Due Process and Counterterrorism

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Counterterrorism—like terrorism—is a reality. Nations have the absolute obligation and right to protect innocent civilians against those seeking to harm them. However, implementation of counterterrorism obligations must be tempered by due process. The essence of democracy is granting—and protecting—civil and political rights of attacker and attacked alike. Failure to provide due process to individuals suspected of involvement in terrorism leads to a society dangerously approaching a slippery slope from which there is no return. While controversial and, perhaps, unappetizing the true test of democracy is protecting those seeking to attack it.

In this article, I examine counterterrorism from the perspective of detention, interrogation and trial and in particular how these three are articulated and implemented. The broader question is whether the contemporary counterterrorism paradigm is based in due process or a legal (not necessarily lawful) regime that minimizes individual rights. That is, does civil, democratic society discard core principles in the face of an on-going, viable threat or are political rights and national security rights effectively balanced in order to protect both. Answering this question requires analyzing the interface between threats and rights; in particular, the extent to which society responds to the former while protecting the latter.

The challenges facing national decision makers are extraordinary; the public demands concrete measures in responses to attacks. Decision makers are charged with simultaneously protecting both the law and the public in accordance with core values of rights and morality. Balancing competing responsibilities is manifested in what I refer to as the “dilemma of the decision maker.”¹ The terrorism/counterterrorism paradigm manifests those tensions and uncertainties in a more powerful manner than perhaps any other issue confronting contemporary decision makers and the public alike. The public’s visceral reaction to feeling threatened is reflected in a survey demonstrating that fifty-eight percent (58%) of U.S. voters say waterboarding and other aggressive interrogation techniques should be used to gain information from the terrorist who attempted to bomb an airliner on Christmas Day”.²

Terrorism, in its broadest articulation, is the constant threat faced by decision makers mandated with ensuring that national institutions are sufficiently prepared to act both proactively and reactively; preferably the former, if need be, the latter. The public demands solutions and no accommodation with terrorists.³ However—public demands notwithstanding—operational

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¹ See http://www.ulaw.tv/collections/simulation for ‘snippets’ from scenario-based counterterrorism simulation exercises I conduct for students enrolled in my class “Global Perspectives on Counterterrorism” (based on casebook, Global Perspectives on Counterterrorism, Aspen Publishers, 2007, second edition 2011); in the simulation exercise students’ role-play decision makers addressing complex, operational counterterrorism dilemmas.
³ J. Daniel Moore, Terrorism and American Foreign Policy, 46 STUDIES IN INTELLIGENCE 2002 (reviewing PAUL R. PILLAR, INTELLIGENCE IN RECENT PUBLIC LITERATURE (2001)), available at
counterterrorism cannot be justification for discarding civil and political rights. Benjamin Franklin’s much cited words of wisdom “any society that would give up a little liberty to gain a little security will deserve neither and lose both”

4 capture the essence of this constant and unremitting tension. Franklin’s words concisely and accurately reflect the overwhelming danger posed by overacting to a ‘clear and present’ danger regardless whether perceived or real. With respect to the paradigm before us—due process and counterterrorism—Franklin’s words spoken over 200 years ago capture the essence of the existential, philosophical, legal and practical dilemma of counterterrorism conducted in societies subject to the rule of law.

Addressing this powerful tension—fraught with danger—is a fundamental challenge confronting decision makers on a daily basis. Resolving it effectively defines the essence of a democratic regime. In exploring these competing tensions, this article will be divided into the following six sections:

Section 1: Terrorism defined;
Section 2: Due process defined in the context of counterterrorism;
Section 3: Detention criteria and standards;
Section 4: Interrogation regimes and rights;
Section 5: Judicial forums; and
Section 6: Moving forward.

I. Terrorism Defined

Applying due process to counterterrorism initially requires defining terrorism; otherwise, the discussion is vague and amorphous. While the requirement to define terrorism is largely—but not unanimously—agreed upon as essential, much disagreement surrounds the actual definition. To that end, I propose the following definition which addresses the core essence of terrorism:

Terrorism is an act by an individual or individuals intended to advance one of four causes: religious, social, economic or political; for the purposes of advancing the identified cause, the actor kills or harms innocent civilians or causes property damage to innocent civilians or intimidates the civilian population from conducting its daily life.

This definition incorporates the critical aspects of attacking civilian targets randomly for the purpose of advancing a specific cause devoid of pecuniary or personal gain for the actor.

Counterterrorism should be simultaneously viewed from two distinct perspectives. One branch of counterterrorism is operational measures ranging from detention to imposition of administrative sanctions to killing suspected terrorists. The other branch is comprised of “soft” measures ranging from building schools and hospitals to economic investment and infrastructure development. The latter’s target audience are those who can be dissuaded. These are individuals who understand terrorism does not benefit their families or communities but are dependent on concrete measures demonstrating that the benefits of progress and modernity outweigh the harm terrorism inflicts.


