

This chapter has been excerpted from my book, Jonathan Hafetz, *Habeas Corpus after 9/11: Confronting America's New Global Detention System* (NYU Press 2011), with the permission of the publisher, New York University Press.

Terrorism as Crime

Toward a Lawful and Sustainable Detention Policy

As the Bush presidency neared its end, approximately 250 prisoners were still being held at Guantánamo, hundreds more in Bagram, thousands in Iraq, and an undefined number in secret or proxy detention. One person was still being detained as an “enemy combatant” inside the United States. For more than five and a half years, Ali al-Marri had been imprisoned without criminal charge or trial at a navy brig in Charleston, South Carolina. Al-Marri had been detained by the military even though he did not meet any traditional or legal definition of a combatant: he was not a member of the armed forces of an enemy state; he had never taken up arms against U.S. or allied forces; and he was not seized on a battlefield or in connection with any military activity. Instead, al-Marri had been arrested at his home in Peoria, Illinois, by FBI agents and then prosecuted in federal court until the president declared him an “enemy combatant” less than a month before trial and on the eve of a hearing to suppress the evidence against him.

Could the president deprive al-Marri of his constitutional right to a criminal trial based on the allegation that he was plotting terrorist acts in the United States and imprison him indefinitely in military custody? The answer to that basic—but critical—question remained uncertain. In June 2007, a three-judge panel of the U.S. Court of Appeals for the Fourth Circuit, which sits in Richmond, Virginia, had ruled that al-Marri’s military detention was illegal.¹ The full appeals court, however, agreed to rehear the case and then reversed the panel’s judgment in a narrowly divided and fractured decision. The full court ruled, by a five-to-four vote, that the president had legal authority to detain al-Marri as an “enemy combatant” if, as the government alleged, he had come to the United States to engage in terrorist activities on behalf of al Qaeda. The court’s decision rested on the Authorization for Use of Military Force (AUMF), enacted by Congress in the immediate aftermath of the September 11 attacks. The court also ruled, however, by a

different five-to-four majority, that al-Marri was entitled to greater protections than the district court had afforded him in challenging those allegations and remanded the case to the district court for further proceedings.³

Judge Diana Gribbon Motz wrote both the original panel decision and the opinion for the four judges who voted to invalidate al-Marri's military detention.³ Judge Motz looked to the laws of war to help determine what domestic military detention power the AUMF granted and the Constitution allowed. According to the Supreme Court's decisions, she explained, the legal definition of a "combatant" had always rested on a person's affiliation with the military arm of an enemy nation.⁴ In *Hamdi*, moreover, the Court had expressly cautioned against stretching the AUMF's grant of military detention power beyond long-standing law-of-war principles, such as soldiers who take up arms on a battlefield alongside enemy government forces. No precedent supported treating al-Marri as a combatant in a global military conflict against a terrorist group and thereby imprisoning him without the guarantees of the Bill of Rights. Instead, Motz said, al-Marri was a civilian, and under the Constitution, civilians must be charged and tried for their alleged crimes in the ordinary courts as long as those courts are open and functioning—a principle embodied by Supreme Court decisions such as *Ex parte Milligan*.

Judge Motz also observed that Congress had specifically addressed the detention of domestic terrorism suspects at virtually the same time it enacted the AUMF. In the Patriot Act, Congress increased law enforcement's power to investigate and prosecute suspected terrorists, and it enhanced the attorney general's authority to detain alien terrorist suspects seized in the United States. But Congress also cabined that detention power, stating that suspected alien terrorists had to be charged within seven days of arrest and rejected the Bush administration's request for the power to detain indefinitely.⁵ By relabeling al-Marri an "enemy combatant," the administration had therefore thwarted not only the Constitution but Congress as well.

Judge Motz underscored the broader threat that al-Marri's military detention posed to the Constitution. The notion that the president could simply designate allegedly dangerous people as enemies of the state and thereby deny them the right to a criminal trial defied the country's core principles. Today it was an alleged al Qaeda agent, but tomorrow it might be someone who merely associated with a terrorist group or knew a terrorist; one day, it might be someone accused of other crimes such as drug trafficking; and eventually, it might be a politically disfavored group. Once the "enemy combatant" category was stretched beyond established law-of-war principles and severed from membership in the armed forces of an enemy nation or par-

ticipation in hostilities on a battlefield, there was no principled limit. This unprecedented expansion of military detention authority gave tremendous discretion to executive branch officials, allowing them to circumvent the fair-trial guarantees of the Constitution when they lacked evidence of criminal activity or wanted to engage in coercive interrogations, or both.

“To sanction such presidential authority to order the military to seize and indefinitely detain civilians,” Judge Motz warned, “would have disastrous consequences for the Constitution—and the country.”⁶ Allowing the president to designate suspected criminals—even suspected terrorists—“enemy combatants” was a more radical step than temporarily suspending habeas corpus during an emergency, Motz said, because it represented the permanent evisceration of not one constitutional guarantee but the many guarantees embodied in the Bill of Rights.⁷ Al-Marri was accused of serious crimes and, if convicted, should be punished severely. But, Motz added, al-Marri’s military detention must cease.

The majority ruled, however, that the executive branch’s allegations of suspected terrorist activity on behalf of al Qaeda, an organization with which the United States was at war, was sufficient to strip lawful residents of the United States of their constitutional right to a criminal trial. Yet the majority could not agree on the meaning of “enemy combatant,” issuing three separate opinions in an effort to define the term. If nothing else, the fractured ruling itself highlighted the problems with trying to treat the fight against terrorism as a global armed conflict and to equate suspected terrorists seized in civilian settings in the United States with soldiers captured on a battlefield.

Judge J. Harvie Wilkinson III offered the most elaborate defense of presidential power. He recognized that the military detention of a person lawfully in the United States “is a momentous step” that raises serious constitutional concerns. He also acknowledged that this detention power would apply equally to citizens and noncitizens for, as the Hamdi and Padilla cases showed, citizens no less than aliens could be “enemy combatants.”⁸ Wilkinson maintained, however, that it was necessary for the United States to take this step into uncharted waters. Terrorism posed an unprecedented threat, as “thousands of human beings can be slaughtered by a single action and . . . large swaths of urban landscape . . . leveled in an instant.”⁹ Congress had responded to this threat in the AUMF by authorizing the president to use “all necessary and appropriate force” against those responsible for the 9/11 attacks. It was therefore incumbent on the courts, Wilkinson argued, to develop an appropriate legal framework for implementing this broadly worded congressional command to protect the nation against future attacks.

In Wilkinson's view, the criminal justice system was not the only way to address terrorism. The president, he maintained, must also have the flexibility to deviate from the normal legal rules by treating terrorism suspects, including those arrested inside the United States, as combatants subject to military detention. Limiting military detention to persons who affiliate with an enemy nation or take up arms on a battlefield, Wilkinson asserted, reflected an outmoded view of war ill suited to today's struggle against al Qaeda and other terrorist groups. In this new war, the struggle was not being waged against armies or on battlefields but was being fought everywhere and at all times. Constitutional protections had to give way. America, he insisted, cannot fight this new and unconventional enemy with its "hands tied with Marquess of Queensberry rules."¹⁰

One problem with the criminal justice system, in Wilkinson's view, was its inability to prevent disclosure of classified or other sensitive information.¹¹ By scrupulously protecting defendants' rights, he argued, terrorism trials could jeopardize national security. They also exposed jurors and judges to threats of violence and possible attack.¹² Given the stakes, requiring the government to charge terrorism suspects in federal court was impractical and potentially dangerous. Some cases, Wilkinson said, had to be handled outside the criminal justice system. Indefinite military detention under a war paradigm provided an alternative.

But Wilkinson's opinion was flawed, both legally and empirically. He discounted the criminal system's success in handling terrorism cases, on the one hand, and the problems with detaining prisoners without trial, on the other. He also underestimated the dangers of giving the executive license to circumvent the criminal justice system simply by alleging that a person had supported or engaged in terrorist activity. This danger was particularly grave, since designation as an "enemy combatant" in the "war on terror" could mean a life sentence. Although Wilkinson acknowledged the need for habeas corpus to prevent mistakes, he viewed the habeas process as highly circumscribed, excluding such important protections as the prisoner's right to see the government's evidence and to confront its witnesses.

Al-Marri appealed the Fourth Circuit's ruling to the Supreme Court, arguing that the indefinite military detention of legal residents arrested in the United States exceeded the president's authority and represented a profound departure from more than two centuries of precedent and tradition. Al-Marri's appeal was supported by former top-level Justice Department and military officials as well as a range of nongovernmental organizations and legal experts. The Bush administration opposed it, trying, as it had in Jose Padilla's case, to

avoid review by the nation's highest court of its most far-reaching claim of executive detention power—a power that extended both to citizens and non-citizens alike. In December 2008, nearly seven years to the date of al-Marri's initial arrest, the Court announced that it would hear his case. This time, however, the decision whether to defend the indefinite military detention of a person arrested in the United States would fall to a new administration.

