RECONCEPTUALIZING FEDERAL COURTS IN THE WAR ON TERROR

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INTRODUCTION

Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms, Professors Judith Resnik and Dennis Curtis's *tour de force* of the iconography of justice and courts, draws parallels between the U.S. detention center at Guantánamo Bay, Cuba, and broader trends in adjudication.[1] Guantánamo, Resnik and Curtis argue, may be aberrational in the extremity of its approach to detention and interrogation.[2] But, they explain, it also reflects a larger, trans-substantive shift away from public dispute resolution, a growing reliance on administrative and other nonjudicial forms of decisionmaking, a loosening of procedural safeguards, and a decline of judicial independence.[3] "One might well think of Guantánamo as isolated in both the literal and legal senses," Resnik and Curtis write.[4] "But unfortunately, some of its procedures are not as foreign to contemporary decisionmaking as one might wish."[5]

Resnik has elsewhere explored the idea of Guantánamo as exemplifying continuity rather than change. In her article *Detention, the War on Terror, and the Federal Courts*, Resnik identifies similarities between Guantánamo and the United States' treatment of criminal defendants, immigrants, and convicted prisoners during the past three decades.[6] She emphasizes, for example, how these prisoners have faced increasingly harsh forms of confinement and limited

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1. JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 328–34 (2011).

2. *Id.* at 327, 334.

3. *Id.* at 334–37.

4. *Id.* at 334.

5. *Id.* at 334–35.

6. Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 634–63 (2010).

access to courts that mirror the treatment of Guantánamo detainees.[7] Other scholars have similarly drawn parallels between America's treatment of prisoners in the "war on crime" and the "war on terror."[8] Viewed from this perspective, Guantánamo represents more of a pronounced expression of broad trends in the U.S. legal system than a radical departure from them. And the example that Guantánamo offers of the devolution of adjudicatory processes from Article III courts to specialized tribunals is one that reverberates beyond the realm of national security detentions.

Representing Justice thus provides a valuable lens through which to examine the impact of changes in U.S. law and policy after 9/11—changes that reflect the shifting role of courts in democracies over time. But it also prompts consideration of how the United States' approach to terrorism has affected our understanding of the way that courts function, are perceived, and reflect social values.

U.S. detentions at Guantánamo, as Resnik and Curtis note, rely on quasi-administrative structures like Combatant Status Review Tribunals ("CSRTs") and military commissions in lieu of federal courts.[9] Yet, notwithstanding the creation of such new, non-Article III forms of adjudication, federal courts will continue to serve as the forum for at least some terrorism prosecutions, including of individuals suspected of supporting al Qaeda and affiliated groups. Military tribunals have not supplanted federal courts but rather emerged as an alternative to them. Once the exclusive mechanism for the long-term incapacitation of terrorism suspects, federal courts have become one choice on a growing menu of detention options.[10]

The creation of these alternative detention options has affected how federal courts are represented and perceived. Proponents of using federal courts increasingly emphasize their toughness as a way of demonstrating their continued viability as a forum for terrorism prosecutions in light of forum competition from military commissions.[11] Even liberal advocacy groups have

7. *Id.* at 634–35.

8. *See, e.g.*, 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) (comparing the wars on terror and crime and concluding that "in some important ways, 9/11 did not change everything"); *see also* Denny LeBoeuf, *From the Big Easy to the Big Lie*, *in* THE GUANTÁNAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW 193–200 (Mark P. Denbeaux & Jonathan Hafetz eds., 2009) (comparing the experience of representing capital defendants in Louisiana to that of representing Guantánamo detainees before military commissions).

9. RESNIK & CURTIS, *supra* note 1, at 327–28.

10. *See, e.g.*, Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1080–81 (2008); Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415, 1427–28 (2012).

11. Joshua T. Bell, *Trying Al Qaeda: Bringing Terrorists to Justice*, PERSP. ON TERRORISM, Oct. 2010, at 73, 77–78, http://www.terrorismanalysts.com/pt/index.php/pot/article/view/115/234.

shown an increasing tendency to justify federal courts based on their ability to deliver convictions rather than to protect individual rights or deal even-handedly with the accused.[12]

At the same time, federal courts are criticized for risking disclosure of classified or other sensitive information, infringing on executive prerogatives, and undermining military and intelligence operations.[13] These criticisms have not only helped legitimize military alternatives to federal criminal prosecution for the long-term incapacitation of terrorism suspects; they also have supplied justifications for denying civil litigants—particularly, victims of torture, arbitrary detention, and other forms of mistreatment—a judicial remedy and for dismissing legal challenges to controversial government programs under various justiciability doctrines.

This Article will explore the ways in which Guantánamo and the war on terror more generally have altered the perception and operation of federal courts.

Part I describes the growth after 9/11 of a new type of military detention system that provides an alternative to Article III-court prosecutions of terrorism suspects. Part II examines how this parallel military detention system has affected the way federal courts are defined and represented as a forum for terrorism prosecutions. Part III looks at federal courts from the perspective of their role in providing a forum for plaintiffs seeking redress for torture, unlawful detention, and related abuses. It describes how many of the same reasons cited in opposition of federal criminal prosecution of terrorism suspects are invoked—often by federal judges themselves—to prevent federal court adjudication of civil damages litigation arising out of government misconduct during counterterrorism operations. Part IV examines federal courts from another vantage point, describing their engagement with the new, post-9/11 military detention system through the exercise of habeas corpus

12. *See, e.g.*, RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS, 2009 UPDATE AND RECENT DEVELOPMENTS, at ii (2009); *ACLU Urges Obama Administration to Stand by Decision to Try 9/11 Suspects in Federal Criminal Courts*, AM. CIVIL LIBERTIES UNION (Mar. 19, 2010), http://www.aclu.org/national-security/aclu-urges-obama-administration-stand-decision-try-911-suspects-federal-criminal-c ("Since 9/11, there have been over 300 terrorism-related convictions in federal court. The military commissions have completed only three terrorism-related cases, with two of the three convicted defendants having served relatively short sentences they have already completed. . . . Attorney General Holder's decision to use federal criminal courts was the right decision for national security and the right decision for the rule of law."); *Ghailani Trial Underscores Federal Courts' Ability To Prosecute Terrorism Suspects, Says ACLU*, AM. CIVIL LIBERTIES UNION (Jan. 25, 2011), http://www.aclu.org/national-security/ghailani-trial-underscores-federal-courts-ability-prosecute-terrorism-suspects-say; *see also* 157 CONG. REC. S6752 (daily ed. Oct. 19, 2011) (statement of Sen. Patrick Leahy).

13. *See* Stephen J. Schulhofer, *Prosecuting Suspected Terrorists: The Role of Civilian Courts*, ADVANCE, Fall 2008, at 63, 63.

jurisdiction. Here, federal courts have performed two, inter-related functions: first, articulating general rules and principles to govern military detention and trial, and second, acting as quasi national security courts by reviewing the validity of individual prisoners' military confinement. While federal courts have imposed some constraints on the government's ability to hold terrorism suspects outside the criminal justice system, they have largely accommodated the new forms of military detention that emerged after 9/11 under the rubric of the war on terrorism and have shown considerable deference to the government's allegations in individual cases.

I. MILITARY DETENTION AND THE OPTIONALITY OF FEDERAL COURT PROSECUTION

Before 9/11, criminal prosecution represented the exclusive method in the United States for the long-term incapacitation of terrorism suspects.[14] This exclusivity resulted from the government's treatment of terrorism as a law enforcement matter. While the United States periodically engaged in military strikes as part of overseas counterterrorism operations, it maintained a civilian-law framework for the treatment of terrorism suspects.[15] The United States could, where appropriate, deport a suspect under immigration law[16] or, if seized abroad, render that suspect to another country.[17] But if the government desired a suspect's long-term incarceration, its only option was to prosecute and convict him in federal court.[18]

After 9/11, the United States has created a new legal framework for detaining terrorism suspects outside the criminal justice system. Relying on

14. Although alien terrorism suspects also could be incapacitated under federal immigration law, this typically constituted short-term detention, pending the alien's removal from the United States. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, §§ 411–12, 115 Stat. 272, 345–52 (codified at 8 U.S.C. §§ 1182, 1189, 1226a (2006)) (supplying terrorism-related definitions and requiring the detention of suspected terrorists); *see also* Zadvydas v. Davis, 533 U.S. 678, 699–700 (2001) (explaining the purposes of immigration removal and asserting that "if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute").

15. Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 HARV. L. REV. 1217, 1217–21 (2002).

16. 8 U.S.C. § 1227(a)(4)(B) (2006).

17. In the mid-1990s, the United States started to send suspected terrorists seized abroad to foreign countries for detention, as opposed to bringing them to the United States to face trial there. *See* JONATHAN HAFETZ, HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA'S NEW GLOBAL DETENTION SYSTEM 52 (2011); *see also* Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1336–37 (2007) (noting the development of the prior use of "renditions to justice" during the 1980s to bring suspects captured abroad to the United States for trial).

18. *See supra* note 14 and accompanying text.

both the 2001 congressional Authorization for Use of Military Force ("AUMF")[19] and his inherent commander-in-chief power, President Bush claimed the authority to treat certain terrorism suspects as "enemy combatants" in a global "war on terrorism."[20] Detainees, the Bush Administration asserted, could be held as enemy combatants for the duration of the conflict or, where appropriate, tried by military commission for war crimes.[21] While the Administration resisted definitional clarity on the scope of its detention authority, it claimed that this authority was without geographic limitation and included members and supporters of al Qaeda, the Taliban, and associated forces, even if they did not directly participate in hostilities.[22] It further asserted that those held as enemy combatants had no right to access U.S. courts if they were held outside the sovereign United States[23] and had *de minimis* judicial review if they were detained inside the country.[24]

This war on terrorism framework underlay the detention without charge of hundreds of individuals at Guantánamo, Bagram, and CIA-run "black sites" as well as the military detention of three people inside the United States.[25] It also supplied the rationale for transferring prisoners between detention facilities as well as rendering prisoners to foreign countries for torture and other abusive interrogation methods through the practice known as "extraordinary rendition."[26]

This alternative system, however, was never intended to supplant the federal criminal justice system. Federal criminal prosecutions of terrorism suspects continued throughout the Bush Administration.[27] There was, moreover, significant overlap between the category of individuals who could be subjected to war-on-terrorism confinement (whether through indefinite enemy combatant detention or military commission prosecution), on the one hand, or federal criminal indictment, on the other. For example, a person who provided support to al Qaeda or assisted al Qaeda in plotting a terrorist attack

19. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

20. HAFETZ, *supra* note 17, at 12, 18.

21. *See id.* at 16, 18.

22. *Id.* at 119.

23. *Id.* at 29–30.

24. *See id.* at 77.

