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### Ditching "The Disposal Plan": Revisiting Miranda in an Age of Terror, 20 St. Thomas L. Rev. 155 (2008)

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# DITCHING “THE DISPOSAL PLAN”: REVISITING *MIRANDA* IN AN AGE OF TERROR<sup>†</sup>

KIM D. CHANBONPIN\*

I. Introduction.....	156
II. Bringing Suspected Terrorists to Justice.....	160
A. The Failures of the Military Commission .....	160
1. The Military Order .....	160
2. Judicial Review and Attempts at Remedial Legislation .....	161
B. The Ad Hoc Court Option .....	166
C. Torture and the “Disposal Plan” .....	168
III. Terror Suspects Should Be Tried in the Normal Criminal Justice System.....	173
A. Evolution of the Legal Doctrine Excluding Coerced Confessions .....	176
B. <i>Miranda</i> and the Public Safety Exception.....	179
IV. Conclusion.....	182

*On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a fetal position on the floor, with no chair, food, or water[.] Most times they urinated or defacated [sic] on themselves, and had been left there for 18 or 24 hours or more[.] On one occasion, the air conditioning had been turned down so far and the temperature was so cold in the room, the barefoot detainee was shaking with from the cold[.] When I asked the MP’s [Military Police] what was going on, I was told interrogators from the day prior ordered this treatment, and the detainee was not to be moved[.] On another occasion, the A/C had been turned off,*

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<sup>†</sup> This Essay was completed and accepted for publication in September 2007. It will be published sometime in the early summer of 2008. Although the passage of time will no doubt require the researcher to update some of the materials used in this Essay, no event has yet preempted the Author’s conclusion. That is, the concerns of the *Miranda* court retain a remarkable currency in today’s War on Terror where the use of torture by interrogators to extract information from suspected terrorists has been well-documented. But rather than easing regulations on interrogations by creating an ad hoc national security court with special admissibility rules, the United States should treat alleged terrorists as criminals and prosecute them in federal district courts.

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*making the temperature in the unventilated room probably well over 100 degrees[.] The detainee was almost unconscious on the floor, with a pile of hair next to him[.] He had apparently been literally pulling out his own hair throughout the night[.] On another occasion, not only was the temperature unbearably hot, but extremely loud rap music played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor[.]*

*Excerpt of FBI e-mail describing conditions  
observed at the Guantánamo Bay detention camp.<sup>1</sup>*

*What are you going to do with these people? The utility of someone like K.S.M. is, at most, six months to a year. You exhaust them. Then what? It would have been better if we had executed them.*

*Tyler Drumheller, former division chief for the  
Directorate of Operations, CIA, Europe.<sup>2</sup>*

## I. INTRODUCTION

Since the terrorist attacks on September 11, 2001 ("September 11<sup>th</sup>"), President George W. Bush has repeatedly vowed to bring terrorists "to justice."<sup>3</sup> The Bush Administration's quest for justice, however, has been tainted with recurring allegations of torture. Torture is illegal under U.S. and international law, and although the administration denies that the United States tortures its captives in the War on Terror,<sup>4</sup> in 2006, President Bush announced his approval of the Central Intelligence Agency's ("CIA") use of an "alternative set of procedures" to extract intelligence information from terror suspects.<sup>5</sup> These alternatives included beatings, extreme

1. Declassified FBI E-mail, Subject: RE GTMO, <http://www.american torture.com/documents/gitmo/12.pdf> (Aug. 2, 2004, 10:46 AM).

2. Jane Mayer, *The Black Sites: A Rare Look Inside the C.I.A.'s Secret Interrogation Program*, THE NEW YORKER, Aug. 13, 2007, at 50.

3. See, e.g., President George W. Bush, Address to a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347 (Sept. 20, 2001); President George W. Bush, U.S. President Remarks on Departure for Camp David, Maryland, and an Exchange with Reporters, 39 WEEKLY COMP. PRES. DOC. 613, 614 (May 16, 2003).

4. President George W. Bush, U.S. President Remarks on Signing the Military Commissions Act of 2006, 42 WEEKLY COMP. PRES. DOC. 1831, 1832 (Oct. 17, 2006) ("As I've said before, the United States does not torture."); Condoleezza Rice, U.S. Sec'y of State, Remarks En Route to Germany (Dec. 5, 2005), <http://www.state.gov/secretary/rm/2005/57643.htm> ("The United States does not permit, tolerate, or condone torture under any circumstances.").

5. President George W. Bush, U.S. President, Remarks on the War on Terror, 42 WEEKLY COMP. PRES. DOC. 1569, 1571 (Sept. 6, 2006) [hereinafter Bush Press Conference Transcript].

isolation, hooding, mock executions, use of dogs, sleep deprivation, and waterboarding.<sup>6</sup>

In addition to raising doubts about the fairness and legitimacy of the U.S. detainee policies, torturing suspected terrorists poses the more immediate problem of, as former CIA chief of European operations Tyler Drumheller phrased it: “[w]hat are you going to do with these people?”<sup>7</sup> If a detainee is prosecuted, the accused will argue that his confession and any corroborating evidence elicited through torture should be excluded.<sup>8</sup> Consequently, CIA interrogators have little incentive to keep terror suspects alive after their intelligence value has been exhausted.<sup>9</sup> Moreover, a living victim of CIA interrogation methods is a prospective witness in the potential criminal prosecution of the CIA agent who performed the interrogation.<sup>10</sup> The fear of prosecution for violating federal torture statutes is so real for CIA interrogators that many of them have purchased professional liability insurance to offset the costs of any legal fees associated with their criminal defense.<sup>11</sup> For any agent, a tempting solution is “the disposal plan,” a euphemism for the extrajudicial killing of terror suspects.<sup>12</sup>

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On July 20, 2007, President Bush signed an executive order announcing that the CIA’s interrogation and detention program would continue under the constraints of the Executive’s interpretation of Common Article 3 of the Geneva Conventions. Press Release, Office of the Press Secretary, President Bush Signs Executive Order (July 20, 2007), <http://www.whitehouse.gov/news/releases/2007/07/20070720-5.html>. The Executive Order grants White House approval to the CIA’s program, explicitly prohibiting acts “comparable to murder, torture, mutilation, and other cruel or inhuman treatment . . .” Exec. Order No. 13,440, 72 Fed. Reg. 40,707§ 3(b)(i)(C) (July 24, 2007). The actual CIA interrogation guidelines, however, remained classified. Karen DeYoung, *Bush Approves New CIA Methods*, WASH. POST, July 21, 2007, at A1.

6. Posting of Marty Lederman to Balkinization, *The CIA’s “Alternative Set of Procedures:” Calling Things by Their Right Names*, <http://balkin.blogspot.com/2006/09/cias-alternative-set-of-procedures.html> (Sept. 6, 2006 11:11 PM); Dana Priest, *Officials Relieved Secret is Shared*, WASH. POST, Sept. 7, 2006, at A17.

7. Mayer, *supra* note 2.

8. See Josh Meyer, *FBI works to bolster case on Al Qaeda*, L.A. TIMES, Oct. 21, 2007, at A1. All available sources indicate that each of the detainees at the U.S. Naval Station at Guantánamo Bay is male. See generally American Civil Liberties Union, *Autopsy reports reveal homicides of detainees in U.S. custody*, Oct. 24, 2005, available at <http://action.aclu.org/torturefoia/released/102405/>.

9. See generally American Civil Liberties Union, *U.S. Operatives Killed Detainees During Interrogations in Afghanistan and Iraq*, Oct. 24, 2005, available at <http://www.aclu.org/intlhumanrights/gen/21236prs20051024.html>.

10. See Mayer, *supra* note 2.

11. *Id.*

12. *Id.* Mayer reports CIA officials voiced objections to the Executive’s plan to hoist detention and interrogation duties on the CIA, an agency which “had virtually no trained

Six years have passed since President Bush signed the military order authorizing trials of non-citizen terrorists in military commissions,<sup>13</sup> but only ten detainees out of the 355 remaining at the U.S. Naval Station at Guantánamo Bay (“Guantánamo”) have been charged.<sup>14</sup> David Hicks, the first of those detainees, agreed to a guilty plea which allowed him to return to his native Australia to serve nine months of a suspended sentence.<sup>15</sup> Charges against two others have been dismissed for lack of jurisdiction,<sup>16</sup> and the Defense Department has not announced when commissions for the seven others will convene. The hundreds of remaining detainees foreseeably could be held in preventative detention for years without being charged with a crime.<sup>17</sup> Clearly, the government’s record in prosecuting the accused, reputed to be “the worst of the worst,” has been disappointing.<sup>18</sup> Perhaps out of frustration with this entire sordid state of affairs, some lawyers and legal scholars have recently proposed that the United States invent a new court, one specifically tasked with bringing terrorists to justice.<sup>19</sup> The specifics of each proposal for a new court differ

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interrogators.” *Id.* Tyler Drumheller, a former chief of European operations, explained: “the problem from the start . . . was that no one had thought through . . . ‘the disposal plan.’” *Id.*

13. See generally Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 16, 2001) [hereinafter Military Order].

14. Bush Press Conference Transcript, *supra* note 5. Since September 11, 2001, Guantánamo has hosted some 770 detainees. *Id.*

15. News Release, U.S. Dept. of Defense, Detainee Convicted of Terrorism Charge at Guantánamo Trial (Mar. 30, 2007), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=10678> [hereinafter Department of Defense News Release]. See also *infra* Part II.A.2.

