("MCA"). The MCA was upheld as constitutional in *Boumediene*. Congress passed the MCA in October 2006, in response to the Supreme Court's striking down an earlier incarnation of the military commission set forth in a Presidential Order. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2792-93, 2795-99 (2006) (finding military commissions violate the Uniform Code of Military Justice and the Third Geneva Convention). The legality of using these commissions has been the subject of much scholarly commentary. See, e.g., Ingrid Brunk-Weurth, *The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567, 1615 (2004); Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1412-35 (2002); Neal Katyal & Laurence Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1286-87 (2002).

<sup>14</sup> See, e.g., ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 131-63 (2002) (advocating legalizing torture in extreme situations and requiring "torture warrants" for judicial approval); David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005); Jeff McMahan, *Torture, Morality, and Law*, 37 CASE W. RES. J. INT'L L. 241 (2005); see also TORTURE: A COLLECTION (Sanford Levinson ed., 2004) [hereinafter TORTURE] (discussing the legality and morality of torture).

This Article uses "torture" in its general sense. See OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining the noun torture as "1. The infliction of severe bodily pain, as punishment or a means of persuasion; spec. *judicial torture*, inflicted by a judicial or quasi-judicial authority, for the purpose of forcing an accused or suspected person to confess, or an unwilling witness to give evidence or information . . .").

There is a distinction between "torture" and "coercive interrogation" in that some practices of coercive interrogation might not be painful enough to amount to torture. Where to draw the line is unclear, and it is beyond the scope of this Article to engage in what Sandy Levinson calls the "grim and unattractive discussions about what methods of interrogation, by stopping 'short' of banned practices, are therefore defined as acceptable." Sanford Levinson, *Contemplating Torture: An Introduction*, in TORTURE 30 [hereinafter Levinson, *Contemplating Torture*]. There has, of course, been significant discussion about whether particular coercive interrogation techniques used by the United States at Guantanamo Bay and other prisons meet the legal definition of "torture" or are otherwise illegal. See, e.g., Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 838-62 (2005) (describing U.S. interrogation tactics at Guantanamo and Iraq as violating U.S. and international law).

Officials have tried to justify some methods by calling them "torture lite." See Seth F. Kreimer, *"Torture Lite," "Full Bodied" Torture, and the Insulation of Legal Conscience*, 1 J. NAT'L SECURITY L. & POL'Y 187, 188 (2005); see also Mark Bowden, *The Dark Art of Interrogation*, 292 ATLANTIC MONTHLY 51 (2003) (describing various tactics and concluding, "Although excruciating for the victim, these tactics generally leave no

critiques have focused on how the policy discounts civil liberties—these critiques argue that the policy is illegal, unfair, immoral, and fails to reflect “American values”<sup>15</sup> by punishing innocent people and denying them any say in the matter. To a lesser extent, critiques have been based on national security considerations, suggesting that what appears to be American hypocrisy regarding justice and human rights may create a disincentive for other countries to assist the United States as the leader in the “War on Terrorism,”<sup>16</sup> that the unfair policy can motivate enemies and be used as

---

permanent marks and do no lasting physical harm”). But as Jordan Paust points out in discussing the “torture memos” by White House lawyers, which sought to make such distinctions, “Of course, the point is hardly relevant when Geneva and human rights law expressly prohibit not merely ‘torture,’ but also ‘violence,’ threats of violence, ‘cruel’ treatment, ‘physical and moral coercion . . . to obtain information,’ ‘physical suffering,’ ‘inhuman’ treatment, ‘degrading’ treatment, ‘humiliating’ treatment, and ‘intimidation’ during interrogation.” Paust, *supra*, at 835.

Such efforts to distinguish coercive interrogation methods from torture are nothing new and have long been a part of American law enforcement. See Jerome H. Skolnick, *American Interrogation: From Torture to Trickery*, in TORTURE, *supra*, at 113.

<sup>15</sup> See, e.g., DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 39-46 (2003); M. CHERIF BASSIOUNI, *Great Nations and Torture*, in THE TORTURE DEBATE IN AMERICA 260 (Karen J. Greenberg ed., 2006) [hereinafter TORTURE DEBATE] (“The difference between a great nation and a mighty nation is not measured by its military wherewithal or its ability to exercise force, but by its adherence to higher values and principles of law. This is what the United States is based on, and this is what has made it a great nation.”); Jennifer Moore, *Practicing What We Preach: Humane Treatment for Detainees in the War on Terror*, 34 DENV. J. INT’L L. & POL’Y 33, 61 (2006) (“If we abandon the rule of law in the ‘war on terror,’ we risk becoming what we fear.”).

<sup>16</sup> See, e.g., MARGULIES, *supra* note 3, at 226-28, 236; Kenneth Roth, *Justifying Torture*, in TORTURE: DOES IT MAKE US SAFER?, *supra* note 3, at 200-01. For the general proposition that the United States’s adherence to internationally accepted norms will help the war on terror in this way, see National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report: An Executive Summary* (2004), available at 2004 WL 1846272, at 15 (part of proposed counterterrorism policy is that the United States should “stand as an example of moral leadership in the world”). See also JOSEPH S. NYE, THE PARADOX OF AMERICAN POWER: WHY THE WORLD’S ONLY SUPERPOWER CAN’T GO IT ALONE 9, 67-75, 147-53 (2002) (U.S. “soft power” in this regard).

Senator John McCain and others have argued that under the principle of reciprocity, U.S. mistreatment of prisoners can lead enemies to mistreat U.S. soldiers if they are captured. McCain, *supra* note 3, at 156. The converse has been applied tendentiously by U.S. government lawyers in arguing for torture: “The moral grounding for the position of the government’s lawyers [in creating Guantanamo policies] was the paramount value of protecting the United States without being constrained by the rules that the enemy had flouted.” Noah Feldman, *Ugly Americans*, in TORTURE DEBATE, *supra* note 15, at 269; see also Robert Coulam, *The Costs and Benefits of Interrogation in the Struggle Against Terrorism*, in EDUCING INFORMATION, *supra* note 1, at 7.

Only a handful of commentators have meaningfully questioned the effectiveness of torture and coercive interrogation. See Philip N.S. Rumney, *Is Coercive Interrogation of Terrorist Suspects Effective? A Response to Bagaric and Clarke*, 40 U.S.F. L. REV. 479, 480



anti-U.S. propaganda,<sup>17</sup> and that other countries might use the policy to justify treating any captured U.S. soldiers similarly.<sup>18</sup>

But the effectiveness of the new justice system in preventing terrorist attacks has not been challenged outright. The dichotomous framing prevents such a challenge because it elides national security justifications with effectiveness.<sup>19</sup> (This elision is promoted by official secrecy, which makes it hard to question the effectiveness of government actions taken in the name of national security.) Indeed, a person approaching this subject for the first time might conclude either that many critics have tacitly accepted that the new system is actually effective but distasteful or that the fact that the system is *ineffective* is a point so obvious that it need not be made. The former is probably the more likely conclusion because ineffectiveness is the most powerful way to criticize a policy and can cut through ideological intransigence and political posturing.

In any event, the view that there is a tension between national security and civil liberties cannot withstand scrutiny, at least at Guantanamo. This view is underwritten by a set of incorrect assumptions that have not been fully articulated, beginning with the assumption that limiting civil rights can increase security by giving the government more power in what is seen as a zero-sum game. That is why the purported benefit of this new justice system is that it gives officials broad discretion and flexibility to deal with terrorism.<sup>20</sup> But going deeper, the assumptions are: that the Executive well

---

(2006) ("Only very limited attention has been given to the issue of effectiveness [of coercive interrogation techniques]."). For a brief discussion of this issue, see *infra* Part IV.B.

<sup>17</sup> MARGULIES, *supra* note 3, at 226-28, 236; Ip, *supra* note 4, at 869-70 (noting this phenomenon in Northern Ireland after Great Britain enacted a broad detention policy in response to IRA terrorism and in the Muslim world as a result of Guantanamo).

<sup>18</sup> See McCain, *supra* note 3 (asserting that United States actions at Abu Ghraib have increased risk to American soldiers). Notably, Alberto Gonzales considered and rejected some of these objections in his Memorandum for the President and concluded that the Geneva Conventions did not apply to al Qaeda and Taliban prisoners. See Gonzales Memo, *supra* note 3. For a recitation of all of what I call the standard objections to Guantanamo by a politician suggesting a putative change to the policy (that essentially amounts to merely moving the prisoners to a different prison), see Press Release, Office of Senator Dianne Feinstein, Senator Feinstein Introduces Legislation [S.B.1249] to Close Detention Facility at Guantanamo Bay, Cuba: Bill Requires Transfer of Guantanamo Bay Detainees to Other Detention Facilities (Apr. 30, 2007), available at [http://www.feinstein.senate.gov/public/index.cfm?FuseAction=NewsRoom.PressReleases&ContentRecord\\_id=43f21507-a14d-a6ef-6226-c216f745c0d5](http://www.feinstein.senate.gov/public/index.cfm?FuseAction=NewsRoom.PressReleases&ContentRecord_id=43f21507-a14d-a6ef-6226-c216f745c0d5) [hereinafter Feinstein Press Release].

<sup>19</sup> Overall, courts generally have deferred to the Executive when it has claimed a national security justification. Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 697-703 (2004). Congress has done the same. Ip, *supra* note 4, at 864-65.

<sup>20</sup> See John Ashcroft, Department of Justice Press Conference (Nov. 14, 2001), available at <http://jurist.law.pitt.edu/terrorism/terrorismmilash.htm> (addressing military tribunals for

knows who is and who is not a terrorist; that judicial participation would only impede the Executive in its efforts to neutralize these enemies by tying officials in bureaucratic (judicial) red tape; and that judicial interference, with its attention to procedural and evidentiary rules designed to protect defendants' rights, would risk erroneously exonerating people whom the Executive has identified as planning terrorist attacks. Such thinking is what underlies shibboleths such as "the Constitution is not a suicide pact."<sup>21</sup>

The Executive, however, is not all-knowing and never has been. Mistakes in identifying people as terrorists have been made in the "War on Terrorism," and at Guantanamo in particular.<sup>22</sup> Normal judicial procedures

---

terrorists); *Military Commissions: Hearing Before the S. Comm. on Armed Services*, 107th Cong. 1 (2001), available at [http://www.senate.gov/~armed\\_services/statemnt/2001/011212wolf&rums.pdf](http://www.senate.gov/~armed_services/statemnt/2001/011212wolf&rums.pdf) (statement of Donald H. Rumsfeld, Secretary of Defense, and Paul D. Wolfowitz, Deputy Secretary of Defense arguing that it was "important to give the [P]resident of the United States the maximum flexibility consistent with his constitutional authority"); see also Parry, *supra* note 2, at 792.

<sup>21</sup> See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) ("[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact."); *The Constitution Is Not a Suicide Pact*, Wikipedia, [http://en.wikipedia.org/wiki/The\\_Constitution\\_is\\_not\\_a\\_suicide\\_pact](http://en.wikipedia.org/wiki/The_Constitution_is_not_a_suicide_pact) (last visited June 17, 2007) (discussing the genesis and use of this phrase in U.S. political discourse).

<sup>22</sup> See Mark Denbeaux & Joshua Denbeaux, *No-Hearing Hearing—CSRT: The Modern Habeas Corpus? An Analysis of the Proceedings of the Government's Combatant Status Review Tribunals at Guantanamo* 4 (Oct. 17, 2006), available at [http://law.shu.edu/news/final\\_no\\_hearing\\_hearings\\_report.pdf](http://law.shu.edu/news/final_no_hearing_hearings_report.pdf) [hereinafter Denbeaux & Denbeaux, *No-Hearing Hearing*]; Mark Denbeaux & Joshua Denbeaux, *Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data 2* (Feb. 8, 2006), available at <http://law.shu.edu/aaafinal.pdf> [hereinafter Denbeaux & Denbeaux, *Profile of 517 Detainees*]. These studies reveal that the possibility of mistaken detention at Guantanamo is extremely high. Only five percent of the prisoners at Guantanamo were initially captured by U.S. forces. *Id.* at 2. Many of the remainder were captured by warring tribes motivated by bounties offered by the United States for al Qaeda and Taliban members. *Id.* at 3. Only eight percent were alleged to be connected to al Qaeda. *Id.* at 2. The imprisonment as enemy combatants was justified by, inter alia, finding that prisoners carried Kalashnikov rifles, wore olive drab clothing, had Casio watches, or had stayed in "guesthouses"—all of which were commonplace in Afghanistan. *Id.* at 2, 17, 19, 20; see also Ip, *supra* note 4, at 846-47 (contrasting the information these studies revealed with the "air of infallibility" surrounding the Bush Administration's early statements about prisoners at Guantanamo, including the famous depiction of the prisoners as "the worst of the worst" who would "gnaw hydraulic lines in the back of a C-17 [transport plane carrying them to Guantanamo] to bring it down").

The Pentagon has recently tried to counteract this widespread view of mistaken detentions with a report commissioned from The Combating Terrorism Center at the United States Military Academy at West Point. William Glaberson, *Pentagon Study Sees Threat in Guantanamo Detainees*, N.Y. TIMES, July 26, 2007, at A16. However, the Pentagon's efforts seem unconvincing in light of the vast evidence it is trying to contradict and its self-serving nature; the efforts seem too little and too late. See *id.* Journalist Andy Worthington critiqued the study, arguing,

can help prevent such mistakes. The process at Guantanamo is meant to make it practically impossible for anyone caught in the net, by mistake or not, to get out. The need for the accuracy that courts contribute should, however, be recognized as more compelling when it comes to preventing terrorism than when it comes to convicting and punishing people for crimes that have already taken place. The danger of identifying the wrong people is greater when hundreds if not thousands of lives are at risk from terrorism, as I will show.

### C. BACKGROUND: TWO ASSUMPTIONS; AND A BRACKETED QUESTION

In this Article I make two assumptions. The first is that this new justice system goes “beyond Guantanamo” as my title indicates.<sup>23</sup> That is, even if Guantanamo is ultimately shut down, as two pending Senate bills propose, there is no indication that such a detention policy and associated tribunals with rigged rules will not merely be implemented elsewhere.<sup>24</sup>

---

[o]n the one hand, the administration commissions its boys to come up with a report stating that 73 percent of the detainees were a “demonstrated threat,” and 95 percent were a “potential threat,” and on the other hand the administration itself has released, or cleared for release, 75 percent of the detainees because they were “not or no longer a threat” (and that’s not counting the 201 detainees who were released before the tribunal process began). How are we supposed to take these clowns seriously?

Andy Worthington, *West Point PR: Why the Pentagon’s Gitmo Study Is a Joke*, COUNTERPUNCH, July 26, 2007, available at <http://www.counterpunch.org/worthington07262007.html>. Worthington is the author of *THE GUANTANAMO FILES: THE STORIES OF THE 759 DETAINEES IN AMERICA’S ILLEGAL PRISON* (2007).

There was also a roundup of non-citizens inside the United States in the days and weeks after the 9/11 attacks, which resulted in 738 non-citizens being detained until August 2002. None was charged with a terrorism crime “and virtually all were cleared of any connection to terrorism by the FBI.” COLE, *supra* note 15, at 30.

<sup>23</sup> See generally Parry, *supra* note 2. U.S. detentions have not been limited geographically to Guantanamo. Since September 11, 2001, the United States has imprisoned thousands of al Qaeda suspects in Afghanistan, the Indian Ocean atoll Diego Garcia, and Charleston, South Carolina without charge or prisoner-of-war status. Bowden, *supra* note 14, at 56; see also COLE, *supra* note 15, at 30 (noting that the United States arrested and detained hundreds of non-citizens after 9/11).

<sup>24</sup> There are two bills pending as of this writing. S.B. 1249, proposed by Senator Dianne Feinstein (D-CA), would require trial in regular U.S. courts (Article III or regular military court), an international tribunal under U.N. authority, or trial in another country “provided that such country provides adequate assurances that the individual will not be subject to torture or cruel, inhuman, or degrading treatment.” This would prevent use of military commissions, but apparently would not prevent use of the CSRT or any other mechanism the Executive employs to determine whether to continue to detain or to release prisoners. The accompanying press release states that “Guantanamo Bay detainees who are found by the Department of Defense to pose no continuing security threat to the United States or its allies, and who have committed no crime, could be released.” Feinstein Press Release, *supra* note

Indeed, the two bills, as written, would keep the system alive in whole or in part. Moreover, it seems that demands for courts to allow easy victories against suspected terrorists may be part of a more general reaction to terrorist attacks, at least in democratic societies.<sup>25</sup> For example, the 9/11 attacks were not the first call for loosening judicial rules: after the 1995 Oklahoma City bombing, there were demands for “military tribunals” to try suspected terrorists without many of the traditional judicial safeguards for defendants’ rights.<sup>26</sup>

My second assumption is one I make *arguendo*, which is that U.S. officials believe that the rules they have created are capable of arriving at accurate determinations of terrorist status and guilt. That is, officials do not believe that the judicial corner-cutting evident in these rules sacrifices the truth-seeking function of the tribunals. Rather, they believe that these shortcuts merely allow the use of evidence that is accurate but which would not be admissible in regular U.S. courts, which employ evidentiary and

---

18. Notably, the press release contains all of the standard objections to Guantanamo that I canvassed above but not the objection that is my thesis.

S.B. 1469, sponsored by Sen. Tom Harkin (D-IA), would move the prisoners and eliminate indefinite detention by requiring that prisoners be charged with a crime or released. However, the bill keeps alive the option to try prisoners by military commission. *See also* Foley, *supra* note 4, at A13 (providing a general critique of proposals to close Guantanamo).

Although the U.S. Court of Appeals for the Fourth Circuit recently relied upon language in the Detainee Treatment Act and the Memorandum by the Secretary of the Navy that created the CSRT to state that the CSRT applies only to prisoners at Guantanamo, this language should not be regarded as dispositive on this issue. The Memorandum, of course, could simply be changed by the Executive branch. In fact, in *al-Marri v. S. L. Wright*, 487 F.3d 160 (4th Cir. 2007), the Deputy Secretary of Defense had represented to the court that a CSRT would be administered for the challenge by al-Marri, an alien legally residing in the United States, if the court agreed that federal courts lacked jurisdiction to hear his challenge. *Id.* at 173. The court found this assertion was not credible and was motivated by sharp litigation practice. *Id.* The upshot is that the Executive, as it noted in its argument, does not believe that *any* process applies to aliens imprisoned outside of the United States or Guantanamo. *Id.*

On the other hand, the court noted that military commissions are not limited by the language of the Military Commissions Act to Guantanamo prisoners but may be applied against enemy combatants captured in Iraq and Afghanistan. *Id.* at 172.

<sup>25</sup> *See* Ip, *supra* note 4, at 865-66; Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1338-40 (2004); *see also* Jonathan H. Marks, *9/11 + 3/11 + 7/7 = ? : What Counts in Counterterrorism*, 37 COLUM. HUM. RTS. L. REV. 559 (2006) (providing a general discussion of the public’s psychological reaction to terrorist attacks).

