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War Courts: Terror's Distorting Effects on Federal Courts

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WAR COURTS: TERROR'S DISTORTING EFFECTS ON FEDERAL COURTS

COLLIN P. WEDEL*

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PREFACE

In recent years, federal courts have tried an increasing number of suspected terrorists. In fact, since 2001, federal courts have convicted over 403 people for terrorism-related crimes.¹ Although much has been written about the normative question of where terrorists should be tried, scant research exists about the impact these recent trials have had upon the Article III court system. The debate, rather, has focused almost exclusively upon the proper venue for these trials and the hypothetical problems and advantages that might inhere in each venue.

The war in Afghanistan, presenting a host of thorny legal issues,² is now the longest war in United States history.³ This means that the federal courts

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¹ NAT’L SECURITY DIVISION, STATISTICS ON UNSEALED INTERNATIONAL TERRORISM AND TERRORISM RELATED CONVICTIONS 9/11/01–3/18/10 (2010). This report also includes a list of all Category I and Category II criminal statutes under which prosecutors successfully charged these 403 terrorists.

² See *Al-Bihani v. Obama*, 590 F.3d 866, 882 (D.C. Cir. 2010) (Brown, J., concurring) (noting that “[t]he legal issues presented by our nation’s fight with this enemy have been numerous, difficult, and to a large extent novel. What drives these issues is the unconventional nature of our enemy: they are neither soldiers nor mere criminals, claim no national affiliation, and adopt long-term strategies and asymmetric tactics that exploit the rules of open societies without respect or reciprocity.”).

³ See Rick Hampson, *Afghanistan: America’s Longest War*, USA TODAY, May 28, 2010, at A1.

*have never endured wartime conditions for so long. As a result of this prolonged martial influence, it is clear that this war is corroding federal court jurisprudence. My research represents a first attempt at synthesizing what impact the war in general, and terror trials in particular, have had upon the federal courts. I argue that the hypothetical fear of “seepage” has become concrete. Indeed, judges already admit that the war has taken a regrettable toll on courts’ opinions.*⁴

In a trend that should alarm both tribunal proponents and detractors alike, tribunals and criminal trials are gradually growing to resemble one another. While efforts to improve the military tribunal system have enjoyed a fair level of success,⁵ long-entrenched Article III standards are deteriorating at a pace that mirrors the pace of tribunals’ improvements. A cluster of recent cases, proposed bills, and regulatory actions have narrowed the gap between Article III courts and military tribunals considerably. When viewed as a whole, these blurred lines between the military and domestic spheres draw the federal courts into disquieting congruity with the tribunal system.

I argue that these decisions and bills have altered (1) habeas jurisprudence, (2) detention policy, and (3) criminal investigatory procedure. More specifically, I contend that, as a result of a decade of federal courts accommodating the government’s campaign against terror, the criminal justice system is beginning to resemble the very military tribunals that were once the antithesis of Article III courts. In Part II, I discuss how the federal judiciary’s perspective on habeas corpus review has shifted dramatically even since the beginning of the global war on terror. In Part III, I argue that recent court decisions and administrative agency actions have created an Article III-sanctioned indefinite detention system that is almost indistinguishable from Guantánamo Bay. In Part IV, I observe that courts have relaxed their threshold evidentiary requirements to a point that is strikingly similar to those of military tribunals. In short, courts are becoming military commissions that convict.

⁴ See, e.g., *Al-Bihani*, 590 F.3d at 882 (“This war has placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules be written. Falling back on the comfort of prior practices supplies only illusory comfort.”).

⁵ See David S. Cloud & Julian E. Barnes, *New Rules on Terror Custody Being Drafted*, L.A. TIMES, Apr. 16, 2010, at A1 (“The Obama administration is for the first time drafting classified guidelines to help the government determine whether newly captured terrorism suspects will be prosecuted or held indefinitely without trial . . .”).

I. INTRODUCTION

There exists an ongoing debate about where to detain and how to try alleged terrorists.⁶ After the events of September 11, 2001, politicians and scholars alike grappled with an array of questions posed by the novel circumstances facing America. It was not readily apparent whether America was “at war.” As a result, it was unclear how best to characterize America’s enemies. The most difficult question this lack of clarity presented was a simple issue of venue: should suspected terrorists be tried as criminals in a federal court or as quasi-soldiers in a military tribunal? For the last decade, the answer to that question has been “both.” The United States has tried and convicted terrorists in both federal courts and in military tribunals for similar bad acts.

Maintaining these two justice systems is, by any measure, a Sisyphean labor. Although both aim ostensibly to achieve the same retributive, punitive, and protective goals, the two systems were intended to be very different.⁷ Such differences are necessary, tribunal supporters argue, because tribunals are a military venture designed to be entirely distinct from Article III courts.⁸ Military tribunals — and the detention centers holding future tribunal defendants at Guantánamo Bay, Bagram Air Force Base in Afghanistan, and elsewhere — are tailored to the exigent needs of a martial judicial system that exists entirely outside the Article III court system. For both supporters and detractors of the tribunal system, the differences between the two systems are precisely what drive the debate about military tribunals. For supporters, tribunals’ deviations from Article III norms afford the government sufficient flexibility to employ evidentiary procedures and retributive measures otherwise unavailable in a federal court setting.⁹ America’s “war” against terror, the argument goes, necessitates a system constructed outside Article III standards. For tribunal opponents

⁶ See, e.g., Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004); Janet Cooper Alexander, *Jurisdiction Stripping in a Time of Terror*, 95 CAL. L. REV. 1193 (2007); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005); David Cole, *Enemy Aliens*, 54 STAN L. REV. 953 (2002); Neal Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); Charlie Savage, *Obama Team Split on Tactics Against Terror*, N.Y. TIMES, Mar. 29, 2010, at A1; Charlie Savage & Scott Shane, *Experts Urge Keeping Both Civilian and Military Options in Terror Trials*, N.Y. TIMES, Mar. 9, 2010, at A15.

⁷ See, e.g., Memorandum from Brad Wiegmann & Mark Martins, Detention Policy Task Force, to the Attorney General & Secretary of Defense (July 29, 2009) (on file with Brief), available at <http://www.justice.gov/opa/documents/preliminary-rpt-dptf-072009.pdf>, (“Military commissions that take into account these concerns are necessarily somewhat different than our federal courts, but no less legitimate.”).

⁸ See *id.*

⁹ See, e.g., John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 574 (2006) (“The days when society considered terrorism merely a law enforcement problem and when our forces against terrorism were limited to the Federal Bureau of Investigation, federal prosecutors, and the criminal justice system will not return.”).

who believe that Article III courts should try terrorists as criminals, however, the methods and procedures used to maintain the tribunal system are unnecessary and constitutionally offensive.

Tribunal opponents have long argued that military tribunals suffer from severe constitutional infirmities.¹⁰ Despite recent tribunal improvements,¹¹ this remains painfully true,¹² especially since the government has not yet found an administrable way to determine what types of terrorists belong in a tribunal system.¹³ In response, these tri-

¹⁰. See, e.g., David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 201 (2008) (“The United States’ post-9/11 implementation of military commission trials has been a national embarrassment, adversely impacting the country’s standing in world public opinion while doing nothing to improve national security.”).

¹¹. See Military Commissions Act of 2009, 10 U.S.C.A. §§ 948–950 (2009); see also Joanne Mariner, *A First Look at the Military Commissions Act of 2009, Part Two*, FINDLAW’S WRIT (Nov. 30, 2009), <http://writ.news.findlaw.com/mariner/20091130.html>. The Military Commissions Act of 2009 improves upon the 2006 version in several notable ways. The 2009 Act refines the definition of America’s present conflict to encompass the expanded scope of military actions against Al Qaeda, Taliban, and other associated groups. See § 948a(7). It bars statements made as a result of cruel, inhuman, or degrading treatment. See § 948r. With regard to admissible evidence, it requires a military judge to examine the “totality of the circumstances” in deciding whether evidence would impact the defendant unfairly. See § 948r(d)(3) (defining these circumstances to include “[t]he lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused”). Finally, it vastly augments defense resources in response to vocal concerns about the 2006 Act. See § 948k. In addition, the 2009 Act remedies the 2006 version’s bold statement that Geneva Conventions could not be invoked as a source of rights. See Military Commissions Act of 2006, 10 U.S.C. § 948b(g) (2006).

¹². See Editorial, *Tainted Justice*, N.Y. TIMES, May 24, 2010, at A24 (“If the Obama administration wants to demonstrate that it is practical and just to try some terrorism suspects in military tribunals instead of federal courts, it is off to a very poor start.”). Indeed, the 2009 Military Commissions Act, like its predecessor, grants unprecedented jurisdiction to military commissions. It mirrors the language from the 2006 Act granting commissions jurisdiction to try defendants for “purposeful and material support” of terrorism. This muscular jurisdictional grant led the Solicitor General’s office to argue that a “little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan,” an English teacher with an al-Qaeda-affiliated pupil, and a journalist who refuses to disclose information about Osama bin Laden’s whereabouts to protect her sources would all be subject to trial by tribunal. See *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) (quoting transcript from oral argument). In the course of litigation, however, President Obama’s Department of Justice has utilized a marginally more nuanced approach when prosecuting terrorism supporters versus terrorism perpetrators. Although the language remains unchanged, it appears that the Department of Justice has conceded its inability to maintain a classification broad enough to covers jihadists in Afghanistan along with Swiss grandmothers.

¹³. White House officials have admitted that the Administration’s uncertainty about the consequences of capturing alleged Al Qaeda operative Saleh Ali Saleh led the White House to order his assassination rather than capture him alive. See David Cloud & Julian Barnes, *U.S. May Expand Use of its Afghan Prisons*, L.A. TIMES, Mar. 21, 2010, at A1; cf. *Goldberg v. Kelly*, 397 U.S. 254, 278-79 (1970) (Black, J., dissenting). In *Goldberg*, Justice Black laments in his dissent that perverse results will often be obtained in systems that produce uncertain outcomes: “The Court apparently feels that this decision will benefit the poor and needy. In my judgment the eventual result will be just the opposite. . . . While this Court will perhaps have insured that no needy person will be taken off the rolls . . . it will also have insured that many will never get on the rolls, or at least that they will remain destitute during the lengthy proceedings followed to determine initial eligibility.” *Id.* Similarly, by maintaining such an extensive “menu” of options for captured terror suspects, the government may insure that it will find *some* way to prosecute or punish captives once caught.

bunal opponents posit that the surest way to remedy tribunals' constitutional failings would be to abolish the system and try terrorists as criminals in Article III courts.¹⁴ While the tribunal system has not been abolished, it has certainly languished in desuetude, bringing just three detainees to trial.¹⁵ More tribunals are planned,¹⁶ but notions that those plans will come to fruition remain dubious. Conversely, between September 11, 2001, and March 18, 2010, federal courts convicted 403 people for terror-related crimes.¹⁷ In late 2009, Attorney General Eric Holder declared that future terrorist suspects would be presumed eligible for trial in federal court.¹⁸ Moreover, regardless whether military commissions are wise or even administrable, they cannot be used in many circumstances. Although instances of terror plots have reached an all-time high,¹⁹ most of the recent plotters have been United States or British citizens.²⁰ Americans, however, are precluded from military tribunal trials,²¹ and British citizens are practically barred from them for diplomatic reasons.²² Therefore, it appears that the majority of contemporary terrorists will be tried in Article III courts.

The greater amount of process needed to make such a determination, however, will insure similarly that the government will assassinate, rather than capture, many terror suspects, like Ali Saleh, whose fate is harder to predict.

¹⁴ See, e.g., *Military Commissions Shouldn't Be Used; Pentagon Rules Shortchange Justice*, HUMAN RIGHTS WATCH (June 25, 2003), http://hrw.org/english/docs/2003/06/25/usdom6178_txt.htm.

