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Specialized Courts for Terrorism Trials

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Abstract

On the campaign trail in 2008, presidential candidate and then-Senator Barack Obama promised to restore America’s place in the world by breaking with many of the national security policies put into effect by President George W. Bush. In January 2009, President Obama made numerous changes to United States foreign policy, including signing an executive order to close the prison at Guantanamo Bay, Cuba and announcing that the United States would not engage in interrogation techniques that constitute torture. In some aspects of national security law and policy, however, Obama has followed the example of President Bush—for example, in his announcement of the resuscitation of a specialized military commission system to try some detainees in a setting apart from a federal court or a court martial proceeding.

Does the resuscitation of a military commissions system restore America’s place in the world? This Article breaks new ground by placing the issue of specialized courts for terrorism trials in a comparative context, investigating how other nations facing grave national security threats handle the challenge of maintaining due process and a fair trial when it comes to the prosecution of terrorists. Examining the use of specialized terrorism courts in the United Kingdom, Israel and India provides insight into the potential benefits and pitfalls of such courts in the United States. This Article concludes that specialized courts in other nations have provided some benefits in terms of efficiency and affording a short-term sense of security; however, they have often contravened the rule of law by failing to establish basic levels of due process and equal protection, and they are often perceived as unfair and illegitimate by those tried in them. As such, the use of specialized courts may alienate communities and contribute to heightened long-term security risks.
“An avidity to punish is always dangerous to liberty. It leads men to stretch, to misinterpret, and to misapply even the best of laws. He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.”

INTRODUCTION

President Obama has made clear that the United States must grapple with questions of how to detain and try potentially dangerous terrorism suspects in a manner that maximizes national security within the boundaries of the rule of law. The United
States faces a serious quandary in terms of how to prosecute suspects who have been detained by the government at Guantanamo Bay, Cuba, which puts at stake the credibility of United States legal system and its adherence to rule of law.\textsuperscript{3}

The question of what trial system to use for suspected terrorists requires an historical interrogation of how and to what effect the United States has used specialized courts for wartime trials previously and whether the ordinary criminal justice system could have handled such trials. Further, the government’s choice to use a specialized court system must be understood within the context of deciding what groups of people are deemed suitable to be tried in a specialized court.

Countries facing the same questions have come to different conclusions about the constitutionality and efficacy of specialized courts. Some nations treat acts of terrorism as a criminal matter and use their ordinary criminal justice systems to try accused terrorists.\textsuperscript{4} Other nations facing serious national security issues,
including the United Kingdom, Israel and India, have at times used specialized courts to prosecute terrorism cases, with mixed results in terms of efficacy, preservation of rights, benefits to national security, adherence to the rule of law, and the public perception of the rule of law and institutional legitimacy. Their experiences offer guidance to the United States in evaluating the tensions raised by the use of specialized terrorism courts and trials, and offer some insight as to whether such specialized courts can realistically exist in compliance with the rule of law.

In recent years, the U.S. government has made clear that it is willing to consider and possibly adopt counterterrorism tactics—
including the use of specialized courts for terrorism trials—from other countries when those tactics are perceived to be successful.\(^5\) This engagement in comparative national security policy analysis can be fruitful, but only if it paired with a consideration of the short-term and long-term efficacy of those policy choices in a contextualized manner, which is what this paper addresses.

Part I of this Article examines the Obama administration’s resuscitation of military commissions in the United States. This Part analyzes the policy considerations of using Article III courts or regularly constituted courts martial to try suspected terrorists. This Part also considers how the use of military commissions on specific populations may undermine their long-term effectiveness.

Part II examines from a comparative perspective how specialized courts were established and utilized in the United Kingdom, Israel and India. This Part analyzes the context and impetus for creation of specialized courts and addresses the legal and societal impact of a specialized trial system.

Part III considers how the U.S. experience with specialized courts fits into the comparative context and what lessons the United States can draw from the experience of these other nations which have grappled with similar questions of national security law and policy.

\(^5\) See, e.g., Catching Terrorists: the British System Versus the U.S. System, Hearing Before a Subcommittee of the Committee on Appropriations, United States Senate, Sen. Hrg. 109-701, Sept. 14, 2006. In this hearing, the subcommittee heard testimony from Judge Richard Posner, former Office of Legal Counsel attorney John Yoo, and Tom Parker, a former British counterterrorism official. All three witnesses testified in favor of the adoption of various British counterterrorism measures, including the specialized terrorism courts used in Northern Ireland known as the Diplock Courts. \textit{Id.} at 5-6 (Judge Posner’s commendation of the Diplock Courts); \textit{see infra}, part ___ for a discussion of the Diplock Courts. Judge Posner noted his enthusiasm for engaging in comparative national security policy analysis: “We must not be too proud to learn from nations such as the United Kingdom that have a much longer history of dealing with serious terrorist threats than the United States has….The United Kingdom is a particularly apt model for us to consider in crafting our counterterrorist policies because our political and legal culture is derivative from England’s.” \textit{Id.} at 4.
I. WHY SPECIALIZED TERRORISM TRIALS?

Two threshold issues are relevant when addressing the question of whether to use a specialized trial system to try suspected terrorists: what is the justification for a specialized trial system, and does such a system offer adequate due process such that it can comport with the rule of law and is perceived to comport with the rule of law?

Traditionally, the United States has used the criminal justice system and ordinary Article III courts to try terrorists, and used the courts martial system to try lawful combatants for violations of the laws of armed conflict. Supporters of the military commission system or other types of specialized courts highlight the purported deficiencies of the criminal justice system and the inapplicability of the courts martial system to try terrorism cases.

A. The Use of Criminal Prosecution for Terrorist Acts in the United States

The United States has historically shied away from specialized courts for terrorist attacks. In fact, many incidents of international and domestic terrorism directly impacting the United States since the 1970s have been dealt with using common criminal justice systems. In part, this policy is intended to affirm the rule of law in the United States and to maintain the U.S. reputation in the international community as a nation with a justice system that accords all defendants with the same sets of rights and procedural protections. This equal application of the law benefited the United States from a utilitarian perspective by denying anti-American groups the right to claim that the United States is

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7 This reputation for a justice system with exceptionally strong protections for defendants is open to critique. See generally James Forman, Jr., _Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible_, 33 N.Y.U. Rev. L & Soc. Change 331 (2009). Forman notes that “[W]e are insufficiently self-reflective…[w]e hav[e] one of the most punitive systems in the world while believing we have one of the most liberal.” Id. at 337.
singling out one particular group (whether based on nationality, religion, or other characteristic) for particularly onerous procedural burdens at trial.  

The U.S. prioritization of the rule of law and its concomitant procedural protections in court were maintained even as terrorism on U.S. soil became a more pressing concern following the 1993 bombing of the World Trade Center, in which six people were killed, and the bombing of the Alfred P. Murrah Federal Building in Oklahoma City in 1995, in which 168 people were killed. IN both cases, the attackers were prosecuted and convicted in federal court. Likewise, the so-called “Unabomber” case, in which Theodore Kaczynski pled guilty in 1998 to sending 16 mail bombs

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8 Editorial, Photographs and Kangaroo Courts, N.Y. Times, May 17, 2009, at WK11 (“Republicans like to mock the notion of trying terrorists as criminals, but that is what they are. Treating them as warriors not only demeans civilian and military justice, but it gives terrorists the martyrdom they crave”); Human Rights First, The Case Against a Special Terrorism Court, at 3 (March 2009) (“Unjust detentions and trials at Guantanamo have fueled animosity toward the United States. These decisions also have undermined U.S. efforts to advance the rule of law around the world, which is critical to confronting the threat of terrorism. Creating a special terrorism court…would perpetuate these errors rather than solving them.”).

9 Those ordinary civilian courts were not always in the United States, as allies of the United States also actively prosecuted terrorism cases in which U.S. interests were implicated. For example, in 1985, the Achille Lauro cruise ship was hijacked and one U.S. citizen was killed. David Ensor, U.S. Captures Mastermind of Achille Lauro Hijacking, cnn.com, Apr. 16, 2003, available at http://www.cnn.com/2003/WORLD/meast/04/15/sprj.irq.abbas.arrested/ (visited June 26, 2009). The United States was unable to conduct the prosecutions of the captured attackers because of a lack of jurisdiction, see Wilcox, supra note ___, at 35, but Italy convicted and imprisoned some of the hijackers in using the ordinary Italian criminal justice system. Alan Cowell, Hijacker Defends Achille Lauro Killing, N.Y. Times, Nov. 14, 1988, at A3.

10 Benjamin Weiser, Mastermind Gets Life for Bombing of World Trade Center, N.Y. Times, Jan. 9, 1998, at A1; see U.S. v. Yousef, 327 F.3d 56 (2d Cir. 2003) (affirming convictions for conspiracy to attack the World Trade Center).

11 Wilcox, supra note ___, at 23.


13 See United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998) (imposing death sentence on Timothy McVeigh for 1993 Oklahoma City bombing); U.S. v. Yousef, 327 F.3d 56 (2d Cir. 2003) (affirming convictions for World Trade Center bombings).
over the course of 17 years that resulted in the deaths of three people, was handled in federal court.\textsuperscript{14}

The prosecution of al-Qaeda for terrorist attacks on U.S. citizens was, by and large, treated as a criminal matter under the pre-September 11 policies of the United States. In 1998, members of al-Qaeda bombed U.S. embassy buildings in Kenya and Tanzania, killing 224 people.\textsuperscript{15} Those attackers captured soon thereafter were tried in U.S. federal court and sentenced to life imprisonment.\textsuperscript{16} One suspect, Ahmed Khalfan Ghailani, was detained by U.S. forces in 2004, held in secret prisons, eventually brought to the U.S. prison at Guantanamo Bay in 2009, and was brought to trial in U.S. federal court in New York in 2009.\textsuperscript{17}

In the post-September 11, 2001 era, powerful tools have been available to prosecutors to try those even tangentially related to dangerous acts or to groups labeled by the U.S. State Department as Foreign Terrorist Organizations.\textsuperscript{18} Prosecutors have made ample use of the criminalization of associational status and/or membership in a terrorist organization.\textsuperscript{19} Material support charges

\begin{itemize}
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Benjamin Weiser, A Plea of Not Guilty for Guantanamo Detainee, N.Y. Times, June 10, 2009, at A25.
\item \textsuperscript{18} See U.S. DEP’T OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, FOREIGN TERRORIST ORGANIZATIONS, (Jan. 19, 2010), available at: http://www.state.gov/s/ct/rls/other/des/123085.htm (designating 45 organizations as foreign terrorist organizations as of January 19, 2010); see 8 U.S.C. § 1189 (authorizing the Secretary of State to designate an organization as a “foreign terrorist organization”); see People’s Mojahedin Organization of Iran v. Dep’t of State, 327 F.3d 1238, 1242 (D.C. Cir. 2003) (finding “that due process require[s] the disclosure of only the unclassified portions of the administrative record”).
\item \textsuperscript{19} E.g., 18 U.S.C. §2339(b). See Robert Chesney & Jack Goldsmith, Terrorism and the Convergence of Criminal and Military Detention Models, 60 STAN. L. REV. 1079, 1101 (discussing material support statute and “group membership liability”).
\end{itemize}
have been used extensively to try terrorism suspects or to exert pressure toward a plea bargain, and are often successful.\textsuperscript{20} Unlike other crimes often invoked to prosecute terror suspects, such as continuing criminal enterprise (CCE)\textsuperscript{21} and Racketeer Influenced and Corrupt Organizations Act (RICO),\textsuperscript{22} which require at least some predicate act for criminal liability to attach,\textsuperscript{23} the material support statute does not require that the defendant has a specific intent to support a terrorist act—knowing support of a designated terrorist organization without intent is enough to convict.\textsuperscript{24} The scope and flexibility offered by the material support statute has made it an often-used\textsuperscript{25} tool for prosecutors and was used to

\textsuperscript{20} See Minneapolis Man Sentenced for Conspiracy to Provide Material Support to al Qaeda, Federal Bureau of Investigation, Minneapolis, Department of Justice Press Release, July 9, 2009, available at http://minneapolis.fbi.gov/dojpressrel/pressrel09/mp070909.htm (visited July 10, 2009) (describing the guilty plea of Mohammed Abdullah Warsame to charges of material support for al Qaeda, which resulted in a prison sentence of 92 months); Philip Coorey, Hicks Case Flawed All Along: Prosecutor, Sydney Morning Herald, Apr. 30, 2008, available at http://www.smh.com.au/articles/2008/04/29/1209234862811.html (visited July 11, 2009) (detailing how David Hicks plead guilty to material support charges because he believed it was the only realistic means to end his detention at Guantanamo and be returned to his native Australia).


\textsuperscript{23} See., e.g., 18. U.S.C. §1961(5) (defining racketeering as involving at least two acts in furtherance of the illegal plan).


\textsuperscript{25} The scope of the material support statute and the ability of prosecutors to indict and convict a broad swath of defendants under the statute have provoked criticism that the statute’s lack of a specific intent requirement renders it fundamentally unfair to defendants and arguably unconstitutional. See, e.g., Pretrial Motions (November 1, 2007) and Post-Hearing Submission in Further Support of Pretrial Motions in United States v. Zeinab Taleb-Jedi (May 16, 2008) (E.D.N.Y. 06-CR-652) (arguing, unsuccessfully, that the material support statute is unconstitutional); see also The Case Against a Special Terrorism Court, supra note ___, at 5; Bill Mears, Justices to Review Patriot Act (…continued)
convict John Walker Lindh\textsuperscript{26} and the so-called “Lackawanna Six,”\textsuperscript{27} among others.

The government has also used ordinary Article III courts proactively, to prevent planned terrorist acts from occurring\textsuperscript{28} and to elicit valuable counterterrorism and intelligence information as part of the interrogation, negotiation and plea bargain process.\textsuperscript{29} The federal material witness statute which empowers the government to detain and question individuals without charge\textsuperscript{30} has

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\textsuperscript{26} United States v. Lindh, 227 F.Supp.2d 565 (E.D. Va. 2002) (entering guilty plea in violation of, among other things, the material support statute).

\textsuperscript{27} Press Release, U.S. Dep’t of Justice, United States Attorney, Western District of New York, United States Attorney’s Office Successfully Concludes Terrorism Case With Sixth Conviction of Al Qaeda Supporter (May 19, 2003) (on file with author) (announcing the conviction of Muhktar al-Bakri).


