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Terrorism and the New Criminal Process

John Parry

Abstract

Executive and legislative actions after 9/11 demonstrate a shift in the way the federal government combats terrorism. Traditional law enforcement entities have been given new powers, and military and intelligence personnel have taken on a new prominence. Criminal prosecutions are still being brought against persons suspected of terrorist activity, but the government seems less willing to accord criminal trials a central role in anti-terror efforts. In short, we are seeing the creation of a “new criminal process” for terrorism, a process that in many cases bypasses federal courts and operates wholly outside the territorial boundaries of the United States.

All of these actions, moreover, react to the perceived emergency created by the 9/11 attacks. Government officials have argued that a state of emergency exists and – critically – that it is unclear when the emergency will end. Other public figures and the media have largely agreed. “Everything has changed” has become the common theme, and the new criminal process provides a legal ratification of that change – a legal structure for a state of emergency.

This essay considers the new criminal process and the perception of emergency out of which it grows from a variety of angles. Although I think the federal government has shifted too far in favor of military and other solutions to terrorism at the expense of traditional criminal processes, my position rests upon a chain of reasoning and a baseline that the new criminal process contests. That deeper contest and its implications are the focus of this essay. To that end, I describe the attributes for the new criminal process, and provide the arguments for and against the traditional and new criminal processes. I also consider the legality of the new criminal process and conclude that it comports with constitutional norms (which may say more about the malleability of constitutional norms than anything else).

The underlying assertion of this essay is that the new criminal process may not be so new. Rather, it may be the latest step in a broad shift in our approach to governing, where pervasive authority is increasingly valued over the constraints of law. This change brings with it modification and dilution of rights, but also the possibility of their expansion within the context of also-expanded state power. Nor is this change occurring without justification. Terrorism is a real policy issue, and rational, liberal-minded people support increased state power to counter the threat. Be that as it may, the critical point is that we are experiencing the modification of the processes by which our government investigates and imposes punishment on people, and the fact that some of these processes arise in the context of the war on terror means, not that those processes are about fighting terrorism, but rather that those processes – the new criminal process – inevitably will and have already begun to generalize.

Terrorism and the New Criminal Process

*John T. Parry**

I. STRUCTURING A STATE OF EMERGENCY

On November 13, 2001 – just over two months after the September 11 attacks – President George W. Bush issued an executive order that authorized the detention and trial of non-citizens “at an appropriate location designated by the Secretary of Defense outside or within the United States” if “there is reason to believe that such individual” (1) was a member of al-Qaeda, (2) had engaged in or aided acts of international terrorism intended to cause “injury or adverse effects on the United States, its citizens, national security, foreign policy, or economy,” or (3) had harbored someone in the first two categories.¹

Under the authority of the November 13 order, the government began to use the Guantanamo Bay naval base, as well as other locations inside and outside the U.S., to house individuals detained during military and intelligence operations in Afghanistan and other places. Lawyers at the White House, the Justice Department, the State Department, and the Defense Department drafted and debated a series of legal memoranda on the application to these detainees of the Geneva Conventions, other sources of international law, and domestic constitutional and statutory law. Ultimately, the President concluded the Geneva Conventions did not apply to members of al-Qaeda, the Taliban, and suspected “terrorists,” but he directed that all persons detained by U.S. armed forces be treated “humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.”²

With respect to interrogations, administration officials concluded

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¹ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001), reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 25 (Karen J. Greenberg and Joshua L. Dratel eds. 2005).

² Memorandum for the Vice President, et al. (Feb. 7, 2002), reprinted in *THE TORTURE PAPERS*, *supra* note __, at 134.

that international and domestic law places few constraints on the aggressive interrogation of suspected terrorists. The Convention Against Torture and a federal statute prohibit torture – defined as the intentional infliction of severe mental or physical pain or suffering – and international law also prohibits cruel, inhuman, or degrading treatment or punishment. In addition, the Constitution limits the government’s ability to use violence, as with the Supreme Court’s interpretation of the due process clauses to prevent state action that “shocks the conscience.”³ In August 2002, the Justice Department’s Office of Legal Counsel (OLC) concluded that these prohibitions permit interrogation that is not specifically intended to cause severe pain and that “severe pain” for purposes of the ban on torture means only pain of a level “that would ordinarily be associated with a sufficiently serious condition or injury such as death, organ failure, or serious impairment of bodily functions.”⁴ On December 30, 2004, OLC issued a new memorandum that repudiated the definition of severe pain in the August memorandum in favor of a definition that looks to whether the underlying conduct is “extreme and outrageous.”⁵

For its part, the Defense Department convened a “working group on detainee interrogations” in response to the President’s orders and requests from commanders in the field. The working group reviewed the law of interrogation and proposed a list of 35 acceptable interrogation techniques that could be used on detainees held outside the U.S.⁶ Secretary of Defense

³ For a description and assessment of the strength of the international law and constitutional protections against torture and other cruel, inhuman or degrading treatment or punishment, see John T. Parry, “*Just for Fun*”: *Understanding Torture and Understanding Abu Ghraib*, 1 J. NAT’L SEC. L & POL. ____ (forthcoming 2005).

⁴ Office of Legal Counsel, Memorandum for Alberto R. Gonzalez, Counsel to the President, Re: Standards of Conduct for Interrogations under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), reprinted in THE TORTURE PAPERS, *supra* note __, at 172; Letter from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to The Honorable Alberto R. Gonzales (Aug. 1, 2002), reprinted in THE TORTURE PAPERS, *supra* note __, at 218. For the argument that traditional criminal law principles would allow executive officials to raise a necessity defense if prosecuted for the illegal use of coercive interrogation, see John T. Parry and Welsh S. White, *Interrogating Suspected Terrorists: Should Torture be an Option?*, 63 U. PITT. L. REV. 743 (2002). For arguments that nearly all interrogation is coercive, that is it not easily disentangled from other forms of state coercion and state violence, and that state violence is simply part of what modern nation states – including the U.S. – do, see Parry, *Just for Fun*, *supra* note __.

⁵ Office of Legal Counsel, Memorandum for James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004).

⁶ Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (Apr. 4, 2003), reprinted in THE TORTURE PAPERS, *supra* note __, at 286.



Donald Rumsfeld ultimately authorized 24 of those techniques (generally the least severe) for use at Guantanamo Bay, with the proviso that 4 of them could only be used in cases of “military necessity” but that he might approve additional techniques on written request in individual cases.⁷ The techniques used at Guantanamo migrated to Afghanistan and Iraq and mingled with aggressive methods adopted by troops on the ground as commanders shared information and interrogators moved from one location to another.⁸

Responding to the President’s order on trying non-citizens suspected of terrorism, the Defense Department also issued a series of “Military Commission Instructions” that defined both the procedures to be used by military tribunals and the crimes triable before them.⁹ Among other things, the rules provide that evidence may be admitted if it “would have probative value to a reasonable person” – a departure from the more exacting standards of the Federal Rules of Evidence.¹⁰ The rule also seems to suggest that evidence obtained through coercive interrogation may be used, subject to any constraints imposed by federal courts in subsequent habeas corpus proceedings to the extent such proceedings are available.¹¹ As of the date of this essay, several persons have been designated for trial before the commissions and counsel have been assigned to some of them, but no trials

⁷ Donald Rumsfeld, Memorandum for the Commander, U.S. Southern Command (Apr. 16, 2003), reprinted in THE TORTURE PAPERS, *supra* note __, at 360.

⁸ Final report of the Independent Panel to Review DoD Detention Operations (Aug. 2004), reprinted in THE TORTURE PAPERS, *supra* note __, at 908, 923-26.

⁹ 32 C.F.R. parts 9-14. For draft and final versions of the military commission instructions and related documents, see National Institute of Military Justice, *Military Commission Instructions Sourcebook* (2003-04). The National Institute of Military Justice website has extensive and frequently updated resources on military commissions. See <http://www.nimj.com/Home.asp>.

¹⁰ 32 C.F.R. § 9.6(d)(1).