¹⁵ Of these trials, all have suffered from severe idiosyncratic defects. See David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil Over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131 (2008).

¹⁶ *Military Commissions*, U.S. DEP'T OF DEF, <http://www.defense.gov/news/commissions.html> (last visited Sept. 27, 2010) (listing names of proposed commissions cases).

¹⁷ See Nat'l Sec. Div., *supra* note 1 and accompanying text.

¹⁸ See Editorial, *The K.S.M. Files*, N.Y. TIMES, Apr. 15, 2010, at A26. Despite this presumption, this debate is far from over. There are several bills pending in Congress that would strip Article III courts of jurisdiction and funding to hear terror cases. See *infra* notes 133-140.

¹⁹ See, e.g., Daniel Byman, *Coming to America: We're Likely to See More Attacks on U.S. Soil by Al-Qaida Affiliates*, SLATE (May 5, 2010), <http://www.slate.com/id/2253051> ("[O]ne thing seems clear: There is a growing danger of attacks on U.S. soil by groups affiliated with, but not formally part of, al-Qaida."); Timothy Noah, *Why Now?*, SLATE (May 4, 2010), <http://www.slate.com/id/2252905> (noting that recently foiled terror attempts by "Zazi, Abdulmutallab, and Shahzad are probably more than just a statistically quirky cluster. They constitute circumstantial but compelling evidence that al-Qaida has stepped up its efforts to attack the United States in response to a perceived or real lowering of our guard.").

²⁰ See Paul Cruickshank, *Homecoming*, NEWSWEEK, Sept. 29, 2009, <http://www.newsweek.com/id/216472>. According to Cruickshank, "Twenty years after Al Qaeda was founded, an average of about one American resident had joined its ranks every two years. Suddenly, though, in the spring of 2008, this slow trickle became a flood. In the past 18 months, at least a half dozen recruits may have trained with Al Qaeda The American dream alone may not be enough to stop youngsters from being attracted into Al Qaeda's ranks. British cases have shown that, as often as not, it is university-educated, middle-class, Mercedes-driving youngsters that plot terrorist attacks." *Id.* See also Raffi Khatchadourian, *Azzam the American: The Making of an Al Qaeda Homegrown*, NEW YORKER, Jan. 22, 2007, at 50.

²¹ See 10 U.S.C.A. § 948c (2009) ("Any alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter.").

²² See Glazier, *supra* note 10, at 156-58 (recording how Britain refuses to allow its citizens to be tried in tribunals).

This debate about whether Article III courts are indeed superior to tribunals is quickly becoming moot. Proponents of Article III trials fatefully assumed that federal courts would adhere to procedural and constitutional guidelines unwaveringly, as opposed to the arbitrary and subjective “kangaroo courts” of the tribunal system.²³ If this assumption were true, Article III courts’ heavy terrorism caseload would seem to signal victory for federal court proponents. But simply hearing a large number of terror cases in federal courts was never meant to be an end in itself: Article III terror trials were but a means to secure the constitutional protections that military tribunals lacked. If, in trying terrorists, Article III courts succumbed to the same pressures that crippled tribunals, holding terror trials in federal courts would be no victory at all.

In a trend that should alarm both tribunal proponents and detractors alike, these once-antagonistic systems are becoming twins. While efforts to improve the military tribunal system to match constitutional and international legal norms have enjoyed a fair level of success,²⁴ long-entrenched Article III standards are deteriorating at a pace that mirrors the pace of tribunals’ improvements. A cluster of recent cases, proposed bills, and regulatory actions have narrowed the gap between Article III courts and military tribunals considerably. When viewed as a whole, these blurred lines between the military and domestic spheres draw the federal courts into disquieting congruity with the tribunal system. Specifically, these decisions and bills have altered (1) habeas jurisprudence, (2) detention policy, and (3) criminal investigatory procedure in ways that suggest a disturbing trend. This trend suggests, in turn, that so long as there remains a pressure to convict and permanently incapacitate alleged terrorists — or, to state the contrapositive, so long as there exists trepidation about releasing alleged terrorists for fear that they may be still dangerous — no court system will be immune from the invariably pervasive effects of such pressure.

²³ See, e.g., David Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st-Century Military Commission*, 89 VA. L. REV. 2005 (2003) (arguing that military tribunals may need additional due process safeguards).

²⁴ See David S. Cloud & Julian E. Barnes, *New Rules on Terror Custody Being Drafted*, L.A. TIMES, Apr. 15, 2010, at A1 (“The Obama administration is for the first time drafting classified guidelines to help the government determine whether newly captured terrorism suspects will be prosecuted or held indefinitely without trial.”); see also Wiegmann & Martins, *supra* note 7, at 3 (“On May 15, the Administration announced five rule changes . . . as a first step toward meaningful reform of the commissions established by the MCA.”).

Wars have a corrosive effect on courts. Many of the darkest moments in federal jurisprudential history have resulted from wartime cases.²⁵ This is because, “[i]n an idealized view, our judicial system is insulated from the ribald passions of politics. [But] in reality, those passions suffuse the criminal justice system.”²⁶ Wars especially tend to excite passions to a fever pitch. As the D.C. Circuit has lamented,

[t]he common law process depends on incrementalism and eventual correction, and it is most effective where there are a significant number of cases brought before a large set of courts, which in turn enjoy the luxury of time to work the doctrine supple. None of those factors exist in the Guantánamo context. . . . [I]n the midst of an ongoing war, time to entertain a process of trial and error is not a luxury we have.²⁷

The war in Afghanistan, presenting a host of thorny legal issues,²⁸ is now the longest war in United States history.²⁹ This means that the federal courts have never endured wartime conditions for so long. As a result of this prolonged martial influence, it is clear that this war is corroding federal court jurisprudence. Court-watchers have long feared the danger of “seepage” — the notion that, if terrorists were tried in Article III courts, the pressure to convict would spur the creation of bad law that would “seep” into future non-terror trials.³⁰ In this Note, I argue that this hypothetical fear of seepage has become concrete. Indeed, judges already admit that the war has taken a regrettable toll on courts’ opinions. In *Al-Bihani v. Obama*,³¹ a recent D.C. Circuit decision about Guantánamo detention, habeas corpus review, and criminal procedure, the opinion’s author admits how the courts have bent to accommodate the pressures of war:

²⁵ See, e.g., *Ex parte Quirin*, 317 U.S. 1 (1942) (which upheld the jurisdiction of a United States military tribunal over the trial of several Operation Pastorius German saboteurs in the United States).

²⁶ David Feige, *The Real Price of Trying KSM: Defense Lawyers Will Inevitably Create Bad Law*, SLATE (Nov. 19, 2009),

²⁷ *Al-Bihani v. Obama*, 590 F.3d 866, 881–82 (D.C. Cir. 2010) (Brown, J., concurring).

²⁸ See, e.g., *Al-Bihani*, 590 F.3d at 881–82 (Brown, J., concurring) (noting that “[t]he legal issues presented by our nation’s fight with this enemy have been numerous, difficult, and to a large extent novel. What drives these issues is the unconventional nature of our enemy: they are neither soldiers nor mere criminals, claim no national affiliation, and adopt long-term strategies and asymmetric tactics that exploit the rules of open societies without respect or reciprocity.”).

²⁹ See Rick Hampson, *Afghanistan: America’s Longest War*, USA TODAY, May 28, 2010, at A1.

³⁰ See, e.g., David Feige, *The Real Price of Trying KSM: Defense Lawyers Will Inevitably Create Bad Law*, SLATE (Nov. 19, 2009), <http://www.slate.com/id/2236146> (“Ever deferential to the trial court, the U.S. Court of Appeals for the Second Circuit will affirm dozens of decisions that redact and restrict the disclosure of secret documents, prompting the government to be ever more expansive in invoking claims of national security and emboldening other judges to withhold critical evidence from future defendants.”).

³¹ See *Al-Bihani*, 590 F.3d 866.

War is a challenge to law, and the law must adjust. It must recognize that the old wineskins of international law, domestic criminal procedures, or other prior frameworks are ill-suited to the bitter wine of this new warfare. We can no longer afford diffidence. This war has placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules be written. Falling back on the comfort of prior practices supplies only illusory comfort.³²

In this Note, I argue that courts have already begun to heed Judge Brown's advice and are writing new rules in three key areas of criminal justice. More specifically, I contend that, as a result of a decade of federal courts accommodating the government's campaign against terror, the criminal justice system is beginning to resemble the very military tribunals that once were the antithesis of Article III courts. In Part II, I discuss how the federal judiciary's perspective on habeas corpus review has shifted dramatically even since the beginning of the global war on terror. In Part III, I argue that recent court decisions and administrative agency action have created an Article III-sanctioned indefinite detention system that is almost indistinguishable from Guantánamo Bay. In Part IV, I observe that courts have relaxed their threshold evidentiary requirements to a point that is strikingly similar to those of military tribunals. In short, courts are becoming military commissions that convict.

These developments should cause all sides to pause and reevaluate the ends they seek. The normative question about where terrorists should be tried should only be answered after assessing what effects those trials will have on the system in which they take place. For, although terrorism caused the changes in the three areas that I highlight, these changes will have impacts that outlast and reach far beyond the current era of terrorism.

II. HABEAS CORPUS AND THE SUSPENSION CLAUSE

Much of the federal courts' terror jurisprudence from the past decade focuses on the writ of habeas corpus. Prior to 9/11, issues surrounding false imprisonment and the death penalty largely shaped habeas case law. Since 2001, however, the most seminal habeas cases have dealt with terror and executive detention. This decade-long pressure on courts to conform habeas jurisprudence to the exigencies of wartime has all but emasculated the Great Writ. Congress has twice

³² *Id.* at 882 (Brown, J., concurring).

attempted to strip the courts of habeas jurisdiction,³³ and the Supreme Court has twice rebuffed such attempts at categorical preclusion.³⁴

Courts' resistance to the Executive branch's broad discretion in its detention decisions has deteriorated. In fact, since the Supreme Court's decision in *Boumediene*, lower courts have distorted significantly both *who* may invoke the writ and *what procedures* ensue if review is available.

Boumediene, and *Hamdan* and *Rasul v. Bush*³⁵ before it, were fact-heavy opinions. But the principle underlying all three seemed clear: the extraterritoriality of an inmate's capture and detention does not foreclose habeas review. At oral argument in *Boumediene*, for example, the government insisted that *Eisentrager* stood for the principle that habeas corpus—and, with that, the privilege of regular criminal process—does not extend to enemy aliens captured abroad and detained abroad.³⁶ The Court rejected this formalistic reading of *Eisentrager* as being at odds with its historically more functional approach to habeas jurisdiction.³⁷ Instead, the Court laid out a tripartite test for whether habeas review would be available. Habeas review will depend upon "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."³⁸ In the case of the *Boumediene* petitioners, the Court found that

³³ See Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739, 2742 (2005) (stating that "no court, justice, or judge shall have jurisdiction to hear or consider (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba; or (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantánamo Bay, Cuba, who (A) is currently in military custody; or (B) has been determined . . . to have been properly detained as an enemy combatant"). Later, in response to the Supreme Court's ruling in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), Congress passed the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2636 (2006), which stated: "(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined . . . to have been properly detained as an enemy combatant or is awaiting such determination. (2) [N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined . . . to have been properly detained as an enemy combatant or is awaiting such determination." For an excellent discussion of Congress's attempts to strip habeas jurisdiction from the federal courts, see Alexander, *supra* note 6.

³⁴ See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan*, 548 U.S. 557.

³⁵ 542 U.S. 466 (2004).

