

THE CASE AGAINST NATIONAL SECURITY COURTS

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I. INTRODUCTION

Calls for a special judicial forum to resolve questions arising out of the detention and incapacitation of suspected terrorists are nothing new. Even before the attacks of September 11, 2001, suggestions within the United States that certain terrorism-related legal questions should be resolved before hybrid tribunals operating under different rules had received a fair amount of attention. Thus, in 1996, for example, Congress created the specialized Alien Terrorist Removal Court (ATRC) to process—behind closed doors—the deportation of non-citizens suspected of involvement in international terrorism.¹

Indeed, the Supreme Court itself had hinted that the relevant constitutional considerations might vary where terrorism was concerned. In its last decision before September 11, the Court held that the potentially indefinite detention of a non-citizen pending deportation violated the Due Process Clause, but was equally clear that its decision did not “consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.”²

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1. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, § 401, 110 Stat. 1214, 1258–68 (codified as amended at 8 U.S.C. §§ 1531–37 (2000)). To date, there have been no reported proceedings before the ATRC. See Stephen Townley, *The Use and Misuse of Secret Evidence in Immigration Cases: A Comparative Study of the United States, Canada, and the United Kingdom*, 32 YALE J. INT’L L. 219, 234 n.126 (2007). The ATRC was itself modeled after the so-called “FISA Court,” created by the Foreign Intelligence Surveillance Act of 1978. See 8 U.S.C. § 1532(a) (2000).

2. *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001).

Since September 11, calls for a hybrid “national security” court to handle such circumstances have taken on a newfound prominence, as courts and policymakers alike have struggled with the complex series of legal and logistical problems posed by the U.S. government’s detention of “enemy combatants,” especially the hundreds of non-citizens so detained at Guantánamo Bay, Cuba. Moreover, whereas the vast bulk of these proposals were initially promulgated in academic circles,³ the past two years have seen increasing calls for such hybrid tribunals in the popular press, including a *Wall Street Journal* op-ed by Attorney General Mukasey,⁴ and a *New York Times* op-ed co-authored by Neal Katyal (who successfully brought the *Hamdan* case to the Supreme Court)⁵ and Jack Goldsmith, the former director of the Justice Department’s Office of Legal Counsel.⁶ As the Goldsmith/Katyal op-ed itself suggests, national security courts are, for many, an increasingly attractive compromise solution to the seemingly irreconcilable division between those who believe that terrorism suspects are not entitled to the traditional criminal process and those who believe not only that they are, but that any other system is categorically unconstitutional.⁷ And in the aftermath of the Supreme Court’s landmark decision in *Boumediene v. Bush* last June,⁸ holding that the Guantánamo detainees have a constitutional right to petition the federal courts for writs of habeas corpus, such a “compromise”

3. Some of the more detailed discussions include ANDREW C. MCCARTHY & ALYKHAN VELSHI, WE NEED A NATIONAL SECURITY COURT (2006), available at [http://www.defenddemocracy.org/images/stories/national security court.pdf](http://www.defenddemocracy.org/images/stories/national%20security%20court.pdf); Harvey Rishikof, *Is It Time for a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes*, 8 SUFFOLK J. TRIAL & APP. ADVOC. 1 (2003); Glenn M. Sulmasy, *The Legal Landscape After Hamdan: The Creation of Homeland Security Courts*, 13 NEW ENG. J. INT’L & COMP. L. 1 (2006); Amos Guiora & John T. Parry, Debate, *Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists*, 156 U. PA. L. REV. PENNUMBRA 356 (2008). The most thorough academic treatment of the risks posed by adherence to the pre-September 11 models is Robert M. Chesney & Jack L. Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008).

4. Michael B. Mukasey, Op-Ed., *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15.

5. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

6. Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, at A19. To be fair, Professor Katyal (who is now the principal Deputy Solicitor General) subsequently retreated somewhat from the initial op-ed. See Neal Katyal, *A National Security Court: Not Now, Not Yet*, GEO. SEC. L. COMMENTARY, Oct. 1, 2008, <http://www.securitylawbrief.com/commentary/2008/10/a-national-secu.html>.

7. See Goldsmith & Katyal, *supra* note 6.

8. See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

solution has become all the more appealing, given both the judicial review that the Supreme Court's decision mandates and the complexity of the issues that it nevertheless leaves unresolved.⁹

As popular as such proposals have been, though, there has been little sustained discussion of their details, which have seldom been fleshed out. Even with respect to those calls for national security courts including *some* discussion of the specifics, the proposals vary widely both substantively and procedurally. For example, some proponents have called for national security courts for detention decisions—to review whether a particular terrorism suspect can be held as an enemy combatant without criminal charges.¹⁰ Others have called for such tribunals as a forum in which to criminally prosecute suspected terrorists—as an alternative either to the traditional Article III criminal process¹¹ or to trial by military commission pursuant to the controversial Military Commissions Act of 2006.¹² Whatever the merits of each individual proposal, little has been written about the broader implications of such a “third way.”

In the article that follows, I attempt to provide a comprehensive introduction to the various proposals for a national security court, and to suggest some of the pros and cons of these efforts. Part II begins by summarizing the proposals and their differences, especially the distinction between detention-related national security courts and national security courts for criminal prosecution. In Part III, the article turns to the fundamental questions implicated by the debate over national security courts. Finally, Part IV considers whether, ultimately, we *need* national security courts.