¹¹ The regulations say nothing about review by federal courts and instead provide that appeals will go to the President or Secretary of Defense for a “final decision” (32 C.F.R. § 9.6(h)(6)). Former White House Counsel and current Attorney General Alberto Gonzales stated that habeas would be available “for any defendant with a U.S. nexus” – that is, those arrested, detained, or tried in the U.S. Vernon Loeb and Susan Schmidt, *U.S. Wants Enemy Leaders Turned Over if Captured*, WASH. POST, Dec. 2, 2001, A22. The Supreme Court’s decision in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), however, appears to hold that federal courts have habeas corpus jurisdiction so long as they have jurisdiction over a prisoner’s custodians. In dissent, Justice Scalia asserted that this holding “permits an alien captured in a foreign theater of active combat to bring a [habeas] petition against the Secretary of Defense,” *id.* at 2706, and one can legitimately wonder whether the Court really meant to create such a sweeping right of access to federal courts and what the scope of review in such cases would be.

have taken place. Instead, debate continues within the administration over the rights of detainees and whether the current military commission rules are appropriate.¹²

In addition, the administration expanded the use of already existing practices. First, prosecutors have enforced relatively minor provisions of the immigration laws more strictly in order to detain, interrogate, and ultimately remove illegal immigrants deemed suspicious – usually Muslims or people of Arab ethnicity.¹³ Second, prosecutors have used the federal material witness statute to arrest and imprison suspicious individuals who may have information relevant to grand jury investigations into terrorist activity.¹⁴

Third, the administration expanded the already existing practice of “rendition” – the informal transfer of a person from one country to another for purposes of trial or interrogation. Although federal immigration and international extradition statutes govern executive efforts to move aliens and citizens from the United States to another country, those statutes do not apply to the efforts of U.S. officials overseas to transfer or encourage the transfer of a person from one foreign country to another foreign country. News reports have also suggested that suspected terrorists were “rendered” to countries that would use torture or other cruel, inhuman or degrading interrogation techniques that U.S. officials were unwilling to use directly.¹⁵

Finally, the CIA has apparently detained and interrogated suspected terrorists and other persons outside the United States, independent from the military or domestic law enforcement.¹⁶ The CIA is not specifically

¹² Tim Golden, *U.S. Drafts Plan to Strengthen Detainees Rights*, N.Y. TIMES, Mar. 27, 2005, A1; Tim Golden, *Administration Officials Split Over Stalled Military Tribunals*, N.Y. TIMES, Oct. 25, 2004.

¹³ See, e.g., Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576-80 (2002) (describing some of these initiatives).

¹⁴ See Ricardo J. Bascuas, *The Unconstitutionality of ‘Hold Until Cleared’: Reexamining the Material Witness Detentions in the Wake of the September 11th Dragnet*, __ VAND. L. REV. __ (2005).

¹⁵ For discussion of these issues, see John T. Parry, *The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees*, 6 MELBOURNE J. INT’L L. __ (forthcoming 2005). See also Committee on International Human Rights of the Association of the Bar of the City of New York and the Center for Human Rights and Global Justice, New York University School of Law, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* (2004).

¹⁶ See Parry, *The Shape of Modern Torture*, *supra* note __. See also Michael Hirsh, et al., *Aboard Air CIA*, MSNBC.COM, Apr. 6, 2005, available at <http://www.msnbc.msn.com/id/6999272/site/newsweek/>; Josh White, *Army Documents*



included in President Bush's "humane treatment" directive, and OLC's August 2002 memorandum is widely viewed as intended to give the CIA considerable room to choose among potential interrogation tactics and practices for these "ghost detainees." A footnote in the December 30, 2004 OLC opinion indicates that OLC has prepared other memoranda on interrogation that have not been made public and that the conclusions in those memoranda remain valid.¹⁷ Put plainly, it appears reasonable to conclude that the CIA is operating a parallel detention system, that coercive interrogation is part of that system, and that the existence of this system and the use of these techniques has been validated by classified legal memoranda and policy decisions.

Although it has conducted little oversight of the administration's actions, Congress has not been idle. On September 18, 2001, Congress passed an Authorization for Use of Military Force (AUMF) that empowered the president "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."¹⁸

On October 26, 2001, the USA PATRIOT Act became law.¹⁹ The PATRIOT Act expands the powers of law enforcement officials to investigate criminal activity, whether or not that activity is defined as "terrorist" or not. Among other things, the provisions of the Act

loosen the restrictions on the government's use of electronic surveillance, loosen the secrecy that attaches to grand jury deliberations, add to its authority to address money laundering, give it additional procedural power in certain

Shed Light on CIA 'Ghosting,' WASH. POST, March 24, 2005, A15; Human Rights Watch, *The United States' Disappeared: The CIA's Long-Term 'Ghost Detainees'* (Oct. 2004).

¹⁷ Memorandum for James B. Comey, *supra* note __, at 2 n. 8 ("we have reviewed this office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum"). For a comprehensive analysis of the December 30, 2004 OLC memorandum, with particular attention to the CIA, see Martin Lederman, "Understanding the OLC Torture Memos," available at <http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part-i.html>.

¹⁸ Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

¹⁹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001).



kinds if immigration matters, and facilitate cooperation between government agents focused on intelligence gathering and those whose goal is arrest and prosecution.²⁰

Several of the Act's provisions expire on December 31, 2005, and debate is underway on the administration's efforts to renew or make permanent many of those powers.

The Homeland Security Act became law on November 25, 2002. Part of the Act abolishes the Immigration and Naturalization Service and replaces it with a Bureau of Citizenship and Immigration Services within the new Department of Homeland Security.²¹ The goal is to increase cooperation between the immigration bureaucracy and other agencies such as the Customs Service and Border Patrol in order to enhance the government's ability to secure borders and prevent the entry of terrorists into the country. In 2004, Congress passed the Intelligence Reform and Terrorism Prevention Act, which created a Director of National Intelligence, made some provisions of the USA PATRIOT Act permanent, and generally sought to increase the tools available to law enforcement and the level of cooperation among the various entities engaged in anti-crime and anti-terror activities.²²

These statutes join an array of already-existing legislation designed to combat – and, for that matter, define – “terrorism” and other emergencies.²³ Worth noting, as well, is that Congress has rejected some of

²⁰ NORMAN ABRAMS, *ANTI-TERRORISM AND CRIMINAL ENFORCEMENT* 10 (2nd ed. 2005).

²¹ Pub. L. No. 107-296, ___ Stat. ___ (2002).

²² Pub. L. No. 108-458, ___ Stat. ___ (2004). For a good summary of the Act, see ABRAMS, *supra* note __, at 33-39.

²³ Significant earlier emergency legislation includes the National Emergencies Act of 1976, 50 U.S.C. § 1601, the International Emergency Economic Powers Act, 50 U.S.C. § 1702, and the Non-Detention Act of 1971, 18 U.S.C. 4001(a) (preventing imprisonment or detention of citizens “except pursuant to an Act of Congress”). Other statutes abound. According to one study, by 1974 there were 470 statutes providing some kind of emergency authority. Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1408 (1989). For additional recent legislation that has created “an alternate system of justice” for terrorism, see Oren Gross, *Chaos and Rules*, 112 YALE L.J. ___, 1017-18 (2003). For a list of federal anti-terror legislation, see ABRAMS, *supra* note __, at 7-8. On the problem of defining “terrorism,” see Alex P. Schmid, *The Response Problem as a Definition Problem*, in WESTERN RESPONSES TO TERRORISM 7-13 (Alex P. Schmid & Ronald D. Crelinsten eds. 1993), and *A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges, and Change* 48-49 (Dec. 2004), available at <http://www.un.org/secureworld/report.pdf>. The definitional problem reflects a more serious theoretical problem with the idea of terrorism to the extent it is conceived of – as it necessarily is in this context – as violence against hegemonic modern states or their allies that themselves employ violence and other forms of power on a global scale. I seek

the administration's proposals for greater executive authority and may pull back further in years to come. My narrative here, in other words, should not be mistaken as simply a story about greater executive power.

Taken together, these executive and legislative actions demonstrate a shift in the way the federal government combats terrorism. Traditional law enforcement entities have been given new powers that have long been on the government's wish list, both for anti-terror and for ordinary law enforcement purposes. Military and intelligence personnel have taken on a new prominence. Criminal prosecutions are still being brought against persons suspected of terrorist activity, but the government seems less willing to accord criminal trials a central role in anti-terror efforts. In short, the events of 9/11 crystallized a "new criminal process" for terrorism, a process that in many cases bypasses federal courts and operates wholly outside the territorial boundaries of the United States.

All of these actions, moreover, react to the perceived emergency created by the 9/11 attacks. Government officials have argued that a state of emergency exists and – critically – that it is unclear when the emergency will end. Other public figures and the media have largely agreed. "Everything has changed" has become the common theme, and the new criminal process provides a legal ratification of that change – a legal structure, that is, for a state of emergency. But a perception of emergency should not be equated with panic. Many of the components of the new criminal process were carefully thought out, and the executive branch has not simply assumed or been given martial law-like powers. Instead, the new criminal process is a deliberate, sturdy, and evolving construct for what are arguably exceptional times.