4 http://www.all-famous-quotes.com/Benjamin_Franklin_quotes.html,
The burden is—fairly or unfairly—imposed on the nation-state to demonstrate the positives inherent to progress and development. Failure to fully embrace this burden reinforces the negativity that is an inevitable by-product of operational counterterrorism which inherently conjures negative images for those living amongst the terrorists. While those who live amongst terrorists may oppose terrorism principally for the damage caused to the community and therefore—tacitly—understand the legitimacy of operational counterterrorism, speaking out in opposition exposes them and their families to extraordinary harm and risk. Therefore, soft counterterrorism is a critical weapon the nation-state can that is no less potent than more conventional counterterrorism weapons.

In order to determine the efficacy of particular counterterrorism measures—whether operational or soft—terms must be defined. Framing the discussion with adequate parameters allows for rigorous analysis. One of the realities of homeland security is that threats, risks and dangers are largely murky and consequently, unarticulated to the public. However, in order to maximize protection of due process rights, the viable, direct and concrete threats must be distinguished from indirect threats that do not pose imminent harm to the nation state. The danger in decision makers viewing all threats as viable and valid is to minimize cautious discernment thereby significantly enhancing the danger of over-reaction and, therefore, violations of individual rights.

Counterterrorism invariably is challenged by the reality of identifying targets suggesting a fundamental lack of clarity and conciseness. Therefore, decision makers must specifically determine and narrowly define both what is a legitimate target and when does the target pose a threat justifying operational engagement. The failure to engage in a robust debate regarding both definition and application directly contributes to operational over-reaction, which has tactical and strategic ramifications that, in the main, prevent effective counterterrorism, whether ‘operational’ or ‘soft.’

Definitions minimize amorphousness, thereby reducing wiggle room otherwise available to the executive branch. This is particularly important with respect to the due process discussion; by failing to clearly define what rights are to be protected, the ability to minimize rights is greatly enhanced. In the tension and fear that pervades the terrorism/counterterrorism discussion, minimizing individual rights in response to either a threat or an attack is, lamentably, a recurring theme. American history is replete with examples of panic responses that directly—and unjustifiably—influenced the due process rights of innocent individuals deprived of civil and political rights. While lawful counterterrorism involves imposing the full weight of government power on individuals, its legality hinges on determining whether the relevant state action is

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6 The term ‘engagement’ is used to describe both operational engagement (in accordance with ‘rules of engagement’) and arrest/detention and other actions that impose limits on personal freedom thereby raising questions directly related to due process.

7 See Korematsu v. United States, 323 U.S. 214 (1944); The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635 (1863); Attorney General A. Mitchell Palmer on Charges Made Against Department of Justice by Louis F. Post and Others,” Hearings before the Comm. on Rules, House of Representatives 27 (1920) Palmer Raids; Alien and Sedition Acts: Naturalization Act, ch. 54, 1 Stat. 566 (1798); Alien Friends Act ch. 58, 1 Stat. 570 (1798); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798); Sedition Act, ch. 74, 1 Stat. 596 (1798).
predicated on person-specific, due process principles. Otherwise, both the rule of law and morality take a dangerous and unwarranted back seat to collective punishment based on an approach most accurately described as ‘round up the usual suspects’.

II. Due Process defined in the context of counterterrorism

To determine the range and application of due process in the counterterrorism paradigm, we next turn our attention to the first document believed to directly address the question of due process, the Magna Carta guarantees. Chapter 39 states: “No freeman shall be taken, imprisoned...or in any other way destroyed...except by the lawful judgment of his peers, or by the law of the land. To no one will we sell, to none will we deny or delay, right or justice.” According to the statutory rendition of Chapter 39 from 1354, "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law.”

Clearly drawing on those words the Fifth Amendment of the U.S. Constitution guaranteed similar rights:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Justice Harlan, in his much cited dissent in Poe v. Ullman, wrote the following words regarding due process:

In the consistent view of this Court has ever been a broader concept... Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three... Thus the guaranties of due process, though having their roots in Magna Carta's “per legem terrae” and considered as procedural safeguards “against executive

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10 Magna Carta, ch. 39 (1215).
11 Statutory rendition of the Magna Carta, ch. 39 (1354).
12 U.S. CONST. amend. X.
usurpation and tyranny,” have in this country “become bulwarks also against arbitrary legislation.”\(^{13}\)

In the aftermath of the Civil War, the U.S. Congress passed the Thirteenth, Fourteenth, and Fifteenth Amendments, collectively known as the Reconstructive Amendments. The Fourteenth Amendment was intended to guarantee the rights and civil liberties of recently freed slaves by denying states the right to abridge privileges and immunities of U.S. citizens without due process:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.\(^{14}\)

In a similar vein, the Lisbon Treaty\(^ {15}\) does not contain a specific provision regarding "due process" but Article 6 of the Treaty gives binding force to the European Charter of Fundamental Rights.\(^ {16}\) The European Charter of Fundamental Rights has specific provisions addressing both deals judicial protection and the right to a fair trial. According to Article 47:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.\(^ {17}\)

Similarly, according to Article 48 “Everyone who has been charged shall be presumed innocent until proved guilty according to law. Respect for the rights of the defense of anyone who has been charged shall be guaranteed.”\(^ {18}\)

However and in spite of the above, nine years after 9/11 civil, democratic society seeking to establish counterterrorism policy predicated on the rule of law has largely failed to satisfactorily address two core questions: how to apply due process and to whom in the context of counterterrorism. The failure to do so results directly from an unwillingness—or inability—to articulate with consistency and certainty the limits of operational counterterrorism. Rather than developing a coherent policy, reflecting a successful melding of legitimate operational requirements with self-imposed restraints, the Bush and Obama Administrations either

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\(^{14}\) U.S. CONST. amend. XIV.
\(^{15}\) Treaty of Lisbon, 2008 O.J. (115) 1.
\(^{16}\) Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1.
\(^{17}\) Charter of Fundamental Rights of the European Union, art. 47, 2000 O.J. (C 364) 1, 20.
\(^{18}\) Id.
implemented measures that violate international and domestic law or are incapable of developing a consistent, articulated coherent policy.