16. See also *infra* Part II.A.2.

17. *Id.*

18. Speaking at the Pentagon in January 2002, Rear Admiral John D. Stufflebeem described the detainees under U.S. control thusly: “They are bad guys. They are the worst of the worst, and if left out on the street, they will go back to the proclivity of trying to kill Americans and others.” Linda D. Kozaryn, *U.S. Gains Custody of More Detainees*, American Forces Press Service (Jan. 28, 2002), available at <http://www.defenselink.mil/news/newsarticle.aspx?id=43813>. See also Neil A. Lewis & Eric Schmitt, *Cuba Detentions May Last Years*, N.Y. TIMES, Feb. 13, 2004, at A1 [hereinafter Lewis & Schmitt] (quoting defense and military officials who insist that Guantánamo detainees are “the worst of the worst”). Similarly, in a 2006 press conference announcing the bill that became the Military Commissions Act of 2006, President Bush declared:

It’s important for Americans and others across the world to understand the kind of people held at Guantánamo. These aren’t common criminals, or bystanders accidentally swept up on the battlefield . . . . Those held at Guantánamo include suspected bomb makers, terrorist trainers, recruiters and facilitators, and potential suicide bombers. They are held in our custody so they cannot murder our people.

Bush Press Conference Transcript, *supra* note 5.

19. See, e.g., Jack L. Goldsmith & Neal Katyal, *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, at A19 [hereinafter Goldsmith & Katyal]; Glenn Sulmasy, *The National Security Court: A Natural Evolution*, JURIST, May 10, 2006 <http://jurist.law.pitt.edu/forumy/2006/05/national-security-court-natural.php>; Glenn Sulmasy, *Momentum for a National Security Court*, JURIST,

somewhat, but they all conclude that trying suspected terrorists under the regular criminal justice system in the U.S. federal courts is an unsatisfactory option.<sup>20</sup>

This Essay will show that the creation of an exceptional ad hoc court for the purpose of trying suspected terrorists in the United States would be a misguided approach to solving the problem of the military commissions. It will also demonstrate that, in a society based on the rule of law, the justice which President Bush seeks for terrorists must include proper treatment in detention and fair trials. The regular criminal justice process in the federal courts has served and can continue to serve as an adequate, efficient, and fair method to bring terrorists to justice. Moreover, the exclusionary rule doctrine available to defendants in criminal courts may provide due process protections and curb torturous interrogation practices.

Part II presents three of the problems the United States currently faces in its quest to bring suspected terrorists to justice. First, the military commissions, the current regime for trying detainees at Guantánamo, has failed. It will describe the military commissions' regime as it currently operates, or rather, as it would operate if it ever reconvenes. Because detainee litigation and subsequent remedial legislation have affected the operations of the military commissions, this Part discusses the relevant Supreme Court cases and also describes the relevant provisions of the Detainee Treatment Act of 2005 ("DTA") and the Military Commissions Act of 2006 ("MCA"). Second, the ad hoc court, which some propose as an alternative to the military commissions, will not be seen as fair or legitimate. In part, this is because the ad hoc court likely would admit evidence obtained through torturous interrogation practices. Third, and finally, the torture of terror suspects by agents of the United States creates perverse incentives to dispose of suspects by killing them, consequently making them unavailable to stand trial in any venue.

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July 13, 2007, <http://jurist.law.pitt.edu/forumy/2007/07/momentum-for-national-security-court.php>; Glenn Sulmasy, *The Legal Landscape After Hamdan: The Creation of Homeland Security Courts*, 13 NEW ENG. J. INT'L & COMP. L. 1 (2006); Andrew McCarthy, *Abu Ghraib & Enemy Combatants: An Opportunity to Draw Good Out of Evil*, NATIONAL REVIEW ONLINE, May 11, 2004, available at <http://www.nationalreview.com/mccarthy/mccarthy200405110832.asp>; Andrew C. McCarthy & Alykhan Velshi, *We Need a National Security Court*, Foundation for Defense of Democracies, July 15, 2007, [http://www.defenddemocracy.org/usr\\_doc/NationalSecurityCourt.doc](http://www.defenddemocracy.org/usr_doc/NationalSecurityCourt.doc) [hereinafter McCarthy & Velshi].

20. See, e.g., Goldsmith & Katyal, *supra* note 19; Sulmasy, *Momentum*, *supra* note 19; Sulmasy, *supra* note 19 at 10. Commentators have suggested a variety of terms for the proposed court, including the terrorists' court, the national security court, and the homeland security court. I use these names interchangeably throughout this Essay.

Part III will show that the military commission scheme is deeply flawed, and the creation of an ad hoc court to try suspected terrorists will not provide the remedies sought, efficient, fair trials for the accused, and a legitimate system for preventative detention. Only regularly-constituted criminal courts, such as the federal district courts, can provide due process protections for the accused. Finally, this Essay will conclude that justice and fairness demand individuals accused of terrorism crimes must be treated as criminals and tried in regular criminal courts.

## II. BRINGING SUSPECTED TERRORISTS TO JUSTICE

### A. THE FAILURES OF THE MILITARY COMMISSION

#### 1. The Military Order

On November 13, 2001, President Bush signed a Military Order (“the Order”) authorizing certain non-citizen terrorist suspects be tried in military commissions.<sup>21</sup> Under the Order, suspected members of al Qaeda were “to be detained, and, when tried, tried for violations of the laws of war and other applicable laws by military tribunals.”<sup>22</sup> Warning of the probability of further terrorist attacks against the United States, President Bush declared “an extraordinary emergency exists” and “issuance of this order is necessary to meet the emergency.”<sup>23</sup>

Furthermore, the Order established “it is not practicable to apply . . . the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”<sup>24</sup> The President delegated authority to prescribe procedural and evidentiary rules for the military commissions to the Secretary of Defense.<sup>25</sup> The Order, however, set a specific baseline for the standard of admissibility for evidence. Any evidence that “would have probative value to a reasonable person” could be admitted to the trial proceedings, a significantly lower standard than applied in U.S. district courts or in courts-martial.<sup>26</sup>

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21. *See generally* Military Order, 60 Fed. Reg. 57,833.

22. *Id.*

23. *Id.* at 57,833–34.

24. *Id.* at 57,833.

25. *Id.* at 57,834.

26. *Id.* at 57,835.

## 2. Judicial Review and Attempts at Remedial Legislation

The original designs for the military commissions under the Order were modified substantially after Guantánamo detainees won key victories in the Supreme Court. In the first of these cases, *Rasul v. Bush*,<sup>27</sup> the Court held that federal courts have jurisdiction over habeas petitions filed by aliens held at Guantánamo under the federal habeas corpus statute.<sup>28</sup> Congress responded to the *Rasul* ruling by promulgating the Detainee Treatment Act of 2005 (“DTA”), a legislative effort to strip the federal courts of jurisdiction over habeas corpus petitions filed by Guantánamo detainees.<sup>29</sup> Under new provisions in the DTA, instead of habeas petitions, detainees were entitled to receive Combatant Status Review Tribunals (“CSRTs”) to determine whether they were being held properly as “enemy combatants.”<sup>30</sup>

A 2004 CSRT found Salim Ahmed Hamdan, Osama bin Laden’s personal driver, was an enemy combatant.<sup>31</sup> The Appointing Authority charged him with conspiracy to commit terrorism<sup>32</sup> and convened a military commission for his trial.<sup>33</sup> Before the commission could get under way, Hamdan’s habeas petition reached the U.S. Supreme Court.

The Supreme Court’s decision in *Hamdan v. Rumsfeld*<sup>34</sup> dealt another blow to the Executive’s military commissions’ scheme. In *Hamdan*, the Supreme Court rejected the Government’s argument the DTA divested federal courts of jurisdiction for habeas actions pending before the DTA

27. 542 U.S. 466 (2004).

28. 28 U.S.C. § 2241 et seq. (2006).

29. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680 (2005).

30. § 1005, 119 Stat. at 2742. The Combatant Status Review Tribunals (CSRTs) completed their initial mandate in March 2005. Kathleen T. Rhem, *38 Guantánamo Detainees to be Freed After Tribunals*, AMERICAN FORCES PRESS SERVICE (Mar. 30, 2005), available at [http://www.defenselink.mil/news/mar2005/20050330\\_368.htm](http://www.defenselink.mil/news/mar2005/20050330_368.htm). Of 520 detainees, thirty-eight were found not to be enemy combatants and were released. *Id.* (quoting Navy Secretary Gordon England). On August 9, 2007, the Pentagon announced fourteen more detainees, including Khalid Sheikh Mohammed, have been deemed “enemy combatants” by CSRTs. Josh White, *Detainees Ruled Enemy Combatants*, WASH. POST, Aug. 10, 2007, at A2.

31. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2761 (2006). See also *United States v. Hamdan*, Corrected Order, June 4, 2007, at 1–2, para. 5, available at <http://www.nimj.org/documents/Corrected%20Order%20US%20v%20Hamdan.pdf> [hereinafter *Hamdan Order*].