This essay considers the new criminal process and the perception of emergency out of which it grows from a variety of angles. My view is that the federal government has shifted too far in favor of military and other solutions to terrorism at the expense of traditional criminal processes. Terrorism is more than aggravated crime, but traditional processes should remain the presumption because they are more familiar, fairer, better supported by developed legal doctrine, and more in accord with separation

to sidestep these issues for purposes of this essay, primarily by taking seriously and assessing on their terms the claims that U.S. officials are making about terrorism. I also put to one side the claim that terrorism can be justified. On a purely theoretical level, it surely can be. But the justification inquiry is inevitably the product of contestable value choices, and I cannot imagine a U.S. court or jury that would accept a necessity claim in an actual case and thereby validate the choices that led to terrorism. See John T. Parry, *Collective and Individual Responsibility for Acts of Terrorism*, in *UNDERSTANDING EVIL: AN INTERDISCIPLINARY APPROACH* 109-10 (Margaret Sönser Breen ed. 2003).

of powers values. I also see traditional criminal processes as part of a more restrained model for responding to the risk of terrorism we are likely to experience for the foreseeable future. That said, my views rest upon a chain of reasoning and a baseline that the new criminal process contests, and that deeper contest and its implications – rather than simple normative claims – are the focus of this essay.

II. WAR, CRIME, AND CHANGE

Choosing between traditional and new criminal processes maps to the post-9/11 dichotomy of war versus crime as the model for addressing terrorism.²⁴ The Bush administration has argued, not just that we face an emergency situation, but that we are in a war, from which it follows that we are entitled to – and perhaps even should – use different rules than we would in peacetime. Others deny that we are at war, and they claim the traditional criminal process can handle terrorism.²⁵

In deciding between different forms of criminal process, and in particular between criminal trials and military tribunals, the baseline – as I already suggested – is critical. Beliefs that military tribunals are as familiar and legitimate as criminal trials or that terrorism investigations and trials raise unique issues could lead a fair-minded observer to conclude that the new process provides the best option. Similarly, a belief that counter-terrorism efforts amount to a war could lead one to accept detention without

²⁴ For discussions of this dichotomy, see Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. _____, 1032-37 (2004), and PHILIP B. HEYMANN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* 20-22 (2003). For a very useful collection of essays that explore the constitutional consequences of war, including the balance between liberty and security, see *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* (Mark Tushnet ed. 2004). One of the essays suggests the development of new criminal processes is a common and not surprising response to insurgency and terrorism. See Samuel Issacharoff and Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, in *id.* at 161. Whether the new processes in other countries share the characteristics and implications that I suggest have emerged in the U.S. is a question beyond the scope of this essay.

²⁵ Some commentators have suggested international courts could play a variety of important roles. See, for example, Laura Dickinson's persuasive article, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407 (2002). Yet the possibility of the U.S. choosing international tribunals is unlikely enough – in part because of death penalty issues – that I will assume the only options are domestic courts or military tribunals. The U.S. likely would turn to such a tribunal – assuming one were available (the International Criminal Court does not have jurisdiction over terrorism per se, see Rome Statute of the International Criminal Court, arts. 5-8) – only if another country refused to extradite a terrorist suspect to the U.S. and instead insisted on international process.

trial of suspects (for war purposes, relabeled “detainees” or “enemy combatants”) for the duration of the conflict.²⁶ By contrast, beliefs that prosecutions for criminal activity should take place in ordinary criminal courts and that terrorism is often just an aggravated form of criminal activity will likely lead to the conclusion that we should lean heavily on traditional process and avoid military detention and military commissions.

Another baseline is also important. Consider the claims that everything changed after 9/11 and we now live in exceptional times. An easy response to this assertion is simply to deny it. Of course, this response admits, some things have changed since 9/11. The shock of the attacks forced the problem of terrorism into the center of the national agenda and ensured that changes would be made in our strategies for fighting it. But, as Bruce Ackerman argues, although al Qaeda’s terrorist campaign is destabilizing as well as deadly, it does not threaten the existence of the United States or the functioning of our constitutional system.²⁷ Much remains the same, and daily life for the vast majority of us goes on as before. Although we may think we are in danger, that perception derives from the ratings-driven media drumbeat of panic and not from anything tangible. At most, life has changed for those who have friends or family members in the armed forces.²⁸ If all of this is true, then the various actions I listed at the beginning of this essay are a series of overreactions.

Yet perceptions matter. Our lives have surely changed if we are more afraid, even if many of our daily routines have stayed the same. After 9/11, many Americans felt both less free and less secure. The belief that our geographic isolation made us invulnerable to attack was broken. The aspect of our nationalism that posits the U.S. as a progressive force in the world was shaken by the concretization of what for many of us had been at most a hazy abstraction – that the U.S. is hated by many people in many parts of the world. (Although both beliefs were in some sense also reinforced by the attacks to the extent they are seen as an aberration and as

²⁶ On the significance of using the word “detainee” instead of “prisoner” in terms of what it conveys about the legal rights, or lack thereof, of the person in custody, see JUDITH BUTLER, *PRECARIOUS LIFE* 64 (2004).

²⁷ Ackerman, *supra* note __, at 1040.

²⁸ Of course, the wars in Afghanistan and Iraq are part of what has changed since 9/11, so that this response perhaps can be faulted for not counting those whose lives have been changed by those wars. But that riposte requires an explanation of how the invasion of Iraq, at least, supports the fight against terrorism – an explanation that can certainly be made, but not, I suspect, with arguments that many supporters of the war would publicly embrace. (In any event, both sides in this debate would have to admit that a connection with terrorism existed once the U.S. began the war, because the war itself became an additional grievance against the U.S. among certain populations.)

an effort to stop progress.) Many of us, as a result, were and remain quite willing to give up civil liberties if that somewhat vague sacrifice would restore security and everyday freedom. Similarly, we support military action if it will prevent those who hate us from attacking us.

I do not seek to resolve this specific debate. Nor, for that matter, do I seek to define a proper balance between liberty and security in response to terror. My goal, rather, is to describe and analyze the new criminal process in relation to traditional processes. What is important, therefore, in my schematic account of the debate over post-9/11 change is the identification of diverging lines of thought that support, respectively, the traditional and new criminal processes. Both are defensible; neither can be entirely proven or falsified absent some contestable value judgment or baseline.

III. CRIMINAL PROCESSES, OLD AND NEW

A. *The Case for Tradition*

Under the traditional view, investigation with the goal of proving criminal charges in an ordinary criminal court is presumptively the appropriate way to assess the responsibility of and assign punishment to people who have carried out, attempted to carry out, or conspired to carry out a terrorist attack in the United States.²⁹ Before 9/11, the United States conducted several successful trials of accused terrorists, including the trial of the first World Trade Center bombers. Suspected terrorists or persons with links to them continue to be prosecuted in U.S. courts, and the failure of some investigations and prosecutions (such as that of Brandon Mayfield in Oregon) can be seen as evidence that the traditional approach is an effective, time-tested way of making sure that innocents are not swept up in the anti-terror campaign (because errors are more easily detected).

Supporters of traditional process can point to several desirable features. First, the familiarity of criminal trials gives them an aura of legitimacy. The constitutional and other procedural rules for the conduct of criminal trials are well-developed and easily applied, and the substantive rules of federal criminal law are grounded in a large body of statutes and caselaw. The power of this advantage is qualified, however, in the context of terrorism, at least when coupled with military action, because the military justice system has expertise with applying the laws of war – expertise that will come into play in the context of military commissions as well – while

²⁹ For a good example of the claim that traditional criminal processes, slightly modified, are well-suited to dealing with terrorism, see HEYMAN, *supra* note __. For good discussions of the reasons for and against using military tribunals or ordinary courts for the trial of terrorists, see *Agora: Military Commissions*, 96 AM. J. INT'L L. 320 (2002), especially the contributions by Ruth Wedgwood and Harold Koh.

some of the federal criminal statutes dealing with terrorism have received little interpretation.

Traditional processes accord familiar rights to the subjects of investigations. Searches generally require reasonably precise warrants, and suspects or witnesses cannot be compelled to incriminate themselves.³⁰ Evidence obtained in violation of these rules will usually be excluded at trial. Due process also protects against other “conscience shocking” conduct.³¹ By contrast, current rules for counter-terror activities and military commissions provide few of these protections.