<sup>26</sup> *See* Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349 (1996). *But see* Daniel M. Filler, *Values We Can Afford—Protecting Constitutional Rights in an Age of Terrorism: A Response to Crona and Richardson*, 21 OKLA. CITY U. L. REV. 409 (1996).

procedural rules that are, in a post-9/11 age, quaint in that they often protect the dignity of citizens (such as against coerced confessions) or honor privileges (such as the attorney-client privilege).<sup>27</sup> I also assume *arguendo* that officials rely upon the determinations of the tribunals as accurate, especially those of terrorist status by the CSRT, and use those determinations for intelligence-gathering and investigatory purposes.<sup>28</sup> On this view, officials are honestly misguided. I make this assumption in order to critique the government policy on its face as being unable to help prevent terrorist attacks.

But the reality is probably more complex, though no less worrying. It seems likely that officials (most of them, at least) know that rigged rules are incapable of reaching accurate conclusions, and that officials do not rely on the tribunals for truth-seeking at all. Indeed, one wonders how they could think otherwise, given the extent to which the rules are rigged. Under this view, rigging is the whole point: the rules are rigged because officials *truly believe* the issue of guilt has already been determined. That is, they believe that the people they have captured pose a threat of terrorism and that it is therefore necessary to guarantee that any judicial “intermeddling” be resolved in the government’s favor. If this is the case, officials are still misguided because they are depriving themselves of a way to test their assumptions and expose mistakes that foster the dangers I discuss in this Article.

There is a further layer of complexity, which is the possibility that officials (or at least some of them) do not have a good faith motive, but a raw, political one. There has been powerful argument that the CSRT was created not to engage in accurate sorting of terrorists from non-terrorists but to cover up the mistaken detentions and overall brutality at Guantanamo that metastasized as a result of government overreactions after 9/11.<sup>29</sup>

---

<sup>27</sup> See Ip, *supra* note 4, at 809.

<sup>28</sup> I make this assumption *arguendo* despite the fact that the CSRT was implemented more than two years after Guantanamo opened its doors (or closed them, depending on one’s perspective).

<sup>29</sup> See MARGULIES, *supra* note 3, at 168-75; Karen J. Greenberg, *Can Guantanamo be Closed? What a New President Could Do*, Antiwar.com, Apr. 27, 2007, available at <http://www.antiwar.com/engelhardt/?articleid=10878> (“U.S. officials have consistently held that they are guarding vital national security interests by keeping the never-to-be-charged detainees in custody. However, the sad truth is that, when it comes to most of these prisoners, what’s really been at stake is the administration’s need to save face by concealing its utter ineptitude. Privately, even Bush administration officials will acknowledge that the detainees were captured and sent to Gitmo capriciously. . . . When an administration defiantly adverse to ever admitting error decided not to send home those who had been seized by mistake, it set itself a trap that it has been unable to escape to this day.”). The CSRT was created to give the appearance of a fair process, which may assure U.S. citizens as well as foreign governments and citizens—at least those who do not look too long or too

These questions of motive are tricky, and it may be that there is a mixture of these motives among officials. Resolving this question is beyond the scope of this Article. My overall point is that the rules are rigged, and whatever the motive, rigged rules prevent the tribunals from being a useful aid—and make them downright counterproductive—to the investigations that seek to thwart terrorist attacks.

Last, in this Article, I bracket the question of whether the processes are legally permissible, and I do not focus on the rights of the men who have been imprisoned. That does not mean that I regard these things as unimportant. Instead, I take this opportunity to question the wisdom of the thinking—which often appears reflexive—among policymakers that seeks to grant only the minimal process that is believed to be due a person in these circumstances. I argue that it is important to reflect upon the problem of what process to give prisoners at Guantanamo, not from the perspective of the prisoner's rights and how much process is legally due but from the separate perspective of how legal process can serve the War on Terrorism goal of preventing terrorist attacks, and how to design legal process to serve that purpose. I hope this Article will convince readers that when it comes to judicial process and terrorism, not only is there no need to sacrifice civil liberties for security, but that sacrificing civil liberties actually *threatens* public safety.

## II. THE RULES ARE RIGGED

The rules that are used to determine whether to detain suspected terrorists and to try them for war crimes are mere shadows—if not outright perversions—of the rules applied in U.S. criminal courts. The Guantanamo rules lack many of the traditional protections for defendants that are guaranteed by the U.S. Constitution, protections that do not simply protect the rights of defendants but that tend to produce accurate determinations by decision-makers. This Part describes the rules used by CSRT, ARB, and military commissions. It is important for the reader to bear in mind that I am not arguing that these rules are illegal because they derogate from the protections provided to criminal defendants in U.S. courts,<sup>30</sup> I am merely

---

closely—that the United States is a law-abiding country and that it is making progress in the War on Terrorism. See MARGULIES, *supra* note 3, at 170. It has also been argued more broadly that the new criminal process helps leaders maintain political support as they “respond by seeking to project an image of resoluteness and reassurance.” Parry, *supra* note 2, at 795. The harsh rules may also simply be a way of punishing, or fulfilling a public desire to punish, Arabic men after 9/11. Daniel M. Filler, Presentation at Drexel University (Jan. 12, 2007).

<sup>30</sup> This is an argument that the U.S. Supreme Court appears to have foreclosed—but should revisit. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-29, 532-36 (2004) (noting that the district court “apparently believed that the appropriate process would approach the

using standard U.S. criminal procedural rules as a touchstone, and of these standard rules I focus on the ones that serve the purpose, in whole or part, of achieving accurate fact-finding.<sup>31</sup>

#### A. DETENTION RULE—COMBATANT STATUS REVIEW TRIBUNALS

##### 1. *Background: The Supreme Court Defers to the Executive in Hamdi and Rasul*

When the United States first brought prisoners to Guantanamo Bay from Afghanistan and other parts of the world in 2002, U.S. officials argued that no laws applied.<sup>32</sup> So, presumably, prisoners would not and did not receive any process, only the conclusions reached by the military upon capture. The prisoners, the Bush Administration had already argued, were not prisoners of war (“POWs”) entitled to international law protections but instead were “unlawful combatants,”<sup>33</sup> then “enemy combatants,”<sup>34</sup> a newly

---

process that accompanies a criminal trial” and rejecting the district court’s view in favor of outlining a much more relaxed process). The Court’s suggestions regarding the appropriate process is discussed *infra* Part II.A.1.

<sup>31</sup> I am also aware that the rules I call “standard” are not strictly obeyed in the majority of criminal cases, as the majority of those such cases end in plea bargains. Plea bargains are very likely to compromise accuracy, which is a serious problem. *See, e.g.,* North Carolina v. Alford, 400 U.S. 25, 37-39 (1970) (finding defendants may enter guilty plea while maintaining innocence where there is strong (pre-trial) evidence of actual guilt); *see also* Stephanos Bibas, *Harmonizing Substantive Criminal Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361 (2003). Plea bargains might be seen as being somewhat protective of accuracy in the sense that the bargains are struck in the shadow of the courts, which apply rules that foster accuracy. *But see* GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* 3 (2003) (barriers against injustice such as cross-examination and jury discretion are absent from plea bargaining); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464 (2004) (questioning this “oversimplified model” found throughout “plea bargaining literature”). For discussion of how rules protecting accuracy can discipline police investigations, see *infra* note 197 and accompanying text. Police investigative techniques can become standardized as a result of procedural rules and important court rulings. Of course, many police will often try to work around and exploit such rules. *See* WELSH S. WHITE, *MIRANDA’S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 76 (2001) (describing how police have “adapted to *Miranda*”).

<sup>32</sup> *See* MARGULIES, *supra* note 3, at 84.

<sup>33</sup> Memorandum from President George W. Bush to the Vice President et al., re *Humane Treatment of Al Qaeda and Taliban Detainees* (Feb. 7, 2002), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 134 (Karen J. Greenberg & Joshua Dratel eds., 2005) [hereinafter THE TORTURE PAPERS].

<sup>34</sup> *Hamdi*, 542 U.S. at 516 (“There is some debate as to the proper scope of this term [“enemy combatant”], and the Government has never provided any court with the full criteria that it uses in classifying individuals as such.”).

invented term.<sup>35</sup> In response to challenges to the detentions, which the Supreme Court addressed in two cases in 2004, *Hamdi v. Rumsfeld*<sup>36</sup> and *Rasul v. Bush*,<sup>37</sup> the Bush Administration argued that Guantanamo Bay did not fall within the jurisdiction of any U.S. court<sup>38</sup> and the prisoners had no right to access U.S. courts to challenge their detention.<sup>39</sup>

In *Rasul*, the Court held that non-citizens regarded as enemy combatants could challenge their detentions under the federal habeas corpus statute.<sup>40</sup> The Court stated that it “need not address now” what procedure would be required for deciding such challenges.<sup>41</sup> In *Hamdi*, on the other hand, the Court did outline such a procedure in holding that a U.S. citizen detained as an enemy combatant could challenge the factual basis of his detention. The plurality opinion by Justice O’Connor was extremely deferential to the Executive. It concluded that citizens accused of being enemy combatants were entitled to “some process” to check that their detention was not mistaken, such as “notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”<sup>42</sup> The plurality stated that “interrogation by one’s captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker.”<sup>43</sup>

Justice O’Connor went on to suggest an outline for these rules in dicta.<sup>44</sup> The process due could be limited because “the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”<sup>45</sup> Justice O’Connor wrote, “Hearsay, for example, may need to be accepted as

---

<sup>35</sup> MARGULIES, *supra* note 3, at 84.

<sup>36</sup> 542 U.S. 507 (2004).

<sup>37</sup> 542 U.S. 466 (2004).

<sup>38</sup> *Id.* at 470.

<sup>39</sup> *Id.* at 475-76 (addressing non-citizens); *Hamdi*, 542 U.S. at 516-17, 525 (noting the Bush Administration argued that the Executive has plenary authority to detain citizens under Article II; that Congress authorized such detention; and that courts should review only the legality of overall detention schemes, not engaging in fact-finding in individual cases but only applying the deferential standard of whether “some evidence” supports the government’s stated reason for detaining the citizen).

<sup>40</sup> *Rasul*, 542 U.S. at 484; *see also* 28 U.S.C. § 2241 (2000).

<sup>41</sup> *Rasul*, 542 U.S. at 485.

<sup>42</sup> *Hamdi*, 542 U.S. at 533.

<sup>43</sup> *Id.* at 537. “Interrogation by one’s captor,” of course, cannot be “an effective intelligence-gathering tool” if the person interrogated is not an enemy combatant or lacks relevant information or both.

<sup>44</sup> *Id.* at 533-36.

<sup>45</sup> *Id.* at 533.



the most reliable available evidence from the government in such a proceeding.”<sup>46</sup> There may be a “rebuttable presumption” in favor of the government’s evidence.<sup>47</sup>

A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant.<sup>48</sup>

This process could be a substitute for a court’s considering a petition for habeas corpus.<sup>49</sup> Notably, neither the plurality nor any other opinion, concurring or dissenting, suggested that, going forward, anything like a *Gerstein* hearing or a Federal Rule of Criminal Procedure 5.1 hearing should be used shortly after capture to test the accuracy of the detention.<sup>50</sup> The reason, as I will suggest in Parts III and IV, is that the Court was unaware of the link between detentions, interrogations, and accurate investigations that is the crux of this Article.

Shortly after the Supreme Court spoke, the Bush Administration followed Justice O’Connor’s lead and created the CSRT, a purported

---

<sup>46</sup> *Id.* at 533-34.

<sup>47</sup> *Id.* at 534.

<sup>48</sup> *Id.* The opinion did not mention that many of the prisoners had been captured by warring Afghani tribes, not U.S. forces, and that these captures may have been motivated by bounties offered by the United States for al Qaeda and Taliban members. See Denbeaux & Denbeaux, *Profile of 517 Detainees*, *supra* note 22, at 3. The Court was, however, aware of the allegations, and noted in *Rasul*, the companion case, that relatives of some detainees who were parties had alleged the capture was motivated by such bounties. *Rasul v. Bush*, 542 U.S. 466, 472 n.4 (2004).

<sup>49</sup> The Court noted that the military could create tribunals to test the factual underpinnings of a detention but that “[i]n the absence of such a process . . . a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved.” *Hamdi*, 542 U.S. at 538.

<sup>50</sup> See discussion *infra* Part IV.A (proposing hearings similar to Rule 5.1 hearings). Under *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) and *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), a suspect who is arrested without a warrant and detained must be taken before a magistrate within forty-eight hours of the arrest so that the court may determine if there was probable cause to arrest under the Fourth Amendment. The Federal Rules of Criminal Procedure require a hearing to determine whether probable cause exists to believe that the defendant committed a crime, which must be held within ten days after the defendant’s initial court appearance if the defendant is in custody or twenty days after the initial court appearance if he is not in custody and he has not been indicted or charged by information. FED. R. CRIM. P. 5.1(c). The defendant may cross-examine witnesses, FED. R. CRIM. P. 5.1(e), and if the court concludes there is no probable cause, “the magistrate must dismiss the complaint and discharge the defendant.” FED. R. CRIM. P. 5.1(f).

substitute for habeas corpus that ostensibly would satisfy the needs and exigencies Justice O'Connor suggested.<sup>51</sup>

## 2. The CSRT Rules

The CSRT rules are rigged. As Joseph Margulies, lead counsel in *Rasul v. Bush*, has written, “the conclusion is simply inescapable that these tribunals were created for no other purpose than to validate a predetermined result. For years, the Administration has told the world that the prisoners at the base were ‘enemy combatants,’ and now a ‘hearing’ will come to precisely that conclusion.”<sup>52</sup> The rules of evidence and the inability of the detainee to gather evidence or otherwise mount a defense “ensure that the particulars of any given detention remain shielded from outside scrutiny, and the prisoner remains in a black hole.”<sup>53</sup> The CSRT does not and cannot carry out the sorting function, and because it is rigged, using it is practically the same as having no hearing at all. Also, the hearings are not required to be held early in the detention;<sup>54</sup> if they were (and if they were accurate), they could help prevent the multiplication of risks that ensues from mistaken detentions.<sup>55</sup>

The shortcomings of the CSRT can be highlighted by comparing the rules to the traditional protections afforded criminal defendants in U.S. courts, as the rest of this Part will do.<sup>56</sup>

---

<sup>51</sup> See Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to the Secretary of the Navy (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>. After the CSRT hearings were completed, the U.S. government informed federal courts planning to hold habeas hearings that these hearings were no longer necessary. Denbeaux & Denbeaux, *No-Hearing Hearing*, *supra* note 22, at 4.

<sup>52</sup> MARGULIES, *supra* note 3, at 169. Much has been made of a military officer who was involved in CSRT hearings coming forward recently to express his misgivings about the accuracy and fairness of the CSRT. See William Glaberson, *An Unlikely Adversary Arises to Criticize Detainee Hearings*, N.Y. TIMES, July 23, 2007, at A1. However helpful such whistle-blowing can be to public awareness and understanding, the same conclusions can be reached (and should have been reached earlier) merely by reading the CSRT rules, as this section will show.

<sup>53</sup> MARGULIES, *supra* note 3, at 169.

<sup>54</sup> Indeed, the CSRT was created more than two years after the first prisoners were brought to Guantanamo.

<sup>55</sup> These mistakes occur regardless of the motive behind rigging the CSRT rules. As stated in Part I, I am assuming *arguendo* that the CSRT is relied upon as an accurate way of screening out mistakenly imprisoned people. It may be that officials are well aware that the rules are rigged and incapable of reaching accurate determinations; if that is true, this Part will have little new to offer them, but they may find Part III illuminating.

<sup>56</sup> Again, I make this comparison not to argue that the rules are illegal because they derogate from these protections but to highlight the risk of inaccuracy that results. Notably, the dissenting opinion in *Boumediene v. Bush*, 476 F.3d 981, 1006 (D.C. Cir. 2007) (Rogers, J., dissenting) argued that the CSRT process failed to provide the minimal protections that a

### a. Broad Definition of “Enemy Combatant”

The CSRT is empowered to keep in prison anybody who fits the following definition of “enemy combatant”:

An “enemy combatant” for the purposes of this order shall mean an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or who has directly supported hostilities in aid of enemy armed forces.<sup>57</sup>

At its broadest, this definition would permit detention at Guantanamo for any person who merely “supported” forces “associated” with the Taliban or al Qaeda that are engaged in “hostilities” with, say, Djibouti, Pakistan, Poland, Nepal, or Qatar, which appear to be members of the “coalition,” though it is unclear what the “coalition” even is.<sup>58</sup> Nor does the definition

habeas corpus hearing must provide: “Insofar as each of these practices impedes the process of determining the true facts underlying the lawfulness of the challenged detention, they are inimical to the nature of habeas review.” I also think it is appropriate in many respects to compare the CSRT rules with the trial rules in the U.S. justice system because the CSRT is the only judicial process (and it is merely quasi-judicial at that) many prisoners have in which to test the accuracy of their detention and losing at this hearing subjects them to indefinite detention. Habeas, on the other hand, usually comes after trial and appeal in regular U.S. courts have been exhausted, so there will have been some process under rigorous rules (claimed errors notwithstanding); if the habeas proceeding is conducted in the context of a war or other emergency, this exceptional circumstance will presumably end within a few years and not last as long as the War on Terror.

It has been noted that the standards are also lower than those Article 5 of the Third Geneva Convention requires to determine whether a captive is a POW or civilian. See MARGULIES, *supra* note 3, at 161. For example, Article 5 tribunals employ a presumption that the person is a POW, which means that the person will be detained with the protections of the Geneva Conventions for a few years, if experience and history are a guide. *Id.* at 164. If the person is found not to be a POW, the person is released, or, if accused of a crime, turned over to civilian authorities and presumably tried in accordance with prevailing procedural and evidence rules. These Article 5 rules differ from the CSRT in that the presumption of the CSRT is that the person will be detained indefinitely—likely at least a generation in the War on Terror—and *without* Geneva protections. *Id.* For the reasons set forth above, I believe the comparison to the regular U.S. system is more appropriate.

<sup>57</sup> Memorandum from the Deputy Secretary of Defense to the Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, and the Under Secretary of Defense for Policy, Enclosure 1: Combatant Status Review Tribunal Process (July 14, 2006), available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf> [hereinafter CSRT Process]. Notably, this definition is expanded beyond the one the United States and Supreme Court used in *Hamdi* and *Rasul* by changing the “and” to an “or,” which makes the newer definition more inclusive. MARGULIES, *supra* note 3, at 161-62 (comparing definition with that set forth in *Hamdi*).