\textsuperscript{30} \textit{See} 18 U.S.C. §3144.
enhanced the ability of law enforcement to detain those with potentially relevant information for terrorism prosecutions, but has also increased the potential for abuse of discretion and abuse of executive power. 31 Nevertheless, the statute remains a potent tool for prosecutors within the ordinary criminal justice system.

Perhaps ironically, although individual defendants and civil libertarians have objected to the scope and application of the material support and material witness statutes, the main criticism of using the criminal law to prosecute terrorism is that the tools available to prosecutors are not strong enough given the level of protections guaranteed to criminal defendants under the U.S. Constitution.

B. Constitutional Protections in Criminal Courts

A primary criticism of using ordinary civilian courts for terrorism prosecutions is that these courts offer too many protections to allegedly dangerous people. 32 The criminal justice system affords

31 The government used the material witness statute broadly after the terrorist attacks of September 11, 2001, arresting hundreds of people and detaining them for up to several months. See, e.g., Elmaghraby v. Ashcroft, No. 04-cv-01809, 2005 WL 2375202, at *2 (E.D.N.Y. Sept. 27, 2005). At least one court has found that the government—and former Attorney General John Ashcroft, personally—may be liable for abusing the material witness statute in the unwarranted detention and harsh treatment of those detained under the statute. See Al-Kidd v. Ashcroft, No. 06-36059 (9th Cir., Sept. 4, 2009) (holding that the detention and treatment of plaintiff Abdullah Al-Kidd under the material witness statute may give rise to personal liability, since Al-Kidd was never accused of criminal activity and was never asked to act as a witness in a criminal prosecution).


defendants a framework of rights grounded in the U.S. Constitution and developed over two centuries of constitutional amendment, statutory clarification and jurisprudence. Included among these protections are various constitutional guarantees, including due process of law; the right to confront the accusers and witnesses; protection against arbitrariness in the application of the law; and protection against selective prosecution based on race, national origin, religion or color.

Criminal trials also require—among other obligations—that the government prove its case “beyond a reasonable doubt” before conviction; that admissible evidence conform to the applicable evidentiary rules; the right to discovery of relevant evidence in the government’s possession; and that exculpatory evidence be turned over to the defendant. This framework of rights and obligations exists to both fulfill the traditional goals of the criminal justice system—punishment, public safety and deterrence—and the goal of minimizing the number of wrongful convictions.

The criminal justice model has showed some flexibility in trying defendants for acts of terrorism, and has been successful in (continued…)

12.html (visited October 19, 2009) (describing the potential disadvantages of using civilian courts for terrorism trials, including juror intimidation, disclosure of classified information, higher security costs for the trial, inability to use certain evidence, low probability of a death sentence being handed down, and the possibility of defendants proselytizing to other people being held in pretrial detention).

33 U.S. Const., amend. V.
34 U.S. Const., amend. VI.
35 U.S. Const., amends. V, IXV.
38 E.g., Fed. R. Evid. 403 (limiting the use of prejudicial evidence).
41 Cf. Chesney & Goldsmith, supra note ___, at 1088 (arguing that the rights afforded by the criminal justice system “operationalize the idea that it is better for some guilty persons to go free than for one innocent person to be convicted of a crime”).
convicting criminals. Prosecutors have successfully convicted those who actively participated in violent acts, those who have provided material support to the active participants, and those who have been affiliated with or members of groups that are designated as terrorist organizations by the government.

The use of the ordinary criminal justice system also sends a powerful message to defendants, the international community and to organizations intent on demonizing the United States and U.S. foreign policy—the message that adherence to the rule of law is a bedrock principle that applies to all defendants, even those professing to seek the destruction of the United States. As such, this focus on the rule of law serves to defuse extremist rhetoric that the United States treats certain groups of individuals unfairly; arguably, this improves long-term security by reducing the possibility of extremism manifesting itself in violent acts.

C. Limitations of criminal courts for terrorism trials

Proponents of a specialized court for terrorism trials—whether in the form of a National Security Court or a revived military

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43 E.g., United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004).
44 E.g., United States v. Lakhani, 480 F.3d 171 (3rd Cir. 2007) (affirming conviction for attempted weapons sales).
46 Other proposals for a specialized court for terrorism trials in the United States have been proposed but not adopted, such as the establishment of a national security court. See, e.g., Jack Goldsmith & Neal Katyal, The Terrorists’ Court, N.Y. Times, July 11, 2007, at A19 (proposing a hybrid model of national security courts for trying suspected terrorists. Such a model would involve elements of the criminal justice system and the military trial system, and would call for the appointment of Article III judges who are experts in national security matters and the laws of war); Amos Guiora, Military Commissions and National Security Courts After Guantanamo, 101 Nw. U.L.R. Colloquy 199, 207 (2008) (also proposing a national security court). Such proposals are themselves subject to criticism for unwarranted assumptions about the lack of efficacy of an Article (…continued)
commission system—cite several reasons why ordinary criminal courts are inadequate to deal with post-9/11 terrorism trials.

First, critics fear that an Article III trial would create an unacceptable risk of revealing sensitive or classified information that could then endanger U.S. national security interests.\textsuperscript{47} Former Attorney General Michael B. Mukasey cites two instances in which a criminal trial led to the dissemination of information which empowered terrorist activity: first, during the prosecution of Omar Abdel Rahman and others for their roles in the 1993 World Trade Center bombing, the government was compelled to turn over a list of unindicted co-conspirators to the defendants, which alerted Osama bin Laden that his connection to that case had been discovered by U.S. authorities. Second, during the trial of Ramzi Yousef, who planned the 1993 World Trade Center bombing, an “apparently innocuous bit of testimony in a public courtroom about delivery of a cell phone battery was enough to tip off terrorists still at large that one of their communication links had been compromised. That link, which...had provided enormously valuable intelligence, was immediately shut down, and further information lost.”\textsuperscript{48}

This criticism is blunted to some extent by the use of the Classified Information Procedures Act (CIPA), the 1980 law which established procedures for the use of classified information in III court, secrecy, lack of due process protections and weakening of the defendant’s right to a fair trial. Richard B. Zabel & James J. Benjamin, Jr., Human Rights First,\textit{ In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts} (2008); Mark R. Shulman, \textit{National Security Courts: Star Chamber or Specialized Justice?} 15 ILSA J. Int’l & Comp. L. 533, 546 (2009) (arguing that Article III courts are capable of handling complex and sensitive national security cases).


criminal trials. CIPA outlines a comprehensive set of procedures when evidence in criminal cases implicates classified information: for example, CIPA allows the government—in some instances—to substitute unclassified summaries of classified evidence. The Supreme Court in Boumediene acknowledged the need to deal with classified information in a sensitive and thoughtful manner, and expressed confidence that ordinary criminal courts and Article III judges would be able to manage the task successfully.

Second, proponents of specialized terrorism trials argue that ordinary criminal trials—with Sixth Amendment guarantees of a right to a public trial, right to be tried by a jury, right to confront adverse witnesses for the defendants and right to counsel—are inappropriate because of the security risks to witnesses, jurors, prosecutors and court personnel. These Sixth Amendment protections, however, are essential to maintaining the rule of law and, importantly, the perception that the rule of law is being upheld. Additionally, use of these protections arguably benefits even short-term national security interests by encouraging defendants who have been assigned counsel to cooperate with the government in exchange for leniency in the sentencing phase.

52 U.S. CONST. amend. 6.
53 Trials can be closed if publicity would interfere with the trial and undermine the defendant’s right to a fair trial, see Sheppard v. Maxwell, 384 U.S. 333 (1966), or if there is “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986).
55 See Mukasey, supra note ___ (arguing against the use of ordinary criminal courts to try terrorists because of the concomitant heightened security risks).
56 See Richard B. Zabel and James J. Benjamin, Jr., In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts. Human Rights First, May 2008, at 118 (“the government recognizes that cultivating cooperation pleas is an effective intelligence gathering tool for all types of criminal investigations, including significant terrorist cases”). See also Kelly Moore, The Role of Federal Criminal Prosecutions in the War on Terrorism, 11 Lewis & Clark L. Rev. 837, 847 (2007).
Third, proponents of a revived military commission system are concerned about the lack of evidence that would be admissible and usable in an Article III court, particularly if prisoners are captured outside of the United States and in a battlefield situation in which gathering usable evidence may be extremely difficult. Additionally, Article III courts would likely deny the admissibility of evidence helpful to the prosecution offered by prisoners who were subjected to torture or enhanced interrogation techniques, thereby leading to a more challenging, if not impossible, task for prosecutors.

Fourth, and derived from the previous critique, is the concern that trials in an Article III court would lead to inappropriately short sentences and a substantial number of acquittals, resulting in the release of numerous prisoners who—according to the government—continue to pose a threat to U.S. national security. This argument has significant political traction, particularly since the detainees at Guantanamo Bay have often been described by government officials as the “worst of the worst,” even when that

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claim has been subsequently debunked or proven to be overblown.\footnote{Philip Coorey, Hicks Case Flawed All Along: Prosecutor, Sydney Morning Herald, Apr. 30, 2008, available at http://www.smh.com.au/articles/2008/04/29/1209234862811.html (visited July 11, 2009) (recalling the early characterization by the Bush Administration of former Guantanamo detainee David Hicks as “the worst of the worst;” prosecutors later believed that Hicks was not a dangerous individual).}

This fear of leniency or acquittal, however, is blunted to some extent by the availability in Article III courts of the death penalty for many terrorism-related crimes,\footnote{Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.} along with the willingness of appellate courts to remand cases for harsher sentencing.\footnote{E.g., John Schwartz, Appeals Courts Throws Out Sentence in Bombing Plot, Calling it Too Light, N.Y. Times, Feb. 3, 2010 at A13 (throwing out the 22-year sentence for Ahmed Ressam, convicted of planning to set off explosives at the Los Angeles International Airport on December 31, 1999, and calling for a harsher sentence to be applied).}
D. The Push for Military Commissions

The Bush administration decided immediately after the September 11 attacks that it had the right to try most prisoners captured in pursuit of the attackers by military commission.\footnote{Military Order of November 13, 2001, 66 Fed. Reg. No. 222, 57833 (Nov. 13, 2001).} In doing so, the Bush administration made a deliberate choice not to import the protections mandated by the Uniform Code of Military Justice for the courts martial system into the process for trying detainees in the so-called “war on terror.”\footnote{The Bush administration argued that detainees in the “war on terror” should not be accorded the Prisoner of War (POW) status which would carry with it the right to a trial by court martial. Under the definition of POW articulated in the Third Geneva Convention, to be afforded POW status, detainees must fulfill four conditions: the presence of a commander responsible for subordinates, the presence of a fixed distinguishing sign that may be identified from a distance, the open and unconcealed carrying of arms and actions undertaken in accordance with the rules and customs of law. Third Geneva Convention of 1949, Article 4(2). Though detainees may seek POW status as a means to avoid civilian or military trial, courts have been unsympathetic to such claims. \textit{See Hamdi v. Rumsfeld}, 542 U.S. 507, ___ (2004) (recognizing the right to designate prisoners as “enemy combatants” and detain them); \textit{see also State of Israel v. Marwan Barghouti}, 092134/02 (D. Ct. of Tel Aviv and Jaffa, Dec. 12, 2002) (holding that suspected terrorists are not entitled to POW status because they do not fulfill the criteria stated in the Third Geneva Convention).}

Although this decision was problematic in terms of perceptions of justice among affected groups, it was not constitutionally impermissible. Since 2001, the Supreme Court has had the opportunity to flesh out some parameters for the establishment of constitutionally sound military commissions. Both \textit{Hamdi v. Rumsfeld}\footnote{\textit{See Hamdi}, 542 U.S. at 538 (acknowledging “the possibility that the [due process] standards [the Supreme Court] ha[s] articulated could be met by an appropriately authorized and properly constituted military tribunal”).} and \textit{Boumediene v. Bush}\footnote{\textit{Boumediene}, 128 S.Ct. at 2255 (holding that the “DTA review procedures are an inadequate substitute for habeas corpus, but that the “DTA and CSRT process remain intact”).} made clear that military commissions can be constitutionally sound and are a viable
alternative to the use of Article III courts, should the administration prefer to try suspected terrorists in a specialized court.

Supreme Court jurisprudence has set a minimum guarantee of constitutional rights, such as that of habeas corpus, to which detainees are entitled. However, the Court has not deemed it unconstitutional for the President to choose which particular detainees are tried by a military commission and which are tried in an Article III court. As such, when Salim Hamdan, driver to Osama bin Laden, was convicted by a military commission, the presiding judge made clear that although Hamdan had access to some exculpatory evidence, ordinary constitutional protections were inapplicable and that the prosecutors had a right to use at least some evidence derived from coercive interrogations. Both

68 See Boumediene, 1228 S.Ct. at 2240 (holding that procedures established by Congress to review a detainee’s status were inadequate as a substitute for habeas corpus); Hamdi, 542 U.S. at 525 (“All agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States.”); Rasul v. Bush, 542 U.S. 466, 481 (2004) (holding that aliens detained at Guantanamo Bay are entitled to habeas corpus).

69 The courts martial system provides more protection than the military commissions proposed immediately after September 11, 2001; although the current GTMO detainees don’t qualify for POW status, a court martial system based on Uniform Code of Military Justice is certainly an option available to the Obama administration. Such a system would offer the time-tested structural protections that have not been available in the previous post-September 11 review systems, including the use of experienced military judges, the availability of neutral appellate review, a system to deal with classified or sensitive government information, and a set of procedures that has been honed over decades. Neal Katyal, Sins of Commission: Why Aren’t We Using the Courts-Martial System at Guantanamo?, Slate.com, Sept. 8, 2004, available at http://www.slate.com/id/2106406/ (visited May 19, 2009) (noting that “it is patently absurd to think that our courts-martial system could not handle classified information. It already does so, day in and day out. We have had courts martial in Bosnia, Afghanistan, and Iraq. Courts martial are already tooled up to handle evidence seized on a battlefield”).

70 William Glaberson, Terror Trial Nears End As Defense Rests Case, N.Y. Times, Aug. 2, 2008, at A9 (reporting that Hamdan was able to offer exculpatory evidence, including statements from al-Qaeda leader Khalid Shaikh Mohamed suggesting that Hamdan was not a leader in the organization).