Once charged, a defendant has a broad right to counsel of his or her choosing,³² whereas defendants before military proceedings will be assigned a military lawyer. This disparity is not as great as it might first appear, however, because the formal right to counsel of one’s choice in federal court is often limited by the inability of many defendants to pay for anything other than an often overburdened court-appointed lawyer. For their part, military lawyers are ethically bound and fully able to represent their clients zealously, and defendants before a military tribunal have a qualified right to obtain civilian counsel – although the Defense Department has placed greater restrictions on counsel than exist for the ordinary military justice system or for terrorism trials in federal court.³³

In addition, the Federal Rules of Evidence draw upon long experience with problems of proof to provide a framework for advocacy that largely focuses on the most reliable evidence. The Classified Information Procedures Act adds a method for addressing the government’s concerns about disclosing sensitive information.³⁴ Defendants in a criminal trial may invoke the aid of the court to obtain documents or the testimony of witnesses, and prosecutors are required to disclose exculpatory evidence.³⁵

³⁰ See U.S. CONST. amds. IV & V; *Missouri v. Siebert*, 542 U.S. 600 (2004); *Groh v. Ramirez*, 540 U.S. 551 (2004).

³¹ See *Rochin v. California*, 342 U.S. 165 (1952).

³² See U.S. CONST. amdt. VI.

³³ Civilian counsel must be U.S. citizens, members of a domestic bar, and have a security clearance. See 32 C.F.R. § 9.4(c). Defense counsel are obligated to reveal confidences under certain circumstances that go beyond the traditional crime/fraud exception to the attorney-client privilege, and attorney-client communications are subject to monitoring “for security or intelligence purposes.” Civilian counsel can be prevented from seeing all of the evidence at trial if security concerns justify restrictions on access. 32 C.F.R. pts. 13 & 14; Human Rights First, *Trials Under Military Order: A Guide to the Final Rules for Military Commissions* (Oct. 2004).

³⁴ 18 U.S.C. App. 3.

³⁵ See Fed. R. Crim. P. 16; *Brady v. Maryland*, 373 U.S. 83 (1963).

Military commissions are not obligated to provide the same assistance. Criminal proceedings in federal court are almost always open to the public, which allows the press to monitor them and report on unusual or dramatic events. The decisionmakers at trial and on appeal are independent, acquittals are final, and the appellate process provides rigorous review. By contrast, the members of military commissions and review panels are appointed officials within the command hierarchy of the U.S. military, and acquittals are apparently subject to review on the same terms as convictions.³⁶ Defendants in federal court have a right to a speedy trial,³⁷ and acquittal usually means that they will be freed. By contrast, the combination of detention and military commissions may translate into no trial or a trial after several years in custody, and acquittal may not lead to release if executive officials decide it is important to continue holding a person (and if habeas review is unavailable or limited on the merits).

Importantly, traditional processes need not be static. The federal courts draw on a common law tradition that takes as a fundamental premise the need for law to adapt to changing circumstances. Consistent with evolving constitutional norms, law enforcement agencies and courts can experiment with procedural mechanisms, particularly if those experiments would maintain the primacy of core traditional processes (although the degree of permissible experimentation is a topic of fierce debate).

These characteristics of the criminal process and trial resonate with history and with ideas of due process to form a system that is widely perceived as fair in the aggregate. The perception of fairness also derives from the separation of powers. Life-tenured judges and the requirement of jury trial are examples of separation of powers at work in the traditional criminal trial, and they provide a counterweight to executive power.³⁸ Significantly, this familiar model of separated power goes beyond control of power at the highest levels and beyond providing counterweights in the machinery of law-making, law enforcement, and legal interpretation. Separation of powers is also and at least as importantly about fragmenting the government's ability to exercise power over individual lives and preventing total control over their bodies, minds, and circumstances. Robert Cover accurately observed that "Legal interpretation takes place in a field of pain and death," but separation of powers may lower the body

³⁶ 32 C.F.R. § 9.6(h)(3).

³⁷ See U.S. CONST., amdt. VI; 18 U.S.C. § 3161, *et seq.*

³⁸ For elaboration of this claim with respect to juries, see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 81-119 (1998).

count.³⁹

Military commissions or tribunals, by contrast, were not used for trying al Qaeda-style terrorists before 9/11, and the lack of precedents and processes that have evolved over time may hamper their effectiveness, at least in the initial stages. Moreover, to the extent they remain extraordinary courts, infrequently used compared to the routine of the traditional process, the risk exists that they will be unable to develop into efficient, reliable, and just institutions.

B. The Case for the New Criminal Process

Whatever the merits of the traditional investigative and trial processes, they have never been the only option. The military justice system, for example, provides a separate investigatory and prosecutorial system. So, too, a long history of creating and using special military tribunals supports their legitimacy in at least some circumstances.⁴⁰ Finally, counter-terror activities – at least those with international overtones – have never been the sole province of traditional, domestic law enforcement and criminal courts.

The primary advantage of the new criminal process is its flexibility and efficiency. To the extent constitutional and statutory rules do not apply or apply more leniently, executive officials have more discretion to craft strategies that adapt to the specific needs of a particular investigation or other activity. Suspects can be held, and officials can decide to interrogate, or not, to bring charges, or not, bound by only mild time constraints. Similarly, the precise characteristics of military commissions are a moving target, because the executive branch can modify their procedures to take account of particular circumstances. Although Congress has authorized military tribunals in the past, it has not overseen them to the same extent that it has overseen the workings of the federal courts. For example, military commissions apparently need not comply with the provisions of the Uniform Code of Military Justice, and perhaps not even with the Geneva Conventions.⁴¹ The result is a degree of flexibility not enjoyed by police, regular prosecutors, or federal courts.

³⁹ Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986), reprinted in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 203 (Martha Minow et al. eds. 1995).

⁴⁰ Curtis Bradley & Jack Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2ND ___, 250-52 (2002).

⁴¹ *Hamdan v. Rumsfeld*, 415 F.3d 33, 38-43 (D.C. Cir. 2005). For a contrary view with respect to the applicability of the laws of war, see Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2661-61 (2005).

Another advantage of military commissions from the executive branch's perspective is greater control over public access, so that defendants have less opportunity to use the trial as a public forum and classified evidence may be presented more easily.⁴² Further, because the Federal Rules of Evidence need not apply to military tribunals, relaxed standards of relevance and admissibility are available. To some observers, relaxation of traditional rules is a common-sense step toward realistic standards of evidence, while others would highlight the risks of using prejudicial, inaccurate, or misleading evidence – particularly when the information was obtained by coercion and presented at secret proceedings.

Military commissions do away with the need for a randomly selected jury which must be protected from threats or retaliation – a particularly serious issue in the terrorism context – even as it must be educated about the issues in the trial. The decisionmakers on a military commission will usually be officers in the armed forces and thus may be more capable and better prepared for trial than the average juror, but their independence will be suspect because they will have been selected by and will be a part of the executive branch. Time-consuming court appeals can be avoided by providing for administrative or executive review, with the possibility of habeas proceedings, if necessary. The existence of some review provides a check against unfair proceedings and inaccurate results, although the lack of significant independent review creates the possibility that errors will go undetected or uncorrected.

Military tribunals also have another advantage: they are not bound by the federal criminal code. The subject matter jurisdiction of the current military commissions, for example, extends to “violations of the laws of war” and related offenses.⁴³ The Department of Defense has prepared regulations that codify several crimes purportedly drawn from the law of war or armed conflict. The definitions of the various offenses are careful and reasonable, but they depart from ordinary federal criminal law. For example, the definition of conspiracy incorporates an idea of “common criminal purpose” that may go beyond federal conspiracy law. When combined with relatively generous notions of command responsibility, definitions like this give the government broader and higher reach within terrorist groups by increasing the chances of convicting higher level

⁴² For example, the current military commission regulations provide for secrecy. 32 C.F.R. § 9.6(b)(3).

⁴³ *Id.*, §§ 9.3(b), 11.3(a).



members and members who were not involved in a particular attack.⁴⁴ The risk, of course, is that broad definitions of crime will shade into guilt by association.

Somewhat more abstractly, the new criminal process allows greater control over the present circumstances and ultimate fate of the defendant. Detention, coercive interrogation, and military trial form an overall approach that treats the suspected terrorist as a person over whose body and circumstances the government should exercise total and exclusive control. To many, this will seem a patently illegitimate goal, but if the magnitude of the threat of terrorism is great, one could argue that such an approach is justified, although perhaps only as a temporary measure.

Finally, the new criminal process serves a domestic political function. Terrorism can cause panic and uncertainty that have wide impacts, and elected leaders may respond by seeking to project an image of resoluteness and reassurance. Forceful, sweeping action – that is, a new level of state violence that is central to the new criminal process – is one way to achieve this goal. Arguably, this approach is consistent with the separation of powers because it falls within executive authority to defend the nation against attack. The risks of this approach are something I will discuss in the last section of this essay.