The intense controversy over al-Marri's case, whose resolution is discussed in the next chapter, shows that the right to habeas corpus is in some ways the start, not the end, of the conversation about law and national security. Once a court has the power to consider a habeas petition, as it did in al-Marri's case, it must then determine whether the detention is lawful. That inquiry, in turn, encompasses a series of important questions. Who, for example, can be held in military custody? And by what process? Are suspected terrorists to be treated as criminals or combatants? Can they be placed in another category, one that shares attributes of each but necessitates a new set of rules? These and other questions remain central to the continuing debate over U.S. detention policy.

On July 27, 2005, John C. Coughenour, a federal district judge in Seattle, sentenced Ahmed Ressam to twenty-two years in prison for his role in a plot to detonate explosives at Los Angeles International Airport on the eve of the millennium. In handing down the sentence, Judge Coughenour explained why the criminal justice system should remain the legal mechanism for trying suspected terrorists: "Our courts have not abandoned our commitment to the ideals that set our nation apart. We can deal with threats to our national security without denying the accused fundamental constitutional protections." Even though Ressam was a foreign national accused of planning to kill Americans, he "received an effective, vigorous defense, and the opportunity to have his guilt or innocence determined by a jury of 12 ordinary citizens." The accusations against him were tested "in the sunlight of a public trial. There were no secret proceedings, no indefinite detention, no denial of counsel."¹³ U.S. Attorney John McKay, whose office prosecuted Ressam, disagreed with the sentence and demanded more jail time. (The court of appeals agreed and subsequently remanded the case for resentencing.) But McKay nonetheless shared Judge Coughenour's assessment that the criminal justice system could handle such cases. In addition, McKay pointed out, Ressam's sentence "sent an important message to would-be terrorists around the world" that "in the United States a fair trial will be given . . . and where it is found that terrorism was committed, a lengthy prison sentence will be imposed."¹⁴

Terrorism, as Judge Coughenour's comments underscore, is a crime, and terrorists are criminals who should be prosecuted in civilian courts under established laws and procedures. The fact that terrorism is international in scope and has the potential to inflict tremendous damage does not alter its fundamental nature. Moreover, the fact that an organization like al Qaeda may have "declared war" on the United States makes no difference: its members and supporters remain outlaws, not soldiers, and should be treated as such.

Trying terrorists in federal courts is sometimes criticized as giving rights to those who do not deserve them.¹⁵ But those criticisms fail to recognize the utility and importance of treating terrorists as criminals. The criminal justice system has proved time and again that it can effectively incapacitate those who plot or plan to commit terrorist acts in the future, as well as those who have committed such acts in the past. If anything, that system has proved to be a far more capable and sustainable mechanism of incapacitating terrorists than detaining them indefinitely as "enemy combatants" or prosecuting them for "war crimes" in military commissions.

Treating terrorists as combatants also has the perverse effect of dignifying the worst kind of criminality by according terrorists the status of soldiers. Throughout history, terrorists of all stripes have tried to justify their actions by claiming that they are fighting against the forces of injustice, while governments have sought to de-legitimize them as criminals, bandits, and outlaws.¹⁶ Equating terrorists with soldiers—even under the label of "unlawful combatant"—lends credence to their contention that they are engaged in an armed struggle with the United States, a fight between opposing forces, each claiming legitimacy. It plays directly into the hands of terrorists by allowing them to cast themselves in the heroic mold of warriors engaged in a historic struggle against a larger and more powerful opponent and to minimize the murder of innocent civilians as the inevitable casualties of war. To take but one example: treating the fight against al Qaeda through the language and legal framework of armed conflict gave Khalid Sheikh Mohammed, the self-proclaimed mastermind of the 9/11 attacks, a platform to compare himself with George Washington, who, he said, would have been labeled an "enemy combatant" if he had been captured during the American Revolution.¹⁷

Conversely, treating terrorists as criminals who must be prosecuted in federal court deprives them of the opportunity to invoke the rhetoric of war to justify their actions. Thus when Richard Reid tried to justify attempting to blow up a commercial airliner with explosives hidden in his shoes by announcing he was "at war" with America, Massachusetts District Judge

William Young could credibly reject Reid's diatribe in sentencing him to life in prison:

You are not an enemy combatant. You are a terrorist. You are not a soldier in any war. You are a terrorist. To give you that reference, to call you a soldier gives you far too much stature. Whether it is the officers of government who do it or your attorney who does it, or that happens to be your view, you are a terrorist.¹⁸

Labels have strategic consequences. "If we are to defeat terrorists across the globe," explained former NATO Supreme Commander Wesley K. Clark, "we must do everything possible to deny legitimacy to their aims and means, and gain legitimacy for ourselves."¹⁹

To be sure, America's criminal justice system is not perfect. Like all other systems, it makes errors. It also forces prosecutors to develop evidence that will hold up in the crucible of the adversarial process, which can be a demanding task. The government thus might sometimes find it easier in the short run simply to label a suspect an "enemy combatant" and imprison him without charge, without a lawyer, and without a prompt judicial hearing. But this approach creates tremendous problems in the long run, inevitably leading to the prolonged detention of innocent people, undermining the legitimacy of counterterrorism efforts, and making it harder to bring the guilty to justice.

The United States' use of military commissions after 9/11 exemplifies the problems of trying to devise new, "alternative" systems for dealing with terrorists. The commissions have fallen far short of internationally recognized standards of due process, failed to bring to justice those allegedly responsible for the 9/11 attacks, and tarnished America's reputation. During the Bush administration, military commissions obtained only three convictions. The first person convicted was David Hicks, a naïve kangaroo skinner from Australia who, at worst, had volunteered to serve as a low-level Taliban foot soldier. The second was Salim Hamdan, a Yemeni citizen with a fourth-grade education who had worked as a driver for Osama bin Laden but who had no knowledge of any terrorist attacks and had not engaged in any acts of terrorism. The third, Ali Hamza al-Bahlul, an al Qaeda propagandist, was convicted and sentenced to life in prison after proclaiming his guilt and hatred for America in open court and failing to offer any defense. Summarizing these three cases, former chief military prosecutor Morris Davis lamented that the United States had managed to convict only "a dupe, a driver, and a default."²⁰

Even after several attempts at reform, the commissions remained plagued by flaws and engulfed in controversy. While the Military Commissions Act of 2006 (MCA) nominally banned the use of evidence gained by torture, the commissions' top legal adviser, Air Force Brigadier General Thomas W. Hartmann, continued to insist that evidence gained through waterboarding and other "enhanced interrogation techniques" from the CIA's secret detention program was admissible at commission trials. The Defense Department also continued to take advantage of lax rules designed to conceal abusive interrogation methods while allowing the fruits of those methods to be used as evidence. For example, most of the government's evidence against Salim Hamdan was based on statements that he had given to FBI interrogators at Guantánamo after almost two years of incommunicado detention and other gross abuses. In pretrial proceedings against another detainee, Canadian citizen Omar Khadr, who was fifteen years old when he was seized in Afghanistan in 2002, the prosecution tried to hide that its evidence was based on confessions coerced from Khadr while he was severely wounded and detained by the United States at Bagram, before his transfer to Guantánamo.

Secrecy continued to pervade the commissions. Important portions of trials and other legal proceedings were closed to the public, not to protect sensitive information, but to hide the mistreatment of prisoners. Critical exculpatory information was withheld from detainees and their attorneys, including information as basic as an agent's interrogation notes that could help reveal the harsh conditions under which a detainee's statements were obtained.

Political influence still plagued the commissions. On paper, the MCA mandated that prosecutors be free from command influence and able to exercise their professional judgment in selecting cases and moving them forward.²¹ But in practice, prosecutors had no such independence, and charging decisions remained highly politicized. For example, high-ranking military officials forced commission prosecutors to bring charges against David Hicks even though he was, at most, a marginal figure. Those officials then negotiated an eleventh-hour plea agreement that resulted in Hicks's return to Australia. The deal not only was negotiated without the prosecutors' knowledge, but was the result of a request to Vice President Cheney from Australia's prime minister John Howard, who was facing increasing demands at home to oppose Hicks's prosecution by a military commission. Hicks's plea highlighted what many had long believed: that a prisoner's release from Guantánamo had less to do with his alleged terrorist or military activities than with the amount of pressure his government was capable of and willing to exert on the United States.

