Due Process and Counterterrorism

Amos N. Guiora

DUE PROCESS AND COUNTERTERRORISM

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Counterterrorism—like terrorism—is a reality. Nations have the absolute obligation and right to protect innocent civilians against those seeking to harm them. However, implementation of counterterrorism obligations must be tempered by due process. The essence of democracy is granting—and protecting—the civil and political rights of attacker and attacked alike. Failure to provide due process to individuals suspected of involvement in terrorism leads a society down a slippery slope from which there is no return. While controversial and perhaps unappetizing, the true test of democracy is protection of those seeking to attack it.

This Article examines counterterrorism from the perspective of detention, interrogation, and trial, and in particular how these three processes are articulated and implemented. The broader question is whether the contemporary counterterrorism paradigm is based in due process or in a legal, not necessarily lawful, regime that minimizes individual rights. That is, does civil, democratic society discard core principles in the face of an ongoing, viable threat; or are political rights and national security rights effectively balanced in order to protect both? Answering this question requires analyzing the interface between threats and rights, and in particular the extent to which society responds to the former while protecting the latter.

The challenges facing national decision-makers are extraordinary, as the public demands concrete measures in response to attacks. Decision-makers are charged with simultaneously protecting both the law and the public in accordance with core values of rights and morality. Balancing these competing responsibilities manifests in what I refer to as the "dilemma of the decision-maker."[1] The terrorism/counterterrorism paradigm manifests these tensions and uncertainties in a more powerful manner than perhaps any other issue

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[1] *See Counter-terrorism Simulation: The 2010 Sim*, S.J. QUINNEY COLL. L., http://simulation.law.utah.edu/past-sims/sim-2010 (last visited Apr. 1, 2012) (showing snippets of a scenario-based counterterrorism simulation exercise, in which students role-play decision-makers addressing complex, operational counterterrorism dilemmas).

confronting contemporary decision-makers and the public. The public's visceral reaction to feeling threatened is reflected in a 2009 survey, finding that "[f]ifty-eight percent (58%) of U.S. voters say waterboarding and other aggressive interrogation techniques should be used to gain information from the terrorist who attempted to bomb an airliner on Christmas Day."[2]

Terrorism, in its broadest articulation, is *the* constant threat faced by decision-makers mandated with ensuring that national institutions are sufficiently prepared to act both proactively and reactively; preferably the former, but if need be, the latter. The public demands solutions and minimal accommodation of terrorists.[3] However—public demands notwithstanding—operational counterterrorism cannot justify discarding civil and political rights. Benjamin Franklin's much-cited words of wisdom—"They who can give up essential liberty to obtain a little temporary safety, deserve neither liberty or safety"[4]—capture the essence of this constant and unremitting tension. Franklin's words concisely and accurately reflect the overwhelming danger posed by overreaction to a clear and present danger, whether perceived or real. With respect to the paradigm before us—due process and counterterrorism—Franklin's words spoken more than 200 years ago capture the essence of the existential, philosophical, legal, and practical dilemmas of counterterrorism conducted in societies subject to the rule of law.

Addressing this powerful tension, fraught with danger, is a fundamental challenge confronting decision-makers on a daily basis. Resolving it effectively defines the essence of a democratic regime. In exploring these competing tensions, this Article is divided into the following six Parts:

Part 1: Terrorism defined;
Part 2: Due process defined in the context of counterterrorism;
Part 3: Detention criteria and standards;
Part 4: Interrogation regimes and rights;
Part 5: Judicial forums; and

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[2] *58% Favor Waterboarding of Plane Terrorist To Get Information*, RASMUSSEN REP. (Dec. 31, 2009), http://www.rasmussenreports.com/public_content/politics/general_politics/december_2009/58_favor_waterboarding_of_plane_terrorist_to_get_information.

[3] J. Daniel Moore, *Intelligence in Recent Public Literature*, 46 STUD. INTELLIGENCE, no. 1, 2002 (reviewing PAUL R. PILLAR, TERRORISM AND AMERICAN FOREIGN POLICY (2001)), *available at* https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol46no1/article07.html.

[4] BENJAMIN FRANKLIN & WILLIAM TEMPLE FRANKLIN, MEMOIRS OF THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN, LL.D. 270 (1818).

Part 6: Moving forward.

I. TERRORISM DEFINED

Applying due process to counterterrorism initially requires defining terrorism; otherwise, the discussion is vague and amorphous. While the requirement to define terrorism is largely—but not unanimously—agreed upon as essential, much disagreement surrounds the actual definition.[5] To that end, I propose the following definition, which addresses the core essence of terrorism:

> Terrorism is an act by an individual or individuals intended to advance one of four causes: religious, social, economic, or political; for the purposes of advancing the identified cause, the actor kills or harms innocent civilians or causes property damage to innocent civilians or intimidates the civilian population from conducting its daily life.

This definition incorporates the critical aspects of attacking civilian targets randomly for the purpose of advancing a specific cause, devoid of pecuniary or personal gain for the actor.

Counterterrorism should be simultaneously viewed from two distinct perspectives. One branch of counterterrorism consists of operational measures, ranging from detention to imposition of administrative sanctions to killing suspected terrorists. The other branch is comprised of "soft" measures, ranging from building schools and hospitals to economic investment and infrastructure development. The latter branch's target audience is those who can be dissuaded. These are individuals who understand that terrorism does not benefit their families or communities, but are dependent on concrete measures demonstrating that the benefits of progress and modernity outweigh the harm terrorism inflicts.

The burden is—fairly or unfairly—imposed on the nation-state to demonstrate the positives inherent to progress and development. Failure to fully embrace this burden reinforces the negativity that is an inevitable by-product of operational counterterrorism, which inherently conjures negative images for those living amongst the terrorists. While those who live amongst terrorists may oppose terrorism principally for the damage caused to the

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[5] *Terrorism: The Problems of Definition*, CENTER FOR DEF. INFO. (Aug. 1, 2003), http://www.cdi.org/program/document.cfm?documentid=1564&programID=39&from_page.

community and therefore—tacitly—understand the legitimacy of operational counterterrorism, speaking out in opposition exposes them and their families to extraordinary harm and risk. Therefore, soft counterterrorism is a critical weapon the nation-state can use that is no less potent than more conventional counterterrorism weapons.

To determine the efficacy of particular counterterrorism measures—whether operational or soft—terms must be defined. Framing the discussion with adequate parameters allows for rigorous analysis.[6] One of the realities of homeland security is that threats, risks, and dangers are largely murky and, consequently, unarticulated to the public. However, in order to maximize protection of due process rights, viable, direct, and concrete threats must be distinguished from indirect threats that do not pose imminent harm to the nation-state. The danger in decision-makers viewing all threats as viable and valid is to minimize cautious discernment, thereby significantly enhancing the danger of overreaction and, therefore, violations of individual rights.[7]

One of the key challenges of counterterrorism is that it is difficult to identify targets; this suggests a fundamental lack of clarity and conciseness. Therefore, decision-makers must specifically determine and narrowly define both *what* is a legitimate target and *when* the target poses a threat justifying operational engagement.[8] The failure to engage in a robust debate regarding both definition and application directly contributes to operational overreaction, which has tactical and strategic ramifications that, in the main, prevent effective counterterrorism, whether "operational" or "soft."

