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Quirin to Hamdan: Creating a Hybrid Paradigm for the Detention of Terrorists

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QUIRIN TO HAMDAN: CREATING A HYBRID PARADIGM FOR THE DETENTION OF TERRORISTS

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I. INTRODUCTION

Five years after the terror attacks of 9/11,[1] much disagreement and uncertainty remains about one of the critical issues in counterterrorism: who are we fighting? In various efforts to describe the enemy, numerous terms, or classifications, have been applied. The continued uncertainty is evidenced by the U.S. Supreme Court's decision in *Hamdan v. Rumsfeld*,[2] which represents the Court's most recent foray into the question of detainee status and rights.

Hamdan's ruling signaled that the Bush Administration could not, under the guise of executive war-time powers, create its own definitions to apply to newly established military commissions for terror detainees.[3] Although the full impact of this decision has yet to play itself out, the decision is highly relevant for the thesis that this Article proposes: the introduction and articulation of the "hybrid paradigm," which I define as "a true mix of both the criminal law and prisoner of war paradigms without full Constitutional and criminal procedure rights."[4]

The hybrid paradigm theme is suggested as the most accurate and relevant categorization for detainee rights and status. The parameters of my proposed paradigm include recommendations to address what have been identified as insufficient procedures in Guantánamo Bay.[5]

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1. Referring to the September 11, 2001 terrorist attacks on the United States, see September 11: Chronology of Terror (Sept. 12, 2001), *at* http://edition.cnn.com/2001/US/09/11/chronology.attack/.

2. Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

3. The Court signaled to the Bush Administration that the rules currently governing the Guantánamo Bay military commissions were illegal and in need of revamping. The Court held this by indicating that the Authorization for the Use of Military Force was not a blank check for the Administration to set up these commissions, but rather was more like the "lowest ebb" of power, similar to *Youngstown Steel*, requiring further congressional approval for such commissions. Youngstown St. & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

4. *See* Amos N. Guiora, *Hamdan as Heir to the Bram-Brown Progeny* (work in progress); Amos N. Guiora, *Know Thine Enemy—Who are We Fighting*, CATH. U. L. REV. (forthcoming 2007).

5. Recent hearings in the U.S. Senate, Committee on the Judiciary showed the various interpretations of the impact of the *Hamdan* decision, and the response appropriate from the U.S. Senate. *See* Hamdan v. Rumsfeld*: Establishing a Constitutional Process Before the S. Comm. on*

This Article's legal and policy recommendations offer a concrete model for procedural changes that may cure the deficiencies highlighted in the *Hamdan* decision.[6] While Osama Bin Laden and those of his ilk are "our enemy," it is critical that the specific legal status of these individuals be defined in order to determine their rights.[7]

II. CURRENT CONFLICT

Before delving into the task of defining the status of those engaged in combat, the conflict itself must first be defined. The current struggle against terror cannot be termed a "war" in the historical legal sense, as war, according to international law, only occurs between states.[8] Further, this conflict cannot be termed a police action, as its universality and scope make that definition irrelevant. The Israeli government addressed exactly this nebulous type of conflict, one which is not quite war and not quite a police action, by creating the term "armed conflict short of war."[9] By defining the present situation as "armed conflict short of war," the immediate follow-up question, and focus of this Article is how to define the individuals attacking the nation-state and what rights are they to be granted.[10]

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the Judiciary, 109th Cong. (2006) [hereinafter *Establishing a Constitutional Process*] (giving witness testimony), *available at* http://judiciary.senate.gov/hearing.cfm?id=1986 (last visited Aug. 15, 2007); *Standards of Military Tribunals and Commissions (House Armed Services Committee)*, Sept. 7, 2006 [hereinafter *House Armed Services Committee Hearing*], *available at* http://www.fcnl.org/issues/item.php?item_id=2079&issue_id=119.

6. *Hamdan*, 126 S. Ct. at 2769 (showing lack of habeas corpus. CIA was given an exemption in terms of interrogation methods).

7. This may become even more important as the government itself currently struggles to determine who the "enemy" is. Recent news reports state that the Bush Administration has, purportedly, disbanded the CIA unit assigned the task of locating Bin Laden, indicating that the focus is no longer on the single individual, but rather on this amorphous group of "enemy combatants," a term for which there is no clear definition. *See CIA Reportedly Shuts Down Anti-Bin Laden Unit*, CNN, July 4, 2006, *available at* www.derechos.org/nizkor/excep/alec.html.

8. The Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

9. Sharm el-Sheikh Fact-Finding Committee—First Statement of the Government of Israel (Dec. 28, 2000), *available at* http://www.mfa.gov.il/NR/exeres/FCFDA57E-15AB-4F50-AFBD-BDCE6A289FA8.htm (last visited Aug. 15, 2007).

10. Compelling areas of inquiry related to the issues addressed in this Article, including self-defense, violation of a foreign nation's sovereignty, the significance of a failed state, rule of law and terrorism, amongst others, will not be discussed.