The Convening Authority, the nominally independent body established by the MCA to oversee the commission process, continually forced prosecutors to bring charges for political purposes. Hartmann, for example, demanded that prosecutors bring “sexy” cases to capture the public’s imagination and increase support for the tribunals. According to Morris Davis, top Pentagon officials, including Deputy Defense Secretary Gordon England, encouraged him to bring charges against the more notorious detainees before the November 2006 midterm elections for their “strategic political value.” The Defense Department’s general counsel, William J. Haynes II, told Davis that only guilty verdicts were acceptable. “We can’t have acquittals,” Haynes reportedly said. “We’ve been holding these guys for years. How can we explain acquittals? We have to have convictions.”²²

The military commissions also violated Common Article 3’s requirement that any trial be conducted by “a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” The commissions were not “regularly constituted courts” because they were not “established and organized in accordance with the laws and procedures already in force in [the] country.” Instead, they were created to punish “war crimes” invented after the fact, and their rules were made up on the fly.²³ The commissions deviated from, rather than mirrored, the regularly constituted courts: federal trials and military courts-martial.²⁴ Furthermore, by attempting to punish conduct that was not necessarily illegal at the time, the commissions raised serious *ex post facto* problems.

The commissions generated vigorous resistance from some military judges and prosecutors as well as military defense counsel. In May 2007, during pre-trial proceedings in Hamdan’s commission case, the military judge, Navy Captain Keith J. Allred, granted a defense motion to bar Hartmann from further participation in the case based on his illegal efforts to influence the prosecution.²⁵ In another case, the judge, Army Colonel Stephen R. Henley, suppressed evidence against Mohammed Jawad, an illiterate young teenager accused of throwing a hand grenade at a military vehicle in Kabul that injured two U.S. service members and their Afghan interpreter. Henley found that the “confession” the government was relying on to prosecute Jawad was the product of torture, obtained from him after he had been hooded, beaten, and threatened with death.²⁶ Henley also rejected the government’s legal theory that Jawad could be convicted of a war crime based solely on his status as an unlawful combatant (i.e., based solely on Jawad’s alleged affiliation with a group “associated” with al Qaeda), without proving that Jawad’s conduct itself violated the law of war, as throwing a hand grenade at a military target plainly did not.

In 2007, Morris Davis resigned as chief prosecutor, explaining that unlawful command influence had corrupted the integrity of the commissions and declaring that “full, fair and open trials were not possible under the current system.”²⁷ The following year, Army Lieutenant Colonel Darrel Vandeveld became the fourth prosecutor to resign, citing the Pentagon’s mishandling of the Jawad case, in which he had served as lead prosecutor. After reviewing the evidence, Vandeveld believed that Jawad should never have been prosecuted in the first place and tried to negotiate a plea deal that would have allowed Jawad’s repatriation to Afghanistan, calculating that this was the quickest way for Jawad to escape the corrupt military commission system and go home. Vandeveld also pointed to Jawad’s abuse by U.S. officials, including severe sleep deprivation under the “frequent-flyer program,” in which interrogators moved Jawad from cell to cell 112 times during a fourteen-day period to cause disorientation and despair. When Vandeveld’s superiors saw that Vandeveld had admitted to Jawad’s abuse by Afghan and U.S. officials and argued for more lenient treatment, they reprimanded him and forced him to withdraw the admission. Vandeveld also cited the Pentagon’s repeated refusal to disclose exculpatory information to defense counsel, including information that the government had regarding another suspect in U.S. custody who had confessed to the same crime that Jawad was accused of committing. “One would have thought that after six years since the commissions had their fitful start, that a functioning law office would have been set up and procedures and policies not only put in effect, but refined,” Vandeveld explained in a sworn statement after his resignation.²⁸

The military commissions’ failure, however, was not due ultimately to any single flaw but to a larger effort to create an inferior, second-class system of justice. In America, as one journalist protested after observing a military commission proceeding, there are no secret trials and reporters are allowed to see the witnesses and the evidence. “This is not America,” a Pentagon spokesperson responded, oblivious to the irony.²⁹

Even among those who criticize the Bush administration’s detention policies, there remains significant disagreement over the solution. A number of commentators and lawyers, for example, have advocated other methods of detaining and trying terrorist suspects outside the criminal justice system. They sympathize with the Bush administration’s effort to create an alternative detention system for suspected terrorists outside the criminal justice system but disagree with the direction that this effort took. They thus seek to preserve important elements of the Bush administration’s approach, such as indefinite detention without charge, while strengthening procedural protec-

tions and other limits on executive power. In short, they propose to reform Guantánamo, rather than to end it.

Professors Robert Chesney and Jack Goldsmith, for example, argue that neither the criminal nor the military 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.”³⁰ The criminal model, they say, is too focused on preventing error, a commitment embodied in the idea that it is better for some guilty persons to go free than for one innocent person to be convicted. “The problem of modern terrorism demands anticipatory or predictive forms of liability, and may demand a lower rate of erroneous acquittals than the traditional criminal system would tolerate,” Chesney and Goldsmith contend.³¹ In other words, government officials must be able to incarcerate people before they do something wrong and without having to subject their suspicions and evidence to the same type of adversarial testing that the criminal process requires. The military system, by contrast, provides too much detention power. Its focus reflects the exigencies of combat and contemplates the short-term detention of combatants and civilians on a mass scale. It allows for detention based solely on association (typically, membership in the enemy’s armed force), on the one hand, and provides relatively few procedural protections, on the other (such as the streamlined status hearings under Article 5 of the Geneva Conventions). If the criminal model is overly concerned with preventing error, Chesney and Goldsmith argue, the traditional military model goes too far in the other direction. Their solution is a hybrid that combines elements of both: allowing for prolonged detention based on some form of membership in or association with a terrorist organization while offering procedural safeguards more rigorous than traditional military status tribunals but considerably less demanding than a criminal trial.

One hybrid proposal that has gained traction in academic and policymaking circles is that of a separate national security court. Specialized courts are not unknown to the federal system. Some courts, for example, hear only tax or patent cases, and specialized administrative agencies decide cases affecting federal benefits, the environment, and various government programs. But national security courts differ from most other specialized tribunals in that they are not driven by a judge’s expertise in a particular subject area but by a desire to evade more rigorous rules and due process protections. National security courts, at bottom, seek to institutionalize a new system for

the long-term, preventive detention of terrorist suspects without the constitutional safeguards of a criminal trial.

Proposals for national security courts vary. One championed by Goldsmith and former Georgetown Law School professor and later deputy solicitor general Neal Katyal would have federal judges review preventive detention in specialized proceedings. Detainees would be represented by counsel, drawn from a permanent staff of top-quality defense lawyers with special security clearances to handle classified information. In addition to judicial review of the initial decision to detain, Goldsmith and Katyal's proposal calls for further appellate review of whether there is "a continuing rationale" to hold people "years after" that decision was made.³² It thus explicitly contemplates long-term incarceration without trial, essentially reforming the model of indefinite detention that developed at Guantánamo under the paradigm of the "war on terror" and incorporating it into the U.S. legal system.³³

Others recommend using national security courts both to detain and to try terrorist suspects. Former federal prosecutor Andrew McCarthy, for example, has called for prosecutions in separate domestic terror courts.³⁴ McCarthy contends that federal criminal trials are ineffective and also jeopardize national security by giving terrorists the chance to transmit classified or other sensitive information to the public. Former Attorney General Michael B. Mukasey has voiced similar concerns about creating a national security court. "Current institutions and statutes," he argues, "are not well suited to even the limited task of supplementing what became, after September 11, 2001, principally a military effort to combat Islamic terrorism."³⁵ These new courts would dispense with key safeguards. Defendants would no longer have the right to see and confront the evidence and witnesses against them. Instead, judges would make determinations about the admission and use of evidence in secret, with the input of the prosecutor but without the defendant or his lawyer present.³⁶ The courts, moreover, would be permanent, creating a new "forum for fairly detaining and trying terrorists no matter how long the war on terror ensues."³⁷

Benjamin Wittes of the Brookings Institution has staked out a similar position.³⁸ The political branches, he says, have failed to create a mature and sustainable legal architecture for the detention and trial of terrorism suspects. Wittes asserts that some form of long-term incarceration of terrorist suspects—outside the criminal justice system—is both desirable and inevitable. The challenge is for Congress to articulate clear legal rules with sufficient safeguards and guidelines to hold the executive accountable and to make the system legitimate. Although the courts would have a meaningful

role in this new system, Wittes argues, that role should be limited to deciding cases under legislatively established standards, not devising policy through ad hoc judicial decision making.³⁹ Wittes envisions a hybrid model—a new law of terrorism—that would provide greater procedural protections than the Bush administration afforded detainees while continuing the practice of long-term detention based on less rigorous standards and rules than in criminal trials. Wittes recognizes that crime, not war, is the more appropriate lens through which to view terrorism, but he argues that the criminal justice system is not up to the task.⁴⁰ This hybrid system of preventive detention, he believes, would create a more secure legal architecture while helping detainees through the establishment of clear, legislatively approved rules and procedures.⁴¹