25. HAFETZ, *supra* note 17, at 31, 48–49, 58, 76–77.

26. *Id.* at 52–53. Although the United States had begun rendering terrorism suspects to foreign governments during the mid-1990s, after 9/11, the practice expanded significantly, operated with fewer internal checks, and was no longer tied to the existence of legal proceedings against the suspect in the receiving country. *Id.*

27. U.S. DEP'T OF JUSTICE, FY2009 BUDGET AND PERFORMANCE SUMMARY pt. 1, at 1, 4 (2009), *available at* http://www.justice.gov/jmd/2009summary/pdf/fy2009-bud-sum.pdf (noting 319 terrorism-related or anti-terrorism-case convictions or guilty pleas between September 11, 2001 and 2009).

could be subject to *either* civilian or military confinement. Indeed, in some cases, individuals were subjected to both forms of confinement.[28] Unlike in prior armed conflicts, where a person's legal status as a combatant (i.e., a prisoner of war) precluded his criminal prosecution except for war crimes, war on terrorism detainees have no such protection from prosecution.[29] The same individual can be prosecuted in federal court for providing material support to al Qaeda if the government elects the law enforcement model or be held indefinitely in military custody as a member of al Qaeda if the government opts instead for the law-of-war paradigm.[30] That person, moreover, may also be prosecuted in a military commission for providing material support to al Qaeda.[31]

Jurisdictional overlap thus expanded the government's options for holding individuals based on a variety of terrorism-related conduct. It also offered greater latitude to conduct interrogations and an escape from procedural protections of the civilian criminal justice system, including access to counsel and a prompt judicial hearing—protections that were denied to war-on-terrorism detainees for years.[32]

Despite his post-inaugural order to close the U.S. detention center at Guantánamo Bay,[33] President Obama has maintained the underlying legal framework that permits the military detention and prosecution of terrorism suspects, pursuing a path of reform and legalization rather than returning to the pre-9/11 exclusivity model of federal criminal prosecution.[34] Early in his administration, Obama stressed the need for flexibility and for maximizing the government's available counterterrorism tools.[35] He stated that "whenever feasible," the Administration would seek to prosecute terrorism suspects in

28. Ali al-Marri, for example, was originally indicted in federal court, declared an enemy combatant before his federal criminal trial, and then finally returned to the civilian system to face different criminal charges after nearly six years of military detention. *See* al-Marri v. Pucciarelli, 534 F.3d 213, 217 (4th Cir. 2008) (Motz, J., concurring in part) (summarizing the underlying facts), *vacated*, Al-Marri v. Spagone, 555 U.S. 1220 (2009).

29. *See* HAFETZ, *supra* note 17, at 184–85.

30. As noted above, under a law-of-war model, the government could either hold a prisoner indefinitely without charge as an enemy combatant or, where appropriate, prosecute that prisoner for the commission of war crimes. *See supra* notes 20–21 and accompanying text.

31. 10 U.S.C. § 950t(25) (Supp. III 2010).

32. *See* HAFETZ, *supra* note 17, at 75, 236.

33. Exec. Order No. 13,492 § 3, 3 C.F.R. 203, 205 (2010).

34. *See generally* HAFETZ, *supra* note 17, at 238–52 (surveying the Obama Administration's detention policy, which "stressed the importance of the criminal justice system" in handling terrorism cases, yet maintained the military commissions system and "continued to hold some Guantánamo detainees indefinitely").

35. *See* President Barack Obama, Remarks by the President on National Security (May 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/.

federal court.[36] But he also endorsed prosecution in reformed military commissions that provide greater protections to the accused and make commissions a "more credible and effective means of administering justice" than they were previously.[37] Obama further accepted the legitimacy of holding some individuals indefinitely in law-of-war detention—that is, without trial in any forum—when prosecution was not possible because, for example, the government's evidence was tainted or insufficient to support a conviction.[38] The Administration subsequently backed legislative reforms to military commissions and provided a more nuanced statement of the President's detention authority under the AUMF, while eschewing claims of inherent executive detention power under the Constitution's Commander-in-Chief Clause.[39] Additionally, Obama halted two of the most controversial practices associated with war-on-terrorism detentions, banning the use of "enhanced interrogation techniques"[40] and ordering the closure of any remaining secret CIA "black sites."[41] These changes, along with Obama's stated commitment to a rights-respecting national security policy,[42] helped diffuse criticism of post-9/11 military detentions and legitimize the long-term incarceration of terrorism suspects outside the criminal justice system.

While the executive branch has sought to maximize its options for detaining terrorism suspects,[43] Congress has sought to limit the President's ability to prosecute terrorism suspects in federal court, even where the President determines that civilian court prosecution best serves the national interest. Congress has repeatedly attached provisions to military appropriations legislation that prohibit the President from using any Defense Department funds to transfer Guantánamo detainees to the United States for

36. *Id.*

37. *Id.*

38. *Id.*

39. The Administration, for example, replaced the label "enemy combatant" with "unprivileged enemy belligerent," relied expressly on the law of war, and required that a prisoner's support for al Qaeda, the Taliban, or an associated group be "substantial" to justify his detention under the AUMF. *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1802, 123 Stat. 2190, 2574–75 (2009) (codified as amended at 10 U.S.C. § 948a (Supp. III 2010)); Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re* Guantanamo Bay Detainee Litig., Misc. No. 08-442 (TFH) (D.D.C. Mar. 13, 2009) (discussing the United States' detention power of Guantánamo detainees under the AUMF in light of law-of-war principles and emphasizing the President's intention to refine detention policies).

40. Exec. Order No. 13,491 § 3(b), 3 C.F.R. 199, 200–01 (2010) (confining the U.S. government to the techniques set forth in the Army Field Manual).

41. *Id.* § 4(a).

42. *See id.* §§ 3–4; Exec. Order No. 13,492, *supra* note 33.

43. *See supra* note 35 and accompanying text.

any purpose, including for criminal prosecution in federal court.[44] These Article III-transfer bans have halted the further civilian court prosecution of any Guantánamo detainees,[45] including the planned prosecution of alleged 9/11 mastermind Khalid Sheikh Mohammed ("KSM") and four co-conspirators in federal court in New York.[46] Additionally, Congress has imposed restrictions on the President's ability to transfer Guantánamo detainees to other countries, even where the President has determined that there is no basis or reason for the United States to continue to hold them.[47] Its restrictions have further embedded the practice of indefinite detention at Guantánamo.

Recent legislation continues this pattern. The National Defense Authorization Act for Fiscal Year 2012 ("2012 NDAA") expressly codifies the President's authority to detain indefinitely individuals who were part of or who substantially supported al Qaeda, the Taliban, or an associated force.[48] The 2012 NDAA also requires the military detention of certain terrorism suspects.[49] While the act allows the President to waive this requirement, it creates for the first time a default presumption of military custody over terrorism suspects.[50] The 2012 NDAA thus not only helps institutionalize indefinite military detention as an alternative to federal criminal prosecution but also suggests how military detention threatens to expand in new directions.

II. TERRORISM AND THE CHANGING PERCEPTION OF FEDERAL COURTS

Federal courts must now operate in the shadow of the alternative military detention system that has emerged as part of the war on terrorism. That system, in turn, has affected how federal courts are defined and perceived. One effect has been to change the metric of success for federal courts, placing emphasis on their ability to produce convictions and impose long sentences

44. *E.g.*, Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4137, 4351 (2011).

45. *See* Charlie Savage, *In a Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES, Apr. 5, 2011, at A1 (noting "stiffening Congressional resistance to bringing Guantánamo detainees into the United States" prior to trying a former Guantánamo detainee in federal court). To date, only one former Guantánamo detainee, Ahmed Khalfan Ghailani, has been prosecuted in federal court. *See* Benjamin Weiser, *U.S. Jury Acquits Former Detainee of Most Charges*, N.Y. TIMES, Nov. 18, 2010, at A1.

46. *See* Savage, *supra* note 45.

47. Ike Skelton National Defense Authorization Act for Fiscal Year 2011 § 1033.

48. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No 112-81, § 1021, 125 Stat. 1298, 1562 (2011).

49. *Id.* at § 1022 (creating a presumption of military custody for covered terrorism suspects). The act excludes U.S. citizens from mandatory military detention. *Id.* at § 1022(b)(1).

50. *Id.* at § 1022(a). Congress had considered an even stronger mandatory detention provision, which would have required a waiver from the Secretary of Defense. National Defense Authorization Act for Fiscal Year 2012, S. 1867, 112th Cong. §§ 1031–32 (as passed by Senate, Dec. 1, 2011).

and minimizing other values, such as an institutional commitment to due process and other constitutional norms.[51] In an era where military detention and prosecution remain options, the virtues of Article III-court prosecutions rest increasingly on their toughness, rather than their fairness.

The overlap between federal criminal prosecution and military confinement—whether through law-of-war detention or military commission prosecution—has resulted in competition among law enforcement, military, and intelligence agencies engaged in fighting terrorism. Given ongoing media focus on U.S. counterterrorism efforts,[52] that competition can be intense. The decision whether to prosecute terrorism suspects in federal court or hold them in some form of military confinement has important legal, political, and inter-agency ramifications. It is also laden with symbolic importance, pitting competing visions of U.S. counterterrorism policy against one another.

Forum competition has surfaced prominently in the debate over the fate of the remaining Guantánamo detainees. Obama's post-inaugural executive order directing the closure of the Guantánamo detention center created an inter-agency task force to review the status of the remaining 240 detainees there and to provide recommendations for their proper disposition.[53] One year later, the task force issued its report, dividing the detainees into three broad categories: those who would be prosecuted, those who would be subjected to continued law-of-war detention, and those who would be transferred to a third country. [54] According to the report, thirty-six detainees had been referred for prosecution, either in a federal court or a military commission.[55] The prosecution category included KSM and four other 9/11 co-conspirators who, as Attorney General Eric Holder had previously announced, would be charged in federal district court in New York.[56] Another detainee, Ahmed Khalfan Ghailani, had already

51. *See supra* notes 11–12 and accompanying text; *see also* Chesney & Goldsmith, *supra* note 10, at 1081 ("[T]he criminal justice system has diminished some traditional procedural safeguards in terrorism trials and has quietly established the capacity for convicting terrorists based on criteria that come close to associational status.").

52. *See, e.g.*, Jane Mayer, *The Trial: Eric Holder and the Battle over Khalid Sheikh Mohammed*, NEW YORKER, Feb. 15–22, 2010, at 52; Savage, *supra* note 45; Weiser, *supra* note 45.

53. Exec. Order No. 13,492, *supra* note 33, § 4.

54. U.S. DEP'T OF JUSTICE ET AL., FINAL REPORT: GUANTANAMO REVIEW TASK FORCE 9–10 (2010), *available at* http://www.justice.gov/ag/guantanamo-review-final-report.pdf [hereinafter FINAL REPORT].