This Article suggests that terrorists do not fit into either the criminal law[11] paradigm or the prisoner of war[12] paradigm. Rather, individuals captured in the "war on terrorism"[13] belong to a unique third 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 lost his status as a soldier or never acquired it in the first place.[14]

Articulating this definition and determining the status of the enemy are of the utmost importance for a myriad of reasons. If the lack of definition for the current conflict continues, then the failure to adequately resolve other issues will linger, casting a pall over all counterterrorism efforts. As an example of the legal impact which undefined terms can have, when President George W. Bush declared "war against terrorism"[15] he reaped an unintended consequence. By declaring the conflict a "war," President Bush essentially defined al-Qaeda as a State and Bin-Laden as a Head of State. Obviously, the President did not intend to so do.

Though the intent of President Bush's statement was to galvanize the nation, the legal impact of his phrasing achieved the opposite result. The President galvanized Bin-Laden.[16] If defined as a war and wars are between States, then those fighting are soldiers and those captured on the battlefield must, according to the Geneva Convention, be granted prisoner of war (POW) status.[17] The President, neither implicitly nor explicitly, intended this result.

The most effective way for scholars, policy-makers, and decision-makers to adequately define the enemy is by determining the rights,

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11. As commonly understood and defined by Black's Law Dictionary as "one who has committed a criminal offense." BLACK'S LAW DICTIONARY 403 (8th ed. 2004).

12. The Geneva Convention defines a POW as a soldier who: 1) is part of a command structure; 2) openly wears his insignia; 3) openly carries his arms; and 4) conducts himself according to accepted laws of war. Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A)(2), Aug. 12, 1949, 6 U.S.T 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention].

13. *See generally* War Against Terror, CNN.com, *at* http://www.cnn.com/SPECIALS/2001/trade.center/ (last visited Oct. 8, 2007).

14. *See Ex Parte* Quirin, 317 U.S. 1, 31 (1942) (The Court stated that "the 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 POW status but rather offend the law of war and are subject to trial and punishment by military tribunals).

15. George W. Bush, President of the United States, Statement by the President in his Address to the Nation, Sept. 11, 2001.

16. I have been told by a leading scholar who is intimately familiar with the Arab world that Bin Laden was emboldened by the President's words (private conversation).

17. Geneva Convention, *supra* note 12, art. 4(A)(2).

privileges, and obligations owed them. Discussion of these three issues will naturally lead to additional, significant questions: what judicial process is appropriate for terrorists; what are the limits of interrogation;[18] what are the limits of detention;[19] what standard of review are they to be granted;[20] and for what crimes may they be tried?[21] This Article seeks to take three important steps in this process: defining the detainees, which enables the creation of the hybrid paradigm which in turn facilitates the delineation of procedures for their trial.

III. CURRENT COMBATANT PARADIGM

According to the Geneva Convention, captured soldiers, termed "prisoners of war," must be returned to their home state upon the cessation of hostilities.[22] Unlike a traditional war, whose culmination is marked by an agreement between the warring states, the present conflict with terrorism lacks a universally agreed upon ending or beginning point.

The absence of a foreseeable "end to the conflict" then has a direct and substantial impact on the definition of a detainee's status. In direct contrast to both a POW and an individual convicted of having committed a crime, both of whom know their release parameters, the current detainee[23] does not know his date of release or the circumstances which could bring about his release.[24]

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18. *See* Amos N. Guiora & Erin M. Page, *The Unholy Trinity: Intelligence, Interrogation and Torture*, 37 CASE W. RES. J. INT'L L. 427 (2006). In addition, I am addressing this issue in a work in progress tentatively entitled *Hamdan as Heir to the Bram-Brown Progeny*.

19. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

20. *See* Amos N. Guiora & Erin M. 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 (2005).

21. *Id.*

22. Geneva Convention, *supra* note 12, art. 118.

23. As defined by this Article but defined by the Bush Administration as an enemy combatant. *See infra* note 28.

24. In light of the *Hamdan* decision and the recent DOD memorandum, it is not clear whether the Administration's changing opinion towards the application of Geneva to detainees will also impact the definition of "enemy combatant" from this Presidential Order. Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006); DOD Memorandum, *at* http://www.defenselink.mil/home/dodupdate/For-the-record/documents/20060711.html (last visited Oct. 8, 2007); Presidential Order, *see infra* notes 25, 32. *See supra* text accompanying note 2; *infra* text accompanying note 44.

The Bush Administration, in section 2 of the November 2001 Presidential Order,[25] articulated which individuals will be brought before the newly created military commissions in Guantánamo Bay, Cuba:

> (a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:
> (1) there is reason to believe that such individual, at the relevant times,
> (i) is or was a member of the organization known as al Qaida;
> (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
> (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order. . . .[26]

This definition of an "individual subject to this order"[27] is uncomfortably vague and subjective. The definition is literally a "catch-all," allowing the government extremely wide latitude to determine who falls under its purview. In light of the fact that such a classification results in denial of the individual's basic rights, as described in Part VI below, this is most problematic.

To illustrate the true breadth of the above definition, an "individual subject to this order"[28] as suggested by the Presidential Order, can be an

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25. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 § 2 (Nov. 13, 2001) [hereinafter Military Order of Nov. 13, 2001].