Despite their technocratic tone, most proposals for national security courts embrace the value judgment that noncitizens deserve less protection than citizens do.⁴² “Experience shows,” McCarthy argues, “that once alien combatants are permitted access to our courts, . . . judges, under the rubric of due process, will effectively treat them as if they are as vested as citizens with substantive and procedural protections.”⁴³ Even the more nuanced and less openly discriminatory proposals reinforce policy-based arguments with the suggestion that America simply “owes” less to foreign terrorist suspects.⁴⁴ These citizenship-based arguments, however, are logically and legally problematic, as well as morally suspect. A person’s citizenship does not tell you whether he poses a danger or is responsible for committing a particular terrorist act. Citizens are just as capable of committing grave crimes as foreign nationals are, as the violent acts of homegrown terrorists like Timothy McVeigh demonstrate. Moreover, creating a permanent, second-class detention system for foreign nationals violates the principle of equal protection under law. If past is prologue, the overwhelming majority of people subjected to this new system will be of Arab descent or Muslim background. This discriminatory impact, even if not intentional, will further undermine the United States’ reputation in the Arab and Muslim world and encourage the recruitment of terrorists.⁴⁵

Proposals for national security courts are also astonishingly underdeveloped. While they call for more relaxed rules than criminal trials, they typically fail to spell out what those rules would be, leaving unanswered an array of important procedural questions such as the burden of proof, the ability to call and confront witnesses, and the standards governing the admission of evidence. In addition, national security court proposals provide relatively little guidance on perhaps the most important question of all: the category of people they would cover. Most proposals recommend some combination

of membership in or association with al Qaeda and other terrorist groups, coupled with some proof of future dangerousness. But how does one determine membership in an amorphous, hydra-headed terrorist organization? What level of association with al Qaeda or other organizations would suffice? And how does one determine “dangerousness” separate from conviction for a crime? The proposals often fail to grapple with these basic questions.

National security court proposals, moreover, ignore the incentive they create for the government to detain individuals without charge and to forgo prosecution altogether. The experience with military commissions at Guantánamo is instructive. In eight years, the Bush administration charged only a handful of Guantánamo prisoners with any crime. One reason is that it was easier to detain them without trial. It would be naïve to expect other administrations to act differently. When given discretion, government officials inevitably gravitate toward a detention option in which the procedures are more flexible and the evidentiary standards lower. Paradoxically, the pressure on government officials to utilize a preventive detention regime with watered-down procedures, rather than developing their cases for trial, will be strongest in those cases in which the government’s allegations are more tenuous and its evidence weaker. Yet it is precisely in those situations that the criminal justice system is most vital to protecting individuals against wrongful imprisonment.

In addition, national security court proposals often turn a blind eye to the problem of coercive interrogation. They criticize the criminal justice system’s ability to incapacitate terrorist suspects while overlooking the extent to which the desire to interrogate, rather than incapacitate, drove U.S. detention policy after 9/11. “Enemy combatant” detentions in the “war on terrorism” had less to do with any perceived inability to hold prisoners through traditional law enforcement methods than it did with the desire to create a class of prisoners outside the law in order to engage in torture and other abusive interrogation methods to gain information. Proposals for national security courts thus tend to see a problem—lack of detention power—where no problem exists. They also largely ignore that diluting the protections of the criminal justice system will inevitably facilitate the use of harsh interrogation methods, whether by denying suspects access to counsel or allowing for the use of evidence gained through torture and other coercion.

Some, such as Georgetown Law School professor David Cole, have advocated continuing the military detention of a more limited group of suspected terrorists under a law-of-war framework rather than creating new national security courts.⁴⁶ Cole argues that the United States should be able to detain

al Qaeda and Taliban “fighters” indefinitely and dispense with the constitutional safeguards of a criminal trial, even if the detainees did not directly participate in hostilities and have no connection to a battlefield, as long as it is established that they belong to groups that have asserted that they are at war with the United States. Cole recognizes that imprisonment without trial raises serious concerns, including the potential for error and the targeting of disfavored groups. But he believes that military detention is justified by the shortcomings of the criminal process and the nature of the armed conflict with al Qaeda, which he compares with the struggle against the Axis powers during World War II. Cole also argues that these concerns can be mitigated by improving procedures and by requiring a stronger connection to al Qaeda or involvement in actual hostilities on al Qaeda’s behalf to limit this new detention power.⁴⁷

But Cole cannot avoid the problem that detentions in an armed conflict against al Qaeda and other terrorist organizations are not simply indeterminate but generational and, indeed, potentially permanent. His proposed narrowing also is problematic on its own terms. It is difficult to determine what level of participation or association is sufficient to trigger military detention. Moreover, that determination will initially be made by the executive branch, which can unilaterally strip individuals of the safeguards of the criminal process based on the allegations it chooses to make against them, thereby funneling them into a shadow criminal justice system that affords fewer rights and protections, is less accountable, and allows for greater secrecy. Habeas corpus may ultimately help check the exercise of this preventive detention power. But that checking function can take years to produce results, as the Padilla, al-Marri, Hamdi, and Guantánamo detainee cases show. Moreover, it remains unclear as a practical matter when or how individuals seized and placed in military detention would first obtain access to a court. Once the government is freed from the criminal law requirement of promptly bringing a prisoner before a judge for a hearing, the prisoner could simply languish in military custody—potentially in secret—until a family member or friend realizes he is being held, files a habeas petition on his behalf, and persuades a judge to order access to counsel and a hearing.

Furthermore, Cole invokes the rationale of prisoner-of-war military detention to justify imprisoning terrorism suspects without trial, noting that the criminal law model is inappropriate because the laws of war forbid the state from prosecuting enemy soldiers (prisoners of war) for fighting and because those soldiers may be obligated to fight (e.g., by the enemy nation’s conscription laws).⁴⁸ But neither is true in the case of alleged “al Qaeda fight-

ers”: they may be prosecuted criminally consistent with the laws of war (as, indeed, the United States has done and continues to do in federal terrorism cases); and those who join al Qaeda are under no legal obligation to do so and thus can be held accountable for their actions, consistent with the principles of criminal law.

Terrorist organizations, moreover, are often loosely defined and continually evolving. Thus, once terrorism becomes an acceptable basis for detention without criminal process, the rationale for limiting the scope of that detention power to a single group, such as al Qaeda, diminishes. After all, al Qaeda itself has mutated into other groups and formations. (Hence the U.S. government’s expansive view of the president’s power to detain members of “associated” groups under the AUMF.) The government will inevitably try to extend its detention power to individuals whom it thinks might be dangerous, whether or not they are affiliated with al Qaeda, as it has already done at Guantánamo.

In the end, proponents of a “third way”—whether detentions based on national security courts or the laws of war—believe that the answer lies in sanding down the rougher edges of Guantánamo and the post-9/11 model rather than scrapping it altogether. They acknowledge, to varying degrees, that the Bush administration went too far by circumventing judicial review, engaging in torture and other gross mistreatment, and rejecting any constraints on presidential power. But they nonetheless agree that terrorism cannot be handled effectively through the criminal justice system (or at least not in many cases) and that the United States must develop an alternative legal framework for incapacitating and interrogating terrorism suspects. This premise is fundamentally flawed, however, and fails to recognize the utility and value of treating terrorism as principally a law enforcement problem and prosecuting suspected terrorists through the regular courts.

A common criticism of the criminal justice system is that it punishes past wrongdoing rather than preventing future harm. That backward-looking focus, critics argue, makes criminal law ill equipped to fight terrorism, given terrorism’s potential to inflict massive human and economic destruction.⁴⁹ But this underestimates the criminal justice system’s capacity to prevent terrorism as well as to punish it.

Over time, Congress has cast an increasingly broad net over those who perpetrate terrorism as well as over those who support it or plan future terrorist acts.⁵⁰ In enforcing those laws, the government has focused increasingly on prevention. After 9/11, federal prosecutors sought to use every avail-

able criminal statute to pursue suspected terrorists before any terrorist act could be committed. The primary goal became detecting, disrupting, and deterring terrorist plots before they could be carried out.⁵¹

In implementing this preventive approach, prosecutors have an array of powerful tools at their disposal. Among the most important are federal laws that prohibit providing material support or resources to terrorists or terrorist organizations.⁵² The first material support law was enacted after the bombing of the World Trade Center in 1993.⁵³ It defines “material support” broadly to encompass providing property, services, money, lodging, training, weapons, expert advice, or personnel, including one’s own person, to facilitate terrorist activity.⁵⁴ Another law passed after the 1995 Oklahoma City bombing bans individuals from giving material support to any organization formally designated a foreign terrorist organization by the secretary of state, even if that person did not actually intend to incite or facilitate terrorist activity.⁵⁵ All that is necessary is for the person to know that the organization has been so designated or has engaged in terrorist activity.⁵⁶ Congress subsequently enacted additional provisions targeting more specific aspects of terrorist financing and attendance at terrorist training camps.⁵⁷ It has also extended the reach of the material support provisions so that they apply extraterritorially.⁵⁸

Material support laws have become an increasingly important law enforcement tool to stop terrorism before it occurs.⁵⁹ To make a material support case, a prosecutor does not have to prove that any underlying terrorist act took place or even that there was an agreement to carry out such an act. Instead, prosecutors can convict individuals merely for raising money for terrorist organizations, attempting to facilitate arms deals, assisting would-be terrorists to obtain travel documents, and attending terrorist training camps.⁶⁰ Not surprisingly, these laws have been used to target low-level players—a terrorist organization’s “foot soldiers and sympathizers”—since prosecutors do not have to prove that the defendant intended to facilitate any specific act of terrorism.⁶¹ In one highly publicized case, the federal government indicted six men from Lackawanna, New York, after discovering that they had traveled to Afghanistan to train with al Qaeda. Prosecutors used material support laws to obtain guilty pleas and significant prison sentences.⁶² While material support laws have been appropriately criticized for their overbreadth—in particular, how they can be used against individuals without showing any connection between the support provided and terrorism or any intent to further terrorist activity—they underscore the government’s capacity to employ criminal statutes to prosecute those who support terrorism without committing any specific terrorist acts.