³⁶ See MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL 34536, *BOUMEDIENE V. BUSH: GUANTÁNAMO DETAINEES' RIGHT TO HABEAS CORPUS* 4 (2008). See also *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

³⁷ See *Boumediene*, 553 U.S. at 758-64; see also *Reid v. Covert*, 354 U.S. 1, 74-75 (1957) (Harlan, J., concurring) (opining that the Constitution's extraterritoriality is contingent upon "particular circumstances," "practical necessities," "possible alternatives which Congress before it," and upon whether doing so would be "impracticable and anomalous.").

³⁸ *Boumediene*, 128 S. Ct. at 2259.

(1) the petitioners were non-citizen, enemy aliens subject to an inadequate determination process;³⁹ (2) they were detained at a location — Guantánamo Bay — subject to *de facto* United States sovereignty;⁴⁰ and (3) their habeas review would present no “threat” to the United States’ war efforts.⁴¹ Thus, the Court permitted habeas review.

Post-*Boumediene*, it was unclear to what extent lower courts would extend its holding beyond its specific facts. But after a pair of recent D.C. Circuit opinions, *Al-Bihani v. Obama*⁴² and *Al Maqaleh v. Gates*,⁴³ it seems that *Boumediene*’s facts mark the outermost bounds of the Suspension Clause’s reach. Indeed, post-*Al-Bihani* and -*Al Maqaleh*, an enervated Suspension Clause will not extend beyond Guantánamo Bay. This is especially important because both *Al-Bihani* and *Al Maqaleh* garnered unanimous opinions from the D.C. Circuit.⁴⁴ Given Justice Stevens’ recent retirement, the Supreme Court is losing its *Boumediene* architect. Moreover, Justice Elena Kagan, Justice Stevens’s replacement, will likely need to recuse herself from reviewing both cases based on her involvement with them while she served as solicitor general. Thus, even if the Supreme Court granted certiorari, the most probable outcome would be a 4–4 affirmance of the D.C. Circuit. *Al-Bihani* and *Al Maqaleh* will therefore stand as the most authoritative rulings on the Suspension Clause for the foreseeable future.

In *Al-Bihani*, the petitioner was a Yemeni citizen imprisoned at Guantánamo Bay since 2002. He contested the lawfulness of his detention and alleged substantial procedural defects with his prior habeas review.⁴⁵ The petitioner, Al-Bihani, claimed that the district court’s habeas procedure was impermissible because (1) it adopted a preponderance of the evidence standard; (2) it shifted the burden to Al-Bihani to disprove the lawfulness of his detention; (3) it did not hold a separate evidentiary hearing; (4) it admitted hearsay evidence; (5) it presumed the government’s evidence to be true; (6) it required Al-Bihani to prove why his discovery request would not unduly burden the government; and (7) it denied all of his discovery requests but one.⁴⁶

^{39.} *Id.*

^{40.} *Id.* at 2262.

^{41.} *Id.* at 2261–62.

^{42.} *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010).

^{43.} *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

^{44.} The *Al-Bihani* opinion, written by Judge Brown, was joined by Judges Williams and Kavanaugh. *Al-Bihani*, 590 F.3d 866. The *Al Maqaleh* opinion, written by Chief Judge Sentelle, was joined by Judges Tatel and Edwards. *Al Maqaleh*, 605 F.3d 84.

^{45.} See *Al-Bihani*, 590 F.3d at 869–70.

^{46.} *Id.* at 875–76.

The D.C. Circuit, acknowledging the truthfulness of Al-Bihani's claims, cursorily cast aside his arguments: "Al-Bihani[] . . . clearly demonstrates error, but that error is his own."⁴⁷ Al-Bihani's error, the court explained, was assuming that *criminal* habeas precedent was applicable to *detainee* habeas cases. "Habeas review for Guantánamo detainees need not match the procedures developed by Congress and the courts specifically for habeas challenges to criminal convictions."⁴⁸ Instead, the court continued, *Boumediene* "invited 'innovation' of habeas procedures by lower courts, [and] grant[ed] leeway for 'certain accommodations to be made to reduce the burden habeas corpus proceedings will place on the military.'"⁴⁹ The court thus held that the long history of robust protections in the criminal habeas sphere was wholly inapplicable to Guantánamo detainees. Instead, the panel was free to "develop various procedures applicable to various circumstances of detention."⁵⁰ In the "circumstance" of detainee detention, detainees may rely only on a nascent, post-9/11 "branch" of habeas procedures that protect military concerns more than individual rights.⁵¹ After setting up this toothless habeas standard of review, the court excused each of the government's procedural missteps as "harmless error" not amounting to constitutionally impermissible behavior,⁵² a decision the court acknowledged resulted from the war's corrosive effect.⁵³

After *Al-Bihani* announced a restrictive view of the procedural protections afforded *if* habeas is available, the issue of *when* habeas is available was ripe for review. In *Al Maqaleh*, the D.C. Circuit was presented with three petitioners, citizens of Yemen and Tunisia, captured in Pakistan and Thailand and later transported to the Bagram detention facility in Afghanistan.⁵⁴ The D.C. Circuit unanimously agreed that the Suspension Clause's protections did not extend to these petitioners.⁵⁵ The government again argued for a strict reading of *Eisentrager* and *Boumediene*, insisting that habeas corpus rights should extend only to regions that "may be considered effectively part of the United States."⁵⁶ Although the court explicitly rejected such a categorical rule,⁵⁷

^{47.} *Id.* at 876.

^{48.} *Al-Bihani*, 590 F.3d at 876.

^{49.} *Id.* (quoting *Boumediene v. Bush*, 128 S. Ct. 2229, 2276 (2008)).

^{50.} *Id.*

^{51.} *Id.* at 877.

^{52.} *Id.* at 881 ("Even assuming error, the errors were harmless").

^{53.} *Id.* at 882 (Brown, J., concurring) ("War is a challenge to law, and the law must adjust. It must recognize that the old wineskins of international law, domestic criminal procedures, or other prior frameworks are ill-suited to the bitter wine of this new warfare. We can no longer afford diffidence. This war has placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules be written. Falling back on the comfort of prior practices supplies only illusory comfort.").

^{54.} See *Al Maqaleh v. Gates*, 605 F.3d 84, 87 (D.C. Cir. 2010).

^{55.} *Id.* at 99.

^{56.} *Id.* at 94.

^{57.} See *id.*

its application of *Boumediene's* three-factor test makes uncertain precisely where else beyond Guantánamo the Suspension Clause could possibly extend.

In its analysis of *Boumediene's* first factor, which concerns the petitioners' citizenship, their status, and the adequacy of the process leading to that determination, the court noted that the *Al Maqaleh* petitioners' citizenship and status "differ[ed] in no material respect from the petitioners at Guantánamo who prevailed in *Boumediene*."⁵⁸ Moreover, because the *Al Maqaleh* petitioners' status determination process "afforded even less protection to the rights of detainees"⁵⁹ than did the process at issue in *Boumediene*, the court found that the first factor "even more strongly favors petitioners here."⁶⁰

The D.C. Circuit found the second factor — the nature of the sites where apprehension and detention took place — to weigh "heavily in favor of the United States."⁶¹ First, the court quietly sidestepped the all-important fact that none of the petitioners before it were captured in or were citizens of Afghanistan by analogizing simply that, "[l]ike all petitioners in both *Eisentrager* and *Boumediene*, the petitioners here were apprehended abroad."⁶² Second, the court held that the Bagram facility is of an entirely different nature than Guantánamo Bay. Despite both Bagram and Guantánamo Bay being subject to U.S. leaseholds, the court claimed that the "surrounding circumstances" at Bagram are "hardly the same."⁶³ The court distinguished the two sites using the novel factors of the government's intent for permanency and the formal hostility of the "host" nation: "The United States manifested its intent to remain in *de facto* control over Guantánamo Bay by having occupied the base for "over a century . . . in the face of a hostile government maintaining *de jure* sovereignty over the property."⁶⁴ In contrast, and in spite of America's indefinite leasehold over Bagram, the court posited that "there is no indication of any intent to occupy the base with permanence, nor is there hostility on the part of the 'host' country."⁶⁵ Therefore, the court concluded, any argument that the government exercises *de facto* control over Bagram is simply not "realistic."⁶⁶

⁵⁸ *Id.* at 96.

⁵⁹ *Id.*

⁶⁰ *Al Maqaleh v. Gates*, 605 F.3d 84, 96 (D.C. Cir. 2010) (internal citations omitted).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 97.

⁶⁴ *Id.*

⁶⁵ *Id.* (emphasis added).

⁶⁶ *Al Maqaleh v. Gates*, 605 F.3d 84, 97 (D.C. Cir. 2010). Future Bagram litigants are even less likely to overcome this standard in light of reports that the Obama Administration is planning to turn over control over the Bagram facility to the Afghan government. See Julian E. Barnes, *U.S. Aims to Share Afghan Prison*, L.A. TIMES, Jun. 9, 2010, at A1. The United States, however, would "carve out a section of the prisons for non-Afghan detainees who would remain under U.S. custody." *Id.*

In its treatment of the third factor, the court found Afghanistan's status as an active war zone to pose "overwhelming" "practical obstacles" to granting habeas review, despite having just found the *lack* of Afghan "hostility" dispositive in its factor-two analysis.⁶⁷ Unlike the prison at Guantánamo Bay, the court argued, the Bagram facilities are "exposed to the vagaries of war,"⁶⁸ a situation that precludes habeas review. The court rested this conclusion on dicta from *Eisentrager*⁶⁹ that wartime trials "hamper the war effort" because they result in the "effective fettering of a field commander . . . [by] allow[ing] the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home."⁷⁰

Finally, the court dismissed the petitioners' argument that this holding will allow the United States to "cho[ose] the place of detention and . . . evade judicial review of Executive detention decisions by transferring detainees into active conflict zones, thereby granting the Executive the power to switch the Constitution on or off at will."⁷¹ While claiming not to "ignore" this argument, the court stated that such a worry has no application to factors two or three and thus would not change the outcome of the case.⁷² The court, although noting that "such manipulation by the Executive might constitute an additional factor" to be considered, nonetheless concluded that no manipulation was at play in the instant case.⁷³

The D.C. Circuit's holding in *Al Maqaleh* all but emasculates *Boumediene*. Under the court's factor-two analysis, the inverse relationship between the "host" and "guest" governments serves as a proxy for intent. The more "hostile" the host government, the more likely it is that a leaseholder truly intends to remain; and, as a result, the more likely it is that the lessee exercises *de facto* sovereignty over the land. But by focusing on the formal "peace" or "hostility" between two nations, the court turns the unobjectionable logic of this argument on its head. To declare that the otherwise-pacific base at Guantánamo persists in the face of "hostility," as opposed to the tranquility in which

⁶⁷ *Id.* (analogizing the security conditions at Bagram to those at issue in *Eisentrager*, where the court found that security threats remained high even after the formal cessation of hostilities).

⁶⁸ *Id.* (distinguishing *Boumediene* in that no such exposure was apparent at Guantánamo).

⁶⁹ See *Johnson v. Eisentrager*, 339 U.S. 763, 776 (1950) ("The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our war efforts or give aid to the enemy.") (quoting *Ex parte Kawato*, 317 U.S. 69, 75 (1942)).

⁷⁰ *Al Maqaleh*, 605 F.3d at 98 (quoting *Eisentrager*, 339 U.S. at 779).

⁷¹ *Id.* (internal quotation marks omitted) (citing brief for appellees).

⁷² *Id.* (finding such deliberate transportation of detainees into Bagram absent in this case without further comment on the evidence, while reserving judgment on the weight such a fact would carry if present).