President Obama revived and modified the military commission system established by the Bush administration,\footnote{73}{The decision to reinstate military commissions represented a significant shift in the principles expressed by then-Senator Obama in 2007, when he argued that “[w]e Constitution and our Uniform Code of Military Justice provide a framework for dealing with the terrorists.” Editorial, Obama’s Military Tribunal, Wall St. Journal, May 18, 2009, at A13. See David E. Sanger, Obama After Bush: Leading by Second Thought, N.Y. Times, May 15, 2009, at A3 (discussing President Obama’s changed perspective on this issue).} citing the long history of use of such commissions by the U.S. military and the Defense Department and the need to use military commissions in the interest of national security.\footnote{74}{Press Release, The White House, Office of the Press Secretary, Statement of President Barack Obama on Military Commissions (May 15, 2009) available at: http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Military-Commissions/} President Obama assured the public that the imperative of national security and the need to adhere to the rule of law could co-exist, and that his administration would reconstitute the military commissions system in a way that would abide by both principles.\footnote{75}{See Text: Obama’s Remarks on Military Commissions, N.Y. TIMES, May 15, 2009 available at: http://www.nytimes.com/2009/05/15/us/politics/15obama.text.html.}

In the name of adherence to the rule of law, the Obama administration amended some of the procedures under the Military Commissions Act of 2006 to add protections for defendants. Evidence from coercive or cruel interrogations was disallowed; the use of hearsay was limited,\footnote{76}{Peter Baker & David M. Herszenhorn, Obama Planning to Keep Tribunals for Detainees, N.Y. Times, May 15, 2009, at A18.} with the government bearing the burden of showing the reliability of the hearsay evidence prior to admission;\footnote{77}{The Bush administration’s attempts—continued by the Obama administration—to have hearsay evidence be treated as presumptively reliable in the context of the detention of terrorist suspects were met with skepticism by Article III courts. See Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004) (noting that (…continued)
their counsel; and protections against self-incrimination were instituted for defendants who choose not to testify.

The Obama administration also attempted to create some transparency in the process of determining whether detainees would be tried in Article III courts, before a military commission, or detained indefinitely pursuant to executive decree. In its July 2009 protocol governing the determination of detainee placement, the administration noted that detainees are entitled to the presumption of trial in an Article III court, but then delineated numerous objective and subjective factors that could warrant a change in venue, including strength of interest, efficiency and “other prosecution considerations” such as the available sentence and the ability to use certain evidence in a given forum. As of this writing, no detainee has been tried under the reconstituted military commission model, although several detainees have been referred to that system for trial.

(continued…)

hearay “may need to be accepted as the most reliable available evidence from the Government…. [T]he 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”); Parhat v. Gates, 532 F.3d 834,849 (D.C. Cir. 2008) (the court did “not suggest that hearsay evidence is never reliable—only that it must be presented in the form, or with sufficient additional information, that permits [the finder of fact] to assess its reliability”) (emphasis in original); Al-Odah v. United States, Classified Memorandum Opinion, dated Aug. 29, 2009 (D.D.C. Civ. Action No. 02-828) (“[t]he Court is fully capable of considering whether a piece of evidence (whether hearsay or not) is reliable, and it shall make such determinations in the context of the evidence and arguments presented during the Merits Hearing—including any arguments the parties have made concerning the unreliability of hearsay evidence); Ahmed v. Obama, 613 F. Supp. 2d 51, 55 (D.D.C. 2009) (rejecting a presumption of accuracy for the Government’s evidence).

78 See Determination of Guantanamo Cases Referred for Prosecution, Department of Defense & Department of Justice Protocol, July 20, 2009.
79 See Determination of Guantanamo Cases Referred for Prosecution, Department of Defense & Department of Justice Protocol, July 20, 2009, at ¶2.
E. Criticisms of the Military Commission Model

The U.S. criminal justice system has been refined for more than two centuries to attempt to find a balance between security and punishment on the one hand, and fairness and adherence to the rule of law on the other. The courts martial system codified in the Uniform Code of Military Justice has, likewise, been developed and changed over many years to find a balance between the individual rights of the defendant and the need for prosecutorial efficiency in the context of violations of the laws of armed conflict.

Although each of these systems is vulnerable to the critique that they do not strike an appropriate balance between security and liberty interests, each system reflects a strong commitment to equal protection and the rule of law for those defendants within that system’s jurisdiction. All civilians can expect the procedural protections of an Article III court when tried for a crime. All lawful combatants can expect the protections of the Uniform Code of Military Justice when tried in a courts martial proceeding. This commitment to the equal application of the law—regardless of nationality, religion, the nature of the crime being charge or the public fear of the defendant—reinforces rule of law norms and the reputation of the U.S. justice system for impartiality.

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81 See Richard B. Zabel & James J. Benjamin, Jr., In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts 25 (Human Rights First, 2009) available at: http://www.humanrightsfirst.org/us_law/publications/index.aspx (discussing the need “to balance the defendant’s right to a fair trial with the need to protect sensitive evidence that could endanger national security if disclosed”).


83 See, e.g., Forman, supra note ___, at 333 (critiquing the U.S. approach to criminal justice based on the scope of the prison complex, prison conditions, harsh treatment of juveniles, attacks on judicial authority and undermining the role of defense counsel).
The military commission model cannot reinforce rule of law norms, despite assertions to the contrary by the Obama administration. First, it is unclear whether, even with the changes made in 2009, that the military commission system can guarantee substantive due process, since defendants are accorded significantly fewer rights than those facing courts martial proceedings. Due process concerns are particularly acute because the Obama administration has specifically reserved the right to continue to imprison anyone acquitted under the military commission system if U.S. security interests suggestion that detention is necessary.

Second, there is a significant danger that the military commission system will apply not only to those detainees at Guantanamo, but to all detainees held by the United States in military actions against non-state actors as part of an effort to expedite the trial process and achieve higher conviction rates.

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84 See Testimony of Jeh C. Johnson, General Counsel, Dept. of Defense, before the Senate Armed Services Committee, July 7, 2009 (hereinafter “Johnson Testimony”).


86 Jess Bravin, Detainees, Even if Acquitted, Might Not Go Free, Wall Street Journal, July 8, 2009, available at http://online.wsj.com/article/SB124699680303307309.html (visited July 9, 2009) (quoting Rep. Jerrold Nadler on the Obama plan to assign prisoners to different venues with different levels of due process protections, “What bothers me is that they seem to be saying, ‘Some people we have good enough evidence against, so we’ll give them a fair trial. Some people the evidence is not so good, so we’ll give them a less fair trial. We’ll give them just enough due process to ensure a conviction because we know they’re guilty.’ That’s not a fair trial, that’s a show trial”).

87 Editorial, Photographs and Kangaroo Courts, N.Y. Times, May 17, 2009, at WK11. (noting that although military tribunals are a “well-established part of American and international military justice…[t]he problem is that these tribunals, unlike traditional ones, did not just cover prisoners captured on the battlefield. They covered anyone whom [President] Bush declared beyond the (…continued)
The structural inequities in the military commission system and the ability of the administration to pick and choose in which venue it will try defendants leads to the appearance and perception that the United States believes one system of justice is appropriate for U.S. citizens, and a lesser level of protection is appropriate for noncitizens.

88 Deputy Solicitor General Neal Katyal commented on this disparity as follows: Neal Katyal: ‘These trials are not ‘equal justice’: For the first time since equality was written into our Constitution, America has created one criminal trial for ‘us’ and one for ‘them.’ The rules for the Guantanamo trials apply only to foreigners—the millions of green-card holders and five billion people on the globe who are not American citizens. An American citizen, even one who commits the most horrible and treasonous act (such as the detonation of a weapon of mass destruction), gets the Cadillac version of justice—a criminal trial in federal court. Meanwhile, a green-card holder alleged to have committed a far less egregious offense gets the beat-up Chevy: a military commission at Guantanamo. Before that commission, that noncitizen will have few of the very rights America has championed abroad, and he can be sentenced to death.” Neal Katyal, On the Ground at Guantanamo: While the Supreme Court Ponders, A Real Trial Begins, Slate.com, Dec. 4, 2007, available at http://www.slate.com/id/2179173/ (visited May 19, 2009). Some commentators have framed the “us” and “them” dichotomy in religious terms, noting the tendency for public discourse to equate being Muslim to being a terrorist. See Glenn Greenwald, What if the Uighurs Were Christian Rather Than Muslim?, salon.com, July 6, 2009, available at http://www.salon.com/opinion/greenwald/2009/07/06/uighurs/index.html (visited July 7, 2009).

89 This distinction based on citizenship has been criticized at times by the Supreme Court. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1889) (holding that a racially neutral law, if enforced in a prejudicial manner against non-citizens, contravenes the equal protection guarantees of the Constitution). See also David Cole, Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism 13 (2003) (addressing how aliens are always seen as a first target of national security law and policy in times of emergency). Some case law suggests that U.S. courts are comfortable with the citizenship distinction in national security contexts. E.g., United States v. Duggan, 743 F.2d 59, 75 (affirming constitutionality of U.S. government decision to treat aliens differently for purposes of the Foreign Intelligence Surveillance Act) (citing Mathews v. Diaz, 96 S.Ct. 1883 (1976)).
F. Perceived Targeting of Minority Populations

Arguably, the military commission system resuscitated by President Obama complies with United States obligations under the Geneva Conventions. However, possible compliance with relatively lenient international norms does not ensure that the military commissions will be perceived as legitimate, particularly by those populations from which the defendant class is being drawn.

The perception that the United States accords certain groups of defendants second-class due process protections engenders extremism and provides a recruiting tool for terrorist organizations. The extensive racial and ethnic profiling of Muslim men as part of the U.S. government’s post-September 11


91 See Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Art. 3, §1(d) (Aug. 12, 1949) (Common Article 4 of the Geneva Conventions) (mandating that “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”). It is arguable whether the Obama military commission system even satisfies the relatively weak protections offered under Common Article 4 of the Geneva Conventions, since it is unclear whether the military commissions would be considered “regularly constituted courts” since their existence is separate and distinct from both Article III regularly constituted courts and courts-martial constituted under the rubric of the Uniform Code of Military Justice.

92 See Davis, supra note ___ (arguing that the Obama administration should choose one legally acceptable venue for the trial of all terrorism suspects, and that, “[d]ouble standards don’t play well in Peoria. They won't play well in Peshawar or Palembang either. We need to work to change the negative perceptions that exist about Guantanamo and our commitment to the law. Formally establishing a legal double standard will only reinforce them”).

counterterrorism work did not appear to yield much relevant information, but created the perception that racial and ethnic bias and animus were an inherent part of the government’s counterterrorism efforts.

These measures, taken to promote national security in times of emergency, may assuage the fears of the majority of U.S. citizens, but serve to alienate and polarize the targeted minority populations both domestically and abroad. Further fueling the distrust from targeted minority populations is the backdrop of U.S. national security policy, which has, at times, used a racialized frame as justification for undermining the rule of law and doing away with basic equal protection guarantees. The lessons of the Japanese-American internment during World War II are particularly germane. During the internment, over 120,000 people of Japanese descent—most of them U.S. citizens—were forcibly displaced for years and had their property sold based on unfounded national security fears. Premised largely on their status as a racial minority and the perception of Japanese people as an “other” in American society, this displacement and internment was validated by Congress and the Supreme Court.

The treatment of Muslims in the United States since September 11 does not parallel the treatment of Japanese Americans in scope nor scale. However, the perception among the defendants, all foreign nationals and all Muslim, is that certain national security measures

96 See Gott, supra note ___, at 1081-82 (describing Korematsu as an example of destructive behavior by the Supreme Court in legitimizing a racialized panic that had taken over American society and the political branches of government).
98 Korematsu v. United States, 323 U.S. 214 (1944) (holding that the decision of President Roosevelt to intern Japanese Americans during World War II was consistent with the President’s war powers).
such as specialized terrorism courts apply only to them. This policy serves to further undermine the rule of law because it engenders the belief that the equal application of the law does not reach defendants like them.

As such, the question of whether to use specialized terrorism courts must encompass both the perceived benefits from a national security perspective, as well as a possible detriment in terms of equal protection, liberty interests and the rule of law. These negative ramifications may ultimately undermine the long-term national security interests of the United States.

II. COMPARATIVE PERSPECTIVES ON SPECIALIZED TERRORISM TRIALS

Analyzing the history and use of specialized courts for trials of terrorism and related acts contextualizes the domestic debate in the United States over due process, national security, the rule of law, and individual rights. It is clear that the history, culture, national security landscape, and constitutional constraints in the United Kingdom, Israel and India are all significantly different than that of the United States. However, in some respects it is precisely these differences that enhance the utility of comparative analysis because each of these nations, like the United States, has used specialized terrorism courts at some point to attempt to deal with national security threats.

Taking a closer look at these experiments with specialized courts, and the trade-offs that each government has made in terms of the rule of law and national security, offers some guidance as to the tensions that must be navigated in the United States as we continue to experiment with the use of military commissions for the trial of terrorist acts.

A. United Kingdom

The United Kingdom has confronted significant internal and external threats to national security for many decades. The development of the United Kingdom’s modern national security regime was largely determined by the government response to the
violent conflicts between Catholic Nationalists and Protestant Unionists known as “The Troubles” in Northern Ireland, which escalated in the early 1970s and were largely resolved only in 1998 with the signing of the Belfast Agreement. During The Troubles, almost 3,000 people were killed and over 30,000 were seriously injured.

More recently, the United Kingdom has confronted international terrorist threats, including an attack on the London mass transit system in July 2005 which killed 56 people including the attackers, and injured over 700 others.

I. Structural Constraints on Counterterrorism Policy-Making

U.K. law and policy has vacillated in trying to maintain a balance among the interests of national security, civil rights and liberties, and the rule of law. The British Prime Minister is endowed with war-making power as a legacy of a historical Crown prerogative; nevertheless, he or she almost always seeks authorization of the Parliament to act. Additionally, U.K. law and constitutional norms require that emergency powers be exercised in a legal framework involving the Parliament and the

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[100] Peter Taylor, Loyalists, at 59-60 (Bloomsbury 1999).
[105] Prime Minister Tony Blair attempted to thwart parliamentary efforts to require parliamentary permission before the Prime Minister could engage in any military actions. Martinez, supra note __, at 2491. Matthew Tempest, Government Kills Short’s War Bill, Guardian (London), Oct. 21, 2005, http://politics.guardian.co.uk/iraq/story/0,12956, 1597883,00.html.
courts,\textsuperscript{106} which acts as a significant disincentive to the Prime Minister in making unilateral war-related decisions.\textsuperscript{107} The Prime Minister sets the legislative agenda for the House of Commons, and his or her power is commensurate with his or her ability to exercise discipline over Members of Parliament from the same party.\textsuperscript{108}

The mandatory involvement of Parliament\textsuperscript{109} has ensured that executive branch legal policy does not unilaterally determine how national security interests are going to be balanced with constitutional constraints. Instead, the role of Parliament has forced the Prime Minister to pass legislation in order to deal with particular situations in the war on terror.\textsuperscript{110} For example, in November 2005 former Prime Minister Tony Blair was unable to pass legislation that would allow the government to detain terrorism suspects for up to 90 days without being charged because

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\textsuperscript{107} A (FC) \& Others (FC) v. Sec’y of State for the Home Dep’t, [2005] UKHL 71, [12] (noting that although the Crown had historically used torture without legislative or judicial permission, such powers were rejected with the move toward parliamentary supremacy in the late-1600s).