26. *Id.*

27. *Id.*

28. "An individual subject to this order" has been later defined by the White House to be an "enemy combatant." *See, e.g.*, Press Briefing by Ari Fleischer, June 10, 2002, *available at* http://www.whitehouse.gov/news/releases/2002/06/20020610-3.html (last visited Aug. 16, 2007); Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, Sept. 20, 2002, *available at* http://www.whitehouse.gov/news/releases/2002/09/20020920-4.html (last visited Aug. 16, 2007); Centcom Operation Iraqi Freedom Briefing, Mar. 31, 2003, *available at* http://www.whitehouse.gov/news/releases/2003/03/20030331-9.html (last visited Aug. 16, 2007).

individual who need not be presently involved in an act of terrorism. Accordingly, it is sufficient to have merely provided minimal assistance at any time in the past. Furthermore, the required minimal degree is not defined, thereby leaving significant grounds for expansive interpretation on the part of the executive in determining whether an individual is an enemy combatant.

In the process of reaching the suggested hybrid of rights, the standards originally articulated by the Bush Administration serve as one extreme. This extreme suggests that an enemy combatant, as defined by the Bush Administration, is any individual who has been in contact, passively or actively, with a terrorist organization. This definition denies the detainee basic constitutional rights.[29] At the other extreme would be a system aimed to afford the detainee the full panoply of possible rights, either under the criminal law paradigm or the prisoner of war paradigm. Neither extreme is practicable or appropriate. As the discussion below indicates, the proper system for the hybrid paradigm is somewhere in the middle of these extremes.

IV. U.S. JUDICIAL PRECEDENT FOR STATUS OF TERRORIST DETAINEES

In the U.S. Supreme Court decision, *Ex Parte Quirin*,[30] the Court used two different terms in one paragraph to reference the captured Germans.[31]

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29. This assumes that they are entitled to constitutional rights.

30. In *Ex Parte Quirin*, 317 U.S. 1, 21 (1942), German saboteurs in WWII, captured after entering the United States on the east coast had been trained to sabotage America's war effort by destroying factories and the nation's infrastructure. Upon reaching the United States, the German soldiers buried their uniforms in the sand. *Id.* Therefore, according to the Geneva Convention, they were not soldiers as they were not in uniform nor were they openly carrying their weapons. Geneva Convention, *supra* note 12, art. 4(A)(2). While controversy exists regarding the details of their capture, the five Germans were brought before a military tribunal established by President Roosevelt for the specific purpose of hearing the case. *Ex Parte Quirin*, 317 U.S. at 22. *See, e.g.*, LOUIS FISHER, NAZI SABOTEURS ON TRIAL 36-37 (University Press of Kansas 2005) (2003) (chronicling the events of the German saboteurs' trial before military tribunal and eventual punishment). Though one of the five Haupt, a naturalized American citizen born in Germany came to the United States at age of 5 and gained citizenship during minority. Ex parte Quirin, 317 U.S. at 20, the United States argued that he relinquished his American citizenship when he joined the German Army. *Ex Parte Quirin*, 317 U.S. at 20, 37. The Supreme Court heard the soldiers appeal regarding the legality of the tribunal's commission. *Id.* at 1. The Court held in a brief opinion that the commission was lawful and added they "have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war." *Id.* at 45-46.

31. *Ex Parte Quirin*, 317 U.S. at 30-31 ("enemy combatant" and "unlawful combatant" are

This lack of semantic rigor contributed to the Court's failure to offer a strict definition for the saboteurs. The inability to apply a single expression suggests that the Court was unwilling or unable to define the enemy.

As the multitude of terms indicates, the *Quirin* decision, on which the Bush Administration based its November 2001 Presidential Order,[32] cannot be cited for the proper definition of "enemy combatant." Rather, much like Justice Potter Stewart's approach to pornography,[33] both the Government and the Court have chosen not to engage in active discourse or close examination regarding the specific question of who an enemy combatant is.

It should be noted that the appellants in *Quirin* were German soldiers who lost their status when they *purposefully* discarded their uniforms.[34] Unlike terrorists, who do not belong to a regular army,[35] the 1942 Court applied this enemy combatant definition to individuals who, by all accounts, had been soldiers. The loss of their status, resulting from their own actions, enabled the Court to correctly determine that they were not acting as soldiers at the immediate time of their capture and thus not entitled to prisoner of war status.[36]

The *Quirin* Court's failure to strictly define a term for the saboteurs before them is problematic from the legal, judicial, policy, and practical perspectives. Rather than "define the issue," the executive and judicial branches today, with congressional acquiescence, have simply continued the "tradition" of not defining the combatant.

While the Court has never expanded upon its definition, or lack thereof, in *Quirin*,[37] the tide may now be changing in light of the *Hamdan* decision.[38] As the dust settles from this enormously significant decision, the U.S. government and Congress appear literally pushed by the Court to fully define the status and rights of detainees.[39] This Article recommends

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used in the same paragraph).

32. Military Order of Nov. 13, 2001, *supra* note 25.

33. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (not "attempting to define what may be indefinable . . . but I know it when I see it.").

34. *Ex Parte Quirin*, 317 U.S. at 21.

35. Geneva Convention, *supra* note 12, art. 4(A)(2).

36. *Ex Parte Quirin*, 317 U.S. at 31.

37. *Id.* at 1.

38. Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

39. *See* Recent hearings in the U.S. Senate, Committee on the Judiciary showing the various interpretations of the impact of the *Hamdan* decision, and the response appropriate from the U.S. Senate. *See Establishing a Constitutional Process*, *supra* note 5 (giving witness testimony). *House Armed Services Committee Hearing*, *supra* note 5 (regarding the recent hearings in the U.S. Senate discussing what the appropriate legislative response to *Hamdan* ought to be).

a practical blend of law and policy considerations both for the definition and subsequent implementation of a hybrid of the criminal law and POW paradigms.

V. DEFINITION OF THE POW PARADIGM

In discussing what rights should be granted to detainees, there are two pools of rights from which to draw suggestions: the criminal law paradigm and the prisoner of war paradigm. The Geneva Convention defines a POW as a soldier who: 1) is part of a command structure; 2) openly wears his insignia; 3) openly carries his arms; and 4) conducts himself according to accepted laws of war.[40] Accordingly, a soldier who is part of a regular army of a State easily meets this test.[41] It has been argued elsewhere[42] that members of al-Qaeda do in fact belong to an organization with a command structure.[43] Nevertheless, they unquestionably do not meet the other three parts of the Geneva Convention definition. Detainees suspected of terrorist acts also fail at least the last three parts of this definition.

In the immediate aftermath of 9/11, the Bush Administration determined that al-Qaeda members were not entitled to the full protections of the Geneva Convention.[44] Based on this decision, the Administration held that other than food, water, shelter and basic medical care the detainees were to be denied basic rights guaranteed by the Geneva Convention.[45] Further, because of this determination, the administration

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40. Geneva Convention, *supra* note 12, art. 4(A)(2).

41. In *Ex Parte Quirin*, the Court held that the saboteurs were not soldiers as they had buried their uniforms upon reaching the United States and therefore equated them to spies. *Ex Parte* Quirin, 317 U.S. 1, 37 (1942).

42. *See, e.g.*, Michael C. Dorf, *What is an "Unlawful Combatant," and Why It Matters: The Status of Detained Al Qaeda and Taliban Fighters*, FINDLAW, Jan. 23, 2002 (if members of al-Qaeda do belong to a command structure, then they might be termed part of a regular army state by meeting element No. 1 of the Geneva Convention's definition of Prisoner of War), http://writ.corporate.findlaw.com/dorf/20020123.html.

43. *Id.*

44. *See* Memorandum from Jerald Phifer, to Commander, Department of Defense Joint Task Force 170, *in* MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 167-68 (2004) [hereinafter TORTURE AND TRUTH]; Memorandum from Donald Rumsfeld, Secretary of Defense, to Commander USSOUTHCOM (Jan. 15, 2003), *in* TORTURE AND TRUTH, *supra*, at 183; Memorandum from Jay Bybee, Assistant Attorney General, to Alberto Gonzales, Counsel to the President (Aug. 1, 2002), *in* TORTURE AND TRUTH, *supra* at 115-16.

45. *See, e.g.*, Geneva Convention, *supra* note 12, arts. 21, 84, 87. "Subject to the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary." *Id.* art. 21.

held that the detainees could be subject to harsh interrogation[46] and indefinite detention,[47] and denied independent judicial review.[48] However, in light of the *Hamdan* decision, the administration has reversed course, indicating that the detainees are in fact entitled to Geneva Convention protection.[49]

VI. CRIMINAL LAW PARADIGM FOR DETAINEES

A second possible paradigm is the domestic, Article III,[50] criminal law paradigm. Just as the prisoner of war paradigm is not applicable in full, terrorists are not regular criminals and the criminal law process is, thus, an inappropriate venue.

However, the criminal law paradigm is useful to suggest a variety of possible rights which could be granted in part. Specifically, the criminal law process is predicated on an array of fundamental premises: 1) a defendant presumed innocent until proven guilty; 2) the submission of evidence to a court of law; 3) a right to confront witnesses;[51] 4) a right to

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> A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war. In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.

Id. art. 84. "Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts." *Id.* art. 87.

46. *See* Memorandum from Jay Bybee, Assistant Attorney General, to Alberto Gonzales, Counsel to the President (Aug. 1, 2002), *in* TORTURE AND TRUTH, *supra* note 44, at 115.

47. Brief for the Respondents at 14, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (No. 03-6696).

48. Military Order of Nov. 13, 2001, *supra* note 25, § 4.

49. *See* Memorandum from Deputy Secretary of Defense England to DOD officials (July 7, 2006) (indicating that the detainees are in fact covered by the Geneva Convention), *available at* http://www.washingtonpost.com/wp-srv/nation/nationalsecurity/genevaconvdoc.pdf.

50. U.S. CONST. art. III.

51. U.S. CONST. amend. VI.

remain silent;[52] 5) a right to appeal to an independent judiciary;[53] and 6) a right to trial by a jury of peers.[54]

This discussion should not be misunderstood as it is not meant to recommend the adoption of these rights in full with respect to individuals detained in the aftermath of 9/11. However, equally important, it should also not be understood as a recommendation that terrorists not be granted certain rights. The dilemma is in determining and implementing the appropriate balance between legitimate national security needs and equally legitimate rights of the individual.