Conspiracy laws provide another means of disrupting terrorist plots before they materialize. The seditious conspiracy statute, for example, outlaws any agreement to conspire to overthrow or put down the U.S. government, levy war against it, or interfere with the execution of any U.S. law.⁶³ The statute was enacted in 1861—long before the rise of modern terrorism—to provide “a vehicle for the government to make arrests before a conspiracy ripens into a violent situation.”⁶⁴ More recently, it was used to prosecute Sheikh Omar Abdel Rahman and his codefendants for plotting to bomb New York City tunnels and landmarks and for planning to assassinate Egyptian president Hosni Mubarak.⁶⁵ Under principles of conspiracy liability (or “Pinkerton liability”), as long as one member of the conspiracy takes a step toward carrying out the agreement, other members of the conspiracy can be held accountable for crimes committed in furtherance of that conspiracy, from the lowest to the highest member.

Prosecutors have also used generally applicable criminal statutes to counter terrorism, much as prosecutors previously used the tax laws to convict gangsters like Al Capone. Prosecutors have, for example, convicted terrorists under laws prohibiting fraud, money laundering, racketeering, arms dealing, and the destruction of property.⁶⁶ In addition, they have increasingly used statutes involving more “minor” offenses, such as financial or credit-card fraud, making false statements to federal officials, or obtaining false documents. These statutes allow for immediate incapacitation through the denial of bail, cast a wide net over possible prohibited conduct, and do not require prosecutors to reveal their suspicions that wider terrorist activity is afoot. Most important, they allow for the detention of individuals when terrorist activity is suspected but there is not sufficient evidence to support terrorism charges.⁶⁷ As the Department of Justice has explained, the prosecution of terrorism targets on alternative grounds “is often an effective method—and sometimes the only available method—of deterring and disrupting potential terrorist planning and support activities without compromising national security information.”⁶⁸ And even though the punishment for such offenses is ordinarily less severe than for terrorism or other violent crimes, substantial jail terms still can be imposed.

The government, moreover, need not wait until it obtains a conviction to detain someone it believes presents a threat to the public. Federal law provides ample authority to detain criminal suspects once they have been charged with a crime. While the Bail Reform Act of 1984 generally requires the release of defendants under the “least restrictive” conditions possible, it allows for their continued detention pending trial if a judge determines that the defen-

dant poses a flight risk or that his pretrial confinement is necessary to ensure the safety of the community. In terrorism cases, the act specifically creates a presumption in favor of detention.⁶⁹ The government also may detain non-citizens pending immigration removal proceedings in certain circumstances, and such detention can be mandatory in cases involving terrorism.⁷⁰

Critics of the criminal justice model further contend that terrorism prosecutions risk disclosure of classified information, impose overly onerous requirements that prevent the admission of relevant hearsay evidence, and employ rules that hamstring prosecutors and other law enforcement officers. While national security investigations can present challenges, these criticisms are misguided.

One of the main arguments for indefinitely detaining suspected terrorists as “enemy combatants” instead of trying them in federal court has been the need to protect classified information. But the Classified Information Procedures Act (CIPA) already addresses this concern.⁷¹ Congress enacted CIPA in 1980 to facilitate the prosecution of cold war spies without exposing intelligence assets and information. It has since become a crucial tool in federal prosecutions of suspected terrorists. Under CIPA, the government has been able to use information gained from foreign law enforcement and intelligence sources without compromising the sources’ integrity. CIPA has also enabled the government to prosecute terrorism cases without revealing the details of sensitive military and intelligence operations.⁷²

CIPA does not change the government’s discovery obligations or alter the rules of evidence but instead regulates a defendant’s access to and use of classified material. It authorizes a judge to review classified information in a closed hearing to determine whether it is relevant to the case before a defendant can obtain that information during pretrial discovery or use the information at trial. If a judge finds the information relevant, CIPA affords the government a chance to create an unclassified substitute, which may be a redacted version of the classified document (with the sensitive portions blacked out), an unclassified summary, or a statement of the facts that the sensitive material would prove.⁷³ Regardless of the form it takes, the substitute must “provide the defendant with substantially the same ability to make his defense” as would disclosure of the classified information itself.⁷⁴ If the government does not or cannot provide a fair substitute, it can still choose to withhold the information. But there is a cost in doing so. CIPA requires that the court impose an appropriate sanction in such circumstances, not to punish the government, but to ensure the integrity of the trial and judicial process. Sanctions can include barring the government from calling a wit-

ness if the defendant is deprived of evidence necessary to effectively cross-examine the witness or dismissing the prosecution altogether if the government refuses to disclose information important to the defense.⁷⁵

CIPA, to be sure, is not perfect, and it can adversely affect a defendant's ability to obtain relevant information and challenge the government's evidence at trial. Under the act, judges must determine what evidence among potentially thousands of pages of law enforcement and intelligence documents is relevant and helpful to the defense and must therefore be disclosed during the pretrial discovery process. To help facilitate this review, courts have ordered disclosure only to members of the defense team with a security clearance and barred the defendant himself from seeing the information. This "cleared counsel" solution, however, presents a problem from a defense perspective. It prevents a defendant from helping his lawyer assess the relevance of materials, thus impairing a defendant's constitutional right to the effective assistance of counsel. It also can jeopardize a defendant's constitutional right to self-representation, since defendants typically lack the security clearance necessary to review classified information themselves.⁷⁶ Furthermore, judges can evaluate the relevance of materials requested in discovery *ex parte*, considering arguments by the government but excluding the defendant and his counsel from participating.⁷⁷ But its shortcomings aside, CIPA has helped enable terrorism cases to be prosecuted in federal court without jeopardizing the disclosure of sensitive national security information. As Patrick Fitzgerald, the U.S. attorney who helped prosecute the 1998 U.S. embassy bombings case, noted, "When you see how much classified information was involved in that case, and when you see that there weren't any leaks, you get pretty darn confident that the federal courts are capable of handling these prosecutions."⁷⁸

Two examples are commonly cited to show that criminal prosecutions cause the disclosure of sensitive information. Neither has merit. The first involved an alleged breach during the trial of Sheikh Omar Abdel Rahman, when the government handed over to the defense a list of names of individuals alleged to be unindicted co-conspirators, including Osama bin Laden. The list supposedly reached bin Laden in Khartoum, alerting him that his connection to the case had been uncovered.⁷⁹ The problem was that the government had neglected to invoke CIPA or any other court-management tool, such as a protective order, to prevent disclosure of the information. Had the government done so, as it has done in other cases, the sensitive information would not have been disseminated.⁸⁰ The second example involved the introduction of bin Laden's satellite phone records and other

evidence regarding a satellite phone battery pack during the 1998 U.S. embassy bombings trial that supposedly tipped off bin Laden and caused him to stop using the phone.⁸¹ Bin Laden, however, had ceased using the phone long before the material was presented at trial or disclosed to the defense in discovery. The federal prosecution thus was not the source of the problem.⁸²

Another criticism of terrorism prosecutions is that the rules are too restrictive and hinder prosecutors from presenting evidence to a jury. “Federal rules of evidence often prevent the introduction of valid factual evidence for public policy reasons that have no application in a trial of a foreign terrorist,” former defense secretary Donald Rumsfeld and former deputy defense secretary Paul Wolfowitz told Congress in December 2001.⁸³ Or as other skeptics of the criminal justice system put it, “It would provoke laughter to suggest that soldiers in Desert Storm should have obtained search or arrest warrants before capturing Iraqi soldiers and their equipment.”⁸⁴ These broad-brushed attacks ignore the way that the rules of criminal procedure work in practice. They also create a straw man of “battlefield captures” that has little connection to terrorism prosecutions.