Ultimately, I argue that proposals for national security courts are dangerously myopic proxies for larger debates that must first be resolved, including, most prominently, the debate over the extent to which the government should be able to preventively detain terrorism

9. See, e.g., Stephen I. Vladeck, *On Jurisdictional Elephants and Kangaroo Courts*, 103 NW. U. L. REV. COLLOQUY 172, 172 (2008) (noting the impact of *Boumediene* on reform proposals).

10. See, e.g., Goldsmith & Katyal, *supra* note 6.

11. Indeed, even during World War II, individuals within the United States suspected of giving aid and comfort to the enemy were tried in civilian criminal courts, rather than subjected to military detention and/or trial. See, e.g., Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863 (2006).

12. Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of 10, 18, and 28 U.S.C.). On the potential overbreadth of the Military Commissions Act of 2006, see Vladeck, *supra* note 9, at 173.

suspects, and the equally significant definitional question of just *who* qualifies as such an individual.¹³ Until and unless meaningful progress is made on these issues, calls for national security courts are little more than form without substance.

II. NATIONAL SECURITY COURTS: THE PROPOSALS

A. *The Nature of Terrorism and the Need for a "Third Way"*

At the heart of each argument for a national security court is the assertion that the "traditional" models of criminal process or military detention are inadequate to deal with the particular nature of the threat posed by international terrorism. As Professors Chesney and Goldsmith describe:

Neither model in its traditional guise can easily meet the central legal challenge of modern terrorism: the legitimate preventive incapacitation of uniformless terrorists who have the capacity to inflict mass casualties and enormous economic harms and who thus must be stopped before they act. The traditional criminal model, with its demanding substantive and procedural requirements, is the most legitimate institution for long-term incapacitation. But it has difficulty achieving preventive incapacitation. Traditional military detention, by contrast, combines associational detention criteria with procedural flexibility to make it relatively easy to incapacitate. But because the enemy in this war operates clandestinely, and because the war has no obvious end, this model runs an unusually high risk of erroneous long-term detentions, and thus in its traditional guise lacks adequate legitimacy.¹⁴

Thus, on their view (and that of many others), the central difficulty is that the criminal model is insufficiently preventative and thus dangerously underbroad, while the military model is insufficiently accurate and thus dangerously overbroad—assuming that the military model can be applied to terrorism *at all*, a point that has itself been hotly contested.

13. Indeed, in a draft white paper released as this article went to print, Jack Goldsmith argued that, for this very reason, proposals for a national security court are a "canard." See Jack Goldsmith, Long-Term Terrorist Detention and Our National Security Court (Feb. 4, 2009) (unpublished manuscript), available at http://www.brookings.edu/~media/Files/rc/papers/2009/0209_detention_goldsmith/0209_detention_goldsmith.pdf. On that point, at least, he and I are in complete agreement.

14. Chesney & Goldsmith, *supra* note 3, at 1081.

In addition, incapacitating terrorism suspects raises unique problems because of the nature of terrorism itself. The Bush Administration consistently maintained that, no matter what, it had to have the ability to extract information from terrorism suspects in order to adequately protect against future attacks.¹⁵ Whatever view one takes of the merits of that suggestion, it is certainly true that interrogation of detainees is heavily regulated and proscribed in *both* traditional models. *Miranda v. Arizona*¹⁶ and its successors tightly constrain the government's ability to interrogate criminal suspects; the laws of war generally, and the Geneva Conventions specifically, tightly constrain the government's ability to interrogate those held pursuant to the laws of war.¹⁷

Finally, regardless of which side they take, most commentators agree that the status quo is unacceptable. Because of the patchwork system that has emerged since September 11, there seems to be no single clear set of criteria to apply to any individual case. Instead, individuals picked up in entirely similar circumstances have been met with entirely different treatment for reasons that are beyond public view—if they exist at all. Even the term “enemy combatant” was wanting for a statutory definition until more than five years after September 11. No matter the reasons for such a lack of clarity, its impact has been profound—and incredibly deleterious both to U.S. interests abroad and to real progress (and perhaps even security) at home.

Thus, there is a perceived need for a third way. But a third way for what? For preventive detention? For long-term incapacitation pursuant to conviction? For both? The proverbial devil, ultimately, is in the details.

B. National Security Courts for “Detention” Decisions

Perhaps the less disturbing proposal for a national security court is with respect to reviewing the decision to detain a terrorism suspect preventatively. Of course, such proposals assume—as they must—that preventative detention is not inherently unconstitutional, which is hardly a settled proposition (and one considered in more depth

15. See, e.g., William Glaberson, *Torture Acknowledgment Highlights Detainee Issue*, N.Y. TIMES, Jan. 14, 2009, at A1.

16. 384 U.S. 436 (1966).

17. See, e.g., Mark Mazzetti, *Letters Give C.I.A. Tactics a Legal Rationale*, N.Y. TIMES, Apr. 27, 2008, at A1.

below).¹⁸ Nonetheless, proceeding off that assumption, proposals for detention-related national security courts have generally extolled such courts as the best way to ensure that preventative detention is not overbroad, and that both substantive and procedural rules are applied fairly and effectively.¹⁹ Calls for national security courts for “detention” decisions are therefore invariably cast as a better way to protect the rights of the detainees than the status quo.