<sup>58</sup> According to the U.S. government, the coalition began on September 12, 2001, and now seventy nations are involved in the “global war on terrorism.” Coalition Fighting Terror, <http://www.centcom.mil/sites/uscentcom2/Coalition%20Fighting%20Terror/CoalitionPages/Coalition%20Fighting%20Terror.aspx> (last visited Sept. 23, 2007). If

distinguish among detainees based on citizenship (U.S. citizens versus non-U.S. citizens), and it may well be that the CSRT process would pass constitutional muster for a citizen, as it is based on Justice O'Connor's dicta in *Hamdi*. In fact, counsel for the Executive branch argued in a federal district court that this definition would include:

[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities, a person who teaches English to the son of an al Qaeda member, and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source.<sup>59</sup>

The little old lady, the English teacher, and the journalist are not terrorists, and they are not engaged in war, or even violence, against the United States or coalition nations. Nor are these hypothetical enemy combatants likely to have relevant knowledge of terrorism against the United States. Such a broad definition is contrary to the principle derived from the U.S. Constitution that crimes may not be defined so broadly that they are capable of sweeping up lots of innocent people and criminalizing what may be understood as innocent behavior.<sup>60</sup> I am not arguing that this definition of enemy combatant is therefore illegal;<sup>61</sup> I am pointing out that this broad definition is likely to cause many innocent people to be imprisoned indefinitely and interrogated, the dangers of which are discussed below.

#### b. Mode of Proceedings

The CSRT does not provide a trial but rather a hearing that is “non-adversarial.”<sup>62</sup> This framework contravenes a basic premise of the U.S.

---

“coalition” is limited to Operation Enduring Freedom in Afghanistan, and to the initial invasion, the number of nations is smaller: twenty-seven, according to the White House, which did not provide a listing. White House, *Operation Enduring Freedom: One Year of Accomplishments*, <http://www.whitehouse.gov/infocus/defense/enduringfreedom.html> (last visited Feb. 28, 2007).

<sup>59</sup> *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) (citations omitted), *vac'd by* *Boumediene v. Bush*, 476 F.3d 981, 994 (D.C. Cir. 2007). Government counsel did not create these individuals but was responding to hypothetical questions posed by the court. *Id.*

<sup>60</sup> *See Morales vs. Chicago*, 527 U.S. 41, 45-46, 64 (1999) (striking down as overbroad and violative of due process an ordinance prohibiting “criminal street gang members” from “loitering”); *Papachristou v. Jacksonville*, 405 U.S. 156 (1972) (same for vagrancy ordinance).

<sup>61</sup> This is a question I have bracketed for the purposes of my critique. *See* discussion *supra* Part I.

<sup>62</sup> CSRT Process, *supra* note 57, at 1 § B.

legal system, which is that adversarial hearings promote truth-seeking.<sup>63</sup> At Guantanamo, however, the non-adversarial proceedings involve a rebuttable presumption in favor of the government's evidence that the person is an enemy combatant.<sup>64</sup> This standard is contrary to the adversarial standard of U.S. criminal trial rules, where no presumptions in favor of guilt (rebuttable or not) are permitted: everything must be proved.<sup>65</sup> The standard of proof for the CSRT is "preponderance of the evidence,"<sup>66</sup> much weaker than the "beyond a reasonable doubt" standard in the U.S. criminal system.<sup>67</sup>

---

<sup>63</sup> See, e.g., Geoffrey C. Hazard, *Law Practice and the Limits of Moral Philosophy*, in *ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 75-93* (Deborah L. Rhode ed., 2000). Hazard states:

Underlying this procedural function is a two-fold assumption. On the one hand, it is assumed that judges are subject to such human failings as incomprehension, inattention, impatience, and bias. On the other hand, it is assumed that legal procedures can mitigate these failings by requiring the judge to consider plausible alternative versions of the law and the facts. The judge must consider these plausible alternative versions on the way to, and as the means of, finding the truth of the matter.

*Id.* at 81. Hazard continues and states that without lawyers arguing competing sides of an issue, "the parties would have no advocates. We would be relegated to trusting divine intervention or constituting the advocate as 'both prosecutor and judge,' as the saying goes." *Id.* at 83. Hazard also notes that this dialectical approach is found as well in our political system, where an opposition party can serve this function, and in our economic system, where competition serves to force competing viewpoints such as in advertising. *Id.* at 84. *But see* Tung Yin, *Procedural Due Process to Determine "Enemy Combatant" Status in the War on Terrorism*, 73 TENN. L. REV. 351, 410-11 (2006) (questioning whether lawyers help achieve accuracy as opposed to "justice" in some instances). It is also believed by some jurists that an inquisitorial as opposed to adversarial system can be more effective at truth-seeking. See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

<sup>64</sup> CSRT Process, *supra* note 57, at 1 § B & 6 § G(11). Moreover, the presumption is bolstered by the statement, "Each detainee whose status will be reviewed by a Tribunal has previously been determined, since capture, to be an enemy combatant through multiple levels of review by military officers and officials of the Department of Defense." *Id.* It is likely that the CSRT, made up entirely of military officers, might feel reluctant to gainsay the findings of their superiors at the Department of Defense. See *id.* at 1 § C.

<sup>65</sup> See *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Ulster County Court v. Allen*, 442 U.S. 140 (1979). The presumption of innocence is a fundamental aspect of U.S. criminal procedure. *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

<sup>66</sup> CSRT Process, *supra* note 57, at 1 § B.

<sup>67</sup> See *In re Winship*, 397 U.S. 358 (1970). The U.S. criminal justice system at times uses lower standards of proof, such as requiring a judicial determination of probable cause for detaining someone after an arrest for the purposes of a trial. *Gerstein v. Pugh*, 420 U.S. 103, 124-26 (1975). Pretrial release can be denied under Bail Reform Act, 18 U.S.C. § 3141 et seq. (2000), "[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community." *United States v. Salerno*, 481 U.S. 739, 751 (1987). In *Salerno*, the Supreme Court held that the Bail Reform Act provided sufficient safeguards for arrestees because it required a "full

The tribunal members who make the ultimate determination at Guantanamo are military officers, not judges. Only one of them is required to be a trained attorney.<sup>68</sup> Legal training is important, however, in terms of arriving at accurate results because it develops the ability to weigh both sides of a case, to scrutinize evidence, and to consider the various ways that it can cut. Attorneys are trained to examine witnesses for bias, hidden motives, personal knowledge, perceptive abilities, memory, and logical consistency. People without legal training are less likely to question evidence in these ways. Military officers are even less likely to question evidence because they may fear that contradicting the earlier determination that a prisoner is an enemy combatant could be interpreted as disobedience. Indeed, the Uniform Code of Military Justice, which applies to regular courts martial but not to the CSRT, specifically allows a defendant to appeal if he believes the proceedings were unduly affected by “command influence.”<sup>69</sup> There are no such grounds for appeal, however, from the CSRT. This unavoidable lack of neutrality can infect CSRT fact-finding.

The detainee is specifically prohibited from having the assistance of counsel,<sup>70</sup> unlike our own system, where the assistance of counsel is explicitly guaranteed by the Sixth Amendment to the U.S. Constitution.<sup>71</sup> Instead, the suspect is given a “Personal Representative,” a military officer

---

blown adversary hearing” and “immediate appellate review of the detention decision.” *Id.* at 750-52. These situations are distinguishable from the CSRT because the detention is not indefinite—ultimately the arrestee, if the government decides to prosecute him, will be guaranteed a trial using a beyond a reasonable doubt standard of proof, within a reasonable amount of time as guaranteed by the Constitution’s right to a speedy trial. U.S. CONST. amend. VI.

<sup>68</sup> I do not stress that there is no jury, as guaranteed in criminal trials by the Constitution, see U.S. CONST. amend. VI, because it is arguable whether a jury protects accuracy.

<sup>69</sup> See 10 U.S.C. § 837 (2000); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2804, 2806-07 (2006) (Kennedy, J., concurring in part). The U.S. Supreme Court has described “command influence” in courts martial as follows:

Courts-martial are typically ad hoc bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of “command influence.” In essence, these tribunals are simply executive tribunals whose personnel are in the executive chain of command. Frequently, the members of the court-martial must look to the appointing officer for promotions, advantageous assignments and efficiency ratings—in short, for their future progress in the service. Conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, the members of a court-martial, in the nature of things, do not and cannot have the independence of jurors drawn from the general public or of civilian judges.

*Reid v. Covert*, 354 U.S. 1, 35 (1957) (holding that trial by court martial of non-military dependents of military personnel for capital offenses overseas in peacetime violated Constitution).

<sup>70</sup> CSRT Process, *supra* note 57, at 2 § C(3).

<sup>71</sup> U.S. CONST. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335 (1963).

who “shall *not* be a judge advocate . . . to assist the detainee in reviewing all relevant unclassified information, in preparing and presenting information, and in questioning witnesses at the CSRT.”<sup>72</sup> On the other hand, the government’s evidence is presented by the “Recorder,” who is “preferably a judge advocate,” i.e., a trained attorney.<sup>73</sup> The recorder functions not unlike a prosecutor, given that the recorder is “to obtain and present all relevant evidence to the Tribunal and to cause a record to be made of the proceedings.”<sup>74</sup> So not only is the playing field tilted in the government’s favor in that there is a presumption in favor of the government’s evidence, but it is also tilted in that a lawyer presents the government’s evidence against the prisoner. Also, the personal representative, who is a member of the military, may be outranked by the members of the CSRT,<sup>75</sup> which could subject his or her conduct to “command influence” in instances where he or she perceives or even merely believes that the CSRT members desire particular action or a particular outcome. The personal representative can also be influenced by commanders more generally in that, much like the CSRT members, the personal representative may fear questioning the overall determination that a prisoner is an enemy combatant.<sup>76</sup>

### c. Unreliable Evidence and Lack of Cross-Examination

Protections against unreliable evidence are relaxed as well. For example, secret evidence may be used. That is, the suspect may be removed from the CSRT while the decision-makers and his personal representative hear the recorder present classified evidence against the suspect.<sup>77</sup> The suspect is prohibited from seeing this evidence, and the personal representative is prohibited from discussing it with him.<sup>78</sup> This methodology is contrary to traditional requirements of notice and opportunity to be heard,<sup>79</sup> and very likely the Confrontation Clause in the Sixth Amendment.<sup>80</sup> What is not well understood, however, is that keeping

<sup>72</sup> CSRT Process, *supra* note 57, at 2 § C(3) (emphasis added).

<sup>73</sup> *Id.* at 2 § C(2) (stating that the recorder is “preferably a judge advocate”).

<sup>74</sup> *Id.* at 1 § B, 2 § C(2), 7 § H.

<sup>75</sup> *Id.* at 1, 2 §§ C(1), C(3). The personal representative may outrank the recorder. *Id.* at 2 §§ C(2), C(3).

<sup>76</sup> See discussion *supra* note 64.

<sup>77</sup> CSRT Process, *supra* note 57, at 4 § F(8), 8 § G(7).

<sup>78</sup> *Id.* at 4 § F(8), 8 § G(8).

<sup>79</sup> *Boumediene v. Bush*, 476 F.3d 981, 1005-06 (D.C. Cir. 2007) (Rogers, J., dissenting).

<sup>80</sup> U.S. CONST. amend. VI; *Crawford v. Washington*, 541 U.S. 36, 51-57, 62 (2004) (Confrontation Clause requires that defendant have opportunity to cross-examine “testimonial” evidence). It also violates U.S. statutory law, as set forth in the Uniform Code of Military Justice (“UCMJ”) and the Geneva Conventions. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2792-93, 2795-99 (2006) (discussing the UCMJ and the Third Geneva

evidence secret from the suspect also threatens accuracy in that not only is the suspect barred from seeing the evidence, but the personal representative also cannot ask him to rebut or explain it—that is, to question its accuracy either factually or contextually, or to help develop questions for cross-examination.<sup>81</sup> Hearsay evidence also may be used if the CSRT believes it is reliable.<sup>82</sup> This contravenes the Federal Rules of Evidence, which prohibit hearsay except for certain categorical exceptions that have, over time, proven to be accurate.<sup>83</sup> Moreover, the Federal Rules do not give even Article III judges the power to make a blanket determination of reliability such as the non-lawyers on the CSRT are empowered to make.<sup>84</sup> Likewise, coerced testimony may be used at Guantanamo if the CSRT believes it is reliable.<sup>85</sup> This contravenes protections long understood as

Convention); see also Andrew E. Taslitz, *What Remains of Reliability: Hearsay and Freestanding Due Process After Crawford v. Washington*, 20 CRIM. JUST. 39 (2005) (discussing the Confrontation Clause and reliability after *Crawford*).

<sup>81</sup> See *Hamdan v. Rumsfeld*, 344 F. Supp. 2d. 152, 168 (D.D.C. 2004) (addressing use of classified evidence in military commissions), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006).

<sup>82</sup> CSRT Process, *supra* note 57, at 6 § G(7) (“The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issues before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances.”).

<sup>83</sup> See FED. R. EVID. 801-807.

<sup>84</sup> At least, the judges are not clearly given that power.

[O]ne of the more divisive controversies in evidence law is whether hearsay that narrowly fails the test for admission under one of the many hearsay exceptions (a “near miss”) can be admitted nonetheless under the Federal Rule of Evidence 807, which allows a “residual exception” for hearsay that a judge deems reliable.

GEORGE FISHER, EVIDENCE 514-18 (2002).

<sup>85</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739, 2742 (2005). This section provides:

(b) CONSIDERATION OF STATEMENTS DERIVED WITH COERCION—

(1) ASSESSMENT—The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess—

(A) whether any statement derived from or relating to such detainee was obtained as the result of coercion; and

(B) the probative value (if any) of any such statement.

Obviously, a CSRT or ARB can use these statements if the members deem the statement to have probative value. Additionally, the CSRT or ARB might not find it “practicable” to assess whether a statement was derived from coercion in the first place. Without such assessment, the statement may simply be considered. CSRT Process, *supra* note 57, at 6 § G(7) (permitting Tribunal to consider “any information it deems relevant”). Notably, coerced testimony is not mentioned expressly in the CSRT Process.



required by the U.S. Constitution.<sup>86</sup> Coerced confessions have long been seen as inherently unreliable<sup>87</sup> and, for that reason and others,<sup>88</sup> are never admissible in U.S. courts against a defendant.<sup>89</sup>

Cross examination has been recognized by the Supreme Court as the “greatest legal engine ever invented for the discovery of truth.”<sup>90</sup> Yet the CSRT limits a prisoner’s ability to cross-examine. There is no right for him to confront witnesses against him if their identity is classified or if they are “unavailable.”<sup>91</sup> A witness might be “unavailable” because he is a soldier and his commanding officer deems that the soldier’s testifying at the CSRT “will adversely affect combat or support operations,”<sup>92</sup> an extremely broad standard that can be abused easily. Proceeding without such a witness is contrary to the Confrontation Clause<sup>93</sup> and can lead to inaccuracy.

A prisoner or his personal representative (if so inclined) likely would have difficulty conducting anything approaching a competent cross-examination even if there were a full opportunity to do so, given that most likely the prisoner is not an attorney, and no personal representatives are attorneys. Also at Guantanamo, many prisoners speak no English or speak it as a second or third language, which further complicates their limited

<sup>86</sup> See *Jackson v. Denno*, 378 U.S. 368, 385-86 (1964); *Brown v. Mississippi*, 297 U.S. 278, 287 (1936).

<sup>87</sup> John H. Langbein, *The Legal History of Torture*, in *TORTURE*, *supra* note 14, at 100 (“History’s most important lesson is that it has not been possible to make coercion compatible with truth.”).

<sup>88</sup> Accuracy is not the only consideration: there are concerns over dignity, see *Miranda v. Arizona*, 384 U.S. 436, 457, 460 (1966); fairness, see JOSEPH D. GRANO, *CONFESSIONS, TRUTH, AND THE LAW* 106 (1993); protecting against a suspect’s having his “will . . . overborne and his capacity for self-determination critically impaired,” *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961); and overall trust of government by citizens, see Margaret L. Paris, *Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL’Y & L. 3, 25-27 (1995).

<sup>89</sup> However, the erroneous use of coerced testimony at trial does not automatically lead to a reversal of the verdict. The admission is tested under the harmless error test. *Arizona v. Fulminante*, 499 U.S. 279 (1991). Also, although “[f]ailure to administer *Miranda* warnings creates a presumption of compulsion,” *Oregon v. Elstad*, 470 U.S. 298, 307 (1985), such statements may be admissible against a defendant pursuant to minor exceptions. See *Pennsylvania v. Muniz*, 496 U.S. 582, 600-02 (1990) (finding police are not required to give *Miranda* warnings when asking “administrative,” “routine booking questions” of arrestees, such as requests for “name, address, height, weight, eye color, date of birth, and current age”); *New York v. Quarles*, 467 U.S. 649, 657-50 (1984) (holding that admission of confession without *Miranda* warnings was proper because police were seeking to protect public’s safety when they asked suspect they had just arrested where he had discarded his gun during pursuit).

<sup>90</sup> See *California v. Green*, 399 U.S. 149, 158 (1970) (quoting JOHN HENRY WIGMORE, 5 WIGMORE ON EVIDENCE § 1367, at 29 (3d ed. 1940)).

<sup>91</sup> See CSRT Process, *supra* note 57, at 6 §§ G(9), G(10).

<sup>92</sup> *Id.* at 6 § G(9)(b).

<sup>93</sup> U.S. CONST. amend. VI; *Crawford v. Washington*, 541 U.S. 36 (2004).

chance to cross-examine. The Supreme Court has recognized that skilled cross-examination can help prevent wrongful detentions, and for that reason, has required the assistance of counsel at adversarial preliminary hearings in U.S. courts.<sup>94</sup>

#### d. Presenting a Defense

Detainees are not guaranteed any right to present witnesses in their favor.<sup>95</sup> This is contrary to a meaningful opportunity to be heard,<sup>96</sup> as well as the right to compulsory process in U.S. courts.<sup>97</sup> A suspect may call witnesses but their attendance at the CSRT is voluntary (the CSRT does not issue subpoenas) and at the witness's own expense.<sup>98</sup> Witnesses who cannot be present may testify by telephone or video telephone, and other information may be sent by e-mail or fax, but this is done only at the discretion of the President of the Tribunal.<sup>99</sup> These opportunities will in most instances, however, be illusory. One can easily imagine, for example, the difficulty a prisoner held incommunicado might have in contacting such witnesses, or the difficulty that a witness from Afghanistan, one of the world's poorest countries, might have in finding out about, much less paying for, a plane ticket from Kabul to Guantanamo Bay, Cuba—or finding a telephone, video-telephone, computer, or fax machine.<sup>100</sup>

Also, unlike our criminal justice system, there is no duty on the part of the government to turn over exculpatory evidence.<sup>101</sup> This means that a CSRT might have evidence that tends to show, or even proves, that a detainee is not an enemy combatant but can keep it under wraps. Given that the CSRT is designed to verify that the detainee was properly categorized as an enemy combatant—here, assuming (as I do *arguendo*) that the CSRT is rigged in good faith to permit the government to detain and interrogate the prisoner where the government merely suspects but cannot prove that he may be involved in terrorism—the military would seem to have little incentive to turn over exculpatory evidence, as it could cause the release of

---

<sup>94</sup> See *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (finding the preliminary hearing is a “critical stage” under the Sixth Amendment right to counsel because “plainly the guiding hand of counsel . . . is essential to protect the indigent accused against an erroneous or improper prosecution” because the attorney can, inter alia, conduct skilled cross-examination).

<sup>95</sup> See CSRT Process, *supra* note 57, at 6 §§ 9, 10.

<sup>96</sup> See *Boumediene v. Bush*, 476 F.3d 981, 1005 (D.C. Cir. 2007) (Rogers, J., dissenting).