IV. LEGAL CONSTRAINTS ON THE NEW CRIMINAL PROCESS

One might think the Constitution stands in the way of the new criminal process, but for several reasons that expectation would be inaccurate. First, some of the provisions of the USA PATRIOT Act expand law enforcement authority to gain information that is not protected by constitutional privacy protections.⁴⁵ Similarly, enforcing existing immigration laws may generate harsh results but this enforcement is hardly unconstitutional. Second, much of the new criminal process is implemented overseas, and the Supreme Court generally has found that the Constitution

⁴⁴ *Id.*, §§ 11.6(c)(3), 11.6(c)(6); Jenny S. Martinez & Allison Danner, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. ____ (2005).

⁴⁵ In *Smith v. Maryland*, 442 U.S. 735 (1979), for example, the Supreme Court ruled that pen registers and trap and trace devices for telephone lines are permissible because people do not have a legitimate expectation of privacy in the phone numbers they dial. Some of the Act's provisions relating to the internet may go too far in revealing substantive information, but courts are unlikely to strike those provisions down in their entirety even if some portions are invalid. Finally, it is probable that most, if not all, of the expanded third-party subpoena power provided by the Act will survive constitutional review.

places few limits on the activities of government officials outside the U.S.⁴⁶ The Fifth Amendment's self-incrimination and due process clauses might limit the admissibility of coerced testimony in subsequent federal court proceedings, but that limit matters little if the goal is to gain information rather than a conviction, or if the trial will take place in an overseas military tribunal.

Third, even when they apply, most constitutional doctrines are not absolute. Instead, doctrine is replete with tests – exigent circumstances, reasonableness, assessments of the weight of government interests – that are intentionally flexible and often favor law enforcement. That is certainly true in the context of coercive interrogation.⁴⁷ Finally, consider the nature of constitutional rights themselves. Far from existing on their own foundation, rights are dependent upon and exist only in relation to state power. So, for example, the expansion of civil rights and liberties in the second half of the twentieth century must be placed in the context of an increase in state power that is at least as significant, especially in terms of the government's power to influence, intervene in, and even control our daily lives (for better or worse). Reliance on civil liberties arguments to counter the new criminal process may result in expansion or entrenchment of certain rights, but only against a background of increased state power.⁴⁸

Congress could pass statutes that limit the new criminal process, but as we have seen Congress is more likely to stand aside or pass statutes that codify and expand the new process (perhaps with sunset provisions). Even in the midst of the Abu Ghraib controversy, Congress failed to reinforce or expand explicit limits on the use of coercive interrogation techniques. Over time, Congress may take a second look, but experience suggests that, at most, it will tinker around the edges and will not do away with the new criminal process.⁴⁹ Moreover, statutes that impose criminal penalties for

⁴⁶ See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding Fourth Amendment provisions on searches and seizures have little extraterritorial application); Mark A. Godsey, *The New Frontier of Constitutional Confession Law – The International Arena*, 91 GEO. L.J. 851 (2003).

⁴⁷ See Parry, *Just for Fun*, *supra* note __, at __-__; John T. Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation After Chavez v. Martinez*, 39 GA. L. REV. 733, 763-81, 819-29 (2005).

⁴⁸ For a discussion of constitutional balancing tests and the dependence of rights on state power, see Parry, *Just for Fun*, *supra* note __, at __-__.

⁴⁹ So far, Congress's only legislative response to the revelations of torture and abuse at Abu Ghraib and other places has been to insert a provision into the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief that prohibits the use of any funds appropriated *in that act* "to subject any person in the custody



abusive investigatory activity will not be applied unless the executive branch chooses to prosecute – and the exercise of discretion not to prosecute is the more likely result in all but a few cases. Finally, international law imposes obligations on the conduct of U.S. officials overseas, but few if any of those prohibitions are enforceable in U.S. courts and thus provide little immediate constraint.⁵⁰

With respect to detentions, the executive branch has considerable power. A plurality of the Supreme Court declared in *Hamdi v. Rumsfeld* that “indefinite detention [of citizen enemy combatants] for the purpose of interrogation” is not authorized by any relevant federal statute, and it also seemed to say there is no inherent executive emergency power to take such action.⁵¹ But the plurality found that the AUMF provided authority to detain enemy combatants, including citizens, for the duration of the conflict (at least as long as “United States troops are still involved in active combat in Afghanistan”), so long as detained individuals received some form of process.⁵² Also, the plurality said nothing about inherent power to detain for a limited period or about the conduct of interrogation during a limited detention, except to imply that such interrogation may be limited to “appropriate” actions by relevant legislation, as with the detention at issue in *Hamdi*, and therefore possibly limited by various sources of domestic and international law that the U.S. recognizes.

Justice Souter, joined by Justice Ginsburg, was willing in principle to recognize “an emergency power of necessity . . . limited by the emergency” that would justify unauthorized executive detention and, presumably, interrogation of a citizen who is “an imminent threat to the safety of the nation and its people.”⁵³ Justice Scalia, joined by Justice Stevens, rejected an inherent emergency power to detain a citizen indefinitely, but his statement that his views “apply only to citizens” leaves open the possibility that he would approve detention and, perhaps, coercive interrogation of an alien (and perhaps even of a citizen for a limited period).⁵⁴ For his part, Justice Thomas was willing to recognize a broad emergency power.⁵⁵ In short, even the most rights-protective reading of

or under the physical control of the United States to torture or cruel, inhuman, or degrading treatment or punishment.” Pub. L. No. 109-13, § 1031(a)(1) (May 11, 2005).

⁵⁰ See *infra* note ____.

⁵¹ 124 S. Ct. 2641, 2650 (2204) (plurality opinion) (emphasis added).

⁵² *Id.* at 2642.

⁵³ *Id.* at 2659 (Souter, J., concurring in part and dissenting in part).

⁵⁴ *Id.* at 2673 (Scalia, J., dissenting).

⁵⁵ *Id.* at 2674-82 (Thomas, J., dissenting).

Hamdi will leave considerable room for executive action.

The Fourth Circuit's recent decision in *Padilla v. Hanft* confirms this view of *Hamdi* by holding that the AUMF allows detention without prosecution for the duration of hostilities of a citizen enemy combatant, regardless of where he or she is captured. The Fourth Circuit stressed that detention is a legitimate goal in and of itself and that it serves other goals that the court also considered to be legitimate:

[T]he availability of criminal process cannot be determinative of the power to detain, if for no other reason that that criminal prosecution may well not achieve the very purpose for which detention is authorized in the first place – the prevention of return to the field of battle. Equally important, in many instances criminal prosecution would impede the Executive in its attempts to gather intelligence from the detainees and to restrict the detainee's communication with confederates so as to ensure that the detainee does not pose a continuing threat to national security even as he is confined⁵⁶

Here, the Fourth Circuit has expanded on the *Hamdi* Court's interpretation of "appropriate force" in the AUMF to approve detention without trial for purposes – isolating, controlling, and thoroughly, perhaps coercively, interrogating a prisoner – that go beyond the core law of war concern about preventing enemy soldiers from returning to combat.⁵⁷ For what it is worth, however, *Padilla*, who is being held in the United States, has been able to contest the legal basis for his detention in habeas proceedings and will still be able to contest the factual basis for it, although his chances of success appear dim.⁵⁸

Importantly, moreover, *Hamdi*'s companion case *Rasul v. Bush* – which held that federal courts have subject matter jurisdiction to hear habeas corpus claims by aliens in U.S. custody at Guantanamo Bay (and perhaps elsewhere) – strongly suggests that the executive branch will have to provide some justification for prolonged detention of anyone, not just a citizen held in the U.S.⁵⁹ Taken together, *Hamdi* and *Rasul* suggest a

⁵⁶ *Padilla v. Hanft*, No. 05-6396 (4th Cir., Sept. 9, 2005) (slip op. at 19).

⁵⁷ For discussion of *Hamdi* and the scope of detention under the laws of war, see Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005); Goodman & Jinks, *supra* note __, at 2658-62, and Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293 (2005).

⁵⁸ See *Padilla*, slip op. at 7 n.1.

⁵⁹ 124 S. Ct. 2686 (2004); see also *supra* note 11.



moderate receptiveness to claims of a limited and justified emergency power to detain and interrogate but also signal a familiar and clear preference for congressional authorization and participation. As I have argued elsewhere, the opinions also suggest troubled openness to coercive interrogation under limited conditions.⁶⁰ The Fourth Circuit's decision in *Padilla* at the very least reinforces these conclusions.

After *Hamdi* and *Rasul*, the executive branch set up Combatant Status Review Tribunals to consider the status of detainees at Guantanamo, and nearly all of the detentions have been upheld. District courts have split on the sufficiency of this process, and appeals are pending.⁶¹ These detainees may gain some procedural protections, but their hearings will never approach the kinds of due process standards that are commonplace in domestic civil, let alone criminal, litigation.