That depends, though, on what the status quo actually *is*. Notwithstanding the Supreme Court’s decision in *Boumediene*,²⁰ substantial questions remain concerning both the scope and the adequacy of the Combatant Status Review Tribunal (CSRT) process²¹—along with the D.C. Circuit’s review thereof.²² Separate from the CSRT process, the D.C. district court has struggled mightily in the months since *Boumediene* sorting out the scope of its authority to adjudicate the detainees’ habeas petitions,²³ especially given the D.C. Circuit’s decision in *Kiyemba v. Obama* (notwithstanding *Boumediene*) that the Guantánamo detainees have no substantive constitutional rights.²⁴ And, perhaps even more fundamentally, the en banc Fourth Circuit divided bitterly over whether the detention authorized by the September 18, 2001 Authorization for the Use of Military Force (AUMF)²⁵ extends to the detention of non-citizens arrested within the United States; a question answered in the negative

18. In his dissent in the *Hamdi* case, Justice Scalia, joined by Justice Stevens, was adamant that, where U.S. citizens held within the United States are concerned, the Constitution only authorizes detention without trial pursuant to a suspension of the writ of habeas corpus—a measure that has, as yet, not been a serious part of any of the post-September 11 legislation or proposals. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 554–79 (2004) (Scalia, J., dissenting).

19. See, e.g., Goldsmith & Katyal, *supra* note 6.

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

21. The CSRTs were initially created in July 2004, in response to the Supreme Court’s *Rasul* and *Hamdi* decisions, and were designed to provide some review of the government’s determination that individuals detained at Guantánamo Bay had been properly classified as “enemy combatants.” See *id.* at 2233 (discussing the CSRTs).

22. See *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007), *vacated*, 128 S. Ct. 2960 (2008); *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008). In January 2009, the D.C. Circuit even suggested that the CSRT process (or, at least, its jurisdiction to entertain appeals from CSRTs) did not survive *Boumediene*. See *Bismullah v. Gates*, 551 F.3d 1068, 1075 (D.C. Cir. 2009). This is a holding that is rather inconsistent with *Boumediene* itself. See *Boumediene*, 128 S. Ct. at 2275 (“[B]oth the DTA and the CSRT process remain intact.”).

23. Compare, e.g., *In re Guantanamo Bay Detainee Litig.*, 570 F. Supp. 2d 13 (D.D.C. 2008), with *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33 (D.D.C. 2008).

24. See No. 08-5424, 2009 WL 383618 (D.C. Cir. Feb. 18, 2009) (holding that the Guantánamo detainees have no due process rights).

25. Pub. L. No. 107-40, 115 Stat. 224 (2001).

by a three-judge panel of the same court.²⁶ One 5–4 majority of the court recently concluded that the detention was authorized (although the judges were completely unable to agree on the proper substantive standard for detention).²⁷ A different 5–4 alignment of the court, though, concluded that the detainee—al Marri—had not received sufficient process.²⁸ And although the Supreme Court granted certiorari in December 2008,²⁹ the Obama Administration successfully mooted the case by indicting al Marri and transferring him to civilian custody.³⁰

Thus, attempts to argue against the status quo in the context of preventative detention are, in effect, attempts to hit a moving target. One potential (albeit extreme) outcome of the current cases is a narrow conception of the category of those who may lawfully be detained and a broad conception of the detainees' ability to challenge their detention in federal court. The other extreme would yield a broad definition of who can be detained and a narrow ability to challenge that detention. Where a national security court would fit in depends to a large degree on what results from the current litigation, including the limits that might be imposed by the Supreme Court—a point almost entirely overlooked by the proponents of such a tribunal.

Moreover, regardless of how the current cases are decided, such proposals must resolve four additional issues: (1) The nature and authority of the presiding judges; (2) the substantive criteria identifying the class of individuals subject to detention; (3) the procedure by which the initial decision is made; and (4) the mechanisms for review, both at the time of the initial decision and in the months and years thereafter.

Frustratingly, most of the proposals get this far, but go into very little additional detail, focusing instead on repetitive arguments for why the traditional models are inadequate. One of the more principled proposals is that offered by Katyal and Goldsmith, who argue that the

26. *al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007).

27. *See al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir.) (en banc), *cert. granted*, 129 S. Ct. 680 (2008).

28. *See id.*

29. *See al-Marri*, 129 S. Ct. 680 (mem.). In the interests of full disclosure, I should note that I co-authored amicus briefs in *al-Marri* both in support of certiorari and in favor of the Petitioner on the merits.