<sup>97</sup> See *Washington v. Texas*, 388 U.S. 14, 18-19 (1967).

<sup>98</sup> See CSRT Process, *supra* note 57, at 6 §§ 9(b), 9(c).

<sup>99</sup> See *id.* at 6 § 9(c).

<sup>100</sup> See MARGULIES, *supra* note 3, at 167.

<sup>101</sup> See *Brady v. Maryland*, 373 U.S. 83, 104 (1963).

a potential threat (however small). Of course, absent good faith, the military would lack incentive to turn over such evidence even if it believed that a prisoner posed no threat, because exonerations could prove politically embarrassing. In either case, without a duty to do so, such a turnover of evidence is unlikely, making it unlikely that the prisoner will be released.<sup>102</sup>

Last, there is no protection against double jeopardy.<sup>103</sup> If a prisoner wins at one tribunal, that successful defense may be ignored. He may simply be tried again, until the government wins.<sup>104</sup>

### 3. Appellate Review and Habeas Corpus

Appeals are extremely limited. There are no appeals within the CSRT system.<sup>105</sup> Beyond that, Congress has expressly limited appeals from CSRT determinations to the U.S. Court of Appeals for the District of Columbia Circuit, and it has limited the scope of these appeals to ensuring only that the CSRT followed its own procedures.<sup>106</sup> There is thus no real review of the facts as determined by the CSRT.<sup>107</sup> There is no right to habeas corpus

<sup>102</sup> MARGULIES, *supra* note 3, at 165-66 (making this point and relating account of CSRT hearing where a German prisoner was not given evidence that German and U.S intelligence officials had concluded there was no evidence he was part of al Qaeda).

<sup>103</sup> See U.S. CONST. amend. V (“No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . .”); *Boumediene v. Bush*, 476 F.3d 981, 1006-07 (D.C. Cir. 2007) (Rogers, J., dissenting).

<sup>104</sup> *Boumediene*, 476 F.3d at 1006-07 (Rogers, J., dissenting) (stating that, in at least one known instance, a detainee was subjected to three hearings until the government finally won).

<sup>105</sup> See generally CSRT Process, *supra* note 57.

<sup>106</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-48, § 1005(e), 119 Stat. 2680 (2005). The Act provides:

SCOPE OF REVIEW—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government’s evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

*Id.* § 1005(e)(2)(C).

<sup>107</sup> The U.S. Constitution does not provide a right to appeal for criminal defendants, and it has not been interpreted as providing such a right by the U.S. Supreme Court. *McCane v. Durston*, 153 U.S. 684 (1894). Rights to appeal are based largely on statutory law. See MARK L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS* 1345-48 (2d ed. 2003).

for any person “properly designated as an enemy combatant,”<sup>108</sup> which would seem to preclude collateral review of the determination itself.<sup>109</sup>

Regardless of whether such rules ultimately survive U.S. Supreme Court scrutiny, it is hard to fathom, as a theoretical matter (and regardless of the actual intent behind the formation of the CSRT), how the determinations by the CSRT can be accurate, given that the rules do not create anything like a firm epistemological basis for reliable conclusions.

#### B. DETENTION RULES—ADMINISTRATIVE REVIEW BOARDS

The CSRT procedure is complemented by an annual reassessment of the prisoner’s status before an ARB.<sup>110</sup> The purpose is to determine whether a prisoner at Guantanamo who has been determined to be an enemy combatant “should be released, transferred, or continue to be detained.”<sup>111</sup> This process gives even less protection for accuracy than the CSRT rules give. For example, there is no hearing in the traditional sense: the ARB session may be conducted without the prisoner present,<sup>112</sup> and “[w]itnesses will not be allowed to testify or present information.”<sup>113</sup> The ARB is not required to include military judges or lawyers.<sup>114</sup> In fact, the session is essentially lawyer-free. The government’s evidence is presented by the Designated Military Officer; these officers “shall *not* be Judge Advocates or Chaplains.”<sup>115</sup> The prisoner is assisted by the “Assisting Military Officer” who similarly “shall not be a Judge Advocate or Chaplain,”<sup>116</sup> and who pointedly “is not an advocate for or against the continued detention of the enemy combatant under review.”<sup>117</sup>

---

<sup>108</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (§ 950j(b)) (2006).

<sup>109</sup> A recent case upholding the provision interpreted in this manner. *See* *Boumediene v. Bush*, 476 F.3d 981, 994 (D.C. Cir. 2007) (“Federal courts have no jurisdiction in these cases.”).

<sup>110</sup> *See* Deputy Secretary of Defense, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretary of Defense for Policy, Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, “Combatant Status Review Tribunal Process” (July 14, 2006), *available at* <http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf> [hereinafter ARB Memo].

<sup>111</sup> *Id.* at 1.

<sup>112</sup> *Id.* at encl. 4 § 1(m).

<sup>113</sup> *Id.* at encl. 4 § 2(d).

<sup>114</sup> *Id.* at encl. 3 § 2.

<sup>115</sup> *Id.* at encl. 3 § 2(b) (emphasis added).

<sup>116</sup> *Id.* at encl. 3 § 2(c).

<sup>117</sup> *Id.*

Protections against unreliable evidence are limited. The Federal Rules of Evidence or any other rules of evidence specifically do not apply; instead, the ARB may consider any evidence that it determines to be reliable.<sup>118</sup> It may also consider coerced confessions if it finds them to have probative value.<sup>119</sup>

Whether the ARBs ultimately gain the Supreme Court's approval, they nevertheless present the same sorts of dangers as the CSRT.<sup>120</sup> Holding an ARB hearing is practically the same as holding no hearing at all.

### C. GUILT ADJUDICATION RULES—MILITARY COMMISSIONS

Unlike the CSRT, military commissions have a venerable tradition. They were used in the American Civil War.<sup>121</sup> They were used in World War II to try suspected Nazi saboteurs who had landed from U-boats on Long Island, New York and Florida.<sup>122</sup> The U.S. Supreme Court concluded that the tribunals were constitutional and fell within the Executive's Article II Commander-in-Chief power.<sup>123</sup> Military tribunals for suspected terrorists were also suggested as a response to the 1993 bombing of the World Trade Center in New York and the 1995 bombing of the Murrah Federal Building in Oklahoma City.<sup>124</sup>

President Bush issued an Executive Order setting up military commissions on November 13, 2001, shortly after the September 11, 2001 attacks, to try enemy combatants for unspecified war crimes.<sup>125</sup> Since then, the rules have gone through various incarnations.<sup>126</sup> In response to the U.S. Supreme Court decision *Hamdan v. Rumsfeld* in June 2006, which held that one aspect of these rules—permitting the government's use of secret

<sup>118</sup> *Id.* at encl. 3 §§ 3(e)(2)-(4).

<sup>119</sup> *Id.* at encl. 13 § B (“[T]he ARB shall assess, to the extent practicable, whether any statement derived from or relating to such detainee was obtained as a result of coercion, and the probative value, if any, or such statement.”).

<sup>120</sup> See Jane Mayer, *Q & A: In Gitmo*, NEW YORKER ONLINE ONLY, July 6, 2005, [http://www.newyorker.com/online/content/articles/050711on\\_onlineonly01](http://www.newyorker.com/online/content/articles/050711on_onlineonly01) (providing an account of an ARB depicting the difficulties prisoners face in questioning the government's evidence against them).

<sup>121</sup> See *Ex parte Milligan*, 71 U.S. 2 (1866).

<sup>122</sup> See *Ex parte Quirin*, 317 U.S. 1 (1942).

<sup>123</sup> *Id.*

<sup>124</sup> See Crona & Richardson, *supra* note 26, at 350-51.

<sup>125</sup> Presidential Military Order (Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism), 66 Fed. Reg. 57831-57836 (Nov. 13, 2001) [hereinafter Bush Order].

<sup>126</sup> See Military Commission Order No. 1 (Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terror, March 21, 2002) 32 C.F.R. § 9.2 (2002) [hereinafter Military Commission Order No. 1].

evidence—violated statutory law (the Uniform Code of Military Justice and the Third Geneva Convention),<sup>127</sup> Congress passed legislation known as the Military Commissions Act of 2006 (“MCA”) that repealed these statutes in relevant part in October 2006.<sup>128</sup>

Notwithstanding Congress’s participation (some might say acquiescence),<sup>129</sup> the legality of military commissions is questionable.<sup>130</sup> To resolve that question, it is more likely that the derogations from standards required in U.S. courts martial and civilian criminal courts will matter to the Supreme Court if it decides to hear challenges to the legality of the commissions, as the enemy combatant is being tried for crimes and subjected to the possibility of punishment, including the death penalty.<sup>131</sup> Again, however, accuracy, not ultimate conclusions about legality, is my focus.<sup>132</sup>

---

<sup>127</sup> Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2792-99 (2006).

<sup>128</sup> See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006). The Military Commission procedural rules were issued on January 18, 2007, totaling 238 pages. See UNITED STATES ARMED FORCES, MANUAL FOR MILITARY COMMISSIONS, available at <http://www.defenselink.mil/pubs/pdfs/The%20Manual%20for%20Military%20Commissions.pdf>.

<sup>129</sup> See, e.g., Ip, *supra* note 4, at 864-65 (calling passage of MCA a “craven capitulation” by Congress). But see Parry, *supra* note 2, at 778-82 (arguing that Congress has played a greater role in limiting executive power than it may appear).

<sup>130</sup> As of this writing, the MCA is considered constitutional, as it was upheld by a federal appeals court on February 20, 2007. See Boumediene v. Bush, 476 F.3d 981, 986-88, 994 (D.C. Cir. 2007). After *Boumediene*, military commission cases against Omar Khadr and Salim Ahmed Khadr were dismissed by military judges who concluded that the defendants did not fall within the ambit of the MCA because they were only “enemy combatants” pursuant to the CSRT and not “unlawful enemy combatants,” as the MCA requires. William Glaberson, *Military Judges Dismiss Charges for Two Detainees*, N.Y. TIMES, June 5, 2007, at A1 (emphasis added). Subsequently, the new Court of Military Commission Review has concluded that a military commission judge has the power to determine whether a terrorism suspect is an “unlawful enemy combatant” and has ordered the commission to go forward against Omar Khadr. Josh White, *Court Reverses Ruling on Detainee*, WASH. POST, Sept. 25, 2007, at A4. I will use the term “enemy combatant” in this article. For my purposes, the label does not matter. Congress can amend the MCA to delete “unlawful” if it chooses, the Executive can reconfigure the CSRT to determine whether the prisoners it chooses to try in a military commission are “unlawful enemy combatant[s]” and hold new hearings, or a new label can be created.

<sup>131</sup> Military Commissions Act of 2006 § 948d(d).

<sup>132</sup> There has been insufficient discussion of the need for accuracy. Indeed, even the ACLU’s support of a bill to revise the UMCJ lacks meaningful discussion of accuracy and instead focuses on how the military commissions do not embody American “values.” E-mail from Anthony Romero, Executive Director, American Civil Liberties Union, to Brian J. Foley, Associate Professor of Law, Florida Coastal School of Law, et al. (Feb. 7, 2007, 17:39:07 EST) (supporting bill by Senator—and presidential candidate—Christopher Dodd, D-CT, to revise MCA).

### *1. Wide Variety of Crimes*

Military commissions try enemy combatants for “offenses that have traditionally been triable by military commissions,” and the legislation states that it creates no new crimes.<sup>133</sup> Twenty-eight crimes are listed, but only two deal directly with terrorism: “Terrorism,”<sup>134</sup> and “Providing Material Support for Terrorism.”<sup>135</sup> There are crimes that do not seem related to terrorism, including: “Pillaging,”<sup>136</sup> “Denying Quarter,”<sup>137</sup> “Improperly Using a Flag of Truce,”<sup>138</sup> “Sexual Assault or Abuse,”<sup>139</sup> and “Intentionally Mistreating a Dead Body.”<sup>140</sup>

Other than the two terrorism crimes, these offenses may be appropriate in the sense that some of the men imprisoned at Guantanamo were captured on traditional battlefields, but they muddy the waters by making it possible for investigators and prosecutors to spend time on matters that pale in significance to preventing terrorist attacks. There seems little reason to transport to Guantanamo a man whose crime was intentionally mistreating a dead body in Afghanistan. It may be that these crimes were included simply as arrows in the prosecutor’s quiver: an enemy combatant can be threatened with trial by military commission, and the death penalty, for a wide variety of crimes, as a way of forcing him to divulge information in interrogations. That said, using the threat of a military commission as a coercive interrogation tactic is most likely an ineffective way of gathering accurate intelligence, as will be explained below.<sup>141</sup>

### *2. Mode of Proceedings*

The military commissions provide more structural protections than the CSRT rules provide, which may help achieve accurate fact-finding. For example, the government must prove an enemy combatant has committed a crime against the law of war “beyond a reasonable doubt.”<sup>142</sup> The tribunal must be presided over by an actual military judge.<sup>143</sup> The enemy combatant is permitted to have an attorney.<sup>144</sup> These structural protections, however,

---

<sup>133</sup> Military Commissions Act of 2006 § 950p.

<sup>134</sup> *Id.* § 950v(b)(24).

<sup>135</sup> *Id.* § 950v(b)(25).

<sup>136</sup> *Id.* § 950v(b)(5).

<sup>137</sup> *Id.* § 950v(b)(6).

<sup>138</sup> *Id.* § 950v(b)(18).

<sup>139</sup> *Id.* § 950v(b)(22).

<sup>140</sup> *Id.* § 950v(b)(20).

<sup>141</sup> *See infra* Part III.D.1.

<sup>142</sup> Military Commissions Act of 2006 § 949(c).

<sup>143</sup> *Id.* § 948j.

<sup>144</sup> *Id.* § 948k.

are largely undercut by other derogations from the rules used in U.S. criminal courts.

### 3. *Unreliable Evidence and Lack of Cross-Examination*

Hearsay may be used if the tribunal believes it is reliable.<sup>145</sup> The same goes for coerced confessions.<sup>146</sup> Again, as discussed above, even Article III

<sup>145</sup> *Id.* § 949a(b)(2)(E). Hearsay that would be inadmissible “under the rules of evidence applicable in trial by general courts-martial” may be admitted if the proponent of the evidence gives the opposing party fair notice, and if the party opposing admission fails to “demonstrate[ ] that the evidence is unreliable or lacking in probative value.” *Id.* § 949a(b)(2)(E)(ii). Notably, this rule empowers the military commission to create a “catch-all” exception to the Hearsay Rule that is far broader than the catch-all rule in the Federal Rules of Evidence. See discussion *supra* note 84.

<sup>146</sup> Military Commissions Act of 2006 § 949a. This Section requires admission (“shall not be excluded”) of statements alleged to result from coercion or compulsory self-incrimination if the statements meet the requirements of MCA § 948r. *Id.* § 949a. Section 948r purportedly prohibits statements “obtained by the use of torture,” but it does not bar statements “in which the degree of coercion is disputed.” Such statements are admissible:

Only if the military judge finds that—

- (1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value;
- (2) the interests of justice would best be served by admission of the statement into evidence.

*Id.* § 948r. Statements obtained after passage of the Detainee Treatment Act of 2005 are admitted with an additional requirement: “[T]he interrogation methods used to obtain the statement did not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.” *Id.* § 948r(d)(3). The Detainee Treatment Act definition of such treatment reads as follows:

[T]he term “cruel, inhuman, or degrading treatment or punishment” means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Conventions Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003(d), 119 Stat. 2680 (2005). Notably, when President Bush signed this bill into law, he issued a signing statement that the President had the power to interpret this Act as he saw fit, subject to “necessity.” STATEMENT ON SIGNING THE DEPARTMENT OF DEFENSE, EMERGENCY SUPPLEMENTAL APPROPRIATIONS TO ADDRESS HURRICANES IN THE GULF OF MEXICO, AND PANDEMIC INFLUENZA ACT, 2006, *available at* <http://www.whitehouse.gov/news/releases/2005/12/20051230-9.html>. It is therefore likely that these limitations will not restrict the Executive branch in a meaningful way, especially when detainees have no right to challenge any such treatment in a U.S. court. It is also likely that the torture restriction in the MCA is meaningless. It would seem that any time torture is alleged, if it is disputed by the U.S. government, then the statement that the detainee alleges was the result of torture will then become a statement where “the degree of coercion is disputed.” See Military Commissions Act of 2006 § 948r. Then the statement will be admitted if the arguably lax requirements set forth earlier in this footnote are met (“totality of circumstances” as to reliability and “interests of justice”).



judges—trained, usually experienced, lawyers who must be confirmed by the Senate—are not permitted to admit hearsay unless it fits within carefully crafted exceptions to the rule of exclusion. Article III judges can never admit coerced confessions.<sup>147</sup>

Evidence may also be used without disclosure of the “sources, methods, or activities by which the United States acquired the evidence” if that information is classified.<sup>148</sup> So the suspect cannot confront witnesses against him<sup>149</sup> or examine a witness fully if doing so would bring up classified evidence. In contrast, in U.S. courts, if the government decides not to give up classified evidence, then it cannot use that evidence against the defendant; the government must make a choice. In the military commission rules, as the district court noted in *Hamdan*, the government does not have to make such a choice, and the evidence may be used without any possibility for the accused to test its accuracy.<sup>150</sup>

#### 4. Presenting a Defense

The accused is given “a reasonable opportunity to obtain witnesses and other evidence,” and the process for compulsion must be “similar” to that in U.S. criminal courts.<sup>151</sup> However, it is not difficult to foresee that the jurisdictional limitation (“any place where the United States shall have jurisdiction thereof”<sup>152</sup>) could make this right illusory in most military commission cases because most defendants will need information located in foreign countries.

Similarly, the requirement that the government turn over exculpatory evidence is weakened by the requirement that classified evidence must be withheld and may be replaced with “an adequate substitute . . . to the extent

---

<sup>147</sup> See *supra* note 89 and accompanying text.

<sup>148</sup> Military Commissions Act of 2006 § 949d(f). Of course, this makes it impossible for the accused to cross-examine the source of the information, which would violate the Confrontation Clause of the Sixth Amendment in a U.S. trial: such evidence simply could not be admitted. See *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 170-71 (D.D.C. 2004) (noting the UCMJ has elaborate procedures to protect classified evidence, but evidence which cannot be protected or be substituted by an alternative cannot be admitted against defendant). *Id.* at 168.

The restriction on using classified evidence in military commissions is greater than that in the CSRT, where the accused may be kept out of the courtroom while classified evidence is admitted against him; a defendant may be excluded from a military commission only where “the accused persists in conduct that justifies exclusion from the courtroom—(1) to ensure the physical safety of the individuals; or (2) to prevent disruption of the proceedings by the accused.” Military Commissions Act of 2006 § 949d(e).

<sup>149</sup> See U.S. CONST. amend. VI; *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004).

<sup>150</sup> *Hamdan*, 344 F. Supp. 2d at 171.

<sup>151</sup> Military Commissions Act of 2006 § 949j.