Democratic states cannot afford the luxury of refusing all rights for suspected terrorist detainees.[55] The hybrid paradigm seeks to propose what criminal law rights can be granted to the detainee suspected of terrorist acts, who cannot be treated as a criminal as defined and fully protected by the criminal law process. One basic criminal law right which I propose cannot be applied to the terrorist is the right to confront accusers. Counterterrorism is based on information gleaned from intelligence gathering.[56] Under the criminal law paradigm the prosecution would be required to make intelligence sources available for cross-examination.[57] The overwhelming risk of obligating such sources to appear in front of the suspect is obvious and significant.[58]

Further, applying the criminal law paradigm in full to terrorists would not only require the outing of intelligence sources, but also require prosecutors to submit physical evidence to the court, a task often not possible in the world of counterterrorism intelligence. Conversely, adopting a legal regime whereby the prosecutor *could* submit sensitive

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52. U.S. CONST. amend. V.

53. U.S. CONST. art. III (creating an independent judiciary).

54. U.S. CONST. amend. VI.

55. President Barak, head of the Israeli Supreme Court, expresses this by saying that while terrorists can fight however they want, "a democracy must fight with one hand tied behind its back." Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 148 (2002).

56. Intelligence gathering largely emanates from two sources: HUMINET, which is human intelligence, and SIGNET, which is signal intelligence. Guiora & Page, *supra* note 18, at 428. HUMINET depends on individuals willing to act as sources for a variety of reasons. *Id.* For a fuller description of this, see Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319 (2004) (describing how intelligence information is used).

57. *Id.*

58. *See Statement of Anti-Defamation League and American Jewish Congress B'nai B'rith International, Hadassah, and the Jewish Council for Public Affairs on H.R. 2121—The Secret Evidence Repeal Act Before the House Committee on the Judiciary*, 106th Cong. (2000) (statement of Thomas C. Homburger, Vice Chair of the Anti-Defamation League's National Commission), *available at* http://www.fas.org/sgp/congress/2000/homburger.html.

intelligence without granting the defendant the full right to confront certain witnesses, or evidence, would permit the prosecution to base a case substantially on sensitive intelligence information. Such a practice, as noted by the Supreme Court's criticism of the Mobb's Declaration[59] in *Hamdi*,[60] can be beneficial to the state, but dangerous to the detainee.[61] The critical issue, then, is determining what rights should be included in the hybrid paradigm.

VII. ISRAELI PARADIGM

Thus far this Article has focused on the current situation for detainees in Guantanámo Bay and two existing models to draw from in the development of the proper procedures for the "hybrid paradigm." However, before moving to the recommended set of procedures for this paradigm, it may be useful to explore the procedures of a nation that has had a great deal of experience with counterterrorism. In Israel, there are two separate methods for trying terrorists: criminal trials and administrative hearings.

A. *Trials of Detainees*

The trials take place in one of two venues: either in Israel Defense Force (IDF) military courts[62] or in Israeli civilian courts, with similar rules of criminal procedure and evidence. The IDF military courts should not be confused with a court martial, as a court martial only tries soldiers.[63] Procedurally, the Israeli model differs from the current military commission system in Guantánamo Bay, where judges, prosecutors and

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59. The Mobb's Declaration was a statement supplied by a DOD official, summarizing the intelligence information known to the authorities regarding the activities of a particular defendant. Hamdi v. Rumsfeld, 542 U.S. 507, 512-13 (2004). The material is used in detention hearings. *Id.* In Israel, the classified information presented to the Judge regarding a defendant was previously referred to as "negative security material" and reflected the known intelligence based on HUMINET and SIGNET alike. Amos N. Guiora, *Where are Terrorists to be Tried—A Comparative Analysis of Rights Granted to Suspected Terrorists*, 56 CATH. U. L. REV. (2007) [hereinafter *Where are Terrorists to be Tried*]. The material was used for a variety of criminal law and administrative sanctions. The primary issue is the reliability of the sources and whether the material is corroborated.

60. *Hamdi*, 542 U.S. at 533.

61. *Id.* at 507.

62. *See Where are Terrorists to be Tried*, *supra* note 59 and accompanying text.

63. The overwhelming majority of Palestinians accused of terrorism acts are tried in the Military Court, even if the act was committed in Israel proper (the pre-1967 borders). *Where are Terrorists to be Tried*, *supra* note 59.

defense attorneys are all members of the U.S. armed services Judge Advocate General Corps. In the Israeli system, only the prosecutors and judges are career military officers, but they do not serve in the same unit. Defense counsel are either Palestinian lawyers or Israeli lawyers (Jewish and Arab alike), but never IDF officers.[64] The defendants are Palestinian residents of the West Bank[65] accused of having committed security crimes against Israelis or the State of Israel, or accused of harming Palestinians suspected of collaborating with Israel.[66]

When the accused is not a Palestinian or in otherwise extraordinary circumstances, Israeli civilian courts will hear such trials.[67] The trial process itself is similar to the American criminal system where the defendant is innocent until proven guilty; the state submits a charge sheet and the defendant may admit guilt.[68] Guilty verdicts are based either on the defendant's confession or on witness testimony heard in open court.[69] Classified intelligence information cannot be submitted to a court for purposes of conviction. However, classified information can be the basis both for an initial detention of up to eight days and an extension of such detention. Furthermore, the Israeli legal regime differs from the current Guantánamo Bay military commissions in that it provides a right of appeal to an independent judiciary.[70]

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64. LISA HAJJAR, COURTING CONFLICT, THE ISRAELI MILITARY COURT SYSTEM IN THE WEST BANK AND GAZA 159-60 (2005).