32. The unsigned charging document contained allegations that Hamdan: willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with [named members of al Qaeda] to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism.

*Hamdan*, 126 S. Ct. at 2761.

33. *Id.* at 2761–62.

34. See generally *id.*, 126 S. Ct. 2749.



was enacted, and therefore undertook certiorari review of Hamdan's habeas petition.<sup>35</sup> Citing *Ex Parte Milligan*,<sup>36</sup> the Court explained even during times of war, the President's power to convene military commissions is subject to Congress' specific authorization and these are the separate roles for the respective political branches envisioned by the Constitution.<sup>37</sup> The Court held neither the 2001 Authorization for Use of Military Force<sup>38</sup> ("AUMF") nor the DTA provides the specific congressional authorization necessary to legitimize the military commission.<sup>39</sup> When, as in this case, Congress had not sanctioned the tribunals, the courts must decide whether the military commissions are justified by "a controlling necessity."<sup>40</sup> The Court concluded the President had not successfully demonstrated that requisite military necessity existed.<sup>41</sup>

A major concern of the *Hamdan* court was the military commissions would operate under a separate set of rules and procedures, significantly different from both civilian criminal justice and military justice paradigms.<sup>42</sup> The Uniform Code of Military Justice ("UCMJ") requires military commissions to comply with the U.S. common law of war, the UCMJ itself, and with the "rules and precepts of the law of nations," including the four Geneva Conventions.<sup>43</sup> Article 36(b) of the UCMJ provides whether or not military commission rules conform with the Federal Rules of Evidence, they must be "uniform insofar as practicable."<sup>44</sup> In *Hamdan*, the Court acknowledged the principle of uniformity was not rigid, but read the UCMJ to require proof from the Executive it was "impracticable" to apply the same rules in military commissions as are applied in courts-martial.<sup>45</sup>

Hamdan argued the military commission rules deviated from the admissibility and relevance rules applicable in both criminal and court-martial proceedings, and were, therefore, illegal.<sup>46</sup> For example, under

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35. *Id.* at 2764–69. The provisions of the DTA went into effect on December 20, 2005. § 1005(h)(1), 119 Stat. at 2680, 2743.

36. 71 U.S. 2 (1866).

37. *Hamdan*, 126 S. Ct. at 2773–74.

38. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

39. *See Hamdan*, 126 S. Ct. at 2774–75.

40. *See id.* at 2773–74 (quoting *Ex Parte Milligan*, 71 U.S. at 139–40).

41. *See id.* at 2785–86.

42. *See id.* at 2830.

43. *See id.* at 2786.

44. *See id.* at 2791 (quoting Uniform Code of Military Justice, 10 U.S.C. §836(b))(emphasis omitted).

45. *See Hamdan*, 126 S. Ct. at 2790.

46. *See id.* at 2787.

Commission Order No. 1, which set forth the procedures for commissions prior to the Manual for Military Commissions (“MMC”), Hamdan could have been convicted on secret evidence and on evidence that would not meet the standards for admissibility in a court-martial.<sup>47</sup> Dismissing the Government’s argument that it should abstain from considering Hamdan’s argument,<sup>48</sup> the Court concluded that nothing in the record demonstrated there would be “any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility.”<sup>49</sup> While the Court deferred to the President’s determination it was impracticable to apply the rules and procedures of civilian criminal law,<sup>50</sup> the Court held the Executive had not demonstrated it would be impracticable to apply the rules for courts-martial.<sup>51</sup>

As an additional but independent basis for its ruling in *Hamdan*, the Court held the military commissions did not comply with the Geneva Conventions.<sup>52</sup> While the majority did not tackle the justiciability issue, it held that Common Article 3 of the Conventions applied regardless.<sup>53</sup> Common Article 3 provides that in a “conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum,” certain provisions protecting “[p]ersons . . . placed *hors de combat* by . . . detention.”<sup>54</sup> The Court further held the Geneva Conventions prohibit “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees recognized as indispensable by civilized people.”<sup>55</sup> Although the Geneva Conventions do not provide a definition of “a regularly constituted court,” a treatise on international humanitarian law by the International Committee for the Red Cross (“ICRC”) explains a regularly constituted court means one that is “established and organized in

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47. *See id.*

48. *See id.* at 2787–88.

49. *See id.* at 2792.

50. *See id.* at 2791 (citing Military Order, *supra* note 13).

51. *Hamdan*, 126 S. Ct. at 2792. The rules regulating relevance and admissibility in courts-martial and in U.S. district courts are cognates. *Id.* at 2795. Compare FED. R. EVID. and Manual for Courts-Martial, United States, 2005, Rules for Courts-Martial. The *Hamdan* Court noted: “[t]he only reason offered in support of [the impracticability determination] is the danger posed by international terrorism. Without for one moment underestimating that danger, it is not evident to us why it should require, in the case of Hamdan’s trial, any variance from the rules that govern courts-martial.” *Hamdan*, 126 S. Ct. at 2792 (footnote omitted).

52. *Hamdan*, 126 S. Ct. at 2793.

53. *Id.* at 2795.

54. *Id.*

55. *Id.*

accordance with the laws and procedures already in force in a country.”<sup>56</sup> The *Hamdan* decision had the immediate effect of suspending all cases before the military commissions.<sup>57</sup>

On September 6, 2006, President Bush sent a bill to Congress to authorize the creation of military commissions.<sup>58</sup> Congress eventually approved a version of the bill that became the Military Commissions Act of 2006 (“MCA”) and it was signed into law on October 17, 2006.<sup>59</sup> The MCA asserted Guantánamo detainees only had a statutory right of habeas, which the MCA withdrew.<sup>60</sup> In promulgating the MCA, Congress purportedly disempowered federal courts from hearing all pending and future habeas petitions filed by detainees.<sup>61</sup>

Therefore, after five years of delays, charges in the cases of ten detainees from Guantánamo finally were referred to the military commissions for trial.<sup>62</sup> The Government’s record in prosecuting the accused, reputed to be “the worst of the worst,” however, proved to be disappointing.<sup>63</sup> The first charges were brought in February 2007 against David Hicks, an Australian citizen.<sup>64</sup> The Government initially charged

56. *Id.* at 2797 (quoting INT’L COMM. RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 355 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005)).

57. *Hamdan*, 126 S. Ct. at 2799.

58. President George W. Bush, Message to the Congress of the United States, Sept. 6, 2006, <http://www.whitehouse.gov/news/releases/2006/09/20060906-4.html>.

59. The Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a-950w and other sections of titles 10, 18, 28, and 42).

60. Military Commissions Act, 28 U.S.C. § 2441(a) amends 28 U.S.C. § 2241(e). The new subsection (e) provides:

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the [DTA], no court justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or condition of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

*Id.*

This amendment applies retroactively to “any aspect of the detention, transfer, treatment, trial, or condition of detention of an alien detained by the United States since September 11, 2001” and became effective on October 17, 2006. 28 U.S.C. § 2441(b).

61. 28 U.S.C. § 2441(a).

62. U.S. Dep’t of Defense, Military Commissions, Commissions Cases, <http://www.defenselink.mil/news/commissionsarchives.html> (last visited Aug. 12, 2007).

63. See Lewis & Schmitt, *supra* note 18.

64. United States v. Hicks, Charges, MC Form 458 at 3 (Feb. 2, 2007), available at <http://www.defenselink.mil/news/d2007Hicks%20-%20Notification%20of%20Sworn%20Charges.pdf>

Hicks with attempted murder in violation of the law of war and providing material support for terrorism.<sup>65</sup> In the end, Hicks plead guilty to one charge of providing material support for terrorism, received a suspended sentence of seven years, and returned to Australia to serve the remaining nine months of his sentence.<sup>66</sup>

The dismissal of charges against the next two detainees, Omar Ahmed Khadr<sup>67</sup> and Salim Ahmed Hamdan,<sup>68</sup> demonstrates the procedures under the MCA for referring charges from CSRTs to the military commissions contain serious defects. In both cases, military judges found the military commissions lacked jurisdiction over the accused and dismissed the charges without prejudice.<sup>69</sup> In Hamdan's case, a 2004 CSRT had determined he was "a part of or associated with al-Qaeda forces," and therefore was "properly detained as an 'enemy combatant.'"<sup>70</sup> When Hamdan's case was referred to military commission, however, the military judge ruled under the MCA, military commissions have jurisdiction to try offenses only when committed by an "alien *unlawful* enemy combatant."<sup>71</sup> In granting Hamdan's motion to dismiss all charges, the military judge reasoned the 2004 CSRT determination was made for the sole purpose of ascertaining whether his detention was proper, not to qualify him to stand trial by military commission.<sup>72</sup> The distinction is important because the standards used by the CSRT to determine "enemy combatant" status is "less exacting" than the definition of "unlawful enemy combatant" provided by the MCA.<sup>73</sup>

The series of events described above highlights the distinction between military and civilian modes of justice some critics have suggested are insufficient models to try suspected terrorists. For these critics, the criminal justice paradigm is a poor fit for accused terrorists. Formal federal prosecutor and legal commentator Andrew McCarthy argues: "Here the executive is not enforcing American law against a suspected criminal but exercising national defense powers to protect the nation against external

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65. *Id.*

66. Department of Defense News Release, *supra* note 15.

67. United States v. Khadr, Order on Jurisdiction (June 4, 2007), available at <http://www.nimj.org/documents/Khadr%20Order%20on%20Jurisdiction.pdf>.

