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## Comparative Perspectives on Specialized Trials for Terrorism

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# COMPARATIVE PERSPECTIVES ON SPECIALIZED TRIALS FOR TERRORISM

*Sudha Setty*

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## COMPARATIVE PERSPECTIVES ON SPECIALIZED TRIALS FOR TERRORISM

*Sudha Setty\**

*“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.”<sup>1</sup>*

### I. 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 while adhering to the rule of law.<sup>2</sup> Yet the United States faces a serious quandary in terms of how to prosecute suspects who have been detained at Guantanamo Bay, Cuba, that puts at risk the reputation of the United States justice system and its adherence to rule of law.<sup>3</sup>

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1. THOMAS PAINE, DISSERTATIONS ON FIRST PRINCIPLES OF GOVERNMENT (1795).

2. See President Barack Obama, Remarks by the President on National Security, Speech delivered by President Barack Obama (May 21, 2009, 10:28 AM EDT), [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-On-National-Security-5-21-09/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/) (last visited Oct. 19, 2010) [hereinafter President’s Remarks]. As the President explained:

Guantanamo set back the moral authority that is America’s strongest currency in the world. Instead of building a durable framework for the struggle against al Qaeda that drew upon our deeply held values and traditions, our government was defending positions that undermined the rule of law. . . . [We] will make our military commissions a more credible and effective means of administering justice, and I will work with Congress and members of both parties, as well as legal authorities across the political spectrum, on legislation to ensure that these commissions are fair, legitimate, and effective.

*Id.*

3. See, e.g., *Political Punch*, ABCNEWS.COM (June 9, 2009, 5:01 PM), <http://blogs.abcnews.com/politicalpunch/2009/06/todays-qs-for-os-wh-692009.html> (last visited Oct. 19, 2010) (in response to a reporter’s question regarding the credibility of the United States’ criminal justice system, White House spokesperson Robert Gibbs declines to confirm that suspects who are found “not guilty” in United States’ courts would be released). The impression that the post-September 11 military commissions were created to circumvent the rule of law and Constitution has cast doubt on the credibility of the United States as a leader on developing governmental procedures that comport with the rule of law. See, e.g., Editorial, *A Travesty of Justice*, N.Y. TIMES (Nov. 16, 2001), <http://www.nytimes.com/2001/11/16/opinion/a-travesty-of-justice.html> (last visited Oct. 9, 2010).

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 Article III courts or the military 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 whether certain groups of people are deemed more suitable than others to be tried in a specialized court.

Countries facing similar 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.<sup>4</sup> Other nations facing serious national security issues, including the United Kingdom, Israel, and India, have used specialized courts or trial procedures to prosecute some 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. As nations that share both a legal heritage and the burden of dealing with serious national security threats with the United States, their experience offers guidance in

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4. See, e.g., *Turkey: Life in Prison for 6 al-Qaida Suspects*, ASSOCIATED PRESS (June 10, 2009, 5:08 AM), <http://www.signonsandiego.com/news/2009/Jun/10/eu-turkey-al-qaida-trial-061009/> (last visited Oct. 19, 2010) (a Turkish appellate court approved of life imprisonment terms for six suspects and lesser sentences for thirty-three other suspects of the 2003 fatal bombings of synagogues, a bank and a British consular office); Nicholas Kulish, *Suspects Plan Guilty Pleas in Terror Case in Germany*, N.Y. TIMES (June 9, 2009), [http://www.nytimes.com/2009/06/10/world/europe/10germany.html?\\_r=1&src=tw&tw=nytimes](http://www.nytimes.com/2009/06/10/world/europe/10germany.html?_r=1&src=tw&tw=nytimes) (last visited Oct. 19, 2010) (four suspects, accused of membership in terrorist organizations and of planning bombings in Germany, plan to plead guilty to charges that would bring a prison sentence of twenty to thirty years); *14 Terror Suspects to Go Straight to Trial*, THE CANADIAN PRESS (Sept. 24, 2007, 4:45 PM ET), [http://www.ctv.ca/CTVNews/Canada/20070924/terror\\_trial\\_070924/](http://www.ctv.ca/CTVNews/Canada/20070924/terror_trial_070924/) (last visited Oct. 19, 2010) (moving forward with a trial for fourteen suspects accused of plotting to bomb the Canadian Parliament and assassinate Prime Minister Stephen Harper); Duncan Gardham, *Key al-Qaeda Figure to be Sentenced*, THE DAILY TELEGRAPH (Dec. 18, 2008, 10:44 PM GMT), <http://www.telegraph.co.uk/news/uknews/3835870/Key-al-Qaeda-figure-to-be-sentenced.html> (last visited Oct. 19, 2010) (the United Kingdom's Manchester Crown Court convicted an al-Qaeda suspect of "directing the activities of an organisation to commit acts of terrorism," among other charges); Saurav Shukla, *India Files Charges Against Mumbai Terrorist Suspects*, TOP NEWS LAW (Feb. 25, 2009, 15:28), <http://www.topnews.in/law/india-files-charges-against-mumbai-terrorist-suspects> (last visited Oct. 19, 2010) (reporting on the preparations in India for the criminal trial of a suspect in the November 2008 Mumbai hotel bombings); Al Goodman, *Court Convicts "Spanish Taliban"*, CNN.COM (Oct. 5, 2005, 14:03 GMT), <http://edition.cnn.com/2005/WORLD/europe/10/05/spain.terror.conviction/index.html> (last visited Oct. 19, 2010) (conviction and prison sentence of six years for Spanish member of al-Qaeda); *Dutch Terror Suspects Go On Trial*, BBC NEWS (Oct. 16, 2006, 14:02 GMT), <http://news.bbc.co.uk/2/hi/europe/6054324.stm> (last visited Oct. 19, 2010) (describing how those convicted in Dutch courts for membership in terrorist organizations have been sentenced to fifteen years in prison).

Of course, the decision of other nations to use an ordinary criminal court for the prosecution of terrorism suspects does not mean that the due process protections that are used in those nations are comparable to what is constitutionally mandated in the United States. See, e.g., Bret Stephens, *Who Needs Jacques Bauer?*, WALL ST. J. (Feb. 25, 2007), <http://www.opinionjournal.com/wsj/?id=110009712> (last visited Oct. 19, 2010) (noting that French law allows counterterrorism officials to conduct surveillance, search private property and detain suspects with greater ease than their United States counterparts because the United States Constitution offers greater individual rights with regard to these issues).

evaluating the tensions raised by the use of specialized terrorism courts and trials and insight into whether such specialized processes can realistically exist in compliance with the rule of law.

In recent years, the United States has been 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.<sup>5</sup> This engagement in comparative national security policy analysis can be fruitful only if paired with consideration of the short- and long-term efficacy of those policy choices in context, which is what this Article seeks to address.

Part I of this Article examines the Obama administration's resuscitation of military commissions in the United States. Analyzing the policy considerations of using Article III courts or regularly constituted courts martial to try suspected terrorists, this Part 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 specialized trial systems.

Part III considers how the United States recent experience with specialized courts fits into the comparative context and what lessons the country can draw from the experiences of other nations that have been grappling with similar questions of national security law and policy.

## II. 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 protections, such that it can comport with the rule of law and, importantly in terms of alienation of certain communities, is perceived to comport with the rule of law?<sup>6</sup>

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5. See, e.g., *Catching Terrorists: the British System Versus the U.S. System*, Hearing Before a Subcomm. of the Comm. on Appropriations, Sen. Hrg. 109-701, 109th Cong. 2-19 (2006) [hereinafter *Catching Terrorists*]. 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. *Id.* at 5-6 (Judge Posner's commendation 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.

*Id.* at 4 (Judge Posner's prepared statement).

6. Although definitions of the rule of law vary, bedrock principles common to most definitions include: that the law should be uniform; that the law should be known in advance; and that the application of the law should be equal to all people. See, e.g., Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHICAGO L. REV. 455, 457 (2002) (listing common elements of the rule of law); Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307 (2001) (examining the idea of the rule of law in England and in the United States).

Traditionally, the United States has used the criminal justice system and Article III courts to try accused terrorists and 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 cases in which terrorist acts are alleged.

*A. The Use of Criminal Prosecution for Terrorist Acts*

The United States has historically shied away from specialized trials for terrorist attacks. In fact, many incidents of international and domestic terrorism directly impacting the United States since the 1970s<sup>7</sup> have been dealt with using the criminal justice system. In part, this policy is intended to affirm the rule of law in the United States and to maintain the United States' 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.<sup>8</sup> This equal application of the law has also benefited the United States from a utilitarian perspective by denying anti-American groups the right to claim that the United States is singling out one particular group (whether based on nationality, religion, or other characteristic) for particularly onerous procedural burdens at trial.<sup>9</sup>

The United States' focus on the rule of law and its concomitant procedural protections<sup>10</sup> were maintained even as terrorism on United States soil became a more pressing concern following the 1993 bombing of the World Trade Center, in which six people were killed,<sup>11</sup> and the bombing of the Alfred P. Murrah Federal

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7. Philip C. Wilcox, Jr., *United States*, in *COMBATING TERRORISM: STRATEGIES OF TEN COUNTRIES* 23 (Alexander Yonah, ed., 2002).

8. 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 "we 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.

9. See 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* 3 (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").

10. Those ordinary civilian courts were not always in the United States, as allies of the United States also actively prosecuted terrorism cases in which the interests of the United States were implicated. For example, in 1985, the Achille Lauro cruise ship was hijacked and one United States citizen was killed. David Ensor, *U.S. Captures Mastermind of Achille Lauro Hijacking*, CNN.COM (Apr. 16, 2003, 5:10 EDT), <http://www.cnn.com/2003/WORLD/meast/04/15/sprj.irq.abbas.arrested/> (last visited Oct. 19, 2010). The United States was unable to conduct the prosecutions of the captured attackers because of a lack of jurisdiction, see Wilcox, *supra* note 7, at 35, but Italy convicted and imprisoned some of the hijackers through the ordinary Italian criminal justice system. Alan Cowell, *Hijacker Defends Achille Lauro Killing*, N.Y. TIMES, Nov. 14, 1988, at A3.

11. Benjamin Weiser, *Mastermind Gets Life for Bombing of World Trade Center*, N.Y. TIMES, Jan. 9, 1998, at A1. See also *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003) (affirming convictions for conspiracy to attack the World Trade Center).

Building in Oklahoma City in 1995,<sup>12</sup> in which 168 people were killed.<sup>13</sup> In both cases, the attackers were prosecuted and convicted in federal court.<sup>14</sup> Likewise, the so-called “Unabomber” case, in which Theodore Kaczynski pled guilty in 1998 to sending sixteen mail bombs over the course of seventeen years that resulted in the deaths of three people, was handled in federal court.<sup>15</sup>

The prosecution of members of al-Qaeda for attacks on United States citizens both inside and outside of the United States 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 United States embassy buildings in Kenya and Tanzania, killing 224 people.<sup>16</sup> Those attackers, captured soon thereafter, were tried in federal court and sentenced to life imprisonment.<sup>17</sup> One suspect, Ahmed Khalfan Ghailani, was detained by United States forces in 2004, held in secret prisons, eventually moved to the United States’ prison at Guantanamo Bay in 2009, and was brought to face trial in the Southern District of New York in 2009.<sup>18</sup>

In the post-September 11, 2001 era, powerful tools have been made available to prosecutors to try individuals even tangentially related to dangerous acts or to groups labeled by the State Department as Foreign Terrorist Organizations.<sup>19</sup> Prosecutors have made ample use of the criminalization of associational status and/or membership in a terrorist organization.<sup>20</sup> Material support charges have been used extensively to try terrorism suspects or to exert pressure toward a plea bargain, and are often successful.<sup>21</sup> Unlike other crimes often invoked to prosecute

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12. Wilcox, *supra* note 7, at 23.

13. Jo Thomas, *McVeigh Guilty on All Counts in the Oklahoma City Bombing; Jury to Weigh Death Penalty*, N.Y. TIMES, June 3, 1997, at A1.

14. *See* United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998) (imposing death sentence on Timothy McVeigh for 1993 Oklahoma City bombing); United States v. Yousef, 327 F.3d 56 (2d Cir. 2003) (affirming convictions for World Trade Center bombings).

15. William Glaberson, *The Unabomber Case: The Overview; Kaczynski Avoids A Death Sentence With Guilty Plea*, N.Y. TIMES, Jan. 23, 1998, at A1. *See also* United States v. Kaczynski, 239 F.3d 1108 (9th Cir. 2001) (upholding denial of motion to withdraw guilty plea).