While President Obama signed an Executive Order ordering the closure of the Guantanamo Bay detention center for the purpose of discontinuing trials before Military Commissions, on April 26, 2010 the Administration re-instituted the Military Commissions. It is unclear whether this represents reversal of previously articulated but not implemented, policy or a ‘stop gap’ measure is unclear. Whatever the explanation, the Administration has largely failed to satisfactorily address rule of law questions essential to creating and implementing counterterrorism policy necessary for the purpose of ensuring implementation of due process guarantees and obligations. For example, the Administration has failed to resolve whether Article III courts are the proper judicial forums for suspected terrorists. Perhaps this continuing failure is reflective of political infighting as demonstrated in the backtracking with respect to the Khalid Sheikh Mohammad’s trial. The result is a disturbing failure to ensure due process for individuals suspected of involvement in terrorism.

More fundamentally, the status of individuals detained post 9/11 has not been uniformly nor consistently articulated or applied. That is, varying definitions have been articulated at different times reflecting legal and policy uncertainty directly affecting the ability to establish and consistently apply a legal regime based on due process. For thousands of individuals whose initial detention was based on questionable intelligence and subsequent, inadequate habeas protections the process is inherently devoid of due process.

I propose that detainees are neither prisoners of war nor criminals in the traditional sense; rather they are a hybrid of both. To that end, I recommend the appropriate term for post 9/11 detainees is a combination—a convergence of the criminal law and law of war paradigms—best described as a hybrid paradigm.

Over the years, terms such as enemy combatant, illegal combatant, unlawful combatant, and illegal belligerent have been used to describe an individual engaged in combat that either lost

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his status as a soldier or never acquired it in the first place.\textsuperscript{24} Articulating this definition and determining the status of the enemy are of the utmost importance for a myriad of reasons, particularly in this context for due process considerations.

The hybrid paradigm is philosophically and jurisprudentially founded on the principle that the accused must have judicial resolution of his status before a court of law.\textsuperscript{25} However, as touched on in subsequent sections, the American criminal law process is largely inapplicable to the current conflict.\textsuperscript{26} Accordingly, in order to guarantee the suspect certain rights and privileges in accordance with due process principles, the hybrid paradigm is predicated on criteria based initial detention and subsequent remand decisions, interrogation methods that do not include torture, the right to appeal conviction (regardless of before what court convicted) to an independent judiciary, the right to counsel of the suspect’s own choosing, known terms of imprisonment, and procedures to prevent indefinite detention.

Justice O’Connor’s unfortunate words in \textit{Hamdi}: “the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided,” are extraordinarily problematic and troubling.\textsuperscript{27} Simply stated, the constitution does not contain a rebuttable presumption that favors the state at the expense of a defendant’s rights. O’Connor’s unfortunate phrasing is, largely, in accordance with the late Chief Justice Rehnquist’s judicial philosophy with respect to the role of the Supreme Court during armed conflict: “in times of armed conflict the courts must be reticent”.\textsuperscript{28}

In analyzing the application of due process to counterterrorism, Justice O’Connor’s words highlight the essence of the philosophical, existential and legal tension between powerful competing standards and tests. The essence of Justice O’Connor’s unfortunate phrasing is to suggest that at the critical confluence—the actual meeting place—between legitimate individual

\textsuperscript{24} \textit{See} Ex Parte Quirin, 317 U.S. 1, 31 (1942) (The Court stated that “the spy who secretly and without uniform passes the military lines of a belligerent in time of war… or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property” are examples of belligerents not entitled to POW status but rather offend the law of war and are subject to trial and punishment by military tribunals).


\textsuperscript{27} \textit{Hamdi v. Rumsfeld, 124 S. Ct. 2635542 U.S. 507, 534 2649 (2004).}

\textsuperscript{28} \textit{WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WAR TIME 225 (Patricia Hass ed., Alfred Knopf, Inc. 1998).}
rights and equally legitimate national security rights the constitution’s protections are not to be fully extended to the defendant.

In the coming sections we shall examine how—if at all—due process has been applied with respect to detention, interrogation and trial paradigms; the ‘guide’ will be the principle that due process is essential for counterterrorism to be lawful and moral. To what extent it should be applied is an implementation question; the principled decision that has been largely avoided by successive American administrations is whether it should be applied at all. While the Supreme Court has addressed the habeas issue in Boumediene and Judge Bates did the same in Maqualeh. Our focus will be on the executive branch and how it has applied—or not applied—due process to counterterrorism. That is the essential question to be examined; it is to that we turn our attention.