55. *Id.* (noting that forty-four cases had initially been referred for prosecution and that thirty-six cases remained the subject of active referrals). The report also specified that 126 detainees had been approved for transfer; forty-eight detainees had been approved for continued detention under the AUMF; and thirty detainees from Yemen had been approved for "conditional" detention based on security conditions in Yemen. *Id.*

56. *See* Charlie Savage, *U.S. To Try Avowed 9/11 Mastermind Before Civilian Court in New York*, N.Y. TIMES, Nov. 14, 2009, at A1.

been transferred from Guantánamo to the U.S. District Court for the Southern District of New York for prosecution there based on his alleged involvement in the 1998 Embassy bombings in East Africa.[57] The task force report did not indicate how many of the remaining detainees in the prosecution category would be charged in federal court, as opposed to a military commission, although Holder had also previously announced that six individuals connected with the 2000 terrorist attack on the Navy destroyer *Cole* in Yemen would be prosecuted in military commissions.[58]

The decision to prosecute even a few Guantánamo detainees in federal court ignited a political backlash, with opposition crystallizing over the Justice Department's plan to try KSM in New York.[59] Lawmakers, political-advocacy groups, and conservative pundits all attacked Holder's decision.[60] According to Andrew McCarthy, a former terrorism prosecutor and outspoken critic of using federal courts to prosecute terrorism suspects, Holder failed to recognize that in wartime the rule of law means using military commissions and not "wrap[ping] our enemies in our Bill of Rights."[61] Opposition to KSM's prosecution gained momentum following the attempted 2009 Christmas Day bombing by Umar Farouk Abdulmutallab of a Northwest Airlines plane bound for Detroit.[62] Critics charged that Abdulmutallab should be prosecuted before a military commission and not treated as a criminal suspect, as Obama's Justice Department had done.[63] "Why in God's name would you stop questioning a terrorist," remarked former New York City mayor Rudolph Giuliani in response to reports that Abdulmutallab had ceased cooperating after invoking his *Miranda* rights during interrogations after his arrest.[64] Senator Lamar Alexander told FOX News that Holder should resign for failing to distinguish "terrorists who are flying into Detroit, blowing up planes, and American citizens who are committing a crime."[65]

Before long, New York's political leaders came out against prosecuting KSM in New York, citing costs, security concerns, and local opposition.[66] Congress, in turn, passed legislation barring the use of any military funds to transfer Guantánamo detainees to the United States for any purpose, including

57. Peter Finn, *Guantanamo Bay Detainee Brought to U.S. for Trial*, WASH. POST, June 10, 2009, at A1.

58. Savage, *supra* note 56.

59. *Id.*; Mayer, *supra* note 52, at 52–53.

60. Mayer, *supra* note 52, at 52–53.

61. *Id.* at 52.

62. *Id.* at 52–53.

63. *See id.*

64. *Id.* at 53.

65. Mayer, *supra* note 52, at 54.

66. *Id.* at 53.

for criminal trial.[67] Faced with legal obstacles and mounting political pressure, the Obama Administration reversed its decision to prosecute KSM and the 9/11 co-conspirators in federal court, stating that it would instead try the men in a military commission.[68] To date, Ghailani remains the only Guantánamo detainee prosecuted in a U.S. federal court, and no other civilian court prosecutions of Guantánamo detainees are expected.[69]

Each new arrest of a terrorism suspect, moreover, reignites the debate over federal criminal prosecutions and sparks calls for military jurisdiction. When, for example, Faisal Shahzad, a naturalized American citizen, was arrested in May 2010 for attempting to detonate a car bomb near New York City's Times Square, legislation was introduced in Congress that would have authorized the State Department to strip American citizens suspected of supporting al Qaeda and other terrorist groups of their citizenship, thereby permitting their prosecution by military commission (since current law prohibits the prosecution of American citizens by commission).[70] The federal indictment of Somali terrorism suspect Ahmed Abdulkadir Warsame the following year—after Warsame's two-month detention on a U.S. ship in the Gulf of Aden—prompted attacks against the Obama Administration for failing to prosecute Warsame before a military commission.[71] Bringing Warsame to trial in the United States rather than sending him to Guantánamo, wrote Senators Joseph I. Lieberman and Kelly Ayotte, undermined the government's ability to obtain intelligence, risked the disclosure of classified or other sensitive information, and endangered the country's security.[72] In this narrative, military commissions are associated with toughness and security, while federal courts are portrayed as weak, incapable of handling classified or other sensitive information, and overly protective of a defendant's rights.[73]

Competition from military tribunals has placed pressure on federal courts to demonstrate their ability to handle terrorism cases. Often, this pressure has resulted in government officials and non-government organizations describing

67. *See* National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4137, 4351 (2011).

68. Savage, *supra* note 45.

69. *Ghailani Verdict Underlines Need for Fair Trials for All Guantánamo Detainees*, AMNESTY INT'L (Nov. 18, 2010), http://www.amnesty.org/en/news-and-updates/ghailani-verdict-underlines-need-fair-trials-all-guantánamo-detainees-2010-11-18 ("Ghailani, 36, is the first and only Guantánamo detainee to be transferred to the US mainland for prosecution in a US civilian court.").

70. Terrorist Expatriation Act, S. 3327, 111th Cong. § 2 (2010); Charlie Savage & Carl Hulse, *Bill Targets Citizenship of Terrorists' Allies*, N.Y. TIMES, May 7, 2010, at A12.

71. *See* Charlie Savage & Eric Schmitt, *U.S. to Prosecute a Somali Suspect in Civilian Court*, N.Y. TIMES, July 6, 2011, at A1.

72. Joseph I. Lieberman & Kelly Ayotte, Op-Ed., *Why We Still Need Guantanamo*, WASH. POST, July 22, 2011, at A17.

73. *Id.*

how effective federal courts are in obtaining convictions and negating the charge that federal prosecutions sacrifice security in the name of due process and fairness.[74]

In defending his initial decision to prosecute the 9/11 conspirators in federal court rather than in a military commission, for example, Holder cited federal courts' success in convicting terrorism suspects in the past, their ability to handle classified material, and their power to impose the severest sanctions, including death.[75] Not surprisingly, Holder did not mention the rights afforded all defendants, including those accused of the gravest crimes.[76] Holder echoed similar themes in his statement after the decision to prosecute the 9/11 conspirators in federal court was ultimately reversed.[77] Holder explained that he had chosen a federal forum because it could "achieve swift and sure justice most effectively for the victims of [the 9/11 attacks] and their family members."[78] He criticized congressional restrictions on using federal courts to prosecute Guantánamo detainees because the restrictions undermined America's counterterrorism efforts and threatened its security by taking "one of the nation's most tested counterterrorism tools off the table" and tying the Administration's "hands in a way that could have serious ramifications."[79] While Holder emphasized that federal courts have provided an "unparalleled instrument for bringing terrorists to justice," he once again declined to defend federal courts based on the protections they offer the accused or the mechanisms they provide to ensure a fair trial.[80]

Others have defended federal courts on similar grounds. Former judges, prosecutors, and other government officials have filed amicus curiae briefs in post-9/11 cases that detail the success of federal courts in convicting terrorism suspects.[81] Bar associations have made similar points.[82] Even liberal

74. *See supra* notes 11–12, 51 and accompanying text.

75. *See* Mayer, *supra* note 52, at 54.

76. *See id.*

77. *See* Press Release, Eric H. Holder, Jr., U.S. Att'y Gen., Statement of the Attorney General on the Prosecution of the 9/11 Conspirators (Apr. 4, 2011), *available at* http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110404.html.

78. *Id.*

79. *Id.*

80. *Id.*

81. *See, e.g.*, Brief *Amicus Curiae* of Former Federal Judges & Former Senior Justice Department Officials in Support of Petitioner at 6, Al-Marri v. Spagone, 555 U.S. 1220 (2009) (No. 08-368), 2009 WL 230957 at *6 (emphasizing the federal courts' success in obtaining convictions in terrorism cases, history of imposing lengthy sentences, and ability to handle classified and other sensitive information).

82. *See* Letter from Samuel W. Seymor, President, N.Y.C. Bar Ass'n, to Hon. Harry R. Reid, Majority Leader, U.S. Senate, & Hon. Mitch McConnell, Minority Leader, U.S. Senate 1–2 (Mar. 21, 2011), *available at* http://www.nycbar.org/pdf/report/uploads/20072081-LettertoCongressregardingSections1112and1113ofthe2011Full-YearContinuingAppropriationsAct.pdf

advocacy groups have emphasized the toughness of federal courts in prosecuting terrorism suspects. In a full-page advertisement in the *New York Times*, for example, the American Civil Liberties Union stressed the federal court system's success in handling terrorism cases, along with noting the due process protections it affords the accused.[83] Meanwhile, military commissions have themselves sought to appropriate notions of fairness and justice traditionally associated with federal courts to enhance their legitimacy as a forum for terrorism prosecutions.[84]

Defenses of federal prosecutions thus rest increasingly on their efficacy in securing convictions and promoting national security. The protections afforded criminal suspects, by contrast, have become a liability that federal courts must overcome rather than an independent virtue to be emphasized. To the extent rights are mentioned at all, they are typically referenced in terms of their ability to provide legitimacy to the process and thus support for the conviction, rather than as safeguards of the accused.[85]

The emphasis on prosecutorial prowess and success is understandable. In light of the highly charged political climate surrounding terrorism, stressing federal courts' ability to prosecute terrorism cases can help deflect arguments for military commissions or indefinite detention. Framing the argument for a civilian criminal trial of the 9/11 conspirators in terms of the rights it affords defendants might have been counter-productive, in addition to exacting a heavy political price on those who voiced it. Highlighting federal courts' toughness also facilitates seemingly unlikely alliances—for example, between liberal advocacy groups and law enforcement officials—who may oppose the use of military tribunals for different reasons.

Equating the validity of federal courts with their ability to obtain convictions does, however, have costs. It contributes to a larger narrative in which any result except a guilty verdict represents a failure of the system. In other words, the potential for acquittal, when the metric is toughness and not

(emphasizing the ability of federal courts to obtain convictions in opposing a proposed expansion of military commissions and military detention authority). Disclosure: the author is a member of the group that participated in drafting this letter. The views and opinions expressed in this Article are the author's own.

83. *See* Stephanie Woodrow, *ACLU Calls on Obama to Support Holder on Civilian Trials*, MAIN JUST. (Mar. 8. 2010), http://www.mainjustice.com/2010/03/08/aclu-calls-on-obama-to-support-holder-on-civil-trials/.

84. The website for the military commissions, for example, describes the commissions' mission as "provid[ing] fair and transparent trials of those persons subject to trial by Military Commissions while protecting national security interests." *See* OFF. MIL. COMMISSIONS, http://www.mc.mil/HOME.aspx (last visited Mar. 15, 2012).

85. *See, e.g.*, Letter from Samuel W. Seymor, *supra* note 82, at 2 (describing the effectiveness of federal courts in handling terrorism cases while still preserving due process protections); Woodrow, *supra* note 83 (emphasizing the ability of federal courts to handle terrorism cases while still allowing for due process, leading to greater credibility to the trial).

fairness, becomes a politically and socially unacceptable outcome that undermines the case for federal courts. Indeed, the outcome need not even be an outright acquittal.