With respect to military commissions, the fact that the United States has used military tribunals with some frequency in the past gives weight to the argument that the President has inherent authority to create and use them for terrorists pursuant to the commander-in-chief power. But the history requires some parsing. Past practice and precedent provide strong authority for using military tribunals in occupied territory when civilian justice is unavailable.⁶² But this aspect of the history says little about trying terrorists for activities in or directed against the territory of the United States when ordinary courts are available.

Military tribunals created for domestic use during the Revolutionary War predate the Constitution and so provide only an uncertain precedent. The use of military tribunals during the War of 1812 presents a closer parallel to the present day, although arguably the threat to national survival was much greater and so might justify actions that would remain unjustified under current conditions. The use of military commissions during the Civil War – another instance in which national survival was at stake – produced the Supreme Court's decision in *Ex parte Milligan*, which created a presumption in favor of criminal trials for citizens not engaged in hostilities,

⁶⁰ John T. Parry, *Progress and Justification in American Criminal Law*, 40 TULSA L. REV. ___, ___ n. __ (2005).

⁶¹ See *In re Guantanamo Detainee Cases*, 355 F. Supp.2d 443 (D.D.C. 2005) (holding the Combatant Status Review Tribunals fail to provide due process); *Khalid v. Bush*, 355 F. Supp.2d 311 (D.D.C. 2005) (finding no substantive legal basis to review complaint about detention).

⁶² Bradley & Goldsmith, *supra* note ___, at 252; Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. ___, 1292-95 (2002).

at least when ordinary courts remained open.⁶³

The critical precedent is World War II, because it produced the Supreme Court's decision in *Ex parte Quirin*, which approved use of a military tribunal for eight saboteurs, one of whom was a citizen.⁶⁴ The decision rested primarily on the fact that war had been declared and Congress had provided express statutory authority for military tribunals. The Court interpreted the statutory language as itself a conferral of jurisdiction on military tribunals, but the persuasiveness and sufficiency of that interpretation has been the subject of serious criticism and remains a matter of sharp debate. The Court distinguished *Milligan*, for example, as a case about a person who was a "non-belligerent, not subject to the law of war."⁶⁵

The formal declaration of war is lacking today, but federal law continues to recognize the possibility of military tribunals, Congress passed a resolution, the AUMF, that indicates a general desire to give broad power to the president to combat terrorism, and the Bush administration claimed legislative authorization as one of the bases for creation of tribunals. In *Hamdi*, a plurality of the Supreme Court endorsed *Quirin* and suggested that "an appropriately authorized and properly constituted military tribunal could provide sufficient due process to justify detention of an enemy combatant."⁶⁶ Although the plurality did not say that the specific military commissions established by the Bush administration are "appropriately authorized and properly constituted," its willingness to adopt a broad

⁶³ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); Katyal & Tribe, *supra* note __, at 1272.

⁶⁴ *Ex parte Quirin*, 317 U.S. 1 (1942).

⁶⁵ *Id.* at __. For analysis of *Quirin*, compare Bradley & Goldsmith, *supra* note __, at 252-53 with Dickinson, *supra* note __, at 1420, and Katyal & Tribe, *supra* note __, at 1280-91. Only one of the statutes relied on in *Quirin* remains applicable today. See 10 U.S.C. § 821 ("The provisions of this chapter conferring jurisdiction upon court-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals."). For my part, I think critics such as Katyal & Tribe make too much of the need for a declared war, based on a claims that otherwise Constitutional process and structure have been displaced. Instead, the critical issue is whether the substance of congressional participation has been followed where participation is possible (as opposed, say, to the executive's initial response to an attack or invasion). For a similar conclusion, see *Hamdan v. Rumsfeld*, 415 F.3d 33, 37-38 (D.C. Cir. 2005). I also disagree with the apparent implication from the Katyal & Tribe argument that declarations of war allow – and are the only means of allowing – suspension or curtailment of civil liberties. Even if that once was true, our constitutional landscape has changed so much in the past 50 years that ample room exists to dispute – in both directions – a necessary equation between declared war and broad, unreviewable emergency power.

⁶⁶ *Hamdi*, 124 S. Ct. at 2640-41, 2651 (plurality opinion).



reading of the AUMF strongly hints at such a conclusion.⁶⁷ That conclusion becomes all the more certain when one takes Justice Thomas's more permissive approach to executive power into account.⁶⁸ Thus, the D.C. Circuit's recent decision finding congressional authorization for the Bush administration's military commissions under the AUMF and 18 U.S.C. § 821 is hardly surprising.⁶⁹

Left unclear in the case law are the conditions under which the President has an inherent power to convene military tribunals. As I noted above, this power exists most easily for territory under military occupation during hostilities. Beyond that, I would suggest that any inherent power to convene military tribunals is not an ordinary aspect of the commander-in-chief power and thus is not a standing alternative to criminal courts. Instead, it is an emergency power that applies only in unusual circumstances. Although I would not press this position, one could reasonably argue that President Bush's order creating military tribunals was justified on emergency grounds alone, without reference to any act of Congress, at the time it was issued. Even if that were once true, however, the question then would be whether sufficient time has passed to put the continuing validity of that argument in doubt, absent congressional action. In my view, any emergency has passed by now, so that any currently existing tribunals or commissions can only be justified by an act of Congress. The D.C. Circuit's *Hamdan* opinion, of course, found sufficient congressional action and thus, like *Hamdi*, was able to sidestep the inherent authority debate.⁷⁰

In light of the apparent willingness of the federal courts to find congressional authorization for tribunals, the issue reduces to whether there are any constraints on the ability of Congress and the President, acting together, to take what could be terrorism prosecutions within the subject matter jurisdiction of the federal courts and put them before military tribunals. (I leave aside cases that would be more easily part of the traditional jurisdiction of military commissions and would be less likely ever to land in federal court.) Here, we are squarely in Justice Jackson's first category of separation of powers analysis, in which executive action pursuant to congressional authorization will be upheld unless the federal

⁶⁷ *Id.* at 2640-42.

⁶⁸ *See id.* at 2674-85 (Thomas, J., dissenting).

⁶⁹ *See Hamdan*, 415 F.3d at 37-38.

⁷⁰ *See id.*



government as a whole does not have the power to act.⁷¹ The following analysis suggests, I think, the most that reasonably could be expected from the Supreme Court in favor of federal courts under this framework (as opposed, for example, to what an advocate might seek to establish).

Separation of powers doctrine clearly insulates certain executive actions from complete judicial review in the areas of foreign affairs and military action. But separation of powers also protects the federal courts against interference and actions that undermine their role in the federal system. Prevailing doctrine seems to hold that certain kinds of cases cannot be diverted from federal courts into administrative tribunals, especially not without some ultimate federal court review of the proceeding.⁷² The Court has established a flexible test for resolving these issues:

Among the factors upon which we have focused are the extent to which “the essential attributes of judicial power” are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.⁷³

Although multi-factor inquiries like this are famously malleable, the test suggests that an expansive system of unreviewable trials before military commissions would be unconstitutional. At the same time, however, not every case that could be brought in federal court must be brought there. In particular, I am not aware of any requirement that the federal government must use federal courts instead of tribunals for individuals who acted and are apprehended overseas, at least in times of war or emergency. And *Quirin* suggests that even less may be required, at least in times of war or emergency.⁷⁴ The meaning of “war or emergency” here is plainly both

⁷¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, ___ (1952) (Jackson, J., concurring).

⁷² See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988).

⁷³ *CFTC v. Schor*, 478 U.S. 833, 851 (1985).

⁷⁴ A plurality of the Court suggested a more formal test in *Northern Pipeline v. Marathon Oil* and also recognized courts-martial as one of the situations in which Congress could take cases away from Article III courts. 458 U.S. 50, 64-70 (1982). Although the court-martial exception aids proponents of military commissions at some general level, the questions would remain whether this exception actually includes military commissions of the kind authorized by the Bush administration and whether terrorism trials for acts in or aimed at the U.S. by people who possibly could not be subjected to courts martial can be heard before military commissions instead of in federal courts. Worth noting as well is that

critical and fuzzy, as I discuss in the last section.