16. Phil Hirschorn, *Four Embassy Bombers Get Life*, CNN.COM (Oct. 21, 2001, 10:58 AM), <http://edition.cnn.com/2001/LAW/10/19/embassy.bombings/> (last visited Oct. 19, 2010).

17. *Id.*

18. Benjamin Weiser, *A Plea of Not Guilty for Guantanamo Detainee*, N.Y. TIMES, June 10, 2009, at A25. Ghailani was indicted for his alleged role in the bombings in 1998. *See* United States v. Ghailani, 686 F. Supp. 2d 279 (S.D.N.Y. 2009). In November 2010, Ghailani was convicted of conspiracy to destroy government property. *See* Benjamin Weiser, *Detainee Acquitted on Most Counts in '98 Bombings*, N.Y. TIMES, Nov. 18, 2010, at A1.

19. *See* U.S. Dep’t of State, Office of the Coordinator for Counterterrorism, *Foreign Terrorist Organizations* (Aug. 6, 2010), <http://www.state.gov/s/ct/rls/other/des/123085.htm> (last visited Sept. 9, 2010) (designating forty-six organizations as foreign terrorist organizations as of August 6, 2010). *See also* 8 U.S.C. § 1189 (2005) (authorizing the Secretary of State to designate an organization as a “foreign terrorist organization”); *People’s Mojahedin Org. 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”).

20. *See, e.g.*, 18 U.S.C. § 2339B (2000); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1101 (2008) (discussing material support statute and “group membership liability”).

21. *See* Press Release, Dep’t of Justice, Fed. Bureau of Investigation, Minneapolis, Minneapolis Man Sentenced for Conspiracy to Provide Material Support to al Qaeda, (July 9, 2009), <http://minneapolis.fbi.gov/dojpressrel/pressrel09/mp070909.htm> (last visited Oct. 19, 2010) (describing

terror suspects, such as continuing criminal enterprise (CCE)<sup>22</sup> and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO),<sup>23</sup> which require at least some predicate act for criminal liability to attach,<sup>24</sup> the material support statute does not require the defendant to have had a specific intent to support a terrorist act—knowing support of a designated terrorist organization without intent is sufficient to convict.<sup>25</sup> The scope and flexibility offered by the material support statute has made it an often-used<sup>26</sup> tool for prosecutors and was used to convict John Walker Lindh,<sup>27</sup> Ahmed Omar Abu Ali,<sup>28</sup> and the so-called “Lackawanna Six,”<sup>29</sup> among others.

The government also has used Article III courts proactively, to prevent planned terrorist acts from occurring<sup>30</sup> and to elicit valuable counterterrorism and intelligence information as part of the interrogation, negotiation, and plea bargain process.<sup>31</sup> The federal material witness statute, which empowers the government to

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the guilty plea of Mohammed Abdullah Warsame to charges of material support for al Qaeda, which resulted in a prison sentence of ninety-two months); Philip Coorey, *Hicks Case Flawed All Along: Prosecutor*, SYDNEY MORNING HERALD (Apr. 30, 2008), <http://www.smh.com.au/articles/2008/04/29/1209234862811.html> (last visited Oct. 19, 2010) (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).

22. 21 U.S.C. § 848 (2008).

23. 18 U.S.C. §§ 1961-1968 (2000).

24. *See, e.g.*, 18 U.S.C. § 1961(5) (2008) (defining racketeering as involving at least two acts in furtherance of the illegal plan).

25. 18 U.S.C. § 2339B(a)(1) (2000). *See* Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. LEGIS. 1, 16-18 (2005) (detailing the breadth of the application of the material support statute); Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173, 200-07 (2003) (same).

26. 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.*, Reply Memorandum of Law in Further Support of Zeinab Taleb-Jedi’s Pre-Trial Motions, *United States v. Taleb-Jedi*, 566 F. Supp. 2d 157 (E.D.N.Y. 2008) (No. 06 CR 652 (BMC), 2008 WL 8093630 (arguing, unsuccessfully, that the material support statute is unconstitutional). The United States Supreme Court has rejected those arguments and affirmed the constitutionality of the material support statute. *See* *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

27. *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).

28. *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009). *See* STEPHEN I. VLADECK, TRYING TERRORISM SUSPECTS IN ARTICLE III COURTS: THE LESSONS OF *UNITED STATES V. ABU ALI* (Issue Brief, American Constitution Society) (Aug. 2010) (using the Abu Ali case to analyze the ability of Article III courts to handle terrorism cases).

29. Press Release, U.S. Dep’t of Justice, U.S. Attorney, W. Dist. of N.Y., United States Attorney’s Office Successfully Concludes Terrorism Case With Sixth Conviction of Al Qaeda Supporter (May 19, 2003) (announcing the conviction of Muhktar al-Bakri).

30. *See, e.g.*, Sarah Kershaw, *Terrorist in ‘99 U.S. Case is Sentenced to 22 Years*, N.Y. TIMES (July 28, 2005), <http://query.nytimes.com/gst/fullpage.html?res=9A07E7DC103FF93BA15754C0A9639C8B63> (last visited Oct. 19, 2010) (describing the detention of Ahmed Ressam two weeks prior to the execution of his planned attack).

31. *See* Jeff Zeleny & Charlie Savage, *Official Says Terrorism Suspect is Cooperating*, N.Y. TIMES, Feb. 3, 2010, at A11 (noting that Umar Farouk Abdulmutallab, arrested in conjunction with his alleged attempt to use explosives on a United States-bound airline flight on December 25, 2009, has cooperated



detain and question individuals without charge,<sup>32</sup> has enhanced the ability of law enforcement to detain individuals with potentially relevant information for terrorism prosecutions, but it has also increased the potential for abuse of discretion and abuse of executive power.<sup>33</sup> 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 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.<sup>34</sup> The criminal justice system affords defendants a framework of rights grounded in the United States Constitution and developed over two centuries of constitutional amendment, statutory clarification, and jurisprudence. Included among these protections are various constitutional guarantees, such as due process of law,<sup>35</sup> the right to confront accusers and witnesses,<sup>36</sup> protection against arbitrariness in the application of the law,<sup>37</sup> and protection against selective prosecution based on race,

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extensively with law enforcement officials and offered valuable information pertaining to al-Qaeda); Television Interview by David Gregory with John Brennan, Assistant to the President and Deputy Nat'l Sec. Adviser for Homeland Sec. and Counterterrorism, on Meet the Press (Jan. 3, 2010), *transcript available at* [http://www.msnbc.msn.com/id/34665249/ns/meet\\_the\\_press/](http://www.msnbc.msn.com/id/34665249/ns/meet_the_press/) (last visited Oct. 19, 2010) (noting that Umar Farouk Abdulmutallab may give valuable intelligence to United States law enforcement as part of a plea bargain for the criminal case pending against him regarding his).

32. See 18 U.S.C. § 3144 (2000).

33. 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 JG SMG, 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*, 580 F.3d 949 (9th Cir. 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). International Humanitarian Law authorizes detention of those who participate in hostilities or pose a serious security threat, but only in the case of an international armed conflict between two states. See Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 75 U.S.T. 3315; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 75 U.S.T. 3316.

34. Michael B. Mukasey, *Civilian Courts Are No Place to Try Terrorists*, WALL ST. J., Oct. 19, 2009, at A21 (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).

35. U.S. CONST. amend. V.

36. U.S. CONST. amend. VI.

37. U.S. CONST. amends. V, IXV, § 1.

national origin, religion or color.<sup>38</sup> Criminal trials also require—among other obligations—that the government prove its case “beyond a reasonable doubt” before conviction,<sup>39</sup> that admissible evidence conform to the applicable evidentiary rules,<sup>40</sup> the right to discovery of relevant evidence in the government’s possession,<sup>41</sup> and that exculpatory evidence be turned over to the defendant.<sup>42</sup> This framework of rights and obligations exists to fulfill the traditional goals of the criminal justice system—punishment, public safety, and deterrence—and to limit the number of wrongful convictions.<sup>43</sup>

The criminal justice model has shown some flexibility in trying defendants for acts of terrorism, and prosecutors have been successful in Article III courts<sup>44</sup> in convicting those who have actively participated in violent acts,<sup>45</sup> provided material support to the active participants,<sup>46</sup> and those who have been affiliated with or were members of groups that are designated as terrorist organizations by the government.<sup>47</sup>

The use of the ordinary criminal justice system further sends a powerful message to defendants, international allies, and to organizations intent on demonizing the United States and its 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, focus on the rule of law serves to defuse rhetoric that the United States treats certain groups of individuals unfairly. Arguably, this improves long-term security by strengthening international alliances, increasing cooperation and positive relations with alienated communities, and reducing the possibility of extremism manifesting itself in violent acts.<sup>48</sup>

### C. *Limitations of Criminal Courts for Terrorism Trials*

Proponents of a specialized court for terrorism trials—whether in the form of a

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38. U.S. CONST. amend. IXV, § 1. *See generally* United States v. Armstrong, 517 U.S. 456 (1996) (setting forth the constitutional standard for proving a selective prosecution claim).

39. *E.g.*, *In re Winship*, 397 U.S. 358, 362 (1970).

40. *E.g.*, FED. R. EVID. 403 (limiting the use of prejudicial evidence).

41. FED. R. CRIM. P. 16(a)(1).

42. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

43. *Cf.* Chesney & Goldsmith, *supra* note 20, 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”).

44. *E.g.*, United States v. Salameh, 152 F.3d 88, 161 (2d Cir. 1998) (affirming convictions for the 1993 bombing of the World Trade Center).

45. *E.g.*, United States v. Moussaoui, 382 F.3d 453, 482 (4th Cir. 2004).

46. *E.g.*, United States v. Lakhani, 480 F.3d 171, 172-74 (3rd Cir. 2007) (affirming conviction for attempted weapons sales).

47. *E.g.*, United States v. Afshari, NO. CR 01-209(C) DOC, 2009 WL 1033791, at \*7 (C.D. Cal. Apr. 14, 2009) (denying defendant’s motion challenging designation as a foreign terrorist organization).

48. *See* Tom Tyler, et al., *Legitimacy and Deterrence Effects in Counter-Terrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC’Y REV. 365, 368-69 (2010) (finding a “robust correlation between perceptions of procedural justice and both perceived legitimacy and willingness to cooperate among Muslim American communities in the context of anti-terrorism policing” and noting that under a normative model of anti-terrorism measures, “people obey the law and cooperate with legal authorities when they view government as legitimate and thus entitled to be obeyed”).

National Security Court<sup>49</sup> or a revived military 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 national security interests.<sup>50</sup> This criticism is blunted to some extent by the use of the Classified Information Procedures Act (CIPA), the 1980 law that established procedures for the use of classified information in criminal trials.<sup>51</sup> 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.<sup>52</sup> The Supreme Court in *Boumediene v. Bush* 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.<sup>53</sup>

Second, proponents of specialized terrorism trials argue that ordinary criminal trials—with Sixth Amendment<sup>54</sup> guarantees of a right to a public trial,<sup>55</sup> right to be

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49. 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 N. Guiora, *Military Commissions and National Security Courts After Guantanamo*, 101 NW. U. L. REV. 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 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., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS (Human Rights First, 2008); see also Mark R. Shulman, *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).

50. See Jack Goldsmith, *The Laws in Wartime: Boost Trust, Close Guantanamo, and Establish a National Security Court*, SLATE.COM (Apr. 2, 2008, 7:12 AM), <http://www.slate.com/id/2187870/> (last visited Oct. 21, 2010); Michael B. Mukasey, *Jose Padilla Makes Bad Law: Terror Trials Hurt the Nation Even When They Lead to Convictions*, WALL ST. J., Aug. 22, 2007, at A15 (arguing that "terrorism prosecutions in this country have unintentionally provided terrorists with a rich source of intelligence" and citing two instances in which valuable intelligence information was lost or leaked in conjunction with the trials of the 1993 World Trade Center bombers); but see Zabel & Benjamin, *supra* note 49, at 25-26 (rejecting Mukasey's argument and noting the efficacy of CIPA in keeping classified information secret in several trials, including *United States v. Kassir*, 582 F. Supp. 2d 498, 499-501 (S.D.N.Y. 2008) and *Abu Ali*, 528 F.3d at 244-45).

51. Classified Information Procedures Act of 1980, Pub. L. No. 96-456, 94 Stat. 2025.

52. *Id.* at § 6.