30. *See al-Marri v. Spagone*, No. 08-368, 2009 WL 564940 (U.S. Mar. 6, 2009) (granting the government's application to transfer al Marri to civilian custody, vacating the en banc Fourth Circuit's decision, and remanding to that court with instructions to dismiss).

decision-makers should be life-tenured Article III judges, selected by the Chief Justice in the same way as the judges on various specialized Article III courts (including, as an important related example, the Foreign Intelligence Surveillance Court and Court of Review).³¹ Although Katyal and Goldsmith believe that “traditional” procedural and evidentiary rules should be relaxed, they nevertheless trumpet that:

The court would have a permanent staff of elite defense lawyers with special security clearances as part of its permanent staff. Defense lawyers trained in the nuances of taking apart interrogation statements, particularly translated statements, are crucial because often the legal proceedings will involve little else in the way of evidence.³²

They also argue for meaningful appellate review from the initial decision, for review of whether there is “a continuing rationale to detain people years after their initial cases were heard,”³³ and, importantly, for the collapsing of any distinction between citizens and non-citizens.³⁴

Missing from their proposal, though, are two critical points: The burden of proof, and, more basically, the substantive criteria for detention—the definition of who *can* be held, if the evidence so provides, and, as importantly, who must be released. Thus, even while arguing that courts should continually review whether there is a “continuing rationale” for detention, Katyal and Goldsmith decline to offer what such a rationale might be. And these are hardly trifling details. To the contrary, these questions go to the heart of the problem: Just who would such a regime apply to, and under how much (and what) evidence? Without these details, it is difficult—if not impossible—to truly assess the extent to which such a proposal is even a departure from prevailing norms, let alone a departure that is warranted.

Other proposals suffer from similar defects. Thus, in the American Enterprise Institute white paper prepared by Andrew McCarthy and Alykhan Velshi,³⁵ perhaps the most detailed and widely circulated proposal to date, the authors propose a national

31. See Goldsmith & Katyal, *supra* note 6.

32. *Id.*

33. *Id.*

34. See *id.*

35. See MCCARTHY & VELSHI, *supra* note 3.

security court for *both* detention decisions *and* criminal prosecutions (more on the latter below); the proposal for the former focuses on who the judges should be and where they should sit.³⁶ In terms of substance, McCarthy and Velshi propose that the court merely entertain appeals from the currently established CSRTs at Guantánamo Bay,³⁷ a function already assigned to the D.C. Circuit under the Detainee Treatment Act of 2005 (DTA)³⁸ and the Military Commissions Act of 2006 (MCA).³⁹

Additionally, given the current legal uncertainty surrounding just what the D.C. Circuit is entitled to consider in its review of the CSRTs (or what criteria the D.C. district court should apply in habeas cases), it is hardly clear from McCarthy and Velshi's proposal what substantive criteria the new court should follow in such cases, or what evidentiary burden it should impose. All McCarthy and Velshi seem to be advocating for is a change in forum from the D.C. federal courts to the hybridized—and secret—national security court.

If there is to be a regime of preventive detention for at least *some* terrorism suspects, it is inevitable that such detention will be subject to at least some judicial review in some forum, especially after *Boumediene*. Thus, the questions these proposals have skirted go more to the underlying legality of the detention *ab initio*, rather than the appropriate forum in which that question should be answered.

C. National Security Courts for Criminal Prosecutions

By far the more controversial—and comprehensive—set of proposals for a national security court concern criminal prosecutions of suspected terrorists. Along with the white paper by McCarthy and Velshi (relied upon by Mukasey), articles by Commander Glenn Sulmasy and Professor Amos Guiora have expressly called for prosecutions by hybrid courts as the best way forward for incapacitating terrorism suspects, and as vastly preferable to trials either in Article III courtrooms or in military commissions under the MCA.⁴⁰

36. *See id.* at 34.

37. *See id.* at 40–41.

38. Pub. L. No. 109-48, §§ 1001–1005, 119 Stat. 2680, 2739–44 (2005).

39. Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of 10, 18, and 28 U.S.C.).

40. *See* Guiora & Parry, *supra* note 3; Sulmasy, *supra* note 3; MCCARTHY & VELSHI, *supra* note 3.

Unlike preventive detention, where there are fewer established norms from which the proposals can (and do) deviate, the proposals for a national security court for criminal prosecutions are replete with departures from the traditional criminal process. These distinctions generally run along two axes: the nature of the evidence that may be introduced (both by the government and by the detainee), and the means by which that evidence is reviewed (including the prospect that certain secret evidence be withheld from the detainee). Most proposals therefore start with perceived constraints of the Article III process, including: the right to confront witnesses under the Sixth Amendment's Confrontation Clause; the exclusion of hearsay evidence and evidence obtained through coercion; the right to self-representation; and the right to a trial by a jury of the defendant's peers.⁴¹ Emphasizing these constraints, proponents of national security courts suggest that the Article III courts simply are not in a position to adequately handle such cases, and that any attempt to do so risks long-term damage to the civilian criminal justice system as a whole.⁴²

A national security court, in contrast, would be marked by relaxed evidentiary rules, including the ability to introduce hearsay testimony and perhaps even evidence that is produced by governmental coercion.⁴³ As importantly, the government would also be able, under most proposals, to use classified information as evidence without fully disclosing such to the defendant. Otherwise, as McCarthy and Velshi describe in their proposal:

[P]eople who commit mass murder, who face the death penalty or life imprisonment, and who are devoted members of a movement whose animating purpose is to damage the United States, are certain to be relatively unconcerned about violating court orders (or, for that matter, about being hauled into court at all). Our congenial rules of access to attorneys, paralegals, investigators and visitors make it a very simple matter for accused terrorists to

41. The most comprehensive critique in any of the proposals can be found in MCCARTHY & VELSHI, *supra* note 3, at 5–13.

42. *See, e.g., id.* at 13 (“[T]rials in the criminal justice system don’t work for terrorism. They work for terrorists.”). These critiques have elicited sharp and pointed responses. *See, e.g.,* RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUM. RTS. FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS (2008), available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>; Mark R. Shulman, *National Security Courts: Star Chamber or Specialized Justice?*, 15 ILSA J. INT’L & COMP. L. (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1328427.