One example is the authentication of evidence. Judges understandably need to ensure that a document or recording is what one side represents it to be. The Federal Rules of Evidence implement this commonsense requirement. The rules establish categories of “self-authenticating” documents (such as certified public records) that require no additional proof that they are what they appear to be.⁸⁵ They also give a judge wide latitude to allow the admission of other material, requiring only that the party provide “evidence sufficient to support a finding that the matter in question is what its proponent claims.”⁸⁶ The government generally has not had problems authenticating evidence in terrorism prosecutions, even when some of the evidence came from a theater of military operations. At Jose Padilla’s criminal trial, for example, the government successfully introduced an al Qaeda training camp application with Padilla’s fingerprints on it that had been uncovered in Afghanistan. The government established the authenticity of the document, despite vigorous objection by the defense, through a confidential witness who described how he came into possession of the document in Kandahar before it was sent to a federal agent in Pakistan to allay concerns about the chain of custody and the document’s reliability.⁸⁷

Courts have also applied evidentiary rules flexibly to ensure that a witness with relevant testimony can present it to the jury even in the unusual case when the witness cannot testify in person. Judges, for example, have allowed

testimony of witnesses through videotaped depositions or two-way video-conferencing as long as a defendant has an adequate opportunity to cross-examine the witness and a jury can observe the witnesses' demeanor.⁸⁸ The same is true for the rule against hearsay, which contains a number of exceptions allowing out-of-court statements to be considered.⁸⁹ Judges presiding over terrorism cases have typically applied the rules in a pragmatic fashion so that relevant evidence may be considered without undermining the fairness and integrity of the process.

At the same time, this flexibility is not boundless: the Constitution establishes certain baseline guarantees that cannot be transgressed. A defendant, for example, has the right to a prompt judicial hearing following his arrest and to the assistance of counsel, including for counsel to be appointed at the government's expense if necessary. A defendant must have the opportunity to see and confront the evidence and witnesses against him as well as the ability to compel the production of witnesses in his favor. The government must also disclose to the defendant any material evidence in its possession supporting the defendant's innocence, including any evidence that could be used to impeach a government witness. In addition, the government must establish a defendant's guilt by proof beyond a reasonable doubt. Courts, prosecutors, and defense lawyers, however, all have managed to operate within these fixed parameters in terrorism prosecutions, no matter the size or the complexity of the case.

The Zacarias Moussaoui trial is sometimes cited to show the problems of prosecuting terrorism cases in federal court.⁹⁰ But this trial shows the opposite, highlighting the ability of federal courts to function under even the most trying circumstances. The district judge in the case confronted a difficult and mentally unstable defendant who fought continually with the court and with his attorneys, refused to enter a plea, and sought to use the courtroom for ideological rants against the United States. Moussaoui also wanted to exercise his constitutional right to represent himself. Self-representation posed challenging legal questions because the case involved classified information that Moussaoui could not see. The judge nevertheless fashioned solutions as new issues arose. For example, she provided standby counsel with access to the classified information that Moussaoui was not permitted to see.⁹¹ This solution was not ideal, and burdened Moussaoui's right to self-representation.⁹² But the same issue has come up in military commission prosecutions, which shows that creating an alternative system does not make tough questions go away but only channels them into a system with less experience, less credibility, and less institutional capacity to address them.⁹³

Perhaps the most controversial issue in Moussaoui's trial concerned his effort to question several individuals held at secret CIA "black sites" whose testimony, Moussaoui's attorneys believed, would undermine the government's case for a death sentence by showing his lack of involvement in the 9/11 attacks. The court of appeals eventually rejected the district court's solution of witness depositions in favor of a process in which the jury would receive summaries of the witnesses' testimony.⁹⁴ The appeals court's solution, which was modeled on CIPA, has rightly been criticized as limiting a defendant's Sixth Amendment right to compel and examine witnesses in his favor, an important reminder of how constitutional protections can be compromised even when the criminal justice system is used. But those criticisms should not obscure these two points: first, that the court devised a solution that sought to balance the respective interests of the parties, and second, that there would never have been any problem in gaining access to the detainee-witnesses in the first place had those individuals been in lawful criminal custody rather than illegally imprisoned and tortured in a secret CIA jail.

Another frequent criticism of criminal prosecutions is that they impose constitutional requirements like *Miranda* warnings that impede the interrogation of terrorism suspects. Under the Supreme Court's 1966 decision in *Miranda v. Arizona*, law enforcement agents must inform a suspect in custody, before questioning him, that he has the right to remain silent, that anything he says can be used against him, and that he has the right to the presence of an attorney even if he cannot afford one.⁹⁵ The purpose of the warnings is to preserve an individual's constitutional right against self-incrimination amid the inherently coercive pressures of custodial interrogations. *Miranda* warnings also seek to prevent false confessions, which can both result in wrongful convictions and lead law enforcement authorities astray. Statements obtained in violation of *Miranda* may be suppressed and cannot be used against a defendant at trial. Once highly controversial, *Miranda* rights have "become embedded in routine police practice to the point where the warnings have become part of our national culture."⁹⁶

Criticisms of applying *Miranda* to terrorism cases rest on several misconceptions. First, *Miranda* applies only to the questioning of individuals who are in custody; it does not limit the government's ability to question those who are not. Officials, moreover, can still question individuals in custody without providing *Miranda* warnings in order to gather information. That is, what *Miranda* restricts is the government's ability to use evidence it obtains from custodial interrogations against the defendant at trial. Thus, as long as the government has other evidence untainted by those interroga-

tions, *Miranda* poses no impediment to prosecution. Furthermore, contrary to popular belief, many terrorism suspects do not stop but continue talking after *Miranda* warnings are provided.

Another criticism of *Miranda* in the national security context is that the warnings would be extended to military operations. Military officials, the argument goes, should not have to administer *Miranda* warnings to soldiers captured on the battlefield. The problem with this argument lies not with *Miranda* but with the failure to limit armed conflict to its proper sphere and with a conception of the battlefield that is so elastic that it is effectively limitless. In practice, *Miranda* has not been an obstacle in counterterrorism investigations, including those conducted overseas, and courts have applied *Miranda* pragmatically in this context.⁹⁷ Nor would *Miranda* necessarily impede criminal prosecution in the unusual case in which a terrorism suspect was captured and interrogated in a real battlefield setting. In that situation, a court might find that *Miranda* did not apply, given the nature and exigencies of the situation, thereby making a statement admissible as long as it was made voluntarily.⁹⁸ A court might also find that *Miranda*'s "public safety" exception applied to questioning that was urgently needed to secure time-sensitive intelligence.⁹⁹ But that is very different from the radical argument made by John Yoo and others: that *Miranda* requirements do not apply to interrogations conducted in the global "war on terror."

An example of the criminal justice system's ability to handle complex terrorism cases is the prosecution of the 1998 U.S. embassy bombings in East Africa that killed more than two hundred people and wounded thousands. The defendants were convicted and sentenced to life in prison for their role in the plot. Three of the four defendants appealed. One defendant, who was an American citizen, claimed that the government had violated his Fourth Amendment right to be free of unlawful searches and seizures when FBI agents raided his home in Kenya and conducted surveillance of his telephone conversations without a warrant. Two other defendants argued that their statements to U.S. and non-U.S. officials after their arrest in Kenya should be suppressed because they were not provided valid *Miranda* warnings and because their statements were not voluntary, given the coercive conditions under which they were held. The appeals court rejected these challenges and affirmed the convictions.¹⁰⁰ The court recognized that the defendants had the same constitutional protections as other criminal defendants, even though they were foreign nationals arrested outside the United States. It then sought to apply those protections to accommodate the demands of overseas terrorism investigations without sacrificing fundamental trial rights. The appeals

court concluded, for example, that while *Miranda* warnings must still be administered when the United States actively participates in the interrogation of a suspect in foreign custody, the warnings could be administered in a way that takes into account local conditions, including the fact that outside the United States, a suspect in custody might not be entitled to an attorney right away or at the detaining government's expense. The court also found that while the Fourth Amendment applies to American citizens overseas, its application could vary based on the circumstances. While the United States would still need to demonstrate that the search or surveillance was reasonable to introduce evidence at trial, it would not be required to obtain a warrant to search a person's home or listen to his telephone calls in a foreign country, as it would inside the United States.

Questions can—and should—be asked about whether the court reached the right result on all the issues and whether it erred too much on the side of security. But from the perspective of the extraordinary measures taken by the Bush administration in the “war on terrorism,” these debates are at the margins. The prisoners were not detained indefinitely as “enemy combatants,” nor were they put before substandard tribunals like the Guantánamo military commissions, as were other individuals accused of involvement in the same terrorist attack. Instead, they were prosecuted in a legitimate, time-tested system and given the same trial rights as other defendants, even if those rights were interpreted in light of the particular circumstances of overseas counterterrorism operations.