65. Post-disengagement from the Gaza Strip, IDF Military Courts do not have jurisdiction over Palestinian residents of the Gaza Strip.

66. The relevant offenses are codified in a series of laws largely inherited by the IDF from the British Mandate. David A. Kirshbaum, *Israeli Emergency Regulations and the Defense (Emergency) Regulations of 1945*, Israel Law Resource Center, *available at* www.Geocities.com/savepalestinenow/emergencyregs/essays/emergencyregsessay.htm (last visited Aug. 16, 2007).

67. Based on person knowledge and experience of the author while holding senior command positions in the Israel Defense Forces Judge Advocate General Corps, the number of such cases is a mere handful; a prime example was the trial of Marwaan Barghouthi, a Palestinian resident of the West Bank accused of murdering 27 Israelis. Information on Marwan and Ahmed Barghouti, Israel Ministry of Foreign Affairs (Apr. 15, 2002), *available at* http://www.mfa.gov.il/MFA/MFA Archive/2000_2009/2002/4/Information%20on%20Marwan%20and%20Ahmed%20Barghouti%20-%2015-Apr. In a controversial decision, the then Attorney General of the State of Israel, Elyakim Rubenstein decided that for a variety of nonlegal considerations Mr. Barghoutti would be tried in the Tel Aviv district court. *Where are Terrorists to be Tried*, *supra* note 59. Similar to the military court structure, three judges sit in the civilian trials.

68. Similar to large American cities, approximately 90% of defendants plead out.

69. Similar to the U.S. Sixth Amendment Confrontation Clause, which guarantees a right to confront the accuser, open confession or testimony is the essence of the Israeli adversarial system. U.S. CONST. amend. VI.

70. Upon conviction in the civilian court, the defendant may appeal from the magistrate court (lowest level) to district court and then to the Supreme Court. The severity of the original charge

B. *Administrative Hearings for Detainees*

The other regime available in Israel for detaining suspected terrorists is administrative detentions. Should the General Security Services (GSS) determine that the intelligence information cannot be submitted to an open court of law,[71] the individual will be "administratively detained."[72] Additional administrative sanctions include deportations, assigned residence, and house demolitions.[73]

A GSS recommendation that an individual be administratively detained must be approved by the IDF Legal Advisor prior to the West Bank Military Commander signing the detention order.[74] Should the military commander sign the detention order, the affected individual is brought before a military judge, not for a trial,[75] but rather for a review of the intelligence leading to the detention.[76] Lastly, if approved by the judge (rank of Major), then a higher ranking judge (rank of Lt. Col. and Col.) reviews the detention order.[77] Petitions for appeal may be filed against these decisions to the High Court of Justice.[78]

The initial six month detention period is indefinitely renewable.[79] However, each extension period is reviewable by an independent

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determines which court (either the magistrate or district court) initially hears the case. If the defendant is convicted in the military court, the Military Court of Appeals hears the appeal. Such cases may also be brought before the Israeli Supreme Court.

71. This determination would be based either on fear that harm will befall the human source (human intelligence; HUMINET) or on concern that sensitive intelligence gathering methods will be exposed (signal intelligence; SIGNET).

72. Reg. 111 of the Defence (Emergency) Regulation of 1945, as described in Kirshbaum, *supra* note 66. It should be noted that the sanction of administrative detention has been used against both Palestinians and Israeli Jewish extremists alike. Amos Guiora, *Counter-Terrorism and the Rule of Law, Istanbul Conference of Democracy and Global Security* (in press).

73. Reg. 111 of the Defence (Emergency) Regulation of 1945, as described in Kirshbaum, *supra* note 66.

74. The recommended detention cannot exceed six months. *Id.*

75. Neither the detainee nor his attorney has the right to examine the information on which the detention is based. *Id.*

76. During the course of the hearing (based on the author's experience as a judge, prosecutor, and legal advisor with respect to administrative detentions), the judge fulfills a double-role: that of judge and defense attorney (civilian; not military akin to the Military Court regime) alike whose role is, at best, highly minimal.

77. *See supra* note 76.

78. *See supra* note 76. I have sat in on these hearings and decisions of mine have been appealed to the High Court of Justice.

79. Kirshbaum, *supra* note 66.

judiciary.[80] While this may sound as if the legal regime intends to establish a regime of indefinite detention, the multilayered approval process required prior to each detention in conjunction with a complete review every six months creates institutionalized controls.[81]

VIII. RECOMMENDED REVISIONS FOR THE HYBRID PARADIGM

This Article has, thus far, examined the current system of rights and procedures for detainees,[82] examined two traditional paradigms of criminal law and prisoners of war,[83] and discussed current practices in Israel that can serve as a model.[84] The discussion, now, must turn to the proposed rights to be granted to the detainee in the hybrid paradigm.

The hybrid paradigm is philosophically and jurisprudentially founded on the principle that the accused must be brought to some form of trial, but that the American criminal law process is inapplicable to the current conflict. Accordingly, in order to guarantee the suspect *certain* rights and privileges, the hybrid paradigm will be predicated on the following: the use of intelligence information, interrogation methods that do not include torture, the right to appeal to an independent judiciary, the right to counsel of the suspect's own choosing, known terms of imprisonment, and procedures to prevent indefinite detention.