43. *See, e.g., id.* at 41–48.

transmit what they learn in discovery to their confederates—and we know that they do so.⁴⁴

Similarly, but in somewhat more detail, Professor Guiora also proposes that national security courts have the ability to consider classified information without disclosure to the defendant:

[I]ntelligence information would be presented in camera by the prosecutor and a representative of the intelligence services who would be subject to rigorous cross-examination by the court. The judges who would sit on the domestic terror courts would be trained in understanding intelligence information. In addition, the bench would be expected to fulfill a “double role”—that of fact-finder and defense counsel alike. As the latter will be barred from attending the hearings when intelligence information is submitted, the domestic terror courts would have to proactively engage the prosecutor. The burden on the court would be enormously significant because the defendant, who would not be present, would not have counsel representing him with respect to the submission of intelligence information into the record.⁴⁵

In the process, these proposals bemoan as hopelessly inadequate the provisions of the Classified Information Procedures Act (CIPA),⁴⁶ which prescribe procedures for the use of classified information in criminal proceedings. The criticisms rest on two separate grounds: First, proponents of national security courts view CIPA as too constraining substantively—as too greatly infringing upon the government’s ability to use secret evidence in the abstract. Second, the proposals also view CIPA as an insufficient protection for the government’s interest in keeping classified information classified—as insufficiently protecting against the disclosure of such information by the defendant.

Beyond that, proposals for national security courts for trials of terrorism suspects are light on the details. As with the proposals for such tribunals regarding detention decisions, none of the major proponents identify the substantive criteria that would govern either the court’s personal or subject-matter jurisdiction. Instead, the proposals harp upon the ways in which “traditional” evidentiary rules unduly burden the government’s ability to prosecute suspected terrorists, suggest alternate evidentiary rules, and leave it at that.

44. *Id.* at 11 (footnote omitted).

45. Guiora & Parry, *supra* note 3, at 361.

46. 18 U.S.C. app. 3 §§ 1–16 (2000).

D. Common Themes of the Proposals

Once these proposals are placed side-by-side, one conclusion emerges: The substance of the proposals invariably focuses on evidentiary issues—the government’s need to use: (1) classified evidence without disclosing that evidence to the terrorism suspect; (2) evidence that would otherwise be inadmissible in traditional legal proceedings (e.g., hearsay or coerced statements); or (3) both. In other words, deviation from the current system is necessary because the current system cannot adequately handle the evidence the government might potentially have against terrorism suspects. Even assuming for the sake of argument that such an assertion is true, the proposals all skirt the difficult questions that necessarily follow—what limits the Constitution might place on departures from these standards; what definition will dictate to whom such departures may be applied; and so on.

III. THE ASSUMPTIONS PERVADING THE PROPOSALS

As alluded to above, virtually every proposal for a national security court, in whatever guise, has at its core a series of assumptions that are not necessarily true. Although the specific assumptions vary, they fall into four rough groups: (1) that preventative detention of terrorism suspects is not unlawful; (2) that CIPA and other evidentiary rules render traditional criminal prosecutions of terrorism suspects unworkable; (3) that, in general, the Article III courts are inappropriate forums for terrorism cases; and (4) that there are no analogous tribunals and/or procedures already available under extant law. In important ways, each of these assumptions is incomplete—if not altogether unconvincing.

A. The Lawfulness of Preventive Detention

Without question, the most significant assumption undergirding the proposals for national security courts is that preventative detention, in general, is lawful. Thus, with respect to detention decisions, the various proposals catalogued above might best be understood as a search for the most appropriate *process*. But it is hardly a given that the preventative detention of *any* terrorism suspect comports with federal statutes, with the U.S. Constitution, or with international law.

First, with respect to the Constitution, Justice Scalia and Justice Stevens, at the very least, are on record as believing that the Constitution prohibits the detention of U.S. citizens without trial unless Congress has suspended the writ of habeas corpus.⁴⁷ As Scalia wrote in his dissent in *Hamdi v. Rumsfeld*, the central purpose of the Constitution's Suspension Clause was to prohibit detention without trial.⁴⁸ Although the Court has not gone quite so far, it has repeatedly reiterated that the Due Process Clause of the Fifth Amendment only countenances non-criminal detention in exceptional cases—and even then, only upon a highly individualized showing by the government of the threat the detainee poses to society.⁴⁹

Second, with respect to federal statutes, it is not at all obvious that the AUMF confers upon the government the authority to detain any individual determined by the President to be an enemy combatant. The *Hamdi* plurality was extremely careful to limit its endorsement of a power to detain suspected terrorists to “individuals who fought against the United States in Afghanistan as part of the Taliban.”⁵⁰ The plurality did not suggest that the AUMF would cut no more broadly, but it *did* suggest that the most obvious detention authority to be found in the statute concerned traditional battlefield detentions of individuals captured in such a “zone of active combat.”⁵¹

Concurring in part and dissenting in part, Justice Souter—joined by Justice Ginsburg—noted that even if the AUMF could be read to support battlefield detentions in the abstract, it would only authorize the detention of particular individuals consistent with the laws of war.⁵² According to Justice Souter, if the authority to detain enemy combatants came from the law-of-war-based rule that enemy combatants on the battlefield are subject to capture and confinement, such authority was necessarily cabined by its source—the laws of war.⁵³

47. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 554–79 (2004) (Scalia, J., dissenting).