III. Detention Criteria and Standards

Detention—depriving an individual of his freedom—is lawful in the American criminal law paradigm. It requires probable cause pertaining to past acts. The initial arrest, provided exigent circumstances do not exist, requires an arrest warrant issued by a “detached and neutral” magistrate in response to a request submitted by law enforcement based on evidence or sourced information. In addition to the initial detention, the court may conclude that continued detention is warranted, predicated on a variety of factors including severity of the crime, danger posed by the suspect and whether the individual is a possible flight risk. The presence of these additional factors allows the court to require additional detention. This detention model, with varying degrees of interpretation subject to country specific criminal procedure codes, is largely representative in countries adhering to the rule of law and separation of powers between the executive and judiciary. It is the essence of judicial review of the executive, so essential to preserving liberty and due process.

However, in the immediate aftermath of 9/11 the Bush Administration established an alternative paradigm for those detained in the so-called “Global War on Terrorism”. Rather than relying on the traditional model, the Administration created an alternative fundamentally deficient with respect to due process. Devoid of probable cause standards, much less review by an independent judiciary, the Administration implemented the unitary executive theory paradigm, actively advocated by Professor John Yoo and David Addington, amongst others.

31 Probable cause is defined as “reasonable belief that person has committed a crime.”
32 See Kirk v. Louisiana, 536 U.S. 635, 635 “[a]bsent exigent line at the entrance to the firm’ circumstances, ‘the house ... may not reasonably be crossed without a warrant.’” (citing Payton v. New York, 445 U.S. 573, 590 (1980)).
34 For an article comparing Israeli and American judicial review see Amos N. Guiora & Erin Page, Going Toe to Toe: President Barak’s and Chief Justice Rehnquist’s Theories of Judicial Activism, 29 HASTINGS INT’L AND COMP. L. REV. 51 (2006).
35 See Christopher S. Kelley, Rethinking Presidential Power—The Unitary Executive and the George W. Bush Presidency,
The significance of the unitary executive theory in the due process discussion is profound: in its essence, it significantly minimizes the role and power of the Congress and judiciary with respect to counterterrorism. Regarding the application of established constitutional principles of separation of powers and checks and balances to counterterrorism the unitary executive theory raises profound questions. Fundamentally, according to its proponents, the theory establishes a constitutional model whereby the executive assumes extraordinary powers at the absolute 'expense' of the judiciary and legislative branches.

With respect to due process—the rights so carefully protected in the Fifth and Fourteenth Amendments—the Bush Administration’s approach was to create a paradigm that largely denied detainees this fundamental right. Justice Stevens’ dissent in Padilla addressed this directly:

Whether respondent is entitled to immediate release is a question that reasonable jurists may answer in different ways. There is, however, only one possible answer to the question whether he is entitled to a hearing on the justification for his detention. At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process. Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the in-formation so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals

http://www.pegc.us/archive/Unitary%20Executive/annotated_kelly_unit_exec.pdf (last viewed April 24, 2010).

36 Yoo was deputy assistant attorney general in the Office of Legal Counsel of the U.S. Department of Justice; Yoo’s memo “The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them” was critical in establishing Bush Administration counterterrorism policy. Memorandum from John C. Yoo on The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them to the Deputy Counsel to the President (Sept. 25, 2001), available at http://www.justice.gov/olc/warpowers925.htm.

37 Addington was Vice-President Cheney’s counsel and played a decisive role in creating and implementing Bush Administration counterterrorism policies.

38 Art. I § 1; U.S. Const. art. III; Marbury v. Madison, 5 U.S. 137 (1803).

39 See Articles I, II and III U.S. Constitution establishing a balance of power amongst the three branches of government with no one branch granted power to overcome another.

symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny."\footnote{Rumsfeld v. Padilla, 542 U.S. 426, 464 (2004) (Stevens, J., dissenting).} (emphasis added, ANG)

In the due process discussion, the need to develop standards in determining when and why an individual may be detained is critical to establishing a due process predicated paradigm. As Justice Stevens’ dissent makes clear, the Bush Administration’s detention policy with respect to post 9/11 detainees was devoid of minimal due process standards; while this was in accordance with the world view articulated by senior officials, it feel short of meeting constitutional standards. However—and the caveat is essential—the appropriate query is whether 9/11 presented a threat that justified denying basic, due process rights.

In other words, is American’s national security sufficiently threatened to deny due process both with respect to initial and continued detention? While former U.S. Secretary of Defense Rumsfeld categorized the individuals detained in Guantanamo the worst of the worst, facts did not bear his assessment accurate. The number of detainees released without any judicial process suggests that Rumsfeld’s statement was based neither on careful analysis nor articulated criteria.