\textsuperscript{108} Martinez, supra note __, at 2489; Richard Hefferman \& Paul Webb, The British Prime Minister: Much More Than “First Among Equals,” in The Presidentialization of Politics, supra note __, at 26, 32-33.

\textsuperscript{109} Canada has followed international best practices in establishing an even more powerful legislative oversight mechanism in order to increase accountability: the creation of a National Security Committee of Parliamentarians that would have full access to classified national security information. See Rouč, supra note __, at 2169-2170 (noting that in April, 2005, the Canadian government accepted that such a committee should review the “ability of departments and agencies engaged in security and intelligence activities to fulfill their responsibilities,” including identifying “required ongoing improvements to the effectiveness of Canada’s national security system.”

\textsuperscript{110} Schulhofer, supra note __, at 1936-39 (Parliament’s central role in developing legal policy on national security matters).
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the House of Commons, led by Blair’s own Labour Party, voted
down the proposed legislation.\footnote{Martinez, supra note ___, at 2499; Ed Johnson, Great Britain: Parliament Rejects Crucial Blair Antiterrorism Bill, Miami Herald, Nov. 10, 2005, at A15.}

Further, the judicial check on executive exercise of national security powers is a robust one: judicial review is available for all national security-related legal policy, including the treatment of individual detainees, even in times of war.\footnote{Schulhofer, supra note ___, at 1940-43. See also Kent Roach, Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain, 27 Cardozo L. Rev. 2151, 2163 (2006).}

In recent years, the jurisdiction of the European Court of Human Rights (ECHR) provides an additional avenue for recourse since detainees have the right to appeal domestic legislation and judicial decisions to the ECHR.\footnote{Schulhofer, supra note ___, at 1943.} The 2004 decision of \textit{A v. Secretary of State for the Home Department}\footnote{[2004] UKHL 56, [2005] 2 A.C. 68 (U.K.).} illustrated that British courts can take a strong stand against national security policies crafted by Parliament and the Cabinet—in that case, the Anti-Terrorism, Crime and Security Act, 2001 Part IV—if they deem a law to be disproportionate and discriminatory under ECHR standards.\footnote{See Alexandra Chirinos, \textit{Finding the Balance Between Liberty and Security: The Lords’ Decision on Britain’s Anti-Terrorism Act}, 18 Harv. Hum. Rts. J. 265 (2004). Notably, the legislation in question had been reviewed and criticized by Parliament’s Joint Committee on Human Rights and the Privy Counsellor Review Committee prior to being heard in court. \textit{Id.} at 267.}

Accountability for national security laws and policies is further bolstered by independent reviews by a member of the House of Lords who was granted security clearance and given a mandate to make independent reports on the operation of the Terrorism Act, 2000 and the Prevention of Terrorism Act, 2005.\footnote{Roach, supra note ___, at 2171 (noting the need for such a measure to ensure against “[w]idespread public suspicion about national security activities [which] could eventually compromise the effectiveness of security activities”).}
As a result of these structural constraints and the layers of judicial review available, many counterterrorism laws in the United Kingdom focus on a rule of law perspective and give primacy to the need to preserve civil rights and civil liberties for those arrested pursuant to the criminal law.\textsuperscript{117} As such, the protections of the ordinary criminal justice system have almost always been in effect, despite the constraints that this system places on prosecutors and counterterrorism measures generally.\textsuperscript{118}

The prioritization of civil rights and individual liberty has not always held true with regard to the arrest, detention and prosecution of suspected terrorists in Northern Ireland. In fact, rule of law considerations have, at times, been intentionally compromised to further a utilitarian model of counterterrorism and national security policy.\textsuperscript{119} Because of the potential tension between adherence to the rule of law and the desire to maximize utilitarian goals, the evolution of counterterrorism law and policy

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\item Britain’s system of trying suspected terrorists in ordinary criminal courts, although subject to much criticism, has recently resulted in convictions of criminals plotting to set off explosives during trans-Atlantic flights. John F. Burns, \textit{British Court Convicts Three in Plot to Blow Up Airliners}, N.Y. Times, Sept. 7, 2009, available at http://www.nytimes.com/2009/09/08/world/europe/08britain.html?_r=1&hp (visited September 7, 2009) (noting that the first trial for these suspects resulted in a hung jury, and that the judge during the second trial instructed the jury—in accordance with British procedure—that a conviction could be handed down if a 10-2 majority of the jury voted to do so). Four of the eight suspects tried were acquitted of all charges. \textit{Id.} During the first trial in 2008, the three men convicted of conspiring in the terrorist plot in 2009 were convicted only of conspiracy to commit murder. British authorities laid some of the responsibility on the fact that the Crown Prosecution Service was unable to introduce material from British or foreign intelligence agencies, and that British courts do not admit evidence gathered from domestic wiretaps. \textit{See} John F. Burns & Elaine Sciolino, \textit{No One Convicted of Terror Plot to Bomb Planes}, N.Y.Times, Sept. 9, 2008 at A1.
\item See Testimony of Tom Parker, Appropriations Subcommittee Hearing, supra note \_, at 17 (noting that “until [the passage of the Terrorism Act, 2000], in the United Kingdom you could not be a terrorist unless you were Irish, unless you were one of the proscribed organizations…which was very, very tightly defined just to focus on the terrorist threat in Northern Ireland”).
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in Northern Ireland provides an apt and useful comparator for the current debate over military commissions in the United States.

2. **Counterterrorism Law and Policy for Northern Ireland**

The structural and political constraints of counterterrorism law and policy in Northern Ireland are quite distinct from those of England. Until the devolution of legislative power from Westminster to Northern Ireland in 1998, emergency powers were invoked as a utilitarian necessity by the Westminster parliament to deal with counterterrorism issues in Northern Ireland. The invocation of those emergency powers and their specific, unique application to the population of Northern Ireland offer instructive guidance on the costs and benefits of creating specialized process for suspected terrorists.

The Civil Authorities (Special Powers) Act (Northern Ireland), 1922, underpinned most of the emergency and counterterrorism legislation that followed throughout the twentieth century. Among other provisions, this Act provided for the internment—detention without charge or guarantee of trial—for any individuals suspected by the Royal Ulster Constabulary of terrorist activity or non-

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120 The structure of governance for Northern Ireland has shifted over the decades as the relationship between Northern Ireland and the central government of the United Kingdom has changed. The Government of Ireland Act, 1920 established a local parliament in Belfast, Northern Ireland, which exercised limited powers. See Government of Ireland Act, 1920, 10 & 11, Geo. 5, c. 67 (England) (establishing Home Rule in Northern Ireland and Southern Ireland). The Act was suspended in favor of Direct Rule by Westminster in the Northern Ireland (Temporary Provisions) Act, 1972, passed after the outbreak of the “Troubles” in Northern Ireland. Although Home Rule was reestablished intermittently over the ensuing 25 years, the Government of Ireland Act, 1920, was officially repealed through the passage of the Northern Ireland Act, 1998, c. 47 (England), which established the devolved Northern Ireland Assembly.


122 Civil Authorities (Special Powers) Act (Northern Ireland), 1922, 12 & 13 Geo. 6, c. 5 (N. Ir.).
terrorist illegal activity.\textsuperscript{123} However, by the early 1970s this tool of internment was deemed inadequate to deal with the political violence between the Catholic Nationalists and Protestant Unionists in Northern Ireland.\textsuperscript{124}

Lord Diplock of the House of Lords was tasked with chairing a commission to consider modifying legal procedures to strengthen counterterrorism efforts.\textsuperscript{125} The resulting commission report, known as the “Diplock Report,” analyzed the political violence in Northern Ireland and recommended regarding restructuring the criminal justice system in Northern Ireland in order to combat terrorism more effectively.\textsuperscript{126}

The Diplock Report recommended, among other things, an increase in detention powers and the ability to try suspected terrorists before a judge, with no jury involved.\textsuperscript{127} The Northern Ireland (Emergency Provisions) Act, 1973,\textsuperscript{128} enacted as a response to the Diplock Report, set up so-called “Diplock Courts,” where certain offenses—among them, terrorist activities—were tried,\textsuperscript{129} and by authorizing prolonged detention without charge or trial.\textsuperscript{130} Both of these provisions marked serious shifts away from traditional common law protections of trial by jury and the right to be charged as soon as practicable. However, the Diplock Report framed the shift in terms of better adherence to the rule of law and claimed its purpose was to increase the rights of prisoners in

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\textsuperscript{123} Civil Authorities (Special Powers) Act (Northern Ireland), 1922, 12 & 13 Geo. 6, c. 5, §§ 1, 8 (N. Ir.).  
\textsuperscript{124} Michael P. O’Connor and Celia M. Rumann, \textit{Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland}, 24 Cardozo L. Rev. 1657, 1666 (2003).  
\textsuperscript{125} Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland, 1972, Cmnd. 5185 (“Diplock Report”).  
\textsuperscript{126} Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland, 1972, Cmnd. 5185 (“Diplock Report”).  
\textsuperscript{127} Diplock Report, \textit{supra} note \textsuperscript{125}, at ¶36.  
\textsuperscript{129} Northern Ireland (Emergency Provisions) Act, 1973 (c. 53) (England), §2(1).  
\textsuperscript{130} Northern Ireland (Emergency Provisions) Act, 1973 (c. 53) (England), §10 (schedule 1).
Northern Ireland when compared to the preventive detention powers authorized by the 1922 legislation.\textsuperscript{131}

This tiered structure of criminal justice for suspected terrorists in Northern Ireland established in the early 1970s provides fertile ground for comparisons with the current justifications for the use of military commissions in the United States and the rule of law and national security tensions that undergird our domestic debate. Like the British context, the U.S. formation of the military commissions has been framed as a utilitarian necessity that provides adequate protections regarding the rule of law, and as an improvement over previous conditions for prisoners suspected of terrorist acts.\textsuperscript{132}

\textbf{a. Diplock Courts}

The justifications for the non-jury Diplock Courts were to deal with “perverse verdicts” due to the intimidation of jurors\textsuperscript{133} and to increase the number of convictions of suspected terrorists while affording some closure to some detainees previously being held under the indefinite detention system.\textsuperscript{134}

The Diplock Report framed its problem in terms of the United Kingdom’s obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms to provide a fair criminal trial with the same due process protections for all

\textsuperscript{131} Diplock Report, \textit{supra} note ____, at ¶7(e).
\textsuperscript{132} Remarks by President Obama, \textit{supra} note ____ (“[M]y administration is bringing our [military] commissions in line with the rule of law . . . no longer permit[ting] the use of evidence -- as evidence statements that have been obtained using cruel, inhuman, or degrading interrogation methods.”).
\textsuperscript{133} \textit{See} Diplock Report, \textit{supra} note ____, at ¶ 7(a) (“The main obstacle to dealing effectively with terrorist crime in the regular courts of justice is intimidation by terrorist organisations of those persons who would be able to give evidence for the prosecution if they dared”). \textit{Cf.} Report of a Committee to Consider, in the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland (1975) (“Gardiner Report”), at 10 (noting that there was little evidence of juror intimidation, but that the Diplock Court structure was fair and ought to continue).
\textsuperscript{134} Diplock Report, \textit{supra} note ____, at ¶7(e).
The Diplock Report noted the right of the United Kingdom to derogate from its obligations in times of public emergency, and framed the situation in Northern Ireland as qualifying as a public emergency given the level of political violence occurring at the time.\footnote{135 Diplock Report, supra note ___, at ¶12 (citing European Convention on Human Rights and Fundamental Freedoms, Art. 6 (May 1963)).} The authors of the report asserted their desire to comply with the United Kingdom’s international legal obligations, and recommended that since that the protection of witnesses is an integral part of providing due process under the European Convention, the use of bench trials with in camera hearings where necessary would protect witnesses appropriately.\footnote{136 Diplock Report, supra note ___, at ¶12 (citing European Convention on Human Rights and Fundamental Freedoms, Art. 15 (May 1963)).} As an additional measure to protect witnesses, the Diplock Report recommended the criminalization of membership in proscribed associations, which would obviate the need for witness testimony in some cases and allow the prosecutions to proceed based on the Attorney General’s designations of various organizations as “unlawful” and the use of police affidavits as evidence of the defendant’s association with such organizations.\footnote{137 Diplock Report, supra note ___, at ¶¶ 15-16, 20.}

The Diplock Report emphasized the need for the judicial system to retain the trust and respect of the people under its jurisdiction. The authors concluded, “If anything were done which weakened [the trust and respect], it might take generations to rebuild, for in Northern Ireland memories are very long.”\footnote{138 Diplock Report, supra note ___, at ¶¶ 21, 22.}

The recommendations in the Diplock Report led to the establishment of the Diplock Courts by the Emergency Procedures Act of 1973. Even after the Belfast Agreement of 1998 led to the devolution of a significant amount of political control to Northern Ireland, the use of the Diplock Courts was reaffirmed by the Terrorism Act, 2000,\footnote{139 Diplock Report, supra note ___, at ¶13.} which adopted the procedures and list of...
Specialized Courts for Terrorism Trials

scheduled offenses that were employed under the Emergency Procedures Act of 1973.