48. *Id.* at 554

49. See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 347–48 (1997) (citations omitted); *Foucha v. Louisiana*, 504 U.S. 71, 73–83 (1992) (citations omitted); *United States v. Salerno*, 481 U.S. 739, 750–51 (1987).

50. *Hamdi*, 542 U.S. at 518 (plurality opinion).

51. See *id.* at 521–24.

52. See *id.* at 548–51 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

53. *Id.*

There are thus three levels of distinction to which the proposals for national security courts are disturbingly indifferent. At most, *Hamdi* supports only the proposition that the AUMF authorizes the preventive detention of enemy combatants captured “on the battlefield,” i.e., in the midst of active combat operations against the U.S. military in places such as Afghanistan. Even then, if Justice Souter is correct, such detention must comport with the laws of war, including the Geneva Conventions. Finally, there is the more general—but no less important—constitutional question of whether the government has *any* power to preventively detain individuals who are *not* captured “on the battlefield,” a question that divided the en banc Fourth Circuit in *al-Marri v. Pucciarelli*.⁵⁴ Separate from the unique circumstances of that case, though, and given that a number of the current Guantánamo detainees were arrested nowhere near Afghanistan, these are vexing assumptions, indeed.

B. The Inadequacy of Evidentiary Rules

The second central assumption behind both sets of national security court proposals (i.e., proposals both for preventive detention regimes and quasi-criminal trials for terrorism suspects) is that current evidentiary rules are inadequate to handle the unique challenges posed by terrorism cases. Specifically, the bulk of the proposals focus on two perceived defects with the current process: (1) that CIPA does not give the government enough flexibility with respect to using classified information; and (2) that the Federal Rules of Evidence exclude evidence that *should* be sufficient to establish a terrorism suspect’s status as an enemy combatant.⁵⁵

CIPA, of course, is a procedural statute; it alters neither the substantive rights of the defendant nor the discovery obligations of the government. At its core, it simply creates procedures through which the government and the court can best determine how (if at all) classified information is to be used in a criminal prosecution.⁵⁶ The critical provision of CIPA is section 4, which provides that:

The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from

54. 534 F.3d 213 (4th Cir. 2008) (en banc), *vacated*, No. 08-368, 2009 WL 564940 (U.S. Mar. 6, 2009).

55. See, e.g., MCCARTHY & VELSHI, *supra* note 3, at 11.

56. 18 U.S.C. app. 3 §§ 2–16 (2000). See *United States v. Mejia*, 448 F.3d 436, 455 (D.C. Cir. 2006).

documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting the relevant facts that classified information would tend to prove.⁵⁷

Such a showing may be made in camera and ex parte.⁵⁸ Moreover, if the district court nevertheless orders the disclosure to the defendant of classified information, such an order is subject to an immediate and expedited interlocutory appeal.⁵⁹

The question nevertheless remains whether CIPA does not allow the government enough flexibility with respect to the introduction of classified information in a criminal trial. Although CIPA usually allows the government to introduce summaries of the classified material or stipulated facts, in cases where such summaries are insufficient, it forces the government to choose between disclosure and sanctions—including the exclusion of all related evidence.⁶⁰

The problem with the critiques of CIPA is that they do not thereby provide support for a national security court: Either these concerns can be remedied without a new court—simply by amending CIPA to give greater flexibility to the government—or they cannot be because such an amendment would call CIPA's constitutionality into serious question. In other words, either CIPA can be tweaked short of scrapping the entire system of criminal trials in Article III courts, or it cannot be because it already represents the constitutional ceiling for the use of classified information—a line that cannot be transgressed.

A similar problem befalls the evidentiary assumptions at the heart of most proposals for national security courts. In particular, the proposals generally focus on the need in individual cases to use hearsay evidence—evidence that would not generally be admissible in an Article III court—in order to prove that an individual is in fact an enemy combatant (and, in the criminal context, has committed a particular crime). Again, one of two things is necessarily true: Either the evidentiary rules that would apply to such cases can be modified, or they cannot be. That is to say, either Congress can amend the Federal Rules of Evidence to allow for the introduction of particular forms of evidence in particular cases, or the Constitution prohibits

57. 18 U.S.C. app. 3 § 4.

58. *See id.* § 6(c)(2).

59. *See id.* § 7.

60. *See, e.g., id.* § 6(e).

Congress from so acting. The former would suggest that a move to a national security court would be akin to using a bazooka to kill an ant; the latter would suggest that national security courts *couldn't* have a lesser evidentiary burden.