68. This is the same petitioner in *Hamdan*, discussed above. See *Hamdan Order*, *supra* note 31.

69. Khadr, Order on Jurisdiction, *supra* note 68, at para. 3; Hamdan Order, *supra* note 31, at 4.

70. Hamdan Order, *supra* note 31, at 1, para. 5.

71. *Id.* at 2, para. 1 (emphasis added).

72. *Id.* at 3, para. 1.

73. *Id.* at 3, para. 2.

threats.”<sup>74</sup> Instead of dealing with the constraints on prosecution associated with U.S. district courts, some argue a new court, one with special rules and procedures tailor made to meet the unique logistical problems posed by prosecuting terrorists, should be created to replace the failed military commission scheme.

## B. THE AD HOC COURT OPTION

Most would agree the current methods for detaining and trying suspected terrorists is unsatisfactory. Of the ten detainee cases referred from CRSTs to the military commissions, only one case has been adjudicated and hundreds more are still detained at Guantánamo without charges.<sup>75</sup> Commentators from the United States and abroad have criticized this system of indefinite detention as unfair, inefficient, and violative of international law.<sup>76</sup> Certainly, the moment to address the shortcomings of the military commissions and indefinite detention scheme and to proffer solutions is now. Many commentators in the legal community have risen to the challenge and have concluded the answer to the problem of the military commissions is the creation of a new homeland security court.

For the purposes of this discussion, it is helpful to first identify the various goals to be achieved by the creation of an ad hoc national security court. The primary goal is replacing the failed military commission system, but advocates of such an approach also seem concerned with establishing a universally-recognized, legitimate means of processing, prosecuting, and punishing individuals accused of terrorism.<sup>77</sup> Indeed, proponents often cite winning international support for the United State’s war effort as a justification for the creation of such a court.<sup>78</sup> Professor Glenn Sulmasy foresees: “Creating a homeland security court system will

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74. McCarthy & Velshi, *supra* note 19 at 7–8.

75. Rhem, *supra* note 30.

76. See, e.g., Jennifer Van Bergen, *Bush’s Military Commissions Act and the Future of America*, COUNTERPUNCH, (Oct. 14–15, 2006), available at <http://www.counterpunch.org/vanbergen10142006.html> (criticizing the prospect under the military commission system, that the Executive could wield open-ended authority to detain suspected terrorists); Press Release, United Nations, UN Expert on Human Rights and Counter Terrorism Concerned that Military Commission Act is Now Law in United States (Oct. 27, 2006) <http://www.unhchr.ch/huricane/hurricane.nsf/view01/13A2242628618D12C12572140030A8D9?opendocument> (reporting UN Special Rapporteur Martin Schenin’s conclusion that the MCA “appear[s] to contradict the universal and fundamental principles of fair trial standards and due process”).

77. Sulmasy, *After Hamdan*, *supra* note 19, at 12.

78. *Id.* at 2.

enable us to adequately fight the war, maintain international support, and continue to display our resolve to hold up the rule of law.”<sup>79</sup> Professors Jack L. Goldsmith and Neal Katyal echo these sentiments: “the government’s system of detaining terrorists without charge or trial has harmed the reputation of the United States, disrupted alliances, hurt us in the war of ideas with the Islamic world[,] and has been viewed skeptically by our own courts.”<sup>80</sup> The objectives cited above, legitimacy and justice, are laudable. The means they have proposed utilizing to achieve those goals, however, are incompatible with the rule of law. These commentators have concluded the only answer to the quagmire that is the military commission scheme is to invent a new court, one specially designed to try terrorists free from the burdens of constitutional due process rights.<sup>81</sup>

For example, the ad hoc court could allow the Government to introduce evidence obtained through torturous interrogation practices. Although no proponent of a new terrorist court has furnished any specific details regarding what standards of admissibility for evidence would apply in that court, it is reasonable to assume the standards for the new court would be less strict than the federal rules and not more strict than the rules set forth under the Manual for Military Commissions (“MMC”); the MMC sets a low bar.

The MCA amended the UCMJ to establish procedural and evidentiary rules for trials under the military commissions.<sup>82</sup> In January 2007, the Secretary of Defense submitted the MMC to Congress, which contains the Military Commissions Rules of Evidence.<sup>83</sup> Rule 304(a) provides generally that statements obtained by use of torture shall not be admitted into evidence against any party.<sup>84</sup> This general rule is subject to a significant exception in Rule 304(c), which contemplates admission of torture evidence “[w]hen the degree of coercion inherent in the production of a statement . . . is disputed.”<sup>85</sup> In summary, although evidence obtained by torture specifically is excluded from such trials, if the totality of the

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79. *Id.* at 3.

80. Goldsmith & Katyal, *supra* note 19.

81. *See generally* McCarthy & Velshi, *supra* note 19. “[This new tribunal] would inject judicial participation into the process to promote procedural integrity and international cooperation, but would avoid the perilous prospect of judicial micromanagement of the executive branch’s war on terror.” *Id.* at 2.

82. R. Jeffrey Smith, *Pentagon Releases Rules for Trials of Terrorism Suspects*, WASH. POST, Jan. 19, 2007, at A13.

83. *Id.*

84. MIL. COMM’N R. EVID. 304(a).

85. MIL. COMM’N R. EVID. 304(c).

circumstances renders statements obtained by coercion reliable and probative in the judgment of the Military Judge, they may be admitted.<sup>86</sup>

The proponents of the ad hoc court have proposed a series of alarming departures from the minimum requirements for due process long-recognized in this country.<sup>87</sup> These proposed changes indicate the rules of the ad hoc court will be designed to follow the trend towards weakening procedural protections for terror suspects set by the military commission system. This problem is exacerbated by the United State's continued use of torture as an interrogation method.

### C. TORTURE AND THE "DISPOSAL PLAN"

Although torture is illegal under both U.S. and international law, the United States has a long history of using torture to achieve intelligence goals. In his book, *A Question of Torture*, History Professor Alfred W. McCoy documents the last fifty years in the CIA's experiments with torture.<sup>88</sup> Professor McCoy traces the roots of the abuses recorded at Abu Ghraib prison to CIA interrogation practices dating back to at least the Cold War era.<sup>89</sup> The physically and psychologically coercive interrogation techniques the CIA uses on torture suspects violates the absolute prohibition on torture enshrined in domestic and international law.<sup>90</sup>

86. The Manual for Military Commissions, pt. I, § 1(g), provides:

Statements obtained by torture are not admissible (10 U.S.C. §948r(b)), but statements 'in which the degree of coercion is disputed' may be admitted if reliable, probative, and the admission would best serve the interests of justice (10 U.S.C. §948r(c)). In addition, for such statements obtained after December 30, 2005, the methods used to obtain those statements must comply with the [DTA], enacted on that date (10 U.S.C. §948r(d)(3)).

U.S. Dep't of Defense, Manual for Military Commissions, pt. I, § 1(g) (2007), available at <http://www.defenselink.mil/pubs/pdfs/The%20Manual%20for%20Commissions.pdf>.

87. These include suggestions that the standard of admissibility for evidence be relaxed, the Government's duty to provide exculpatory evidence to the accused be eliminated, and the burden of proof be lowered. See Goldsmith & Katyal, *supra* note 19 (suggesting the standards for admitting evidence should be less stringent than those required by the Federal Rules of Evidence); McCarthy, *supra* note 19 (arguing the government's duty to provide exculpatory evidence to the accused be narrowed or eliminated altogether and advocating that, instead of the guilt beyond a reasonable doubt burden, the government should only be required to prove its allegations by a preponderance of the evidence).

88. See generally ALFRED W. MCCOY, *A QUESTION OF TORTURE: CIA INTERROGATION, FROM THE COLD WAR TO THE WAR ON TERROR* (Metropolitan Books 2006).

89. *Id.* at 5-7.

90. See generally *id.* (discussing the physical and psychological torture methods used on detainees). See United Nations Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, U.N. Doc. A/RES/39/708 (1984), reprinted in 23 I.L.M. 1027 (1984).

The Eighth Amendment to the U.S. Constitution forbids “cruel and unusual punishment” in the United States.<sup>91</sup> In the international arena, the 1984 United Nations Convention Against Torture (“CAT”), which the United States ratified on October 21, 1994, specifically prohibits torture.<sup>92</sup> In its 1999 report to the United Nations Committee Against Torture, the State Department averred:

Every act of torture within the meaning of the Convention is illegal under existing federal and state law, and any individual who commits such an act is subject to penal sanction as specified in criminal statutes. Torture cannot be justified by exceptional circumstances, nor can it be excused on the basis of an order from a superior officer.<sup>93</sup>

For example, the federal torture statute, which implements U.S. obligations under CAT, criminalizes torture, attempted torture, and conspiracy to torture.<sup>94</sup> Anyone prosecuted under the torture statute is subject to fines or imprisonment for up to twenty years.<sup>95</sup> The statute provides the perpetrator shall be sentenced to life in prison or death, if the victim dies from the torture.<sup>96</sup>

Other federal statutes provide for the criminal prosecution of military service members and military contractors accused of torture. The UCMJ explicitly criminalizes torture and provides military personnel who abuse prisoners can be prosecuted by a court-martial.<sup>97</sup> The Military

91. U.S. CONST. amend. VIII.

92. Article I of CAT, provides in relevant part:

Any act which by severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession . . . or intimidating or coercing . . . when such pain or suffering is inflicted . . . with the consent or acquiescence of a public official.