A. *Use of Intelligence Information*

First, the hybrid paradigm must enable the prosecution to introduce intelligence information which the judge would review and use for purposes of deciding guilt or innocence. While intelligence information cannot be the sole basis for the decision, it can be used to strengthen the holding.

This provision is the most severe break from the criminal law paradigm. Unlike the criminal law process, where the prosecutor is obligated to put forth all available evidence, the hybrid paradigm

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80. *See supra* note 76.

81. Human rights organizations have been highly critical of the process described above. *See, e.g.*, Amnesty International, *Israel: Further Information on Fear of Torture and Ill-Treatment/ Detention Without Charge, 'Abel al-Nasser Quzmar*, Sept. 4, 2003; Human Rights Watch, *Background Briefing: Israel's Proposed "Imprisonment of Combatants not Entitled to Prisoner of War Status Law,"* June 2000.

82. *See supra* Parts II-IV.

83. *See supra* Parts V-VI.

84. *See supra* Part VII.

recognizes that in the world of counterterrorism, it is not always possible to do so. However, this standard needs to be restricted whereby the prosecution may not use the intelligence information *unless and until* a judge has determined[85] that presenting the information to the defendant poses a significant threat to national security. Further, if traditional evidence is available and sufficient for the court to order the suspect's continued detention, the state must submit the criminal law evidence, rather than relying on the classified intelligence information.

In the hybrid paradigm, the judge's determination on these questions of admissibility must favor the defendant's rights. Despite Justice O'Connor's unfortunate words in *Hamdi*, where she indicated that "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,"[86] I argue that on the contrary, the Constitution does not contain a rebuttable presumption that favors the state at the expense of a defendant's rights.

B. *Torture*

Secondly, although full Miranda rights need not be extended to the suspect upon his detention, interrogation based on torture is inadmissible.[87] The 1984 Convention Against Torture[88] must be applied when detainees are interrogated as interrogation based on torture is both legally and morally wrong.[89] Given the context in which detainees are held as suspected terrorists, it is permissible for them to be subjected to a more thorough interrogation (as distinguished from torture in a ruling of the Israeli High Court of Justice),[90] provided that the interrogator has reasonable cause to believe the specific detainee either has information which will lead to the arrest of another terrorist or is suspected of having committed an act of terrorism himself.[91]

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85. The judge shall construe all the information in a manner most favorable to the defendant.

86. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2649 (2004).

87. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, *opened for signature* Dec. 10, 1984.

88. *Id.*

89. *See* Guiora & Page, *supra* note 18, at 429.

90. HCJ 5100/94 Public Comm. Against Torture in Israel v. State of Israel & General Sec. Serv. [1999], *available at* http://www.derechos.org/human-rights/mena/doc/torture.html (last visited Aug. 17, 2007).

91. *Id.*

C. *The Right to Appeal*

Third, all judicial decisions must be appealable to a higher court for independent judicial review. A strict interpretation of the Constitution would disallow a system whereby a defendant, who does not know the charges for which he is held, is prohibited from appealing the unlimited detention decision. A right to independent judicial review must be afforded. This not only protects the right of a defendant to appear before a separate and independent judiciary, it also protects the integrity of the system itself.

D. *The Judiciary*

Fourth, the detainee should be tried before three qualified judges instead of a jury; the judges may be either civilian or military. There is a need to establish a domestic terror court in which the trial by "a jury of one's peers" is inapplicable to the detainees, largely because of the introduction of classified, complex intelligence information. The role of this independent judiciary in the process is critical to ensure active review of the state's actions.[92] The November 2001 Presidential Order, which did not provide for independent judicial review at Guantánamo Bay,[93] has been heavily criticized for this deliberate omission.[94] The procedures suggested in this Article would allow for appeal in the U.S. District Courts, U.S. Court of Appeals, and the U.S. Supreme Court.

E. *The Right to Counsel*

The defendant may be denied the right to see an attorney for a limited number of days, but only after a judicial decision, based on the recommendation of interrogators that a meeting between the detainee and his attorney poses a viable security risk. Similarly, the defendant need not

92. *See* Guiora & Page, *supra* note 20, at 51.

93. Military Order of Nov. 13, 2001, *supra* note 25, § 4.

94. *See, e.g.*, Gregory P. Noone & Diana C. Noone, *The Military Commissions—A Possible Strength Giving Way to a Probable Weakness—and the Required Fix*, 36 CASE W. RES. J. INT'L L. 523 (2004); Randolph Moss & Edward Siskel, *The Least Vulnerable Branch: Ensuring the Continuity of the Supreme Court*, 53 CATH. U. L. REV. 1015 (2004); Irma Alicia Cabrera Ramirez, *Unequal Treatment of United States Citizens: Eroding the Constitutional Safeguards*, 33 GOLDEN GATE U.L. REV. 207 (2003); Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004).

agree to be represented by assigned military counsel, rather he can choose to be represented by a civilian attorney only.[95]

F. *Maximum and Minimum Imprisonment Terms*

Sixth, there must be clearly stated terms of imprisonment, which is a critical component of the criminal process, and has not been incorporated into the military commission rules in Guantánamo Bay. In order to facilitate a system whereby a detainee may properly defend himself, he must be made aware of the charges against him and the maximum term of imprisonment. This affords him the ability to better weigh available options in the preparation of his defense.