53. *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229, 2276 (2008).

54. U.S. CONST. amend. 6.

55. 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, 355 (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-Enter. Co. v. Superior Court of Cal. for Riverside Cnty.*, 478 U.S. 1, 10 (1986) (quoting *Press-Enter Co. v. Superior Court of Cal. for Riverside Cnty.*, 464 U.S. 501, 510 (1984)).

tried by a jury, right to confront adverse witnesses for the defendants,<sup>56</sup> and right to counsel—are inappropriate because of the security risks to witnesses, jurors, prosecutors, and court personnel.<sup>57</sup> These Sixth Amendment protections are essential to effecting equal treatment of defendants, 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.<sup>58</sup>

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 where gathering usable evidence may be extremely difficult.<sup>59</sup> 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, leading to a more challenging, if not impossible, task for prosecutors.<sup>60</sup>

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 United States’ national security.<sup>61</sup> This argument has significant political traction,<sup>62</sup> particularly since the detainees at Guantanamo Bay have often been described by government officials as the “worst of the worst,”<sup>63</sup> even when that claim has been subsequently debunked

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56. See *Crawford v. Washington*, 541 U.S. 36 (2004) (extending the confrontation right for defendants to all testimonial witnesses).

57. See *Mukasey*, *supra* note 34 (arguing against the use of ordinary criminal courts to try terrorists because of the concomitant heightened security risks).

58. See ZABEL & BENJAMIN, *supra* note 54, at 118 (“[T]he 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).

59. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 531-32 (2004) (acknowledging concerns regarding the chain of custody of evidence gathered on the battlefield).

60. See, e.g., Memorandum and Order, *United States v. Ghailani*, 1:98-cr-01023-LAK (S.D.N.Y. Oct. 6, 2010) (excluding the testimony of a witness based on the grounds that “the government has failed to prove that Abebe’s testimony is sufficiently attenuated from Ghailani’s coerced statements to permit its receipt in evidence”).

61. President’s Remarks, *supra* note 2.

62. Editorial, *The Politics of Fear*, N.Y. TIMES, Feb. 9, 2010, at A24 (noting that some Republican politicians had objected strongly to trying suspects of terrorism acts in Article III courts as opposed to military commissions for political advantage); Television Interview by David Gregory with John Brennan, Assistant to the President and Deputy Nat’l Sec. Adviser for Homeland Sec. and Counterterrorism, on Meet the Press (Jan. 3, 2010), *transcript available at* [http://www.msnbc.msn.com/id/34665249/ns/meet\\_the\\_press/](http://www.msnbc.msn.com/id/34665249/ns/meet_the_press/) (last visited Oct. 21, 2010).

63. See *Taxi to the Dark Side* (ThinkFilm 2007) (montage of television footage in which Bush administration officials described the detainees at the Guantanamo Bay prison facility as “the worst of the worst”); Television Interview by John King with Tom Ridge, on State of the Union with John King, CNN.COM (May 24, 2009, 9:00 PM), *transcript available at* <http://transcripts.cnn.com/TRANSCRIPTS/0905/24/sotu.01.html> (last visited Oct. 21, 2010) (noting the concern of politicians about bringing Guantanamo detainees into the United States for trial and/or imprisonment because of

or proven to be overblown.<sup>64</sup>

This fear of leniency or acquittal, however, is tempered by the track record of Article III courts, which have on occasion handed down significantly harsher sentences than military commissions with regard to comparable crimes.<sup>65</sup> Furthermore, Article III courts have available the death penalty for many terrorism-related crimes<sup>66</sup> and appellate courts have been willing to remand cases for harsher sentencing.<sup>67</sup>

#### 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.<sup>68</sup> In doing so, the Bush administration rejected the idea that the attacks ought to be treated as a criminal matter, and even in the context of treating the attacks as an act of war, 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.<sup>69</sup>

Although this decision was problematic in terms of perceptions of justice among affected groups, it was not constitutionally impermissible. Since 2001, the United States Supreme Court has had the opportunity to flesh out some parameters for the establishment of constitutionally sound military commissions. Both *Hamdi*

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their purported dangerousness to the public); and Michael Melia, *Gitmo Detainee Allowed to Contact Top Suspects*, ASSOCIATED PRESS, (May 3, 2008), <http://www.sudanvisiondaily.com/modules.php?name=News&file=article&sid=34472> (last visited Oct. 21, 2010) (quoting a Justice Department civilian prosecutor as describing Salim Ahmed Hamdan as “the worst of the worst”). Hamdan was later acquitted of most charges against him before a military commission, but was convicted of providing material support to al Qaeda. See Jerry Markon, *Hamdan Guilty of Terror Support*, WASH. POST, Aug. 7, 2008, at A01.

64. Coorey, *supra* note 21 (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).

65. For example, pursuant to a plea agreement, Lindh was sentenced to twenty years imprisonment. See *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002).

66. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

67. *E.g.*, *United States v. Ressam*, 593 F.3d 1095 (9th Cir. 2010) (vacating the twenty-two-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).

68. Military Order of November 13, 2001, 66 Fed. Reg. 57833 (Nov. 13, 2001).

69. 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: (1) the presence of a commander responsible for subordinates; (2) the presence of a fixed distinguishing sign that may be identified from a distance; (3) the open and unconcealed carrying of arms and actions undertaken in accordance with the rules; and (4) customs of law. Geneva Convention Relative to the Treatment of Prisoners of War, art. 4(2), Aug. 12, 1949, 6 U.S.T. 3315. Though detainees may seek POW status as a means to avoid civilian or military trial, courts have been unsympathetic to such claims. See *Hamdi* 542 U.S. at 514 (recognizing the right to designate prisoners as “enemy combatants” and detain them); *DC (TA) 092134/02 State of Israel v. Marwan Barghouti* (2002) (holding that suspected terrorists are not entitled to POW status because they do not fulfill the criteria stated in the Third Geneva Convention).

*v. Rumsfeld*<sup>70</sup> and *Boumediene v. Bush*<sup>71</sup> 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.<sup>72</sup> 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.<sup>73</sup> As such, when Salim Hamdan, driver and aide to Osama bin Laden, was convicted by a military commission, the presiding judge made clear that although Hamdan had access to some exculpatory evidence,<sup>74</sup> ordinary constitutional protections were inapplicable and that the prosecutors had a right to use at least some evidence derived from coercive interrogations.<sup>75</sup> Both of these concessions to the prosecution represented significant deviations from an Article III proceeding.<sup>76</sup>

President Obama revived and modified the military commission system established by the Bush administration,<sup>77</sup> citing the long history of use of such commissions by the United States military and the Defense Department and the

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70. 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”).

71. *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”).

72. See *id.* 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).

73. 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, 11:11AM), <http://www.slate.com/id/2106406/> (last visited Oct. 21, 2010) (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”).

74. 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).

75. Markon, *supra* note 63.

76. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. § 948r(d) (Supp. 2008)).

77. The decision to reinstate military commissions represented a significant shift in the principles expressed by then-Senator Obama in 2007, when he argued that “[o]ur 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 also 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).

need to use military commissions in the interest of national security.<sup>78</sup> 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.<sup>79</sup>

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 torture or cruel, inhuman or degrading interrogations was disallowed, the use of hearsay was limited,<sup>80</sup> with the government bearing the burden of showing the reliability of the hearsay evidence prior to admission,<sup>81</sup> defendants were granted greater latitude in selecting their counsel, and protections against self-incrimination were instituted for defendants who chose 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,

78. Press Release, The White House, Office of the Press Secretary, Statement of President Barack Obama on Military Commissions (May 15, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Statement-of-President-Barack-Obama-on-Military-Commissions/](http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Military-Commissions/) (last visited Oct. 21, 2010).

79. See Obama's Remarks on Military Commissions, N.Y. TIMES (May 15, 2009), [http://www.nytimes.com/2009/05/15/us/politics/15obama.text.html?\\_r=1](http://www.nytimes.com/2009/05/15/us/politics/15obama.text.html?_r=1) (last visited Oct. 21, 2010).

80. Military Commissions Act of 2009, 47 U.S.C. § 948r(a) (Supp. 2008). The Act provides:

No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made.

*But see* § 949(a)(b)(3)(B) ("A statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r of this title"); Marc Thiessen, *Holder's Terror Trial Catastrophe*, WASH. POST (Oct. 11, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/11/AR2010101102834.html> (last visited Oct. 21, 2010) ("But if the Obama administration insists on prosecuting Ghailani, there is a forum where the key witness against him would almost certainly be permitted to testify: a military commission at Guantanamo Bay"). Section 949(a)(b)(3)(D) provides:

Hearsay evidence that would not ordinarily be admissible in a general courts-martial may be admitted if the adverse party is given adequate notice of intent and the military judge determines that (1) statement is offered as evidence of a material fact, (2) is probative on the point on which it is offered, (3) that direct testimony not available as practical matter, and (4) general interests of the rules of evidence and interests of justice are best served.

81. 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*, 542 U.S. at 533-34 (noting that hearsay "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"); *Al-Odah v. United States*, 648 F. Supp. 2d 1, 5 (D.D.C. 2009) ("The Court is fully capable of considering whether a piece of evidence . . . 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).

before a military commission, or detained indefinitely pursuant to executive decree.<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup>

### *E. Criticisms of the Military Commission Model*

The United States’ criminal justice system has been refined for more than two centuries in an 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.<sup>85</sup> 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.<sup>86</sup>

Although each of these systems is vulnerable to the critique that they do not strike an appropriate balance between security and liberty interests,<sup>87</sup> each system reflects a strong commitment to equal protection and the rule of law for those defendants within that system’s jurisdiction. All civilians should expect the procedural protections of an Article III court when tried for a federal 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 United States’ justice system for impartiality.

The military commission model cannot reinforce rule of law norms, despite

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82. See DEPARTMENT OF DEFENSE & DEPARTMENT OF JUSTICE PROTOCOL, DETERMINATION OF GUANTANAMO CASES REFERRED FOR PROSECUTION (July 20, 2009).

83. See *id.* at ¶ 2.

84. See Charlie Savage, *Judge Delays Resumption of Guantanamo Trial*, N.Y. TIMES (Oct. 14, 2010), <http://www.nytimes.com/2010/10/15/us/15gitmo.html> (last visited Oct. 21, 2010); Charlie Savage, *Cole Attack Trial Will Test Tribunal System*, N.Y. TIMES, Dec. 1, 2009, at A16.

85. See ZABEL & BENJAMIN, *supra* note 49, at 25 (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”).

86. See UNIF. CODE OF MILITARY JUSTICE, §§ 830, 831(2008) (enumerating pre-trial and post-trial procedure); *but cf.* Edward T. Pound, *Unequal Justice: Military Courts are Stacked to Convict—But Not the Brass. The Pentagon Insists Everything’s Just Fine*, U.S. NEWS & WORLD REPORT (December 8, 2002), <http://www.usnews.com/usnews/news/articles/021216/16justice.htm> (last visited Oct. 21, 2010) (finding that “[t]he system heavily favors prosecutors,” and for a one-year period ending in September of 2001 of the 7,603 members court-martialed, 7,373 were convicted).

87. See, e.g., Forman, *supra* note 8, at 333 (critiquing the United States 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).



assertions to the contrary by the Obama administration.<sup>88</sup> It is unclear whether, even with the changes made in 2009, the military commission system can guarantee substantive due process, given the fact that defendants are accorded significantly fewer rights than those facing courts martial proceedings.<sup>89</sup> The Military Commissions Act of 2009<sup>90</sup> explicitly carves out rights that defendants are afforded in federal courts or in a courts martial, but are not to be granted to defendants in military commissions.<sup>91</sup> For example, defendants are not guaranteed the right to remain silent or the right to the exclusion of their previous coerced statements.<sup>92</sup> Defendants are guaranteed neither a speedy trial nor the right to the exclusion of evidence that was obtained without authorization.<sup>93</sup> Trial for ex post facto crimes is permissible in a military commission.<sup>94</sup> Guilty verdicts in non-capital cases can be rendered by two-thirds of the jury;<sup>95</sup> in some instances the jury can be comprised of nine jurors,<sup>96</sup> meaning that only six votes are necessary for conviction. Hearsay evidence is more easily admissible and access to classified information is significantly curtailed.<sup>97</sup> The problematic curtailing of these due process protections is further compounded by the Obama administration's reservation of the right to continue to imprison anyone acquitted under the military commission system if security interests suggest that continued detention is necessary.<sup>98</sup>

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88. See Testimony of Jeh C. Johnson, Gen. Counsel, Dept. of Defense, Before the Senate Armed Servs. Comm. (July 7, 2009) [hereinafter Johnson Testimony].