At their height in the 1980s, the Diplock Courts tried over 300 cases a year.\textsuperscript{141} However, after the ceasefire and the Belfast Agreement in 1998, the Diplock Courts began to try significantly fewer defendants. Throughout the early 2000s, such courts were used to try approximately 60 defendants per year.\textsuperscript{142} In 2007, the U.K. government curtailed the use of the Diplock Courts, making some allowances for the continued use of non-jury trials in limited circumstances.\textsuperscript{143}

The use of Diplock Courts to legitimize the judicial treatment of defendants was perceived by many as a failure because of the disparate and harsh treatment of Catholic Nationalists under the regime.\textsuperscript{144} Fueling this perception was the broad range of scheduled offenses which would land a defendant within the jurisdiction of Diplock Courts. Many of the scheduled offenses involved violence but were not necessarily terrorism-related, which led many to conclude that the Diplock Courts were undergoing a “mission creep” that forced Catholic Nationalists accused of almost any violent criminal activity to be tried in that venue.\textsuperscript{145}

Those who consider the Diplock Courts to be a success argue that without these specialized courts for terrorism trials, the ceasefire in

\begin{itemize}
\item \textsuperscript{141} See Replacement Arrangements for the Diplock Court System, Northern Ireland Office, at 4 (August 2006).
\item \textsuperscript{142} See Replacement Arrangements for the Diplock Court System, Northern Ireland Office, at 4 (August 2006).
\item \textsuperscript{143} Justice and Security (Northern Ireland) Act 2007, at §§ 4, 5 (2007 Chapter 6). All trials would presumptively be slated for a jury, but could be shifted to a bench trial if the Director of Public Prosecutions believed that there was a “risk to the administration of justice” in holding a jury trial. Sixteenth Report of the Independent Monitoring Commission, at ¶¶ 5.4, 5.5 (Sept. 2007) (noting that under the new system, the decision to use a bench trial would be predicated on the individual facts of a case, not on a list of scheduled offenses as was the case with the Diplock Courts).
\item \textsuperscript{144} Ni Aolain, supra note ___, at 1378.
\item \textsuperscript{145} See Ni Aolain, supra note ___, at 1378.
\end{itemize}
Northern Ireland could not have been achieved. In fact, the continued, albeit limited, use of non-jury trials after the Belfast Agreement can be viewed as evidence that the British government continues to value the Diplock Court model and the flexibility that it offers to judges and prosecutors.

b. Internment

The Diplock Report recommended—and the Emergency Procedures Act of 1973 enacted—a modification of the 1922 preventive detention system under which an alleged terrorist could be held without formal charge or trial. In an effort to increase accountability and adherence to traditional rule of law protections, the Emergency Procedures Act of 1973 required that the government present to the Secretary of State a prima facie case of the alleged terrorist’s involvement in a scheduled offense related to terrorism, as well as an affirmation of the ongoing danger to the community if the alleged terrorist remained out of state custody. However, the evidence presented to the Secretary of State was not made available to the alleged terrorist, nor was there an opportunity for the alleged terrorist to challenge his detention immediately. Although these procedures represented a departure from the due process guarantees mandated by the European Convention on Human Rights and Fundamental Freedoms, the United Kingdom made a choice to derogate from its obligations based on the purported existence of a public emergency.

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146 E.g., Replacement Arrangements for the Diplock Court System, Northern Ireland Office, at (August 2006).
147 U.K. government officials acknowledge that the current limited use of non-jury trials may be considered by some to be “too close” to the Diplock Courts model. Independent Monitoring Commission Report, supra note ____, at ¶ 5.7.
148 Diplock Report, supra note ____, at ¶(e); Northern Ireland (Emergency Provisions) Act, 1973 (c. 53) (England), §10 (schedule 1).
150 See Gardiner Report, supra note ____, at 38.
When a prima facie case was established, an interim custody order would issue from the Secretary of State, thereby permitting the government to detain an alleged terrorist for up to twenty-eight days. After twenty-eight days, the government was obligated to release the alleged terrorist unless the Royal Ulster Constabulary chose to refer the matter to a Commissioner for “determination” as to the fate of the suspect.

Once the referral was made, the suspect could be held indefinitely pending determination; during the 1970s, this indefinite detention often lasted several months. The determination process, however, contained some elements of the adversarial process intended to protect the rights of the accused: the suspect had the right to notice of the terrorist acts of which he was accused and was provided counsel at no expense.

With respect to these protections, the preventive detention program under the Emergency Provisions Act of 1973 represents a greater protection of civil liberties and individual rights than the Combatant Status Review Tribunals (CSRTs) established after the U.S. Supreme Court’s decision in Rasul v. Bush. The CSRT structure, established by the Department of Defense within ten days of the Rasul decision, contains a mixed bag of procedural

(continued…)

suspects for four days and six hours without access to a judge was unacceptable under the European Convention on Human Rights and Fundamental Freedoms); see also Fionnuala Ni Aolain, The Fortification of an Emergency Regime, 59 Alb. L. Rev. 1353, 1365-66 (1996) (noting the repeated derogation of the United Kingdom from the European Convention on Human Rights and Fundamental Freedoms with regard to the detention and trial of prisoners in Northern Ireland).

156 Gardiner Report, supra note 154, at 39.
158 See Memorandum from Deputy Secretary of Defense Paul Wolfowitz to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal, (…continued)
protections. The CSRT Order granted detainees the right to be notified in advance of their detention hearing of the basis under which they have been designated an “enemy combatant,” but did not designate how far in advance such notice must be given.\(^{159}\)

The CSRT Order furthermore offered detainees the right to have “personal representative” at the detention hearing,\(^{160}\) but unlike the internment procedures under the Emergency Procedures Act of 1973,\(^{161}\) the CSRT personal representative was a military officer who was not necessarily a lawyer.\(^{162}\)

In other respects, however, the Northern Ireland internment determination proceedings of the 1970s and CSRT hearings contained similar levels of procedural protection to detainees: hearsay was allowed in both venues,\(^{163}\) the admissibility of the accused statements was broader than it would have been within the ordinary criminal justice system,\(^{164}\) and both systems shifted the

\(^{159}\) See CSRT Order, supra note ___, at ¶ b., g.(1), g.(6).
\(^{160}\) See CSRT Order, supra note ___, at ¶ c., g.(4).
\(^{161}\) Gardiner Report, supra note ___, at 39.
\(^{162}\) See CSRT Order, supra note ___, at ¶ c., g.(4).
\(^{163}\) See Gardiner Report, supra note ___, at 40 (allowing for hearsay evidence to be admitted into the detention proceedings and denying the accused access to the names and testimony of witnesses who worked for the government in an intelligence-related capacity); CSRT Order, supra note ___, at ¶ g.(7), g.(8), g.(9). The CSRT Order specifies that “[t]he Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful….It may consider hearsay evidence, taking into account the reliability of such information in the circumstances.” Id. at ¶ g.(9).
\(^{164}\) Whereas British common law traditionally excluded all statements which were the result of threats or oppressive government conduct, see, e.g., R. v. Priestly, [1966] 50 Crim. App. R. 183, under the determination hearing system, detainees could have their own statements excluded only if they could show that the statements were given when the detainee was subject to torture or inhumane and degrading treatment. See Northern Ireland (Emergency Provisions) Act, 1973 (c. 53) (England), §6(2). Similarly, the CSRT Order does (…continued)
burden of proof squarely to the defendant.\textsuperscript{165} Taken as a whole, the procedural protections offered to a defendant under both the Northern Ireland internment determination review system and the U.S. CSRT system were extremely limited and designed with a focus on ensuring a high conviction rate, not on the protection of the adversarial process or the prioritization of civil liberties and individual fairness.

The extraordinary measures of creating an internment program in Northern Ireland and reshaping the criminal justice system specifically for terrorist suspects were taken to preserve national security. In hindsight, however, it appears that the cost of such a program—in terms of both the individual costs to those detained\textsuperscript{166} and the larger societal cost of fostering distrust and resentment among the targeted population—may have outweighed the benefits. Subsequent investigations prove what many believed to be true at the time—that the Catholic population in Northern Ireland was specifically targeted for arrest and detention under the emergency legislation.\textsuperscript{167}

\textsuperscript{165} See Northern Ireland (Emergency Provisions) Act, 1973 (c. 53) (England), §7; CSRT Order, supra note ___, at ¶ g.(9).

\textsuperscript{166} The internment program prompted the hunger strike by Catholic Nationalist prisoners in 1981, which in turn focused international attention and sympathy on the Nationalists. The strike is also credited with assisting the April 1981 parliamentary election of Bobby Sands, who was at the time imprisoned in the Maze Prison and on hunger strike himself. Sands, along with nine other prisoners who had been fasting for up to 73 days, died during the 1981 strike. The strike is credited with the development and influence of Sinn Fein, the political arm of the Irish Republican Army. See The Hunger Strike of 1981, CAIN Web Service, available at http://cain.ulst.ac.uk/events/hstrike/hstrike.htm (visited February 15, 2010).

\textsuperscript{167} Records of the internments in the early 1970s reflect that of the 1,981 people detained without charge or trial, 1,874 were Catholic Nationalists, supportive of the independence of Northern Ireland, and only 107 were Protestant Loyalists, (…continued)
Military sources reported that the internment program actually led to significant increases in political violence. The separatist Irish Republican Army\textsuperscript{168} was able to use the selective internment of Catholics as an effective recruiting tool, and the Catholic Nationalist community in Northern Ireland became less moderate and more polarized against the Protestant government.\textsuperscript{169} Furthermore, the internment program caused political parties in Northern Ireland to refuse to become involved in negotiations with the British government, thereby allowing the continued radicalization of the Catholic population in Northern Ireland,\textsuperscript{170} and reinforcing the loss of reputation of the British government regarding matters of justice in the criminal justice system and adherence to the higher principles of the rule of law.\textsuperscript{171}

Further fueling the polarization of the Catholic communities in Northern Ireland was that the vast majority of those detained under

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(continued…)

politically aligned with the British government and the Royal Ulster Constabulary. See Internment—Summary of Main Events, CAIN Web Service, available at http://cain.ulst.ac.uk/events/intern/sum.htm (visited September 28, 2009). Although it was known that Protestant Loyalists had committed various offenses that would have qualified the perpetrators for internment, they were not arrested and detained under the same pretext or conditions as those Catholic Nationalists who committed similar acts. See id.\textsuperscript{168} The Provisional Irish Republican Army (also known as the “Irish Republican Army,” “IRA” and “PIRA”) was a paramilitary organization from the late 1960s through the late 1990s which used political violence, among other means, to attempt to free Northern Ireland from British control. See generally Kathryn Gregory, Provisional Irish Republican Army (IRA) (aka PIRA, “the provos,” Oglai\textsuperscript{h}gh na hEireann) (U.K., Separatists), Council on Foreign Relations, available at http://www.cfr.org/publication/9240/ (visited September 28, 2009).\textsuperscript{169} O’Connor & Rumann, \textit{supra} note ___, at 1679.\textsuperscript{170} O’Connor & Rumann, \textit{supra} note ___, at 1680.\textsuperscript{171} Lord Gardiner, in his 1975 report, stated the following: “Although the quasi-Judicial system of [internment determination] hearings and reviews operates with a scrupulous regard for the principles of justice, and produces just decisions in the majority of cases, it is not perceived as being just by members of the general public. Delays, the admission of hearsay evidence, the inability to cross-examine witnesses and the lowered standard of proof have provided much material for propaganda on the grounds that this is not ‘British justice’…”). See Gardiner Report, \textit{supra} note ___, at 43.
the internment program were not tried for any offense, and those convictions that did occur were largely for non-terrorist offenses.\footnote{172}{Government accounts report that over 22,000 people were detained in Northern Ireland under the Emergency Provisions Acts and the Prevention of Terrorism Acts that were in effect between the early 1970s and the early 2000s. Of these 22,000, fewer than two percent were charged with terrorism-related offenses, and approximately 26 percent were charged with a non-terrorism related offense. The remainder of the detainees were never charged with any offense. \textit{See} O’Connor & Rumann, \textit{supra} note ____, at 1681-83.} All of these shortcomings led the government and others to view the internment program as a failure by the mid-1970s, even among those who continued to support the use of Diplock Courts in Northern Ireland.\footnote{173}{\textit{See} Testimony of Tom Parker, Appropriations Subcommittee Hearing, \textit{supra} note ____, at 21 (noting that “the legacy of this [internment] policy was a major escalation in the level of violence across the Province and the extension of the nationalist terror campaign to the British Mainland”).}

The Diplock Report also framed its recommendations as emergency legislation that was needed on a short-term basis to deal with political violence and insurgency.\footnote{174}{Laura K. Donohue, \textit{Terrorism and Trial By Jury: The Vices and Virtues of British and American Criminal Law}, 59 Stan. L. Rev. 1321, 1326 (2007).} Although the failures of the internment system led to its relatively fast demise within a few years, the emergency measures legalizing the Diplock Courts were entrenched through the passage of additional measures for the next 30 years. Both the Diplock Courts and the internment system continue to be sources of controversy in Northern Ireland as the United Kingdom attempts a normalization process to improve security, reestablish the primacy of the rule of law and build a positive relationship between the central government and the people of Northern Ireland.\footnote{175}{\textit{See} International Monitoring Commission Report, \textit{supra} note ____, at Annex II (commenting on the rule of law being fundamental and necessary to a society attempting to combat terrorism effectively).}

\subsection*{B. Israel}

Israel has a relatively long history of using specialized courts for terrorism. After the June 1967 Six Day War, the Israel Defense
Forces created military courts in the occupied Palestinian territories of the West Bank and Gaza to try Palestinians suspected of terrorist acts against Israel. No such parallel


177 Article 66 of the Fourth Geneva Convention recognizes the right of an occupying power to bring offenders before a military court for the purpose of punishing offenses against the occupying power. See Fourth Geneva Convention, Article 66 (Aug. 12, 1949). The general requirements for such a military court are that it is properly constituted, non-political and located within the occupied territory. Id. Likewise, Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) mandates that all defendants are guaranteed a “fair and public hearing by a competent, independent and impartial tribunal established by law.” International Covenant on Civil and Political Rights, Article 14(1) (Dec. 16, 1966). The ICCPR also guarantees, among other rights, the right to a presumption of innocence, the right against self-incrimination and the right to an appeal. See ICCPR, Article 14(2), 14(3)(g), 14(5).

The scope of the jurisdiction of the military courts has been interpreted broadly by the Israeli Defense Forces. See Sharon Weill, The judicial arm of the occupation: the Israeli military courts in the occupied territories, International Review of the Red Cross, Selected Articles on International Humanitarian Law, vol. 89, no. 866, at pp. 403-404 (June 2007).

178 The military court system in Gaza was operational until August 2005, when the Israeli military completed its withdrawal from Gaza. Although the Israeli military continues to have some involvement with the operations of Gaza, it no longer administers military courts there. See Kathleen Cavanaugh, The Israeli Military Court System in the West Bank and Gaza, 12 J. Conflict & Security L. 197, 199 (2007).