G. *Indefinite Detention*

Lastly, the defendant cannot be held indefinitely without court order. In order to most effectively balance the suspect's basic rights and the equally legitimate security considerations of the state, the detainee may be held for a period not to exceed five days prior to a judicial hearing in his presence. Continuing detention must be by court order, and only by court order. The extension of remand will be by court order for a finite, renewable, period and this five day period can be extended upon approval by an appellate level judiciary.[96] Should the court deny the state's request for further remand, an appeal could be heard by an appellate court. This process may be repeated for up to one year, so as to comply with the right to a speedy trial in the United States.[97] At the end of one year, the state must either bring charges against the detainee or release him. A petition against this release may then be made by the Attorney General before the U.S. Supreme Court.

Further, the basis for the request to extend the five day detention must be made by the head of the specific interrogation team who has firsthand knowledge of the intelligence information relevant to the particular suspect. The head of the team will be required to sign an affidavit filed

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95. U.S. Department of Defense, Military Commissions, Military Commission Instructions, Military Commission Instruction 5, Qualification of Civilian Defense Counsel, *available at* http://www.defenselink.mil/news/Aug2004/commissions_instructions.html (last visited Oct. 9, 2007). According to the President Order establishing the military commissions, civilian defense counsel must be U.S. citizens, have requisite security classifications and are retained by the defendant at his own cost.

96. The U.S. District Court hearing this request may extend the detention for an additional 15 days.

97. U.S. CONST. amend. VI.

with a court and also, if the Court so orders, testify as to the dangers posed to the nation's security by the suspect. This requirement, though perhaps a burden for the state,[98] will ensure that detainees are not held without cause. The Court, in hearing a petition for extending an administrative detention, should apply strict scrutiny.[99] Both in principle and in reality, this is the only protection offered to the suspect as neither he nor his counsel is entitled to review the intelligence submitted.[100]

IX. CONCLUSION

Given the originally mentioned failures,[101] it is time for the government to establish a system of process and rights for detained individuals. To continue the current course is ultimately a violation of constitutional and of international law. In addition, and perhaps most critically, it is a blight on the moral standards of the United States.

To begin, in order for the government to even consider bringing someone into the hybrid paradigm, the state must have credible intelligence information[102] or criminal evidence strongly indicating that the individual is actively engaged in a terrorist organization.[103] Accordingly, citizens and noncitizens alike who are suspected, based on a "strong indication," of having an involvement in terrorism may be designated "enemy combatants" as defined by the Bush Administration[104] or "detainees" as defined in this Article. Upon such designation, and

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98. Regarding "burden," it is instructive to recall the words of President Aharon Barak of the Israel Supreme Court in *Marab*. HCJ 3239/02 Marab v. IDF Commander in the West Bank [2002]. The Court commented that bureaucratic consideration encountered by the State is not a mitigating circumstance enabling the State to deny detainee's basic rights even (perhaps particularly) in the context of armed conflict. *Id.*

99. *See* President Barak's statement in *Ajuri* that "'security of the State' is not a 'magic word' that prevents judicial review," and O'Connor's assertion in *Hamdi* that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." HCJ 7015/02 Ajuri v. IDF Commander in West Bank at 375 [2002]; Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2650 (2004).

100. For a description of the administrative detention process in place in Israel, please see Amos N. Guiora, *Counter-Terrorism and the Rule of Law*, Istanbul Conference on Democracy and Global Security (in press).

101. *See supra* note 6.

102. For a discussion of intelligence information, see Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319 (2004).

103. Actively engaged shall be defined as follows: participating in the planning of an attack, providing harbor to those committing the attack, ensuring the availability of financial resources, providing significant logistical support or actually performing the act.

104. *See supra* note 28.

subsequent to detention, the individual shall then be subject to the seven-part process recommended above.

The hybrid paradigm seeks to balance competing interests present in any national security situation. Trial by a civilian court, with special rules and appeal to a regularly functioning civilian court of appeals,[105] represents a balanced approach focusing on the rights and needs of both the detainee and the government. In contrast to the system established by the Bush Administration in the wake of 9/11,[106] the model suggested in this Article represents important guarantees that should be afforded to those suspected of having committed acts of terrorism balanced against the national security needs of society.

Further, the various terms applied to this new category must be streamlined. It is critical for society to define who the enemy is. Accordingly, this new paradigm, which is indeed a mixture of multiple systems, should be called the "hybrid paradigm" and apply to detainees.

This model, which draws from the criminal law and prisoner of war paradigms should be the model for the future since the two other models are inapplicable to and inappropriate for terrorism. Terrorism is neither a criminal act nor warfare. Terrorists are enemy combatants who must be granted some rights in the context of a judicial system. Although they should not be granted full rights, a democratic society cannot afford to deny detainees all rights. The model suggested in this Article reflects that reality, protecting national security while also protecting the rights of the individual.

105. In *Milligan* the Supreme Court held against the establishment of military commissions as the civilian courts in the State of Indiana were open and functioning and, therefore, according to the Court, there was neither need nor justification for military commissions. *Ex Parte* Milligan, 71 U.S. 2, 127 (1866).

106. *See supra* note 25.