The Ghailani case[86] illustrates this problem. In June 2009, after nearly five years of enemy combatant detention—first at a secret CIA "black site" and then at Guantánamo—Ghailani was transferred to the United States for federal criminal prosecution.[87] Ghailani was indicted on more than 280 counts of murder and conspiracy for his role in the 1998 U.S. embassy bombings in East Africa that killed 224 people and injured thousands.[88] As the first—and still only—criminal prosecution of a former Guantánamo detainee,[89] the Ghailani trial was laden with symbolism, a "test case" for the viability of federal prosecutions of former Guantánamo detainees and others held as enemy combatants. After five days of deliberation, the jury returned a verdict convicting Ghailani on a single count of conspiracy to destroy government property and buildings and acquitting him of all other charges.[90] Critics of civilian court prosecutions seized on the verdict as an example of the risks federal trials pose. Representative Peter King of New York (Republican), for example, called the verdict "a tragic wake-up call to the Obama [A]dministration to immediately abandon its ill-advised plan to try Guantánamo terrorists" in federal civilian courts and an example of why the United States "must treat [the detainees] as wartime enemies and try them in military commissions at Guantánamo."[91] Senator Mitch McConnell of Kentucky (Republican) questioned why the United States would "even take the chance" of trying Ghailani in a civilian court, where he might be acquitted.[92] The Justice Department responded that the conviction showed the federal court system worked because Ghailani was convicted and would receive a lengthy sentence, despite the complications his case posed—complications, it noted, that were the result of Ghailani's prior mistreatment in secret CIA detention.[93]

86. United States v. Ghailani, 761 F. Supp. 2d 167 (S.D.N.Y. 2011).

87. Weiser, *supra* note 45.

88. *See* Office of Pub. Affairs, *Ahmed Ghailani Transferred from Guantanamo Bay to New York for Prosecution on Terror Charges*, U.S. DEP'T JUST. (June 9, 2009), http://www.justice.gov/opa/pr/2009/June/09-ag-563.html; *see also* Weiser, *supra* note 45.

89. Weiser, *supra* note 45; *Ghailani Verdict Underlines Need for Fair Trials for All Guantánamo Detainees*, *supra* note 69.

90. Weiser, *supra* note 45.

91. Charlie Savage, *Ghailani Verdict Reignites Debate Over the Proper Court for Terrorism Trials*, N.Y. TIMES, Nov. 19, 2010, at A18.

92. *See* Joseph Margulies, *Deviance, Risk, and Law: Reflections on the Demand for the Preventive Detention of Suspected Terrorists*, 101 J. CRIM. L. & CRIMINOLOGY 729, 774 (2011) (quoting Sen. McConnell's statement).

93. *See* Peter Finn, *Embassy Bomber Receives Life Sentence*, WASH. POST, Jan. 26, 2011, at A2; Weiser, *supra* note 45.

(Ghailani ultimately received a life sentence).[94] Some journalists and advocates, to be sure, pointed out that the success of federal courts should be measured in terms of their ability to provide fair trials, which, by necessity, must include the possibility of acquittal.[95] But it was the perception of federal courts as posing an unacceptable risk of acquittal that dominated the public discourse.

Even the district judge who presided over Ghailani's case sought to dispel any concerns that a federal trial could result in Ghailani's release. Before trial, District Judge Lewis A. Kaplan had barred a key government witness from testifying on the ground that admission of the testimony would violate Ghailani's Fifth Amendment right against self-incrimination because the government had obtained the witness's testimony through its coercive interrogation of Ghailani in secret CIA detention.[96] In his order suppressing the witness's statements, Kaplan emphasized the need to preserve the integrity of the federal courts by upholding constitutional protections.[97] "[T]he Constitution is the rock upon which our nation rests," he explained. "We must follow it not only when it is convenient, but when fear and danger beckon in a different direction."[98] Yet, Kaplan also sought to assuage any fear that his ruling could result in the defendant's release: even if Ghailani were acquitted at trial, he said, the United States could still "probably" detain him as an enemy combatant.[99]

Courts, Resnik and Curtis observe in *Representing Justice*, have long provided a way for the government "to legitimate its own use of force against the disobedient by demonstrating that those who have breached [its] law[s] are identified and sanctioned after being found responsible."[100] Yet, that

94. Finn, *supra* note 93.

95. *E.g.*, Amy Davidson, *The Ghailani Verdict*, NEW YORKER (Nov. 17, 2010), http://www.newyorker.com/online/blogs/closeread/2010/11/the-ghailani-verdict.html ("Our legal system is not a machine for producing the maximum number of convictions, regardless of the law."); Charlie Savage, *Terror Verdict Tests Obama's Strategy on Trials*, N.Y. TIMES (Nov. 18, 2010), http://www.nytimes.com/2010/11/19/nyregion/19detainees.html (quoting Mason Clutter of the Constitution Project) ("I don't think we judge success based on the number of convictions that were received. I think we judge success based on fair prosecutions consistent with the Constitution and the rule of law.").

96. United States v. Ghailani, 743 F. Supp. 2d 261, 264, 287–88 (S.D.N.Y. 2010). The witness, Hussein Abebe, would have testified that he had sold Ghailani explosives prior to the bombing. *Id.* at 279.

97. United States v. Ghailani, No. S10 98 Crim. 1023 (LAK), 2010 WL 4006381, at *1 (S.D.N.Y. Oct. 6, 2010).

98. *Id.*

99. *Ghailani*, 743 F. Supp. 2d at 288. In addition, Kaplan noted, a military commission would likely have excluded the testimony, thus neutralizing any disadvantage of prosecuting him in an Article III forum. *Id.* at 287 n.182.

100. RESNIK & CURTIS, *supra* note 1, at 13.

legitimacy also depends on the proposition that courts will provide even-handed justice, including to those accused of the most serious crimes. In a prior generation, some maintained that federal courts were superior to other forums (namely, state courts) because of their ability and willingness to enforce constitutional protections.[101] Yet, the development of an alternative, military system for incarcerating terrorism suspects, along with the highly charged political climate on national security matters, has both helped make protecting rights a liability and tethered the continued legitimacy of federal courts to their ability to deliver a specific outcome.

A related consequence of the forum competition created by military detention is the pressure it places on courts to limit rights within the confines of the federal prosecution itself. Again, the *Ghailani* case is instructive. Following his transfer from Guantánamo to the United States, Ghailani moved to dismiss the indictment on the ground that it violated his speedy trial rights under the Sixth Amendment.[102] An indictment against Ghailani had been pending in the Southern District of New York since 1998.[103] But rather than being brought to the United States to stand trial after his seizure in 2004, Ghailani was taken first to a CIA "black site," where he was held for two years, and then to Guantánamo, where he was detained for nearly three more years.[104] The district court nevertheless rejected Ghailani's speedy trial argument under the functional analysis set forth in *Barker v. Wingo*.[105] Judge Kaplan found that Ghailani was not prejudiced by the delay because the purpose of his prior war on terrorism detention was "to gather intelligence, not evidence for use in [his] criminal case."[106] Further, Kaplan said, the alleged abuse Ghailani suffered during CIA and military interrogations did not require pretrial incarceration that would not have otherwise have occurred since Ghailani would have been held as an enemy combatant even if there had been no indictment pending against him.[107] While the court questioned the government's decision to detain Ghailani at Guantánamo rather than bring him to the United States for trial, it found that Ghailani's initial detention at a CIA "black site" had the valid purpose of gathering information through

101. *See generally* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (describing the superiority of federal courts compared to state courts for constitutional cases).

102. United States v. Ghailani, 751 F. Supp. 2d 515, 526 (S.D.N.Y. 2010).

103. *Id.* at 521 (describing the indictment against Ghailani and others for their participation in the 1998 bombings of the U.S. embassies in Nairobi and Dar es Salaam).

104. *Id.* at 522–26 (describing Ghailani's detention in CIA custody and at Guantánamo).

105. 407 U.S. 514, 530 (1972) (examining the "[l]ength of delay, the reason for the delay, the defendant's assertion of the right, and prejudice to the defendant"); *see also Ghailani*, 751 F. Supp. 2d at 528–40 (applying the *Barker* factors to the case).

106. *Ghailani*, 751 F. Supp. 2d at 532.

107. *Id.*

interrogations.[108] The district court's ruling thus underscored how enemy combatant detentions—both as a means of gathering intelligence and incapacitating terrorism suspects—can limit constitutional protections, such as the guarantee of a speedy trial.[109]

War on terrorism detentions have created pressure to relax other constitutional protections, such as the *Miranda* requirement, which restricts the government's ability to use as evidence statements made during custodial interrogations.[110] Critics of using federal courts to prosecute terrorism suspects argue that *Miranda* impedes the government's ability to gather intelligence and neutralize security threats.[111] The attempted terrorist attacks by Abdulmutallab and Shahzad reignited the controversy over *Miranda*, with critics arguing that providing *Miranda* warnings to recently arrested terrorism suspects impedes the government's ability to gain useful intelligence.[112] Abdulmutallab and Shahzad were questioned for nearly one hour and three hours, respectively, before *Miranda* warnings were provided.[113] In other cases, the administration relied on *Miranda*'s "public safety exception," which permits law enforcement officers to delay issuing *Miranda* warnings where the officers need to obtain information quickly to prevent further crimes.[114] Republican lawmakers nevertheless criticized the Obama Administration for treating Abdulmutallab and Shahzad as criminal suspects rather than as military prisoners, as doing the latter would have permitted the government to continue the interrogations, free of any *Miranda* requirement.[115] The Administration defended its decision to treat the suspects as criminal detainees, noting that both men provided valuable

108. *Id.* at 540.

109. *See id.* at 540–41.

110. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (generally forbidding prosecutors from using as evidence statements made by suspects in custody before they have been warned that they have the right to remain silent and to legal counsel).

111. *See, e.g.*, M. Katherine B. Darmer, Miranda *Warnings, Torture, the Right to Counsel and the War on Terror*, 10 CHAP. L. REV. 631, 648 (2007); Rick Pildes, *Should Congress Codify the Public-Safety Exception to Miranda for Terrorism Cases?*, BALKINIZATION (May 6, 2010, 9:00 AM), http://balkin.blogspot.com/2010/05/should-congress-codify-public-safety.html. *But cf.* Ryan T. Williams, *Stop Taking the Bait: Diluting the* Miranda *Doctrine Does Not Make America Safer from Terrorism*, 56 LOY. L. REV. 907 (2010) (arguing that the dilution of *Miranda* does not improve national security).

112. Amos N. Guiora, *Relearning the Lessons of History*: Miranda *and Counterterrorism*, 71 LA. L. REV. 1147, 1147–49 (2011) (discussing the arguments against providing terrorism suspects such as Abdulmutallab and Shahzad with *Miranda* warnings).

113. *See* Charlie Savage, *Holder Backing Law to Restrict Miranda Rules*, N.Y. TIMES, May 10, 2010, at A1.

114. *See* New York v. Quarles, 467 U.S. 649, 655–56 (1984) (describing the "public safety" exception).