At a minimum, habeas corpus review in federal court should be available, as it was in *Quirin* and as the Bush administration has admitted it would be for some cases before military tribunals. Unless the scope of review is extremely limited, habeas arguably preserves the “essential attributes” of judicial power and limits the jurisdiction and powers of military tribunals. But the meaningful availability of habeas for extraterritorial cases is uncertain at best; it depends not only on a strong reading of *Rasul* to establish jurisdiction but also on finding a meaningful substantive claim under federal law.⁷⁵ For criminal cases against people acting or found in the U.S. and when significant punishment is at stake, the Court’s test can easily be read to require an actual criminal trial in an Article III court – but such a result requires reading *Milligan* strongly and reading *Quirin* as an outlier.⁷⁶ In *Padilla*, by contrast, the Fourth Circuit followed the lead of the *Hamdi* plurality to read *Milligan* more narrowly and *Quirin* more broadly.⁷⁷ For most cases, in short, and not just for cases with no “U.S. nexus,” habeas may be the most that is possible, and even habeas may be unavailable or substantively inadequate.

Under any of these readings, we see the new criminal process at work in a particularly interesting way. Habeas corpus – the traditional

the Supreme Court approved the transfer of civil suits from federal courts to an international arbitration tribunal in *Dames & Moore v. Regan*, 453 U.S. 654 (1981). The long history of and congressional acquiescence in allowing the executive branch to settle international claims supported the holding. In the context of military tribunals, where individual life and liberty are at stake and the history is more ambiguous, *Dames & Moore*’s application is more tenuous. Compare *infra* n. __ (discussing the relevance of international extradition litigation).

⁷⁵ See *supra* notes 11 & 60. Courts will likely reject claims arising under treaties such as the Geneva Conventions on the ground that the treaties are not self-executing in the sense that they do not create rights that individuals can enforce judicially. See *Hamdan*, 415 F.3d at 38-40. For discussion of the issues raised by the effort to enforce international human rights and humanitarian norms in U.S. courts, see David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129 (1999); Stephen I. Vladeck, Casenote, *Non-Self-Executing Treaties and the Suspension Clause After St. Cyr*, 113 YALE L.J. 2007 (2004); Carlos M. Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695 (1995). See also *Sosa v. Alvarez-Machain*, 124 S. Ct. 2734, 2763, 2767 (2004) (appearing to hold that non-self-execution declarations prevent federal courts from “interpreting and applying international human rights law” and prevent a treaty from creating “obligations enforceable in the federal courts”).

⁷⁶ Compare *Hamdi*, 124 S. Ct. at 2660-61 (Scalia, J., dissenting) (insisting that *Hamdi* must be charged with a crime or released).

⁷⁷ *Padilla v. Hanft*, No. 05-6396 (4th Cir., Sept. 9, 2005) (slip. op. at 23-24).

guarantee of constitutional rights against arbitrary state action – becomes a way of legitimizing departures from tradition. Put more concretely, habeas functions in the “war on terror” cases as a backstop that likely holds out only the possibility of minimal due process protections, while most of the real criminal process – whether for detention or trial – takes place in non-Article III forums. In some cases, moreover, habeas is a mirage. Either it is jurisdictionally available but substantively empty, or, depending upon how *Rasul* is interpreted, jurisdiction will be entirely lacking (these cases will be labeled exceptions, of course).⁷⁸

Still, if the federal government does divert cases to military commissions that otherwise would come before federal criminal courts, some possibility remains that federal courts would use habeas to impose many of the constitutional criminal procedure requirements developed in recent decades, on the ground that trials before commissions are the functional equivalent of a criminal trial in state or federal court.⁷⁹ Policymakers considering the actual use – and not just the formal creation – of military commissions might conclude that the resulting process would be

⁷⁸ International extradition may provide a fruitful analogy here. The consequences of an extradition are serious – a person, perhaps a citizen, will be seized, removed from this country, and sent overseas to face a criminal process that may be far less rights-protective than our own. The extraditee receives a hearing before a federal judge or magistrate, but the process resembles a probable cause hearing, and denials of extradition are rare. What is more, several courts have ruled that the federal judge or magistrate who presides over an extradition hearing acts under Article I, not Article III. See *Lopez-Smith v. Hood*, 121 F.3d 1322, 1327 (9th Cir. 1997); *LoDuca v. United States*, 93 F.3d 1100, 1005-09 (2nd Cir. 1996). The extraditee may seek habeas relief, but “habeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.” *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925) (Holmes, J.). For discussion of the extradition process, including Article III issues and the scope of habeas, see John T. Parry, *The Lost History of International Extradition Litigation*, 43 VA. J. INT’L L. 93 (2002). In short, the extradition process, which dates back to the 1840s, could be a model for the new criminal process, for it incorporates significant amounts of executive discretion, minimal legal process, and easily-satisfied substantive rules. Because extradition touches on international relations, courts have also been extremely deferential to the executive branch, despite the individual liberty issues involved, going so far as to say that, if there were no extradition statute, “the Executive would have plenary authority to extradite.” *LoDuca*, 93 F.3d at 1003. Such words are music to the ears of proponents of indefinite detention, military commissions, and extraordinary rendition. For a detailed explanation of why those words are nonetheless flatly wrong from the perspectives of history and precedent, see Parry, *Lost History*, *supra*, at 105-24.

⁷⁹ Diane Marie Amann, *Guantanamo*, 42 COLUM. J. TRANSN. L. ___, 290-91 (2004); Katyal & Tribe, *supra* note ___, at 1303-04.

too cumbersome to provide significant advantages over criminal trials in ordinary courts, at least for cases in which detainees would have meaningful access to meaningful habeas review.

V. THE NEW CRIMINAL PROCESS, EMERGENCY POWER,
AND THE STATE OF EXCEPTION

So far, I have tried to present the arguments for and against the new criminal process and to show how, desirable or not, it is roughly consistent with existing constitutional norms. I have also indulged the assumption that the traditional criminal process is presumptively superior to the new criminal process for addressing issues relating to terrorism, despite the new criminal process's greater flexibility. That assumption is open to several objections. First, of course, is one that I mentioned near the beginning of this essay: even if there should be a presumption in favor of traditional criminal processes in normal times, the "war on terror" puts us in a situation in which the presumption has shifted. Hard-headed analysis, in short, arguably suggests that we are in the exceptional situation in which the war approach trumps the crime approach, with the result that the new criminal process has also become the new presumption. Some things, in other words, have changed after all, at least for a while.

Second, one could take a further step to argue that there is simply no basis for a presumption in favor of the traditional criminal process. Terrorism is not just a problem of law enforcement; it also implicates national security, diplomacy, economic policy, immigration, the role of the military, and many other issues. Seen in this way, reasonable people can easily assert that, at best, traditional criminal processes should be merely one option along with other, more violent but perhaps also more effective responses. This objection, then, goes beyond the war/crime dichotomy to suggest that terrorism is a complex issue that requires a nuanced and flexible response along a variety of policy and legal paths. As with many other issues, a narrow focus on one form of legal process is short-sighted and ultimately ineffective.

I do not wish to dispute this point at a general level, except to suggest that it obviously also applies to the problem of "ordinary" crime, and, indeed, to nearly any issue of public importance, as much as to the problem of terrorism. Faced with this insight, moreover, one can straightforwardly respond that we still have to decide what processes to use under what circumstances. That is, traditional criminal processes remain an available choice, and we need some way of deciding when to use traditional processes and when to use the new criminal process. Also, to the extent issues once seen as the province primarily of legal process and ordinary policing are now seen as larger issues of social concern along a variety of

metrics, this shift simply reflects the fact of increasing rationalization and expansion of modern state power. The interesting question, especially for purposes of this essay, is the role that emergencies play in this process.

Third, and most important, one could dispute my claim that the traditional process exists at all. Put differently, there may once have been something close to what I have described as the traditional criminal process, but we long ago began to abandon that approach, and the new criminal process is simply the criminal process that we have. Less dramatically, one might argue that the new criminal process is a permanent part of our everyday criminal process, alongside and partially overriding the remnants of the traditional process. To the extent this third objection has weight, it raises important issues about the persistence of emergency powers, as well as about the difference between exceptional and ordinary conditions, and between emergency and normal powers.

At the beginning of this essay, I argued that the President and Congress have created a legal structure for a state of emergency. Since 9/11, constitutional law scholars have renewed the debate over the existence and constitutionality of emergency powers. Unlike the constitutions of many other countries, the U.S. Constitution has little to say on this issue apart from preventing quartering of soldiers in people's homes and allowing Congress to suspend the writ of habeas corpus "in Cases of Rebellion or Invasion [where] the public Safety may require it."⁸⁰ To some scholars, this means there are no other emergency powers – anything the government does must accord with the Constitution in normal or emergency times. Others suggest the Constitution must include a broad inherent authority to act in cases of emergency (and this power is often claimed for the executive branch).⁸¹ A third position, articulated most persuasively in articles by

⁸⁰ See U.S. CONST. art I, § 9, cl.2 & amend. III. For discussion of emergency provisions in other constitutions, see Gabriel L. Negretto and José Antonio Aguilar Rivera, *Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship*, 21 CARDOZO L. REV. 1797 (2000); Kim Lane Scheppelle, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004). The Supreme Court has not clearly ruled on whether the President can suspend the writ unilaterally in an emergency, but most commentators take Chief Justice Taney's opinion in *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487), claiming the President lacks such power, to state the correct and proper interpretation of the suspension clause. Notably, however, the Lincoln administration did not obey the court order for the release of Merryman.