In the criminal law paradigm, a suspect's remand requires independent judicial authorization; in the Military Commission’s model, a detainee’s remand would require neither judicial authorization nor review. While Boumediene\footnote{For an interesting analysis of Boumediene see Jean-Marc Piret, Boumediene v. Bush and the Extraterritorial reach of the U.S. Constitution: A Step Towards Judicial Cosmopolitanism, 4 Utrecht L. Rev. 81 (2008), available at http://www.utrechtlawreview.org/publish/articles/000084/article.pdf.} held that enemy combatants detained in Guantanamo have a constitutionally guaranteed right of habeas corpus review\footnote{Boumediene v. Bush, 128 S.Ct. 2229 (2008).} and Judge Bates held in Maqaleh v. Gates that some prisoners held by the U.S. military base in Afghanistan captured outside the zone of combat have a right to challenge their imprisonment the reality is the following: thousands of detainees are presently held—directly or indirectly—by the U.S. in a detention paradigm that can best be described as indefinite detention\footnote{Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. 2009).} While uncertainty—perhaps ambiguity\footnote{Kenneth Anderson & Elisa Massimino, The Cost of Confusion: Resolving Ambiguities in Detainee Treatment, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=968177&rec=1&srcabs=938202 (last viewed April 21, 2010).}—was understandable in the immediate aftermath of 9/11, it is incomprehensible nine years later.

According to the U.S. Constitution “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it”\footnote{U.S. Const. art. 1 § 9.}; in the Due Process discussion, denying detainees the Great Writ is a fundamental violation of an otherwise guaranteed right for American citizens. While that right is guaranteed to American citizens, Professor David Cole has written:

As politically tempting as the trade-off of immigrants’ liberties for our security may appear, we should not make it. As a matter of principle, the rights that we
have selectively denied to immigrants are not reserved for citizens. The rights of political freedom, due process, and equal protection belong to every person subject to United States legal obligations, irrespective of citizenship.\footnote{David Cole, \textit{Enemy Aliens}, 54 Stan. L. Rev. 953, 953 (2000).}

At the confluence between due process, habeas corpus and counterterrorism lies the question if, as Cole writes, rights and protections are to be extended to persons subject to U.S. legal obligations but not implicitly protections. Judge Bates’ decision is a positive affirmation of that principle by expanding the right to a category of individuals not previously granted the privilege. The dangers of not granting the right are extraordinary: the creation of a permanent class of individuals not entitled to independent judicial review whose status is best defined as ‘indefinite detention’.

The origins of the question whether to extend Constitutional protections to non-citizens was addressed in the \textit{Dred Scott} decision, holding that the Fifth Amendment was not limited to the geographic boundaries of the states, but rather such protections were extended to all incorporated territories of the U.S.\footnote{\textit{Dred Scott v. Sandford}, 60 U.S. 393 (1857).} In the 150 years since \textit{Dred Scott}, the Court has discussed similar cases with two distinct “lines of demarcation” important for determining detainee rights: first, distinguishing between individuals within and outside of the United States, and secondly distinguishing between citizens and non-citizens.\footnote{\textit{United States v. Tiede}, 86 F.R.D. 227 (U.S. Ct. Berlin 1979).}

In discussing these two issues, case law slowly extended Constitutional protections to include non-citizens, provided cognizable ties to the United States could be demonstrated. The clearest tie was physical location within the border of the United States. In accordance with \textit{Eisentrager},\footnote{\textit{Johnson v. Eisentrager}, 339 U.S. 763 (1950). In Eisentrager, petitioner sought habeas corpus review as a German national in the custody of the United States Army. The Supreme Court held that the German nationals who were being held based on a military commission conviction for having engaged in military activity against the United States, possessed no right to a habeas corpus petition.} this specific inquiry directly influences this article’s question as the decision of Guantanamo Bay’s status as a territory of the United States is of the utmost importance. If Guantanamo Bay is held as a territory of the United States, then the precedent dictates that fundamental rights, like the Fifth and Fourteenth Amendments, should apply. Nevertheless, if not held to be a territory, then the Constitutional protections would not necessarily be afforded.

Failing to institutionalize independent judicial review of detention decisions directly resulted in the significant number of detainees held indefinitely. If there are no criteria for determining what actions pose a threat to American national security the detentions are reflective of an approach best described as round up the usual suspects. This is not a policy; it is a tragic reality of the past eight years. Indefinite detention, perhaps, sounds attractive for it removes from the zone of combat--indefinitely--individuals suspected of involvement in terrorism. The qualifier “perhaps” is essential to the discussion for its inherent unconstitutionality has a pervasive affect on U.S. counterterrorism. Furthermore, the lack of articulated criteria for initial detention and subsequent remand alike inevitably guarantee that individuals have been wrongly detained precisely because threat has not been defined.

While Judge Bates’ decision was of the utmost importance—more than any Supreme Court holding of the past eight years addressing counterterrorism save \textit{Boumediene}--it has not...
resulted either in a significant re-articulation of U.S. policy nor in the granting of habeas corpus to thousands of detainees. Aside from its decision in Boumediene, the Supreme Court has failed to articulate the rights granted to suspected terrorists. Similarly, Congress has failed to articulate these rights through its constitutionally granted oversight powers. It is essential that balancing—or maximizing—the legitimate rights of the individual with the equally legitimate national security rights of the state. Furthermore, it seeks to move beyond the amorphousness that has defined much of the debate over the last seven years.51

While it has been suggested that habeas hearings satisfactorily provide detainees “their day in court” the measure does not establish a rights based counterterrorism regime. Though habeas hearings enable the detainee to come before a judge the process is fundamentally flawed both because the detention (original and remand) was not premised on carefully delineated criteria and because adjudication of personal responsibility is not in the offing. The combination represents a significant failure with respect to establishing and maintaining a due process regime. That failure is compounded as we turn our attention to the interrogation of detainees.