115. Savage, *supra* note 113.

intelligence.[116] The Administration also said, however, that it would consider backing legislation to give officials greater leeway to interrogate terrorism suspects as part of a law enforcement investigation.[117]

Thus far, the Obama Administration has not pressed for legislation to limit *Miranda*. It has, however, issued a policy guidance that seeks to give FBI agents greater latitude in determining whether, and when, to provide *Miranda* warnings in certain terrorism cases.[118] The guidance provides a more flexible interpretation of *Miranda*'s public safety exception, which allows the admission of unwarned statements obtained from questioning that is intended to prevent some immediate harm to the officers or the public safety rather than to elicit testimonial evidence.[119] The Supreme Court has held that the exception applies to an alleged assailant's unwarned statements to police officers about the location of a gun in a supermarket after the officers noticed the assailant's holster was empty.[120] The Obama Administration's FBI guidance argues that the magnitude and complexity of the threat posed by terrorist organizations requires a more flexible interpretation of exigency than ordinary crime—that is, a broader conception of what questioning may be "reasonably prompted by a concern for the public safety."[121] The FBI memo thus explains that the public safety exception could extend to the questioning of "operational terrorist" suspects about "possible impending or coordinated terrorist attacks; the location, nature, and threat posed by weapons that might post an imminent danger to the public; and the identities, locations, and activities or intentions of accomplices who may be plotting additional imminent attacks."[122] Additionally, the guidance acknowledges that there may be situations where the need to collect "valuable and timely intelligence not

116. *See id.*

117. Anne E. Kornblut, *Should Terrorists Have Rights to Remain Silent?*, WASH. POST., May 10, 2010, at A10.

118. *See* Memorandum from U.S. Dep't of Justice, Fed. Bureau of Investigation, on Custodial Interrogation for Public Safety and Intelligence-Gathering Purposes of Operational Terrorists Inside the United States (Oct. 21, 2010), *reprinted in F.B.I. Memorandum*, N.Y. TIMES (Mar. 25, 2011), http://www.nytimes.com/2011/03/25/us/25miranda-text.html [hereinafter FBI *Miranda* Guidance]; Charlie Savage, *Delayed Miranda Warning Ordered for Terror Suspects*, N.Y. TIMES, Mar. 25, 2011, at A17.

119. *Quarles*, 467 U.S. at 657; FBI *Miranda* Guidance, *supra* note 118; Savage, *supra* note 118.

120. *Quarles*, 467 U.S. at 657.

121. *Id.* at 656; FBI *Miranda* Guidance, *supra* note 118; Savage, *supra* note 118.

122. FBI *Miranda* Guidance, *supra* note 118. The Guidance defines an "operational terrorist" as "an arrestee who is reasonably believed to be either a high-level member of an international terrorist group; or an operative who has personally conducted or attempted to conduct a terrorist operation that involved risk to life; or an individual knowledgeable about operational details of a pending terrorist operation." *Id.*

related to any immediate threat" warrants continued unwarned questioning, even at the cost of the statements being inadmissible.[123]

While the FBI guidance's effect on law enforcement investigations remains uncertain, it underscores how the development of an alternative system of military detention can help lead to limitations on individual rights within the existing law enforcement paradigm. The prospect of law-of-war detention or military commission prosecution—unencumbered by any *Miranda* requirement—places added pressure on the civilian justice system to accommodate government demands for increased flexibility in detaining and questioning terrorism suspects. Additionally, it gives policymakers greater confidence in staking out aggressive positions—even to the point of expressly authorizing unwarned interrogations outside *Miranda*'s public safety exception—because they know that there remains an alternative to criminal justice detention should prosecution become infeasible due to the inadmissibility of statements obtained in violation of *Miranda*.[124]

Forum competition from military tribunals has also helped mute criticism of the government's broad interpretation of and increased reliance on material support statutes to prosecute terrorism suspects for supporting or assisting terrorism or designated terrorist organizations.[125] In *Holder v. Humanitarian Law Project*,[126] the Supreme Court upheld the government's authority to prosecute two groups of Americans for providing assistance to nongovernment organizations that had been designated foreign terrorist organizations in those organizations' efforts to seek peaceful resolution of regional conflicts and obtain humanitarian assistance.[127] While individuals remained free to speak

123. *Id.*; Savage, *supra* note 118.

124. *Cf.* David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT'L SECURITY L. & POL'Y 1, 73–74 (2011) (noting that interrogating terrorism suspects without *Miranda* warnings may have a slightly higher chance of producing intelligence, but "only Mirandized interrogation offers an enhanced ability to neutralize the terrorist by using his statements to support his long-term detention through the criminal justice system").

125. *See* 18 U.S.C. § 2339A (2006) (prohibiting the provision of material support to terrorists); *id.* § 2339B (prohibiting the provision of material support to foreign terrorist organizations). Material support is defined to include such activities as "training," providing "personnel," and giving "expert advice or assistance." *Id.* § 2339A(b)(1). For a discussion of the government's increasing reliance on the material-support statutes in federal terrorism investigations and prosecutions, see, for example, Kris, *supra* note 124, at 14 n.47, 17 nn.50–51 (collecting cases). *See also id.* at 7 n.29 (discussing expansion of the material-support statutes after 9/11).

126. 130 S. Ct. 2705 (2010).

127. *Id.* at 2729–30. One group of Americans seeking to invalidate 18 U.S.C. § 2339B in *Holder* had tried to assist a separatist Kurdish organization by training it to use international law and the United Nations for peaceful dispute resolution; the other group in *Holder* had sought to assist a separatist organization in Sri Lanka by training it to apply for humanitarian aid. *Id.* at 2713, 2716.

out on any topic they wished, the Court said, they could be criminally prosecuted for providing material support to terrorism, consistent with the First Amendment, if the speech was done in concert with a foreign terrorist organization and imparted "specialized knowledge" or a "specific skill" to that organization.[128] The Court thus upheld material-support prosecutions even where the speech itself did not advocate terrorism and where the government had not provided evidence that the speech would actually increase terrorist activity.[129] Yet, while civil liberties groups criticized the Court's decision in *Holder* for "criminalizing [protected] speech meant to promote peace and human rights,"[130] those groups have also cited the material support statutes in defending the use of Article III courts over military tribunals because of the broad powers it gives law enforcement to incapacitate terrorism suspects even before any terrorist act is even committed.[131]

Another effect of this alternative system of military detention is the incentive it creates to channel weaker cases away from federal court and towards military jurisdiction. The Obama Administration's Task Force recommended a federal prosecution of the 9/11 conspirators not only because of the severity of the crime, but also because of its confidence that federal prosecutors could obtain a conviction.[132] By contrast, where the Task Force was less confident about a conviction for evidentiary, procedural, or other reasons, but was still opposed to the detainee's transfer to another country, it recommended indefinite law-of-war detention under the AUMF.[133] Paradoxically, therefore, it is the weaker cases—those in which the federal criminal justice system's protections matter most to the accused—that will most likely be channeled towards military detention because that forum's rules so heavily favor the government.

128. *Id.* at 2722–24.

129. Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 730 (2011); *see also* Aziz Z. Huq, *The Signaling Function of Religious Speech in Domestic Counterterrorism*, 89 TEX. L. REV. 833, 893 (2011) (explaining that *Holder* "reduce[s] constitutional protection against guilt by association in a class of cases defined by the government to a token ban on membership proscription that government can easily circumvent").

130. *See, e.g.*, *Supreme Court Rules "Material Support" Law Can Stand*, AM. CIVIL LIBERTIES UNION (June 21, 2010), http://www.aclu.org/national-security/supreme-court-rules-material-support-law-can-stand (quoting former President Jimmy Carter).

131. *See, e.g.*, RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 31–38 (2008), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/080521-USLS-pursuit-justice.pdf; *Fact Sheet: Trying Terror Suspects in Federal Court*, HUMAN RIGHTS FIRST, http://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-Fact-Sheet-Courts.pdf, 1 (last modified Mar. 1, 2012).

132. FINAL REPORT, *supra* note 54, at 19–21.

133. *Id.* at 23–24.

III. CIVIL REMEDIES AND THE VANISHING FEDERAL FORUM

Civil litigation by individuals seeking redress for torture and other abuses surfaces similar debates about the viability of federal courts as a forum for terrorism cases. Federal courts have repeatedly dismissed actions by noncitizens against U.S. officials seeking damages for arbitrary detention, torture, and other mistreatment.[134] The dismissals, which rest on various grounds, including the "state secrets" privilege, *Bivens*'s "special factors," and qualified immunity, typically cite the twin concerns of separation of powers and limited judicial capacity as reasons for denying litigants a federal forum.[135] The decisions portray federal courts as unable to provide remedies for even the most egregious rights violations. That some judges have been willing to exercise jurisdiction over the relatively few civil damages actions brought by U.S. citizens[136] only highlights the degree to which broader criticisms of federal court review in this area have gained acceptance, including among federal judges themselves.

Suits brought by individuals in connection with the CIA's "extraordinary rendition" program[137] have foundered on state secrets grounds. In *El-Masri v. United States*, the Fourth Circuit upheld the district court's dismissal of a lawsuit filed by Khaled El-Masri, a German citizen who was seized while traveling in Macedonia and rendered by the CIA to Afghanistan, where he was secretly detained and tortured.[138] Similarly, in *Mohamed v. Jeppesen Dataplan, Inc.*,[139] a narrowly divided Ninth Circuit, sitting en banc, upheld the dismissal on state secrets grounds of an action brought by five individuals who had been subjected to the CIA's extraordinary rendition program.[140] The plaintiffs in that case had sued Jeppesen Dataplan, Inc., a U.S. corporation, for

134. *See, e.g.*, Arar v. Ashcroft, 585 F.3d 559, 565, 567, 582 (2d Cir. 2009) (affirming the district court's dismissal of a complaint brought by a dual citizen of Syria and Canada against federal officials seeking damages for harms suffered as a result of his detention, confinement, and interrogation); Rasul v. Myers, 563 F.3d 527, 528, 533 (D.C. Cir. 2009) (affirming the district court's dismissal of a complaint brought by four British nationals against Donald Rumsfeld and military officials seeking damages for illegal detainment and mistreatment); El-Masri v. United States, 479 F.3d 296, 300, 313 (4th Cir. 2007) (affirming the district court's dismissal of a complaint brought by a German citizen against George Tenet and other CIA employees seeking damages for being held against his will and other mistreatment suffered during his detention).

135. *See infra* notes 142–93 and accompanying text.

136. *See infra* notes 206–09 and accompanying text.

137. The CIA's "extraordinary rendition" program is defined as "the clandestine abduction and detention outside the United States of persons suspected of involvement in terrorist activities, and their subsequent interrogation using methods impermissible under U.S. and international laws." *El-Masri*, 479 F.3d at 300.

138. *Id.* at 300, 313.

139. 614 F.3d 1070 (9th Cir. 2010) (en banc).

140. *Id.* at 1073–75.

its role in transporting them among various locations where they were secretly detained and tortured by the CIA.[141]

In *El-Masri* and *Jeppesen*, the appeals courts dismissed the lawsuits under the state secrets privilege,[142] as recognized by the Supreme Court in *United States v. Reynolds*.[143] Their application of the privilege rested on two overarching factors: the separation of powers concerns that would be raised by judicial review of the plaintiffs' allegations[144] and the limited institutional capacity of the judiciary in matters affecting national security and sensitive foreign policy questions.[145] As to the separation of powers, the Fourth Circuit in *El-Masri* determined that because the state secrets privilege has a constitutional basis, it limits judicial interference with military and foreign affairs matters committed to the executive branch.[146] Thus, the court suggested, allowing a suit challenging a secret CIA detention and interrogation program to proceed could bring the judiciary into constitutional conflict with the executive.[147] The Ninth Circuit's en banc opinion in *Jeppesen* similarly underscored the need for judicial deference to the executive on matters of foreign policy and national security.[148]

Questions about the institutional competency of courts weighed heavily in both cases. *El-Masri* emphasized the superiority of executive and intelligence agencies in evaluating the consequences of relying on sensitive government information.[149] "[G]iven the sophisticated nature of modern intelligence analysis," the court explained, judges lack the ability to determine how one seemingly innocuous item of information might be of great significance when

141. *Id.* at 1075.