89. Such structural unfairness in the military commissions convened since 2001 prompted several military commission prosecutors to resign in protest. See Josh Meyer, *Guantanamo Prosecutor Who Quit Had 'Grave Misgivings' About Fairness*, L.A. TIMES (Oct. 12, 2008), <http://articles.latimes.com/2008/oct/12/nation/na-gitmo12> (last visited Oct. 21, 2010).

90. Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2574 (2009) (codified at 10 U.S.C. §948(a) *et seq.*)

91. Military Commissions Act § 948b(d).

92. Compare Military Commissions Act § 949a(b)(2)(c) with UNIF. CODE OF MILITARY JUSTICE, art. 31, §§ (a), (b), & (d) (guaranteeing freedom from self-incrimination, and which are specifically made inapplicable to military commissions) and U.S. CONST., amend. V (guaranteeing freedom from self-incrimination).

93. Military Commissions Act § 949a. A speedy trial is guaranteed in both Article III courts and courts martial. U.S. CONST., amend. VI (giving the right to a speedy trial); 18 U.S.C. § 3161(d)(2) (2008) (mandating commencement of trials within seventy days of indictment or original appearance in court). UNIF. CODE OF MILITARY JUSTICE, art. 10. Likewise, protection against unreasonable search and seizure is guaranteed in other trials. U.S. CONST., amend. IV; *cf.* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (limiting Fourth Amendment protections regarding alien property on foreign soil); *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 176-77 (2d Cir. 2008) (limiting warrant requirement for searches conducted by U.S. agents on foreign soil).

94. Military Commissions Act §§ 948d, 950p. *Cf.* U.S. CONST., art. 1, § 9, cl. 3 (“No...ex post facto law shall be passed.”).

95. Military Commissions Act § 949m. *Cf.* FED. R. CRIM. P. 31 (requiring unanimous jury verdicts for conviction).

96. Military Commissions Act § 949m.

97. Military Commissions Act §§ 949a(b)(3)(D), 949p-1-p-7.

98. Jess Bravin, *Detainees, Even if Acquitted, Might Not Go Free*, WALL ST. J. (July 8, 2009), <http://online.wsj.com/article/SB124699680303307309.html> (last visited Oct. 21, 2010). There is also some danger that the military commission system will serve as a model to try other groups of detainees designated as non-state actors by the United States and captured as a part of the ongoing battle against al-Qaeda or any other group deemed to have provided support for al-Qaeda. Editorial, *Photographs and*

*F. Perceived Targeting of Minority Populations*

The structural inequities in the military commission system and the ability of the administration to pick and choose the venue in which it will try defendants leads to the appearance and perception that the United States believes one system of justice is appropriate for its citizens,<sup>99</sup> and a lesser level of protection is, as a policy matter, appropriate for noncitizens who are potentially dangerous.<sup>100</sup> The military commission system resuscitated by President Obama may comply with United States' obligations under the Geneva Conventions.<sup>101</sup> However, possible compliance with relatively flexible international norms<sup>102</sup> does not ensure that the

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*Kangaroo Courts*, N.Y. TIMES, May 17, 2009, at WK11 (noting that although military tribunals are not new to 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 reach of law with the preposterous claim that the whole world is now a field of battle”).

99. Deputy Solicitor General Neal Katyal, prior to taking on his current post within the Obama administration, commented on this disparity as follows:

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, 6:12 PM), <http://www.slate.com/id/2179173/> (last visited Oct. 21, 2010). 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, 8:07 EST), <http://www.salon.com/opinion/greenwald/2009/07/06/uighurs/index.html> (last visited Oct. 21, 2010).

100. 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, 369 (1886) (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* 12 (The New Press ed., 2003) (addressing how aliens are often seen as a first target of national security law and policy in times of emergency). Yet case law suggests that United States courts are comfortable with the citizenship distinction in national security contexts. See, e.g., *United States v. Duggan*, 743 F.2d 59, 75 (2d Cir. 1984) (affirming constitutionality of government decision to treat aliens differently for purposes of the Foreign Intelligence Surveillance Act) (citing *Mathews v. Diaz*, 426 U.S. 67 (1976)).

101. Morris Davis, *Justice and Guantanamo Bay*, THE WALL ST. J. ONLINE (Nov. 10, 2009, 8:51 PM), <http://online.wsj.com/article/SB10001424052748704402404574525581723576284.html> (last visited Oct. 21, 2010). But see Brief of Amici Curiae International Human Rights Organizations Center for Constitutional Rights, Human Rights Watch, and International Federation for Human Rights in Support of Petitioner-Appellant, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184), 2006 WL 53982, at \*13 (Jan. 6, 2006) (arguing that “[b]oth the detention and military commission systems established by the Executive to indefinitely imprison certain individuals and to try others being held as enemy combatants at Guantánamo violate the protections afforded military detainees by customary international humanitarian law, independent of protections under humanitarian law treaties”).

102. See Fourth Geneva Convention, art. 3, §1(d), Aug. 12, 1949, 6 U.S.T. 3516 (prohibiting “the passing of sentences and the carrying out of executions without previous judgment pronounced by a

military commissions will be perceived as legitimate, particularly by those populations from which the defendant class is drawn.<sup>103</sup>

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.<sup>104</sup> The extensive racial and ethnic profiling of Muslim men as part of the United States' post-September 11 counterterrorism activities yielded limited amounts of relevant information,<sup>105</sup> but created the perception that racial and ethnic bias and animus were an inherent part of the government's counterterrorism efforts.<sup>106</sup>

These measures, taken to promote national security in times of emergency, may assuage the fears of the majority of United States citizens, but serve to alienate and polarize the targeted minority populations both domestically and abroad.<sup>107</sup> Further fueling the distrust from targeted minority populations is the backdrop of the United States' 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.<sup>108</sup> During the internment, over 120,000 people of Japanese descent—most of them United States citizens—were forcibly displaced for years and had their property sold based on unfounded national security fears.<sup>109</sup> Premised largely on their status as a racial minority and

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regularly constituted court, [and] 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.

103. See Davis, *supra* note 101 (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").

104. Tyler, *supra* note 48, at 3; Nancy A. Youssef, *Did 'Returning' Terrorists Become Extremists in Guantanamo?*, MCCLATCHEY NEWSPAPERS (May 26, 2009), <http://www.mcclatchydc.com/homepage/story/68872.html> (last visited Oct. 21, 2010) (implying how years of detention at Guantanamo may have encouraged ex-detainees to turn to extremist groups to seek revenge for their unwarranted captivity). See also ANDREW BLICK, TUFYAL CHOUDHURY AND STUART WEIR, *THE RULES OF THE GAME: TERRORISM, COMMUNITY AND HUMAN RIGHTS*, in UNIVERSITY OF ESSEX, A REPORT FOR THE HUMAN RIGHTS CENTRE, UNIVERSITY OF ESSEX 11 (2005).

105. Jim McGee, *Ex-FBI Officials Criticize Tactics on Terrorism; Detention of Suspects not Effective, They Say*, WASH. POST, Nov. 28, 2001, at A1.

106. See Gil Gott, *The Devil We Know: Racial Subordination and National Security Law*, 50 VILL. L. REV. 1073, 1082 (2005).

107. BLICK, CHOUDHURY AND WEIR, *supra* note 104, at 11.

108. See Gott, *supra* note 106, 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).

109. See Exec. Order No. 9066, 67 Fed. Reg. 1407 (Feb. 19, 1942) (President Roosevelt's order allowing for the internment of Japanese and Japanese-American people due to national security concerns). See generally JOAN Z. BERNSTEIN, ET AL., *PERSONAL JUSTICE DENIED: THE REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS* (1982).

the perception of Japanese people as an “other” in American society, this displacement and internment was validated by Congress and the Supreme Court.<sup>110</sup>

The treatment of Muslims in the United States since September 11 does not parallel the treatment of Japanese Americans in scope or scale. However, the perception among the defendants, all foreign nationals and all Muslim, is that certain national security measures, arguably including 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, beyond even the deontological question of whether differential treatment is ever appropriate under such circumstances, 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.

### III. 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 or trials at some point to attempt to deal with national security threats. Taking a closer look at these experiments with specialized trials, 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 the country continues 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,<sup>111</sup> which escalated in the early 1970s<sup>112</sup> and were largely resolved in 1998 with the signing of the Belfast

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110. *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944) (holding that the decision of President Roosevelt to intern Japanese Americans during World War II was consistent with the President’s war powers).

111. For a general discussion of the history of the Troubles, see *Conflict and Politics in Northern Ireland (1968 to the present)*, CAIN WEB SERVICE, <http://cain.ulst.ac.uk/> (last visited Oct. 21, 2010).

112. Peter Taylor, *LOYALISTS: WAR AND PEACE IN NORTHERN IRELAND* 59-60 (Bloomsbury 1999).

Agreement.<sup>113</sup> During The Troubles, almost 3,000 people were killed and over 30,000 were seriously injured.<sup>114</sup> More recently, the United Kingdom has confronted international terrorist threats, including an attack on the London mass transit system in July 2005 that killed fifty-six people including the attackers, and injured over 700 others.<sup>115</sup>

### 1. *Structural Constraints on Counterterrorism Policy-Making*

United Kingdom 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;<sup>116</sup> nevertheless, he or she almost always seeks authorization of the Parliament to act.<sup>117</sup> Additionally, United Kingdom law and constitutional norms require that emergency powers be exercised in a legal framework involving the Parliament and the courts,<sup>118</sup> which acts as a significant disincentive to the Prime Minister in making unilateral war-related decisions.<sup>119</sup> 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.<sup>120</sup>

Mandatory involvement of Parliament<sup>121</sup> has ensured that executive branch

113. Agreement Reached in the Multi-Party Negotiations, Apr. 10, 1998, 37 I.L.M. 751 (1998), available at <http://www.nio.gov.uk/agreement.pdf> (last visited Oct. 21, 2010) [hereinafter Belfast Agreement].

114. Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 MICH. L. REV. 1906, 1933 (2004).

115. HOUSE OF COMMONS, REPORT OF THE OFFICIAL ACCOUNT OF THE BOMBINGS IN LONDON ON 7TH JULY 2005 2 (2006).

116. PAUL BOWERS, PARLIAMENT AND THE USE OF FORCE (2003), available at <http://www.parliament.uk/documents/upload/snai-01218.pdf> (last visited Oct. 21, 2010).

117. Prime Minister Tony Blair attempted to thwart parliamentary efforts to require parliamentary permission before the Prime Minister could engage in any military actions. See Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480, 2491 (2006), and Matthew Tempest, *Government Kills Short's War Bill*, GUARDIAN (LONDON) (Oct. 21, 2005, 15:24 BST), <http://politics.guardian.co.uk/iraq/story/0,12956,1597883,00.html> (last visited Oct. 21, 2010).

118. Martinez, *supra* note 117, at 2499 (addressing the cooperation among the Prime Minister, Parliament, and the judicial system in dealing with the ramifications of an emergency situation); CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 185-89 (1948).

119. 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).

120. Martinez, *supra* note 117, at 2489; Richard Hefferman & Paul Webb, *The British Prime Minister: Much More Than "First Among Equals"*, in THE PRESIDENTIALIZATION OF POLITICS 26, 32-33 (Thomas Poguntke & Paul Webb, eds., 2005).

121. 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 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, 2169-2170 (2006) (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

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.<sup>122</sup> For example, in November 2005, then Prime Minister Tony Blair was unable to pass legislation that would allow the government to detain terrorism suspects for up to ninety days without being charged because the House of Commons, led by Blair's own Labour Party, voted down the proposed legislation.<sup>123</sup>

Further, judicial review is available for all national security-related legal policy, including the treatment of individual detainees, even in times of war.<sup>124</sup> The jurisdiction of the European Court of Human Rights (ECHR) has provided an additional avenue for recourse since detainees have enjoyed the right to appeal domestic legislation and judicial decisions to the ECHR since 1966.<sup>125</sup> The 2004 decision of *A v. Secretary of State for the Home Department*<sup>126</sup> 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.<sup>127</sup>

Accountability for national security laws and policies is further supported 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.<sup>128</sup>

As a result of these structural constraints and the layers of review available, many counterterrorism laws in the United Kingdom focus on a rule of law perspective and the need to preserve civil rights and civil liberties for those arrested pursuant to the criminal law.<sup>129</sup> As such, conducting trials for alleged terrorists

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Canada's national security system") (quoting Press Release, Office of the Deputy Prime Minister & Minister of Pub. Safety & Emergency Preparedness, Deputy Prime Minister Details Proposed Model for National Security Committee of Parliamentarians (Apr. 4, 2005), <http://circ.jmellon.com/docs/view.asp?id=789> (last visited Oct. 21, 2010)).