Convention Against Torture, *supra* note 90, at art. 1.

93. U.S. Dep’t of State, Initial Report of the United States to the United Nations Committee Against Torture (Oct. 15, 1999) *available at* [http://www.state.gov/www/global/human\\_rights/torture\\_index.html](http://www.state.gov/www/global/human_rights/torture_index.html). See also Torture Victims Protection Act of 1991, Pub. L. 102-256, 28 U.S.C. § 1350 (furnishing a tort remedy for torture victims).

94. 18 U.S.C. § 2340A(a) (2007). Section 2340 of the U.S. Code defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions) upon another person within his custody or physical control.” 18 U.S.C. § 2340(1) (2007). “Severe mental pain or suffering” is further defined as the “prolonged mental harm caused by or resulting from (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.” *Id.* at § 2340(2)(A-B).

95. 18 U.S.C. § 2340A(a).

96. *Id.*

97. See generally Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2007).



Extraterritorial Jurisdiction Act of 2000<sup>98</sup> provides military personnel and contractors working for the Department of Defense may be prosecuted in U.S. district courts for certain felony offenses, including torture committed abroad while employed by or accompanying U.S. forces overseas.<sup>99</sup> Other nations have adopted similar laws criminalizing torture and providing for the prosecution of offenders.<sup>100</sup> Many legal commentators and jurists agree the prohibition against torture now has become a peremptory norm of international human rights and humanitarian law from which no derogation is allowed.<sup>101</sup>

The September 11<sup>th</sup> attacks, however, furnished visceral incentives for lawyers in the Justice Department to launch a legal assault against the unqualified prohibition against torture. In early 2002, Jay Bybee wrote a memo to former White House Counsel Alberto Gonzales effectively re-defining torture to provide legal justification for the use of more severe interrogation techniques against terror suspects.<sup>102</sup> The memo began by concluding "certain acts may be cruel, inhuman, or degrading, but still not

98. Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 18 U.S.C. §§ 3261 et seq. (2000).

99. 18 U.S.C. § 3261(a) (2007). *See also* DEP'T OF DEF., INSTRUCTION 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS § 6.1 (2005).

100. Article 19 of CAT requires that State parties submit an initial report on measures taken at the national level to implement obligations under CAT to the Committee Against Torture within the first year of entry into force. Convention Against Torture, *supra* note 90, at art. 19. In its 2005 Report to the Committee, a Canadian official declared that Canada's Criminal Code contains "robust anti-torture laws." Committee Against Torture, Presentation of Canada's Fourth and Fifth Reports (May 4, 2005), [http://www.dfait-aeci.gc.ca/canada\\_un/geneva/can\\_reports\\_com-en.asp](http://www.dfait-aeci.gc.ca/canada_un/geneva/can_reports_com-en.asp). In 2007, Italy, the Netherlands, and Ukraine submitted reports averring that torture was prohibited under their respective national laws. *See* Press Release, Committee Against Torture Concludes Thirty-Eighth Session (May 18, 2007), *available at* [http://www.unog.ch/unog/website/news\\_media.nsf/\(httpNewsByYear\\_en\)/29F1BA9E6E6E34FAC12572DF004208C7?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/29F1BA9E6E6E34FAC12572DF004208C7?OpenDocument).

101. *See, e.g.,* Jordan J. Paust, *The Reality of Jus Cogens*, 7 CONN. J. INT'L L. 81, 81 (1991); M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 68 (1996) (naming, inter alia, torture, genocide, and slavery as international crimes that are jus cogens); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1711 (2005) (torture is jus cogens); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n. *See also* *In re Estate of Marcos*, 978 F.2d 493, 500 (9th Cir. 1992) (quoting *Siderman de Blake v. Argentina*, 965 F.2d 699, 715, 717 (9th Cir. 1992) (acknowledging that official acts of torture are now widely recognized as jus cogens violations)).

102. Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, Department of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel for the Department of Defense (Jan. 22, 2002) *available at* [http://www.american torture.com/documents/torture\\_memos/10.pdf](http://www.american torture.com/documents/torture_memos/10.pdf) [hereinafter Bybee Memo].

produce pain and suffering of the requisite intensity to fall within Section 2340A's proscription against torture."<sup>103</sup> The remainder of the memo explains how such a parsing, between torture and "cruel, inhuman, or degrading" acts, or between torture and "torture lite" is legally defensible.<sup>104</sup> Bybee argued the prohibition against torture was limited to "extreme, deliberate, and unusually cruel practices."<sup>105</sup> He reasoned the physical or mental pain attending the predicate act "must be of such a high level of intensity that the pain is difficult for the subject to endure."<sup>106</sup>

By requiring proof of corporeal impact upon a victim, Bybee eviscerated the CAT's clear prohibition against psychological torture.<sup>107</sup> With these definitions as his baseline, Bybee concluded interrogators who used certain techniques to obtain intelligence from detainees likely would not be subject to criminal prosecution under the U.S. Code.<sup>108</sup> According to Bybee's logic, to qualify as torture, the interrogator must specifically intend to commit not only the prohibited act, but also the consequence of that act.<sup>109</sup> In other words, Bybee reasoned an interrogator could perform actions approximating torture, but escape prosecution as long as he did not specifically intend to cause the victim prolonged mental harm. Moreover, to qualify as "prolonged," the mental harm must be "endured over some period of time," not limited to the period of interrogation itself.<sup>110</sup> In sum, Bybee's memo concluded that the standard of proof for prosecuting interrogators for violations of U.S. laws prohibiting torture would be very high indeed.

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103. *Id.* at 1.

104. See Seth F. Kreimer, "Torture Lite," "Full Bodied" Torture, and the Insulation of Legal Conscience, 1 J. NAT'L SECURITY L. & POL'Y 187, 224 (2005). Professor Kreimer explains the difference between torture, "in which physical assaults on the body of the victim result in excruciating pain," and "torture lite" techniques which "involve the infliction of severe physical or psychological stress by means other than physical assault." *Id.* at 188 n.3. Sleep deprivation, stress and duress positions, physical isolation, and subjection to loud noises or very bright lights are all examples of "torture lite" techniques. *Id.*

105. Bybee Memo, *supra* note 102, at 28–29 (relying on the European Court of Human Right's decision in *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. 25 (1978), which held that while interrogation techniques such as wall standing, hooding, use of loud noise, sleep deprivation, and deprivation of food and drink were inhumane and degrading, they did not amount to torture).

106. *See id.* at 5.

107. Convention Against Torture, *supra* note 90, at art. 1(1).

108. Bybee Memo, *supra* note 102, at 46.

109. *See id.* at 3 (reasoning "because Section 2340 requires a defendant act with specific intent to inflict severe pain, the infliction of such pain must be the defendant's precise objective").

110. *Id.* at 7.

While the ban on torture in domestic and international law is absolute, lawyers working for the U.S. Government searched for a legal loophole.<sup>111</sup> This type of overly legalistic approach to real-life interrogation situations proved to be disastrous in the field. In essence, interrogators without legal educations were left to determine, on their own, what techniques were permissible and which were prohibited. Observers have linked the abuses at Abu Ghraib prison, for example, to poor leadership and lack of specific regulations for interrogations, beginning at the top levels of government, and with the Bybee memo in particular.<sup>112</sup>

The Bush Administration's splitting-hairs approach leads down a slippery slope, posing the problem some CIA officials unofficially term "the disposal plan."<sup>113</sup> At the bottom of that slope, Professor McCoy asserts, "is a chasm . . . called extrajudicial execution."<sup>114</sup> Stated differently, when CIA interrogators subject high value detainees to treatment that stops short of "extreme, deliberate, and unusually cruel practices" in order to extract intelligence information, the detainees become "tainted for trial."<sup>115</sup> At this stage, the temptation to dispose of the detainee through summary execution is great because, besides having destroyed any chance for prosecuting the detainee, interrogators fear their treatment of the detainee will make themselves vulnerable to future criminal prosecution under federal torture statutes.<sup>116</sup> A living survivor of the interrogation, after all, is a potential witness. More pointedly, Tyler Drumheller, former chief of European operations at the CIA explains: "What are you going to do with these people? The utility of someone like K.S.M. is, at most, six

111. See MCCOY, *supra* note 88, at 112–13. McCoy also describes various memos penned for the Executive by David S. Addington, John Yoo, Alberto Gonzales, and Jay Bybee that effectively allowed the CIA to use torture when interrogating suspected members of al Qaeda and the Taliban. *Id.* at 112–16.

112. See, e.g., Marcy Strauss, *The Lessons of Abu Ghraib*, 66 OHIO ST. L.J. 1269, 1280–81, 85 (2005). See also Richard B. Schmitt, *Justice Adopts Revised View of Torture Definition*, L.A. TIMES, Jan. 1, 2005, at A31 (explaining the role of Alberto Gonzales in the Justice Department memo allowing for torture of suspects detained by the military); David Johnston & James Risen, *The Reach of War: The Interrogations; Aides Say memo Backed Coercion for Qaeda Cases*, N.Y. TIMES, Jun. 27, 2004, at 11 (providing a full account of the Justice Department's memo).