⁷³ *Id.* at 99 (reaching its determination in part by reasoning that officials could not have anticipated *Boumediene* when selecting Bagram over a location outside the theater of war).

the Bagram facility sits, belies the actual nature of the two sites and stretches the definition of “hostility” far beyond its natural meaning. This definition of hostility is still more implausible when coupled with the court’s third-factor analysis. Although Afghanistan’s status as an active warzone has no bearing on whether the site is “hostile,” it holds dispositive weight for factor three. The court’s second- and third-factor analyses together pack a powerful one-two punch: habeas review is unavailable in nations (a) with which the United States is formally at peace and (b) in which the United States has military forces subject to the “vagaries” of war. Ironically, this logic applies neatly to Cuba’s nearest neighbor, Haiti. Despite being at peace with Haiti, America has maintained a military presence there since 2004, and its troops have been subject to occasional violent attacks.⁷⁴ After *Al Maqaleh*, a prisoner detained at a hypothetical American facility in Haiti arguably would have less right to habeas protections than his counterparts incarcerated at Guantánamo, mere miles away across a Caribbean channel.

Such distinctions based on formal “hostility” underscore how much the war on terror has eroded federal court habeas jurisprudence since 9/11. Since the Guantánamo inmate population is expected to dwindle,⁷⁵ the import of a decision limiting extraterritorial habeas review to just Guantánamo Bay cannot be overstated. For example, the D.C. Circuit relies heavily upon the *Eisentrager* Court’s fear that “calling commanders to account” for habeas review would disturb the war effort.⁷⁶ Yet, the majority opinion never explains how granting habeas review for prisoners in Afghanistan differs in any meaningful way from doing so for prisoners at Guantánamo Bay: in both circumstances, the same officer would need to appear at the same type of proceeding in the same venue, with the only difference being the location of the prisoner at issue. Finally, the petitioners’ argument that the Executive may now capture prisoners anywhere and then detain them beyond reach of the Constitution is highly salient.⁷⁷ However, the court gives it superficial

⁷⁴ See UNITED NATIONS, UN MISSION’S CONTRIBUTIONS BY COUNTRY 7 (Feb. 28, 2009), http://www.un.org/en/peacekeeping/contributors/2009/feb09_5.pdf (identifying the number of United States troops and police active in the international mission in Haiti). See also U.N. S.C. Rep. of the Security Council, Apr. 13–16, 2005, ¶17, U.N. Doc. S/2005/302 (May 6, 2005) (detailing the combat deaths of several members of the United Nations mission in Haiti). See generally U.N. DEP’T OF PUB. INFO., STABILIZATION MISSION IN HAITI: FACTS AND FIGURES, <http://www.un.org/en/peacekeeping/missions/minustah/facts.shtml> (2010) (providing references to Security Council resolutions authorizing the mission in Haiti since 2004, along with lists of contributing countries, total deployment strength, and mission fatalities).

⁷⁵ See Cloud & Barnes, *supra* note 13 (reporting that no prisoners have been sent to Guantánamo under the Obama administration).

⁷⁶ *Al Maqaleh*, 605 F.3d at 98 (finding the arguments against allowing the *Eisentrager* prisoners access to civil courts even more persuasive when applied to Bagram) (citing *Johnson v. Eisentrager*, 339 U.S. 776, 779 (1950)).

⁷⁷ See *id.* (“[W]ithout dismissing the legitimacy or sincerity of appellees’ concerns [regarding the government’s possible ability to transfer detainees to avoid constitutional protections], we doubt that this fact goes to either the second or third of the Supreme Court’s enumerated factors.”).

treatment, noting only that a showing in some future case of governmental intent to circumvent habeas review might change its analysis. It is far from certain, however, what showing would be needed to trigger this exception. For neither Congress's attempts to strip federal habeas jurisdiction nor a White House official's admission that the prison at Bagram is being expanded, in part, because the United States "has few other places to hold and interrogate foreign prisoners without giving them access to the U.S. court system,"⁷⁸ demonstrate the requisite governmental intent to circumvent the judiciary.

Al Maqaleh's reasoning is expansive enough to preclude from habeas protections all future detainees except for those at Guantánamo, and *Al-Bihani* ensures that even those who get habeas review will find the Great Writ to offer less-than-great protection. Together, these two "war-time" decisions distort habeas into something much weaker than its pre-9/11, or even pre-*Boumediene*, analogue. Indeed, in *Boumediene*, the Supreme Court declared "[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled, and in our system they are reconciled within the framework of the law."⁷⁹ Yet less than two years after that statement, *Al-Bihani's* bold pronouncement that "[w]ar is a challenge to law, and the law must adjust,"⁸⁰ indicates a frightening new chapter in wartime habeas jurisprudence.

III. MILITARY DETENTION AND CRIMINAL INCARCERATION

Detention has long been one of the most contentious issues in the war on terror.⁸¹ The Executive's claimed ability to detain suspected terrorists indefinitely has been controversial, but is technically permitted under a Congressional mandate granting the President broad detention power.⁸² Many detainees have languished for over eight years in facilities at Guantánamo Bay and elsewhere, often without charges or a chance to contest the facts leading to their detention.⁸³ Despite initial

⁷⁸. Cloud & Barnes, *supra* note 13.

⁷⁹. *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008).

⁸⁰. *Al-Bihani v. Obama*, 509 F.3d 866, 886 (D.C. Cir. 2010) (Brown, J., concurring).

⁸¹. See, e.g., Allison M. Danner, *Defining Unlawful Enemy Combatants: A Centripetal Story*, 43 *Tex. INT'L L.J.* 1 (2007); Glazier, *supra* note 10.

⁸². See Harold Koh, Legal Advisor, U.S. Dep't of State, Remarks at the Annual Meeting of the American Society of International Law (Mar. 25, 2010) ("The federal courts have confirmed our legal authority to detain in the Guantanamo habeas cases, but the Administration is not asserting an unlimited detention authority. For example, with regard to individuals detained at Guantánamo . . . we are resting our detention authority on a domestic statute — the 2001 Authorization for Use of Military Force (AUMF) — as informed by the principles of the laws of war. Our detention authority in Afghanistan comes from the same source."); see also Authorization for Use of Military Force, S. J. Res. 23, 107th Cong., 115 Stat. 224 (2001).

⁸³. See Marc Ambinder, *Inside the Secret Interrogation Facility at Bagram*, ATLANTIC (May 14, 2010), <http://www.theatlantic.com/politics/archive/10/05/inside-the-secret-interrogation-facility-at->

cues to the contrary,⁸⁴ the Obama Administration is weighing a major expansion of its military detention program that would involve a permanent prison facility at the United States Air Force Base in Bagram, Afghanistan, where about 800 terror suspects currently await charges.⁸⁵

Detainees appear to have lost in their struggle to apply international legal norms — which would otherwise mandate their release at a conflict's conclusion⁸⁶ — to the United States' military detention

bagram/56678 ("The Defense Intelligence Agency (DIA) runs a classified interrogation facility for high-value detainees inside Bagram Air Field in Afghanistan, defense and administration officials said, and prisoners there are sometimes subject to tougher interrogation methods than those used elsewhere."); Hilary Andersson, *Red Cross Confirms 'Second Jail' at Bagram, Afghanistan*, BBC News (May 11, 2010), http://news.bbc.co.uk/2/hi/south_asia/8674179.stm (noting the existence of separate, distinct, and until recently, secret holding facility at the Bagram Air Force Base).

^{84.} See Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009) (ordering the closure of the Guantánamo Bay Detention Center by Jan. 22, 2010). Nevertheless, The White House lawyer who originally led the efforts to end Guantánamo's role as a detention and tribunal center, Daniel J. Meltzer, resigned in early May. See also Charlie Savage, *White House Deputy Counsel Resigns*, CAUCUS (May 7, 2010), <http://thecaucus.blogs.nytimes.com/2010/05/07/white-house-deputy-counsel-resigns>.

^{85.} See Cloud & Barnes, *supra*, note 13. See also Ambinder, *supra* note 83; Andersson, *supra* note 83. This expansion is especially worrisome given recent allegations from Bush Administration defense officials that many Guantánamo Bay and Abu Ghraib inmates were wrongfully detained and are, in fact, innocent. See Sworn Declaration of Col. Lawrence B. Wilkerson at 5, *Hamad v. Bush*, CV 05-1009 JDB (D.D.C. Mar. 24, 2010) ("It was . . . clear that many of the men were innocent, or at a minimum their guilt was impossible to determine let alone prove in any court of law, civilian or military."); *Id.* at 8 ("[M]y investigation into the Abu Ghraib detentions revealed that some 50–60% of those imprisoned in Abu Ghraib were probably innocent."). Wilkerson's declaration in support of Adel Hassan Hamad's civil suit marks the first time a Bush Administration official has, under oath, proclaimed the innocence and wrongful detention of a Guantánamo detainee. In his declaration, Wilkerson makes a range of allegations regarding Hamad's innocence in particular as well as the failures of the military detention system in general: "With respect to the assertions by Mr. Hamad that he was wrongfully seized and detained, it became apparent to me as early as August 2002, and probably earlier to other State Department personnel who were focused on these issues, that many of the prisoners detained at Guantánamo had been taken into custody without regard to whether they were truly enemy combatants, or in fact whether many of them were enemies at all. I soon realized from my conversations with military colleagues as well as foreign service officers in the field that many of the detainees were, in fact, victims of incompetent battlefield vetting." *Id.* at 4.

^{86.} See, e.g., *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010) (citing Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135). See also Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135) ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."); see also Hague Convention on Laws and Customs of War on Land art. 20, July 29, 1899, 32 Stat. 1817 (requiring repatriation after "conclusion of peace"); Hague Convention Respecting the Laws and Customs of War on Land, art. 20, Oct. 18, 1907, 36 Stat. 2301 (also requiring repatriation "[a]fter the conclusion of peace"); Geneva Convention Relative to the Treatment of Prisoners of War art. 75, July 27, 1929, 47 Stat. 2055 (noting that repatriation should be accomplished "with the least possible delay after conclusion of peace"); Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained without Trial*, 44 HARV. INT'L L.J. 503, 510-511 (2003) (noting that prisoners of war "can be detained during an armed conflict, but the detaining country must release and repatriate them 'without delay after the cessation of active hostilities,' unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences.") (citing Geneva Convention Relative to the Treatment of Prisoners of War arts. 85, 99, 118, 119, 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.).

scheme. *Hamdi v. Rumsfeld* made clear that America's military engagement justifying detention could last indefinitely⁸⁷ and, even if the war ended, *Al-Bihani v. Obama* introduced the principle that detention may outlast the end of an engagement.⁸⁸

Article III trials, therefore, seem to offer the greatest protection against arbitrary and indefinite detention. Regardless what process the courts followed, alleged terrorists would still receive a sentence matching the crime for which they were convicted. But a recent Supreme Court decision and a proposed rule from the Bureau of Prisons cast doubt on whether Article III trials — and, more importantly, Article III sentences — will continue to protect against indefinite detention.

The Supreme Court's ruling in *United States v. Comstock* sets a disturbing precedent for terrorist-detainees.⁸⁹ *Comstock* involved sentencing issues for sex offenders, a topic seemingly unrelated to terrorism. Yet the Court held that Congress may use its Necessary and Proper Clause powers to permanently detain dangerous sex offenders if they appear to pose a threat to the surrounding community upon release.⁹⁰ That Congress may order the civil commitment of dangerous prisoners *after* completing their sentences sets the stage for transplanting an indefinite detention regime into the criminal sphere. The possibility that this reasoning would or could be extended to cover terrorists subject to Article III criminal sentencing is far from remote. Indeed, many commentators noticed instantly *Comstock's* potential impact on terror-connected inmates.⁹¹

⁸⁷. *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) ("If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that [a detainee] might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that [his] detention could last for the rest of his life."). The "end of an engagement" is dependent on a political determination that could come long after the actual violence in which the combatant was involved ends.