C. *The Existence (and Ignorance) of Precedent*

Finally, what cannot be gainsaid about the proposals discussed in Part II is that they all assume that, whether we *need* national security courts or not, we do not at present *have* them. This assumption is critical, because the vast majority of the proposals rely upon the inadequacy of the current system as proof of the need for a third way. Thus, one key question is whether the mechanisms for which their proponents are arguing *already* exist (or at least have existed in other forms in the past). The precedents surveyed below bring these questions into sharp relief, and suggest that some of the elements of the current proposals have already been tried, and rejected.

1. *Precedents Reborn: Alien Enemies and Emergency Detention*

The Japanese-American internment camps during World War II are not the only example in American history of preventive detention of individuals during wartime (or other national security emergencies) simply as a means of incapacitation. The Alien Enemy Act of 1798, which remains on the books today, provides that during a declared war, “all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies.”⁶¹ Although the Alien Enemy Act would obviously be of no help in incapacitating terrorism suspects (who are often nationals of our allies), another more recent example—the much-maligned Emergency Detention Act of 1950 (EDA)⁶²—might provide a better exemplar.

The EDA, passed as part of the Internal Security Act of 1950, provided a detailed and sophisticated mechanism for the detention of suspected Communists (or other potential saboteurs or

61. 50 U.S.C. §§ 3–21 (2000). See Stephen I. Vladeck, *Enemy Aliens, Enemy Property, and Access to the Courts*, 11 LEWIS & CLARK L. REV. 963 (2007), for a survey of the Act and its mostly unexplored jurisprudence.

62. Pub. L. No. 81-831, § 1024, 64 Stat. 987, 1019–31 (1950) (repealed 1971).

insurrectionists) during a declared “internal security emergency.”⁶³ The statute provided for detailed administrative review of the detentions within 48 hours of the initial arrest, with subsequent appeals to the federal courts.⁶⁴ The EDA was hotly criticized, and was ultimately repealed in 1971 (largely as a symbolic repudiation of the internment camps from World War II)⁶⁵ in the same statute in which Congress enacted the so-called “Non-Detention Act,” 18 U.S.C. §4001(a), which provides that “[n]o citizen shall be imprisoned or otherwise detained except pursuant to an Act of Congress.”⁶⁶ Given the significance of the repeal of the EDA, one question for current proponents of a national security court for detention decisions is whether the reasons for repeal of the EDA in 1971 are less salient today.

2. *Mandatory Detention and the USA PATRIOT Act*

Along lines echoing the EDA, six weeks after September 11, Congress expressly provided for the short-term detention of suspected terrorists in section 412 of the USA PATRIOT Act, which authorizes the Attorney General to detain *any* non-citizen “engaged in any . . . activity that endangers the national security of the United States.”⁶⁷ In other words, the USA PATRIOT Act provides the government with statutory detention authority to detain *any* non-citizen terrorism suspect without charges, albeit for a short period of time. Critically, the mandatory detention provision expressly contemplates review of the detention decision, both internally by the Attorney General, and externally via petitions for writs of habeas corpus in the D.C. federal district court.⁶⁸ That the U.S. government has, to date, declined to exercise its authority under the statute does not vitiate its applicability to potential future cases.

63. *Id.*

64. For helpful academic discussions of the EDA, see Richard Longaker, *Emergency Detention: The Generation Gap, 1950-1971*, 27 W. POL. Q. 395 (1974), and Leslie W. Dunbar, *Beyond Korematsu: The Emergency Detention Act of 1950*, 13 U. PITT. L. REV. 221 (1952).

65. See Stephen I. Vladeck, Note, *The Detention Power*, 22 YALE L. & POL’Y REV. 153, 178–80 (2004).

66. Act of Sept. 25, 1971, Pub. L. No. 92-128, 85 Stat. 347 (1971) (codified at 18 U.S.C. § 4001(a)).

67. Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272, 350–52 (2001) (codified at 8 U.S.C. § 1226(a)).

68. See *id.*

3. *Combatant Status Review Tribunals*

Separate from the USA PATRIOT Act, the U.S. government has already established a process to decide whether terrorism suspects can be detained as enemy combatants—the Combatant Status Review Tribunals (CSRTs) launched in July 2004 and noted above.⁶⁹ Although the CSRTs are composed only of military officers, and provide exceedingly minimal process, the DTA confers upon the detainees a statutory right to appeal their CSRT determination to the D.C. Circuit,⁷⁰ and *Boumediene* recognizes the Guantánamo detainees' right to petition for habeas corpus review in the D.C. district court.⁷¹ Thus, in a sense, the D.C. federal courts are already functioning as national security courts.⁷²

4. *The Military Commissions Act of 2006*

Although the Supreme Court in *Hamdan*⁷³ invalidated the military tribunals created by President Bush pursuant to a November 2001 Executive Order,⁷⁴ Congress responded by enacting the Military Commissions Act of 2006 (MCA). The MCA provides the executive branch with sweeping authority to try any “alien unlawful enemy combatant,” which the MCA defines as a non-citizen who “who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).”⁷⁵ Thus, the MCA could theoretically apply to any non-citizen who provides “material support” to a group involved in hostilities against the United States or its co-belligerents. In addition, the MCA, in new 10 U.S.C. § 950v, authorizes trial by military commission for a wide range of criminal offenses, ranging from traditional war crimes to “conspiracy,”

69. See *supra* notes 21–22 and accompanying text.

70. Detainee Treatment Act of 2005, Pub. L. No. 109-48, § 1005(e)(2), 119 Stat. 2680, 2742–43.

71. See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

72. As noted above, what the D.C. Circuit can actually review on appeal is an issue of significant current debate. See *supra* note 22 and accompanying text. At bottom, though, the D.C. district court has habeas jurisdiction over the Guantánamo detainees.

73. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

74. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (codified at 32 C.F.R. pt. 10).

75. Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2601 (codified at 10 U.S.C. § 948a(1)(A)).

“terrorism,” and the provision of “material support” thereto.⁷⁶ If the MCA is constitutional in relevant respects,⁷⁷ then it authorizes the trial by military commission for an exceptionally broad class of offenders and an exceptionally broad class of offenses.

Moreover, trials pursuant to the MCA would be conducted under drastically different evidentiary rules. Although the MCA prohibits convictions obtained solely on the basis of irrebuttable evidence and bars the introduction of evidence obtained through torture, new 10 U.S.C. §§ 948r and 949a(b)(2) expressly authorize the introduction of certain hearsay testimony and of statements obtained through coercion, in addition to evidence gathered through unlawful searches.⁷⁸

The MCA specifically, and the other examples discussed above more generally, raise two fundamental challenges to proposals for national security courts: Either (1) the substantive provisions of these statutes are constitutional, and effectively create a legal regime mirroring the extant proposals (rendering such proposals unnecessary); or (2) the provisions are unconstitutional, a fate that would likely befall proposals for national security courts along similar lines.

IV. DO WE NEED NATIONAL SECURITY COURTS?

Assuming that the assumptions documented in Part III are valid, that leaves the central question: Do we really *need* national security courts? Put another way, are the problems identified by proponents of national security courts worth a solution? Even if they are, are hybrid tribunals the answer?

Philosophically, proposals for national security courts are, in many respects, proxies for larger debates that have been ongoing since shortly after September 11. Thus, inextricably bound up in proposals for national security courts is the assertion that neither the traditional criminal paradigm nor the traditional military paradigm is adequate to handle the unique problems posed by international terrorism. Proposals for national security courts thus attempt to avoid answering the question of whether terrorism is war or crime.

76. *Id.* § 3(a)(1), 120 Stat. at 2625–30 (codified at 10 U.S.C. § 950v).

77. For a short synopsis of the arguments against the constitutionality of these provisions, see Vladeck, *supra* note 9, at 178–80.

78. *Id.* § 3(a)(1), 120 Stat. at 2607–09 (codified at 10 U.S.C. §§ 948r and 949a(b)(2)).

What is perhaps so disconcerting about the proposals, then, is the extent to which proposals for national security courts for detention decisions *resemble* the currently prevailing military paradigm, and the extent to which proposals for national security courts for criminal prosecutions *resemble* the currently prevailing criminal paradigm. The former set of proposals focus on the ability to incapacitate terrorism suspects for a long period of time, and trifle mostly over what evidence can be used in reviewing the decision to detain. The latter set focus on the ability to prosecute terrorism suspects in courts, albeit non-Article III courts, and, again, trifle over what evidence can be used in attempting to convict the defendant of the charges against him. If neither paradigm is apt, why hew so closely to their traditional structures?

At their core, proposals for national security courts suggest that, as a legal system, we do not want to relax the rules in *all* cases—just those involving terrorism suspects. And yet, that’s precisely the nub of the problem; even if one were tempted to ignore Justice Frankfurter’s celebrated admonition that “[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people[.]”⁷⁹ that still leaves the threshold definitional question unanswered: Just who *are* the terrorism suspects who can be subjected to this “third” way, and what checks are there to protect against false positives? By focusing so much on evidentiary issues, proposals for national security courts proceed on the assumption that these questions are either unimportant or have already been answered. Neither, though, is true.

Ultimately, proposals for national security courts are thought-provoking, but dangerously incomplete. The idea that there is a class of individuals for whom neither the criminal nor military paradigms suffice presupposes that such a class of individuals is readily identifiable. The idea that national security courts are a proper third way for dealing with such individuals presupposes that the purported defects in the current system are ones that cannot adequately be remedied within the confines of the current system, and yet *can* be remedied in hybrid tribunals without violating the Constitution. Whether such a tightrope could be successfully navigated or not, the extant proposals for national security courts do exceedingly little to bridge that gap. In short, we cannot have a serious debate over the need for national security courts until and unless we first resolve

79. *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

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critical questions as to the scope of the government's authority to incapacitate terrorism suspects, and the scope of those suspects' constitutional rights vis-à-vis the government.

Deliberately, I have not tried to suggest answers to these questions in the above pages. Indeed, I think it tautological that reasonable people will disagree as to what the government can and cannot do. And in any event, it cannot be gainsaid that it will be years before we have a full accounting of the myriad legal and policy questions that terrorism-related detentions engender. I have my own views, to be sure, but they are immaterial here. Rather, the central thesis of this article is that a system of national security courts would only further perpetuate the extant uncertainty, providing more questions than answers.