IV. Interrogation Regimes and Rights

While the protections of the Fifth and Fourteenth Amendments are inextricably tied to domestic criminal law interrogations, it is presently unresolved whether those rights will be extended to terrorism related interrogations.52 Resolving this dilemma requires determining within which rubric terrorism falls: criminal law, law of war or something else.53 Answering that question enables determining the rights, privileges and protections to be extended to individuals suspected of involvement in terrorism. In particular, with respect to the question this article seeks to address, the fundamental question is whether due process rights are to be extended regardless of the paradigm applied.


To that end, from the due process perspective, the ultimate question regarding the Fifth Amendment is whether the right against self-incrimination should be extended to detainees.\textsuperscript{54} The question whether when an individual arrested in the “zone of combat”\textsuperscript{55} should be read be read his Miranda rights is likely to be answered in the negative given the inherent impracticality of American military personnel assuming this responsibility in the actual zone of combat. However, the question whether such rights and protections should be granted to the detainee once he is in the interrogation setting remains to be satisfactorily resolved.\textsuperscript{56}

The Supreme Court has linked the Fifth Amendment’s protections against self-incrimination to general limitations of acceptable interrogation methods. In addressing the question of extending Fifth Amendment rights to non-citizens, courts and scholars have often wrestled on exactly this question, for instance, in \textit{Zadvydas v. Davis}, the Supreme Court reaffirmed the tradition of applying due process to aliens present within the United States, regardless of their legal status.\textsuperscript{57} Specifically, the Court held that the Fifth Amendment is incongruent with a law that would permit the indefinite detention of a non-citizen on domestic soil. Thus, “once present in the country, aliens can claim due process protections.”\textsuperscript{58}

\begin{itemize}
\item[55] This is a much used, perhaps misused and misunderstood, term of art. In traditional warfare, the zone of combat was where armies faced each other: infantry and armored corps units on the battleground, air forces in the air and navies on the high sea. In “armed conflict short of war,” the zone of combat has been significantly expanded to include the civilian population and urban residential areas. The training of the soldier for the zone of combat is significantly different than for traditional warfare.
\item[58] Sinnar at 1428.
\end{itemize}
seized by agents of the Drug Enforcement Agency while searching the home of a Mexican citizen without a warrant. 59

While the Court held that Fourth Amendment rights are not to be extended to non-citizens, Justice Kennedy, in his concurring opinion, stated that the defendant should be entitled to Due Process Clause protection under the Fifth Amendment when his case finally went to trial. 60 Specifically, the Court ruled that Fourth Amendment protections did not extend to the home of a Mexican citizen in Mexico. The Court, however, made a point to distinguish its holding from one that would have occurred had the appeal been regarding the Fifth Amendment. In looking at the language of the Fourth Amendment, the Court noted that the Amendment’s application was only to “the people.” The Fifth and Sixth Amendments, however, apply to “persons” or “the accused,” respectively. The Court although not explicitly extending Fifth Amendment protections to non-citizens, used dicta to indicate that such a holding is not beyond the pale.

The Constitution did not initially have any reach beyond the territorial boundary of the United States. However, although the “Insular Cases” 61 began the process of expanding such a holding generally, they did not specifically touch on the question for non-citizens. Specifically, the “Insular Cases” achieved four effects relevant to this distinction: (1) they offered explicit legal justification of American endeavors in Puerto Rico; (2) the cases created a system by which America, as a State, could exert power over a foreign entity; (3) they defined the “legitimate” framework for later political struggles relating to the issue of the political status of Puerto Rico and the granting of legal and political rights to Puerto Ricans; and (4) they created a framework that facilitated the establishment of practices which recognized, and validated, the colonial project in Puerto Rico. 62

61 The “Insular Cases” are nine cases addressing the constitutional questions of the status of Puerto Rico and the Philippines in 1901. The Insular Cases also include a series of cases from DeLima v. Bidwell, 182 U.S.1 (1901) to Balzac v. Puerto Rico, 258 U.S. 298 (1922).
The Eisentrager Court\(^6\) held that physical presence *alone* in the country creates an implied guarantee of certain rights, which become even more extensive when an active statement of intent to become a citizen is made.\(^6\) Specifically, the Court noted “in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act.”\(^6\) Applying these principles to the discussion of Guantanamo detainees, the court in *Khalid v. Bush* held that Guantanamo Bay detainees do not possess any cognizable rights because, the district court noted, non-citizens detained by the United States beyond the domestic borders (as the court argued to be the case with Guantanamo Bay) cannot avail themselves of constitutional protections.\(^6\) *Rasul v. Bush*, then, offers a more appropriate frame of reference on the question of the interplay between the decisions of Guantanamo’s territorial status and the proper extension of constitutional protections.\(^6\) *Rasul* stands for the proposition that the federal courts have jurisdiction to hear a detainee’s habeas petition *whenever* they are held in a place where the “United States exercises complete jurisdiction and control.”\(^6\)