142. *Id.* at 1093; *El-Masri*, 479 F.3d at 313.

143. 345 U.S. 1, 6–7, 10 (1953). Under *Reynolds*, a court must honor the executive's assertion of the privilege if it determines that the privilege is valid and that "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Id.* at 10.

144. *See Jeppesen*, 614 F.3d at 1081–82; *El-Masri*, 479 F.3d at 303.

145. *See Jeppesen*, 614 F.3d at 1081–82; *El-Masri*, 479 F.3d at 305.

146. *See El-Masri*, 479 F.3d at 303 ("Although the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities.").

147. *See id.* ("[T]he state secrets doctrine allow[s] the Court to avoid the constitutional conflict that might have arisen had the judiciary demanded that the Executive disclose highly sensitive military secrets.").

148. *Jeppesen*, 614 F.3d 1081–82 (quoting Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1203 (9th Cir. 2007)) ("[W]e acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.").

149. *El-Masri*, 479 F.3d at 305.

viewed in its proper context.[150] Similarly, the court suggested that judges cannot properly assess the risk of diplomatic fall-out resulting from the failure to protect sensitive information from disclosure.[151]

In *Jeppesen*, the original appellate panel had reversed the district court's decision dismissing the suit on state secrets grounds.[152] In his dissent from the en banc opinion, Judge Hawkins, the author of the Ninth Circuit panel decision,[153] explained that the state secrets privilege extends only to evidence, and not to facts, and thus cannot be used "to prevent a litigant from persuading a jury of the truth or falsity of an allegation by reference to non-privileged evidence," even if the privileged evidence "might also be probative of the truth or falsity of the allegation."[154] The *Reynolds* privilege, Hawkins reasoned, must be asserted by the government with respect to specific pieces of evidence and on an item-by-item basis, rather than through its wholesale application to the plaintiffs' allegations.[155] Although Hawkins recognized that some evidence in *Jeppesen* might be subject to the state secrets privilege, the plaintiffs must still have the opportunity to establish their claims with non-privileged evidence,[156] including the evidence about the extraordinary rendition program and Jeppesen's role in it, that was already in the public domain and thus not protected by the privilege.[157]

The en banc court rejected this more limited interpretation of the state secrets privilege.[158] It assumed that the plaintiffs' prima facie case and

150. *Id.*

151. *Id.*

152. Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 951–52, 962 (9th Cir. 2009), *reh'g en banc granted*, 586 F.3d 1108 (9th Cir. 2009).

153. *See id.*, 579 F.3d at 949.

154. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1099 (9th Cir. 2010) (en banc) (Hawkins, J., dissenting).

155. *Id.* at 1099 n.13. A separate form of the state secrets privilege bars suit where the entire subject of the litigation is a state secret. *See* Totten v. United States, 92 U.S. 105, 105–07 (1875) (dismissing suit by a spy for alleged breach of an agreement with the government to compensate him for his wartime espionage services); *see also* Tenet v. Doe, 544 U.S. 1, 3 (2005) (relying on *Totten* in dismissing claims by two former Cold War spies who accused the CIA of reneging on a commitment to provide financial support in exchange for their espionage services). The en banc court in *Jeppesen* rested its decision on the narrower *Reynolds* bar. *Jeppesen*, 614 F.3d at 1085 (majority opinion) (declining to decide whether the suit was barred under *Totten* because the *Reynolds* bar applied).

156. *Jeppesen*, 614 F.3d at 1100–01 (Hawkins, J., dissenting).

157. *See id.* at 1095 & n.2 (stating that the plaintiffs in *Jeppesen* submitted more than 1,800 pages of documents regarding the extraordinary rendition program, which were in the public record and were summarized as an Appendix to the dissent).

158. *See id.* at 1087 (majority opinion) (holding that dismissal is required even if it is assumed that the plaintiffs could prove their case with non-privileged evidence).

Jeppesen's defenses might not necessarily depend on privileged evidence.[159] It concluded, however, that it would be too difficult for a court to separate privileged from non-privileged evidence or to manage properly the risks of unintended disclosure of sensitive information.[160] More specifically, the court concluded that, because the facts underlying the plaintiffs' claims were "so infused with [state] secrets, *any* plausible effort by Jeppesen to defend against them would create an unjustifiable risk of revealing [those] secrets."[161] The appeals court thus affirmed the district court's pleading-stage dismissal, even though it recognized that the result left the plaintiffs without the possibility of a judicial remedy for allegedly egregious violations of their rights.[162]

Similar perceptions about limited judicial competency on matters implicating national security and foreign policy have led to Rule 12 dismissals of *Bivens* claims seeking redress from arbitrary detention and torture. In its 1971 decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court established that individuals may obtain a judicially created damages remedy for constitutional torts committed by federal officials.[163] The Court noted, however, that a judicial remedy might not be appropriate when "special factors counsel[] hesitation in the absence of affirmative action by Congress."[164] The Supreme Court has previously found that special factors preclude a *Bivens* remedy when Congress has created a comprehensive remedial scheme,[165] when the suit would interfere with the military's internal disciplinary structure,[166] or when defining a workable cause of action proves too difficult.[167] In *Arar v. Ashcroft*, however, the Second Circuit expanded this exception in concluding that national security itself could

159. *Id.* The en banc panel also assumed, without deciding, that the *Totten* bar did not apply. *Id.* at 1085.

160. *Id.* at 1088.

161. *Jeppesen*, 614 F.3d at 1088.

162. *Id.* at 1089, 1091–93.

163. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971).

164. *Id.* at 396.

165. Schweiker v. Chilicky, 487 U.S. 412, 423–24, 429 (1988) (dismissing due to Congress's creation of a comprehensive remedial scheme for Social Security benefits).

166. Chappell v. Wallace, 462 U.S. 296, 297, 304–05 (1983) (dismissing a suit by enlisted men against superior officers for racial discrimination in duty assignments and performance evaluations).

167. Wilkie v. Robbins, 551 U.S. 537, 543, 562, 567–68 (2007) (dismissing a suit by a landowner against federal officials, who allegedly interfered with the landowner's exercise of property rights through harassment and intimidation because creating "a new *Bivens* remedy to redress such injuries collectively . . . raises a serious difficulty of devising a workable cause of action").

constitute a special factor that warrants dismissal in the absence of express congressional action creating a damages remedy.[168]

Arar's complaint alleged that U.S. government agents, including high-level Justice Department officials, conspired to render him from the United States to Syria, where he was detained incommunicado for nearly a year and tortured.[169] In a divided decision, the Second Circuit, sitting en banc, upheld the district court's dismissal of Arar's *Bivens* claims against the officials based on special factors.[170] Like *El-Masri* and *Jeppesen*, *Arar* framed concerns about judicial involvement in terms of both constitutional separation of powers and institutional capacity. In particular, the Second Circuit underscored the problems a federal court would face in managing the litigation without jeopardizing national security or harming the country's foreign relations.[171] Those problems included the presence of classified and other sensitive information,[172] the risk of intruding on the sensitive area of diplomatic communications surrounding prisoner transfers,[173] and the risk of "graymail," as the government would face pressure to settle the case on terms favorable to the plaintiff merely to avoid intrusive discovery or to prevent sensitive information from becoming public.[174] Although the challenges presented by classified and other sensitive information are not unique to extraordinary rendition, the panel questioned whether judges could handle those challenges in the context of national security.[175] It concluded that judges should not entertain suits for the harms caused by extraordinary rendition absent legislation by Congress expressly providing for a civil damages remedy, as Congress "alone has the institutional competence to set parameters, delineate safe harbors, and specify relief."[176] Indeed, the court said, judges lacked competence not merely to decide the various evidentiary and case management issues raised by the suit, but also to identify the line between constitutional and unconstitutional conduct.[177] It thus contrasted suits against government officials for extraordinary rendition with those against prison guards for

168. 585 F.3d 559, 574–76 (2d Cir. 2009) (en banc).

169. *Id.* at 566.

170. *Id.* at 574, 582.

171. *Id.* at 574.

172. *Id.* at 576–77.

173. *Arar*, 585 F.3d at 578.

174. *Id.* at 578–79.

175. *See id.* at 575–76 (stating that courts "have long been *hesitant* to intrude" on "matters touching upon foreign policy and national security" and noting that in order to probe the basis of the plaintiff's designation as a terrorist and his removal to Syria, the district court would have to consider the actions of the national security apparatus of at least three foreign countries plus the United States).

176. *Id.* at 564.

177. *Id.* at 580.

beating an inmate or against agents for executing a warrantless search, explaining "that the context of extraordinary rendition is so different, involving as it does a complex and rapidly changing legal framework beset with critical legal judgments that have not yet been made, as well as policy choices that are by no means easily reached."[178]

The D.C. Circuit applied a similar logic in dismissing damages suits against high-ranking government officials by individuals previously held in military custody. In *Rasul v. Myers*, the court identified "[t]he danger of obstructing U.S. national security policy" as a basis for dismissing a *Bivens* suit brought by four former detainees who claimed they had been tortured and abused at Guantánamo.[179] Additionally, in *Ali v. Rumsfeld*, the court held that special factors precluded a *Bivens* remedy for individuals previously imprisoned in Iraq and Afghanistan.[180] Civil damages litigation, the court explained, would hinder U.S. armed forces and disrupt the war effort.[181]

Although not decided on *Bivens* special factors or state secrets grounds, the Supreme Court's five-Justice majority decision in *Ashcroft v. Iqbal* adopts a similar view of the limitations of federal courts in adjudicating challenges to illegal government conduct in the national security context.[182] In the months after the 9/11 terrorist attacks, the government arrested and detained approximately 762 individuals on immigration charges, a number of whom were designated "high interest" detainees and were held under highly "restrictive conditions designed to prevent them from communicating with the general prison population or the outside world."[183] One of those detainees, Javier Iqbal, brought suit under *Bivens* against various federal officials, including former Attorney General John Ashcroft and FBI Director Robert Mueller, for their role in his detention and treatment.[184] Iqbal, a Muslim from

178. *Arar*, 585 F.3d at 580.

179. Rasul v. Myers, 563 F.3d 527, 528, 532 n.5, 533 (D.C. Cir. 2009). Although the court dismissed the *Bivens* claims on qualified immunity grounds, it identified special factors as an alternative basis for dismissal of the claims. *Id.* at 532 & n.5; *see also* Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 105, 112 (D.D.C. 2010) (relying on *Rasul v. Myers* in dismissing a wrongful death action by families of two former Guantánamo detainees who died in U.S. custody at the Guantanamo prison on, *inter alia*, *Bivens* special factors grounds), *aff'd on other grounds*, Al-Zahrani v. Rodriguez, No. 10-5393, 2012 WL 539370 (D.C. Cir. Feb. 21, 2012) (holding that habeas corpus statute amendments deprived the federal courts of jurisdiction over the action).