Definitions minimize amorphousness, thereby reducing wiggle room otherwise available to the executive branch. This is particularly important with respect to the due process discussion; by failing to clearly define what rights are to be protected, the ability to minimize rights is greatly enhanced. In the tension and fear that pervade the terrorism/counterterrorism discussion,

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[6] *See The Resilient Homeland: How DHS Intelligence Should Empower America To Prepare for, Prevent, and Withstand Terror Attacks: Hearing Before the Subcomm. on Intelligence, Info. Sharing, and Terrorism Risk Assessment of the H. Comm. on Homeland Sec.*, 110th Cong. 9–17 (2008) (statement of Amos N. Guiora, Professor, S.J. Quinney College of Law, University of Utah) [hereinafter *The Resilient Homeland*].

[7] *See Right to Fair Trial*, COUNTER-TERRORISM IMPLEMENTATION TASK FORCE, http://www.un.org/en/terrorism/ctitf/proj_righttotrial.shtml (last visited Apr. 1, 2012) ("In their fight against terrorism, some States have conducted activities which infringe basic standards of fair trial, while in others the implementation of counter-terrorism measures limits access to the judicial process.").

[8] The term "engagement" describes operational engagement (in accordance with "rules of engagement"), arrest/detention, and other actions that impose limits on personal freedom, thereby raising questions directly related to due process.

minimizing individual rights in response to either a threat or an attack is, lamentably, a recurring theme. American history is replete with examples of panic responses that directly—and unjustifiably—influenced the due process rights of innocent individuals deprived of civil and political rights.[9] While lawful counterterrorism involves imposing the full weight of government power on individuals, its legality hinges on determining whether the relevant state action is predicated on person-specific due process principles.[10] Otherwise, both the rule of law and morality take a dangerous and unwarranted back seat to collective punishment based on an approach most accurately described as "round up the usual suspects."

II. DUE PROCESS DEFINED IN THE CONTEXT OF COUNTERTERRORISM

To determine the range and application of due process[11] in the counterterrorism paradigm, we next turn our attention to the first document believed to directly address the question of due process, the Magna Carta.[12] Chapters 39 and 40 of the Magna Carta state: "No freemen shall be taken or imprisoned . . . or in any way destroyed . . . except by the lawful judgment of his peers or by the law of the land. To no one will we sell, to no one will we refuse or delay, right or justice."[13] According to the 1354 statutory rendition of this text: "[N]o Man of what Estate or Condition that he be, shall be put out of his Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law."[14]

Clearly drawing on those words, the Fifth Amendment to the U.S. Constitution guarantees similar rights:

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[9] *See* Korematsu v. United States, 323 U.S. 214 (1944); *The Brig Amy Warwick* (The Prize Cases), 67 U.S. (2 Black) 635 (1863); Sedition Act, ch. 74, 1 Stat. 596 (1798); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798); Alien Friends Act ch. 58, 1 Stat. 570 (1798); Naturalization Act, ch. 54, 1 Stat. 566 (1798); *Attorney General A. Mitchell Palmer on Charges Made Against Department of Justice by Louis F. Post and Others: Hearings Before the H. Comm. on Rules*, 66th Cong. 27 (1920).

[10] *See Right to Fair Trial*, *supra* note 7 ("States are under the obligation to ensure that all guarantees of due process are respected when persons who are alleged to have committed terrorism-related offences are arrested, charged, detained and prosecuted.").

[11] For a thoughtful discussion regarding due process, see Henry J. Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267 (1975).

[12] For insightful articles addressing the historical roots of due process, see Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585 (2009) and Andrew T. Hyman, *The Little Word "Due*," 38 AKRON L. REV. 1 (2005).

[13] MAGNA CARTA chs. 39–40.

[14] Liberty of Subject, 1354, 28 Edw. 3, c. 3, § 3 (Eng.), modern English translation *available at* http://www.legislation.gov.uk/aep/Edw3/28/3.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[15]

Justice Harlan, in his much-cited dissent in *Poe v. Ullman*, wrote that due process:

> [I]n the consistent view of this Court has ever been a broader concept. . . . Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. Thus the guaranties of due process, though having their roots in Magna Carta's "per legem terrae" and considered as procedural safeguards "against executive usurpation and tyranny," have in this country "become bulwarks also against arbitrary legislation."[16]

In the aftermath of the Civil War, the U.S. Congress passed the Thirteenth, Fourteenth, and Fifteenth Amendments, collectively known as the Reconstruction Amendments. The Fourteenth Amendment was intended to guarantee the rights and civil liberties of recently freed slaves, by denying states the right to abridge privileges and immunities of U.S. citizens without due process:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[17]

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[15] U.S. CONST. amend. V.

[16] Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (citations omitted) (quoting Hurtado v. California, 110 U.S. 516, 532 (1884)).

[17] U.S. CONST. amend. XIV.

In a similar vein, the Treaty of Lisbon[18] does not contain a specific provision regarding due process, but as amended by the Treaty of Lisbon, the Treaty on European Union gives binding force to the European Charter of Fundamental Rights, which was originally proclaimed in 2000 and revised in 2007.[19] The European Charter of Fundamental Rights has specific provisions addressing both judicial protection and the right to a fair trial. According to Article 47:

> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.[20]

Similarly, according to Article 48: "1. Everyone who has been charged shall be presumed innocent until proved guilty according to law. 2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed."[21]

In spite of the above, a decade after 9/11, civil democratic society seeking to establish counterterrorism policy predicated on the rule of law has largely failed to satisfactorily address two core questions: how to apply due process and to whom in the context of counterterrorism.[22] The failure to do so results directly from an unwillingness—or inability—among these decision-makers to articulate with consistency and certainty the limits of operational counterterrorism.[23] Rather than developing a coherent policy reflecting a

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[18] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1.

[19] Charter of Fundamental Rights of the European Union, 2007 O.J. (C 303) 1.

[20] *Id.* art. 47.

[21] *Id.* art. 48.

[22] *See* David Cole, *Out of the Shadows: Preventative Detention, Suspected Terrorists and War*, 97 CALIF. L. REV. 693, 695 (2009) (stating that questions relating to who may be put under preventative detention and what substantive and procedural safeguards should accompany such detention are among the most controversial of legal questions); Gary Thompson, *Guantanamo and the Struggle for Due Process of Law*, 63 RUTGERS L. REV. 1195, 1199–1200, 1213 (2011) (stating that while the debate as to how much due process to give detainees at Guantanamo Bay continues without resolution, the detainees have in effect become convicted criminals serving ten-year sentences).

[23] *See* Ersun N. Kurtulus, *The New Counterterrorism: Contemporary Counterterrorism Trends in the United States and Israel*, 35 STUD. CONFLICT & TERRORISM 37, 45 (2012) (arguing that a debate among

successful melding of legitimate operational requirements with self-imposed restraints, the Bush and Obama Administrations have either implemented measures that violated international and domestic law[24] or seemed incapable of developing a consistent, articulated coherent policy.[25]

While President Obama signed an Executive Order ordering the closure of the Guantanamo Bay detention center[26] for the purpose of discontinuing trials before Military Commissions, in April 2010 the Obama Administration reinstituted the Military Commissions.[27] It is unclear whether this represents reversal of a policy previously articulated but not implemented, or a stopgap measure. Whatever the explanation, the Obama Administration has largely failed to satisfactorily address the rule-of-law questions essential to creating and implementing counterterrorism policy that ensures implementation of due process guarantees and obligations. For example, the Administration has failed to resolve whether Article III courts are the proper judicial forums for suspected terrorists.[28] Perhaps this continuing failure is reflective of political infighting, as demonstrated in the backtracking with respect to Khalid Sheikh Mohammed's trial.[29] The result is a disturbing failure to ensure due process for individuals suspected of involvement in terrorism.

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academics about the use of torture for counterterrorism provides legitimacy for the normalization of torture because it indicates that torture is an option that can be considered).