179 Although the military courts are ostensibly limited to dealing with national security issues, the jurisdiction of the military courts has, in some instances, expanded such that they have tried Palestinians for offenses such as tax evasion and unauthorized construction. See Cavanaugh, supra note ___, at 206.

180 See Lisa Hajjar, Courting Conflict: The Israeli Military Court System in the West Bank and Gaza 1 (California 2005); Amos Guiora, Global Perspectives on Counterterrorism 333 (Aspen 2007). The rationale for the use of military courts to try Palestinians is that Palestinians have no sovereign nation and, therefore, have no independent justice system to adjudicate such matters. Hajjar, at 2, 27-28. The scope of the courts has shifted over the years as certain powers have been granted to the Palestinian Authority (or rolled back from the Palestinian Authority). However, the military courts have consistently been used to try (…continued)
military court system exists for Israeli citizens, who are tried exclusively within the civil court system for suspected acts of terrorism.\footnote{181}

1. Rules and Procedures

The military justice system in the occupied Palestinian territories has been structured to mirror the civilian court system in numerous respects, including the right to habeas corpus, the right of the defendant to be represented by counsel, the placement of the burden of proof on the prosecution and the right of appeal.\footnote{182} However, there are numerous areas for which, as a matter of utilitarian national security priorities and perceived need to compromise rule of law protections to satisfy those national security policies, the rules and procedures of the military court system differ significantly from that of the civilian court system under which Israeli citizens are tried. These differences can lead to starkly different treatment of defendants, particularly since the Israeli Defense Forces are vested with the sole authority to decide whether a Palestinian suspect is tried before a civilian court or a military one.\footnote{183}

For example, the civilian justice system requires that defendants are brought before a judge within 24 hours of arrest,\footnote{184} whereas under the military court system, a Palestinian detainee may be held for up to eight days before being brought before a judge.\footnote{185}

\footnote{181}{Guiora, supra note ___, at 332 n. 55.}
\footnote{182}{Guiora, supra note ___, at 332.}
\footnote{183}{See Cavanaugh, supra note ___, at 211. Although the Israeli Supreme Court, sitting as the High Court of Justice, has a broad scope of judicial review even with regard to military matters, it tends to exercise a great deal of deference to the judgment of the Israeli Defense Forces, even in the context of military trials. See, e.g., HCJ 4400/98, Barham v. Jurist Judge Lt. Col. Shefi, P. D. 52 (5) 337 (in which the High Court of Justice declined to compel military judges to hear live witnesses instead of basing their decisions on affidavits alone).}
\footnote{184}{Israeli Penal Code, §9.3.3.}
\footnote{185}{Military Order 378. This timeframe has been changed by military order from time to time. At some points, military personnel were allowed to hold arrested (…continued)
Palestinians tried by military courts are interrogated by Israel’s General Security Services and by the Israel Police under the belief that ordinary police interrogations are not adequate to deal with the potential national security threats that are at stake. During this time, the military may deny the suspect the right to see counsel—or anyone else—for up to 31 days. A military judge can extend the time frame for denial of access to counsel up to 90 days if the military affirms that the interrogation of the suspect is ongoing for that duration of time.

Interrogators are allowed to exert some physical force as part of the interrogation of the suspect. Any confessions made to General Security Services or the Israeli Police are admissible in the

suspects for eighteen days without access to a judge. See Hajjar, supra note ___, at 257.

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\textsuperscript{186} Guiora, supra note ___, at 333. In the ordinary civil courts in Israel, a suspect has the right to see counsel immediately after arrest. \textit{Id}. The duration for which a Palestinian may be held in pretrial detention without access to counsel has changed numerous times since the inception of the military court system in 1967. This determination is made via military order and is reviewable by the Israeli High Court of Justice. See Hajjar, supra note ___, at 258 (noting that in April 2002, the Israeli Defense Forces issued Military Order 1500, which instituted a blanket prohibition against attorney-client meetings for eighteen days after arrest; a petition was submitted to the High Court of Justice for review of the Order. This prompted Military Order 1505 in July 2002, which changed the duration of denial of attorney contact to twelve days).

\textsuperscript{187} See Hajjar, supra note ___, at 257.

\textsuperscript{188} The authority of the General Security Service to employ certain interrogation techniques was examined by the Israeli Commission of Inquiry, which undertakes investigations of government actions, and was convened under the authority of the Commission of Inquiry Statute (1968). The Commission concluded in 1995 that the General Security Service had the authority to interrogate suspects using some physical techniques, included harsh shaking which, in one instance, led to the death of the detainee; prolonged detention in stress positions; exposure to extreme temperatures; and covering the detainee’s head with a vomit-covered hood. See H.C. 5100/94, \textit{Public Comm. Against Torture in Isr. v. Government of Israel}, 53(4) P.D. 817, ¶¶ 8-13 (1999).

The treatment of Palestinians during interrogation has been criticized harshly by some international observers. See, \textit{e.g.}, Human Rights Watch, \textit{Israel’s Interrogation of Palestinians from the Occupied Territories} (1994) (describing the interrogation of Palestinians by Israeli security forces as “torture,” and concluding that the use of evidence from such interrogations compromises the legitimacy of the military court system).
military court.\textsuperscript{189} The defendant has the right to an \textit{in camera} hearing before the military judge to challenge the admissibility of the confession, although this is not often used by defense counsel.\textsuperscript{190}

Military judges and prosecutors are recommended by the Israeli Defense Forces’ Military Advocate General and are military personnel appointed by the military commanders of the West Bank and Gaza, whereas defense attorneys are almost always civilians.\textsuperscript{191}

Many fundamental procedural protections remain in the military court system: the trials are governed by the same Israeli Rules of Criminal Procedure that apply to civilian courts.\textsuperscript{192} The rules of evidence are drawn from the Military Justice Law, which also governs Israeli courts-martial proceedings.\textsuperscript{193} Defendants are considered innocent until proven guilty.\textsuperscript{194} Secret information cannot be submitted to the court to bolster evidence toward a conviction,\textsuperscript{195} although secret evidence can be used to extend the period of pretrial detention and to bring initial charges against a defendant.\textsuperscript{196} Both the defendant and the prosecution retain a

\begin{footnotesize}
\begin{enumerate}
\item[189] Guiora, \textit{supra} note \textsuperscript{___}, at 333.
\item[190] Because an allegation that a confession is coerced often turns on the credibility of defendants versus that of the military interrogators, there is some perception among defense counsel that a challenge to the admissibility of a confession will, in most cases, be unsuccessful. \textit{See} Hajjar, \textit{supra} note \textsuperscript{___}, at 109.
\item[191] \textit{See} Hajjar, \textit{supra} note \textsuperscript{___}, at 253 (noting that military judges are required to have reached a certain rank prior to appointment; a President of a military court must have achieved the rank of lieutenant colonel or higher, and other judges must have achieved the rank of major or higher); \textit{see also} Guiora, \textit{supra} note \textsuperscript{___}, at 333 (same).
\item[192] Guiora, \textit{supra} note \textsuperscript{___}, at 333.
\item[194] Guiora, \textit{supra} note \textsuperscript{___}, at 335.
\item[195] Guiora, \textit{supra} note \textsuperscript{___}, at 335. This protection is akin to the Classified Information Procedures Act (CIPA) in the United States, which sets forth a framework to deal with classified government information in the context of a prosecution. \textit{See} Classified Information Procedures Act, 18 U.S.C. App. III. Sections 1-16 (1980).
\item[196] \textit{See} Hajjar, \textit{supra} note \textsuperscript{___}, at 110.
\end{enumerate}
\end{footnotesize}
limited right to appeal from the military court, the appeal to be heard by the Military Court of Appeals.

Palestinians also retain the right to challenge military procedures in the civilian court system via a petition to the Israeli Supreme Court sitting as the High Court of Justice. These matters are justiciable so long as they turn on a challenge to particular acts, and not a challenge to overarching national security or military policy. Although the High Court of Justice tends to be extremely deferential to the decisions made by the Israeli Defense Forces, the High Court of Justice does occasionally modify the procedures of the military court system to increase the protections for Palestinians. Further, the knowledge that each action taken

197 For trials of serious crimes, the right of appeal is always guaranteed. For minor crimes, appellate review is discretionary. See Hajjar, supra note ___, at 255. Additionally, the military commander for the region also has the right to reduce or commute the sentence of a convict of the military court. Id.
198 Guiora, supra note ___, at 333. Cases may be appealed from the military appeals court to the Israeli Supreme Court sitting as the High Court of Justice as well. See, e.g., Ajuri v. Israeli Defense Forces Commander in the West Bank, 7015/02 (reviewing the military decision to reassign family members of Palestinians suspected of committing terrorist acts against Israel).
199 See Hajjar, supra note ___, at 57.
200 Aharon Barak, Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 Harv. L. Rev. 16, 153 (2002) (noting that any complaint against the executive branch and its actions is considered justiciable by the Israeli Supreme Court, regardless of the standing of the complainant); see also Stephen J. Schulhofer, Checks and Balances in Wartime: American, British and Israeli Experiences, 102 Mich. L. Rev. 1906, 1923 (2004) (noting that the Israeli Supreme Court dismantled various doctrinal barriers to judicial review, such as standing and justiciability, in the 1990s). Schulhofer also notes that Israeli government and military leaders seem to accept the judicial safeguards that have been put into place to modify the conduct of the administration. Id. at 1931.
201 See, e.g., Public Committee Against Torture in Israel v. Government of Israel, H.C.J. 769/02 (2005), at ¶ 8, 51, in which the High Court of Justice found that a suit which challenged particular military air strikes was justiciable because the suit did not implicate political or military policies per se; the suit did not question the practice of targeted strikes generally, so much as the effect of the specific military strikes on individual civilians. Id.
202 See, e.g., Marab v. The Commander of IDF Forces in the West Bank, HCJ 3239/02 (July 28, 2002).
203 E.g., Marab v. The Commander of IDF Forces in the West Bank, HCJ 3239/02, at ¶ 26 (July 28, 2002) (holding that the duration of time for which a (…continued)
by the Israeli military may be taken up in the High Court of Justice in itself provides a deterrent to overreaching by the military courts or by military officers.\textsuperscript{204}

2. Benefits and Costs Associated with the Israeli Military Court System

From the utilitarian and national security-oriented perspective of the Israeli military, the specialized court system for terrorism trials is a key element in maintaining security and order in the West Bank and Gaza.\textsuperscript{205} Proponents of the military court model cite the fact that Israel has been in a state of war since 1948 and that national security must, in some respects, be the first imperative of the Israeli government. Accordingly, supporters argue that the differentiated procedures and protections of the military court model are necessary accommodations made to ensure national security.\textsuperscript{206}

The military has arrested hundreds of thousands of Palestinians since 1967; of those, some have been released, some have been placed in indefinite administrative detention, and some have been charged in military courts with crimes against Israel and/or Israeli citizens. Of those charged, ninety-five percent have been convicted or have pled guilty to charges.\textsuperscript{207} This high conviction rate has been interpreted in two ways: Israeli government argues that the military is effectively policing regions with high crime and high terrorism incidence rates; many Palestinians argue that the military court system is a vehicle for legal repression.\textsuperscript{208}

\hfill (continued…)

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Palestinian may be held in detention without access to a lawyer must be shortened in order to comport with basic due process principles).\textsuperscript{204} Amos Guiora, Legislative and Policy Responses to Terrorism, A Global Perspective, 7 San Diego Int’l L.J. 125, 144 (2005) (hereinafter “Guiora Global Perspective”).

\textsuperscript{205} Hajjar, supra note ___, at 3, 4.

\textsuperscript{206} Hajjar, supra note ___, at 32.

\textsuperscript{207} Hajjar, supra note ___, at 3.

\textsuperscript{208} Hajjar, supra note ___, at 3.
Critics of the military court structure raise numerous rule of law concerns that render the military court model fundamentally unfair and repressive. First, the military courts have differentiated procedures and diminished protections for defendants compared to the civilian court system. These structural differences alone have created skepticism as to the legitimacy of the military courts.

Second, critics consider the legal foundation for the military courts to be problematic. Although the military courts comply with domestic law and the edicts of the Israeli courts, critics question whether the military court system violates customary international law by sidestepping the protections of the Fourth Geneva Convention. The Israeli government asserts that it is not bound by the rules set forth in the Fourth Geneva Convention governing hostile occupation, but maintains that it treats Palestinians humanely as a matter of policy. In addition to not perceiving customary international law as barring the use of military courts for certain sectors of the population, the rationale for the military courts is bolstered by invocation of the British Defence (Emergency) Regulations, a relic of British colonial rule in Israel.

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209 Hajjar, supra note __, at 5.
210 Hajjar, supra note __, at 206.
211 For example, the Fourth Geneva Convention offers certain protections to detainees in a conflict that, like the conflict between Israel and Palestinians, is non-international in nature. See Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 3. The Fourth Geneva Convention protects detainees against differentiated treatment based on religion or faith. See id. at Art. 3(1). Detainees are also protected against violence against their person, as well as humiliating and degrading treatment. See id. at Art. 3(1)(a), (c).
212 See M. Shamgar, The Observance of International Law in the Administered Territories, 1 Isr. YBHR 262 (1971) (explaining the lack of international law jurisdiction over the West Bank and Gaza); see also Cavanaugh, supra note __, at 203-04.
213 See Cavanaugh, supra note __, at 204. In this respect, the Israeli stance mirrors that of the George W. Bush administration, which argued that detainees in the so-called “war on terror” were not entitled to the protections of the Geneva Conventions, but that the United States, as a matter of policy, would treat detainees humanely. See Military Order of November 13, 2001.
and the Palestinian territories, whose applicability is now limited to Palestinians but not Israelis.\textsuperscript{214}

Third, the high conviction rate in military courts, coupled with the fact that many of the defendants are teenagers and young adults, has created the impression of inevitable injustice against Palestinian defendants that polarizes the Palestinian population.\textsuperscript{215} Even staunch allies of Israel, such as the United States, have noted that ill treatment of Palestinians within the military court system has created distrust in the legitimacy of the system.\textsuperscript{216} This polarization has manifested itself in the radicalizing of younger Palestinians, many of whom believe they have nothing to lose by committing violence against Israel.\textsuperscript{217}

Fourth, critics of the military courts argue that the rules and procedures, as actually implemented, fall far short of ensuring that defendants’ rights are adequately protected. A 2007 study of over 800 military court cases concluded that in the areas of preserving the presumption of innocence, the right to a public trial, the right to access defense counsel and numerous other areas, the actual operation of the Israeli military courts sometimes fails to comply with its own procedures, as well as under Israel’s international law

\textsuperscript{214} British Defence (Emergency) Regulations (1945). This regulation was withdrawn by the British government prior to the transfer of power to the Israeli state, but it is unclear as to whether the withdrawal was effective with regard to the Palestinian territories. \textit{Hajjar, supra} note ____, at 60.