In further arguing for constitutional protections for detainees, the *In re Guantanamo Detainees*, court cited *Rasul* as recognizing the precedent from *Eisentrager* barring claims of an alien seeking to enforce the U.S. Constitution in a *habeas* proceeding outside of a sovereign territory of the United States.\(^6\) However, the *In re Guantanamo Detainees* court held that the *Eisentrager* decision, which denied German detainees constitutional rights, was inapplicable to

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\(^6\) *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In Eisentrager, petitioner sought habeas corpus review as a German national in the custody of the United States Army. The Supreme Court held that the German nationals who were being held based on a military commission conviction for having engaged in military activity against the United States, possessed no right to a habeas corpus petition. The historical litany of this distinction began in 1891 with the case of *In re Ross*, 140 U.S. 453 (1891). In Ross, an American seaman was suspected of murder on an American ship in Japan. The defendant then was tried and convicted by a consular court in Japan, appealed based on a Fifth Amendment claim, and the Supreme Court denied the appeal because the trial took place outside of the United States, and thus the Fifth Amendment did not apply. In that case the Court acknowledged that it was a valid question to inquire whether the person asserting constitutional protection was inside or outside of the United States. This line of cases continued, then, with the “Insular Cases” running from 1901-1922. Specifically, cases considered to be within the progeny of the “Insular Cases” dealt with the land acquired by the United States during the Spanish-American War. This was, for the first time, where the Court noted that some constitutional rights could be extended out to U.S. territories, but only some rights would be here extended, as the territory was not fully incorporated. *See* Downes v. Bidwell, 182 U.S. 244 (1901).

\(^6\) Eisentrager at 766.

\(^6\) *Id.* at 771.


\(^6\) *Id.* at 449.

the Guantanamo detainees because the detainees, unlike the Germans, “have been imprisoned in territory over which the U.S. exercises exclusive jurisdiction and control.”

With respect to granting Miranda rights to the detainees, then, an expanded articulation of due process rights would suggest that both the constitution and Supreme Court precedent would tolerate this extension. While the public safety exception to Miranda has been suggested as applicable to individuals suspected of involvement in terrorism this is, I suggest, akin to mixing apples and oranges. The interrogation is extraordinarily complicated and complex; it is also fraught with anxiety and fear. Furthermore, the fundamental disproportionate position between interrogator and interrogate is the essence of the relationship between the two individuals. One represents and manifests the maximization of state power whereas the second is at his most vulnerable. In 1931, The Wickersham Commission Report determined that willful infliction of pain, the “Third degree,” on criminal suspects was widespread and pervasive. The Commission further determined that the abusers included not just interrogators, but the entire system: police officers, judges, magistrates, and other officials of the criminal justice system.

In the Deep South, those detained by law enforcement officials were mainly poor, illiterate African Americans subjected to threats, cumulative mistreatment, and additional interrogation methods that violated Constitutional safeguards. The Deep South interrogation methods continued until the Supreme Court finally extended Fourth and Fourteenth Amendment protections to interrogations that state and local law enforcement conducted by imposing the Fourth Amendment’s due process requirements and extending the Fourth Amendment Exclusionary Rule.

In that vein, the protections articulated by the Supreme Court in Miranda were intended to protect the detainee from involuntary and coerced confessions. In his majority opinion, Chief Justice Warren wrote:

we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent… To sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

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70 Id. at 476. The German detainees were held and tried by the United States Army in the “China Theatre.” However, upon their convictions they were sent to Germany to serve their sentences. Eisentrager at 766.

71 See Quarles v. New York, 467 U.S. 649 (1984). In Quarles, the police stopped and frisked Quarles; the officer found an empty shoulder holster and asked Quarles where the gun was, Quarles responded and was then arrested by the officer and read his Miranda rights. The Court held that there is a public safety exception to the requirement that officers administer Miranda warnings.


The Court has, in subsequent decisions over the past forty years, created exceptions but has refused to over-turn Miranda. In Dickerson, Chief Justice Rehnquist wrote:

[w]e hold that Miranda, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule Miranda ourselves. We therefore hold that Miranda and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.

While Rehnquist had, over the course of years, advocated a roll-back Miranda, in Dickerson, the Court re-affirmed Miranda as a constitutional protection rather than a mere prophylactic. The suggestion, then, is that Miranda guarantees though whittled down by exceptions have withstood the test of time and interpretation and are, indeed, constitutional protections.

In an expansive articulation of due process, then, extending Miranda protections to individuals suspected of involvement in terrorism most effectively guarantees the rights of detainees in a rights-less regime. By extending the privilege against self-incrimination to post 9/11 detainees the implicit danger of coerced, involuntary confessions would be largely eliminated. This is particularly important from an operational perspective: receipt of incorrect information from a suspect can directly contribute to a misallocation of resources that significantly hampers counterterrorism. Simply put: a suspect subject to an interrogation devoid of protections and rights is more liable than a protected interrogate to provide incorrect information. That is, my recommendation to extend Miranda protections to individuals suspected of involvement in terrorism is intended to both protect the detainee and directly facilitate more effective operational counterterrorism.