[24] *See* BRENNAN CENTER FOR JUST. (Dec. 29, 2008), http://www.brennancenter.org/content/resource/investigating_violations_of_the_rule_of_law_in_counter_terrorism_policy; Editorial, *Lawless and Soon Long Gone*, L.A. TIMES, Dec. 24, 2008, at A16 ("This editorial page has been uncompromising in its criticism of the Bush administration's flouting of international and domestic law. The administration was wrong to evade courts in seeking warrantless surveillance of Americans, wrong to establish the Guantanamo Bay detention center, heinous in its acceptance of torture."); Press Release, American Civil Liberties Union, ACLU Says DOJ Investigation into CIA Interrogation Program Too Narrow (June 30, 2011), *available at* http://www.aclu.org/national-security/aclu-says-doj-investigation-cia-interrogation-program-too-narrow ("For a period of several years, and with the approval of the Bush administration's most senior officials, the CIA operated an interrogation program that subjected prisoners to unimaginable cruelty and violated both international and domestic law.").

[25] Anne E. Kornblut & Peter Finn, *Obama Aides Near Reversal on 9/11 Trial*, WASH. POST, Mar. 5, 2010, at A1; Charlie Savage, *In Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES, Apr. 5, 2011, at A1.

[26] *Background: President Obama Signs Executive Orders of Detention and Interrogation Policy*, WHITE HOUSE, http://www.whitehouse.gov/the_press_office/BACKGROUNDPresidentObamasignsExecutiveOrdersonDetentionandInterrogationPolicy (last visited Apr. 21, 2010).

[27] Peter Finn, *Military Tribunal Opens Hearings on Youngest Guantanamo Detainee*, WASH. POST, Apr. 29, 2010, at A4; Morris Davis, *Obama and Change at Guantanamo: Believe It When You See It*, HUFFINGTON POST (Apr. 27, 2010, 7:36 AM), http://www.huffingtonpost.com/morris-davis/obama-and-change-at-guant_b_553113.html.

[28] Peter Finn & Anne E. Kornblut, *Obama Allows Indefinite Detention*, WASH. POST, Mar. 8, 2011, at A1.

[29] Savage, *supra* note 25.

More fundamentally, the status of individuals detained post-9/11 has not been uniformly or consistently articulated or applied. That is, varying definitions have been articulated at different times, reflecting legal and policy uncertainty directly affecting the ability to establish and consistently apply a legal regime based on due process.[30] For thousands of individuals whose initial detention was based on questionable intelligence and subsequent, inadequate habeas protections, the current regime is inherently devoid of due process.[31]

I propose that detainees are neither prisoners of war nor criminals in the traditional sense; rather, they are a hybrid of both. To that end, I propose that the appropriate term for post-9/11 detainees is a combination—a convergence of the criminal law and law of war paradigms—best described as a hybrid paradigm.

Over the years, terms such as enemy combatant, illegal combatant, unlawful combatant, and illegal belligerent have been used to describe an individual engaged in combat who either has lost his status as a soldier, or never acquired it in the first place.[32] Articulating this definition and determining the status of the enemy are of the utmost importance, particularly in the context of due process considerations.

The hybrid paradigm is philosophically and jurisprudentially founded on the principle that the accused must have judicial resolution of his status before a court of law.[33] However, as touched on in subsequent sections, the American criminal law process is largely inapplicable to the current conflict.[34] Hence, to guarantee the suspect *certain* rights and privileges in accordance with due

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[30] MICHAEL GARCIA ET AL., CONG. RESEARCH SERV., R 40139, CLOSING THE GUANTANAMO DETENTION CENTER: LEGAL ISSUES 55–56 (2011).

[31] Cole, *supra* note 22, at 725–26, 744–745; Thompson, *supra* note 22, at 1198, 1213.

[32] *See Ex parte* Quirin, 317 U.S. 1, 31 (1942) (stating that "[t]he spy who secretly and without uniform passes the military lines of a belligerent in time of war . . . or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property" are examples of belligerents not entitled to prisoner-of-war status, and as offenders of the law of war, subject to trial and punishment by military tribunals); Boumediene v. Bush, 553 U.S. 723 (2008); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (showing the evolving definitions of key terms in recent years).

[33] Amos N. Guiora, *The Quest for Individual Adjudication and Accountability: Are International Tribunals the Right Response to Terrorism?*, 24 EMORY INT'L L. REV. 497, 506 (2010).

[34] *Id.* at 508; *The Resilient Homeland*, *supra* note 6, at 9–17; Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1081 (2008); Glenn M. Sulmasy, *The Legal Landscape After* Hamdan*: The Creation of Homeland Security Courts*, 13 NEW ENG. J. INT'L & COMP. L. 1, 10 (2006); Andrew C. McCarthy & Alykhan Velshi, *Outsourcing American Law: We Need a National Security Court* 3–10 (Am. Enterprise Inst., Working Paper No. 156, 2009), http://www.aei.org/files/2009/08/20/20090820-Chapter6.pdf.

process principles, the hybrid paradigm is predicated on criteria-based initial detention and subsequent remand decisions, interrogation methods that do not include torture, the right to appeal conviction (regardless of before what court convicted) to an independent judiciary, the right to counsel of the suspect's own choosing, known terms of imprisonment, and procedures to prevent indefinite detention.

Justice O'Connor's unfortunate words in *Hamdi v. Rumsfeld*—"the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided"—are extraordinarily problematic and troubling.[35] Simply stated, the Constitution does *not* contain a rebuttable presumption that favors the state at the expense of a defendant's rights. O'Connor's unfortunate phrasing is, largely, in accordance with the late Chief Justice Rehnquist's judicial philosophy with respect to the role of the Supreme Court during armed conflict: "The laws will thus not be silent in time of war, but they will speak with a somewhat different voice."[36]

In analyzing the application of due process to counterterrorism, Justice O'Connor's words highlight the essence of the philosophical, existential, and legal tension between powerful competing standards and tests. The essence of Justice O'Connor's unfortunate phrasing is to suggest that at *the* critical confluence—the actual meeting place—between legitimate individual rights and equally legitimate national security rights, the Constitution's protections are not to be fully extended to the defendant.

In the coming Parts, I examine how—if at all—due process has been applied with respect to detention, interrogation, and trial paradigms; the "guide" will be the principle that due process is essential for counterterrorism to be lawful and moral. To what extent it should be applied is an implementation question; the principled decision that has been largely avoided by successive American administrations is whether it should be applied at all. While the Supreme Court has addressed the habeas corpus issue in *Boumediene v. Bush*[37] and Judge Bates did the same in *Al Maqaleh v. Gates*,[38] my focus will be on the executive branch and how it has applied—or not

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35 *Hamdi*, 542 U.S. at 534 (O'Connor, J., plurality opinion).

36 WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WAR TIME 225 (1998).

37 *Boumediene*, 553 U.S. at 723.

38 Al Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).

applied—due process to counterterrorism. That is the essential question to be examined; it is to that I turn my attention.

III. DETENTION CRITERIA AND STANDARDS

Detention—depriving an individual of his freedom—is lawful in the American criminal law paradigm, requiring probable cause pertaining to past acts.[39] The initial arrest, provided exigent circumstances do not exist,[40] requires an arrest warrant issued by a "neutral and detached magistrate" in response to a request submitted by law enforcement based on evidence or sourced information.[41] In addition to the initial detention, the court may conclude that continued detention is warranted, predicated on a variety of factors including severity of the crime, danger posed by the suspect, and whether the individual is a possible flight risk.[42] The presence of these additional factors allows the court to require additional detention. This detention model, with varying degrees of interpretation subject to country-specific criminal procedure codes, is largely representative in countries adhering to the rule of law and separation of powers between the executive and judiciary.[43] Judicial review of the executive is essential to preserving liberty and due process.[44]

However, in the immediate aftermath of 9/11, the Bush Administration established an alternative paradigm for those detained in the so-called "Global War on Terrorism." Rather than relying on the traditional model, the Administration created an alternative model that is fundamentally deficient with respect to due process. Devoid of probable cause standards, much less review by an independent judiciary, the Bush Administration implemented the

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[39] Probable cause is defined as "[a] reasonable ground to suspect that a person has committed or is committing a crime." BLACK'S LAW DICTIONARY 1321 (9th ed. 2009).