\textsuperscript{215} \textit{Hajjar, supra} note ____, at 207.

\textsuperscript{216} \textit{See} United States State Department, 2003 \textit{Country Reports on Human Rights Practices, Israel and the Occupied Territories}, Feb. 25, 2004, at Occupied Territories, Respect for Human Rights, §1(e) (citing delays in trials, lack of travel permission for defense witnesses, lack of adequate language interpretation, coercion of confessions and poor arrangements for attorney-client meetings as serious problems that undermine the efficacy of the Israeli military court system).

obligations. Other courts outside of Israel have also concluded that military courts struggle with the international law requirements of impartiality and due process, and that, therefore, the rule of law is almost always compromised when military courts are used to try civilians.

C. India

India has been coping with serious national security concerns, both internal and external, for the last 60 years. By some accounts, India has faced the highest number of terrorist acts in recent years of any nation. In response to internal and external threats of terrorism that have been present since Indian independence, the central government of India and the parliament have enacted a number of statutes which authorize preventive detention and empower the convening of specialized terrorism courts.

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219 See Incal v. Turkey, European Court of Human Rights (41/1997/825/1031), at ¶¶ 68-73 (June 9, 1998) (noting that military judges are often unable to act with impartiality toward a defendant within the context of a military court).
220 See id.; see also Cavanaugh, supra note ___, at 218-219.
221 See Anil Kalhan, et al., Colonial Continuities: Human Rights, Terrorism and Security Laws in India, 20 Colum. J. of Asian L., 1, 99 (Fall 2006); K.R. Gupta, ed., Anti-Terrorism Laws: India, the United States, the United Kingdom and Israel, at 1 (Atlantic 2002).
222 E.g., Arun Venugopal, India Worst Hit by Terrorism in 2004, India Abroad, Aug. 19, 2005 at A14.
223 The central government of India has the responsibility to develop laws and policies to preserve the national security of India. India Const., 7th sched., List I (Union List), §§ 1-2, 2A, List III (Concurrent List), §§ 1-2.
224 Under Article 22 of the Indian Constitution, those arrested must be provided the basis for arrest “as soon as may be” and produced before a magistrate within 24 hours. However, Article 22(3) of the Constitution allows the central and state governments to enact preventive detention laws during non-emergency times and contains a carve-out such that a person arrested or detained under preventive detention laws need not be brought before a magistrate before 24 hours, nor does the detainee have the right to counsel or to be informed of grounds for arrest.
225 For example, the Defence of India Act of 1962 authorized the central and state governments to broaden their use of preventative detention beyond (…continued)
The stated impetus for the creation of specialized terrorism courts is to expedite the prosecution of alleged terrorists—not a small concern in India, where the lag time from arraignment to prosecution ranges from many months to several years—and to create a trial system that offers some due process protections but is structured to result in a higher conviction rate than the ordinary court system would afford. In reality, these specialized courts have resulted in a low conviction rate and often appeared to target political enemies and particular minority populations within India for harsher treatment in courts that affords them fewer procedural and substantive protections.

1. History of Specialized Courts

(continued…)

ordinary laws as a means to quell potential uprisings against the government and in response to hostilities in the Jammu and Kashmir region. See Kalhan, supra note __, at 132-33 (citing Venkat Iyer, States of Emergency: The Indian Experience 109 (2000)).

227 Statutes are not the only mechanism by which the central government has attempted to deal with purported national security threats. During the era of Emergency Rule under Prime Minister Indira Gandhi, which lasted from 1975 to 1977, the Indian Constitution was suspended and Gandhi ruled by decree. See Granville Austin, Working a Democratic Constitution: A History of the Indian Experience 295-97 (Oxford University Press, paperback edition 2003).


229 Sachin Mehta, Repeal of POTA Justified, Legal Services India, available at http://www.legalservicesindia.com/articles/pota.htm (visited June 24, 2009) (noting that authorities had achieved only a one-percent conviction rate under TADA, despite the fact that TADA granted prosecutors the ability to use a broader range of evidence than was admissible in the regular criminal justice system).

229 Under TADA, evidence indicated that Muslims were arrested en masse whenever unrest occurred, whereas violence committed by Hindus went largely unacknowledged. See Jayanth K. Krishnan, India’s “Patriot Act”: POTA and the Impact on Civil Liberties in the World’s Largest Democracy, 22 Law & Ineq. J. 265, 270-71, 275 (2004).
In 1967, the government enacted the Unlawful Activities (Prevention) Act (UAPA), which served as a catchall legislation by which terrorist acts, among other crimes, could be prosecuted. The UAPA authorized the central government to set up tribunals to determine whether particular organizations posed a threat to the safety of India, and would, therefore, be considered unlawful associations. The UAPA made membership in unlawful associations a prosecutable offense and immunized the government against claims of wrongful conduct, so long as the government acted in good faith in its execution of UAPA. UAPA, however, did not set up a system of separate courts to deal with prosecutions; instead, prosecutors utilized the flexibility of the criminalized acts under UAPA to try suspects within the standard criminal justice system.

In 1985, the government enacted the Terrorist and Disruptive Activities (Prevention) Act (TADA). It was India’s first nationwide legislation specifically crafted to address the investigation and prosecution of terrorism. The motivation for the law’s passage was the escalating threat of violence in Punjab and the concern that existing legislation, such as the UAPA,

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231 UAPA, at § 5.
232 Id. at §§ 10-14.
233 Id. at § 18.
235 TADA was preceded by the Terrorist Affected Areas (Special Courts) Act 1984, Act No. 61 of 1984 (enacted Aug. 31, 1984). This Act created Special Courts for terrorism offenses with many of the same definitions, procedures and processes that were embodied in TADA. See Terrorist Affected Areas (Special Courts) Act, at ¶ 2 (Definitions), 4 (Establishment of Special Courts), 5 (Composition and appointment of Judges of Special Courts), 10 (Procedures and powers of Special Courts), 14 (Appeal). However, the Terrorist Affected Areas (Special Courts) Act applied to all regions of India except Jammu and Kashmir. See Terrorist Affected Areas (Special Courts) Act, at ¶1. Although TADA was initially enacted with the same carve-out for Jammu and Kashmir, it was quickly amended to apply to all regions of India. See Kartar Singh v. State of Punjab, (1994) 2 S.C.R. 375, at ¶8.
granted insufficient powers to the government to combat and prosecute terrorism.236

Under TADA, the government was granted the ability to convene specialized courts (“Designated Courts”) to try terrorism cases.237 Numerous aspects of the specialized court system significantly undercut rights afforded to defendants within the regular criminal justice process. For example, on the question of jurisdiction, the central government or state government had the discretion to decide whether a case was referred to a Designated Court or to the standard criminal justice system.238 If any question arose as to the appropriateness of assigning a case to be tried by the Designated Court, the decision would be referred to the central government, whose decision on the matter was final.239

For crimes for which the prison sentence is three years or fewer, the Designated Court judge had the right to abrogate the usual criminal procedural process and hold an in camera summary trial at his or her discretion.240 Most drastically, TADA shifted the burden of proof onto defendants for various crimes including the possession of firearms and the financing of unlawful associations.241 TADA expired in 1995242 amid heavy criticism that the government had misused the legislation to target racial and

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236 The deficiencies in India’s counterterrorism programs were highlighted by the 1984 assassination of Prime Minister Indira Gandhi. See Jayanth K. Krishnan, India’s “Patriot Act”: POTIA and the Impact on Civil Liberties in the World’s Largest Democracy, 22 Law & Ineq. J. 265, 267 (2004).
238 Id. at § 9(1), (2).
239 Id. at § 9(3).
240 Id. at § 14(2).
241 Id. at § 21.
242 TADA was enacted in 1985 with a two-year sunset provision. However, its duration was extended by the Terrorist and Disruptive Activities (Prevention) Act, 1987, Act No. 28 of 1987. The 1987 version of TADA was substantially identical to the original version from 1985, and was renewed repeatedly until it was allowed to expire in 1995.
religious minorities and that it had not achieved the desired effect of stemming legitimately dangerous activity.

In the wake of the September 11, 2001 terrorist attacks and attacks on Indian government buildings soon afterward, India expanded its antiterrorism laws to grant additional authority and power to the central government to maintain national security. The Indian Parliament enacted the Prevention of Terrorism Act, 2002 (POTA) which mirrored TADA provisions in numerous ways. The government, in conducting antiterrorist activities and in case of a self-determined emergency, was authorized to set aside ordinary legal protections in numerous respects, including criminalizing association or communication—with terrorist suspects, broadening the right to wiretap any person within India without authorization, extending the duration and scope of preventative detention measures, allowing

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244 *See* Mehta, *supra* note ___.

245 An additional impetus for the passage of POTA was United Nations Security Council Resolution 1373, a post-September 11 resolution which required all governments to enact specific anti-terrorism legislation (Sept. 28, 2001).


248 *Id.* at §3(5).

249 *Id.* at § 43. The admissibility of evidence garnered in this manner is established in § 45.

250 *Id.* at §§ 48(2), 49.
confessions to police officers to be admitted as substantive evidence,\textsuperscript{251} and denying arrested suspects access to counsel.\textsuperscript{252}

POTA authorized specialized terrorism courts ("Special Courts") and set up specific guidelines for the management of such cases.\textsuperscript{253} The Special Courts system mirrored TADA’s limitation of rights for defendants, including the discretion of the central government or state government to decide whether a case was referred to a Special Court or to the standard criminal justice system.\textsuperscript{254} Likewise, the Special Court judge could hold a summary trial at his or her discretion for offenses carrying a sentence of fewer than three years.\textsuperscript{255}

One notable difference between TADA and POTA was the burden-shifting provisions in POTA. The right of the Special Court to take judicial notice that the offense had occurred if so requested by the government\textsuperscript{256}—a feature that essentially shifted the burden of proof can shifted from the prosecution to the defendant\textsuperscript{257}—was not limited to only firearms and financing offenses, as they were under TADA. Under POTA, the burden of proof could be shifted for any offense under the statute.\textsuperscript{258} Courts also had the right to proceed with a trial in the absence of the defendant, so long as the right of the defendant to recall witnesses for later cross-examination was preserved.\textsuperscript{259}

\textsuperscript{251} Id. at § 32. The admissibility of confessions is a reversal of the pre-POTA rule that confessions to police officers are generally inadmissible. \textit{See} Kalhan, \textit{supra} note \underline{___}, at 161.
\textsuperscript{252} Id. at § 52.
\textsuperscript{253} Id., Chapter IV.
\textsuperscript{254} Id. at § 23(1). As with TADA, the central government made the final decision on whether a case was appropriately tried in a Special Court. \textit{Id.} at § 23(3).
\textsuperscript{255} Id. at § 29(2).
\textsuperscript{256} Id. at § 29(1).
\textsuperscript{258} Id. at § 29(1).
\textsuperscript{259} POTA, at § 29(5).
Despite curtailing numerous procedural rights, POTA, like TADA, preserved the right of appeal to the appropriate state high court or Indian Supreme Court for defendants convicted in a Special Court.\textsuperscript{260} Additionally, defendants maintained the right to cross-examine witnesses and to have limited access to relevant evidence.\textsuperscript{261}

POTA was met with a great deal of opposition from human rights advocates and opposition political parties based on fears of misuse and abuse in its application.\textsuperscript{262} In fact, in the years that it was in effect, POTA appeared to be used selectively to target particular populations.\textsuperscript{263} The then-governing political party, the Bharatiya Janata Party (BJP), a party that rose to parliamentary power on an explicitly Hindu nationalist platform, used POTA to criminalize membership in 32 organizations that the government designated as terrorist groups, most of them Muslim.\textsuperscript{264} Evidence from the state of Gujarat suggests that arrests under POTA may also have been religiously selective, since almost all of the 280 arrests were of Muslims.\textsuperscript{265} In contrast, Hindus who were arrested for suspected involvement in communal violence in Gujarat in 2002 were not tried in Special Courts, if they were tried at all.\textsuperscript{266} Further, critics

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\textsuperscript{260} POTA, at § 34. Although this provision preserved a right of appeal to a high court, it eliminated the right of direct appeal through the ordinary judicial processes to attempt to streamline the appeals process.

\textsuperscript{261} Id. at § 29(2), (5).


\textsuperscript{263} Human Rights Watch, World Report 2003, \textit{supra }note ___, at 241.

\textsuperscript{264} Ramachandran, \textit{supra }note ___, \textit{Guioa Global Perspective, supra }note ___, at 171 (noting that POTA was described by some as a “terrorist law that would be used to terrorise minorities”).

\textsuperscript{265} Ramachandran, \textit{supra }note ___; Mehta, \textit{supra }note ___.

\textsuperscript{266} In February 2002, communal violence broke out in the context of tension over the location of a proposed Hindu temple on the site of a mosque that was destroyed in 1992. After 58 Hindu activists were killed in a train fire, the retaliatory violence led to the killings of over 2,000 Muslims. Human Rights Watch, World Report 2003, \textit{supra }note ___, at 236-37. Most of the investigations of the retaliatory violence were not resulting in arrests or trials of suspects. \textit{Id. }at 238. At the time of this violence, a temporary Prevention of Terrorism Ordinance—containing virtually the same provisions as POTA, was in effect. \textit{See Prevention of Terrorism Ordinance, 2001, No. 9 of 2001 (enacted (\ldots\text{continued})
argued that the insufficient procedural protections in Special Courts were further weakened by judges who often erred on the side of the prosecutors under the rationale that they were acting as a government safeguard against defendants who were likely terrorist threats.267

POTA became a driving issue in the 2004 parliamentary election. The Congress party, then a minority party in parliament, ran on the promise to repeal POTA because the law enabled abuses of human rights and civil liberties.268 When the Congress Party won the 2004 parliamentary elections, POTA was repealed almost immediately.269 However, many key provisions of POTA were immediately incorporated into the UAPA via amendments in order to ensure that specific antiterrorism legislation remained in effect.270 These amendments also curtailed the government’s power considerably in declining to authorize specialized courts to try terrorism suspects and by limiting the government’s ability to shift the burden of proof onto defendants.271

(continued…)


269 Prevention of Terrorism (Repeal) Act, No. 26 of 2004 (Dec. 21, 2004). People arrested under POTA continued to be held in detention after the repeal of POTA and until their status had been determined by the government or they had been charged and tried for a crime (in a specialized or ordinary court). For some detainees, this determination period lasted for two years or more beyond the repeal date of POTA. See India: Continued detention two years after the repeal of POTA, Amnesty International, AI Index: ASA 20/026/2006 (Sept. 20, 2006).