⁸¹ Compare Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L. J. 1801 (2004), with Ackerman, *supra* note __, and with Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2004). The Office of Legal Counsel and the Defense Department's Working Group on Detainee



Jules Lobel and Oren Gross, maintains there is no inherent constitutional emergency power, but the President may violate the Constitution in an emergency and then face whatever consequences Congress and the people wish to impose. Institutional and political controls, in short, might be able to limit and contain emergency power even if law cannot.⁸²

I have little to add to this specific debate, except to say that I find the arguments made by Professors Lobel and Gross to be convincing. As both admit, however, their model is not the dominant approach. Far more likely is the prospect of courts accepting claims of expanded power in times of emergency, combined with efforts to mitigate those powers once the emergency has passed, which creates a “two steps forward, one step back” process of increasing state – and particularly executive – power. In light of their root in various emergency situations, moreover, these increased powers tend to take a special form in which more familiar legal processes are pushed aside in favor of efficient discretionary authority.

Writing after 9/11 and drawing primarily on the work of Carl Schmitt, Giorgio Agamben (among others) has argued that in modern states “the state of exception tends increasingly to appear as the dominant paradigm of government.”⁸³ In a state of exception, normal rules are suspended, and sovereign authority wields discretionary power. When the suspension of normal rules becomes the new norm, then no space remains for anything but discretion; ordinary legal rules are pushed aside. If, therefore, as Schmitt claimed, “the state remains, whereas law recedes” in a time of exception, then, as Mark Tushnet suggests, a permanent condition of emergency threatens “the end of the rule of law itself.”⁸⁴

My point is not that we live now in a permanent, across-the-board state of exception in which the rule of law is at best window-dressing. Exceptions and emergencies appear to work differently in modern, liberal democracies. We don’t clamor openly for the firm hand of a leader who will represent us better than a corrupt or indecisive legislature (although many of us value “leadership” and “decisiveness” to the point almost of

Interrogations both articulated strong views of inherent executive power in their analysis of the law of interrogation.

⁸² See Lobel, *supra* note __; Gross, *Chaos and Rules*, *supra* note __.

⁸³ GIORGIO AGAMBEN, *STATE OF EXCEPTION 2* (Kevin Attell trans. 2005).

⁸⁴ CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 12 (George Schwab trans. 1985); Mark Tushnet, *Emergencies and the Idea of Constitutionalism*, in *THE CONSTITUTION IN WARTIME*, *supra* note __, at 45. See also BUTLER, *supra* note __, at 50-100; Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt’s Theory of Emergency Powers and the ‘Norm-Exception’ Dichotomy*, 21 *CARDOZO L. REV.* __, 1854, 1857 (2000); Lobel, *supra* note __, at 1404.

fetish). We are often willing to see firmness applied to domestic or foreign “others” who are implicated in the emergency and do not deserve the benefit of legal “technicalities,” but we take a different approach to matters closer to “home.” As policy issues arise one by one in a variety of areas, rational, well-intentioned policymakers often conclude that increased government discretion is necessary, sometimes girded by procedural frameworks. Issues of foreign policy and national security are particularly susceptible to this kind of treatment, but they are not the only areas, and the definition of what makes a national security issue seems continually to expand (to include, for example, parts of the criminal law).⁸⁵

Consider the following examples. In 1933, Franklin Roosevelt declared a banking emergency that lasted into the 1970s. In 1950, President Truman declared a national emergency that also lasted until the early 1970s. By the time those “emergencies” finally ended, the U.S. statute books contained roughly 470 pieces of legislation that provided the executive with some form of emergency power in particular circumstances.⁸⁶ Myriad other statutes have nothing ostensibly to do with emergency power, but they follow what has become the “normal” model of providing relatively unconstrained delegations of lawmaking power or its equivalent from the legislature to the executive.⁸⁷

Because wartime is the most obvious state of exception, consider also the amount of time the U.S. has been at war in recent years. After World War II, the U.S. entered almost immediately into a Cold War with the Soviet Union that lasted until 1989, with numerous sub-wars and proxy wars in Korea, Vietnam, Africa, the Middle East, and Central America. The Gulf War against Iraq followed as soon as the Cold War ended, and after that swift victory, the U.S. remained on a military footing with respect to the Middle East that culminated in the second war against Iraq, as well as the war against Afghanistan (which can also be seen as part of an arguably separate war on terror). Military occupation of Afghanistan and Iraq continues, not to mention the persistence for twenty-five years of a cold war with Iran. The idea of war has also played out in domestic policy. At least since the 1970s we have been embroiled in a war on crime that spawned an ongoing war on drugs and that overlaps with the new (old?) war on terror. The war metaphor has spilled over into other policy issues as well. That is to say, the idea of war as a way of addressing social ills – by mobilization of resources, new structures of discretionary authority, and cutting through red

⁸⁵ See Gross, *Normless and Exceptionless*, *supra* note __, at 1858-60.

⁸⁶ See Lobel, *supra* note __, at 1404, 1408.

⁸⁷ See, e.g., *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001).



tape that may include rights claims – has been normalized for quite some time.

In short, although the exception may not be the norm in all areas of public life, it appears to be the norm in many areas, including national security and criminal law. The process by which the exception becomes normal has an interesting effect on the legal rules that continue to apply to “normal” issues. If, for example, constitutional rules relating to search and seizure or interrogation or communication between lawyer and client become looser in the context of drugs or terrorism, those looser rules will often apply across the board to other investigations and prosecutions that have little necessary connection with drugs or terrorism.⁸⁸

So, too, the social meaning of emergency power has changed, although the effort to trace the social meaning of government practices with any precision is difficult because different people and groups will have different sets of reactions, and these reactions will often be shaped by preexisting preferences or commitments and will change over time. Nonetheless, the growth of emergency and discretionary power means that the exercise of such power becomes expected (whether or not desired). In the context of terrorism, the conduct of the United States, especially since 9/11, has powerful, complex, and conflicting social meanings. It reassures citizens that the government is resolved to protect them, and it may in fact disrupt terrorist networks, at least in the short term. Even the willingness to cut corners and push against constitutional constraints can be interpreted as part of a deeply serious and formidable response to terrorism. But opponents of the U.S. might interpret these moves as hypocritical or even as small victories, because they undermine our stated commitment to the rule of law. Our actions also support the idea that U.S. political, economic, and political dominance of world affairs is neither benign nor disinterested but instead aggressively imperial and oppressive. Yet whatever the cost, within our current political discourse the failure to act quickly, strongly, and at the boundaries of law would be almost unthinkable against what has become an expectation of action.

The new criminal process, then, may not be so new. Rather, it may be the latest step in a broad shift in our approach to governing, where pervasive authority is increasingly valued over the constraints of law. This change is not a simple expansion, and it brings with it modification and dilution of rights, but also the possibility of their expansion within the context of also-expanded state power. Nor is this change occurring without

⁸⁸ For a good discussion, see William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002).



justification. For reasons that surely include our own actions, terrorism is a real policy issue and a real threat, and rational, liberal-minded people support increased state power to counter the threat. Be that as it may, the linkage of the new criminal process with the legal and conceptual problems associated with the normalization of emergency power means that state power over all of us – over our bodies, our mobility, our words and actions, and of course our lives – continues to increase. And whether we like it or not, we may soon be unable to ignore the reality of “biopolitics,” or even what we might without irony come to call “constitutional biopolitics.”⁸⁹ For now, the critical point is that we are experiencing the modification of the processes by which our government investigates and imposes punishment on people, and the fact that some of these processes arise in the context of the war on terror means, not that those processes are about fighting terrorism, but rather that those processes – the new criminal process – inevitably will and have already begun to generalize.

⁸⁹ See GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 119 (Daniel Heller-Roazen trans. 1998) (discussing “modern biopolitics: the politics of the great totalitarian states of the twentieth century”); BUTLER, *supra* note __, at 51-62 (discussing these ideas in terms of governmentality, sovereignty, and discipline); MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: *LECTURES AT THE COLLÈGE DE FRANCE, 1975-1976*, at 241, 245-47 (David Macey trans. 2003) (articulating the idea of biopolitics).