[40] *See* Kirk v. Louisiana, 536 U.S. 635, 636 (2002) (per curiam) ("'[A]bsent exigent circumstances,' the 'firm line at the entrance to the house . . . may not reasonably be crossed without a warrant.'" (alteration in original) (quoting Payton v. New York, 445 U.S. 573, 590 (1980))).

[41] *See* Johnson v. United States, 333 U.S. 10, 13–14 (1948); United States v. Leon, 468 U.S. 897, 905–25 (1984).

[42] 18 U.S.C. § 1342(g) (2006); *see also* Bell v. Wolfish, 441 U.S. 520, 533–34 (1979); United States v. Salerno, 481 U.S. 739 (1987).

[43] Australia and Great Britain, two democratic nations that follow the doctrine of separation of powers, utilize detention models similar to the one put in place in the United States. *See Al-Kateb v Godwin* [2004], HCA 37 (Austl.); Clare Feikert, *Pre-charge Detention for Terrorist Suspects: United Kingdom*, LIBR. CONGRESS (2008), http://www.loc.gov/law/help/uk-pre-charge-detention.php.

[44] For an article comparing Israeli and American judicial review, see Amos N. Guiora & Erin Page, *Going Toe to Toe: President Barak's and Chief Justice Rehnquist's Theories of Judicial Activism*, 29 HASTINGS INT'L & COMP. L. REV. 51 (2006).

unitary executive theory[45] paradigm, a system devoid of probable cause standards that has been actively advocated by Professor John Yoo[46] and David Addington[47] amongst others.

The significance of the unitary executive theory in the due process discussion is profound: in essence, it significantly minimizes the role and power of the legislature and judiciary with respect to counterterrorism. The unitary executive theory raises profound questions regarding the application of established constitutional principles of separation of powers[48] and checks and balances[49] to counterterrorism. According to its proponents, the theory establishes a constitutional model whereby the executive assumes extraordinary powers at the absolute "expense" of the judiciary and legislative branches.[50]

With respect to due process—the rights so carefully protected by the Fifth and Fourteenth Amendments—the Bush Administration's approach was to create a paradigm that largely denied detainees their fundamental rights.[51] Justice Stevens' dissent in *Rumsfeld v. Padilla* addressed this directly:

> Whether respondent is entitled to immediate release is a question that reasonable jurists may answer in different ways. There is, however, only one possible answer to the question whether he is entitled to a hearing on the justification for his detention. At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors

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[45] *See* Christopher S. Kelley, Rethinking Presidential Power—The Unitary Executive and the George W. Bush Presidency (2005) (paper prepared for the 63d Annual Meeting of the Midwest Political Science Association, Chicago, Illinois, Apr. 7–10, 2005), *available at* http://www.pegc.us/archive/Unitary%20Executive/annotated_kelly_unit_exec.pdf.

[46] Yoo was the Deputy Assistant Attorney General in the Office of Legal Counsel of the U.S. Department of Justice. Yoo's memo, *The President's Constitutional Authority To Conduct Military Operations Against Terrorists and Nations Supporting Them*, was critical in establishing the Bush Administration's counterterrorism policy. Memorandum from John C. Yoo on The President's Constitutional Authority To Conduct Military Operations Against Terrorists and Nations Supporting Them to the Deputy Counsel to the President (Sept. 25, 2001), *available at* http://www.justice.gov/olc/warpowers925.htm [hereinafter Memorandum from John C. Yoo].

[47] Addington was Vice President Cheney's counsel and played a decisive role in creating and implementing the Bush Administration's counterterrorism policies.

[48] U.S. CONST. arts. I, § 1, III; Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[49] U.S. CONST. arts. I, II, III. The U.S. Constitution established a balance of power amongst the three branches of government with no one branch granted power to overcome another.

[50] *Undermining the Bill of Rights: The Bush Administration Detention Policy*, PEOPLE FOR AM. WAY, http://www.pfaw.org/media-center/publications/undermining-the-bill-of-rights (last visited Apr. 1, 2012).

[51] *See generally id.*; Memorandum from John C. Yoo, *supra* note 46; David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002).

> is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process. Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. *For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny*.[52]

The need to develop standards in determining *when and why* an individual may be detained is critical to establishing a due process predicated paradigm. As Justice Stevens' dissent makes clear, the Bush Administration's detention policy, with respect to post-9/11 detainees, was devoid of minimal due process standards. While this was in accordance with the worldview articulated by senior officials, it fell short of meeting constitutional standards according to Justice Stevens.[53] However—and the caveat is essential—the appropriate query is whether 9/11 presented a threat that justified denying basic due process rights.

In other words, is America's national security sufficiently threatened to deny due process both with respect to initial and continued detention? While former U.S. Secretary of Defense Rumsfeld categorized the individuals detained in Guantanamo as the "worst of the worst,"[54] facts indicate that his assessment was not accurate.[55] The number of detainees released without any judicial process suggests that Rumsfeld's statement was based neither on careful analysis nor articulated criteria.[56]

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[52] Rumsfeld v. Padilla, 542 U.S. 426, 464 (2004) (Stevens, J., dissenting) (emphasis added).

[53] *Id.*

[54] Julian Borger, *Guantanamo: Ten Years of Limbo*, GUARDIAN (Jan. 10, 2012, 12:50 PM), http://www.guardian.co.uk/world/julian-borger-global-security-blog/2012/jan/10/guantanamo-legacy-afghanistan.

[55] KAREN J GREENBERG, THE LEAST WORST PLACE: GUANTANAMO'S FIRST 100 DAYS 160 (2009).

[56] *Id.*

In the criminal law paradigm, a suspect's remand requires independent judicial authorization;[57] in the Military Commission's model, a detainee's remand would require neither judicial authorization nor review.[58] Although the Court in *Boumediene*[59] held that enemy combatants detained in Guantanamo have a constitutionally guaranteed right of habeas corpus review,[60] and Judge Bates held in *Al Maqaleh* that some prisoners captured outside the zone of combat[61] and detained at a U.S. military base in Afghanistan had a right to challenge their imprisonment,[62] the reality is the following: hundreds of detainees are presently held—directly or indirectly—by the U.S. in a detention paradigm that can best be described as indefinite detention. While uncertainty—perhaps ambiguity[63]—was understandable in the immediate aftermath of 9/11, it is incomprehensible ten years later.

According to the U.S. Constitution, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[64] In the due process discussion, denying detainees the "Great Writ" is a fundamental violation of an otherwise guaranteed right for American citizens. While that right is guaranteed to American citizens, Professor David Cole has written:

> As politically tempting as the trade-off of immigrants' liberties for our security may appear, we should not make it. As a matter of principle, the rights that we have selectively denied to immigrants are not reserved for citizens. The rights of political freedom, due process, and equal protection belong to every person subject to United States legal obligations, irrespective of citizenship.[65]

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[57] Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict–Criminal Divide*, 33 YALE J. INT'L L. 369, 369 (2008).

[58] Laura A. Dickenson, *Using Legal Process To Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1415 (2002).