<sup>152</sup> *Id.* § 949j(b)(2).

practicable.”<sup>153</sup> It is unclear what a substitute might be or what “practicable” might mean in any particular case. It follows that if there is no substitute, then the exculpatory evidence cannot be turned over and the case would proceed.

### 5. Appellate Review and Habeas Corpus

Appellate review will be provided by the new “Court of Military Commission Review” established by the Secretary of Defense, which will be made up of appellate military judges meeting the regular qualifications of military judges or civilians “with comparable qualifications.”<sup>154</sup> The scope of these appeals is limited to matters of law.<sup>155</sup> Therefore, there is no review of the military commission’s fact-finding. (Nor does this court review the CSRT’s fact-finding, as the military commission itself cannot review the conclusion that the accused is an enemy combatant—that conclusion “is dispositive for purposes of jurisdiction for trial by military commission.”<sup>156</sup>) Any appeal outside of this system must be made to the United States Court of Appeals for the District of Columbia Circuit, which has exclusive jurisdiction.<sup>157</sup> Review there is also limited to matters of law,<sup>158</sup> and the review is itself limited to “(1) whether the final decision was consistent with the standards and procedures specified in this chapter; and (2) to the extent applicable, the Constitution and the laws of the United States.”<sup>159</sup> The U.S. Supreme Court may review a final judgment by writ of certiorari.<sup>160</sup> There is no habeas review.<sup>161</sup>

---

<sup>153</sup> *Id.* § 949j(d). “To the extent practicable” is incorporated by this subsection’s reference to 949j(c). *Id.*

<sup>154</sup> *Id.* § 950f(a)-(b).

<sup>155</sup> *Id.* § 950f(d).

<sup>156</sup> *Id.* § 948d(c).

<sup>157</sup> *Id.* § 950g(a).

<sup>158</sup> *Id.* § 950g(b).

<sup>159</sup> *Id.* § 950g(c).

<sup>160</sup> *Id.* § 950g(d). The review is “pursuant to section 1257 of title 28.” *Id.*

<sup>161</sup> *Id.* § 950j(b); see *Boumediene v. Bush*, 476 F.3d 981, 986-88, 994 (D.C. Cir. 2007) (holding that the MCA and Constitution deny habeas corpus for Guantanamo detainees), *cert. denied*, 127 S. Ct. 1478 (2007), *cert. granted*, 127 S. Ct. 3078 (2007). It is unclear whether such a negation of the venerable right is permissible. See Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After Rasul v. Bush*, 153 U. PA. L. REV. 2073, 2073 (2005) (arguing that the “majority opinion strongly suggests in a footnote that foreign nationals in U.S. custody at Guantanamo Bay Naval Base (‘Guantanamo’) possess constitutional rights” but noting that the “opinion leaves ambiguous the reason why foreign nationals have constitutional rights there—whether because they are human beings in long-term U.S. custody or because of the special character of U.S. authority at Guantanamo”).

## III. DANGERS OF RIGGED RULES

## A. INTRODUCTION

Rigging the rules in a way that eases protections on accuracy creates several dangers beyond those to the prisoner's liberty interest: it threatens national security. Some of the dangers, such as fomenting and feeding the anger and resentments that can motivate people to attack the United States using terrorist tactics, impeding relationships with relevant communities that could be used to help track down terrorists, and making the United States look hypocritical in that its "soft power" to effect and affect positive policies and serve as an example is weakened, have been discussed in other commentaries.<sup>162</sup> This Article focuses on a different danger: the danger that these rigged rules pose for the collection of accurate information crucial to effective prosecution of the war on terror.

It should be noted that the problems discussed in this part have plagued intelligence-gathering efforts at Guantanamo from the start. The cause has not been the CSRT and its rigged rules, which, after all, were created more than two years after the first prisoners arrived, but the government's overall failure to design a reliable way of sorting out prisoners who are involved in terrorism from those who are not. This failure has been noted by interrogation expert Steven M. Kleinman in a study sponsored by the National Defense Intelligence College, who said that accurate sorting was absent, albeit necessary, at Guantanamo: "This point, while seemingly obvious, has proven anything but in the course of current interrogation operations."<sup>163</sup> The CSRT has failed to correct this

---

<sup>162</sup> See *supra* notes 16-18; see also David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1787 (2004) (discussing post-attack suspicionless dragnets based on racial or religious stereotypes and stating, "Even where there may be some rational basis for the stereotype, as in the supposition that al Qaeda is likely to consist predominantly of Arab and Muslim men, such profiling is, in most cases, vastly overbroad, and inevitably incurs resentment in the targeted group. That resentment in turn reduces the likelihood that members of the targeted group will cooperate in helping to locate the truly bad actors, while fueling recruits to the cause against us.").

<sup>163</sup> See Kleinman, *supra* note 1, at 107. Kleinman wrote:

[S]creening is a critical component of the overall interrogation process. Every effort must be made not only to assess the knowledgeability and cooperation of the source, but—of supreme importance—to vet the individual in a manner that provides the interrogator with a high degree of confidence in the source's identity. *This point, while seemingly obvious, has proven anything but in the course of current intelligence operations.* From the detention center in Guantanamo Bay, Cuba, to Bagram Air Force Base, Afghanistan, to various interrogation facilities in Iraq, reports abound of prisoners held in detention and interrogated at length because of mistaken identification. Several factors contribute to this unfortunate situation, including difficulties in transcribing names from Arabic, Pashto, and Urdu into English; classic cross-cultural

problem which, if used going forward, will foster the dangers discussed in this section.

These dangers will persist regardless of officials' motive in designing the CSRT as well as in using it. If officials believe that the CSRT provides an accurate conclusion that a prisoner is a terrorist, as I assume *arguendo*, then they risk that investigations will be ineffective and counterproductive. If officials do not believe the CSRT is accurate but understand that it is rigged to rubberstamp earlier conclusions about prisoners yet also believe the truth of those earlier conclusions that the prisoners pose a danger, the officials court the same dangers to effective investigations. If officials know the CSRT is rigged for political expedience and are savvy enough to recognize that many of its determinations are inaccurate, they are still courting risks, because they are missing an opportunity to correct mistakes which foster the dangers discussed in this section. The main problem is that, CSRT or no CSRT, U.S. officials have not created any mechanism that allows for objective, vigorous testing of its conclusion that a prisoner is an enemy combatant.

This Part relies on logic and experience to argue about these dangers. The experience cannot be based wholly on Guantanamo or the new justice system because of the secrecy surrounding them, and their newness. The extent of the wrongful detentions and the missed and botched investigative opportunities will likely never be fully known. Likewise, it is possible that some successes will not be known at least for the time being, if the government chooses not to trumpet them, perhaps out of a belief that revealing this information could compromise national security. However, these missing data should not deter us from subjecting this policy to analysis.

#### B. DANGERS TO INVESTIGATORY EFFECTIVENESS WHERE THE PURPOSE OF DETENTION IS INTERROGATION

What must be understood about Guantanamo is that it is an interrogation camp, not a traditional prisoner-of-war camp where combatants are merely detained until the end of hostilities to prevent their rejoining the fight.<sup>164</sup> It was designed as a legal no man's land, a black hole, where U.S. laws would not apply; the enemy combatant classification

---

misunderstandings; and a high-threat operating environment that leads many to err on the side of capture rather than release.

*Id.* (emphasis added). Kleinman could have added that the problem also stems from CSRT rules that risk such errors by applying a low standard of proof, a presumption of guilt, and reliance on hearsay and coerced testimony.

<sup>164</sup> MARGULIES, *supra* note 3, at 39 ("We begin to see what the Administration had in mind when it created Camp Delta [at Guantanamo]: the ideal interrogation chamber.").

was designed so that international laws, most notably the Geneva Convention, would not apply: enemy combatants fall through the cracks between combatants and civilians—or so the argument goes.<sup>165</sup> Therefore, Guantanamo became a place where U.S. officials believed they could “legally” (read: not illegally) apply certain coercive interrogation techniques which have been detailed in what is known as the “KUBARK [CIA] Manual,” a CIA-written manual of interrogation techniques.<sup>166</sup>

The upshot is that coercive interrogation techniques virtually guarantee a certain proportion of false confessions. This fact is crucial. The reliability of coerced confessions has long been seen as questionable.<sup>167</sup> U.S. officials are therefore probably hearing many false confessions from suspected terrorists. Reports that have poked out from behind the shroud of secrecy at Guantanamo support this contention.<sup>168</sup> Most people who are

<sup>165</sup> *Id.* at 39.

<sup>166</sup> *Id.* at 37-40. “KUBARK” is a CIA code name for itself. The manual, written in 1963, was classified but became publicly known in 1997 pursuant to a Freedom of Information Act by the *Baltimore Sun*. The manual and further information about it can be found on George Washington University’s National Security Archive website. Prisoner Abuse: Patterns from the Past, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/index.htm> (last visited Feb. 26, 2007). Most likely, public political support for these policies (perhaps not overwhelming and perhaps not even majority support, but sufficient for the policy to persist) is based on a belief that these harsh methods work. Brian J. Foley, *Why Americans Don’t Care About GTMO, and Why They Should*, JURIST, Nov. 1, 2005, <http://jurist.law.pitt.edu/forumy/2005/11/why-americans-dont-care-about-gtmo-and.php>.

<sup>167</sup> See Stephen Holmes, *Is Defiance of Law a Proof of Success? Magical Thinking in the War on Terror*, in TORTURE DEBATE, *supra* note 15, at 119-23 (setting forth views from Aristotle to the present). For a brief discussion of this topic, see *infra* Part IV.B.

A recent study by the National Defense Intelligence College Intelligence Science Board concludes:

[A]lthough there is no valid scientific research to back the conclusion, most professionals believe that pain, coercion, and threats are counterproductive to the elicitation of good information. The authors [of chapters 5 and 6 of the book] cite a number of psychological and behavioral studies to buttress their conclusion, but are forced to return to the statement: “more research is necessary.”

Pauletta Otis, *Educating Information: The Right Initiative at the Right Time by the Right People*, in EDUCATING INFORMATION, *supra* note 1, at xix. Likewise, Rumney, in his article questioning the effectiveness of coercive interrogation, concludes:

Unfortunately for the proponents and opponents of coercive interrogation, effectiveness is a far more complex affair than has often been acknowledged. The fact is that coercion does sometimes work in individual cases, but a significant body of evidence raises serious doubts about its overall reliability and predictability.

Rumney, *supra* note 16, at 512. Levinson also questions whether the effectiveness of torture can ever be determined. Levinson, *Contemplating Torture*, *supra* note 14, at 33-34.

<sup>168</sup> Some of the false confessions that have become known will be discussed later in Part III.B.1. For an additional argument that confessions at Guantanamo have not been reliable, and that, moreover, Guantanamo has not proved to be a source of useful intelligence, see

“water-boarded,” beaten, deprived of sleep, and attacked by guard dogs—or who are simply threatened with such treatment—will, at some point, decide that it is in their interest to acquiesce to their captors, such as by telling them what they know, agreeing with the accusations interrogators make against them, or even concocting stories that they believe will please their interrogators.<sup>169</sup>

Another point is even more crucial: even if the interrogation techniques used at Guantanamo are effective, even if *torture* is effective in some cases at squeezing accurate rather than fabricated information out of suspects who actually are terrorists,<sup>170</sup> such effectiveness is severely dampened when torture is applied to people who have been imprisoned pursuant to a broad, indiscriminate policy that nets a large number of suspects who lack relevant knowledge. The weak standards of the CSRT may exacerbate this problem at Guantanamo and certainly will do so if used as part of the U.S. detention policy going forward because the rigged rules can serve to “validate” for (at least some) investigators the sense that the people they are interrogating are actually terrorists with relevant information; these suspects’ failure to provide information may be

---

Joshua Dratel, *The Curious Debate*, in TORTURE DEBATE, *supra* note 15, at 114 (“Surely if there were some benefit from the torture practiced at Guantanamo Bay, the government would have announced it widely. Yet the government has not pointed to a single piece of information gleaned from the Guantanamo Bay detainees—and the response that such intelligence is classified is merely an excuse to hide behind, since the government has regularly leaked information it has received from detainees in other locations . . . that has been useful in the war against terrorism . . . . [T]he information the government obtained via torture at Guantanamo Bay has often proved *unreliable* . . . . In fact, the most useful information gleaned from al Qaeda captives has been through conventional intelligence and law enforcement methods.”).

<sup>169</sup> See Amos N. Guiora & Erin M. Page, *The Unholy Trinity: Intelligence, Interrogation and Torture*, 37 CASE W. RES. J. INT’L L. 427, 446-47 (2006) (“A final thought—one of the significant problems with torture is that a detainee in order to stop the pain will tell his interrogator what he thinks he wants to hear either consciously (disinformation) or unconsciously (misinformation). From an operational perspective, both are highly problematic. Limited resources can be misdirected (a military force will stop bus number 5, rather than bus number 7 that actually has the bomb). That in and of itself, is cause enough to forbid torture.”). I discuss these particular dangers below. See *infra* Part III.B (misinformation) and Part IV.B (disinformation). Coercive methods used by U.S. interrogators have been described in depth elsewhere. See, e.g., Bowden, *supra* note 14, at 51-76; Douglas Jehl, *Report Warned C.I.A. on Tactics in Interrogation*, N.Y. TIMES, Nov. 9, 2005; Joseph Lelyveld, *Interrogating Ourselves*, N.Y. TIMES MAG., June 12, 2005, at 36-69; Jane Mayer, *The Experiment: The Military Trains People to Withstand Interrogation. Are Those Methods Being Misused at Guantanamo?*, NEW YORKER, July 11, 2005, at 60; Amnesty International, *Guantanamo and Beyond: The Continuing Pursuit of Unchecked Executive Power* (May 13, 2005), available at <http://web.amnesty.org/library/Index/ENGAMR510632005>.

<sup>170</sup> See *infra* Part IV.B & note 227.

interpreted not as ignorance but as intransigence, even as evidence of al Qaeda training.<sup>171</sup> The “confirmation” of enemy combatant status by a supposed judicial tribunal can lead investigators to continue coercing the suspect until he finally “confesses.”<sup>172</sup> Investigators will be inundated with false confessions and false leads that often will appear just as solid as genuine confessions and genuine leads.

For preventing terrorism, this policy is not only ineffective; it is counterproductive. There are several problems that result from interrogating people who are falsely identified as terrorists.

### *1. Distorting Reality*

Hundreds of prisoners giving false confessions present officials with a distorted view of reality. Investigators hear incriminating accounts by and about individuals who are not really terrorists, stories of plots that are not real, and about terrorist tactics that are pure invention. Ultimately, investigators are not learning about the enemy. In chasing such illusions, and in constructing Maginot Lines against them, U.S. officials could be blindsided by actual attackers.

Indeed, notwithstanding the secrecy surrounding U.S. interrogations at Guantanamo and other sites, it is known that false confessions have occurred. A confession extracted—and later recanted—from a prisoner “rendered” to Egypt that al Qaeda operatives received training in chemical and biological weapons in Iraq was an important part of the U.S. case for invading Iraq,<sup>173</sup> an invasion that is now widely regarded as an unnecessary, costly blunder.<sup>174</sup> Interrogations of alleged 9/11 plotter Khalid Sheikh Mohammed caused him to “spin an elaborate web of lies.”<sup>175</sup> Shafiq Rasul, the named plaintiff in *Rasul v. Bush*, falsely confessed to being at an al Qaeda training camp in Afghanistan when undisputed evidence ultimately showed that he was home in England at that time.<sup>176</sup> Journalist David Rose reported that Moazzem Begg, under interrogation at Bagram in Afghanistan, “confessed to planning to drop anthrax spores on the House of

---

<sup>171</sup> See Kleinman, *supra* note 1, at 117 (“[O]ne cannot overlook the role of formalized resistance training. As the so-called *Al Qaeda Manual* attests, that organization has compiled a systematic resistance strategy for employment by operatives taken into custody.”).

<sup>172</sup> MARGULIES, *supra* note 3, at 40.

<sup>173</sup> *Id.* at 118-19.

<sup>174</sup> See James A. Baker III & Lee H. Hamilton, *Letter from the Co-Chairs*, in THE IRAQ STUDY GROUP REPORT: THE WAY FORWARD—A NEW APPROACH 4 (2006).

<sup>175</sup> MARGULIES, *supra* note 3, at 178-79.

<sup>176</sup> *Id.* at 40-43. Margulies also details the false confession of another client, Mamdouh Habib, resulting from coercive interrogation after being rendered to Egypt. *Id.* at 182-88.

Commons from a ‘drone,’ an unmanned aerial vehicle.”<sup>177</sup> Rose points out that the confession was absurd, given that the flight of the drone was to begin in Sussex, which is several miles from London, and that for such a flight, a sophisticated drone would be required, and Begg was unlikely to acquire one: “Accurate UAVs [unmanned aerial vehicles] are part of the latest generation of American weaponry, and they cost millions of dollars each.”<sup>178</sup> Also, some of the information that caused Bush Administration officials to issue “terror alerts” during the past few years came from interrogations.<sup>179</sup> It is thus not surprising that some of these threats were proven false.<sup>180</sup> These known false confessions are likely just the tip of the iceberg.<sup>181</sup>

In addition, the coercive methods can render a prisoner useless as an intelligence source in that they might drive him insane. Several prisoners at Guantanamo have suffered this fate.<sup>182</sup> Recently, lawyers for a U.S. citizen held as an enemy combatant, José Padilla, have argued that Mr. Padilla is

---

<sup>177</sup> DAVID ROSE, *GUANTANAMO: AMERICA’S WAR ON HUMAN RIGHTS* 120 (2004). Begg has penned his own book, MOAZZEM BEGG & VICTORIA BRITAIN, *ENEMY COMBATANT: MY IMPRISONMENT AT GUANTÁNAMO, BAGRAM, AND KANDAHAR* (2007). The book appears under various titles.

<sup>178</sup> ROSE, *supra* note 177, at 120.

<sup>179</sup> See SUSKIND, *supra* note 8, at 115-18.

<sup>180</sup> See Joshua Micah Marshall, *Toying with Terror Alerts?*, TIME MAG., July 7, 2006, <http://www.time.com/time/nation/article/0,8599,1211369,00.html> (suggesting “the quite reasonable suspicion that the Bush Administration orchestrates its terror alerts and arrests to goose the GOP’s poll numbers”); see also IAN S. LUSTICK, *TRAPPED IN THE WAR ON TERROR* 46-47 (2006) (questioning degree of the threat and noting, “What we see is striking—the near total absence of evidence of al Qaeda sleeper cells or of sophisticated groups of Muslim extremists planning or preparing for attacks of massive destruction inside the borders of the United States . . . [I]f there are such threats, their magnitude is without doubt vastly smaller than the scale of the War on Terror.”); see generally JOHN MUELLER, *OVERBLOWN: HOW POLITICIANS AND THE TERRORISM INDUSTRY INFLATE NATIONAL SECURITY THREATS, AND WHY WE BELIEVE THEM* (2006).

<sup>181</sup> ROSE, *supra* note 177, at 83-129 (discussing interrogation techniques and criticism of those techniques as not yielding reliable intelligence). Indeed, as Rose reports, one military intelligence officer who worked at the Pentagon in 2003 did not believe Guantanamo was an effective intelligence-gathering operation.