271 Unlawful Activities (Prevention) Amendment Ordinance, 2004, at §45.
Numerous major terrorist attacks occurred after the repeal of POTA, including 2006 bombings in Varanasi\(^{272}\) and Mumbai\(^{273}\) which killed at least 215 people combined, and attacks in Bengaluru,\(^{274}\) Ahmedabad\(^{275}\) and New Delhi\(^{276}\) in 2008, which killed over 80 people combined. However, none of those events prompted new legislation specifically addressing issues of terrorism; instead, the government sought flexibility within the existing criminal justice system in order to prosecute the cases more rapidly than ordinary cases.\(^{277}\)

The impetus for legislative change came after a three-day terrorist attack in Mumbai in late November 2008, in which 163 people were killed by ten gunmen who coordinated with trainers in Pakistan to carry out their attack,\(^{278}\) triggering outrage among the Indian public and a demand for stronger national security and antiterrorism measures.\(^{279}\) In response, the Lok Sabha, the lower

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house of the Indian parliament, rapidly passed two pieces of legislation: the National Investigation Agency Bill (NIA Bill) and further amendments to the UAPA.

The NIA Bill established a National Investigation Agency to coordinate national security and counterterrorism operations, but also reinstated the Special Courts that had been eliminated in the 2004 repeal of POTA. All of the provisions regarding the Special Courts, including those relating to jurisdiction, the burden of proof lying with the defendant, the right of the Special Court to use summary trials and the right of the Special Court to proceed without the defendant in attendance are identical to the language in POTA that Parliament had rejected four years earlier. In some respects the scope of the current legislation is broader than POTA since the NIA Bill covers numerous offenses that were not within the scope of POTA.

The 2008 amendments to UAPA are even stronger than the NIA Bill with regard to the powers accorded to the government in investigating and prosecuting terror-related crimes even in ordinary courts. The 2008 UAPA amendments broaden the definition of a terrorist act, expand the power of police to conduct search and seizure, extend the limits on preventive detention to 180 days without charge, limit or abolish the right

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280 National Investigation Agency Bill, 2008 (passed by the Lok Sabha on Dec. 17, 2008).
281 Unlawful Activities (Prevention) Amendment Bill, 2008 (passed by the Lok Sabha on Dec. 17, 2008).
282 NIA, at Chapter IV.
283 Id., at § 11(1), (2).
284 Id., at § 16(1).
285 Id., at § 16(2).
286 Id., at § 16(5). In a regular criminal proceeding, the accused is protected by Section 273 of the Criminal Procedural Code, which requires evidence to be taken by a court only when the accused is present.
289 UAPA 2008 Amendments, at § 43(A)-(D).
290 UAPA 2008 Amendments, at § 43(2)(a), (b).
to bail in many cases, and shift the burden of proof onto accused.

The trial of the Ajmal Kasab, the lone surviving gunman from the Mumbai 2008 attack, began in June 2009 in a special court designated for the case, and the speed of the trial is remarkable for the notoriously slow Indian judicial system. Nonetheless, serious due process concerns have surfaced with regard to this trial, such as the fact that defense counsel has been allowed only fifteen minutes per day to meet with Kasab, and that all attorney-client meetings have taken place in the presence of police and court officials. Both restrictions reflect significant shifts away from standard procedures in the ordinary criminal justice system.

Critics of the 2008 legislation argue that the bills are a repetition of previous missteps in TADA and POTA. They note that the 2008 UAPA amendments reflect a convergence of the draconian counterterrorism policies of TADA and POTA with ordinary criminal procedure, creating a framework by which innocent citizens could be arrested, held in preventive detention, tried in a nonpublic Special Court and be convicted solely because they were unable to overcome a presumption of guilt. Critics also object to the lack of external checks and oversight on the implementation of the legislation: TADA and POTA both contained sunset

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291 UAPA 2008 Amendments, at § 43(D).
292 UAPA 2008 Amendments, at § 43(E).
295 Id.
297 Id.; Pande, supra note ____.
provisions, whereas the 2008 UAPA amendments do not. Further, the 2008 UAPA amendments do not require any meaningful judicial scrutiny of the prosecutor and the central government’s decision as to whether detainees will be prosecuted within the ordinary court system or in a Special Court.298

2. Legal Treatment of Specialized Terrorism Courts

The use of these Special Courts has been upheld, with some reservations, by the Indian Supreme Court. In Kartar Singh v. State of Punjab,299 the constitutionality of TADA and similar legislation was addressed by the court.300 Specifically, the Court undertook a review of the legality of Special Courts and their procedures as articulated under TADA.301 The petitioner’s challenge to the Designated Court/Special Court system was based on Article 21 of the Indian Constitution,302 which guarantees due process,303 and the Indian Supreme Court’s decision in Maneka Gandhi v. Union of India, which interpreted Article 21 as establishing a guarantee of substantive due process.304

The Court first noted that the purpose of TADA and other similar legislation was to expedite the trial process in instances where national security concerns are implicated.305 It lauded this goal, noting that the right to a speedy trial was fundamental in limiting pretrial detention, protecting a defendant’s right to defend himself, and fulfilling societal interests in the resolution of a case.306

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298 Repeating the Mistakes of the Past, supra note ___.
300 Kartar Singh, at ¶2. TADA was challenged based on Kartar Singh, at ¶35.
301 Kartar Singh, at ¶82.
302 Article 21 reads, “No person shall be deprived of his life or personal liberty except according to procedure established by law.” Indian Const. Art. 21.
303 Kartar Singh, at ¶¶ 80-81 (noting that petitioner’s argument was that the Special Courts did not afford a fair trial based on the streamlining of procedures, the compromise of judicial independence and the presumption of guilt of the defendant).
305 Kartar Singh, at ¶82.
306 Kartar Singh, at ¶85. In doing so, the Court noted the protections of the Magna Carta, the Sixth Amendment of the U.S. Constitution and the 1974 Speedy Trial Act. Id., at ¶84.
With regard to the specialized procedures and burden-shifting in favor of the prosecution, the court upheld the constitutionality of TADA based on the limited application of the laws to suspected acts of terrorism, as well as the dire national security situation and the corresponding need for flexibility within the criminal justice system.\textsuperscript{307} The court also took note of the fact—seemingly with approval—that the provisions of TADA in question mirrored those of the Northern Ireland Emergency Provision Act of 1978, used as part of the counterterrorism effort during the Troubles.\textsuperscript{308}

The Court rejected a substantive due process argument as well, noting that the judiciary did not have the right to substitute its own judgment for that of the legislature with regard to the appropriate measures to take to fight national security threats.\textsuperscript{309}

Although their constitutionality may not be at issue after the \textit{Kartar Singh} decision, it remains unclear whether the new Special Courts under the NIA Bill can avoid the pitfalls that plagued previous iterations of the specialized terrorism courts, namely a low conviction rate, selective prosecution of particular ethnic and religious groups and a concern for serious human rights abuses. Given that the current legislation is broader and further reaching than POTA, yet has been stripped of some of POTA’s oversight of the police and prosecutors, it may be even more difficult for future Special Courts to deliver both justice and national security effectively.

III. THE U.S. SYSTEM WITHIN A COMPARATIVE CONTEXT

The current iteration of the military commission system in the United States shares many traits with specialized courts in the other nations examined here. Like the United Kingdom and India, the genesis of the current U.S. military commissions stems from a

\textsuperscript{307} \textit{Kartar Singh}, at ¶¶ 219-223.
\textsuperscript{308} \textit{Kartar Singh}, at ¶ 224.
\textsuperscript{309} \textit{Kartar Singh}, at ¶¶ 229-232 (holding that TADA and the other statutes at issue did not contravene the protections against arbitrariness embodied in Article 14 of the Indian Constitution). The court also noted that even though TADA allows for a detainee to appeal the denial of bail to the courts under limited circumstances, courts should be wary of exercising the power to accept such appeals. \textit{Id.} at ¶ 368(17).
perceived national emergency for which the traditional justice system is believed to be inadequate.\textsuperscript{310} Whereas the construction of the criminal justice system is a delicate balance among the interests of security, individual rights, and the rule of law, the specialized courts jettison many of the fundamental protections for defendants in a manner meant to increase the conviction rate and in the hopes of improving national security, at least in the short-term.\textsuperscript{311} The specialized court systems in Northern Ireland, India and the United States also suffer from a seemingly subjective set of criteria to determine whether a defendant enjoys the rights of an ordinary criminal trial, or whether he is shuttled into the specialized court system.

Like Israel, the United States predicated and justified its decision to use a military commission system instead of ordinary courts based partly on its assessment of international law. Israel’s decision to use military courts to try Palestinians for crimes against Israel and Israeli citizens is arguably sound given the fact that it is an occupying force in Palestinian territory.\textsuperscript{312} Likewise, the United States’ decision to use a military commission system is based partly on its interpretation of international legal protections that attach to various types of combatants, and its determination that the detainees in the “war on terror” do not warrant legal treatment as lawful combatants.\textsuperscript{313} However, the international legal status of the detainees or the fact of the use of a military commission is

\begin{footnotesize}
\begin{enumerate}
\item Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Military Order of Nov. 13, 2001. In this military order, President George W. Bush justified the use of military commission as follows: “Given the danger to the safety of the United States and the nature of international terrorism...it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts....Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.” \textit{Id. at} §1(f)-(g).
\item See \textit{id.}
\item See Hajjar, supra note ___, at 2, 27.
\item See Military Order of November 13, 2001.
\end{enumerate}
\end{footnotesize}
clearly does not determine what types of procedural and substantive protections are implemented in a military commission. Yet in both the Israeli and U.S. context, the government made a conscious decision to offer a lower level of protections to defendants than what is offered in ordinary criminal courts, or to citizens of the nation in question who have been accused of similar crimes.

In Northern Ireland, Israel, India and the United States, the use of specialized courts for terrorism trials is either largely or exclusively confined to a particular group of individuals whom the government (and perhaps the majority population of the nation) believes to be a national security threat. In Northern Ireland, it was overwhelmingly the Catholic Nationalists who were interned by the executive or tried in the Diplock Courts. In Israel, only Palestinians are subject to trial by military courts. In India, it is largely Muslims who are slated for trial in the Designated Courts. In the United States, defendants have historically been tried for terrorism in ordinary Article III courts; yet under the framework of the so-called “war on terror” and the current military commissions, it is only Muslim men who are not U.S. citizens who are being slated for trial in the military commissions.

There is little legal argument to be made that the disparate impact on Muslims of the government policy of trying some terrorism defendants in military commission qualifies as an equal protection violation. Yet the lack of a constitutional violation does not

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314 See discussion supra Part II.A.2.a.
315 See discussion supra Part II.B.
316 See discussion supra Part II.C.1.
317 See discussion supra Part I.E.
318 The standard for proving a selective prosecution claim under the 14th amendment is extremely high. See United States v. Armstrong, 517 U.S. 456, 457 (1996). Based on the standard in Armstrong, in order prove an equal protection violation based on selective prosecution of Muslims in a military commission, the plaintiff would have to prove intent to discriminate based on a protected category, such as religion, and also prove that similarly situated non-Muslims have been treated by the government in a different manner. Id. This is often a difficult, if not impossible, standard to fulfill. See, e.g., McCleskey v. Kemp, 481 U.S. 279 (1987).
translate into the perception of impartiality in Muslim communities, either in the United States or internationally.\textsuperscript{319}

It is this perceived lack of impartiality among the targeted communities in Northern Ireland, Israel, India and the United States that has contributed greatly to the alienation of members of these communities, often radicalizing them against the governments of these nations.\textsuperscript{320}

In all of the countries examined here, the question of whether to use a specialized terrorism court is not a matter of legality under the nation’s constitution or, arguably, under international law. Rather, the question turns on utilitarianism, national security, individual rights and the rule of law. All of the factors which differentiate the treatment of those defendants slated for trial in a specialized court contribute to the shift away from an adherence to the rule of law into a model where national security concerns are given primacy, regardless of whether a utilitarian benefit can be proven as to short-term or long-term national security gains.

\textbf{CONCLUSION}

In continuing to use specialized courts to try terrorism suspects, the United States remains in the ranks of the nations surveyed here. Like the United Kingdom, Israel and India, the United States policy appears to give primacy to national security concerns over adherence to the rule of law. Whether this choice provides a utilitarian benefit to the United States in terms of short-term and long-term national security is yet to be seen. What is already clear, however, is that the U.S. military commission system has created the perception of that the type of trial—and, therefore, the type of justice—accorded to a defendant depends not necessarily on a

\textsuperscript{319} See Office for Democratic Institutions and Human Rights, \textit{Expert Meeting on Security, Radicalization, and the Prevention of Terrorism}, ¶ 28 (July 28, 2008) \textit{available at:} www.osce.org/item/34235.html (finding that of the 25 countries listed in the United States security entry/exit registry, all but one, North Korea, were predominantly Muslim).

\textsuperscript{320} See Office for Democratic Institutions and Human Rights, \textit{Expert Meeting on Security, Radicalization, and the Prevention of Terrorism}, ¶ 28 (July 28, 2008) \textit{available at:} www.osce.org/item/34235.html (“In fact, the mere perception of profiling may be sufficient to foster mistrust of authorities and result in alienation of communities.”).
belief in the equal protection of the law for all individuals, but
more on the strength of the evidence in the possession of the
prosecution and the government’s perception of whether a
conviction can be easily guaranteed.

As the Obama administration continues to refine the military
commission system, it must bear in mind the trade-offs that are
necessarily linked with the decision to use specialized courts for
terrorism trials. The administration may ultimately decide that the
continued alienation of targeted communities and the international
perception of a second-class system of justice for certain groups of
people within the United States is a necessary price to pay for
strengthening national security through the use of military
commissions. However, like other nations that have used
specialized courts in the past or continue to do so now, the United
States must come to terms with the compromises to the rule of
law—and the political and long-term security risks that may occur
because of those compromises—concomitant with the use of
specialized courts that differ so greatly from the basic protections
of the ordinary justice system.