122. Schulhofer, *supra* note 114, at 1936-39 (discussing Parliament's central role in developing legal policy on national security matters).

123. Martinez, *supra* note 117, at 2499; Ed Johnson, *Great Britain: Parliament Rejects Crucial Blair Antiterrorism Bill*, MIAMI HERALD, Nov. 10, 2005, at A15.

124. Schulhofer, *supra* note 114, at 1940-43. *See also* Roach, *supra* note 121, at 2163.

125. Schulhofer, *supra* note 114, at 1943.

126. [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.) [7] (appeal taken from Eng.).

127. *See generally* Alexandra Chirinos, *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 Counselor Review Committee prior to being heard in court. *Id.* at 267.

128. Roach, *supra* note 121, 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").

129. Terence Taylor, *United Kingdom*, in COMBATING TERRORISM: STRATEGIES OF TEN COUNTRIES 188-189 (Alexander Yonah ed., 2002). *But see* BLICK, CHOUDHURY AND WEIR, *supra* note 104, at 11 (arguing that British counterterrorism measures—even within the ordinary justice system—have “a disproportionate effect on the Muslim communities in the UK and so are prejudicing the ability of the government and security forces to gain the very trust and cooperation from individuals in those communities that they require to combat terrorism”).

within the ordinary criminal justice system has usually been in effect, despite the constraints that this system may place on prosecutors, intelligence personnel, and police.<sup>130</sup>

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.<sup>131</sup> 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 in Northern Ireland provides an apt and useful comparator for the current debate over military commissions in the United States as they might be applied to domestic terrorist activities.

## 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.<sup>132</sup> Until the devolution of legislative power from Westminster to Northern Ireland in 1998,<sup>133</sup> 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 a specialized process for suspected terrorists.

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130. 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, *British Court Convicts Three in Plot to Blow Up Airliners*, N.Y. TIMES (Sept. 7, 2009), [http://www.nytimes.com/2009/09/08/world/europe/08britain.html?\\_r=1&hp](http://www.nytimes.com/2009/09/08/world/europe/08britain.html?_r=1&hp) (last visited Oct. 21, 2010) (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. *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. See John F. Burns & Elaine Sciolino, *No One Convicted of Terror Plot to Bomb Planes*, N.Y. TIMES, Sept. 9, 2008 at A1.

131. See *Catching Terrorists*, *supra* note 5, Testimony of Tom Parker, 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”).

132. 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 (Eng.) (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 twenty-five years, the Government of Ireland Act, 1920, was officially repealed through the passage of the Northern Ireland Act, 1998, c. 47 (Eng.), which established the devolved Northern Ireland Assembly. *Id.*

133. Northern Ireland Act, 1998, c. 47 (Eng.).

The Civil Authorities (Special Powers) Act (Northern Ireland) of 1922<sup>134</sup> 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-terrorist illegal activity.<sup>135</sup> 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.<sup>136</sup>

Lord Diplock of the House of Lords was tasked with chairing a commission to consider modifying legal procedures to strengthen counterterrorism efforts.<sup>137</sup> The resulting commission report, known as the “Diplock Report,” analyzed the political violence in Northern Ireland and recommended restructuring the criminal justice system in Northern Ireland in order to combat terrorism more effectively.<sup>138</sup> 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.<sup>139</sup> The Northern Ireland (Emergency Provisions) Act, 1973,<sup>140</sup> enacted as a response to the Diplock Report, set up so-called “Diplock Courts,” where certain offenses—among them, terrorist activities—were tried,<sup>141</sup> and by authorizing prolonged detention without charge or trial.<sup>142</sup> 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 Northern Ireland when compared to the preventive detention powers authorized by the 1922 legislation.<sup>143</sup>

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 the United States’ domestic debate. Like the British context, the United States formation of military commissions post-9/11 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.<sup>144</sup>

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134. Civil Authorities (Special Powers) Act (Northern Ireland), 1922, 12 & 13 Geo. 6, c. 5.

135. Civil Authorities (Special Powers) Act (Northern Ireland) §§ 1, 8.

136. Michael P. O’Connor & Celia M. Rumann, *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).

137. REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, 1972, Cmnd. 5185 [hereinafter DIPLOCK REPORT].

138. *Id.*

139. *Id.* at ¶ 36.

140. Northern Ireland Act (Emergency Provisions), 1973, c. 53 (Eng.).

141. Northern Ireland Act (Emergency Provisions) § 2(1).

142. Northern Ireland Act (Emergency Provisions) §10 (schedule 1).

143. DIPLOCK REPORT, *supra* note 137, at ¶ 7(e).

144. President’s Remarks, *supra* note 2 (“[M]y administration is bringing our [military] commissions in line with the rule of law . . . no longer permit[ing] the use of evidence—as evidence statements that have been obtained using cruel, inhuman, or degrading interrogation methods.”).



*a. Diplock Courts*

The justifications for the non-jury Diplock Courts were to deal with “perverse verdicts” due to the intimidation of jurors<sup>145</sup> and to increase the number of convictions of suspected terrorists while affording some closure to some detainees who had previously been held under the indefinite detention system.<sup>146</sup> The Diplock Report framed this 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 defendants.<sup>147</sup> 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 that time.<sup>148</sup>

The authors of the report asserted their desire to comply with the United Kingdom’s international legal obligations, and recommended that because 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.<sup>149</sup> 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.<sup>150</sup> 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.”<sup>151</sup>

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,<sup>152</sup> which adopted the procedures and list of scheduled offenses that were employed under the Emergency Procedures Act of 1973.

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145. See DIPLOCK REPORT, *supra* note 137, 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”). Cf. REPORT OF A COMMITTEE TO CONSIDER, IN THE CONTEXT OF CIVIL LIBERTIES AND HUMAN RIGHTS, MEASURES TO DEAL WITH TERRORISM IN NORTHERN IRELAND 10 (1975) [hereinafter GARDINER REPORT] (noting that there was little evidence of juror intimidation, but that the Diplock Court structure was fair and ought to continue).

146. DIPLOCK REPORT, *supra* note 137, at ¶ 7(e).

147. *Id.* at ¶ 12 (citing European Convention on Human Rights and Fundamental Freedoms, art. 6 (May 1963), available at [http://www.solarnavigator.net/embassies/european\\_convention\\_of\\_human\\_rights.htm](http://www.solarnavigator.net/embassies/european_convention_of_human_rights.htm) (last visited Oct. 21, 2010) [hereinafter European Convention]).

148. *Id.*

149. DIPLOCK REPORT, *supra* note 137, at ¶¶ 15-16, 20.

150. *Id.* at ¶¶ 21, 22.

151. *Id.* at ¶ 13.

152. Terrorism Act (Northern Ireland), 2000, pt. VII & schedule 9 [hereinafter Scheduled Offenses].

At their height in the 1980s, the Diplock Courts tried over 300 cases a year.<sup>153</sup> 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 sixty defendants per year.<sup>154</sup> In 2007, the United Kingdom curtailed the use of the Diplock Courts, making some allowances for the continued use of non-jury trials in limited circumstances.<sup>155</sup>

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.<sup>156</sup> Fueling this perception was the broad range of scheduled offenses that would bring 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.<sup>157</sup>

Those who consider the Diplock Courts to be a success argue that without these specialized courts for terrorism trials the ceasefire in Northern Ireland could not have been achieved.<sup>158</sup> 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.<sup>159</sup>

#### *b. Internment*

The Diplock Report recommendation that the 1922 preventive detention system under which an alleged terrorist could be held without formal charge or trial—a system known as internment—be used as a counterterrorism measure was implemented in 1973.<sup>160</sup> Although the internment system represented a departure

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153. See Northern Ireland Office, Replacement Arrangements for the Diplock Court System, at 4 (2006) [hereinafter Replacement Arrangements].

154. See *id.*

155. Justice and Security Act (Northern Ireland), 2007, c. 6, §§ 4, 5. 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. See INDEP. MONITORING COMM’N, SIXTEENTH REPORT OF THE INDEPENDENT MONITORING COMMISSION ¶¶ 5.4, 5.5 (2007) [hereinafter INDEP. MONITORING COMM’N REPORT] (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).

156. Fionnuala Ni Aolain, *The Fortification of an Emergency Regime*, 59 ALB. L. REV. 1353, 1377-78 (1996).

157. See *id.* at 1378.

158. E.g., Replacement Arrangements, *supra* note 153, at 2.

159. 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. INDEP. MONITORING COMM’N REPORT, *supra* note 155, at ¶ 5.7.

160. DIPLOCK REPORT, *supra* note 137, at ¶ 7(e); Northern Ireland Act, 1973, c. 53 (Eng.), §10 (schedule 1). The 1973 Act 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. Northern Ireland Act (Emergency Provisions), 1973, c. 53, § 10 (Eng.) (schedule 1). However, the evidence presented to the Secretary of State was not made available to the alleged

from the due process guarantees mandated by the European Convention on Human Rights and Fundamental Freedoms,<sup>161</sup> the United Kingdom derogated from its obligations based on the purported existence of a public emergency.<sup>162</sup>

Under the internment system, a suspect could be held indefinitely pending determination.<sup>163</sup> Nonetheless, internment under the Emergency Provisions Act of 1973 arguably set forth a greater protection of civil liberties and individual rights than the Combatant Status Review Tribunals (CSRTs) established after the Supreme Court's decision in *Rasul v. Bush*.<sup>164</sup>

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<sup>165</sup> 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.<sup>166</sup>

Military sources reported that the internment program actually led to

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terrorist, nor was there an opportunity for the alleged terrorist to challenge his detention immediately. See GARDINER REPORT, *supra* note 145, at 38.

161. European Convention, *supra* note 147, at art. 6.

162. See, e.g., Brogan and Others v. United Kingdom, App. Nos. 11209/84, 11266/84, 11386/85, 11 Eur. H.R. Rep. 117 (1988) (holding that the detention of 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 Ni Aolain, *supra* note 156, at 1365-66 (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).

163. GARDINER REPORT, *supra* note 145, at 39.

164. 542 U.S. 466 (2004) (establishing federal jurisdiction over the United States naval base at Guantanamo Bay, Cuba). The CSRT structure, established by the Department of Defense within ten days of the *Rasul* decision, contained a mixed bag of protections for detainees. See Paul Wolfowitz, Deputy Sec., Dep't of Defense, Memorandum to the Secretary of the Navy (July 7, 2004), available at <http://www.defense.gov/news/Jul2004/d20040707review.pdf> (last visited Oct. 21, 2010) [hereinafter CSRT Order]. For example, the CSRT Order offered detainees the right to have "personal representative" at the detention hearing, but unlike the internment procedures under the Emergency Procedures Act of 1973, the personal representative was not an attorney. Compare *id.* at 1 with GARDINER REPORT, *supra* note 145, at 39 (establishing the right of interned individuals to be represented by an attorney).

165. 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 credited with the development and influence of Sinn Fein, the political arm of the Irish Republican Army.

166. 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, politically aligned with the British government and the Royal Ulster Constabulary. See *Internment—Summary of Main Events*, CAIN WEB SERVICE, <http://cain.ulst.ac.uk/events/intern/sum.htm> (last visited Oct. 21, 2010). 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.*

significant increases in political violence. The separatist Irish Republican Army<sup>167</sup> 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.<sup>168</sup> 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,<sup>169</sup> 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.<sup>170</sup>

The Diplock Report framed its recommendations for the Diplock Courts and internment as emergency legislation that were needed on a short-term basis to deal with political violence and insurgency.<sup>171</sup> 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 thirty 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.<sup>172</sup>

### B. Israel

Israel has a relatively long history of using specialized courts for terrorism trials. After the June 1967 Six Day War, the Israel Defense Forces created military

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167. 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 that 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 na hEireann) (U.K., Separatists)*, COUNCIL ON FOREIGN RELATIONS (Mar. 16, 2010), <http://www.cfr.org/publication/9240/> (last visited Oct. 21, 2010).