113. Mayer, *supra* note 2. "In the Vietnam War, the CIA . . . avoid[ed] the formalities of prosecution with pump and dump—pumping suspects for information by torture and then dumping the bodies." MCCOY, *supra* note 88, at 119.

114. MCCOY, *supra* note 88, at 195.

115. *Id.* Memorandum from the Office of the Assistant Attorney Gen. on Legal Standards Applicable under 18 U.S.C. §§ 2340–2340A to Deputy Attorney Gen. James B. Comey (Dec. 30, 2004) (on file with author).

116. Mayer, *supra* note 2. Some CIA agents have reportedly purchased professional liability insurance policies to assist with potential legal fees. *Id.* As discussed in Part II.C., perpetrators of torture are subject to both criminal prosecution and civil lawsuits. See *infra* Part II.C.

months to a year. You exhaust them. Then what? It would have been better if we had executed them.”<sup>117</sup> But effective alternatives to torture exist.

Before the Executive turned control over interrogations to the CIA, the Federal Bureau of Investigation (“FBI”) had been running quite a successful counterintelligence program in Afghanistan.<sup>118</sup> Under strict orders to “work by the book,” FBI agents used empathetic, non-coercive tactics to encourage terror suspects to talk.<sup>119</sup> These techniques, which included building trust and rapport with the detainees rather than fear and loathing, produced solid, actionable intelligence.<sup>120</sup> In stark contrast, when CIA or military interrogators using harsh techniques took over from the FBI, “the detainee would stop being cooperative.”<sup>121</sup>

Using torturous methods to interrogate suspects for either intelligence or evidence is illegal and immoral.<sup>122</sup> Moreover, torturing suspects is counterproductive.<sup>123</sup> Torture does not lead to credible information which can be used to rout the terrorist threat;<sup>124</sup> and allegations of U.S. sponsored torture practices potentially can lead to the radicalization of new generations of terrorists.<sup>125</sup> If bringing terrorists to justice is indeed a paramount objective, in order to accomplish that objective, prosecutors need evidence clean of the taint of torture.

### III. TERROR SUSPECTS SHOULD BE TRIED IN THE NORMAL CRIMINAL JUSTICE SYSTEM

The military commission system has failed, but inventing an ad hoc terrorist court will not repair the damage done by President Bush’s failed

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117. Mayer, *supra* note 2.

118. See MCCOY, *supra* note 88, at 118.

119. *Id.* Federal Bureau of Investigation (“FBI”) agent Jack Cloonan specifically instructed his operatives in Kabul to use interrogation techniques “that would allow later prosecution.” *Id.*

120. *Id.* at 118–19.

121. *Id.* at 159. FBI agent Dan Coleman succinctly observed: “Brutalization doesn’t work. We know that. Besides, you lose your soul.” *Id.* at 203.

122. Amos N. Guiora & Erin M. Page, *The Unholy Trinity: Intelligence, Interrogation, and Torture*, 37 CASE W. RES. J. INT’L L. 427, 429 (2006).

123. Anne Applebaum, *Torture is Counterproductive*, SLATE, March 20, 2007, <http://slate.com/id/2162211/>.

124. See Guiora & Page, *supra* note 122, at 429. See also Mayer, *supra* note 2 (quoting a former top CIA official who estimated that “ninety percent of the information [obtained through the CIA’s interrogation and detention program] was unreliable”).

125. See, e.g., MCCOY, *supra* note 88, at 201. A former MI5 agent is quoted as stating that the British approach to containing IRA terrorists had the paradoxical effect of creating even more terrorists. *Id.* “It did nothing but exacerbate the situation. Most of those interned went back to terrorism. You’ll end up radicalizing the entire population.” *Id.*

experiment. In order to win support for the United State's war effort, the trials of suspected terrorists must be viewed as legitimate and fair by both the domestic and international community. Thus, the urgent need to try and punish terrorists efficiently must be tempered with the obligation to do so in accordance with the established rule of law. Any criminal tribunal used to try terror suspects must provide the accused with due process rights acknowledged internationally. However, the Bush Administration's quest to bring terrorists to justice has been haunted by the specter of inappropriately coercive interrogation methods "tantamount to torture."<sup>126</sup>

It is beyond debate that using torture to elicit either intelligence information or confessions of criminal activity is illegal under both U.S. and international law.<sup>127</sup> Federal district courts, unlike military commissions or the proposed ad hoc national security court, have developed a sophisticated jurisprudence which imposes a harsh penalty on the Government for violations of the prohibition against torture, namely the exclusion of evidence tainted by illegal interrogation practices.<sup>128</sup> For these reasons, U.S. district courts are the most appropriate venues to bring suspects accused of terrorism offenses to justice.

At the outset, it is important to acknowledge federal district courts successfully have prosecuted terrorists in the past using established mechanisms that balance the Government's national security interests with the due process rights of the accused.<sup>129</sup> Unlike the military commissions or the proposed terrorist court, whose procedures are untested, the district courts have an established record of completed prosecutions.<sup>130</sup> The perpetrators of the 1993 bombing of the World Trade Center,<sup>131</sup> including later, Ramzi Yousef;<sup>132</sup> the perpetrators of the 1995 bombing of the

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126. INT'L COMMITTEE OF THE RED CROSS, REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT, AND INTERROGATION, 4 (Feb. 2004), available at [http://www.globalsecurity.org/military/library/report/2004/icrc\\_report\\_iraq\\_feb2004.pdf](http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf) [hereinafter ICRC Report].

127. See Convention Against Torture, *supra* note 90, at art. 2; See generally Resolution of Advice and Consent to Ratification, S. Exec. Rep. No. 101-30 (1990); 18 U.S.C. §2340.

128. See *infra*. Part II.A.–II.B.

129. See *United States v. Bin Laden*, 58 F. Supp. 2d 113, 123 (S.D.N.Y. 1999); *United States v. Al-Arian*, 267 F. Supp. 2d 1258, 1267 (M.D. Fla. 2003).

130. Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems*, 34 RUTGERS L.J. 1, 52 (2002).

131. James McKinley, Jr., *The Terror Conspiracy: The Verdict: Mountains of Evidence, But Questions Remain*, N.Y. TIMES, Oct. 2, 1995, at B5. Sheik Omar Abdel Rahman and nine others were convicted of conspiracy to commit terrorist acts. *Id.*

132. Christopher S. Wren, *Verdicts in Terror Trial: The Overview: U.S. Jury Convicts 3 in a Conspiracy to Bomb Airlines*, N.Y. TIMES, Sept. 6, 1996, at A1. Judge Kevin Duffy of the U.S.

Oklahoma City federal building;<sup>133</sup> the perpetrators of the 1998 bombing of the U.S. embassies in Kenya and Tanzania;<sup>134</sup> and the “twentieth” 9/11 terrorist, Zacarias Moussaoui,<sup>135</sup> have all been tried and convicted using normal criminal procedures in U.S. district courts. In August 2007, as this Essay was being written, the jury in the federal trial of the alleged “dirty bomber,” Jose Padilla,<sup>136</sup> returned a guilty verdict.<sup>137</sup> Certainly, the criminal trials of accused terrorists have suffered logistical difficulties,<sup>138</sup>

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District Court for the Southern District of New York sentenced Yousef to 240 years for his part in the 1993 World Trade Center bombings and life in prison for the 1994 bombing of a Philippine Airlines jet that killed one person. *Id.*

133. Jo Thomas, *The Oklahoma City Bombing: The Verdict: McVeigh Jury Decides on Sentence of Death in Oklahoma Bombing*, N.Y. TIMES, June 14, 1997, at 1-1. Timothy McVeigh, a U.S. Army veteran of Operation Desert Storm, was sentenced to death for his part in the Oklahoma City bombing. *Id.* His co-conspirator, Terry Nichols, was convicted in federal court of conspiracy to bomb a federal building, eight counts of involuntary manslaughter, and was sentenced to life in prison. Jo Thomas, *Terry Nichols Gets Life Term Bombing Plot*, N.Y. TIMES, June 5, 1998, at A1. Jurors in Nichols’s Oklahoma state criminal trial convicted him of 161 counts of murder. *Id.* He was sentenced to life in prison in that case. Associated Press, *Hung Jury Spares Nichols a 2nd Time From Death*, N.Y. TIMES, June 12, 2004, at A7.

134. Benjamin Weiser, *Trial Poked Holes in Image of Bin Laden’s Terror Group*, N.Y. TIMES, May 31, 2001, at A1. In October 2001, four associates of Osama Bin Laden were convicted and sentenced to life in prison. *Id.* Bin Laden was also named in the indictment. *Id.*

135. See generally *United States v. Moussaoui*, 483 F.3d 220 (2007); See also Jerry Markon & Timothy Dwyer, *Jurors Reject Death Penalty for Moussaoui*, WASH. POST, May 4, 2006, at A1.