⁸⁸. Indeed, in *Al-Bihani*, the court relied on the petitioner's avowed quasi-military service as a justification for his detention but paradoxically disregarded such status with respect to *Al-Bihani's* request for release. See *Al-Bihani*, 590 F.3d at 872-74. The court notes that there are currently enough U.S. troops in Afghanistan to consider it an ongoing conflict that justifies continued detention, which implies that the eventual U.S. exit from Afghanistan would trigger the release of those held in military detention according to international norms. *Id.* at 874. But the court confronts the specter of a future release directly — and depressingly. According to the court, releasing *Al-Bihani* at the end of hostilities "would make each successful campaign of a long war but a Pyrrhic prelude to defeat. The initial success of the United States . . . in ousting the Taliban from the seat of government and establishing a young democracy would trigger an obligation to release Taliban fighters captured in earlier clashes. Thus, the victors would be commanded to constantly refresh the ranks of the fledgling democracy's most likely saboteurs." *Id.*

⁸⁹. See *United States v. Comstock*, 130 S. Ct. 1949 (2010).

⁹⁰. See *id.* at 1965 (holding that the statute in question "is a 'necessary and proper' means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others.").

⁹¹. See, e.g., Lauren M. Kulpa, Comment, *U.S. v. Comstock*, 43 *LOY. L.A. L. REV.* (forthcoming 2011) (noting prominent criticisms regarding *Comstock's* potential impact in terror-related incarceration

The statute at issue in *Comstock* authorizes a court to civilly commit a soon-to-be-released prisoner if he (1) previously “engaged or attempted to engage in sexually violent conduct or child molestation,” (2) “suffers from a serious mental illness, abnormality, or disorder,” and (3) as a result of the disorder, remains “sexually dangerous to others” such that “he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.”⁹² If a court finds all of these factors, it may commit the prisoner to the Attorney General’s custody, who must make “all reasonable efforts” to return the prisoner to the state in which he was tried or in which he is domiciled.⁹³ If the Attorney General is unsuccessful in this endeavor, the prisoner is sent to a federal treatment facility and remains there until he is no longer dangerous.⁹⁴

By its terms, this statute applies to sex criminals, not terrorists. Nevertheless, this opinion, which garnered the support of seven justices, clears away any foreseeable barriers to Congress issuing a similar statute aimed at terrorists. After *Comstock*, Congress may authorize the Attorney General to detain “dangerous” criminals in perpetuity after the termination of their sentences under its Necessary and Proper Clause powers. A statute codifying that notion would alter terrorism prosecutions radically.

Of all terrorism-related indictments between 2001 and 2009, 478 have resulted in criminal sentences.⁹⁵ Of those, a plurality of 220 led to a sentence of less than one year, and an additional 134 led to a sentence of between one and five years.⁹⁶ A mere twenty-six convictions have led to a sentence of thirty or more years.⁹⁷ Thus, 74% of terror prosecutions result in the defendant serving less than five years in prison. This relatively light sentencing is a byproduct of the difficulty of proving in court some of the government’s more serious allegations, like those falling under the “Terrorism” chapter of the U.S. Code.⁹⁸ As a result, only 29.5% of suspected terrorists’ indictments even included a charge under a “terrorism” statute.⁹⁹ Many suspected terrorists instead have

tion); Dahlia Lithwick, *Detention Slip*, SLATE (May 18, 2010), <http://www.slate.com/id/2254223> (“[T]he more worrisome question is whether this very expansive view of federal crime-fighting authority would carry over to terrorism suspects whom the government may want to detain without trial.”).

⁹² 18 U.S.C. § 4247(a)(5)-(6) (2006). See also 18 U.S.C. § 4248(d) (2006) (authorizing civil commitment of sexually dangerous persons according to the definitions set forth in § 4247).

⁹³ See *Comstock*, 130 S. Ct. at 1954 (citing 18 U.S.C. § 4248(d)).

⁹⁴ 18 U.S.C. § 4248(d).

⁹⁵ CENTER ON LAW & SEC., NEW YORK UNIV. SCH. OF LAW, HIGHLIGHTS FROM THE TERRORIST TRIAL REPORT CARD 2001–2009: LESSONS LEARNED 11 (2009).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ 18 U.S.C. § 2331 (2006).

⁹⁹ HIGHLIGHTS FROM THE TERRORIST TRIAL REPORT CARD, *supra* note 95.

been charged with immigration and weapons violations, resulting in significantly lesser penalties.¹⁰⁰

The obvious and ominous portent of the *Comstock* decision is that the government may obtain a conviction for a suspected terrorist on a relatively minor charge carrying a light sentence and then, after the conclusion of the sentence, declare the prisoner to be “dangerous” and thus subject to indefinite detention. Indeed, Obama Administration officials have admitted that part of the government’s unwillingness to release Guantánamo inmates to criminal authorities is driven by the perceived difficulty the government will have in obtaining an adequately long sentence for “known” terrorists if sufficient evidence is lacking.¹⁰¹ If a conviction for a lesser crime could be obtained, *Comstock’s* logic would offer an attractive avenue for closing Guantánamo while detaining its former inmates indefinitely.

It is not hard to imagine a slightly altered version of the statute at issue in *Comstock* applying in a terrorism context. Congress could tweak the *Comstock* statute to allow indefinite detention based on a finding that a prisoner (1) previously “engaged or attempted to engage in [terrorism-related] violent conduct,” (2) remains committed to his terrorist cause, and (3) as a result of his terrorism connections, remains “dangerous to others” such that “he would have serious difficulty in refraining from [terrorist or] violent conduct if released.” In essence, *Comstock* permits the Executive to entertain the notion: “once a danger to children, always a danger to children.” This, in itself, is troubling. The more troubling analogue, though, is “once a terrorist, always a terrorist,” which seems a likely conclusion given predictions that Al Qaeda will never cease to exist.¹⁰² If Al Qaeda or its analogues are still operational upon a prisoner’s scheduled release, it is difficult to see

¹⁰⁰ *Id.*

¹⁰¹ See generally Peter Finn, *Panel on Guantanamo backs indefinite detention for some*, WASH. POST, Jan. 22, 2010, at A1 (noting that detainees can challenge evidence which may compromise intelligence-gathering).

¹⁰² Present understandings of Al Qaeda suggest that its organizational structure makes its extermination an unachievable goal. Indeed, “Al Qaeda is a phenomenon that defies scorecard evaluations. . . . [Y]ou never know how close you are to reaching an objective.” Michael Brenner, *Al-Qaeda On the Ropes?*, HUFFINGTON POST (Apr. 26, 2010), http://www.huffingtonpost.com/michael-brenner/al-qaeda-on-the-ropes_b_552324.html. Brenner’s take on Al-Qaeda suggests that Al-Qaeda is more an idea than an entity, making the notion of defeating it all-but-impossible: “Using a proper noun, our minds instinctively conjure the image of an entity of well defined contours and dimension [But the] phenomenon we call al-Qaeda is amorphous, diffuse and in a continual state of flux. This is especially true after 9/11 and during its years of duress. The exact links between al-Qaeda in Mesopotamia and “headquarters” in AfPak are obscure even to official Washington. . . . “Al-Qaeda” is not the counterpart to the numerous nationalist movements we have known. It is not geo-politically focused on a specific plot of ground; its aims are changeable al-Qaeda in AfPak, al-Qaeda in Mesopotamia, al-Qaeda in the Maghreb, al-Qaeda in Arabia, al-Qaeda in East Africa are all linked in various ways with other outfits Hence, each al-Qaeda unit’s capability, tactics and orientation are partially a function of those shifting ties and the fortunes of their associates. Those associates, in turn, are even more diffuse than is the local al-Qaeda itself.” *Id.*

how a terrorist could ever overcome the Government's assertions of "dangerousness." Regardless of whether this is a wise step, it is a significant departure from our standard approach to prison sentences.

A recent proposed rule by the Bureau of Prisons, which will alter the criminal detention landscape dramatically, draws *Comstock's* potential impact into sharp relief.¹⁰³ In December 2006, the Bureau of Prisons created the first of two "Communication Management Units" (CMU) in Terra Haute, Indiana.¹⁰⁴ Another CMU followed in March 2008, in Marion, Illinois.¹⁰⁵ According to a Bureau of Prisons spokesperson at the time, the CMUs were "established to house inmates who, due to their current offense of conviction, offense conduct, or other verified information, require increased monitoring of communications between the inmate and persons in the community in order to protect the safety, security and orderly operation of Bureau facilities, and to protect the public."¹⁰⁶ Despite this innocuous description, the two CMUs drew immense criticism.¹⁰⁷ Dubbed "Little Guantánamos" for the austere conditions imposed on inmates, CMUs were separate areas of the prison into which the government placed mostly Arab Muslims suspected of having terrorist ties.¹⁰⁸ Once there, the CMU inmates' communications with the outside world was limited severely.¹⁰⁹ This allowed prison wardens at the two CMUs to ghettoize suspected terrorists and monitor their restricted communications.¹¹⁰

Because of the significant opposition to these CMUs, their implementation remained limited to the two facilities at Marion and Terra Haute and it seemed that the CMU "experiment" would be phased out.¹¹¹ Instead, the new proposed rule codifies the current CMU scheme of segregated detention and permits federal prisons throughout the United States to institute their own CMUs. Citing the need to protect against the danger of coded messages sent by prisoners,¹¹² the rule increases the already draconian limitations on CMU inmates' contact

¹⁰³ Communication Management Units, 75 Fed. Reg. 17,324, 17,327-29 (proposed Apr.6, 2010) (to be codified at 28 C.F.R. pt. 540(j)).

¹⁰⁴ See Communication Management Units, 75 Fed. Reg. at 17,324.

¹⁰⁵ *Id.*

¹⁰⁶ Dean Kuipers, *Isolation prisons under fire*, L.A. TIMES, Jun. 18, 2009, at A11.

¹⁰⁷ See, e.g., Dan Eggen, *Facility Holding Terrorism Inmates Limits Communication*, WASH. POST, Feb. 25, 2007, at A7; Daniel McGowan, *Tales from Inside the U.S. Gitmo*, HUFFINGTON POST (Jun. 8, 2009), http://www.huffingtonpost.com/daniel-mcgowan/tales-from-inside-the-us_b_212632.html.

¹⁰⁸ See Eggen, *supra* note 107.

¹⁰⁹ See McGowan, *supra* note 107 (revealing that CMU inmate communication with family and attorneys outside the prison was nearly impossible).

¹¹⁰ Indeed, the Bureau of Prisons has stated that CMU "will not be limited to inmates convicted of terrorism-related cases, though all of the prisoners fit that description." McGowan, *supra* note 107.

¹¹¹ See Eggen, *supra* note 107.

¹¹² See Communication Management Units, 75 Fed. Reg. 17,324, 17,326 (proposed Apr. 6, 2010) (to be codified at 28 C.F.R. pt. 540(j)). See also *Turner v. Safley*, 482 U.S. 78, 93 (1987) (noting danger of coded prison messages); *United States v. Hammoud*, 381 F.3d 316, 334 (4th Cir. 2004) (same); *United States v. Salameh*, 152 F.3d 88, 108 (2d Cir. 1998) (same).

with persons within and without the prison: communication would be limited to a maximum of three pieces of double-sided paper, sent and received once per week, to *and from* a single recipient,¹¹³ a limit the prison warden may reduce as he deems “necessary.”¹¹⁴

More troubling than severity conditions within a CMU is the ease with which the government may channel inmates into one. The rule gives expansive discretion to prison wardens for deciding whom to place within a CMU.¹¹⁵ According to the Bureau of Prisons:

Inmates may be designated to a CMU if *evidence* of the following criteria *exists*:

- (a) The inmate’s current offense(s) of conviction, or offense conduct, *included* association, communication, or involvement, related to international or domestic terrorism; [or]
- (b) The inmate’s current offense(s) of conviction, or offense conduct, or activity while incarcerated, indicates a propensity to encourage, coordinate, facilitate, or otherwise act in furtherance of, illegal activity through communication with persons in the community¹¹⁶

These provisions apply to any inmate even tenuously connected to terrorism, since the criteria demand merely that evidence of a terrorism connection *exist* to justify CMU detention.¹¹⁷ And, despite the rule’s stated purpose of preventing all forms of dangerous communication from all groups of prisoners, the short history of CMUs thus far has demonstrated that the majority of its inmates are Arab Muslims charged with or suspected of having terrorist ties.¹¹⁸

¹¹³ See Communication Management Units, 75 Fed. Reg. at 17,328.