In his view, the incentive system . . . coupled with the prospect of indefinite detention, makes information obtained through interrogation inherently unreliable. If a detainee has no hope for release, he is probably going to do whatever he can to improve the quality of his life. Many detainees have spent a year or more locked down under very tough conditions. Offering detainees comfort items . . . in exchange for information is most likely to result in them telling you what they think you want to hear.

*Id.* at 115, 117-18.

<sup>182</sup> MARGULIES, *supra* note 3, at 139.



unfit to stand trial because the coercive methods and more than five years of incommunicado detention have rendered him mentally incompetent.<sup>183</sup>

## 2. *Waste of Investigators' Time and Resources*

False confessions also waste investigators' time. When many people have been imprisoned and interrogated, investigators can become inundated with too many leads,<sup>184</sup> which they must chase down.<sup>185</sup> This waste cannot be avoided. Most investigators do not want to be "The One Who Dropped the Ball," so if a prisoner says he conspired to bomb the New York Stock Exchange, a reasonable investigator will feel obligated to check it out. If the plot amounts to nothing, the investigator moves on to the next. If that turns out to be nothing, the investigator tries the next. And so on. After several wild goose chases, a dynamic is likely to take effect: investigators run out of enthusiasm and cease to apply the same rigor in pursuing new leads, some of which might be real.<sup>186</sup> Chasing down false leads represents an opportunity cost of time and resources that could be used to develop real leads in investigations of real plots.<sup>187</sup>

---

<sup>183</sup> Naomi Klein, *A Trial for Thousands Denied Trial*, NATION, Mar. 12, 2007, available at <http://www.thenation.com/doc/20070312/klein>.

<sup>184</sup> They are already inundated with leads from their post-9/11 increase in surveillance and data collecting powers, and they cannot analyze all of those. See BRUCE SCHNEIER, *BEYOND FEAR: THINKING SENSIBLY ABOUT SECURITY IN AN UNCERTAIN WORLD* 162 (2003).

<sup>185</sup> Michael Ratner, *Moving Away from the Rule of Law: Military Tribunals, Executive Detentions and Torture*, 24 CARDOZO L. REV. 1513, 1521 (2003) ("[T]orture will elicit a lot of false information from many people. Agents will spend wasted time tracking down false leads. The government will issue warnings that have no basis."). Ratner does not elaborate further, and at least four other commentators have suggested this problem without elaborating further. See Guiora & Page, *supra* note 169, at 446-47; Levinson, *Contemplating Torture*, *supra* note 14, at 33; Rumney, *supra* note 16, at 481 n.11; see also MARGULIES, *supra* note 3, at 29 ("The military obviously has no legitimate interest in obtaining unreliable intelligence, and the most compelling practical objection to the use of torture is the likelihood that it will produce just that."). Notably, a recent study by the National Defense College failed to address the fact that poor screening and coercive interrogation can distort terrorism investigations; this danger was not addressed in an essay purporting to detail the costs and benefits of interrogation in the war on terrorism. See generally Coulam, *supra* note 16.

<sup>186</sup> It seems the only way to avoid this drop in enthusiasm and rigor would be to hire new investigators perennially, in the management tactic known as "churn and burn" that is common at many large law firms. See Tamara Loomis, *The Real World According to Summer Associates*, AMERICAN LAWYER (Nov. 27, 2006), available at <http://www.law.com/jsp/article.jsp?id=1164103528625>.

<sup>187</sup> How terrorism investigations are conducted is by nature a question shrouded in secrecy. Professor Christopher Hewitt has studied U.S. terrorism and, after examining "293 cases for which details are available," charted the "most important factors involved in the capture of terrorists" as a percentage as: informers and infiltrators, 46.4%; surveillance, 29.7%; caught in the act, 23.5%; routine policing, 7.5%; investigation, 14.7%; information

### 3. *Misdirected Focus*

A danger that pervades this policy comes from the fact that it causes investigators to focus on proving (read: confirming) that the people who have been rounded up are terrorists. This bias infects efforts to obtain confessions and other evidence, and it infects how investigators interpret evidence. When one is sure that someone is a terrorist, everything he does reflects that. A flight to Saudi Arabia may look like something more. A meeting with other men may look like a meeting where terrorist attacks are planned. Seemingly innocuous emails could be coded plans for attacks. A man simply walking with his head down now seems “furtive.” And so on. But if the person believed to be a terrorist is not a terrorist, then it does not matter how hard investigators look: the person will not lead them to information that can thwart attacks.

This confirmatory focus is opposite to the focus that investigators should have: they should start by looking at actual evidence of terrorism and then following that evidence to where it leads, which will ultimately be to people, instead of starting by looking at people who are merely suspected of terrorism (based on unreliable information, including hunches based on race, religion, and nationality) and then trying to obtain evidence from them. Starting with actual evidence of terrorism (such as may be obtained by treating the site of a terrorist attack as a crime scene) may be more painstaking than rounding up the usual suspects and interrogating them until they confess, but they are more likely to be fruitful because they start with real evidence, not the phantoms of fears and prejudices.

### 4. *Dangers of Profiling*

The roundup of suspects itself, if done with a wide net, can also misdirect focus. Wide nets ultimately rely on “profiling,” which can be ineffective, especially if it is race-based.<sup>188</sup> Profiling that is inaccurate or too general can blind law enforcement to actual terrorists and can cause officials to let their guard down.<sup>189</sup> A simple experiment can illustrate. Ask a group of about twenty people in a room to look around at the other members of the group for about fifteen seconds. Tell them you are going to ask them a question about what they are observing. Then have them close their eyes. Ask them (for example) how many people in the room are

---

from public, 8.5%; fellow terrorists, 2.4%. CHRISTOPHER HEWITT, UNDERSTANDING TERRORISM IN AMERICA: FROM THE KLAN TO AL QAEDA 89-90 (2003). It is not clear whether Professor Hewitt has separated cases where terrorist attacks were preempted from those where terrorists were captured after the attack.

<sup>188</sup> SCHNEIER, *supra* note 184, at 134-37.

<sup>189</sup> COLE, *supra* note 15, at 55-56.

wearing yellow shirts. Invariably, almost no one can answer correctly. At the outset, the group did not know what it was looking for, so it looked at everything. Try the experiment again, only this time, tell the group beforehand that you will ask them, after you have allowed them to look at the other members of the group for ten seconds, how many people are wearing, say, blue shirts. After the ten seconds have passed, have them close their eyes, and then ask the question. Almost everyone will get the correct answer, or at least come very close.

Next ask the group to keep their eyes closed and to report how many people are wearing green shirts. Almost no one will be able to answer correctly because they were never looking for green shirts. At first, they were focused on everything and nothing, and then they were focused on finding blue shirts.<sup>190</sup>

The implication of the exercise is that investigators must have a well-defined idea of what they are looking for if they are going to be able to recognize real evidence when they find it.<sup>191</sup> Looking for everything amounts to seeing very little.

Profiles can also waste time. If officials are looking for blue shirts, they will overlook the red ones. Or, as security expert Bruce Schneier wrote, "If U.S. border guards stop and search everyone who's young, Arab, and male, they're not going to have the time to stop and search all sorts of other people, no matter how hinky they might be acting."<sup>192</sup> Indeed, the border guards might not even notice anyone who is acting hinky. An inaccurate profile is worse than none at all.

Profiles can be gamed. Some profile characteristics, once known by terrorists, can simply be avoided.<sup>193</sup> Terrorists also can recruit among people who lack some of the intrinsic profile factors such as race, or they can disguise those characteristics, including even some racial characteristics.<sup>194</sup> In any event, we need focused intelligence in order to know whom to detain—no matter how wide a net we cast, we cannot detain the whole world.

---

<sup>190</sup> This point can be made in a number of ways. For an amusing video exercise, see <http://viscog.beckman.uiuc.edu/grafs/demos/15.html> (last visited Oct. 3, 2007).

<sup>191</sup> This concept has long been understood as Plato's "Meno Problem," which can be summarized as the need to have some conception of what you are looking for in order to be able to recognize it when you find it. PLATO, MENO at 80ds-81e2.

<sup>192</sup> SCHNEIER, *supra* note 184, at 136-37. Schneier also notes that government officials issued a memorandum after 9/11 that emphasized focusing on behavior, not ethnicity, "not out of equality concerns, but for reasons of security." *Id.* at 55.

<sup>193</sup> *Id.* at 136-37.

<sup>194</sup> *Id.* at 135-36.

### 5. Investigative Atrophy

The rules also allow for easy government “victories” in that leaders can announce they have locked up terrorists and that tribunals (such as the CSRT) have validated the detention as accurate. The rules create the incentive for investigators not to “rock the boat” by questioning these earlier validations. For example, the Defense Secretary’s Memorandum creating CSRT rules states, “Each detainee whose status will be reviewed by a Tribunal [CSRT] has previously been determined, since capture, to be an enemy combatant through multiple levels of review by military officers and officials of the Department of Defense.”<sup>195</sup> That the Defense Secretary expects the CSRT merely to validate these earlier determinations could not be clearer.<sup>196</sup>

The rules effectively permit and even create the incentive for officials to avoid any further investigation. Investigators know they can simply coerce confessions out of prisoners and use that testimony to win their cases. The same goes for hearsay and other weak evidence. The Guantanamo tribunals lack the disciplining effect that stronger procedural rules in regular courts exercise on regular prosecutors and police, who would know that such forms of evidence would be inadmissible and that they would have to gather more reliable evidence if they wanted to win a conviction or even maintain a prosecution.<sup>197</sup> Prosecutors and police in the U.S. court system also do not go into trial knowing that the burden of proof is in their favor, and that the judge is by design predisposed to rule for them. They know they must hone their arguments and choose their evidence carefully.

Operating under lax rules, investigators will know they can avoid the effort needed to learn Arabic, develop leads, and infiltrate terror groups.<sup>198</sup> In the short term, opportunities to learn more about terrorists will be missed. Over the long term, investigators will not develop an accurate

---

<sup>195</sup> CSRT Process, *supra* note 57, at encl. 1 § B.

<sup>196</sup> This point has been recognized elsewhere. See, e.g., MARGULIES, *supra* note 3, at 166.

<sup>197</sup> Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 271, 272 (2006) (“[I]f [prosecutors] lose on suppression motions or face acquittals at trial because of faulty police procedures, they have a strong adversarial incentive to pressure the police into adopting better future investigative methodologies.”).

<sup>198</sup> John Langbein quotes Sir James Fitzjames Stephen’s recording of an observation in 1871 about police in India who tortured suspects: “It is far pleasanter to sit comfortably in the shade rubbing red pepper into some poor devil’s eyes than to go about in the sun hunting up evidence.” Langbein, *supra* note 87, at 101; see also *Watts v. Indiana*, 338 U.S. 49, 54 (1949) (Frankfurter, J.) (preferring evidence “independently secured through skillful investigation” over evidence extracted solely from defendant’s own mouth).

database or the accurate institutional knowledge they need. Also, many investigators will not develop the requisite skills for investigating terrorism, and their existing skills will atrophy. There will grow among officials a reluctance to unlearn the practice of coercive interrogation and reliance on weak evidence and replace these habits with effective investigative skills.<sup>199</sup> Officials will find themselves less and less able to sort prisoners accurately, exacerbating the dangers that the lack of accurately identifying terrorists creates in the first place.

#### 6. A Possible Counterargument

A possible counterargument is that these dangers may be avoided if there are additional, *separate* rules for determining who needs merely to be detained and who should be both detained and interrogated. Higher evidentiary standards could be used to determine who should be interrogated, though these standards could not guarantee that some innocent suspects would not be interrogated.<sup>200</sup> Then again, what interest does the government have in imprisoning people who are very likely not involved in terrorism or who lack relevant knowledge? It wastes resources and thus impedes the war on terror. There are also other dangers from the “false positives” that indiscriminate detention creates.

#### C. DANGERS TO INVESTIGATORY EFFECTIVENESS WHERE RULES PERMIT MERE “PREVENTIVE DETENTION” (CSRT, ARB)

Rigged rules are less dangerous if the sole purpose of detention is to incapacitate (as opposed to interrogate) known or suspected terrorists. Indeed, incapacitating the right people might successfully preempt an attack or at least mitigate its destructiveness. That is because the problems described above stem from interrogation and, in particular, coercive interrogation.<sup>201</sup> However, there are still dangers arising from mere detention under a Guantanamo-style policy. If the government can lock people up based on unreliable evidence, neither the government nor the public can be sure the government has identified and incapacitated the right ones. Officials and the public nevertheless could be lulled into believing

---

<sup>199</sup> Langbein, *supra* note 87, at 101 (noting that “[a]nother insight from history is the danger that, once legitimate, torture could develop a constituency with a vested interest in perpetuating it,” as has occurred in institutionalizing forfeiture laws in the War on Drugs, and plea bargaining).

<sup>200</sup> *Id.*

<sup>201</sup> It is important to keep in mind that some people may confess falsely even absent government coercion. See, e.g., *Colorado v. Connelly*, 479 U.S. 157, 160-61 (1986) (schizophrenic defendant approached police officer and confessed to murder because “voice of God” told him to confess or commit suicide).

that these detentions mean the threat has been decreased and that all possible terrorists have been netted, thereby reducing vigilance.

But talk of mere detention is unrealistic in what could be described as an intelligence war.<sup>202</sup> It is hard to imagine that officials would refrain from interrogating people who fit their profile of a suspected terrorist. After all, the person potentially has information that could prevent a terrorist attack. Also, recent U.S. history shows an “unholy trinity” of detention, interrogation, and torture, suggesting that these things are inextricably linked.<sup>203</sup> This brings us back to the problems described in the previous section: detaining a large number of people, even if the *initial* purpose was merely to incapacitate them, could lead to that investigative fog and atrophy that the widespread, coercive interrogation of wrongly detained people creates. Casting a wider net leads to more interrogations, more confessions, and more confusion.

Casting a wide net that ensnares false positives, therefore, does not exact costs only from the people who are wrongly detained. Focused investigations would avoid many of the dangers discussed above, and they stand a more reasonable chance of capturing actual terrorists.

#### D. DANGERS TO INVESTIGATORY EFFECTIVENESS WHERE THE PURPOSE OF THE RULES IS TO ADJUDICATE GUILT (MILITARY COMMISSIONS)

Many of the problems that result from the CSRT’s rigged rules are also obtained when rules designed for adjudicating guilt for terrorism crimes are rigged, such as in the military commissions. But there are additional dangers that are unique to military commissions.

---

<sup>202</sup> Justice Stevens seemed to attempt this distinction in his dissenting opinion in *Rumsfeld v. Padilla*, 524 U.S. 426, 465 (2004), writing, “Executive detention of subversive citizens . . . may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure.” Perhaps Stevens means an extremely brief detention, which may seem reasonable at first blush, but on further consideration it seems unlikely that authorities would release the person after the threat he represented was over—how would the threat be over in a world where, as we hear often from officials, men with boxcutters can turn commercial aircraft into missiles? How could the man be allowed to communicate with the outside world, when such communications might be coded information enabling upcoming attacks? My point is not that I agree with these arguments—reminiscent of Chicken Little—but to point out their prevalence and the inability to counter them when scarcely any evidence may be used to detain people who putatively represent “threats.”

<sup>203</sup> See Jennifer Van Bergen & Douglas Valentine, *The Dangerous World of Indefinite Detentions: Vietnam to Abu Ghraib*, 37 CASE W. RES. J. INT’L L. 449 (2006) (analyzing detention policies from Vietnam onward). The term “unholy trinity” comes from Guiora & Page, *supra* note 169.

### 1. *False Confessions and Bearing False Witness*

The fact that military commissions mete out punishment can end up *detering* prisoners from divulging real information, or at least, self-incriminating information, to their captors. It is quite likely, therefore, that “cooperating” prisoners are giving out false incriminating information about *other* prisoners and are just “jailhouse snitches.”<sup>204</sup> The prisoners against whom such testimony is used (at the CSRT, in military commissions) might actually have nothing to do with terrorism. This can lead to the investigative confusion, missed opportunities, and investigative atrophy described above.

On the other hand, some prisoners might falsely incriminate themselves *in order that* they may be punished by the death penalty. This assertion may sound strange at first blush, but prisoners might want to escape indefinite detention. There have, in fact, been several suicide attempts at Guantanamo.<sup>205</sup> The phenomenon of preferring death to life imprisonment extends even to our own criminal justice system, where conditions of confinement are generally better than at Guantanamo.<sup>206</sup> There are reported cases where convicted criminals waived their right to appeal their death sentence in order to avoid having the sentence reduced to life imprisonment, and courts did not find such waiver unreasonable in light of the overwhelming, ever-present agony that lifelong imprisonment promises.<sup>207</sup>

---

<sup>204</sup> See *Hoffa v. United States*, 385 U.S. 293, 320 (1966); ROBERT M. BLOOM, RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM (2002); Clifford Zimmerman, *Back from the Courthouse: Corrective Measures to Address the Role of Informants in Wrongful Convictions*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 199 (Saundra D. Westervelt & John A. Humphrey eds., 2001); Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 *GOLDEN GATE U. L. REV.* 107 (2006). It has long been understood that an informant that gives information that incriminates other people is less reliable than when the informant gives information that also incriminates himself. See *Williamson v. United States*, 512 U.S. 594, 600 (1994) (“Even the confessions of arrested accomplices may be admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor.”); see also *FED. R. EVID.* 804(b)(3) (recognizing an exception to rule against hearsay for “[a] statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true.”).

<sup>205</sup> MARGULIES, *supra* note 3, at 138-39.

<sup>206</sup> Tung Yin, *Coercion and Terrorism Prosecutions in the Shadow of Military Detention*, 2006 *BYU L. REV.* 1255, 1277-81 (2006) (comparing these conditions and concluding that U.S. prisons appear to provide better conditions than those suffered by enemy combatants).

<sup>207</sup> See, e.g., *Autry v. McKaskle*, 727 F.2d 358, 363 (5th Cir. 1984); *Smith v. State*, 686 N.E.2d 1264, 1273 (Ind. 1997); *Stevens v. State*, 691 N.E.2d 412, 430 (Ind. 1997); *People v. Guzman*, 755 P.2d 917, 947-48 (Cal. 1988).

## 2. Killing the Goose

The fact that military commissions can sentence prisoners to death presents an additional problem. Given that the military commissions have some protections for accuracy, such as assistance of counsel and the “beyond a reasonable doubt” standard, someone convicted by a military commission is still, theoretically at least, more likely to be an actual terrorist (depending on the crime he is convicted of committing) than someone who has been detained and who lost his challenge in the CSRT.<sup>208</sup> That means that enemy combatants convicted of actual crimes are, in some cases, more likely to be a rich source of intelligence information than other detainees. To kill such a person seems *counterproductive* in an intelligence war. Such prisoners should be kept for further questioning. How can U.S. officials know they actually have learned all the prisoner knows? Why not keep the prisoner around as a sort of consultant, to apply his expertise and knowledge to help analyze new information? Again, the need for accuracy in military commissions and the CSRT becomes clear: officials would want to be sure that their consultant is not a charlatan.