168. O’Connor & Rumann, *supra* note 136, at 1679 (quoting COMM. ON THE ADMIN. OF JUSTICE, NO EMERGENCY, NO EMERGENCY LAW: EMERGENCY LEGISLATION RELATED TO NORTHERN IRELAND—THE CASE FOR REPEAL 6 (1995)).

169. O’Connor & Rumann, *supra* note 136, at 1680 (quoting PAUL BEW & GORDON GILLESPI, *NORTHERN IRELAND: A CHRONOLOGY OF THE TROUBLES 1968-1993* 37 (1993)).

170. 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’ . . . .

GARDINER REPORT, *supra* note 145, at 43.

171. Laura K. Donohue, *Terrorism and Trial By Jury: The Vices and Virtues of British and American Criminal Law*, 59 STAN. L. REV. 1321, 1326 (2007).

172. See INDEP. MONITORING COMM’N REPORT, *supra* note 155, at 42 (commenting on the rule of law being fundamental and necessary to a society attempting to combat terrorism effectively).

courts<sup>173</sup> in the occupied Palestinian territories<sup>174</sup> of the West Bank and Gaza<sup>175</sup> to try Palestinians suspected of terrorist acts<sup>176</sup> against Israel.<sup>177</sup> No such parallel military court system exists for Israeli citizens, who are tried exclusively within the civil court system for suspected acts of terrorism.<sup>178</sup>

### *I. 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.<sup>179</sup> 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

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173. Military Proclamation No. 2 Concerning Regulation of Authority and the Judiciary (West Bank) (1967) set forth the governance for the occupied territories. The Security Provisions Order (Consolidated Version) (West Bank) (no. 378) (1970) sets forth much of the criminal code for the occupied territories.

174. 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, art. 66, Aug. 12, 1949, 6 U.S.T. 3516. 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, art. 14(1), Dec. 16, 1966, 999 U.N.T.S. 171 (ICC). 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 ICC arts. 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*, 89 INT’L REV. OF THE RED CROSS 395, 403-04 (2007).

175. 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).

176. 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 *id.* at 206.

177. 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. See HAJJAR, *supra* 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 Palestinians suspected of terrorist acts against Israel since their inception in 1967. *Id.* at 13-15.

178. GUIORA, *supra* note 177, at 332 n.55.

179. *Id.* at 332.

authority to decide whether a Palestinian suspect is tried before a civilian court or a military one.<sup>180</sup>

For example, the civilian justice system requires that defendants be brought before a judge within twenty-four hours of arrest,<sup>181</sup> whereas under the military court system, a Palestinian detainee may be held for up to eight days before being brought before a judge.<sup>182</sup> 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.<sup>183</sup>

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 thirty-one days.<sup>184</sup> A military judge can extend the time frame for denial of access to counsel up to ninety days if the military affirms that the interrogation of the suspect is ongoing for that duration of time.<sup>185</sup> Interrogators are allowed to exert some physical force as part of the interrogation of the suspect.<sup>186</sup> Any confessions made to General Security Services

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180. See Cavanaugh, *supra* note 175, 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 (Isr.) (in which the High Court of Justice declined to compel military judges to hear live witnesses instead of basing their decisions on affidavits alone).

181. Israeli Penal Code §9.3.3.

182. Israel Military Order No. 378, Order Concerning Security Provisions. This timeframe has been changed by military order from time to time. At some points, military personnel were allowed to hold arrested suspects for eighteen days without access to a judge. See HAJJAR, *supra* note 177, at 257.

183. See *id.* at 253-54 (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). See also GUIORA, *supra* note 177, at 333 (same).

184. GUIORA, *supra* note 177, at 333. In the ordinary civil courts in Israel, a suspect has the right to see counsel immediately after arrest. *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 177, 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).

185. See HAJJAR, *supra* note 177, at 257.

186. 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 HCJ 5100/94, Pub. Comm. Against Torture in Isr. v. State of Israel, 53(4) PD 817, ¶¶ 8-13 (1999).

or the Israeli Police are admissible in the military court.<sup>187</sup> The defendant has the right to an in camera hearing before the military judge to challenge the admissibility of the confession, although this is not often used by defense counsel.<sup>188</sup>

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.<sup>189</sup> The rules of evidence are drawn from the Military Justice Law, which also governs Israeli courts-martial proceedings.<sup>190</sup> Defendants are considered innocent until proven guilty.<sup>191</sup> Secret information cannot be submitted to the court to bolster evidence toward a conviction,<sup>192</sup> although secret evidence can be used to extend the period of pretrial detention and to bring initial charges against a defendant.<sup>193</sup> Both the defendant and the prosecution retain a limited right to appeal from the military court,<sup>194</sup> the appeal to be heard by the Military Court of Appeals.<sup>195</sup>

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.<sup>196</sup> These matters are justiciable<sup>197</sup> so long as they turn on a challenge to

The treatment of Palestinians during interrogation has been criticized harshly by some international observers. *See generally* HUMAN RIGHTS WATCH, TORTURE AND ILL-TREATMENT: 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).

187. GUIORA, *supra* note 177, at 333.

188. 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. *See* HAJJAR, *supra* note 177, at 109.

189. GUIORA, *supra* note 177, at 333.

190. Military Justice Law 5715-1955, 9 LSI 195, (1954-55) (Isr.). *See* HAJJAR, *supra* note 177, at 257.

191. GUIORA, *supra* note 177, at 335.

192. *Id.* 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. *See* Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. App. III. §§ 1-16 (2010)).

193. *See* HAJJAR, *supra* note 177, at 110.

194. For trials of serious crimes, the right of appeal is always guaranteed. For minor crimes, appellate review is discretionary. *See id.* 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.*

195. GUIORA, *supra* note 177, 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.*, HCJ 7015/02 Ajuri v. Israeli Defense Forces Commander in the West Bank, 56(4) PD 861 [2002] (Isr.) (reviewing the military decision to reassign family members of Palestinians suspected of committing terrorist acts against Israel).

196. *See* HAJJAR, *supra* note 177, at 57.

197. 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* Schulhofer, *supra* note 114, at 1923 (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.

particular acts, and not a challenge to overarching national security or military policy.<sup>198</sup> Although the High Court of Justice tends to be extremely deferential to the decisions made by the Israeli Defense Forces,<sup>199</sup> the High Court of Justice does occasionally modify the procedures of the military court system to increase the protections for Palestinians.<sup>200</sup> Further, the knowledge that each action taken 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.<sup>201</sup>

## 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.<sup>202</sup> 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.<sup>203</sup>

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, 95 percent have been convicted or have pled guilty to charges.<sup>204</sup> This high conviction rate has been interpreted in two ways: The 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.<sup>205</sup>

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.<sup>206</sup> These structural differences alone have created skepticism as to the legitimacy of the military courts.<sup>207</sup>

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198. See, e.g., HCJ 769/02 Pub. Comm. Against Torture in Israel v. State of Israel, 53(4) PD 817, ¶¶ 8, 51 [2005] (Isr.), 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.*

199. See, e.g., HCJ 3239/02 Marab v. The Commander of IDF Forces in the West Bank, 57(2) PD 349 [2002] (Isr.).

200. E.g., *id.* at ¶ 26 (holding that the duration of time for which a Palestinian may be held in detention without access to a lawyer must be shortened in order to comport with basic due process principles).

201. 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].

202. HAJJAR, *supra* note 177, at 3, 4.

203. *Id.* at 32.

204. *Id.* at 3.

205. *Id.*

206. *Id.* at 5.

207. *Id.* at 206.



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.<sup>208</sup> The Israeli government asserts that it is not bound by the rules set forth in the Fourth Geneva Convention governing hostile occupation,<sup>209</sup> but maintains that it treats Palestinians humanely as a matter of policy.<sup>210</sup> 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 Defense (Emergency) Regulations, a relic of British colonial rule in Israel and the Palestinian territories, the applicability of which is now limited to Palestinians but not Israelis.<sup>211</sup>

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.<sup>212</sup> 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.<sup>213</sup> 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.<sup>214</sup>

Fourth, critics of the military courts argue that the rules and procedures, as actually implemented, fall far short of ensuring that defendants' rights are

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208. 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* Fourth Geneva Convention art. 3, Aug. 12, 1949, 6 U.S.T. 3516. The Fourth Geneva Convention protects detainees against differentiated treatment based on religion or faith. *Id.* at art. 3(1). Detainees are also protected against violence against their person, as well as humiliating and degrading treatment. *Id.* at art. 3(1)(a), (c).

209. *See* Meir Shamgar, *The Observance of International Law in the Administered Territories*, in ISRAEL HANDBOOK ON HUMAN RIGHTS 262 (Yoram Dinstein ed., 1971) (explaining the lack of international law jurisdiction over the West Bank and Gaza); *see also* Cavanaugh, *supra* note 175, at 203-04.

210. *See* Cavanaugh, *supra* note 175, at 205. 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, 3 C.F.R. 918 (2002).

211. British Defence (Emergency) Regulations, 1945 (Eng.). 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. *See* HAJJAR, *supra* note 177, at 60.

212. HAJJAR, *supra* note 177, at 207.

213. *See* U.S. State Dep't, Bureau of Democracy, Human Rights, and Labor, 2003 Country Reports on Human Rights Practices, Israel and the Occupied Territories, app. § 1(e) (Feb. 25, 2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27929.htm> (last visited Oct. 21, 2010) (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).

214. HAJJAR, *supra* note 177, at 207. *See also* *Palestinian Teenagers, Hit By Closures and Poverty, Benefit from UN-Backed Youth Centres*, UNITED NATIONS NEWS CENTRE (Aug. 15, 2007), <http://www.un.org/apps/news/story.asp?NewsID=23508&Cr=palestin&Cr1=> (last visited Oct. 21, 2010) (noting that many Palestinian teenagers are in need of a constructive way to spend their time given their chronic anxiety and the feeling of loss of control over their lives that stems from the Israeli occupation).

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 obligations.<sup>215</sup> Some courts outside of Israel have similarly concluded that military courts struggle with the international law requirements of impartiality and due process,<sup>216</sup> and that, therefore, the rule of law is almost always compromised when military courts are used to try civilians.<sup>217</sup>

### C. India

India has been coping with serious national security concerns, both internal and external, for the last sixty years.<sup>218</sup> By some accounts, India has faced the highest number of terrorist acts in recent years of any nation.<sup>219</sup> In response to internal and external threats of terrorism that have been present since Indian independence, the central government of India<sup>220</sup> and the parliament have enacted a number of statutes that authorize preventive detention<sup>221</sup> for terrorism suspects<sup>222</sup> and empower the convening of specialized terrorism courts.<sup>223</sup>

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

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215. See YESH-DIN VOLUNTEERS FOR HUMAN RIGHTS, BACKYARD PROCEEDINGS: THE IMPLEMENTATION OF DUE PROCESS RIGHTS IN THE MILITARY COURTS IN THE OCCUPIED TERRITORIES 164-65 (December 2007).

216. See *Incal v. Turkey*, App. No. 22678/93, 29 Eur. Comm'n H.R. Dec. & Rep. 449, ¶¶ 68-73 (1998) (noting that military judges are often unable to act with impartiality toward a defendant within the context of a military court).

217. See *id.*; see also Cavanaugh, *supra* note 175, at 218-219.

218. See Anil Kalhan, et al., *Colonial Continuities: Human Rights, Terrorism and Security Laws in India*, 20 COLUM. J. OF ASIAN L. 93, 99 (2006); ANTI-TERRORISM LAWS: INDIA, THE UNITED STATES, THE UNITED KINGDOM AND ISRAEL I (K.R. Gupta, ed., Atlantic 2002).

219. E.g., Arun Venugopal, *India Worst Hit by Terrorism in 2004*, INDIA ABROAD, Aug. 19, 2005 at A14.

220. 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 §§ 1-2, 2A, List III §§ 1-2.

221. 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. INDIA CONST. art. 22. 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. INDIA CONST. art. 22(3).

222. For example, the Defence of India Act of 1962 authorized the central and state governments to broaden their use of preventive detention beyond 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 218, at 132-33 (citing VENKAT IYER, STATES OF EMERGENCY: THE INDIAN EXPERIENCE 109 (2000)).