Critics of using the criminal justice system to fight terrorism also underestimate its strengths in gaining valuable intelligence. One of prosecutors' most important information-gathering tools is their ability to offer suspects more lenient treatment in exchange for their cooperation.¹⁰¹ Individuals charged with crimes often provide useful and incriminating information about other suspects in order to avoid going to jail or to lessen their own exposure through the prospect of a reduced jail term. Indeed, the federal sentencing guidelines are structured to obtain this cooperation by reducing sentences for defendants who accept responsibility in pleading guilty¹⁰² and who provide substantial assistance in the investigation of another criminal suspect.¹⁰³ At the same time, the government can threaten to seek even longer jail terms against those who do not cooperate.¹⁰⁴ Defense lawyers typically help, not hinder, this process by underscoring the advantages of cooperating and the risks of not cooperating, and by facilitating negotiations with the government when appropriate.

Prosecutors have long used the promise of more lenient treatment in taking down large and complex criminal enterprises like organized crime and

drug cartels. More recently, they have used this tactic to infiltrate and build cases against terrorist suspects.¹⁰⁵ By leveraging criminal charges and long prison sentences to induce cooperation from defendants, the Justice Department has obtained “critical intelligence about al-Qaida and other terrorist groups, safe houses, training camps, recruitment, and tactics in the United States, as well as the operation of those terrorists who mean to do Americans harm.”¹⁰⁶ In the “Lackawanna Six” case, for example, prosecutors agreed to a reduced sentence for one of the defendants, Yahya Goba, in exchange for Goba’s assistance. Goba, in turn, not only provided information that helped lead to the conviction of his codefendants, but also provided important testimony for the government in other terrorism cases.¹⁰⁷

By their nature, criminal investigations also lead to both more information and greater understanding of the information that has been accumulated.¹⁰⁸ Each investigation offers the chance that new defendants and informants will cooperate and provide valuable information. Those investigations yield search warrants, post-arrest statements, and assistance from foreign governments, all of which contribute to a growing storehouse of knowledge. What may at first seem small and isolated pieces of information can ultimately enable law enforcement to infiltrate terrorist activities and bring prosecutions in court.¹⁰⁹ Those cases produce what national security experts have called a “treasure trove” of new information about terrorism.¹¹⁰

The criminal justice system also helps foster reliable intelligence gathering. Prosecutors must anticipate that any information the government receives from an informant or a cooperating witness in a criminal investigation will later be challenged by defense counsel and scrutinized by a judge and jury if introduced in court. Prosecutors therefore have an incentive to ensure that the information is accurate by probing, analyzing, and verifying it. This examination and corroboration process helps ensure the integrity of judicial proceedings and yields more dependable information. As one former prosecutor explained, “When you have to demonstrate probable cause to a judge to get a wiretap, or proof beyond a reasonable doubt to a jury, information must be reliable and corroborated.”¹¹¹ By contrast, with sham proceedings like the Combatant Status Review Tribunals used to justify detentions at Guantánamo, the government had no incentive to ensure the accuracy of the information, since it believed that the information would never be reviewed by a judge or presented in court. In short, inferior adjudicatory systems encourage shoddy intelligence gathering.

Criminal prosecutions, moreover, will always have the legitimacy that military commissions, national security courts, and other second-class mod-

els lack. Often, the most important leads in uncovering terrorist plots come from voluntary statements by members of the community and the general public. Sometimes those tips come from relatives of the perpetrators themselves, as in the case of the attempted bombing attacks of London's transportation system on July 21, 2005.¹¹² But the people with the most valuable information—the members of the same religious, ethnic, or geographic community as the would-be terrorists—are less likely to offer their assistance if they perceive their group has been singled out for inferior treatment.

Of course, not every terrorist suspect who has information is willing to cooperate. But there is no evidence that terrorist suspects cooperate less frequently than do defendants accused of other serious crimes.¹¹³ It also is possible in some cases that the government may lack sufficient evidence to charge a suspect or that the government has come into possession of information that it cannot use at trial, for example, because it would compromise a source or risk disclosure of sensitive intelligence. But such cases are rare and the problem is not novel; it commonly arises in large drug-trafficking and organized-crime cases. In general, criminal prosecutions have proved effective not only at incapacitating suspected terrorists before they engage in attacks but also at gaining information useful to prevent future terrorist acts. By contrast, creating alternatives to criminal prosecutions to enable the government to interrogate suspects with fewer restrictions and then to use the fruits of those interrogations as a basis for imprisonment, imposes tremendous costs that far outweigh any benefits.

Most intelligence and counterterrorism experts agree that torture and other abusive interrogation practices do not produce accurate information and are counterproductive in the long run. Torture, according to one expert, “overwhelms investigators with misleading information.”¹¹⁴ Robert S. Mueller III, director of the FBI since 2001, has stated that no attacks have been disrupted because of intelligence gained through torture or other mistreatment.¹¹⁵ The “only thing torture guarantees you,” insists a veteran FBI interrogator, “is pain.”¹¹⁶ An extensive report from a group of experts advising U.S. intelligence agencies describes the use of harsh interrogation methods as outmoded, amateurish, and unreliable.¹¹⁷ General David H. Petraeus, commander of the U.S. Central Command and formerly the top general in Iraq, has stated that torture and other “expedient methods” used to gain information are not only wrong but useless and unnecessary.¹¹⁸

Bush administration officials nevertheless claimed repeatedly that harsh interrogation methods saved lives and prevented future attacks by providing valuable information. They often cited the CIA's interrogation of Abu

Zubaydah at a secret prison in Thailand following his capture in 2002—the catalyst for the initial Justice Department torture memos. Under the pressure of its “enhanced interrogation techniques,” the CIA claimed, Zubaydah provided leads about a number of terrorism suspects, including Jose Padilla, who was arrested soon after Zubaydah’s interrogation. In addition to waterboarding, which the CIA inflicted on Zubaydah eighty-three times in a single month, CIA operatives stripped Zubaydah naked, exposing his injuries (previously suffered during a firefight in Pakistan); raised the air conditioning so much that he “seemed to turn blue”; blasted rock music at him; and made him stand for hours at a time in a frigid cell.¹¹⁹ (The CIA later subjected Khaled Sheikh Mohammed to waterboarding 183 times in a single month.)¹²⁰ The former military psychologist, James Mitchell, led the CIA’s interrogation team, announcing that Zubaydah had to be treated “like a dog in a cage” and his power to resist broken.¹²¹ There is no evidence, however, that those techniques produced useful intelligence. Indeed, the interrogators on the ground suggested that the brutal treatment was “unnecessary,” but they were overruled by the CIA officials in headquarters who were monitoring the interrogation.¹²² By contrast, the FBI agents who initially questioned Zubaydah through standard interview techniques had far greater success.¹²³ Their progress, however, came to a halt when the CIA team arrived, froze the FBI out of the interrogation process, and turned to torture.¹²⁴ In addition to misrepresenting the efficacy of its interrogation methods, the CIA also profoundly overstated Zubaydah’s importance: the CIA and top Bush administration officials had sought to justify Zubaydah’s treatment on the ground that he was a senior member of al Qaeda and a close associate of Osama bin Laden. Interrogators later realized that Zubaydah was merely a low-level personnel clerk who helped facilitate travel to training camps in Afghanistan.¹²⁵ In order to justify Zubaydah’s brutal treatment, government officials nevertheless continued to perpetuate the lie for years afterward that Zubaydah was a high-ranking al Qaeda member until eventually abandoning the claim that Zubaydah was even a member of or formally identified with al Qaeda.¹²⁶ In the end, not a single plot was thwarted as a result of statements wrung from Zubaydah through torture. As one former intelligence official said, “We spent millions of dollars chasing false alarms.”¹²⁷

The most successful U.S. interrogations since 9/11 instead have come through traditional law enforcement methods. In the weeks after the attacks, Ali Soufan of the FBI and Robert McFadden of the Navy Criminal Investigative Service interrogated Abu Jandal, Osama bin Laden’s former bodyguard, at a Yemeni prison where Jandal had been held for nearly a year. Jandal

refused to cooperate and insisted that the attacks had been orchestrated by Israel's Mossad. Rather than resorting to torture, Soufan got Jandal to open up through a combination of guile and craft, starting the process by giving the diabetic Jandal sugar-free cookies as a sign of friendship and respect. Jandal later provided reams of valuable information about al Qaeda without waterboarding, sleep deprivation, or other harsh interrogation methods, and notwithstanding the fact that he was advised of his constitutional rights.¹²⁸ Matthew Alexander, a former military interrogator in Iraq whose efforts helped track down al Qaeda leader Abu Mousab al-Zarqawi, has pointed out that coaxing, cajoling, and tricking terrorist suspects, and not torturing them, is the right way to obtain valuable intelligence.¹²⁹ Another professional interrogator, Eric Maddox, credits similar tactics in yielding the information that led to the capture of Saddam Hussein. Maddox got Mohammed Ibrahim, a mid-ranking Baath Party leader with close ties to Hussein, to provide directions to Hussein's whereabouts by creating a false sense of urgency: Maddox told Ibrahim that unless he volunteered the information immediately, Hussein might move, and he could no longer help Ibrahim from going to prison.¹³⁰ Substantial intelligence has been gleaned in various other ways—from materials found on detainees after they were captured (known as “pocket litter”), from playing detainees against one another, and from detainees freely volunteering information that they believed their questioners already knew.¹³¹