Here the death penalty represents retributive emotion overpowering reason and the desire for abstract justice overpowering the need for genuine security.

## 3. Public Cynicism

Rigged military commissions are ultimately “show trials” or “kangaroo courts,”<sup>209</sup> which, like mass detentions, can lull investigators and citizens into thinking they are winning the War on Terror. The victories could also have a different effect: if the trials are obviously rigged, in the sense that a majority of citizens see that they are rigged, cynicism can develop. Such cynicism could undercut any good-faith efforts by officials that might actually be effective to combat terrorism.<sup>210</sup>

---

<sup>208</sup> As of this writing, just one person has been convicted by military commission; that conviction was the result of a plea bargain. See Office of the Assistant Secretary of Defense (Public Affairs), News Release, *Detainee Convicted of Terrorism Charge at Guantanamo Trial*, Mar. 30, 2007, available at <http://www.defenselink.mil/releases/release.aspx?releaseid=10678>. The Department of Defense website has posted the charges against two other defendants awaiting trial by military commission, Salim Ahmed Hamdan and Omar Ahmed Khadr. See U.S. Dep’t of Defense, *Military Commissions: Commission Cases*, available at <http://www.defenselink.mil/news/commissions.html>.

<sup>209</sup> See David Glazier, *Kangaroo Court or Competent Tribunal? Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2093 (2003) (“A military commission trial falling short of the full UCMJ [Uniform Code of Military Justice] standard is all but certain to be pejoratively judged as a ‘kangaroo court’ in the court of public opinion.”).

<sup>210</sup> See generally Margaret L. Paris, *Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL’Y & L. 3 (1996) (discussing the Fifth and Sixth Amendments); Scott Sundby, “Everyman’s”



E. DANGER THAT RIGGED RULES POSE FOR THE NATION'S ABILITY TO  
CREATE EFFECTIVE ANTITERRORISM INVESTIGATION POLICY

1. "Success" Breeds "Success"

Reports of government victories at the CSRT and military commissions can translate into unearned and unwarranted political gain: the public, believing that the government is winning the war on terror, will approve of the methods and perhaps will approve—or even *demand*—more intense versions of the “successful” methods. The government could end up with more prisoners, many of whom are likely innocent, and use even more coercive interrogations to obtain the “evidence” to convict them. The government will get even more false leads, with all the attendant problems. And even worse rules could end up being developed to shield these further mistakes from scrutiny.<sup>211</sup> Ultimately, such an increasingly ineffective policy could become institutionalized and entrenched because of its political utility.

2. Lack of Oversight of the Executive

Guantanamo makes the Executive the legislature, the judge, the jury, and the executioner.<sup>212</sup> This problem is not simply formal. With checks and balances annihilated, the Executive, even if it is well-intentioned, could be doing a lousy job, but no one can know for sure. Obscuring the failures and ineffectiveness of Executive policy from the scrutiny of other branches of government and the public makes it hard for the nation to change course from a counterproductive and dangerous policy.

---

*Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1777-1802 (1994) (discussing the Fourth Amendment); Samantha Power, *Our War on Terror*, N.Y. TIMES SUNDAY BOOK REV., July 29, 2007, at 1 (noting generally the danger that citizens who reject their government's failed policies designed to combat a threat might also reject other policies, even well-designed ones, and might even come to believe the threat is non-existent). In addition, speculation (of the sort often cavalierly rejected by many people and pundits as “conspiracy theories”) could develop over what the government's real motivations are, which can further disable any good-faith government efforts.

<sup>211</sup> See *supra* Part I.C.

<sup>212</sup> See *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 327 (1979) (finding the magistrate was not neutral and detached where he “allowed himself to become a member, if not the leader, of the search party which was essentially a police operation” in search of store for obscene materials); *Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971) (finding a search warrant issued by an attorney general invalid because he “was actively in charge of the investigation and later was to be chief prosecutor at trial”).

### 3. *Lack of Expertise and Misplaced Focus*

The Executive created the Guantanamo policy in secret, and the extent to which it consulted relevant experts is unknown. It appears that a non-expert, David Addington, an unelected, largely unknown lawyer in the office of the Vice President, created this policy.<sup>213</sup> It is thus perhaps not surprising that the many dangers the policy creates apparently were not considered or even recognized. Instead, Congress should set the policy. It is designed to deliberate, consider implications, and engage in fact-finding by taking testimony from experts, affected individuals, and other stakeholders.

Nor should the Executive be spending its time writing judicial rules, a task that is usually the province of Congress and the Judiciary. The most recent incarnation of the Military Commission rules is 238 pages long.<sup>214</sup> One might ask why the Executive is writing rules that merely make it easy for it to validate its (deeply flawed) terror-fighting efforts. Existing rules should be applied unless proven to be ineffective, or unless, *ex ante*, they can be shown as highly likely to fail. If deemed ineffective, the existing rules should be tinkered with and tried again. Eschewing this process and creating a new justice system out of whole cloth was a rash overreaction.<sup>215</sup>

### 4. *A Scary Argument Lurks*

If the present policy at Guantanamo is widely seen as effective, then there will be reason to argue that it should be extended broadly to U.S. citizens.<sup>216</sup> The argument is that if, as the Bush Administration has claimed

---

<sup>213</sup> Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House's War on Terror*, NEW YORKER, June 26, 2006, at 44.

<sup>214</sup> See UNITED STATES ARMED FORCES, *supra* note 128.

<sup>215</sup> See Filler, *supra* note 26, at 414-19; Parry, *supra* note 2, at 798-97.

<sup>216</sup> Although at least three U.S. citizens have been subjected to indefinite detention as enemy combatants (José Padilla, Yaser Esam Hamdi, and Ali Saleh al-Marri), detentions of U.S. citizens have not been widespread. Nevertheless, the Bush Administration has argued in open court that it has the power to detain *any* U.S. citizen it deems an enemy combatant. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005). The Supreme Court's decision in *Hamdi* is not reassuring to those who believe that the U.S. government lacks such power; in *Hamdi*, the plurality opinion concluded that a U.S. citizen could be held indefinitely as an enemy combatant (as defined in that opinion), subject only to the plurality's suggested blueprint rules that spawned the CSRT. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-35, 538-39 (2004); see also discussion *supra* Part II.A.1.

There is likewise a lack of reassurance for U.S. citizens in that a prominent legal scholar, Bruce Ackerman, has proposed legalizing such roundups of U.S. citizens and non-citizens after a major terrorist attack. See BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 48-58 (2006). Ackerman proposes limiting any such detention to forty-five days, during which the government would have the chance to assemble evidence against the detainee; at the end of the period, if no evidence is

before the Supreme Court,<sup>217</sup> it is too dangerous to give *foreign* suspects a “fair” chance to be released and too dangerous to give them access to information to be used against them (in that it is classified and that to reveal it would compromise sources and methods and tip off terrorists<sup>218</sup>), and if it is too dangerous to give them an attorney (because the attorney might pass messages and information, even unwittingly, to compatriots of the suspected terrorist<sup>219</sup>), then these dangers are *even greater* when the suspect is a U.S. citizen. Terrorists who are U.S. citizens can more easily “infiltrate” the United States (they are already here) and can more easily “fit in” (they already do). They have U.S. passports and can be highly mobile without raising suspicions. Letting anyone who is merely suspected of

---

adduced, the detainee would go free. The detainee would also be compensated \$500 per day of detention. Yet it is uncertain that these dragnets would even be effective, even according to Ackerman himself:

[After an attack,] the security services will be thrashing about a good deal. If they had been on top of the conspiracy, they would have intervened beforehand. So they are almost certain to be in the dark during the early days after a terrorist attack. Nevertheless, early dragnets may well be functional, and not only because they provide appropriate television footage for calming public anxieties. While many perfectly innocent people will be swept into the net, the “usual suspects” identified by counterintelligence agencies may contain a few genuine conspirators. If we are lucky, the detention of a few key operators can disrupt existing terrorist networks, reducing the probability of a quick second strike and its spiral of fear.

*Id.* at 84. Ackerman fails to envision the downsides of a mass detention policy as are described in this Article. Ackerman justifies the dragnet by arguing that “[i]f we are lucky, the detention of a few key operators can disrupt existing terrorist networks”; it is doubtful this strikes an appropriate balance against them. See David Cole, *In Case of Emergency*, N.Y. REV. OF BOOKS, July 13, 2006, at 53 (criticizing Ackerman’s book); see also David Cole, *The Priority of Morality: The Emergency Constitution’s Blind Spot*, 113 YALE L.J. 1753, 1785 (2004) (critiquing Ackerman’s proposal for an “emergency constitution” when the proposal was at an earlier stage and stating, “At bottom, what is most troubling about Ackerman’s proposal is its implicit normative judgment: that it is permissible to lock up human beings without any showing that they are actually dangerous in order to ‘reassure’ the American public in the wake of a terrorist attack. Given the serious deprivation that incarcerating a human being entails, our manifest inability to predict the future, and the history of abusive mass preventive detention campaigns in the past, we should be extremely reluctant to authorize detention in the absence of a threshold showing of dangerousness, and we should insist on prompt procedural protections designed to reduce the likelihood that persons who pose no risk of danger will be detained.”). Cole’s critique is based primarily on morality, as his title indicates, not on the dangers I discuss in this Article.

Ultimately, counterterrorism policies may exist on a very slippery slope. For an argument that the investigative methods originally developed to gather evidence about terrorism from non-citizens and citizens alike will ultimately be used as part of regular criminal (read: non-terrorist) investigations, see Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 101 (2006).

<sup>217</sup> See *Hamdi*, 542 U.S. at 537-38; MARGULIES, *supra* note 3, at 34-40.

<sup>218</sup> See *Hamdi*, 542 U.S. at 537-38.

<sup>219</sup> See *id.*

harboring nefarious intentions run free would be suicidal—so goes the argument.<sup>220</sup>

If challenges are to be made to such a policy, they must be made before it is implemented, not after—when the government can claim that the citizens it has captured are terrorists and disproving such claims will be difficult if not impossible, as has been the case with prisoners at Guantanamo, because the government controls the relevant information. Challenges must focus on the *effectiveness* of mass detention and coercive interrogation techniques, regardless of the detainees' citizenship, which, after all, is a perverse distinction.<sup>221</sup> Otherwise, if the present policy at Guantanamo *is* perceived to be effective in preventing terrorism, it is likely that eventually it will be extended broadly to U.S. citizens. The niceties of citizenship are unlikely to stop a scared and angry government—or public—from doing whatever it believes is necessary to protect itself.<sup>222</sup>

#### IV. PROPOSAL: RECALIBRATE THE RULES TO INCREASE ACCURACY

Rules such as those in place at Guantanamo and such as those proposed after the 1995 Oklahoma City bombing do nothing to prevent terrorism, and they even exacerbate the danger. It is counterproductive to detain a high number of people who have nothing to do with terrorism; it is even worse to use coercive interrogation methods on them. If the United States nevertheless maintains a policy to engage in widespread detention and interrogation, the rules that guide it need to be changed to permit more discernment before, and shortly after, capture. The likelihood of both false positives and false negatives would be reduced.<sup>223</sup> Robust, fact-based investigations that lead to actual terrorists also should help reduce this likelihood; it may well be that official reliance on dragnets and roundups is

---

<sup>220</sup> Of course, proponents of this argument would stress that “the Constitution is not a suicide pact.”

<sup>221</sup> Justice Scalia essentially rested on this distinction in coming to opposite conclusions about the process due citizens and non-citizens at Guantanamo. See *Hamdi*, 542 U.S. at 577 (Scalia, J., dissenting) (arguing the government must release Hamdi or put him on trial because he is a citizen); *Rasul v. Bush*, 542 U.S. 466, 498 (2004) (Scalia, J., dissenting) (objecting to granting habeas corpus right to non-citizens).

<sup>222</sup> See Marks, *supra* note 25, at 562, 566-70.

<sup>223</sup> As should be obvious, it is my position that serious discernment should take place *before* any decision to capture. Such serious discernment, resulting from investigators' knowledge that any captures will be scrutinized early, is likely to discipline the investigators to focus on the accuracy of information *ab initio*. The likely result will be fewer captures, fewer mistaken captures, fewer interrogations, and fewer false confessions.

motivated at least in part by an unexamined fear that these other more traditional<sup>224</sup> investigative methods are insufficient for the “war on terror.”

Any new rules need to result from wide-ranging discussions among policymakers, with the assistance of experts. I will suggest a few guidelines to jumpstart discussion.<sup>225</sup>

#### A. RECONFIGURE THE CSRT AS A “PRELIMINARY (TO INTERROGATION) HEARING”

The CSRT should be reconfigured to reflect the main goal of the War on Terrorism: preventing terrorist attacks. To meet that goal, accurate investigations are necessary. The CSRT was created under a different rubric, balancing how much discretion the Executive is allowed under the Constitution vis-à-vis the “rights” of the detainee, which misses this crucial point.<sup>226</sup>

Hearings should be held soon after capture and before any prolonged, concentrated interrogation—especially interrogations using coercive tactics such as those set forth in the KUBARK manual and used at Guantanamo because they could yield false confessions.<sup>227</sup> The overall burden of challenging the government’s case for detention should be shifted to require the government to justify every detention. There is already precedent for such hearings. In the United States justice system, there are *Gerstein* hearings, which must be held within forty-eight hours of a warrantless arrest so that a judge may inquire into probable cause,<sup>228</sup> and more rigorous,

---

<sup>224</sup> One might say, “tried and true,” but that might evince too much faith in our criminal justice system.

<sup>225</sup> A “terrorists’ court” was recently proposed by two prominent law scholars. See Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, at 19A. The proposal is flawed, however, because it would do little to correct the problem of inaccuracy that fosters the dangers described in Part III. Any effective approach must require eliminating vague crimes and low evidentiary standards, not simply enabling their use by the government.

<sup>226</sup> See *Hamdi*, 542 U.S. at 518-21; see also discussion *infra* Part IV.D.

<sup>227</sup> Indeed, a terrorist who has been captured could avoid such testing and decide to further his cause by disseminating false information to send government officials scurrying in the wrong directions.

<sup>228</sup> *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975); see also *supra* note 50 (describing *Gerstein* hearings). Of course, forty-eight hours might be too tight of a time frame for the sort of hearing I propose. However, it should not be too much longer, as the dangers of investigators’ gathering incorrect information increases over time. That said, if investigators know they must bring evidence to the hearing that passes tests for accuracy and reliability, then they are likely to do so, and this danger is lessened somewhat. On the other hand, I think the forty-five days suggested by Bruce Ackerman is too long, notwithstanding that Ackerman’s rule would require financial remuneration for the prisoners who turn out to be innocent. (Such a

adversarial probable cause hearings under Federal Rule of Criminal Procedure 5.1.<sup>229</sup>

It is not clear how much accuracy the revamped CSRT should aim for. Many of the dangers described in this Article are matters of degree. For example, perhaps investigators would waste too much time and too many resources chasing false leads from interrogations of 500 innocent prisoners, but false confessions from, say, fifty or fifteen innocent prisoners could be handled without creating the dangers discussed above. The optimal level is probably not known by the government, which most likely has not considered the problem in this way. Two initial ways to “calibrate” the tribunals to yield a more manageable number of prisoners would be: (1) to tighten the definition of “enemy combatant” to reflect the real concern—terrorism—and (2) to increase the government’s burden of proof from preponderance of the evidence with a rebuttable presumption in its favor to at least clear and convincing evidence.<sup>230</sup> That standard should render sufficient accuracy under the circumstances and reflects the importance of avoiding the dangers in interrogating false positives..

In general, rewriting the rules should incorporate the new thinking in criminal procedure and evidence law about the impact of such rules on accuracy. Lawyers and legal scholars are recognizing that U.S. criminal procedure rules could be made more effective at preventing wrongful convictions;<sup>231</sup> at present, the rules are primarily geared toward protecting citizens from abuses of power by the government, which is not necessarily the same thing.<sup>232</sup> For example, the Constitution does not bar admission of a coerced confession if the government played no part in inducing that

---

payment could create the perverse incentive for investigators to create evidence of guilt). Many false confessions could be elicited in that time period. *See* ACKERMAN, *supra* note 216.

<sup>229</sup> *See supra* note 50 (describing Rule 5.1 hearings).

<sup>230</sup> *See* GRANO, *supra* note 88, at 3-25 (1993) (providing a general discussion of the goal of accuracy in the U.S. criminal justice system, including its relation to burdens of proof).

<sup>231</sup> *See* Andrew E. Taslitz, *Convicting the Guilty, Acquitting the Innocent: The ABA Takes a Stand*, 19 CRIM. JUST. 18 (2005) (commenting on the first five of nine resolutions by the American Bar Association Criminal Justice Section’s Ad Hoc Innocence Committee (interrogations and false confessions; crime laboratories and forensic evidence; eyewitness identification procedures; investigative policies and personnel; prosecution practices)); Myrna S. Raeder, Andrew E. Taslitz & Paul C. Gianelli, *Convicting the Guilty, Acquitting the Innocent: Recently Adopted ABA Policies*, 20 CRIM. JUST. 14 (2006) (commenting on the remaining four proposals (systemic remedies; jailhouse informants; defense counsel practices; compensation for the wrongfully convicted)); *see also* BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT, 351-57 (2001).

<sup>232</sup> Andrew E. Taslitz, *Wrongful Rights*, in CONSTITUTIONAL CRIMINAL PROCEDURE 56-58 (Andrew E. Taslitz & Margaret Paris eds., 2003).

confession.<sup>233</sup> (Of course, the defendant can always argue to the jury that it should not give the confession any weight.) On the other hand, creating new rules geared toward preventing “wrongful convictions” by the CSRT and military commissions would in effect emphasize the public’s “right” to ensure that the Executive has captured and imprisoned the right people. Indeed, the political discussion about rewriting the rules could be framed in terms of the *public’s* rights (and needs and concerns) rather than the *defendant’s* rights, which could help convince even the politicians, pundits, and citizens who have proposed giving suspected terrorists no quarter.<sup>234</sup>

All tribunals should consist of trained judges, preferably from outside the military, to prevent bias, and preferably Article III judges. Proceedings should be adversarial. A lawyer should be provided for the prisoner, preferably a civilian lawyer, who would be less likely to be subjected to command influence. Hearsay should be excluded unless it fits recognized exceptions.<sup>235</sup> All coerced confessions and coerced testimony should be excluded. There should be no use of secret evidence that cannot be cross-examined. There should be something like compulsory process for the accused’s witnesses, who would be flown to the hearing at government expense, rather than their own, if necessary. After all, an accurate outcome benefits not only the suspected terrorist but also the government and the public.

Collaterally, and within the framework of hearings, investigative techniques should be tested for reliability. For example, interrogation techniques should be examined,<sup>236</sup> and there should be efforts to ensure the accuracy of both eyewitness identification<sup>237</sup> and informants,<sup>238</sup> and efforts to curb racial and religious bias.<sup>239</sup>

---

<sup>233</sup> *Id.* at 57 (discussing *Colorado v. Connelly*, 479 U.S.157 (1986)).