223. Statutes are not the only mechanism by which the central government has attempted to deal with purported national security threats.

years<sup>224</sup>—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<sup>225</sup> and often appeared to target political enemies and particular minority populations within India for harsher treatment in courts that afford them fewer procedural and substantive protections.<sup>226</sup>

### 1. History of Specialized Courts

In 1967, the government enacted the Unlawful Activities (Prevention) Act (UAPA)<sup>227</sup> that served as a catchall legislation by which terrorist acts, among other crimes, could be prosecuted. 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.<sup>228</sup> UAPA also made membership in unlawful associations a prosecutable offense<sup>229</sup> and immunized the government against claims of wrongful conduct, so long as the government acted in good faith in its execution of UAPA.<sup>230</sup> 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).<sup>231</sup> TADA was India's first nationwide legislation specifically crafted to address the investigation and prosecution of terrorism.<sup>232</sup>

224. 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, 280 (2004).

225. Sachin Mehta, *Repeal of POTA Justified*, LEGAL SERVICES INDIA, <http://www.legalservicesindia.com/articles/pota.htm> (last visited Oct. 21, 2010) (noting that authorities had achieved only a one-percent conviction rate under the Terrorist and Disruption Activities (Prevention) Act (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).

226. Under TADA, evidence indicated that Muslims were arrested en masse whenever unrest occurred, whereas violence committed by Hindus went largely unacknowledged. *See* Krishnan, *supra* note 224, at 270-71, 275.

227. Unlawful Activities (Prevention) Act, No. 37 of 1967, INDIA CODE (2010), *available at* <http://indiacode.nic.in> (UAPA).

228. UAPA § 5.

229. UAPA §§ 10-14.

230. UAPA § 18.

231. Terrorist and Disruptive Activities (Prevention) Act, Act No. 28 of 1987, INDIA CODE (2010), amended by Act No. 43 of 1993, *available at* <http://indiacode.nic.in>.

232. TADA was preceded by the Terrorist Affected Areas (Special Courts) Act, Act No. 61 of 1984, INDIA CODE. (2010), *available at* <http://indiacode.nic.in>. 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, ¶¶ 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, ¶ 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) 3 S.C.C. 569, ¶ 8 (India) (noting the deficiencies in India's counterterrorism programs were highlighted by the 1984 assassination of Prime Minister Indira Gandhi).

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, granted insufficient powers to the government to combat and prosecute terrorism.<sup>233</sup> Under TADA, the government was granted the ability to convene specialized courts ("Designated Courts") to try terrorism cases.<sup>234</sup>

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 or state government had the discretion to decide whether a case was referred to a Designated Court or to the standard criminal justice system.<sup>235</sup> 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.<sup>236</sup>

For crimes that carried a prison sentence of 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.<sup>237</sup> Most drastically, TADA shifted the burden of proof onto defendants for various crimes including the possession of firearms and the financing of unlawful associations.<sup>238</sup> TADA expired in 1995<sup>239</sup> amid heavy criticism that the government had misused the legislation to target racial and religious minorities<sup>240</sup> and that it had not achieved the desired effect of stemming legitimately dangerous activity.<sup>241</sup>

In the wake of the September 11 terrorist attacks,<sup>242</sup> and attacks on Indian government buildings soon afterward,<sup>243</sup> 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),<sup>244</sup> which mirrored TADA provisions in numerous ways. The government,

233. See Krishnan, *supra* note 224, at 267.

234. Terrorist and Disruptive Activities (Prevention) Act, Act No. 28 of 1987, pt. III, § 9, INDIA CODE (2010), amended by Act No. 43 of 1993, available at <http://indiacode.nic.in>.

235. TADA §§ 9(1), (2).

236. TADA § 9(3).

237. TADA § 14(2).

238. TADA § 21.

239. 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, INDIA CODE (2010), amended by Act No. 43 of 1993. 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. See Kalhan, *supra* note 218, at 100.

240. *Repeal of Anti-Democratic Laws Sought*, THE HINDU (Aug. 7, 2004), <http://www.hindu.com/2004/08/07/stories/2004080707001100.htm> (last visited Oct. 21, 2010).

241. See Mehta, *supra* note 225.

242. 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. See generally S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

243. The Indian parliament building in New Delhi was attacked in December 2001, with 12 people killed and 22 injured in an exchange of gunfire. See *On This Day 1950-2005, 2001: Suicide Attack on Indian Parliament*, BBC NEWS, [http://news.bbc.co.uk/onthisday/hi/dates/stories/december/13/newsid\\_3695000/3695057.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/december/13/newsid_3695000/3695057.stm) (last visited Oct. 21, 2010).

244. The Prevention of Terrorism Act, No. 15 of 2002, INDIA CODE (2010) (POTA), available at <http://indiacode.nic.in>, was enacted March 28, 2002, replacing the Prevention of Terrorism Ordinance, No. 9 of 2001, INDIA CODE (2001), available at <http://indiacode.nic.in>. Under the Indian Constitution,

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—without any criminal intent—with terrorist suspects,<sup>245</sup> broadening the right to wiretap any person within India without authorization,<sup>246</sup> extending the duration and scope of preventative detention measures,<sup>247</sup> allowing confessions to police officers to be admitted as substantive evidence,<sup>248</sup> and denying arrested suspects access to counsel.<sup>249</sup>

POTA authorized specialized terrorism courts (“Special Courts”) and set up specific guidelines for the management of such cases.<sup>250</sup> 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.<sup>251</sup> 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.<sup>252</sup>

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<sup>253</sup>—a feature that essentially shifted the burden of proof from the prosecution to the defendant<sup>254</sup>—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.<sup>255</sup> 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.<sup>256</sup> 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.<sup>257</sup> Additionally, defendants maintained the right to cross-examine witnesses and to have limited access to relevant evidence.<sup>258</sup>

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the executive branch has the power to issue ordinances for a short duration to meet unforeseen or urgent challenges to the nation. INDIAN CONST. art. 123. See M.P. JAIN, INDIAN CONSTITUTIONAL LAW 111-12 (1967).

245. The Prevention of Terrorism Act, No. 15 of 2002, §3(5), INDIA CODE (2010), available at <http://indiacode.nic.in>.

246. POTA § 43. The admissibility of evidence garnered in this manner is established in POTA § 45.

247. POTA §§ 48(2), 49.

248. POTA § 32. The admissibility of confessions is a reversal of the pre-POTA rule that confessions to police officers are generally inadmissible. See Kalhan, *supra* note 218, at 161.

249. POTA § 52.

250. POTA §§ 23-34.

251. POTA § 23(1). As with TADA, the central government made the final decision on whether a case was appropriately tried in a Special Court. POTA § 23(3).

252. POTA § 29(2).

253. POTA § 29(1).

254. Sudha Ramachandran, *Filling India’s Anti-Terrorism Void*, ASIA TIMES ONLINE (Sept. 23, 2004), [http://www.atimes.com/atimes/South\\_Asia/FI23DF03.html](http://www.atimes.com/atimes/South_Asia/FI23DF03.html) (last visited Oct. 21, 2010) [hereinafter Ramachandran].

255. POTA § 29(1).

256. POTA § 29(5).

257. POTA § 34 (preserving a right of appeal to a high court, but eliminating the right of direct appeal through the ordinary judicial processes to attempt to streamline the appeals process).

258. POTA § 29(2), (5).

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.<sup>259</sup> In fact, in the years that it was in effect, POTA appeared to be used selectively to target particular populations.<sup>260</sup> Evidence from the state of Gujarat suggests that arrests under POTA may also have been religiously selective,<sup>261</sup> given that almost all of the 280 arrests were of Muslims.<sup>262</sup> 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.<sup>263</sup> Furthermore, critics 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.<sup>264</sup>

POTA became a driving issue in the 2004 parliamentary election.<sup>265</sup> After Prime Minister Manmohan Singh's election, he followed up on one of his major election promises to repeal POTA.<sup>266</sup> 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.<sup>267</sup> 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

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259. C. Raj Kumar, *Human Rights Implications of National Security Laws in India: Combating Terrorism While Preserving Civil Liberties*, 33 DENV. J. INT'L L. & POL'Y 195, 196 (2005).

260. HUMAN RIGHTS WATCH, WORLD REPORT 2003 (EVENTS OF 2002) 241 (2003).

261. Mehta, *supra* note 225.

262. Ramachandran, *supra* note 254.

263. 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 at least fifty-eight Hindu activists were killed in a train fire, the retaliatory violence led to the killings of over two thousand Muslims. HUMAN RIGHTS WATCH, *supra* note 260, at 236-37. Most of the investigations of the retaliatory violence did not result in arrests or trials of suspects. *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. See Prevention of Terrorism Ordinance, No. 9 of 2001, INDIA CODE (2010), available at <http://indiacode.nic.in>.

264. See Kalhan, *supra* note 218, at 165; Testimony of K. Chandru, in THE TERROR OF POTA AND OTHER SECURITY LEGISLATION: A REPORT ON THE PEOPLE'S TRIBUNAL ON THE PREVENTION OF TERRORISM ACT AND OTHER SECURITY LEGISLATION 63 (Preeti Verma ed., 2004).

265. COMMONWEALTH HUMAN RIGHTS INITIATIVE, INDIA COUNTRY REPORT: ANTI-TERRORISM LAWS & POLICING, IN STAMPING OUT RIGHTS: THE IMPACT OF ANTITERRORISM LAWS ON POLICING 3 (2007), available at [http://www.humanrightsinitiative.org/publications/chogm/chogm\\_2007/docs/country\\_reports/071004\\_chogm07\\_india\\_anti\\_terrorism\\_policing\\_country\\_report2007.pdf](http://www.humanrightsinitiative.org/publications/chogm/chogm_2007/docs/country_reports/071004_chogm07_india_anti_terrorism_policing_country_report2007.pdf) (last visited Oct. 21, 2010) (citing Public Statement of Amnesty International, India: Continued detention two years after the repeal of POTA (Sept. 20, 2006), available at <http://www.amnesty.org/en/library/asset/ASA20/026/2006/en/e7b5cd9f-f9d3-11dd-b1b0-c961f7df9c35/asa200262006en.pdf> (last visited Oct. 21, 2010) [hereinafter Public Statement of Amnesty International]).

266. *Id.* See generally, Prevention of Terrorism (Repeal) Act, No. 26 of 2004, INDIA CODE (2010), available at <http://indiacode.nic.in>. 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 Public Statement of Amnesty International, *supra* note 266.

267. The Unlawful Activities (Prevention) Amendment Ordinance, No. 29 of 2004, INDIA CODE (2010), available at <http://indiacode.nic.in>.

burden of proof onto defendants.<sup>268</sup>

Numerous major terrorist attacks occurred after the repeal of POTA, including the 2006 bombings in Varanasi<sup>269</sup> and Mumbai<sup>270</sup> that killed at least 215 people combined, and attacks in Bengaluru,<sup>271</sup> Ahmedabad,<sup>272</sup> and New Delhi<sup>273</sup> in 2008, that killed over eighty 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.

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,<sup>274</sup> triggering outrage among the Indian public and a demand for stronger national security and antiterrorism measures.<sup>275</sup> In response, the Lok Sabha, the lower house of the Indian parliament, rapidly passed two pieces of legislation: the National Investigation Agency Bill (NIA Bill)<sup>276</sup> and further amendments to the UAPA.<sup>277</sup>

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.<sup>278</sup> All of the provisions regarding the Special Courts, including those relating to jurisdiction,<sup>279</sup> the burden of proof lying with the defendant,<sup>280</sup> the right of the Special Court to use summary trials,<sup>281</sup> and the right of the Special Court to proceed without the

268. Unlawful Activities (Prevention) Amendment Ordinance § 45.

269. *Serial Blasts in Varanasi*, TELEGRAPH (March 7, 2006), [http://www.telegraphindia.com/1060308/asp/frontpage/story\\_5941755.asp](http://www.telegraphindia.com/1060308/asp/frontpage/story_5941755.asp) (last visited Oct. 21, 2010).

270. *Mumbai Death Toll Tops 200*, GUARDIAN (July 12, 2006, 16:07 BST), <http://www.guardian.co.uk/world/2006/jul/12/india> (last visited Oct. 21, 2010).

271. Nirmala Ravindran & Swagata Sen, *Terror Strikes Bangalore; 2 Killed, 12 Injured in 9 Blasts*, INDIA TODAY (July 25, 2008, 14:41 IST), <http://indiatoday.intoday.in/site/Story/11966/LATEST%20HEADLINES/Terror+strikes+Bangalore;+two+killed,+12+injured+in+nine+blasts.html> (last visited Oct. 21, 2010).