¹¹⁴ See *id.*

¹¹⁵ *Id.* This decision must be based on a review of the evidence and a conclusion that the inmate’s designation to a CMU “is necessary to ensure the safety, security, and orderly operation of correctional facilities, or protect the public.” *Id.*

¹¹⁶ *Id.* The rule goes on to include prisoners who, because of a demonstrated propensity to communicate with either coconspirators or victims of their crimes, may also be placed in a CMU. *Id.* (allowing CMU detention of inmates who have demonstrated a propensity to contact the victims of the inmate’s current offense of conviction).

¹¹⁷ By creating a subclass of prisoners based on ties to a charge of “terrorism,” which encompasses myriad criminal statutes, the Bureau may unwittingly group together prisoners ranging from Al Qaeda operatives to disgruntled domestic bombmakers. See, e.g., 18 U.S.C. § 2332a (2006) (defining “weapons of mass destruction” in part as “destructive devices”, which includes any type of bomb, grenade, mine or “projectile device” with a wide barrel. 18 U.S.C. § 921 (2006)). This flexible statute has been used to convict terrorists like Zacharias Moussaoui, Richard Reid, and Umar Farouk Abdulmutallab alongside a disgruntled Arkansas doctor and, recently, members of the Hutaree Militia.

¹¹⁸ See McGowan, *supra* note 107. See Communication Management Units, 75 Fed. Reg. at 17,328 (requiring demonstrated attempt to make an impermissible contact while also allowing CMU designation based solely on conviction offense).

The combination of *Comstock* and the CMU regulations resembles a legally sanctioned Guantánamo-type detention regime set up lawfully within the United States. Suspected terrorists can be held in highly monitored and austere containment, indefinitely. This not only mirrors the military tribunal detention system, but in many ways, exacerbates its perceived infirmities. For, although the Obama Administration has acknowledged that it will indefinitely detain some terrorists even after they complete their tribunal-imposed sentences,¹¹⁹ the range of those persons implicated by military tribunals is much smaller than the reach of *Comstock* and the CMU regulations.¹²⁰ The Government has conceded that the Authorization for Use of Military Force permits Executive detention only of non-citizen enemy combatants and unprivileged belligerents.¹²¹ Thus, the biggest single exception to the Executive's broad military detention authority had been American citizens, precluded from military commission jurisdiction.¹²² Diplomatic concerns had further barred full tribunal trials for British, Australian, and Canadian citizens.¹²³ Since a growing number of recent terror suspects have been American or British,¹²⁴ it appeared that indefinite and segregated Executive detention would have limited future application. But neither *Comstock* nor the CMU regulation is so limited: both would apply fully to American and foreign citizens alike. And because a criminal's offense conduct, which cannot be changed, serves as the underlying justification for *Comstock* and CMU detention, both have the capacity to last indefinitely.¹²⁵

¹¹⁹ See Charlie Savage, *Detainees Will Still Be Held, but not Not Tried*, N.Y. TIMES, Jan. 22, 2010, at A14 (noting that fifty detainees are "are too difficult to prosecute but too dangerous to release").

¹²⁰ Commissions' "jurisdiction [are] substantially narrower than our federal courts: they are properly used only in connection with an armed conflict, and only to prosecute offenses against the law of war committed in the course of that conflict." Memorandum from Brad Wiegmann & Mark Martins, *supra* note 7. See *al-Marri*, 534 F.3d at 230 (Motz, J. concurring) ("*Quirin*, *Hamdi*, and *Padilla* all emphasize that *Milligan's* teaching — that our Constitution does not permit the Government to subject *civilians* within the United States to military jurisdiction — remains good law.>").

¹²¹ See Authorization for Use of Military Force, S. J. Res. 23, 107th Cong., 115 Stat. 224 (2001); see also *al-Marri v. Pucciarelli*, 534 F.3d 213, 237 (4th Cir. 2008) (Motz, J. concurring) (noting the Government's concession of this point at oral argument); Koh, *supra* note 82 ("[I]ndividuals who are part of an organized armed group like al-Qaeda can be subject to law of war detention for the duration of the current conflict. [This includes] whether an individual joined with or became part of al-Qaeda or Taliban forces or associated forces, which can be demonstrated by relevant evidence of formal or functional membership, which may include an oath of loyalty, training with al-Qaeda, or taking positions with enemy forces.>").

¹²² See 10 U.S.C.A. § 948c (2009) (limiting jurisdiction to "alien[s]").

¹²³ See Glazier, *supra* note 10 (noting that British pressure led to the release of several Brits set for trial in a commission); *id.* at 179–181 (noting the Australian government's role in securing a generous plea agreement for David Hicks).

¹²⁴ See Cruickshank, *supra* note 20.

¹²⁵ This is made especially difficult by the difficulty of distinguishing between Al Qaeda and other terrorist organizations. See Byman, *supra* note 19. Byman argues that "what makes al-Qaida so distinct and so dangerous is that it tries to knit [many] different strands together. It backs local causes and, as it does so, it urges the groups to expand their horizons to embrace al-Qaida's global agenda. At times, some of these local groups, such as al-Qaida of Iraq or al-Qaida of the Islamic

IV. CRIMINAL PROCEDURE

Finally, terror suspects' rights before and during Article III trials similarly are deteriorating to the level of protections afforded in military tribunals. The past decade has seen a slow degeneration in several key areas of criminal procedural protections. Among the many adjustments Article III courts have made to accommodate the often unorthodox manner in which terror suspects reach the court, of particular note are changes in *Miranda* protections and pre-trial evidence standards.

Miranda rights, perhaps the most familiar and well-known staple of criminal procedure, recently have come under heavy assault. A series of bills proposed by Congress and a decision handed down by the Supreme Court make *Miranda's* continued viability dubious, at best. Furthermore, the Fourth Circuit's review of a recent terror trial highlights some of the more unorthodox measures Article III courts have adopted in response to terror trials.

A. MIRANDA PROTECTIONS

On May 1, 2010, New York police officers foiled a much-publicized attempt to detonate a car bomb in Times Square.¹²⁶ Within hours, police had apprehended and charged Faisal Shahzad, a Pakistan native and United States citizen purportedly working for the Pakistani Taliban.¹²⁷

Maghreb, have formally joined al-Qaida; at times cells or individuals tied to groups with a local focus have switched allegiance to the al-Qaida core or provided logistical support or manpower for an al-Qaida attack. And some shift over time: Egypt's Islamic Jihad at first focused on the Mubarak regime, but eventually part of the organization split and became the core of al-Qaida. Making this even more complex, after area regimes crushed Egypt's Jamaat al-Islamiyya and the Libyan Islamic Fighting Group, some individuals from these organizations simply switched allegiances to al-Qaida and adopted its global orientation. *Id.* Furthermore, membership in Al Qaeda does not necessarily equate with actual dangerousness. See Del Quentin Wilber, *U.S. Can Continue to Detain Yemeni*, WASH. POST, Dec. 15, 2009 at A12 ("Musa'ab Al-Madhwani has been held at the facility since October 2002 on allegations that he was a member of al-Qaeda. Ruling from the bench, U.S. District Judge Thomas F. Hogan said that the government had met its burden in proving the accusations but that he did not think Madhwani was dangerous. 'There is nothing in the record now that he poses any greater threat than those detainees who have already been released,' the judge said, noting that Madhwani has been a model prisoner over the past seven years.").

¹²⁶ See, e.g., Al Baker & William K. Rashbaum, *Car Bomb Leads to Evacuation in Times Square*, N.Y. TIMES, May 2, 2010, at A1.

¹²⁷ Specifically, Shahzad is believed to be connected with either Jaish-e-Mohammed, "an Al Qaeda-allied Pakistani militant group," or the Tehrik-e-Taliban Pakistan, another al-Qaeda-allied Pakistani militant group. Alex Rodriguez, *Bomb Plot Linked to Militants*, L.A. TIMES, May 6, 2010, at A18. See Bobby Ghosh, *From Pakistan to the World*, TIME, May 17, 2010, at 25, 26–27. Initial theories about who might have engineered the attack abounded, and included conjectures ranging from a group of Al-Qaeda operatives to a "homegrown . . . mentally deranged person or somebody with a political agenda that doesn't like the [recently passed] healthcare bill or something." Interview by Katie Couric with Michael Bloomberg, Mayor, New York City, *CBS Evening News with Katie Couric* (CBS television broadcast May 3, 2010) (on file with Brief). See also Sean Gardiner & Sumathi Reddi, *Bomb Was Crude but Lethal*, WALL ST. J., May 3, 2010, <http://online.wsj.com/article/SB1001424052748704608104575220623841113164.html> ("[It was] most likely the work of an American or expatriate living in America that is not a trained member of a terrorist organization.").

In a particularly provocative response to this episode, Senator Joe Lieberman proposed legislation that would strip terror *suspects* of U.S. citizenship in order to avoid reading them *Miranda* rights.¹²⁸ The proposed bill, called the Terrorist Expatriation Act, would modify existing provisions for revoking U.S. citizenship by adding “providing material support or resources to a foreign terrorist organization” to the list of citizenship-stripping triggers.¹²⁹

As a response to the perceived danger of having to read *Miranda* warnings to Shahzad, the bill suffers from three glaring errors. First, *Miranda* imposes an affirmative duty upon law enforcement officers; it does not grant any new rights to suspects.¹³⁰ A suspect’s status or classification thus would have no impact on an arresting officer’s duties. Second, law enforcement officers issue *Miranda* warnings at the outset of an arrest, long before the officer would have a chance to determine whether the suspect had “provid[ed] material support or resources to a foreign terrorist organization,”¹³¹ and before the process required to strip someone of his citizenship.¹³² Third, even if the arresting agent could discern a suspect’s status, the proposed bill can only revoke citizenship *after* a suspect has been convicted of material support, seemingly undermining the entire purpose for the bill.¹³³

Lieberman’s fear of *Miranda* rights, as expressed through his proposed bill, would likely create more problems than it purports to solve.¹³⁴

¹²⁸ See Terrorist Expatriation Act, H.R. 5237, 111th Cong. (2010). See also *Miranda v. Arizona*, 384 U.S. 436 (1966); Edward Mason, *Brown, Lieberman Bill Would Strip Citizenship of Terror Suspects*, Bos. HERALD, May 6, 2010, http://www.bostonherald.com/news/us_politics/view.bg?articleid=1252976 (noting initial support for the bill); Sam Stein, *Lieberman’s Citizenship-Revoking Bill Slammed as “Draconian”*, HUFFINGTON POST (May 5, 2010), http://www.huffingtonpost.com/2010/05/05/liebermans-citizenship-re_n_564981.html (criticizing the bill’s paradoxical proposals).

¹²⁹ H.R. 5237 § 2(1)(C); see 8 U.S.C. § 1481 (2006).