180. Ali v. Rumsfeld, 649 F.3d 762, 764, 774 (D.C. Cir. 2011).

181. *Id.* at 773–74.

182. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953–54 (2009) (rejecting the "careful-case-management approach," which permits limited discovery against high-ranking government officials to determine whether a misconduct claim should proceed, and finding that there are "serious and legitimate reasons" to preserve, as much as possible, those officials' qualified immunity, especially during this "unprecedented" security emergency).

183. *Id.* at 1943.

184. *Id.* at 1943–44.

Pakistan, contended that Ashcroft and Mueller violated his rights by labeling him a "high interest" detainee and causing him to endure abusive treatment on account of his race, religion, and/or national origin.[185] The Supreme Court held that the claims against Ashcroft and Mueller should be dismissed because Iqbal had failed to plead sufficient facts to establish their plausibility and that other explanations were equally plausible—namely, that "a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims" since "[t]he September 11 attacks were perpetrated by 19 Arab Muslim hijackers"[186] and that Iqbal and others were labeled "high interest" detainees not because of their race, religion, or national origin but because the government "sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity."[187]

Iqbal suggests the Court's resistance to allowing civil damages litigation based on decisions made by government officials in the counterterrorism context, especially where that litigation seeks to hold high-level government officials liable.[188] The Court, to be sure, did not condone Iqbal's physical and emotional abuse in detention, nor did it seek to prevent Iqbal's *Bivens* claims against individual prison guards from going forward.[189] Still, it barred any challenge to the government's broader arrest and detention policies in the

185. *Id.* at 1942, 1944. Iqbal alleged, for example, that his jailors "'kicked him in the stomach, punched him in the face, and dragged him across' his cell without justification, subjected him to serial strip and body-cavity searches when he posed no safety risk to himself or others, and refused to let him and other Muslims pray because there would be '[n]o prayers for terrorists.'" *Id.* at 1944 (internal citations omitted).

186. *Id.* at 1950–52. The Court's language seems to suggest mistakenly that all Muslims are Arabs. Iqbal himself, for example, was not; he was a Muslim from Pakistan. *Id.* at 1942.

187. *Iqbal*, 129 S. Ct. at 1952. In April of 2002, Iqbal pleaded guilty to federal criminal charges of conspiracy to defraud the United States and fraud with identification. Iqbal v. Hasty, 490 F.3d 143, 148 n.1, 149 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1937 (2009). He was deported to Pakistan following his release from prison. *Id.* at 149.

188. The Court's decision in *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074 (2011), demonstrates a similar pattern. There, a U.S. citizen sued then-Attorney General John Ashcroft for pretextual use of the material witness statute to detain him where the government lacked sufficient evidence to charge him criminally. *Al-Kidd*, 131 S. Ct. at 2079. The Court unanimously reversed the decision of the Ninth Circuit and held that Ashcroft was entitled to qualified immunity. *Id.* at 2085 (holding that Ashcroft was entitled to qualified immunity whether or not his conduct was lawful). The Court further held (by a 5-3 majority) that Ashcroft's conduct could not have violated the Fourth Amendment because an arrest made under a validly obtained material witness warrant is lawful regardless of a government official's subjective intent. *Id.* at 2083 & n.3.

189. *Iqbal*, 129 S. Ct. at 1952 ("[Plaintiff's] account of his prison ordeal alleges serious official misconduct that we need not address here."); *see also id.* at 1942 ("[Plaintiff's] account of his prison ordeal could, if proved, demonstrate unconstitutional misconduct by some governmental actors. But the allegations and pleadings with respect to these actors are not before us here.").

aftermath of 9/11 and any judicial inquiry into the role high-level officials like Ashcroft and Mueller played in formulating those policies.[190] Such litigation, the Court said, exacts "heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government."[191] According to the Court, those costs not only outweigh any benefit gained in ensuring that officials comply with the law, but also are magnified in the national security context, particularly when high-level government officials must respond to "a national and international security emergency" like 9/11.[192] The Court thus rejected Iqbal's suggestion that careful case management provided a way for judges to minimize the costs of civil damages litigation in allowing litigation to proceed beyond the pleading stage and deferring decision on an official's qualified immunity defense until summary judgment and after an opportunity for discovery.[193]

Federal courts have also dismissed civil damages actions against civilian contractors for alleged torture and other abuses. In *Saleh v. Titan Corp.*, Iraqi nationals brought suit against two private military contractors that provided military services to the U.S. government at the Abu Ghraib military prison in Iraq,[194] alleging that they were beaten, electrocuted, raped, and subjected to attacks by dogs.[195] A divided D.C. Circuit panel held that the plaintiffs' claims should be dismissed.[196] In finding that plaintiffs' state law tort claims were federally preempted, the panel broadly construed the exemption in the Federal Tort Claims Act ("FTCA") for claims "arising out of the combatant activities of the military or armed forces . . . during time of war."[197] Although plaintiffs had argued there was no conflict with federal policy because federal law prohibits torture, the appeals court found that the claims were preempted by a broader federal policy—embodied in the FTCA's "combatant activities" exception—to eliminate tort liability from the battlefield.[198] In reaching this conclusion, the court emphasized the risks of "judicial probing of the

190. *See* Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 248 (explaining how *Iqbal* shows that while "[c]hallenges against discrete, isolated, and unauthorized acts of abuse sometimes prevail, . . . suits targeting allegedly unconstitutional policies will be turned away at the courthouse door").

191. *Iqbal*, 129 S. Ct. at 1953.

192. *Id.* (quoting *Iqbal v. Hasty*, 490 F.3d 143, 179 (2d Cir. 2007) (Cabranes, J., concurring)).

193. *Id.*

194. Saleh v. Titan Corp., 580 F.3d 1, 2 (D.C. Cir. 2009).

195. *Id.* at 17 (Garland, J., dissenting).

196. *Id.* at 2, 17 (majority opinion).

197. *Id.* at 5–6. The panel also upheld the dismissal of plaintiffs' claims against Titan under the Alien Tort Statute. *Id.* at 3, 5.

198. *Id.* at 7.

government's wartime policies,"[199] much as other courts had done in applying the state secrets privilege and *Bivens* special factors to dismiss lawsuits at the pleading stage.

A divided Fourth Circuit panel reached a similar conclusion in *Al-Shimari v. CACI International, Inc.*, another suit by Iraqi nationals against a civilian contractor retained by the U.S. military to assist it in conducting interrogations.[200] In concluding that the plaintiffs' claims were federally preempted for the reasons articulated in *Saleh*, the Fourth Circuit reversed the district judge's ruling that discovery was required to determine whether the interrogations conducted by the contractors constituted "combatant activities" within the meaning of the FTCA's exception.[201] The panel underscored the "significant conflict with federal interests" that would result "from allowing tort law generally to apply to foreign battlefields."[202] Like *Saleh*, *Al-Shimari* presumed that the kind of judicial inquiry associated with tort litigation is inconsistent with the pursuit of warfare, even when the premise of the litigation is that civilian contractors acted contrary to or in violation of federal rules and directives on the treatment of prisoners.[203] After agreeing to rehear the *Al-Shimari* case en banc,[204] the full Fourth Circuit dismissed the appeals on the ground that the district court's rulings were not immediately appealable under the "collateral order" doctrine.[205] The en banc court's decision thus defers any determination on defendants' preemption arguments until after further litigation in the district court.

Other courts have allowed damages actions by U.S. citizen plaintiffs to proceed past the pleading stage. In *Vance v. Rumsfeld*, a divided Seventh Circuit panel upheld the district court's refusal to dismiss a *Bivens* claim by two U.S. citizen civilians against former Defense Secretary Donald Rumsfeld for their torture and mistreatment in Iraq.[206] The Seventh Circuit panel

199. *Saleh*, 580 F.3d at 8.

200. Al-Shimari v. CACI Int'l, Inc., 658 F.3d 413, 414 (4th Cir. 2011).

201. *Id.* at 415, 419–20. The panel has also interpreted the collateral order doctrine broadly to consider the defendants' interlocutory appeal of the district court's refusal to dismiss the suit on federal preemption grounds. Al-Quraishi v. L-3 Servs., Inc., 657 F.3d 201, 203–05 (4th Cir. 2011).

202. *Al-Shimari*, 658 F.3d at 419.

203. *Id.*; *see also id.* at 430 (arguing that the majority's assertion of this conflict is erroneous as "[n]o federal interest implicates the torture and abuse of detainees.") (King, J., dissenting).

204. Al Shimari v. CACI Int'l, Inc., 658 F.3d 413 (4th Cir. 2011), *reh'g en banc granted*, No. 09-1335 (4th Cir. Nov. 8, 2011).

205. Al Shimari v. CACI Int'l, Inc., Nos. 09–1335, 10–1891, 10–1921, 2012 WL 1656773, at *4, *13 (4th Cir. May 11, 2012) (en banc).

206. Vance v. Rumsfeld, 653 F.3d 591, 594 (7th Cir. 2011), *vacated and reh'g en banc granted*, Nos. 10-1687 & 10-2442, 2011 U.S. App. LEXIS 22083 (7th Cir. Oct. 28, 2011). Judge Manion dissented from the court's decision to allow the *Bivens* claims to proceed. *See id.* at 627–28, 632 (Manion, J., concurring in part and dissenting in part). The U.S. District Court for the

recognized that litigation involving the treatment of detainees in a war zone raised concerns about judicial interference with military decision-making.[207] But those concerns, it said, did not warrant dismissal where it would leave plaintiffs with no other remedy and risk immunizing grave constitutional violations.[208] The panel emphasized the importance of U.S. citizenship in distinguishing *Arar*, *Ali*, and *Rasul*, where the plaintiffs, like those *Vance*, had no other judicial remedy and where dismissal meant immunizing egregious government misconduct.[209] If the *Vance* panel demonstrated more confidence in the judiciary's ability to handle the evidentiary challenges litigation of an overseas detention case posed, it also believed the plaintiffs' U.S. citizenship affected whether the judiciary should tackle those challenges and allow the case to proceed to discovery. The full Seventh Circuit, however, has vacated the panel's opinion and agreed to rehear the case en banc.[210]

Civil litigation involving former "enemy combatant" Jose Padilla has similarly presented the question of whether U.S. citizens can pursue a damages remedy for unlawful detention and mistreatment arising out of the war on terrorism. A district court in South Carolina dismissed Jose Padilla's *Bivens* suit against former government officials for torture and other abuses committed during his prior military confinement as an enemy combatant,[211] while a district court in the Northern District of California ruled that a similar suit could proceed to discovery.[212]

District of Columbia refused to dismiss a similar claim for violation of substantive due process by a former contractor who asserts he was abused by the military in Iraq. *See* Doe v. Rumsfeld, 800 F. Supp. 2d 94, 100–01, 111, 126 (D.D.C. 2011), *appeal docketed*, No. 11-5209 (D.C. Cir. Aug. 22, 2011).

207. *Vance*, 653 F.3d at 618 ("We are sensitive to the defendants' concerns that the judiciary should not interfere with military decision-making.").