272. *Ahmedabad Blasts: Toll rises to 49*, INDIA TODAY (July 27, 2008, 5:18 IST), <http://indiatoday.intoday.in/site/Story/12030/LATEST%20HEADLINES/Ahmedabad+blasts:+Toll+rises+to+49.html> (last visited Oct. 21, 2010).

273. Rahul Tripathi, *Serial blasts rock Delhi; 30 dead, 90 injured*, TIMES OF INDIA (Sept. 14, 2008, 12:50 AM IST), [http://timesofindia.indiatimes.com/Serial\\_blasts\\_rock\\_Delhi\\_18\\_dead/articleshow/3479914.cms](http://timesofindia.indiatimes.com/Serial_blasts_rock_Delhi_18_dead/articleshow/3479914.cms) (last visited Oct. 21, 2010); *Death toll in Delhi blast rises to three*, HINDUSTAN TIMES (Sept. 28, 2008, 10:56 IST), [http://www.hindustantimes.com/StoryPage/FullcoverageStoryPage.aspx?id=4eda9fa6-e2f5-4ea6-bd8e-dff5d4159f26TerrorStrikesDelhi\\_Special&&Headline=Death+toll+in+Delhi+blast+rises+to+three](http://www.hindustantimes.com/StoryPage/FullcoverageStoryPage.aspx?id=4eda9fa6-e2f5-4ea6-bd8e-dff5d4159f26TerrorStrikesDelhi_Special&&Headline=Death+toll+in+Delhi+blast+rises+to+three) (last visited Oct. 21, 2010).

274. Somini Sengupta, *Dossier Gives Details of Mumbai Attacks*, N.Y. TIMES, Jan. 7, 2009, at A5.

275. Somini Sengupta and Keith Bradsher, *India Faces Reckoning as Terror Toll Eclipses 170*, N.Y. TIMES, Nov. 30, 2008, at A1.

276. National Investigation Agency Bill, Bill No. 75-C of 2008, INDIA CODE (2010), available at <http://indiacode.nic.in> (NIA).

277. Unlawful Activities (Prevention) Amendment Bill, Bill No. 76 of 2008 INDIA CODE (2010), amending the Unlawful Activities (Prevention) Act, No. 37 of 1967, INDIA CODE (2010), available at <http://indiacode.nic.in>.

278. NIA, c. II & IV.

279. NIA § 11(1), (2).

280. NIA § 16(1).

281. NIA § 16(2).

defendant in attendance<sup>282</sup> 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.<sup>283</sup>

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,<sup>284</sup> expand the power of police to conduct search and seizure,<sup>285</sup> extend the limits on preventive detention to 180 days without charge,<sup>286</sup> limit or abolish the right to bail in many cases,<sup>287</sup> and shift the burden of proof onto the accused.<sup>288</sup>

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,<sup>289</sup> and the speed of the trial was remarkable for the notoriously slow Indian judicial system.<sup>290</sup> Nonetheless, serious due process concerns surfaced with regard to this trial, such as the fact that defense counsel was allowed only fifteen minutes per day to meet with Kasab, and that all attorney-client meetings took place in the presence of police and court officials.<sup>291</sup> 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.<sup>292</sup> 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

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282. NIA § 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.

283. B.B. Pande, *Anti-Terror Legislation*, SSRN.COM (Aug. 20, 2009), <http://ssrn.com/abstract=1458279> (last visited Oct. 21, 2010).

284. UAPA 2008 Amendments §§ 15-18.

285. UAPA 2008 Amendments § 12.

286. *Id.*

287. *Id.*

288. *Id.*

289. Rama Lakshmi, *In Mumbai Terrorism Case, An Emotional, Historic Trial*, WASH. POST (June 22, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/21/AR2009062101731.html?sub=AR> (last visited Oct. 21, 2010) (describing the start of the trial of suspect Ajmal Amir Kasab in a special court in which the pace of the trial is significantly faster than that of ordinary courts).

290. Vaishnavi Chandrashekhar, *Beyond Kasab Guilty Verdict, Mumbai Attacks Reshape Indian law*, CHRISTIAN SCIENCE MONITOR (May 3, 2010), <http://www.csmonitor.com/World/2010/0503/Beyond-Kasab-guilty-verdict-Mumbai-attacks-reshape-Indian-law> (last visited Oct. 21, 2010) (discussing the relatively speedy conclusion of the Kasab trial and the larger ramifications for Indian counterterrorism law and policy); Vikas Bajaj & Lydia Polgreen, *Suspect Stirrs Mumbai Court by Confessing*, N.Y. TIMES (July 20, 2009), [http://www.nytimes.com/2009/07/21/world/asia/21india.html?\\_r=1&hp](http://www.nytimes.com/2009/07/21/world/asia/21india.html?_r=1&hp) (last visited Oct. 21, 2010) (noting that 134 witnesses had testified in the trial of Ajmal Kasab during the first several weeks).

291. Chandrashekhar, *supra* note 290.

292. *Repeating the Mistakes of the Past*, HUMAN RIGHTS FEATURES (Jan. 22, 2009), <http://www.hrdc.net/sahrdc/hrfeatures/HRF191.htm> (last visited Oct. 21, 2010) [hereinafter *Repeating the Mistakes of the Past*].



Court and be convicted solely because they were unable to overcome a presumption of guilt.<sup>293</sup> Critics also object to the lack of external checks and oversight on the implementation of the legislation: TADA and POTA both contained sunset 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.<sup>294</sup>

## 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*,<sup>295</sup> the constitutionality of TADA and similar legislation was addressed by the court.<sup>296</sup> Specifically, the court undertook a review of the legality of Special Courts and their procedures as articulated under TADA.<sup>297</sup> The petitioner's challenge to the Designated Court/Special Court system was based on Article 21 of the Indian Constitution,<sup>298</sup> which guarantees due process,<sup>299</sup> and the Indian Supreme Court's decision in *Maneka Gandhi v. Union of India*,<sup>300</sup> which interpreted Article 21 as establishing a guarantee of substantive due process.<sup>301</sup>

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.<sup>302</sup> 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.<sup>303</sup>

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.<sup>304</sup> The court 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

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293. *Id.*; Pande, *supra* note 283.

294. *Repeating the Mistakes of the Past*, *supra* note 292.

295. (1994) 3 S.C.C. 569, ¶ 289 (India).

296. *Kartar Singh*, at ¶ 2.

297. *Id.* at ¶ 35.

298. 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.

299. *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).

300. (1978) 2 S.C.R. 621 (India).

301. *Id.* See *Kartar Singh*, at ¶ 81.

302. *Kartar Singh*, at ¶ 82.

303. *Id.* 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.

304. *Id.* at ¶¶ 219-223.

during the Troubles.<sup>305</sup> The court rejected a substantive due process argument as well, noting, like many United States' courts, 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 combating national security threats.<sup>306</sup>

Although their constitutionality may not be at issue after the *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.

#### IV. THE UNITED STATES 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 nations examined above. Like the United Kingdom and India, the genesis of the current United States military commissions stems from a perceived national emergency for which the traditional justice system is believed to be inadequate or inappropriate.<sup>307</sup> 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 some fundamental protections for defendants in a manner meant to increase the conviction rate in the hopes of improving national security, at least in the short-term.<sup>308</sup> The specialized court systems in Northern Ireland, India, and the United States also suffer from a seemingly subjective and easily manipulable set of criteria to determine whether a defendant enjoys the rights of an ordinary criminal trial or is moved into the specialized court system.

Like Israel, the United States predicated and justified its decision to use a

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305. *Id.* at ¶ 224.

306. *Id.* 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. *Id.* at ¶ 368(17).

307. Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (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.

66 Fed. Reg. at 57833-34.

308. *See id.*

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.<sup>309</sup> 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.<sup>310</sup> However, the international legal status of the detainees or the decision to use a military commission clearly does not determine what types of procedural and substantive protections are implemented in a military commission. Yet in both the Israeli and United States contexts, the governments made conscious decisions to offer a lower level of protections to defendants than that 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, only foreign Muslim men are slated for trial in military commissions.

A clear deontological argument can be made that specialized courts should not be used: The very fact that the United States chooses to use a specialized trial system for certain suspects, all of whom happen to be non-U.S. citizens who are Muslim men, raises or ought to raise moral red flags that counsel toward abolishing a specialized and segregated system. Although this argument has been voiced repeatedly since 2001,<sup>311</sup> it has not gained traction in policy-making circles, particularly given the rhetoric surrounding the potential threat to the American public should suspects be afforded the same types of protections available to either civilians or designated lawful combatants.<sup>312</sup> Furthermore, 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

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309. See HAJJAR, *supra* note 177, at 2, 27.

310. See Military Order of November 13, 2001, 66 Fed. Reg. 57833.

311. E.g., Gott, *supra* note 106. See Natsu Taylor Saito, *Internments, Then and Now: Constitutional Accountability in Post 9/11 America*, 2 Duke F. L. & Soc. Change 71, 89 (2010); Natsu Taylor Saito, *For "Our" Security: Who is an "American" and What is Protected By Enhanced Law Enforcement and Intelligence Powers?*, 2 SEATTLE J. SOC. JUS. 23, 29-31 (2004) (citing the difference in judicial treatment of Lindh and McVeigh versus Hamdi and Padilla as evidence of disparate treatment of Middle Eastern men).

312. E.g., *Politicians Rip Decision on Terrorism Trials*, CNN.COM (Nov. 13, 2009, 5:06 PM EST), [http://articles.cnn.com/2009-11-13/politics/mohammed.critics\\_1\\_terrorists-civilian-court-military-trial?\\_s=PM:POLITICS](http://articles.cnn.com/2009-11-13/politics/mohammed.critics_1_terrorists-civilian-court-military-trial?_s=PM:POLITICS) (last visited Oct. 21, 2010).

equal protection violation.<sup>313</sup> Yet the lack of a constitutional violation does not translate into the perception of impartiality in Muslim communities, either in the United States or internationally.<sup>314</sup>

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, undermining their sense of loyalty and inclusion in larger society, and often going so far as to radicalize them against the governments of these nations.<sup>315</sup> In all of the countries examined here, the question of whether to use a specialized terrorism trial process is not a matter of legality under the nation's constitution or, at least arguably, under international law. Policymakers have made clear that they do not view the specialized trial system to be a significant moral issue that counsels toward ordinary courts or the military justice system afforded to lawful combatants. Rather, the question in each nation 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 and equal protection of the law and gravitate towards a model where national security concerns are given primacy, regardless of the moral cost or whether a utilitarian benefit can be proven as to short-term or long-term national security gains.

## V. CONCLUSION

In continuing to use specialized courts to try terrorism suspects, the United States remains in the ranks of the nations surveyed in this Article. Like the United Kingdom, Israel, and India, the United States' policy appears to prioritize national

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313. The standard for proving a selective prosecution claim under the Fourteenth Amendment is extremely high. *See* *United States v. Armstrong*, 517 U.S. 456, 457 (1996). Based on the standard in *Armstrong*, in order to 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).

314. *See* OFFICE FOR DEMOCRATIC INSTS. & HUMAN RIGHTS, EXPERT MEETING ON SECURITY, RADICALIZATION, AND THE PREVENTION OF TERRORISM ¶ 28 (July 28, 2008), available at [www.osce.org/item/34235.html](http://www.osce.org/item/34235.html) (last visited Sept. 28, 2010) ("Expert Meeting on Security") (finding that of the twenty-five countries listed in the United States security entry/exit registry, all but one, North Korea, were predominantly Muslim).

315. *See id.* (stating that "the mere perception of profiling may be sufficient to foster mistrust of authorities and result in alienation of communities"). Researchers from the United Kingdom have argued that seemingly separatist counterterrorism treatment—even those measures falling well short of a specialized trial system—can have negative effects within the targeted community that are detrimental to the long-term security of a nation. *See also* Blick, *supra* note 104, at 11:

[Although there are] comparatively few terrorists in the midst of [British Muslim] communities . . . [there are] larger numbers of people who have some sympathy with their aims, and who share to some extent the frustrations and anger that drives the men of violence and who could give them the tacit or active support on which terrorists everywhere rely. Government policy must persuade these young people that their future lies within the democratic framework of a tolerant and law-abiding nation. These short-term and long-term goals are connected.

security concerns over upholding 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 United States military commission system has created the perception that the type of trial—and, therefore, the type of justice—accorded to a defendant depends not necessarily on a 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 an appropriate 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 significantly from the basic protections of the ordinary justice system.