While the public safety exception has been recommended as applicable to counterterrorism as justification for denying Miranda protections to post 9/11 detainees, the danger to trampling on individual rights outweighs information that interrogators may conceivably receive. The rule of law is at its most vulnerable in the interrogation setting; to that extent, while public safety may be perceived as beneficial to society, the possible gain is, at best, short-term with long term dangers looming in the offing.

V. Judicial Forums

The fundamental premise is that detainees must be afforded the opportunity to be brought before a court of law for purpose of adjudication of their guilt or innocence. Whether the paradigm adopted is the criminal law or a hybrid, the guiding principle must be trial rather than the abyss of permanent indefinite detention. While various proposals and articles have been put forth, resolution has eluded decision makers. The Bush Administration’s attempt to establish

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74 In addition to the public safety exception, there are exceptions for routine booking questions, see Pennsylvania v. Muniz, 496 U.S. 582 (1990) and jail house informants, see Massiah v. United States, 377 U.S. 201 (1964).


military commissions was roundly criticized. While subsequent instructions prepared by the Department of Defense were intended to mollify the chorus of criticism, the practical reality is the Commissions have been widely viewed as an overwhelming failure. Neither in their original inception nor subsequent tweaking were rules, procedures and criteria adequately delineated with respect to suspect (and subsequently, defendant) rights. Nevertheless, the largely acknowledged failure of the Military Commission’s has not resulted in the establishment of a viable alternative.

To that end, in addition to the Military Commissions, there are three options for bringing individuals suspected of involvement in terrorism before a court of law: treaty based international terror court, article III civilian court and a national security court. While I have advocated the establishment of the latter, the other options have also garnered significant—and justified—public support. The critical questions—in determining which option most effectively meets rule of law requirements—are whether due process rights of the defendant are protected. That question, however, can neither be asked nor answered in a vacuum nor absolutely for the reality of terrorism/counterterrorism is that legitimate operational realities justify minimizing certain rights, otherwise protected. In particular, with respect to the trial process, protecting confidential sources is an absolute state requirement and to that end, denying the defendant the


right to confront all witnesses is legitimate. Albeit controversial and suggestive have a rights minimization regime bringing a suspected terrorist to trial requires submitting to the court confidential information.

While introducing classified information denies the defendant the right to confront his accuser, it is a reality of operational counterterrorism. While introducing classified information denies the defendant the right to confront his accuser, it is a reality of operational counterterrorism.\(^81\) Similarly—in the American criminal law paradigm—the defendant has the right to a trial by a jury of his peers.\(^82\) While proponents of Article III courts as appropriate for suspected terrorists the critical question—yet to be resolved—is whether all individuals detained post 9/11 are to be tried. To the point: while President Obama promised to close Guantanamo the issue extends significantly beyond the detention center in Cuba. According to senior military commanders the US, directly and indirectly, is presently detaining approximately 25,000 detainees in detention centers in Iraq and Afghanistan in addition to Guantanamo.

While some have suggested that the Iraqi and Afghan judiciaries are appropriate forums for adjudicating guilt of detainees presently detained in both countries, significant and sufficient doubt has been raised regarding objectivity and judicial fairness. Precisely because the Bush Administrations have ordered the American military to engage in Iraq and Afghanistan in accordance with the Authorization to Use Military Force resolution passed by Congress, the U.S. bears direct responsibility for ensuring adjudication in a court of law premised on the `rule of law.'\(^83\) Simply put: core principles of due process and fundamental fairness demand the U.S. ensure resolution of individual accountability.

While imposing American judicial norms on Iraq and Afghanistan raise legitimate international law questions regarding violations of national sovereignty, the continued denial of due process raises questions and concerns no less legitimate. History suggests there is no perfect answer to this question; similarly, both basic legal principles and fundamental moral considerations suggests that in a balancing analysis the scale must tip in favor of trial, regardless of valid sovereignty and constitutional concerns. While justice is arguably not blind, continued detention of thousands of suspects without hope of trial is blight on society that violates core due process principles.

Regardless of which proposal above is adopted, the fundamental responsibility is to articulate and implement a judicial policy facilitating trial before an impartial court of law. That is the minimum due process obligation owed the detainee.

VI. Moving Forward

Due process is the essence of a proper judicial process; denial of due process, whether in interrogation or trial, violates both the Constitution and moral norms. Denying suspects and defendants due process protections results in counterterrorism measures antithetical to the essence of democracies. While threats posed by terrorism must not be ignored, there is extraordinary danger in failing to carefully distinguish between real and perceived threats. Casting an extraordinarily wide net results in denying the individual rights; similarly, there is no guarantee that such an approach contributes to effective operational counterterrorism. Extending constitutional privileges and protections to non-citizens does not threaten the nation-state; rather, it illustrates the already slippery slope. In proposing that due process be an inherent aspect of counterterrorism, I am in full accordance with Judge Bates’ holding. The time has come to

\(^81\) U.S. Const. art. VIII
\(^82\) Id.
implement his words in spirit and law alike; habeas hearings are an important beginning but do not ensure adjudication of individual accountability. Determining innocence or guilt is essential to effective counterterrorism predicated on the rule of law.