[59] For an interesting analysis of *Boumediene*, see Jean-Marc Piret, Boumediene v. Bush *and the Extraterritorial Reach of the U.S. Constitution: A Step Towards Judicial Cosmopolitanism*, 4 UTRECHT L. REV. 81 (2008).

[60] Boumediene v. Bush, 553 U.S. 723 (2008).

[61] *Illegal Detentions in the "War on Terror*," AM. CIV. LIBERTIES UNION, http://www.aclu.org/indefinitedetention (last visited Apr. 24, 2012).

[62] Al Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).

[63] *See generally* Kenneth Anderson & Elisa Massimino, *The Cost of Confusion: Resolving Ambiguities in Detainee Treatment* (Am. Univ. Washington Coll. of Law Legal Studies Research Paper Series, Paper No. 2008-77, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=968177&rec=1&srcabs=938202.

[64] U.S. CONST. art. 1, § 9.

[65] Cole, *supra* note 51, at 1004.

At the confluence between due process, habeas corpus, and counterterrorism lies the question if, as Cole writes, rights and protections are to be extended to persons subject to U.S. legal obligations but not implicitly protected. Judge Bates' decision affirms that principle by expanding the right to a category of individuals not previously granted the privilege.[66] The dangers of not granting the right are extraordinary: the creation of a permanent class of individuals not entitled to independent judicial review whose status is best defined as "indefinite detention."

The question of whether to extend constitutional protections to non-citizens was originally addressed in the *Dred Scott* decision, which held that the Fifth Amendment was not limited to the geographic boundaries of the states, but rather, such protections were extended to all incorporated territories of the United States.[67] In the 150 years since *Dred Scott*, the Court has discussed similar cases with two distinct "lines of demarcation" important for determining detainee rights: first, distinguishing between individuals within and outside of the United States; and second, distinguishing between citizens and non-citizens.[68]

In discussing these two issues, case law slowly extended constitutional protections to include non-citizens, provided they could demonstrate cognizable ties to the United States.[69] The clearest tie was physical location within the borders of the United States.[70] In accordance with *Johnson v. Eisentrager*,[71] this specific inquiry directly influences this Article's question, as the decision of Guantanamo Bay's status as a territory of the United States is of the utmost importance. If Guantanamo Bay is held as a territory of the United States, then the precedent dictates that fundamental rights, like the Fifth and Fourteenth Amendments, should apply. However, if it is not held to be a territory, then the constitutional protections would not necessarily be afforded.

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66 *Al Maqaleh*, 604 F. Supp. 2d at 235.

67 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

68 United States v. Tiede, 86 F.R.D. 227 (U.S. Ct. Berlin 1979).

69 *See, e.g.*, Detroit Free Press v. Ashcroft, 303 F.3d 681, 691 (2002) (citing Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, 310–11 (1970)).

70 *Id.*

71 Johnson v. Eisentrager, 339 U.S. 763 (1950). In *Eisentrager*, the petitioner sought habeas corpus review as a German national in the custody of the U.S. Army. The Supreme Court held that the German nationals who were being held based on a military commission conviction for having engaged in military activity against the United States possessed no right to a habeas corpus petition. *Id.* at 790–91.

Failing to institutionalize independent judicial review of detention decisions directly resulted in the significant number of detainees held indefinitely. If there are no criteria for determining what actions pose a threat to American national security, the detentions are reflective of an approach best described as "round up the usual suspects." This is not a policy; it is a tragic reality of the past ten years. Indefinite detention perhaps sounds attractive, for it removes from the zone of combat—indefinitely—individuals suspected of involvement in terrorism. The qualifier "perhaps" is essential to the discussion, for the inherent unconstitutionality of indefinite detention has a pervasive effect on U.S. counterterrorism. Furthermore, the dearth of articulated criteria for initial detention and subsequent remand alike inevitably guarantees that individuals have been wrongly detained precisely because threat has not been defined.

While Judge Bates' decision was of the utmost importance—more than any Supreme Court holding addressing counterterrorism in the past eight years, save *Boumediene*—it has *not* resulted either in a significant re-articulation of U.S. policy nor in the granting of habeas corpus to thousands of detainees.[72] Aside from its decision in *Boumediene*, the Supreme Court has failed to articulate the rights granted to suspected terrorists. Similarly, Congress has failed to articulate these rights through its constitutionally granted oversight powers. It is essential to balance—or maximize—the legitimate rights of the individual with the equally legitimate national security rights of the state. Furthermore, Judge Bates' decision seeks to move beyond the amorphousness that has defined much of the debate over the last ten years.[73]

While it has been suggested that habeas hearings satisfactorily provide detainees "their day in court," the measure does not establish a rights-based counterterrorism regime. Though habeas hearings enable the detainee to come before a judge, the process is fundamentally flawed both because the detention (original and remand) was not premised on carefully delineated criteria, and because adjudication of personal responsibility is not in the offing. The combination represents a significant failure with respect to establishing and maintaining a due process regime. That failure is compounded as we turn our attention to the interrogation of detainees.

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[72] *See generally* Andy Worthington, *As Judges Kill Off Habeas Corpus for the Guantanamo Prisoners, Will the Supreme Court Act?*, FUTURE FREEDOM FOUND. (Nov. 28, 2011), http://www.fff.org/comment/com1111v.asp.

[73] *See* Al Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).

IV. INTERROGATION REGIMES AND RIGHTS

While the protections of the Fifth and Fourteenth Amendments are inextricably tied to domestic criminal law interrogations, it is presently unresolved whether those rights will be extended to terrorism-related interrogations.[74] Resolving this dilemma requires determining within which rubric terrorism falls: criminal law, law of war, or something else.[75] Answering that question enables determination of the rights, privileges, and protections to be extended to individuals suspected of involvement in terrorism. In particular, with respect to the question this Article seeks to address, the fundamental issue is whether due process rights are to be extended regardless of the paradigm applied.

To that end, from the due process perspective, the ultimate question regarding the Fifth Amendment is whether the right against self-incrimination should be extended to detainees.[76] The question of whether an individual arrested in the "zone of combat"[77] should be read his *Miranda* rights is likely

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[74] In the immediate aftermath of the so-called 2009 Christmas Day Detroit underwear bomber, Umar Farouk Abdulmutallab, several commentators addressed whether *Miranda* rights should have been extended in that case. *See, e.g.*, Editorial, *Christmas Day Negligence: The Unthinking Handling of a Would-Be Bomber*, WASH. POST, Jan. 23, 2010, at A12; Benjy Radcliffe, *Umar Farouk Abdulmutallab: Enemy Combatant or Criminal*, COURT (Feb. 4, 2010), http://www.thecourt.ca/2010/02/04/umar-farouk-abdulmutallab-enemy-combatant-or-criminal.

[75] *See* Amos N. Guiora, Quirin *to* Hamdan: *Creating a Hybrid Paradigm for Detaining Terrorists*, 19 FLA. J. INT'L L. 2 (2008); Robert M. Chesney, *Terrorism, Criminal Prosecution, and the Preventive Detention Debate*, 50 S. TEX. L. REV. 669 (2009); Chesney & Goldsmith, *supra* note 34; Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 TEMP. L. REV. 787 (2008).