¹³⁰ *Miranda*, 384 U.S. at 468–69. As Chief Justice Warren explained, “[S]uch a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. . . . The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clear cut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.” *Id.* See also Sol Wachtler, *You Have the Right to Remain Constitutional*, N.Y. TIMES, May 13, 2010, at A31 (“[C]ontrary to common belief, the *Miranda* warning doesn’t confer rights; it simply reminds arrestees of the rights already granted to them by the Constitution.”).

¹³¹ H.R. 5237 § 2(1)(C).

¹³² See *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967) (holding that a U.S. citizen cannot be deprived of citizenship involuntarily).

¹³³ H.R. 5237.

¹³⁴ See Stein, *supra* note 128 (“Indeed, what Lieberman is attempting to do is to pave the way for terrorists with American citizenship to be thrown into military tribunals once they are captured.”). This suggestion seems especially likely given the Supreme Court’s approval of a “public safety” exception to *Miranda* if law enforcement officials feel compelled to elicit time-sensitive information from a suspect immediately upon capture. See *New York v. Quarles*, 467 U.S. 649

As increasing numbers of would-be terrorists reveal themselves to be American citizens,¹³⁵ this bill attempts to remedy the *Miranda* “problem” by abandoning the criminal justice system altogether and by trying all terrorists in military tribunals.¹³⁶ In fact, Congress has proposed ten bills to strengthen military tribunals during the 111th Congress alone. Three bills would mandate military commission trials for certain suspected classes of terrorists.¹³⁷ One proposal would bar any proceeding, including a military tribunal, from taking place on American soil (thereby foreclosing Article III review and ensuring a tribunal at Guantánamo).¹³⁸ Three bills would strip the Department of Justice’s funding and permission to prosecute terrorists in Article III courts, and a fourth, in a similar vein, would require the President to secure approval from the Secretaries of Defense and Homeland Security before prosecuting a terrorist for a crime in an Article III court.¹³⁹ A final bill purports to give the President unilateral authority to determine which detainees were subject to trial by tribunal.¹⁴⁰

Neither courts nor the White House could ignore these proposals to strip Article III courts of jurisdiction and funding. In response to these proposals, the White House agreed to work on legislation that would relax *Miranda* requirements, a position diametrically opposed to the one it announced in the immediate aftermath of the Times Square

(1984). This exception was invoked with Shahzad as well as with Umar Farouk Abdulmutallab, the so-called Christmas Day Bomber. See Emily Bazelon, *Miranda Worked! The Bizarre Criticism of the Faisal Shahzad Interrogation*, SLATE (May 5, 2010), <http://www.slate.com/id/2253056>.

¹³⁵ See, e.g., Ghosh, *supra* note 127 (listing thirteen U.S. citizen terrorists, all with ties to Pakistan).

¹³⁶ See Stein, *supra* note 128.

¹³⁷ See H.R. 4127, 111th Cong. (2009) (“[A]lien unprivileged enemy belligerents may only be tried by military commissions if tried for alleged conduct for which a term of incarceration or the death penalty may be sought.”); H.R. 4463, 111th Cong. (2010) (requiring “foreign national[s]” who “engage . . . in conduct constituting an offense relating to a terrorist attack against persons or property in the United States or against any United States Government property or personnel outside the United States; and [are] subject to trial for that offense by a military commission . . . be tried for that offense only by a military commission”); H.R. 4588, 111th Cong. (2010) (maintaining Guantánamo’s existence as a detention center indefinitely and mandating that persons held there be tried only by military commission).

¹³⁸ See H.R. 4738, 111th Cong. (2010) (prohibiting the use of Department of Defense installations in the United States for the prosecution of persons charged with crimes related to the September 11 attacks).

¹³⁹ See H.R. 4111, 111th Cong. (2009) (prohibiting the Department of Justice from prosecuting any “unprivileged enemy combatant”); S. 2977, 111th Cong. (2010) (withdrawing Department of Justice funding for any prosecution in an Article III court of persons involved in the September 11 attacks); H.R. 4556, 111th Cong. (2010) (same); Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010, S. 3081, 111th Cong. § 4(a) (2010) (withdrawing Department of Justice funding for any prosecution in an Article III court of aliens determined to be an unprivileged enemy belligerent); S. 2943, 111th Cong. (2010) (requiring the Attorney General to consult with the Secretaries of Defense and Homeland Security and the Director of National Intelligence before prosecuting a terrorist in an Article III court).

¹⁴⁰ See H.R. 4415, 111th Cong. (2010) (granting the President the authority to determine which persons are subject to detention or military commission trial as unlawful enemy combatants).

incident.¹⁴¹ Surprisingly, however, the Supreme Court also modified its interpretation of *Miranda* protections in a way that may mollify Congress but that comes at too great a cost.

In *Berghuis v. Thompkins*,¹⁴² the Supreme Court responded implicitly to the loudest criticisms of the law enforcement response to the Times Square bomber. In *Berghuis*, police questioned an unresponsive suspect for three hours. After remaining silent during the investigators' monologues, the suspect finally relented to the interrogation by answering "yes" to a question about whether he prayed for forgiveness for the crime.¹⁴³ The 5–4 opinion, written by Justice Kennedy, paradoxically concludes that Thompkins should have broken his silence if he wished to invoke his right to silence.¹⁴⁴ A suspect must thus speak to acknowledge his desire not to. The opinion goes on to establish that, if a suspect has maintained silence for several hours and then speaks but does not use that speech to declare his intent to stay silent, police may construe that action as a waiver of the right to remain silent.¹⁴⁵

As a threshold matter, it is unclear why so many are so concerned about the "dangers" posed by protecting *Miranda* rights.¹⁴⁶ Moreover, although the *Berghuis* ruling does not specifically or especially impact terror suspects, it reflects the public sentiment that *Miranda* warnings are making America less safe. In the past months, all three branches of the federal government have acted substantially to curb *Miranda* rights: Congress and the White House, plainly responding to perceived terror threats, acted first. The Supreme Court, although not explicit in its rationale, followed suit. While it is far from dispositive proof that Article III courts have begun responding to congressional pressure

¹⁴¹ Compare White House Press Briefing with Press Secretary Robert Gibbs (C-SPAN television broadcast May 6, 2010) (noting that Lieberman's proposal lacked any support within the White House), with Pete Yost, 'Modifying' *Miranda* Modifies the Political Debate, HUFFINGTON POST (May 20, 2010), http://www.huffingtonpost.com/2010/05/20/modifying-miranda-rights_n_583000.html ("Attorney General Eric Holder and the rest of the Obama administration are suddenly playing offense, offering to work with Congress on a law that would let law enforcement delay constitutional *Miranda* warnings to terror suspects.").

¹⁴² *Berghuis v. Thompkins*, 2010 S. Ct. WL 2160784 *1 (U.S. June 1, 2010).

¹⁴³ See *id.* at *1.

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

¹⁴⁶ See Wachtler, *supra* note 130 ("[M]any supporters of *Miranda* exclusions argue that the rule hamstring law enforcement. This is wrong."). Judge Wachtler explains that "it's important to note how little most people understand what *Miranda* does and doesn't mean. First and foremost, the failure to give a *Miranda* warning does not result in a case being dismissed. It only results in the inability of the police to use a confession and its fruits in evidence. Indeed, the overwhelming majority of successful criminal prosecutions do not involve confessions. . . . [T]alk-show hosts and television police dramas have led people to believe that before the police may interrogate or arrest a suspect, the *Miranda* warning must be given. That just isn't the case. Neither arrest alone nor interrogation alone (if there has been no arrest) requires the warning to be given. *Miranda* applies only to in-custody questioning; a statement made to the police by a suspect not in custody is not subject to *Miranda*. *Id.*

regarding America's counterterrorism efforts, *Berghuis* is, at the very least, part of a larger trend which points toward the conclusion that Article III courts are not immune to the corrosive effects of an ongoing war against terrorism.

B. TRIBUNAL PROCEDURES IN FEDERAL COURTS

The recent trial of Abu Ali highlights this trend of relaxing procedural standards in the face of terrorism. Ahmed Omar Abu Ali, a United States citizen, was arrested in Saudi Arabia in early 2003 in connection with the May 12, 2003, Riyadh bombing.¹⁴⁷ Held by Saudi officials, Abu Ali claims to have been tortured, describing his experience that month as "very intense."¹⁴⁸ Eventually, Abu Ali was transferred to the United States for trial.¹⁴⁹ Once in America, the government charged Abu Ali with nine separate terror offenses.¹⁵⁰

In bringing Abu Ali to trial, the government was faced with several evidentiary and procedural challenges that led to a fairly unorthodox trial. Specifically, the government sought (a) to tweak Abu Ali's *Miranda* rights; (b) to introduce deposition testimony of Saudi officials taken outside of the defendant's presence; and (c) to use classified information to convict Abu Ali that he would not be allowed to view. The circuit court on review, however, found these deviations from standard procedure "harmless."¹⁵¹ As Professor Vladeck has noted, these deviations "demonstrate[] the flexibility that federal courts can exercise in these cases and the potential dangers lurking in the background for the rights of defendants."¹⁵²

First, the government sought to marginalize Abu Ali's objections to the admission of interrogation testimony taken without his having been given *Miranda* warnings.¹⁵³ When Abu Ali had initially been captured and interrogated by Saudi law enforcement officials, FBI and Secret Service agents were present for much of the interrogation and, at times, crafted the questions they wanted the Saudis to ask of Abu Ali.¹⁵⁴

¹⁴⁷ See *United States v. Abu Ali*, 395 F. Supp. 2d 338, 343-44 (E.D. Va. 2005); see also *United States v. Abu Ali*, 528 F.3d 210, 221-26 (4th Cir. 2008), cert. denied, 129 S. Ct. 1312 (2009); Stephen I. Vladeck, *Terrorism Trials and the Article III Courts After Abu Ali*, 88 TEX. L. REV. 1501 (2010).

¹⁴⁸ *Abu Ali*, 395 F. Supp. 2d at 369.

¹⁴⁹ *Abu Ali*, 528 F.3d at 225.

¹⁵⁰ See Vladeck, *supra* note 147.

¹⁵¹ See *Abu Ali*, 528 F.3d at 257.

¹⁵² Vladeck, *supra* note 147.

¹⁵³ See *Abu Ali*, 395 F. Supp. 2d at 381-83.

¹⁵⁴ *Id.* at 349, 382 (noting that the Saudi interrogators asked six of the thirteen questions the FBI and Secret Service agents sought Abuto be asked of Abu Ali).

Under what is known as the “joint venture” doctrine,¹⁵⁵ a defendant’s statements made during a foreign-agent-administered interrogation must be suppressed if United States officials are involved in the questioning and did not give *Miranda* warnings. Nevertheless, the district court held that the United States officials’ presence and assistance did not constitute a “joint venture” requiring *Miranda* warnings, nor did the Saudi interrogators act at the behest of the United States agents.¹⁵⁶ The Fourth Circuit affirmed by noting that the American officials present did not intend to “evade” *Miranda*,¹⁵⁷ echoing the *Al Maqaleh* court’s conjectures about the government’s intentions.¹⁵⁸ Thus, Abu Ali’s seemingly inadmissible statements made without *Miranda* warnings, under the duress of torture, in the presence of American authorities, and in response to American-authored questions were nevertheless allowed into evidence.¹⁵⁹

Second, the government attempted to overcome the requirements of Rule 15 of the Federal Rules of Criminal Procedure, which mandates that a defendant who is “in custody” be present at a witness’s deposition.¹⁶⁰ In Abu Ali’s case, the government sought to introduce deposition testimony of Saudi government officials sitting in Saudi Arabia outside Abu Ali’s physical presence. As the Fourth Circuit reasoned, getting the Saudi officials to America would be too difficult, and transporting Abu Ali to Saudi Arabia to be present at the deposition would be “impractical.”¹⁶¹ As a novel solution, the district court judge directed that two government attorneys and two of Abu Ali’s defense attorneys attend the deposition in Saudi Arabia while Abu Ali remained in custody in America with another defense attorney.¹⁶² These two separate camps were connected via video chat technology, allowing the Saudi officials and Abu Ali to see and hear one another simultaneously.¹⁶³ Finally, the judge watched from yet a third location to preside over the depositions and rule on objections.¹⁶⁴ The Fourth Circuit approved these

¹⁵⁵ See e.g., *United States v. Yousef*, 327 F.3d 56, 145–46 (2d Cir. 2003) (mandating that a defendant’s statements made during interrogation by foreign agents must be suppressed if United States officials are involved in the questioning).