<sup>234</sup> An example of the anxiety over looking lenient on terrorists in making any proposal to change the current system can be seen in the explanation by Sen. Dianne Feinstein of her bill to close Guantanamo: “I want to be clear. I am absolutely opposed to releasing any terrorists, Taliban fighters or anyone else held at Guantanamo who is committed to harming the United States.” See Feinstein Press Release, *supra* note 18.

<sup>235</sup> This, of course, is a notable difference from preliminary hearings, which do not require application of the Federal Rules of Evidence. See FED. R. EVID. 1101(d)(3). This recommendation could be softened, perhaps, if rule-writers decided to study the hearsay exceptions with an eye toward which ones categorically should not be eliminated because they promote accuracy. I believe this more cautious approach is preferable to the ad hoc attitude toward hearsay that is permitted by the CSRT and military commission rules.

<sup>236</sup> See WHITE, *supra* note 31, at 196-220 (proposing interrogation guidelines).

<sup>237</sup> See SCHECK ET AL., *supra* note 231, at 351, 361-62 (mistaken eyewitness identification a factor (presumably not the sole factor) in 81% of seventy-four wrongful convictions that were studied); Taslitz, *supra* note 232, at 788-809.

<sup>238</sup> See BLOOM, *supra* note 204; Zimmerman, *supra* note 204.

<sup>239</sup> Taslitz, *supra* note 232, at 61.

There might be some changes that would alarm civil libertarians but which would reflect the primacy of accuracy. There probably would be no Fourth Amendment rights, as evidence suppressed pursuant to the Fourth Amendment is very often indubitably accurate and reliable.<sup>240</sup> (Evidence that was obtained under circumstances that cast doubt on whether the accused actually possessed the evidence could of course be challenged.) There probably would be no attorney-client privilege or any other privilege where it can be shown that that particular privilege impedes truth-seeking.<sup>241</sup> Even the famous protections prescribed by *Miranda v. Arizona*<sup>242</sup> should be open to question insofar as they may impede the accuracy of interrogation.<sup>243</sup>

An important point should be stressed. Holding the hearing early in the detention and permitting only evidence that complies with safeguards for accuracy will cause investigators to seek such evidence both before and after capture. Having such a tribunal would go a long way to avoiding the current dangerous situation where investigators feel free to extract and rely on all sorts of inaccurate evidence under the belief that they will never have to defend the evidence against challenges to its admissibility.

---

<sup>240</sup> The Military Commissions Act of 2006 specifically states that the Secretary of Defense may prescribe a provision that blocks Fourth Amendment rights. Military Commissions Act of 2006, Pub.L. No. 109-366, 120 Stat. 2600, 2608 (to be codified at 10 U.S.C. § 949a(b)(2)(B)); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-75 (1990) (discussing standards regarding the extension of Fourth Amendment rights beyond U.S. shores).

<sup>241</sup> Privileges seek to protect interests characterized as important and desirable—more desirable than truth-seeking in particular circumstances. See *Trammel v. United States*, 445 U.S. 40, 50 (1980). Various protected values must still be weighed. See Marjorie Cohn, *The Evisceration of the Attorney-Client Privilege in the Wake of September 11*, 71 *FORDHAM L. REV.* 1233 (2003) (discussing how the attorney-client privilege and related interests have been affected by the War on Terrorism).

<sup>242</sup> 384 U.S. 436 (1966).

<sup>243</sup> It is a long-standing debate whether the *Miranda* protections unduly prevent police from interrogating suspects effectively by burying true confessions in the suspects' silence. See generally *THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING* (Richard A. Leo & George C. Thomas III eds., 1998). In *Miranda*, the Court stated that an attorney's presence during a suspect's custodial interrogation could increase the likelihood of accuracy:

If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement of the police and that the statement is rightly reported by the prosecution trial.

*Miranda*, 384 U.S. at 470.



## B. QUESTION THE EFFECTIVENESS OF TORTURE AND COERCIVE INTERROGATION

There is a question that must be addressed when considering changing the rules to promote more effective interrogation: Do torture and coercive interrogation methods that might not rise to meet the legal definition of torture actually work? This Article has focused on the likelihood that torturing or using coercive interrogation methods on people who lack knowledge of terrorism can lead to false confessions and to instances of false witness, which translate into false leads for investigators. I have argued that the problem of interrogating a high number of people who lack relevant knowledge can be corrected or at least reduced significantly by new rules that emphasize accurate detentions. If that is the case, then should such techniques be used on people who *do* have relevant knowledge? Do these methods help extract this knowledge?<sup>244</sup> And even if those methods do sometimes work, do the various costs of using such methods outweigh their benefits?<sup>245</sup> Are there alternative methods that work better, or as well, or perhaps almost as well (say, if we are to entertain having some scruples, even at a slight cost to investigative effectiveness), and carry fewer downsides and dangers?

We would have to inquire into whether people who do know about terrorism are nevertheless more likely to give false information instead of true, to end the mistreatment. There is also the possibility that an actual terrorist might serve up false information in response to torture, specifically for the purpose of misleading investigators, perhaps even to send them scurrying in the opposite direction of a planned attack.<sup>246</sup>

---

<sup>244</sup> See *supra* note 167 and accompanying text (discussing questionable reliability of coerced confessions). Although the sources discussed in note 167 express that regarding the effectiveness of coercive interrogation, “more research is necessary,” Otis, *supra* note 167, at xix, and despite my question, we probably do not need to be agnostic in contemplating an interrogation regime designed to prevent terrorist attacks. We certainly should be cautious in using such techniques, as incorrect information can mislead investigators and ultimately be more dangerous than if the investigators had elicited no information at all from the suspect. The burden of proof should be on those proposing these measures be used against terrorism suspects.

<sup>245</sup> See Rumney, *supra* note 16, at 489 (“When one examines evidence regarding torture, it becomes apparent that it is used for a variety of reasons, including: the victimization of political opponents, human rights campaigners, and journalists; the general suppression of dissent; as well as the persecution of cultural, racial, and sexual minorities.”).

<sup>246</sup> Also, it is important to keep in mind there is no guarantee that an actual terrorist will divulge actual intelligence under coercion; the contrary might be more likely. See Guiora & Page, *supra* note 169, at 446-47 (possible unconscious or conscious misleading of investigators “in and of itself, is cause enough to forbid torture”); Langbein, *supra* note 87, at 101 (“Terrorists willing to die for their cause would also be willing to plant false tales under torture.”).

Torture may have attained the status of a taboo subject,<sup>247</sup> but the fact remains that the U.S. government has been engaging in torture *without* asking and answering such “taboo” questions. Leaders instead appear to base policy decisions on mere intuitions of the necessity and effectiveness of torture.<sup>248</sup> If there are questions not merely about the moral or legal permissibility of using the techniques but also about their effectiveness, those questions should be addressed fully and openly.<sup>249</sup>

### C. IMPROVE MILITARY COMMISSIONS, OR BETTER, SCRAP THEM

Policymakers should decide whether military commissions are even necessary; they probably are not, as Dan Filler argued more than ten years ago when similar tribunals were suggested after the 1995 Oklahoma City terrorist bombing.<sup>250</sup> U.S. federal courts are likely capable of trying enemy combatants who are charged with war crimes.<sup>251</sup> The federal courts could

---

<sup>247</sup> Rumney, *supra* note 16, at 510 n.145.

<sup>248</sup> See generally THE TORTURE PAPERS, *supra* note 33 (containing the publicly released documents concerning the Bush Administration’s justifications for torture). Certainly, I do not mean to suggest that the United States engage in torture, and I would not want to see my proposal lead to a legalization of torture. However, the decision is not mine alone.

<sup>249</sup> See generally Otis, *supra* note 167 (starting such discussion). The document itself is agnostic about the effectiveness of torture. See *id.* However, discussions of the document by some of the experts involved months after its publication were less agnostic: some of the techniques were lambasted as “outmoded, amateurish, and unreliable.” Scott Shane & Mark Mazzetti, *Advisers Fault Harsh Methods in Interrogation*, N.Y. TIMES, May 30, 2007, at A1. The best antidote to the use of torture would be a widespread understanding that torture is ineffective.

<sup>250</sup> See Filler, *supra* note 26, at 410, 418.

<sup>251</sup> *Id.* The benefits of using federal courts are lost when there exists a parallel, rigged justice system. The government’s ability to send those arrested for terrorism crimes to Guantanamo and its justice system may function as a coercive measure which essentially blackmails the arrested individuals into pleading guilty in the regular justice system. See Yin, *supra* note 206, at 1297-1309. Prosecutors can extract pleas from terrorism suspects by reminding them that should they refuse the plea, the prosecutor can simply drop the charges and allow the military to arrest the suspect as an enemy combatant, after which he would be tried in a military commission with a minimal chance of a fair trial. *Id.* at 1281. See also Carl Takei, *Terrorizing Justice: An Argument That Plea Bargains Struck Under the Threat of “Enemy Combatant” Detention Violate the Right to Due Process*, 47 B.C. L. REV. 581 (2006) (arguing that plea bargains should be per se unenforceable when defendant is threatened with enemy combatant status).

In such a situation, the idea commonly understood by the public about plea bargains—that they are obtained because the defendant sees the evidence against him is overwhelming—can be exploited for political gain by government officials. These officials may contend the defendant was indeed a terrorist and the plea was a government victory in the War on Terrorism, but, in reality, the defendant merely was faced with a choice of evils. (Of course, many defendants in our regular criminal justice system plead guilty when they are not because they believe—for various reasons, including lack of resources—they cannot fight the charges and evidence against them.) See Rodney Uphoff, *Convicting the Innocent:*

reach a more accurate and legitimate result than military commissions. They could also use existing procedures to protect secrecy.<sup>252</sup>

The number of such enemy combatants eligible for trial by military commission appears to be low (at least as of this writing), which makes this argument even more compelling; it makes little sense to create an entirely new justice system to try a mere handful of people. Even if the number were not so low, the regular court system could still be used, with minor adjustments if necessary. For example, the number of real judges and real courtrooms could be increased or existing resources could be reallocated, which would reflect the relative importance of trying terrorist suspects.

#### D. THE COURT AND CONGRESS

It seems clear from the foregoing that many of the issues raised in this Article cannot be addressed adequately in court proceedings, especially when what is necessary, ultimately, is to *rewrite the rules*, an act of policymaking: courts generally say yea or nay to the particular rule that is being challenged but do not write—or rewrite—the rule itself.<sup>253</sup> Also, any legal challenge to the CSRT and military commission rules must overcome peremptory hurdles such as determining which parts of the U.S. Constitution, if any, extend to non-citizen detainees; whether the Executive has the power to create such rules; and whether a court should meddle in such a policy, especially where, as with the military commission rules, Congress has agreed to them.<sup>254</sup> Many court challenges will be by nature piecemeal, such as the prospective challenge to the military commission

---

*Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 762-63 (2006). However, the practical effect of this coercion is not clear, given that a person released from a federal prison after serving a term for terrorism crimes could simply be captured and detained indefinitely as an enemy combatant. Perhaps a defendant would plead guilty to serve time in a regular prison, where conditions are better than those for enemy combatants and take his chances that the government will not dispatch him to Guantanamo at the end of his sentence. See Yin, *supra* note 206, at 1277-81 (describing how a defendant contemplating a plea bargain would likely regard confinement in a U.S. prison as a better option than confinement at Guantanamo).

<sup>252</sup> See generally Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962, 1964-71 (2006) (describing framework and assessing constitutionality of use of secret evidence in U.S. criminal, military, and immigration proceedings).

<sup>253</sup> But see *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-35 (2004) (providing dicta which served as a blueprint for the CSRT).

<sup>254</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (Jackson, J., concurring). This will be one of the many questions courts will need to resolve after passage of the Military Commissions Act. A major question is whether the Constitution provides non-citizens with the right to habeas corpus, which the Supreme Court did not address in *Rasul v. Bush*, 542 U.S. 466 (2004); see also Brian G. Slocum, *The War on Terrorism and the Extraterritorial Application of the Constitution in Immigration Law*, 84 DENV. U. L. REV. 1017 (2007).

rules' use of secret evidence that was asserted in *Hamdan v. Rumsfeld*.<sup>255</sup> The Court held that the military commissions may not use secret evidence, because using such evidence contravenes the Uniform Code of Military Justice<sup>256</sup> and the Geneva Conventions.<sup>257</sup> The question of whether the Constitution prohibits such evidence was not addressed.

Subsequently, and in response, Congress passed the Military Commissions Act, which does not sufficiently protect against use of secret evidence.<sup>258</sup> This statute replaces the relevant portions of the UCMJ and Geneva Conventions (which are treated as a statute). It is possible that the Supreme Court will reverse any sentence meted out by a military commission that is based in whole or in part on secret evidence, but that, of course, is unclear because it is uncertain whether and to what extent the Constitution applies. It will take time for such a challenge to reach the Supreme Court. In that time, if we rely on the courts alone, the flawed interrogations and investigations and hence the danger of terrorism will continue.

Here the courts are probably unable to judge fully the effectiveness of the CSRT and military commission rules and to draft new ones, notwithstanding Justice O'Connor's preliminary outline in dicta in *Hamdi*.<sup>259</sup> Nevertheless, the Court could come closer to the issue of effectiveness by achieving a more incisive understanding of the government's interest in these cases. In *Hamdi*, the interest was set forth by Justice O'Connor as preventing enemy combatants from returning to the battlefield.<sup>260</sup> But the government's interest in detaining enemy combatants is at once broader and narrower. Broadly, it is the effective waging of the war on terror. Narrowly, it is effective incapacitation *and interrogation* of enemy combatants as part of investigating terrorist networks for the purpose of preventing attacks—as distinguished from investigating past attacks for the purpose of punishing the perpetrators (where prevention of future attacks is but one of the goals, as fostered through punishment's aims of specific and general deterrence). The Court could conclude that the current

---

<sup>255</sup> 126 S. Ct. 2749, 2764 (2006).

<sup>256</sup> *Id.* at 2792-93.

<sup>257</sup> *Id.* at 2795-99.

<sup>258</sup> See Military Commissions Act of 2006, Pub. L. No. 109-366, §§ 949d(f), 949j, 120 Stat. 2600 (2006) (permitting the military commission and the government to withhold classified evidence from the accused—which may negatively affect the accused's efforts to cross-examine or otherwise rebut or explain).

<sup>259</sup> See discussion *supra* Part II.A.1.

<sup>260</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 518-21. The purpose of interrogation was not seriously considered but was mentioned offhand: Justice O'Connor wrote, without more, "Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized." *Id.* at 521.

policy is counterproductive, based on arguments such as those I have raised in this Article. Therefore, the CSRT and military commissions can be seen as not serving the government's interest or at least as failing to serve an important aspect of the government's interest.<sup>261</sup> That is, the purported way of serving this interest, the CSRT and military commission rules, could be more smartly tailored toward meeting the government's interests in effective incapacitation, effective interrogation, and effective investigation.<sup>262</sup>

At the end of the day, however, it seems more appropriate for Congress to tailor the rules. Congress has such power, outlined in the Constitution,<sup>263</sup> and which it has exercised already in the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006. The Supreme Court in *Hamdan* acknowledged such power on the part of Congress.<sup>264</sup> Deciding on a set of rules that will serve this crucial interest should be the product of a far-reaching discussion that focuses on any such policy's effectiveness in preventing terrorism.

---

<sup>261</sup> See MARGULIES, *supra* note 3, at 29 (noting that government has no interest in unreliable intelligence).

<sup>262</sup> See Kate Stith, *The Government Interest in Criminal Law: Whose Interest Is It, Anyway?*, in PUBLIC VALUES IN CONSTITUTIONAL LAW 141-47 (Stephen E. Gottlieb ed., 1993) (arguing that the public's safety from private crime and violence is one of the "government interests" in constitutional cases addressing criminal procedure); see also Kermit Roosevelt III, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017, 2068-71 (2005) (suggesting a conflict-of-laws approach in determining which constitutional rights should apply to detainees and arguing that this approach would allow for consideration of American values, and the desire of Americans to have a government that treats non-citizens in accordance with these values).

A separate argument could be based on unpacking the assumptions underlying the Justice O'Connor's opinion in *Hamdi* that the procedures outlined in that decision are "necessary" in given instances. See *Hamdi*, 542 U.S. at 533-34 ("[T]he exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict . . . . Hearsay, for example, may need to be accepted as the most reliable available evidence from the government in such a proceeding.") There is likely no need to "institutionalize" the CSRT process for all prisoners who are U.S. citizens; if the words "exigencies" and "need" are to have any meaning, then the CSRT should be used only for those who cannot, for a reasonable period, be brought to a U.S. court. An argument can also be made that, even if a U.S. citizen is subjected to a CSRT, once the exigency ends, the U.S. citizen is entitled to access a U.S. court. Such an argument does not help the non-citizen prisoners directly, but it could inform arguments made on their behalf and could also inform political decisions about the need *vel non* for limiting the process provided for these non-citizen prisoners.

<sup>263</sup> See U.S. CONST. art. I, § 8, cls. 10, 11, 14 (providing Congress with the "Power" to "define and punish . . . Offences against the Law of Nations," "make Rules concerning Captures on Land and Water," and "make Rules for the Government and Regulation of the land and naval Forces"); see also *id.* at art. I, § 8, cl. 18 (Necessary and Proper Clause).

<sup>264</sup> See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773-74 (2006).

## V. CONCLUSION

Since 9/11, Americans have largely gone along with the Executive's decision to create its own methods and rules to decide who should be imprisoned, interrogated, and perhaps even tried as a terrorist, and how that should be done. The CSRT rules that have developed as a putative check on the accuracy of the decision to imprison someone as an enemy combatant simply make it easy for the Executive to assert that its decision is correct. The military commission rules simply make it easy for the Executive to win its cases whenever it decides to prosecute enemy combatants for particular war crimes. The need for these rules to promote accuracy—and the contribution that accuracy could make to the war on terror—has not been understood. The question of whether these rules are effective in preventing terrorist attacks has gone unasked.

I have argued that the present rules foster inaccurate, wasteful wild goose chases and snipe hunts, and that what is needed, therefore, are rules that promote *accuracy*. No one is truly benefited from detaining people who are not involved in and lack relevant knowledge of terrorism. No one is benefited by the exponential multiplication of false leads that results from the coercive interrogation of such prisoners. These are not difficult points to understand. Now that the shock and fear that followed 9/11 have begun to fade, it is hoped that cooler, more rational heads will prevail and will end the dangerous, counterproductive policy at Guantanamo. It is also hoped that, *beyond Guantanamo*, and indeed within our own domestic criminal justice system,<sup>265</sup> when proposals are made to loosen the strictures of our long-used criminal procedure and evidence rules, these proposals will be met with questions of whether loosening these standards will be effective. Furthermore, I hope that it will be widely understood that judicial protections do not exist merely to protect the rights of suspected criminals and terrorists but serve the larger goal of protecting the public by helping to ensure that investigations are accurate and effective.

---

<sup>265</sup> Our domestic criminal justice system has been moving to a preventive paradigm. See Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 849 (2001) (arguing that the U.S. criminal justice system is “built to incapacitate the greatest number of . . . individuals for the longest possible time with the least effort”).