[76] Specifically, "nor shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. Scholars and Supreme Court cases alike have analyzed the significance of this right in various contexts. *See generally* Russell D. Covey, *Interrogation Warrants*, 26 CARDOZO L. REV. 1867 (2005); Paul G. Alvarez, Comment, *Taking Back* Miranda*: How* Seibert *and* Patane *Can Keep "Question-First" and "Outside* Miranda*" Interrogation Tactics in Check*, 54 CATH. U. L. REV. 1195 (2005); Alexander J. Wilson, Note, *Defining Interrogation Under the Confrontation Clause After* Crawford v. Washington, 39 COLUM. J.L. & SOC. PROBS. 257 (2005). For scholarship discussing the Fifth Amendment in relation to court testimony, see H. Mitchell Caldwell & Carlo Spiga, *Crippling the Defense of an Accused: The Constitutionality of the Criminal Defendant's Right To Testify*, 6 WYO. L. REV. 87 (2006). For scholarship discussing the Fifth Amendment in relation to confessions, see Ronald J. Allen, Miranda*'s Hollow Core*, 100 NW. U. L. REV. 71 (2006) and Eric English, Note, *You Have the Right To Remain Silent, Now Please Repeat Your Confession:* Missouri v. Seibert *and the Court's Attempt To Put an End to the Question-First Technique*, 33 PEPP. L. REV. 423 (2006).

[77] This is a much used, perhaps misused and misunderstood, term of art. In traditional warfare, the zone of combat was where armies faced each other: infantry and armored corps units on the battleground, air forces in the air and navies on the high sea. In "armed conflict short of war," the zone of combat has been significantly expanded to include the civilian population and urban residential areas. The training of the soldier for the zone of combat is significantly different than for traditional warfare.

to be answered in the negative, given the inherent impracticality of American military personnel assuming this responsibility in the actual zone of combat. However, the question of whether such rights and protections should be granted to the detainee *once* he is in the interrogation setting remains to be satisfactorily resolved.[78]

The Supreme Court has linked the Fifth Amendment's protections against self-incrimination to general limitations of acceptable interrogation methods.[79] In addressing the question of extending Fifth Amendment rights to non-citizens, courts and scholars have often wrestled with exactly this question. For instance, in *Zadvydas v. Davis*, the Supreme Court reaffirmed the tradition of applying due process to aliens present within the United States, regardless of their legal status.[80] Specifically, the Court held that the Fifth Amendment is incongruent with a law that would permit the indefinite detention of a non-citizen on domestic soil.[81] Thus, "[o]nce present in the country, aliens can claim due process protection."[82] In further addressing this question, the court in *United States v. Verdugo-Urquidez* denied a motion to suppress evidence seized by agents of the Drug Enforcement Agency while searching the home of a Mexican citizen without a warrant.[83]

While the Court held that Fourth Amendment rights are not to be extended to non-citizens, Justice Kennedy, in his concurring opinion, stated that the defendant should be entitled to Due Process Clause protection under the Fifth Amendment when his case finally went to trial.[84] Specifically, the Court ruled that Fourth Amendment protections did not extend to the home of a Mexican citizen in Mexico.[85] The Court, however, made a point to distinguish its holding from one that would have occurred had the appeal been analyzed

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[78] *See, e.g.*, *Contemporary Practice of the United States Relating to International Law*, 98 AM. J. INT'L L. 820 (2004); Rinat Kitai, *A Custodial Suspect's Right to the Assistance of Counsel: The Ambivalence of the Israeli Law Against the Background of American Law*, 19 BYU J. PUB. L. 205 (2005); Jonathan F. Lenzner, Note, *From a Pakistani Stationhouse to the Federal Courthouse: A Confession's Uncertain Journey in the U.S.-Led War on Terror*, 12 CARDOZO J. INT'L & COMP. L. 297 (2004).

[79] *See* Zadvydas v. Davis, 533 U.S. 678 (2001).

[80] *Id.*; *see also* Shirin Sinnar, Note, *Patriotic or Unconstitutional? The Mandatory Detention of Aliens Under the USA Patriot Act*, 55 STAN. L. REV. 1419 (2003).

[81] *Zadvydas*, 533 U.S. at 679.

[82] Sinnar, *supra* note 80, at 1428.

[83] United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

[84] Brenner A. Allen, *A Cause of Action Against Private Contractors and the U.S. Government for Freedom of Speech Violations in Iraq*, 31 N.C. J. INT'L L. & COM. REG. 535 (2005).

[85] *Verdugo-Urquidez*, 494 U.S. at 271–72.

under the Fifth Amendment.[86] In looking at the language of the Fourth Amendment, the Court noted that the Amendment applies only to "the people."[87] The Fifth and Sixth Amendments, however, apply to "persons" or "the accused," respectively.[88] The Court, although not explicitly extending Fifth Amendment protections to non-citizens, used dicta to indicate that such a holding is not beyond the pale.[89]

Although the "Insular Cases"[90] began the process of expanding the Constitution's reach beyond the territorial boundaries of the United States, they did not specifically touch on the question for non-citizens.[91] Specifically, the Insular Cases achieved four effects relevant to this distinction: (1) they offered explicit legal justification of American endeavors in Puerto Rico; (2) they created a system by which the United States, as a state, could exert power over a foreign entity; (3) they defined the "legitimate" framework for later political struggles relating to the issue of the political status of Puerto Rico and the grating of legal and political rights to Puerto Ricans; and (4) they created a framework that facilitated the establishment of practices that recognized, and validated, the colonial project in Puerto Rico.[92]

In *Eisentrager*,[93] the Court held that physical presence *alone* in the country creates an implied guarantee of certain rights, which become even more

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[86] *Id.* at 269

[87] *Id.* at 265.

[88] *Id.* at 266.

[89] *Id.* at 270–71.

[90] The "Insular Cases" are nine cases addressing the constitutional questions of the status of Puerto Rico and the Philippines in 1901. The Insular Cases also include a series of cases including *Balzac v. Puerto Rico*, 258 U.S. 298 (1922); *Ocampo v. United States*, 234 U.S. 91 (1914); *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); and *Downes v. Bidwell*, 182 U.S. 244 (1901).

[91] *Verdugo-Urquidez*, 494 U.S. 259 at 268.

[92] *See generally* Sanford Levinson, *Why the Canon Should Be Expanded To Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241 (2000).

[93] *See supra* note 71 discussing habeas corpus for military activity. The historical litany of this distinction began in 1891 with the case of *Ross v. McIntyre*, 140 U.S. 453 (1891), in which an American seaman was suspected of murder on an American ship in Japan. The defendant was then tried and convicted by a consular court in Japan, appealed based on a Fifth Amendment claim, and the Supreme Court denied the appeal because the trial took place outside of the United States, and thus the Fifth Amendment did not apply. *Id.* at 464. In that case, the Court acknowledged that it was a valid question whether the person asserting constitutional protection was inside or outside of the United States. This line of cases continued with the Insular Cases running from 1901–1922. *See* cases cited *supra* note 90. Specifically, cases considered within the progeny of the Insular Cases dealt with the land acquired by the United States during the Spanish–American War. This was the first time, the Court noted, that some constitutional rights could be extended out to U.S. territories; but only some rights would be here extended, as the territory was not fully incorporated. *See* Downes v. Bidwell, 182 U.S. 244, 292 (1901).

extensive when an active statement of intent to become a citizen is made.[94] Specifically, the Court noted that, "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."[95] Applying these principles to the discussion of Guantanamo detainees, the court in *Khalid v. Bush* held that Guantanamo Bay detainees do not possess any cognizable rights because non-citizens detained by the United States beyond the domestic borders (as the court argued to be the case with Guantanamo Bay) cannot avail themselves of constitutional protections.[96] *Rasul v. Bush* offers a more appropriate frame of reference on the question of the interplay between the decisions of Guantanamo's territorial status and the proper extension of constitutional protections.[97] *Rasul* stands for the proposition that the federal courts have jurisdiction to hear a detainee's habeas petition *whenever* they are held in a place where the "United States exercises complete jurisdiction and control."[98]

The court in *In re Guantanamo Detainees*, further arguing for constitutional protections for detainees, cited *Rasul* as recognizing the precedent from *Eisentrager* barring claims of an alien seeking to enforce the U.S. Constitution in a habeas proceeding outside of a sovereign territory of the United States.[99] However, the court held that the *Eisentrager* decision, which denied German detainees constitutional rights, was inapplicable to the Guantanamo detainees because the detainees, unlike the Germans, "have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control."[100]

With respect to granting *Miranda* rights to the detainees, then, an expanded articulation of due process rights would suggest that both the Constitution and Supreme Court precedent would tolerate this extension. While the public safety exception to *Miranda* has been suggested as applicable to individuals suspected of involvement in terrorism, this is, I suggest, akin to mixing apples

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94 Johnson v. Eisentrager, 339 U.S. 763, 766 (1950).