¹⁵⁶ *Abu Ali*, 395 F. Supp. 2d at 381.

¹⁵⁷ See *United States v. Abu Ali*, 528 F.3d 210, 230 n.5 (4th Cir. 2008), cert. denied, 129 S. Ct. 1312 (2009).

¹⁵⁸ See discussion *supra* notes 77–78 and accompanying text.

¹⁵⁹ In fact, only one member of the Fourth Circuit panel took umbrage at this apparent circumvention of *Miranda*. See *Abu Ali*, 528 F.3d at 230–31 n.6 (explaining that Judge Motz would hold that the interrogation was a joint venture). Judge Motz’s dissent, however, was purely theoretical: she joined the court’s reasoning that any error was harmless beyond a reasonable doubt and dissented solely on the issue of sentencing. *Id.* at 269.

¹⁶⁰ FED. R. CRIM. P. 15(c)(1).

¹⁶¹ *Abu Ali*, 528 F.3d at 239.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 239–40.

unorthodox deposition procedures as meeting the standard announced in *Maryland v. Craig*.¹⁶⁵ *Craig* requires that deposition testimony taken outside a defendant's presence be "necessary to further public policy" and that its reliability be "otherwise assured."¹⁶⁶ First, the court found that the elaborate procedures used by the district court assured the testimony's reliability.¹⁶⁷ Second — and more tellingly — the court found that prosecuting "those bent on inflicting mass civilian casualties or assassinating high public officials" is, in itself, an "important public interest."¹⁶⁸ The Fourth Circuit explicitly endorsed this ends-over-means analysis, saying conclusively that enforcing the requirement for the defendant to be present at a deposition would preclude the government from using "important testimony."¹⁶⁹

Finally, the government sought to admit classified evidence against Abu Ali at trial under the Classified Information Procedures Act ("CIPA").¹⁷⁰ To do so, the district court permitted the government to employ the "silent witness" method of testimony, in which jurors and a witness both refer to the same classified document in response to questioning rather than speaking the answers aloud. This procedure avoids making the underlying information public. Abu Ali himself, however, would only be able to see a heavily redacted version of the documents being used against him.¹⁷¹ Moreover, Abu Ali's defense counsel, who lacked security clearance, was not permitted to question the government witnesses that would introduce this classified information.¹⁷² On review, the Fourth Circuit agreed unanimously that this process violated Abu Ali's Confrontation Clause rights.¹⁷³ Nevertheless, much like its review of the *Miranda* violations, the Fourth Circuit found this Confrontation Clause violation to be merely harmless error.¹⁷⁴ The trial court's abuse of CIPA was thus relegated to nothing more than a harmless mistake.

Abu Ali presents a situation in which a district court, faced with the complexities of a terror trial, deviated significantly from established criminal procedural protections to accommodate the government's interests. As Professor Vladeck notes, the *Abu Ali* trial "proves that every case raises its own unique set of practical, procedural, and substantive challenges. "But . . . where unique national security concerns are implicated, *Abu Ali* suggests that courts *will* attempt to reach

¹⁶⁵ 497 U.S. 836 (1990).

¹⁶⁶ *Abu Ali*, 528 F.3d at 240–42 (quoting *Craig*, 497 U.S. at 850).

¹⁶⁷ *See id.* at 241–42.

¹⁶⁸ *Id.* at 241.

¹⁶⁹ *Id.*

¹⁷⁰ *See id.* at 249; *see also* 18 U.S.C. app. §§ 1–16 (Classified Information Procedures Act).

¹⁷¹ *Abu Ali*, 528 F.3d at 250 & n.18.

¹⁷² *Id.* at 250–51.

¹⁷³ *Id.* at 255.

¹⁷⁴ *Id.* at 257.

accommodations that take into account . . . the Government's interest" along with the defendant's.¹⁷⁵ Indeed, when viewed as a whole, Abu Ali's trial resulted in the admission of coerced statements, non-confrontational deposition testimony, and secret evidence that neither Abu Ali nor his defense counsel were permitted to review.

These errors, two of which members of the Fourth Circuit thought unconstitutional, were subsequently deemed harmless. The trial court bends, and the reviewing court approves. While one cannot extrapolate *Abu Ali* to apply to all terrorism cases, it is this trend that should give pause to those advocating for Article III terror trials. For, upon closer examination, these measures come troublingly close to those used in military tribunals. The relaxed *Miranda* requirements,¹⁷⁶ the weighing of the government's interest in admitting otherwise inadmissible deposition evidence,¹⁷⁷ and the government's unwillingness to disclose inculpatory information far above what CIPA protects are all consistent with military commission regulations.¹⁷⁸ Although the procedures that the district court adopted may have caused no "harm" to Abu Ali, it is hard to see how approving methods that are equivalent to military commission regulations is anything *but* harmful to Article III courts.

V. CONCLUSION

The pressure to convict "dangerous" terrorists against a backdrop of a decade-long war has taken its toll on the federal courts. Rather than vindicating the accused's constitutional rights in all circumstances, the federal courts have too often become complicit in distorting them.¹⁷⁹ Federal courts have begun to resemble the military tribunal system that was once defined by how distinct it was from the Article III system. The past decade has seen federal courts' power to review executive detention heavily circumscribed. Federal prisons have begun to approximate

¹⁷⁵ See Vladeck, *supra* note 147.

¹⁷⁶ See 10 U.S.C. § 949a(b)(2)–(3) (noting that evidence should not be excluded on self-incrimination or coercion grounds except under certain narrow circumstances).

¹⁷⁷ See 10 U.S.C. § 949a (noting that the tribunal court may weigh the probative value of otherwise inadmissible evidence).

¹⁷⁸ See 10 U.S.C.A. § 949p-1 to 949p-7 (West 2010) (providing that the government cannot be compelled to disclose classified information to anyone not authorized to receive it).

¹⁷⁹ For example, in late April, 2010, trial was set to open in the case of Syed Fahad Hashimi, an American citizen born abroad and educated in New York. The government's handling of its case against Hashimi highlighted many of the dangers of terror trials, including the government's success in restricting access to potentially damaging state secrets. See Jeanne Theoharris, *The Legal Black Hole in Southern Manhattan*, SLATE (Apr. 27, 2010), <http://www.slate.com/id/2252117/page-num/all/#p2>. Hashimi, however, pleaded guilty to conspiracy to provide material support shortly before trial, precluding an actual trial. See Press Release, U.S. Attorney for the S. Dist. of N.Y., U.S. Citizen Pleads Guilty in Manhattan Fed. Court to Conspiring to Provide Material Support to Al Qaeda (Apr. 27, 2010) (on file with author).

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As much as one may endorse the apparent move from military commissions to federal courts, that move should be rejected if it comes at the cost of scarring the Article III system. Therefore, both those in favor of military commissions and those in favor of federal court trials should pause. Regardless of whether it may be desirable that the criminal justice system has the flexibility to adjust to these wartime conditions, these developments have eviscerated the largest disparities between the tribunal and criminal spheres. Even persons in favor of a separate judicial system in the form of tribunals no longer have much justification for such a proposal.

¹⁷⁹ For example, in late April, 2010, trial was set to open in the case of Syed Fahad Hashimi, an American citizen born abroad and educated in New York. The government’s handling of its case against Hashimi highlighted many of the dangers of terror trials, including the government’s success in restricting access to potentially damaging state secrets. See Jeanne Theoharris, *The Legal Black Hole in Southern Manhattan*, SLATE (Apr. 27, 2010), <http://www.slate.com/id/2252117/page-num/all/#p2>. Hashimi, however, pleaded guilty to conspiracy to provide material support shortly before trial, precluding an actual trial. See Press Release, U.S. Attorney for the S. Dist. of N.Y., U.S. Citizen Pleads Guilty in Manhattan Fed. Court to Conspiring to Provide Material Support to Al Qaeda (Apr. 27, 2010) (on file with author).

Wars invariably have a corrosive effect on democratic institutions.¹⁸⁰ Courts are no different. Perhaps, as some have suggested, the solution would be to remove courts from the fast-paced business of trying terror with a common law process.¹⁸¹ However, that solution is too simplistic. It is apparent that, no matter where terrorists are tried, our societal fear of the threat they pose has led us to create mirror-image systems that tend toward kangaroo courts, state secrets, prolonged interrogation, and indefinite detention. Until we confront and deal with this inclination, any system in which we try terrorists is doomed to repeat these errors.

¹⁸⁰ For example, in April, 2010, to mixed public reaction, President Obama authorized the assassination of an American citizen, Anwar al-Awlaki, based solely on his suspected involvement with al-Qaeda. See Alex Rodriguez & David Zuchino, *U.S. Drones Leave a Trail of Discord*, L.A. TIMES, May 2, 2010, at A1 (discussing State Department legal advisor Harold Koh's approval of the program despite severe disagreement among military and intelligence personnel regarding the targeted killing program); Scott Shane, *U.S. Approves Targeted Killing of Radical Muslim Cleric Tied to Domestic Terror Suspects*, N.Y. TIMES, Apr. 7, 2010, at A12 (noting that "[p]eople on the target list are considered to be military enemies of the United States and therefore not subject to the ban on political assassination first approved by President Gerald R. Ford," and that Representative Jane Harman, Chairwoman of a House subcommittee on homeland security, described Awlaki as "the person, the terrorist, who would be terrorist No. 1 in terms of threat against us"). Quoting an unnamed White House official, Shane notes that "[t]he United States works, exactly as the American people expect, to overcome threats to their security, and this individual — through his own actions — has become one. Awlaki knows what he's done, and he knows he won't be met with handshakes and flowers. None of this should surprise anyone." *Id.* The Administration's recent support for such a program belies previously held beliefs that targeted killing would be categorically unlawful. Merely five years before the official announcement of the program, Professor (and later President Obama's OIRA Director) Cass Sunstein had written hypothetically of exactly such an executive action and declared it unthinkable under any legal framework. See Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2663, 2664 (2005). Sunstein opined that, "[t]he President may use 'all necessary and appropriate force.' An execution of someone who can be detained instead is gratuitous; it is neither 'necessary' nor 'appropriate.'" *Id.* at 2668.

¹⁸¹ See Jack Goldsmith & Benjamin Wittes, *A Role Judges Should Not Have to Play*, WASH. POST, Dec. 22, 2009 (noting the exasperation of Judge Thomas F. Hogan of U.S. District Court in Washington, D.C. with the number and complexity of detainee and terror cases, who claimed that "different rules of evidence" and "a difference in substantive law" in federal courts "highlights the need for a national legislative solution with the assistance of the Executive so that these matters are handled promptly and uniformly and fairly for all concerned."). Goldsmith and Wittes claim a dire need for courts to get out of the business of "writing" terror policies, and insist that Congress should "offer a clear definition of who can be detained, a coherent set of evidentiary and procedural rules to determine who fits the definition of an enemy, and guidance concerning the scope of the government's obligation to disclose evidence to detainees' lawyers." *Id.*