136. Eric Lichtblau, *Threats and Responses: The Padilla Case: In Legal Shift, U.S. Charges Detainee in Terrorism Case*, N.Y. TIMES, Nov. 23, 2005, at A1. For three years, Jose Padilla was held in U.S. military custody without charges as an enemy combatant on suspicion of plotting to detonate a “dirty bomb.” *Id.* In 2005, the Justice Department named Padilla as a co-defendant in a case already on the docket in the federal district court in Miami. *Id.* Padilla and his co-defendants were charged with conspiracy to murder U.S. nationals, conspiracy to provide material support to terrorism, and providing material support to terrorism. *Id.* The charges did not include any allegations regarding the dirty bomb. *Id.*

137. Peter Whoriskey, *Jury Convicts Jose Padilla of Terror Charges*, WASH. POST, Aug. 17, 2007, at A1 (noting: “The conviction essentially accomplishes through the criminal-court system what the administration had tried to do five years ago by executive fiat”).

138. Threats to judge, jury, and general public safety are among the conceivable dangers related to hosting civilian criminal trials of accused terrorists. See John W. Dean, *Thoughts on the “Bringing Terrorists to Justice Act of 2006”*, Sept. 22, 2006, <http://writ.news.findlaw.com/dean/20060922.html>. A commonly-raised objection to holding terrorist trials in U.S. district courts is the Federal Rules of Criminal Procedure provide defendants with discovery rights so broad they could compromise sensitive intelligence information. For example, during the 1988 district court trial of Fawaz Yunis, Yunis’s defense counsel asked for copies of all materials related to the electronic surveillance of Yunis and a government informant, a discovery right permitted by the Federal Rules of Criminal Procedure. See *United States v. Yunis*, 1988 WL 16302 (D.D.C. 1988). Yunis was accused of hijacking Royal Jordanian Airlines flight 402. *United States v. Yunis*, 867 F.2d 617, 618 (D.C. Cir. 1989). A joint task force of the CIA, FBI, and Defense Department succeeded in luring Yunis onto a boat and arrested him in international waters. *Id.* at 119. The Government argued the threat to classified information posed by release

but they also have withstood the scrutiny the legal community has reserved for proceedings under a military tribunal system.<sup>139</sup>

#### A. EVOLUTION OF THE LEGAL DOCTRINE EXCLUDING COERCED CONFESSIONS

The U.S. Supreme Court has managed, through a long history of cases involving police interrogation practices, to strike a workable balance between legitimate government needs to question criminals and due process protections for the individuals subjected to such interrogations. Courts in the United States inherited the English common law rule that coerced confessions should not be admitted into evidence against the accused because they were unreliable.<sup>140</sup> Courts also reasoned that forced confessions should be excluded because they were involuntary.<sup>141</sup> Over time the separate rationales became somewhat entangled with each other, and courts continued to exclude coerced confessions because they were inherently untrustworthy, often conflating this with the voluntariness test.<sup>142</sup>

In the United States, the Supreme Court adopted the voluntariness test<sup>143</sup> and the confusion regarding its underlying rationale that

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of the requested records was too great and the United States Court of Appeals for the District of Columbia held that a higher standard for discovery applied when a defendant seeks classified information. *Id.* at 623.

139. As Professor Charles V. Pena observes, the U.S. Government publicly has expressed its concern that military trials sometimes lack basic due process protections. Charles V. Pena, *Blowback: The Unintended Consequences of Military Tribunals*, 16 NOTRE DAME J. L. ETHICS & PUB. POL'Y 119, 123 (2002). In its annual Country Reports on Human Rights Practices, the U.S. State Department has criticized Burma, Egypt, Sudan, and Peru, among other nations, for using special military tribunals to try civilians. *Id.* at 123–25 (citing Bureau of Democracy, Human Rights & Labor, U.S. Dep't of State, Country Reports on Human Rights Practices 2000 (Feb. 23, 2001), available at <http://www.state.gov/drl/rls/hrrpt/2000/>).

140. Professor Wigmore insisted the privilege against self-incrimination was in place solely to exclude unreliable evidence. See J.H. WIGMORE, TREATISE ON EVIDENCE §820 (2d ed. 1923).

141. Other commentators suggest that judicial recognition of the privilege was based in a concern that criminal suspects should be protected from coerced confession or to prevent abusive police practices. See WELSH S. WHITE, MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON 40 (2001) (citing Charles T. McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239, 277 (1946); Monrad G. Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 431, 441 (1954); Francis Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 29 (1950)).

142. WHITE, *supra* note 142, at 39–40 (citing Scott's Case, 1 D&B 47, 58, 169 Eng. Rep. 909, 914 (1956)).

143. Hopt v. Utah, 110 U.S. 574, 584 (1884); Bram v. United States, 168 U.S. 532, 549 (1897).

accompanied it. In cases where interrogation tactics were challenged, the Court reasoned that violence and threats by the police could result in unreliable evidence.<sup>144</sup> The end result of this rationale, however, was that challenges to forced confessions were rejected if the Court was satisfied that the confession was truthful.<sup>145</sup>

Nevertheless, the Court continued to utilize the amorphous voluntariness test throughout the Jim Crow period, during which white law enforcement officials regularly used violence to force black suspects to confess.<sup>146</sup> In *Brown v. Mississippi*,<sup>147</sup> the Court reversed the defendants' convictions for murder, finding they "were void for want of the essential elements of due process."<sup>148</sup> After learning of the murder, the local sheriff and his posse approached Yank Ellington, one of the defendants, in his home and accused him of the crime.<sup>149</sup> When Ellington denied his involvement, the sheriff's posse

hanged him by a rope to the limb of a tree, and, having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and still declining to accede to the demands that he confess, he was finally released, and he returned with some difficulty to his home, suffering intense pain and agony.<sup>150</sup>

Ellington's torment continued when the sheriff's deputy returned to Ellington's house two days later to arrest him.<sup>151</sup> En route to the jail facility, the deputy drove through Alabama, stopped, and beat Ellington with a whip until he confessed to the murder.<sup>152</sup> At trial, Ellington and his co-defendants argued their confessions were false and obtained through "physical torture."<sup>153</sup> Announcing "[i]t is difficult to conceive of methods

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144. WHITE, *supra* note 142, at 42 (citing *Stein v. New York*, 346 U.S. 156, 192 (1953), where the majority declared: "Reliance on a coerced confession . . . vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusive and deceptive evidence").

145. WHITE, *supra* note 142, at 42 (citing *Lyons v. Oklahoma*, 322 U.S. 596 (1944) and *Stein v. New York*, 346 U.S. 156 (1953)).

146. See Amos N. Guiora, *Interrogation of Detainees: Extending a Hand or a Boot?*, 41 U. MICH. J.L. REFORM (forthcoming 2008) (comparing the second-class citizens status of African Americans in "the Deep South" to the alien enemy combatant status assigned to detainees at Guantánamo).

147. 297 U.S. 278, 287 (1936).

148. *Id.* at 287.

149. *Id.* at 281.

150. *Id.*

151. *Id.*

152. *Id.* at 281–82.

153. *Brown*, 297 U.S. at 279. The murder, indictment, trial, conviction, and sentence in this case all occurred within a week's time. *Id.*



more revolting to the sense of justice than those taken to procure the confessions of these petitioners[.]”<sup>154</sup> the Court determined the confessions were both untrustworthy and involuntary, and reversed the conviction.<sup>155</sup>

The Court’s 1961 ruling in *Rogers v. Richmond* marked the Court’s attempt to construct a due process analysis, eliminating the truthfulness inquiry.<sup>156</sup> Unlike *Brown*, in *Rogers*, there was no allegation the defendant had been subject to any physical violence, but the Court’s concern about the coercive nature police interrogations animates its reasoning and holding here.<sup>157</sup> Rogers confessed to killing the victim of a liquor store robbery only after the local chief of police threatened to take Roger’s wife into custody.<sup>158</sup> During his trial, Rogers testified he had confessed to spare his arthritic wife the pain of being transported by the police.<sup>159</sup> The Court ordered Rogers be discharged because the state trial court applied the wrong test in determining whether Rogers’s due process rights had been violated.<sup>160</sup> The trial judge ruled Rogers’s confession was “freely and voluntarily made,” basing this determination solely on the probable veracity of the confession itself.<sup>161</sup> In other words, the trial court weighed the likelihood of the substantive truth of Rogers’s confession as the only factor in determining its voluntariness.<sup>162</sup> The Court held the truth or falsity of Rogers’s confession had no place in a due process inquiry.<sup>163</sup> The Court explained under the Due Process Clause of the Fourteenth Amendment, coerced confessions could not be the bases for criminal convictions.<sup>164</sup> This was

not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.<sup>165</sup>

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154. *Id.* at 286.

155. *Id.* at 287 (noting that, besides the confession, there was no other evidence tying the defendant to the crime).

156. *Rogers v. Richmond*, 365 U.S. 534, 543–44 (1961).

157. *Id.* at 535.

158. *Id.* at 535–36.

159. *Id.* at 536.

160. *Id.* at 540.

161. *Id.* at 541–42.

162. *Rogers*, 365 U.S. at 542.

163. *Id.* at 543–44.

164. *Id.* at 544–45.

165. *Id.* at 540–41.