95 *Id.* at 771.

96 Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005) (concerning foreign nationals captured on the battlefield and brought to Guantanamo Bay filed petitions for writ of habeas corpus).

97 Rasul v. Bush, 542 U.S. 466, 467 (2004).

98 *Id.* at 480 (internal quotations omitted).

99 *In re* Guantanamo Detainees, 355 F. Supp. 2d 443, 449 (D.D.C. 2005).

100 *Id.* at 476. The German detainees were held and tried by the U.S. Army in the "China Theatre." However, upon their convictions they were sent to Germany to serve their sentences. *Eisentrager*, 339 U.S. at 766.

and oranges.[101] The interrogation is extraordinarily complicated and complex; it is also fraught with anxiety and fear. Furthermore, the fundamental disproportionate position between interrogator and interrogatee is the essence of the relationship between the two individuals. The former represents and manifests the maximization of state power whereas the latter is at his most vulnerable. In 1931, The Wickersham Commission Report determined that willful infliction of pain, the "third degree," on criminal suspects was widespread and pervasive.[102] The Commission further determined that the abusers included not just interrogators, but the entire system: police officers, judges, magistrates, and other officials of the criminal justice system.[103]

In the post-Reconstruction Deep South, those detained by law enforcement officials were mainly poor, illiterate African Americans, subjected to threats, cumulative mistreatment, and additional interrogation methods that violated constitutional safeguards.[104] The Deep South interrogation methods continued until the Supreme Court finally extended Fourth and Fourteenth Amendment protections to interrogations that state and local law enforcement conducted by imposing the Fourteenth Amendment's due process requirements and extending the Fourth Amendment Exclusionary Rule.[105]

In that vein, the protections articulated by the Supreme Court in *Miranda* were intended to protect the detainee from involuntary and coerced confessions. In his majority opinion, Chief Justice Warren wrote:

> We might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent . . . . To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate

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101 *See* Quarles v. New York, 467 U.S. 649 (1984). In *Quarles*, the police stopped and frisked Quarles; the officer found an empty shoulder holster and asked Quarles where the gun was; Quarles responded and was arrested by the officer and then read his *Miranda* rights. *Id.* at 651–53. The Court held that there is a public safety exception to the requirement that officers administer *Miranda* warnings. *Id.* at 655–56

102 Zechariah Chafee, Jr. et al., *The Third Degree*, *in* NAT'L COMMISSION ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 13, 152 (1931).

103 *Id.* app. 2 tbl.7, at 208–09.

104 *Id.* at 55–58; JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 48–49 (1994).

105 Mapp v. Ohio, 367 U.S. 643, 660 (1961).

> safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.[106]

In subsequent decisions over the past forty years, the Court has created exceptions but has refused to overturn *Miranda*.[107] In *Dickerson*, Chief Justice Rehnquist wrote:

> We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.[108]

While Rehnquist had, over the course of years, advocated overruling *Miranda*, the Court in *Dickerson* re-affirmed *Miranda*'s core holdings as constitutional protections rather than a mere prophylactic. The suggestion, then, is that *Miranda* guarantees, though whittled down by exceptions, have withstood the test of time and interpretation and are, indeed, constitutional protections.

In an expansive articulation of due process, then, extending *Miranda* protections to individuals suspected of involvement in terrorism most effectively guarantees the rights of detainees in a rights-less regime. By extending the privilege against self-incrimination to post-9/11 detainees, the implicit danger of coerced, involuntary confessions would be largely eliminated. This is particularly important from an operational perspective; receipt of incorrect information from a suspect can directly contribute to a misallocation of resources that significantly hampers counterterrorism.[109] Simply put: a suspect subject to an interrogation devoid of protections and rights is more liable than a protected interrogatee to provide incorrect information.[110] That is, my recommendation to extend *Miranda* protections to individuals suspected of involvement in terrorism is intended to both protect the detainee and directly facilitate more effective operational counterterrorism.

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[106] Miranda v. Arizona, 384 U.S. 436, 457 (1966).

[107] In addition to the public safety exception, there are exceptions for routine booking question and jailhouse informants. *See* Pennsylvania v. Muniz, 496 U.S. 582 (1990); Massiah v. United States, 377 U.S. 201 (1964).

[108] Dickerson v. United States, 530 U.S. 428, 432 (2000).

[109] Lisa Hajjar, *American Torture: The Price Paid, the Lesson Learned*, 251 MIDDLE E. REP. 14, 16 (2009); David Rose, *Tortured Reasoning*, VANITY FAIR (Dec. 16, 2008), http://www.vanityfair.com/magazine/2008/12/torture200812.

[110] Rose, *supra* note 109 ("It is incredible what people say under the compulsion of torture . . . and how many lies they will tell about themselves and others; in the end, whatever the torturers want to be true, is true.").

While the public safety exception has been recommended as applicable to counterterrorism as justification for denying *Miranda* protections to post-9/11 detainees,[111] the danger of trampling on individual rights outweighs information that interrogators may conceivably receive. The rule of law is at its most vulnerable in the interrogation setting; to that extent, while public safety may be perceived as beneficial to society, the possible gain is, at best, short term with long-term dangers looming in the offing.

V. JUDICIAL FORUMS

The fundamental premise is that detainees must be afforded the opportunity to be brought before a court of law for purpose of adjudication of their guilt or innocence. Whether the paradigm adopted is the criminal law or a hybrid, the guiding principle must be trial rather than the abyss of permanent indefinite detention. While various proposals and articles have been put forth,[112] resolution has eluded decision-makers. The Bush Administration's attempt[113] to establish military commissions was roundly criticized.[114] While subsequent instructions prepared by the Department of Defense[115] were intended to mollify the chorus of criticism, the practical reality is the commissions have been widely viewed as an overwhelming failure.[116] Neither in their original

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[111] Charlie Savage, *Holder Backs a Miranda Limit for Terror Suspects*, N.Y. TIMES, May 10, 2010, at A1.

[112] *See* BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR (2008); Chesney & Goldsmith, *supra* note 34, at 1081; Amos Guiora & John T. Parry, *Debate, Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists*, 156 U. PA. L. REV. PENNUMBRA 356 (2008); Gregory S. McNeal, *Beyond Guantanamo, Obstacles and Options*, 103 NW. U. L. REV. COLLOQUY 29 (2008); Harvey Rishikof, *Is It Time for a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes*, 8 SUFFOLK J. TRIAL & APP. ADVOC. 1 (2003); Sulmasy, *supra* note 34; McCarthy & Velshi, *supra* note 34; RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN FEDERAL COURT 9 (2009), *available at* http://www.humanrightsfirst.org/pdf/090723-LS-in-pursuit-justice-09-update.pdf; John C. Coughenour, Op-Ed., *How To Try a Terrorist*, N.Y. TIMES, Nov. 1, 2007, at A27; *Improving Detainee Policy: Handling Terrorism Detainees Within the American Justice System: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2008); HUMAN RIGHTS FIRST, THE CASE AGAINST A SPECIAL TERRORISM COURT (2009), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/090323-LS-nsc-policy-paper.pdf.