Torture is not only ineffective; it also can produce misinformation with devastating consequences, as the case of Ibn al-Shaykh al-Libi illustrates. In late 2001, the United States captured al-Libi in Afghanistan. He initially was interrogated—without torture—by FBI counterterrorism expert Jack Cloonan, who says that he advised FBI agents in Afghanistan to “handle this like it was being done right here, in my office in New York.”¹³² During interrogations, agents were able to dangle the possibility of favorable treatment for al-Libi's wife. Al-Libi cooperated, and provided detailed information about al Qaeda staff and training camps in Afghanistan and about a plot to blow up a U.S. military base, thus helping avert a potentially deadly attack.¹³³ Al-Libi also denied any connection between al Qaeda and Saddam Hussein's regime in Iraq, even though FBI agents repeatedly pressed him on this point.¹³⁴ The CIA, however, resisted the FBI's effort to treat al-Libi like a potential prosecution witness and wanted to use more aggressive tactics. So, several days into the FBI's interrogation, a CIA agent burst into the cell where the FBI was questioning al-Libi and started shouting at the prisoner, “You're going to Egypt! And while you're there, I'm going to find your mother and fuck her!”¹³⁵ Shortly thereafter, al-Libi was strapped to a stretcher, bound

and gagged with duct tape, and rendered to Egypt—with the White House’s approval.¹³⁶

In Egypt, al-Libi’s interrogators pressed him to admit knowing about ties between al Qaeda and Saddam Hussein in Iraq. When al-Libi denied any such connection, he was locked in a tiny cage for eighty hours. After he was finally let out of the box, al-Libi was beaten before being given another chance to “tell the truth.” So al-Libi made up a story, accusing three al Qaeda figures he knew of going to Iraq to learn about nuclear weapons.¹³⁷ When Egyptian interrogators beat al-Libi again to find out more, al-Libi embellished his tale about Iraq’s helping al Qaeda obtain weapons of mass destruction. The information was relayed to the United States, without a description of how it was obtained. Secretary of State Colin Powell later relied on al-Libi’s coerced confession in his February 5, 2003, presentation to the United Nations justifying the United States’ military intervention in Iraq.¹³⁸ “I can trace the story of a senior terrorist operative telling how Iraq provided training in these [chemical and biological] weapons to al Qaeda,” Powell said. “Fortunately, this operative is now detained, and he has told his story.”¹³⁹ Unfortunately, that story—which al-Libi later recanted and the CIA eventually repudiated—was false, and the United States’ decision to invade Iraq rested in part on a false confession gained by burying a prisoner alive. Under torture, al-Libi had told his interrogators what they had wanted to hear. Al-Libi was later transferred to a secret jail in Afghanistan and eventually sent to a prison in Libya where he reportedly committed suicide.¹⁴⁰

Torture also can help fuel terrorism by inculcating the desire for vengeance.¹⁴¹ Al Qaeda leaders such as Ayman al-Zawahiri have cited their torture and abuse in Egyptian prisons as sparking the desire to take revenge through violence.¹⁴² In addition, torture can alienate moderates from Arab and Muslim communities, undermining the United States’ ability to gain support from those whom it needs in fighting terrorism.¹⁴³ America’s image and standing in the world have been seriously undermined by the brutal and dehumanizing actions committed by U.S. officials at Abu Ghraib, Guantánamo, and secret CIA jails.¹⁴⁴ While some may gravitate toward terrorist groups regardless of how the United States treats prisoners, torture harms America’s ability to win the hearts and minds of those who have not yet committed to that path.

Torture, like indefinite detention and sham military trials, also emboldens repressive regimes like Egypt, Sudan, and Syria, which now point to the United States to justify their own human rights violations. As the Parliamentary Assembly of the Council of Europe, an international government organization of forty-six nations, warned:

The commission of unlawful acts—abductions, the exporting of torture to other countries even though they are regarded as “rogue states,” the setting up of detention centers beyond judicial supervision—has severely affected the moral authority of the United States. Worse still, the world’s greatest power is becoming a negative role model for other countries, which feel that they may legitimately follow the same path and flout human rights.¹⁴⁵

At the same time, torture makes the United States less willing to share information with other countries, a point of contention with key allies and a source of frustration among counterterrorism officials in Europe.¹⁴⁶ One German court, for example, had to dismiss the charges against a suspected accomplice of the 9/11 hijackers when U.S. officials refused to produce a key witness to testify at trial because that witness was being held and interrogated in secret CIA custody.¹⁴⁷ “The trial and the legal investigation is at the center of our answer to terrorism,” explains Armado Spataro, a senior Italian counterterrorism prosecutor who saw a broad terrorism investigation he was conducting disrupted by the rendition and torture of Abu Omar. “In the U.S. situation, the trial is not important.”¹⁴⁸

The 9/11 Commission warned early on about the United States’ failure to live up to its legal and moral obligations. “Allegations that the United States abused prisoners in its custody make it harder to build the diplomatic, political, and military alliances the government will need [to fight terrorism].”¹⁴⁹ Members of the commission later reiterated those downsides, citing the United States’ mistreatment of “suspected terrorists in military prisons and secret detention centers abroad.”¹⁵⁰ The U.S. Senate Intelligence Committee similarly highlighted “the complications” secret detention and extraordinary rendition pose to terrorism prosecutions and to America’s image.¹⁵¹

Defenders of torture still cling to the myth of the “ticking time bomb”—that torture may be necessary in an emergency when authorities believe a prisoner has information that could prevent an imminent attack. But it is impossible to know in advance whether a person actually has information that would prevent some future attack. As a result, the goal of saving lives—however remote or tenuous the threat—can always be invoked to justify torture because it is always possible in theory that torture will yield valuable information. So while torture might be intended for only the most extreme situations, it will inevitably be used more widely once the door is opened. Another problem is that torture does not occur in a vacuum but infects a country’s entire legal and political system, which must continually find ways to hide or excuse it.

Those who defend torture will always claim there are situations in which torture yielded useful information. But one can never know if that same information could have been obtained without it. There is no evidence, for example, that the United States gained any information after 9/11 through torture that could not have been obtained through lawful means. Conversely, much of the evidence gained through torture was false. Legal and moral considerations aside, torture remains a much less effective method of gaining information than the more sophisticated and calibrated tools of criminal law enforcement. Torture also carries tremendous costs beyond the physical and mental harms inflicted on its victims. When a democratic country seeks to sanction or legalize torture, it undermines its own legitimacy, creates a backlash among affected communities, and weakens the rule of law at home and abroad.

The criminal justice system contains other safeguards that help to deter torture, such as the privilege against self-incrimination, the right of access to counsel and a prompt judicial hearing following arrest, and the right to confront one's accusers at trial. But as long as the U.S. government continues to detain terrorist suspects militarily and as long as national security courts and other forms of preventive detention are considered possible alternatives to criminal prosecution, habeas corpus will remain important to preventing torture and other abuse because it provides access to a court and thus helps prevent the type of secret, extrajudicial detention that is torture's breeding ground. It is not simply enough to "trust" the executive (no matter who is occupying the White House): the check of an independent judiciary is essential—and its availability is more, and not less, important in an age of international terrorism given the inevitable tendency of government officials to push against legal boundaries and to engage in coercive interrogation practices.

By the end of the Bush administration, the post-9/11 detention regime was still largely intact, even if some of its worst excesses had been curbed. The United States continued to detain hundreds of individuals indefinitely without charge. It also maintained the prerogative to operate secret prisons and engage in torture and other abuse in the name of national security. Detainees at Guantánamo had finally won the right to habeas corpus. But more than two hundred men were still imprisoned there in legal limbo, and the United States continued to resist access to habeas corpus for prisoners held at Bagram in Afghanistan.

The Bush administration had not only altered and corroded America's laws and institutions; it had also changed public consciousness and perception. Despite the widespread criticism of Guantánamo, many of its key fea-

tures had gained traction, particularly indefinite detention without charge, military commissions, and the broader concept of a global “war on terror.” The Bush administration had also done what before was virtually unthinkable: it had made torture a matter of public debate. Important victories had been won in the courts, abuses uncovered, and habeas corpus defended against executive and legislative assault. But much had changed, and the next administration would have to govern in a legal, political, and cultural climate that was different from any before it.