Instead of evaluating the truth of the confession, the Supreme Court held the trial judge should have inquired whether the police chief's actions broke Rogers's will to resist.<sup>166</sup>

The Court's effort to find a judicial solution to the widespread problem of abusive police interrogation has been well-chronicled.<sup>167</sup> The voluntariness test announced in *Rogers*, however, did not satisfy the Court's desire to curb police abuses because this fact-dependent inquiry allowed trial court judges to make factual findings that limited the Court's ability to determine voluntariness on appellate review.<sup>168</sup> Therefore, in its 1966 decision in *Miranda v. Arizona*, the Court announced a rule simultaneously eliminating the fact-specific determinations of its previous Fifth Amendment due process jurisprudence, and provided clear guidelines for future interrogations by law enforcement.<sup>169</sup>

#### B. *MIRANDA* AND THE PUBLIC SAFETY EXCEPTION

In *Miranda*, the Court decided the prohibition against coercive police interrogation practices and the right against self-incrimination had a firm constitutional basis in the Fifth Amendment.<sup>170</sup> The Court ruled the police must, prior to interrogation, inform a person in custody of her right to remain silent, her right to legal counsel, and her right to court-appointed counsel if she is indigent.<sup>171</sup> In its decision, the *Miranda* court specifically announced its disapproval of methods of brutality ("beatings, hanging, whipping") used by the police to force suspects to confess.<sup>172</sup> Rejecting its previous totality of the circumstances approach, the Court explained:

The Fifth Amendment privilege is so fundamental to our system of constitutional law and the expedient of giving an adequate warning as to the applicability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given.<sup>173</sup>

In other words, if police do not give the required warnings, courts would close their ears to prosecution arguments that the defendant

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166. *Id.* at 544.

167. *See e.g.*, WHITE, *supra* note 142.

168. *Id.* at 40–41.

169. *Miranda v. Arizona*, 384 U.S. 436, 467–479 (1966).

170. *Id.* at 467. *See also* *United States v. Dickerson*, 530 U.S. 428, 444 (2000) (affirming in *Miranda*, the Court had pronounced a constitutional rule).

171. *Miranda*, 384 U.S. at 479.

172. *Id.* at 445–46 (citing, *inter alia*, Nat'l Comm'n on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931)).

173. *Id.* at 468.

somehow knew of these rights.<sup>174</sup> Rather, courts faced with future unwarned confessions would simply exclude such evidence from the prosecution's case-in-chief.

That the *Miranda* court sought a long-term solution to the problem of police brutality is evident in its opinion. As the Court reasoned: "Unless a proper limitation upon custodial interrogation is achieved—such as [this] decision[] will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future."<sup>175</sup> Using torture to force suspected terrorists to provide information is no less shocking than police brutality, yet, if proponents of a new ad hoc national security court prevail, *Miranda*'s promise to protect against government violations of this kind will go unfulfilled.

National security court advocates argue it is too burdensome on the Government to make domestic due process rights available to terror suspects when they are detained during a combat situation.<sup>176</sup> For example, Professors Goldsmith and Katyal assert: "Detainees . . . need not be given the full panoply of criminal protections . . . . A terrorist captured in Afghanistan should not be able to seek release because he was not read his *Miranda* rights."<sup>177</sup> The sensible argument implied here is requiring soldiers on the battlefield to provide a list of rights to a captured enemy combatant is overly burdensome. However, the prerequisites for admissibility under *Miranda* are not so inflexible to be unworkable in the War on Terror.

Although the warning rule in *Miranda* is constitutionally-based, the Court has recognized several exceptions to its strictures, including a narrow exception for public safety.<sup>178</sup> In *New York v. Quarles*,<sup>179</sup> police pursued a rape suspect, who according to the victim was armed with a gun, into a supermarket.<sup>180</sup> The arresting officer drew his service revolver as he

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174. See *id.* at 468–69.

175. *Id.* at 447.

176. See Goldsmith & Katyal, *supra* note 19.

177. *Id.*

178. See, e.g., *Harris v. New York*, 401 U.S. 222, 226 (1971) (allowing the prosecution to use unwarned statements to impeach the testimony of a criminal defendant who chose to testify); *Michigan v. Tucker*, 417 U.S. 433, 450–52 (1974) (declining to apply the exclusionary rule from *Miranda* retroactively); *Oregon v. Haas*, 420 U.S. 714, 722 (1975) (allowing the prosecution to use statements elicited in violation of *Miranda* to impeach the defendant who chose to testify); *Oregon v. Elstad*, 470 U.S. 298, 318 (1985) (recognizing a subsequent administration of *Miranda* warnings could cure a confession derived from an earlier unwarned statement).

179. 467 U.S. 649 (1984).

180. *Id.* at 651–52.

approached the suspect and ordered him to stop.<sup>181</sup> The suspect complied, but while he was frisking him, the officer saw the suspect's gun holster was empty.<sup>182</sup> The officer handcuffed the suspect and asked him about the location of the gun.<sup>183</sup> The suspect indicated with a nod of his head and said, "the gun is over there."<sup>184</sup> Only after pausing to retrieve the gun did the officer read the suspect his *Miranda* rights.<sup>185</sup> The trial court suppressed the defendant's in-custody statement about the location of his gun and the gun itself because the statement was obtained before the arresting officer read him his *Miranda* rights.<sup>186</sup> The Supreme Court reversed, holding the defendant's pre-warning statement and the gun itself were admissible because of "the immediate necessity" to secure the safety of the location.<sup>187</sup>

The public safety exception under *Quarles* would certainly apply in circumstances, like those described by Professors Goldsmith and Katyal above, when capturing a suspect on the battlefield might not provide a safe opportunity for a recitation of rights.<sup>188</sup> Under *Quarles*, the duty to inform a terror suspect of his rights hypothetically can be delayed until military forces have secured the safety of the location. Then, as FBI agents working in counterintelligence have done for decades, the suspect can be warned and lawful interrogation can commence.<sup>189</sup>

Using the *Miranda* case as a base upon which to create guidelines on interrogation practices in the battlefield will promote several goals. First, it will provide detailed instructions to guards and interrogators on the proper treatment of detainees. By reorienting the mindset of interrogators, the Government will benefit by receiving admissible evidence to use in criminal cases against suspected terrorists. Second, confessions and other evidence that lack a high indicia of reliability will be excluded. As previously discussed, information gleaned from suspected terrorists using practices "tantamount to torture" does not yield reliable information.<sup>190</sup>

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181. *Id.* at 652.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Quarles*, 467 U.S. at 652.

186. *Id.* at 651.

187. *Id.* at 650.

188. *Id.* at 655–56.

189. See MCCOY, *supra* note 88, at 203.

190. See *infra* at Part II.C. "The torture of suspects did not lead to any useful intelligence information being extracted," reports James Corum, a professor at the Army Command and General Staff College. "The abusers couldn't even use the old 'ends justify the means' argument, because in the end there was nothing to show but a tremendous propaganda defeat for the United

Under threats of physical and/or psychological violence from his captor, a suspect will “say almost anything” to end the interrogation session.<sup>191</sup> Thus, using veracity as the sole test for admissibility is unworkable from a due process standpoint as long as trial courts can admit forced confessions if the confessions are deemed truthful. Therefore, as the Supreme Court announced in *Rogers* and *Miranda*, forced confessions should be excluded from evidence presented at a criminal trial because government coercion constitutes a violation of the accused’s due process rights.<sup>192</sup> Finally, and perhaps most importantly, by guaranteeing even those accused of the most heinous crimes will be accorded due process rights, the United States will satisfy the demand for fair and legitimate trials.

#### IV. CONCLUSION

In its landmark *Miranda* decision, the Supreme Court announced confessions obtained by the police would be excluded from trial unless the criminal defendant had been warned of certain constitutional rights prior to questioning. *Miranda* was the culmination of years of efforts by the Court to curb abuses of police power.

The social issues confronted by the *Miranda* court—abusive police interrogation, procedural protections for criminal defendants, and the legitimacy of the legal system in which these issues are tried—are as relevant in today’s Age of Terror as they were at the time of the Supreme Court’s decision in 1966. The CIA currently is engaged in an interrogation and detention program of suspected terrorists that relies on torture to extract intelligence information. However, rather than easing regulations on interrogations by creating an ad hoc national security court with special admissibility rules, the United States should treat alleged terrorists as criminals and prosecute them in the federal courts. The exclusionary rule announced fifty years ago in *Miranda* should be applied in the criminal trials of accused terrorists. Doing so would satisfy international demands for fair trials and could also lead to the eventual abolition of torture as an interrogation method.

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States.” MCCOY, *supra* note 88, at 196 (citing Stephen Budiansky, *Intelligence: Truth Extraction*, THE ATLANTIC MONTHLY, June 2005, at 32–35).

191. Peter Brookes, *The Torture Test*, Nov. 7, 2005, <http://www.heritage.org/Press/Commentary/ed110705d.cfm> (concluding harsh interrogation techniques actually hinder efforts to obtain actionable intelligence because detainees will often “say almost anything to get the interrogator to stop the torture/humiliation”). See also Ariel Dorfman, *Are We Really So Fearful?*, WASH. POST, Sept. 24, 2006, at B1; Scott Shane & Mark Mazzetti, *Advisers Fault Harsh Methods in Interrogation*, N.Y. TIMES, May 30, 2007, at A1.

192. See *Rogers*, 365 U.S. at 540; see also *Miranda*, 384 U.S. at 462.