[113] Exec. Order No. 13425, 72 Fed. Reg. 7737 (Feb. 20, 2007).

[114] Geoffrey S. Corn, *Questioning the Jurisdictional Moorings of the Military Commissions Act*, 43 TEX. INT'L L.J. 29 (2007); Bill Goodman, *Challenging the Military Commissions Act*, JURIST (Oct. 24, 2006, 10:10 PM), http://jurist.law.pitt.edu/hotline/2006/10/challenging-military-commissions-act.php; Jennifer Van Bergen, *Bush's Brave New World of Torture*, ALTERNET (Nov. 1, 2006), http://www.alternet.org/rights/43691.

[115] DEP'T OF DEF., REGULATION FOR TRIAL BY MILITARY COMMISSIONS (2007), *available at* http://www.defense.gov/news/Apr2007/Reg_for_Trial_by_mcm.pdf.

[116] 156 CONG. REC. S553 (daily ed. Feb. 11, 2010) (statement of Sen. Sessions); 156 CONG. REC. H131 (daily ed. Jan. 13, 2010); Peter Baker & David M. Herszenhorn, *Obama Planning To Keep Tribunals for Detainees*, N.Y. TIMES, May 14, 2009, at A18; Joshua Durkin & Ray Storez, *ACLU's Ben Wizner: Military*

inception nor subsequent tweaking were rules, procedures, and criteria adequately delineated with respect to suspect (and subsequently, defendant) rights.[117] Nevertheless, the largely acknowledged failure of the military commissions has not resulted in the establishment of a viable alternative.

To that end, in addition to the military commissions, there are three options for bringing individuals suspected of involvement in terrorism before a court of law: treaty-based international terror court, Article III civilian court, and a national security court. While I have advocated the establishment of the latter, the other options have also garnered significant—and justified—public support.[118] The critical question, in determining which option most effectively meets rule of law requirements, is whether the due process rights of the defendant are protected. That question, however, cannot be asked nor answered in a vacuum, nor absolutely; for the reality of terrorism/counterterrorism is that legitimate operational realities justify minimizing certain rights, otherwise protected.[119] In particular, with respect to the trial process, protecting confidential sources is an absolute state requirement, and to that end, denying the defendant the right to confront all witnesses is legitimate.[120] Although controversial and suggestive of a rights minimization regime, bringing a suspected terrorist to trial requires submitting confidential information to the court.[121]

While introducing classified information denies the defendant the right to confront his accuser, it is a reality of operational counterterrorism.[122] Similarly, in the American criminal law paradigm, the defendant has the right to a trial by a jury of his peers.[123] While proponents of Article III courts say they are

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Commissions 'An Enormous Practical Failure,' PUB. REC. (Mar. 20, 2010), http://pubrecord.org/law/7251/aclus-wizner-military-commissions; *US Congress Debates Detainee Policy, Military Commissions*, VOA NEWS (July 9, 2009), http://www1.voanews.com/english/news/a-13-2009-07-09-voa3-68744467.html.

117 *US Congress Debates Detainee Policy, Military Commissions*, *supra* note 116.

118 In support of using the International Criminal Court to prosecute terrorism, see Mira Banchik, *The International Criminal Court & Terrorism*, PEACE, CONFLICT & DEV., June 2003, http://www.peacestudiesjournal.org.uk/dl/ICC%20and%20Terrorism.PDF. In support of using Article III courts, see ZABEL & BENJAMIN, *supra* note 112 and Durkin & Storez, *supra* note 116. In support of national security courts, see Jack L Goldsmith & Neal Katyal, Op-Ed., *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19 and McCarthy & Velshi, *supra* note 34.

119 156 CONG. REC. S553 (daily ed. Feb. 11, 2010) (statement of Sen. Sessions) (stating that offering *Miranda* warnings to the Christmas Day bomber jeopardized intelligence gathering).

120 Guiora & Parry, *supra* note 112, at 361–63.

121 *See generally* SERRIN TURNER & STEPHEN J. SCHULHOFER, BRENNAN CTR. FOR JUSTICE AT NYU SCH. OF LAW, THE SECRECY PROBLEM IN TERRORISM TRIALS (2005).

122 *Id.*

123 U.S. CONST. amend. VIII.

appropriate for suspected terrorists, the critical question—yet to be resolved—is whether all individuals detained post-9/11 are to be tried. To the point: while President Obama promised to close Guantanamo, the issue extends significantly beyond the detention center in Cuba.[124] According to senior military commanders, the United States, directly and indirectly, detains approximately 25,000 detainees in detention centers in Iraq and Afghanistan in addition to Guantanamo.[125]

While some have suggested that the Iraqi and Afghan judiciaries are appropriate forums for adjudicating guilt of detainees presently detained in both countries, significant and sufficient doubt has been raised regarding objectivity and judicial fairness.[126] Precisely because the Bush Administrations have ordered the American military to engage in Iraq and Afghanistan in accordance with the Authorization to Use Military Force resolution passed by Congress, the United States bears direct responsibility for ensuring adjudication in a court of law premised on the "rule of law."[127] Simply put: core principles of due process and fundamental fairness demand the United States ensure resolution of individual accountability.

While imposing American judicial norms on Iraq and Afghanistan raise legitimate international law questions regarding violations of national sovereignty, the continued denial of due process raises questions and concerns no less legitimate. History suggests there is no perfect answer to this question; similarly, both basic legal principles and fundamental moral considerations suggest that in a balancing analysis the scale must tip in favor of trial, regardless of valid sovereignty and constitutional concerns. While justice is arguably not blind, continued detention of thousands of *suspects* without hope of trial is a blight on society that violates core due process principles.

Regardless of which proposal above is adopted, the fundamental responsibility is to articulate and implement a judicial policy facilitating trial before an impartial court of law. That is the minimum due process obligation owed the detainee.

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[124] Baker & Herszenhorn, *supra* note 116.

[125] Larisa Epatko, *Detention Centers in Iraq Move from "Chaos" to Reform*, PBS NEWSHOUR (June 20, 2008), http://www.pbs.org/newshour/indepth_coverage/middle_east/iraq/jan-june08/detainees_06-20.html.

[126] Charlie Savage, *Detainees Barred from Access to U.S. Courts*, N.Y. TIMES, May 22, 2010, at A1; Kay Johnson, *Afghanistan Commission Accuses U.S. of Detainee Abuse*, HUFFINGTON POST (Jan. 1, 2012, 3:25 PM), http://www.huffingtonpost.com/2012/01/07/afghanistan-commission-us-detainee-abuse_n_1191345.html.

[127] S.J. Res. 23, 107th Cong. (2001).

VI. MOVING FORWARD

Due process is the essence of a proper judicial process; denial of due process, whether in interrogation or trial, violates both the Constitution and moral norms. Denying suspects and defendants due process protections results in counterterrorism measures antithetical to the essence of democracies. While threats posed by terrorism must not be ignored, there is extraordinary danger in failing to carefully distinguish between real and perceived threats. Casting an extraordinarily wide net results in denying the individual rights; similarly, there is no guarantee that such an approach contributes to effective operational counterterrorism. Extending constitutional privileges and protections to non-citizens does not threaten the nation-state; rather, it illustrates the already slippery slope. In proposing that due process be an inherent aspect of counterterrorism, I am in full accordance with Judge Bates' holding. The time has come to implement his words in spirit and law alike; habeas hearings are an important beginning but do not ensure adjudication of individual accountability. Determining innocence or guilt is essential to effective counterterrorism predicated on the rule of law.