208. *Id.* at 618, 624 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 535 (2004) (plurality opinion)) ("'[W]hile we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims.'").

209. *Id.* at 619–20, 622 ("The fact that the plaintiffs are U.S. citizens is a key consideration here as we weigh whether a *Bivens* action may proceed."). The court did note that, unlike U.S. citizens, foreign nationals could petition their own respective governments to seek redress for the violations. *Id.* at 620 n.19.

210. Vance v. Rumsfeld, Nos. 10-1687 & 10-2442, 2011 U.S. App. LEXIS 22083 (7th Cir. Oct. 28, 2011).

211. Lebron v. Rumsfeld, 764 F. Supp. 2d 787, 790 (D.S.C. 2011) (dismissing Padilla's *Bivens* suit against Rumsfeld and other government officials for his treatment as an enemy combatant in the Navy brig in Charleston, South Carolina).

212. Padilla v. Yoo, 633 F. Supp. 2d 1005, 1012, 1014–15, 1030, 1039–40 (N.D. Cal. 2009) (denying the motion to dismiss Padilla's *Bivens* suit against John Yoo, the former Deputy Attorney General in the Office of Legal Counsel, for his role in the decision to designate Padilla

On appeal from the South Carolina district court decision, the Fourth Circuit affirmed the dismissal of Padilla's suit.[213] The Fourth Circuit concluded that the military detention and treatment of an enemy combatant during wartime presented "special factors" counseling hesitation.[214] The court cited both the separation of powers concerns triggered by judicial review of executive-branch action in this area[215] and the judiciary's limited competence in adjudicating claims challenging military decisions during wartime.[216] Absent affirmative action by Congress to create a damages remedy for enemy combatants, the court reasoned, judges should stay their *Bivens* hand.[217]

The Ninth Circuit also ordered dismissal of Padilla's separate suit brought in the Northern District of California, thus reversing the district judge's decision in that case.[218] The Ninth Circuit, however, did not reach the issue of *Bivens* "special factors," instead resting its decision on the ground that the defendant, former Office of Legal Counsel attorney John Yoo, was entitled to qualified immunity.[219] Unlike the Fourth Circuit, therefore, the Ninth Circuit did not deem Padilla's suit non-justiciable but rather concluded that Padilla was not subjected to treatment that violated any clearly established constitutional right.[220]

an enemy combatant and for his subsequent treatment in the Navy brig in Charleston, South Carolina).

213. Lebron v. Rumsfeld, 670 F.3d 540, 544 (4th Cir. 2012).

214. *Id.* at 548, 551.

215. *Id.* at 548–52. The court further explained that the need for judicial deference is greatest where, as in Padilla's case, the executive acted pursuant to the type of broad delegation of power contained in the AUMF. *Id.* at 549–50.

216. *Id.* at 552–56.

217. *Id.* at 552 (quoting United States v. Gilman, 347 U.S. 507, 513 (1954)) ("[C]reating a cause of action [under these circumstances] is 'more appropriately for those who write the laws, rather than for those who interpret them.'").

218. Padilla v. Yoo, No. 09-16478, 2012 WL 1526156, at *15 (9th Cir. May 2, 2012).

219. *Id.* at *1, *15.

220. *Id.* at *1. The appeals court reached its qualified immunity ruling for two reasons: first, because at the time in question it was not clearly established that an enemy combatant possessed the same constitutional rights as an ordinary convicted prisoner or accused criminal; and second, because although it was clearly established that the torture of a U.S. citizen violated the Constitution, it was not clearly established at the time that the treatment to which Padilla was subjected amounted to torture. *Id.* For a critical assessment of the Ninth Circuit's qualified immunity analysis, see David Cole, *No Accountability for Torture*, NYR BLOG (May 7, 2012, 3:05 PM), http://www.nybooks.com/blogs/nyrblog/2012/may/07/john-yoo-jose-padilla-torture-lawsuit/, and Jonathan Hafetz, *The Ninth Circuit's Dismissal in* Padilla*: The Accountability Gap Widens*, BALKINIZATION (May 3, 2012, 1:33 AM), http://balkin.blogspot.com/2012/05/ninth-circuits-dismissal-in-padilla.html.

The government has also relied on similar "special factors" arguments in moving to dismiss a lawsuit[221] by a U.S. citizen who was secretly rendered, detained, and mistreated by FBI agents in the Horn of Africa.[222] The government's motion in that case, *Meshal v. Higgenbotham*, is pending before the federal district court in Washington, D.C.[223]

The outcome of these citizen-damages suits thus remains uncertain, and U.S. citizen challenges to other national security practices, like targeted killing, have failed on justiciability grounds.[224] Even if, however, courts ultimately permit citizen-damages suits to proceed past the pleading stage—which looks increasingly unlikely absent Supreme Court intervention—it would not alter the non-availability of a federal forum for the larger category of cases brought by noncitizens that challenge national security detention and interrogation practices.[225] Instead, citizen-damages suits will, at most, represent a narrow exception to the general bar against civil litigation seeking redress for abuses in the war on terrorism—an exception rooted in the heightened obligation courts believe are due U.S. citizens, the rights U.S. citizens possess compared to noncitizens, and the limited number of citizen-damages cases that are likely to be brought. U.S. citizen cases, if allowed, will thus proceed not because of a belief in the judiciary's ability to address the various concerns surrounding classified information, military and intelligence operations, and diplomatic relations, but rather because of a normative determination that such litigation should be permitted in that narrow category of cases despite those concerns.

IV. FEDERAL COURTS AS NATIONAL SECURITY DETENTION COURTS

Another post-9/11 model for federal court adjudication centers on judicial review of military detention through the exercise of habeas corpus jurisdiction. Here, courts have served two main and interrelated functions: first, as a forum for examining broader policies concerning the military detention and trial of terrorism suspects; and second, as a forum for deciding the merits of individual detainee cases. These functions have been exercised mainly in the context of

221. *See* Motion to Dismiss Plaintiff's Amended Complaint Filed by Defendants Chris Higginbotham, Steve Hersem, John Doe 1, and John Doe 2 at 8–18, Meshal v. Higgenbotham, No. 09-cv-2178-EGS (D.D.C. June 23, 2010), ECF No. 33 [hereinafter Higgenbotham's Motion to Dismiss].

222. Amended Complaint for Damages and Declaratory Relief at 1–3, Meshal v. Higgenbotham, No. 09-cv-2178-EGS (D.D.C. May 10, 2010), ECF No. 31. I am co-counsel with the American Civil Liberties Union for the plaintiff Amir Meshal in this lawsuit.

223. *See* Higgenbotham's Motion to Dismiss, *supra* note 221.

224. *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8, 11, 35, 52 (D.D.C. 2010) (dismissing, for lack of standing and on political question grounds, a "next friend" lawsuit by father of U.S. citizen, Anwar al-Aulaqi, challenging his son's placement on the U.S. government's "targeted killing" list based on his son's alleged terrorist activities in Yemen).

225. *See supra* note 134 (collecting cases brought by noncitizens).

the Guantánamo detainee litigation, where courts have largely accepted and accommodated the government's adoption of a new form of detention outside the criminal justice system even as they have selectively resisted the executive's effort to deprive them of any role in determining its contours.

The Supreme Court's decisions in *Hamdi v. Rumsfeld*,[226] *Hamdan v. Rumsfeld*,[227] and *Boumediene v. Bush*,[228] all illustrate how the judiciary can serve as a forum for review of war on terror detention practices. *Hamdi* and *Boumediene* demonstrate how courts, through the exercise of their habeas jurisdiction, can examine both the category of individuals who may be lawfully held in military custody and the process they must be afforded to justify their continued confinement. In *Hamdi*, the Court held that the President's AUMF-based military detention authority extended, at minimum, to individuals who were part of or were supporting forces hostile to the United States in Afghanistan and who engaged in armed conflict against the United States or its coalition partners there.[229] Such individuals, the Court said, could be detained as enemy combatants for the duration of the armed conflict.[230] The Court left further development of the parameters of the enemy combatant category to future cases.[231] While it cautioned against expanding that category too far,[232] the Court nevertheless sanctioned the theory that enemy-combatant detention provided an alternative to federal criminal detention and that those properly categorized as enemy combatants could be held indefinitely to prevent their "return to the battlefield."[233]

Four years later, in *Boumediene*, the Court reaffirmed that judges exercising habeas corpus jurisdiction in Guantánamo detainee cases could determine the legitimate scope of the government's AUMF-based military detention authority, but did not further address the scope of that authority.[234]

226. 542 U.S. 507 (2004).

227. 548 U.S. 557 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

228. 553 U.S. 723 (2008).

229. *Hamdi*, 542 U.S. at 516–18 (plurality opinion).

230. *Id.* at 521.

231. *Id.* at 522 n.1.

232. *Id.* at 521 (noting that "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war," the "understanding" that the AUMF authorizes detention "may unravel").

233. *Id.* at 519.

234. *Boumediene*, 553 U.S. at 788 (noting that courts, as part of their constitutionally mandated habeas jurisdiction, must have authority to consider the petitioners' "most basic claim: that the President has no authority under the AUMF to detain them indefinitely"); *see also id.* at 790 ("If a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court."). In *Hamdan*, the Court suggested the government had continued authority to militarily detain at least some individuals seized in the non-international armed conflict against al Qaeda,

Since *Boumediene*, however, lower courts have elaborated on that standard in adjudicating individual habeas petitions, determining that the President has authority under the AUMF to detain individuals who were part of or who supported al Qaeda, the Taliban, or associated forces that are engaged in hostilities with the United States or its coalition partners.[235] These courts have extended AUMF-based detention authority beyond the narrow circumstances present in *Hamdi*, refusing to limit that authority to individuals who were captured on a battlefield or who took part in the armed conflict in Afghanistan (as opposed to the global armed conflict against al Qaeda and associated forces).[236]

Hamdi and *Boumediene* also addressed the process to which the petitioners were entitled in challenging their law-of-war-based detention under the AUMF. In both cases, the Court found the existing process inadequate—under the Due Process Clause in *Hamdi*[237] and under the Suspension Clause in *Boumediene*[238]—and ordered individualized judicial determinations to remedy the defect. Although the decisions rested on different constitutional provisions, they both maintained that a constitutionally adequate process had to provide detainees with a meaningful opportunity to challenge the government's assertions before a neutral decisionmaker.[239] The decisions also acknowledged that a military tribunal could provide an adequate fact-finding process if it contained sufficient procedural safeguards.[240] But where the military fact-finding process was as deficient or tainted by bias as it was in *Hamdi* and *Boumediene*, the Due Process Clause (*Hamdi*) and Suspension Clause

but it did not further elaborate on the scope of that authority. Hamdan v. Rumsfeld, 548 U.S. 557, 635 (2006).

235. *See, e.g.*, Al Alwi v. Obama, 653 F.3d 11, 15 (D.C. Cir. 2011); Hatim v. Gates, 632 F.3d 720, 721 (D.C. Cir. 2011); Al-Adahi v. Obama, 613 F.3d 1102, 1103 (D.C. Cir. 2010).

236. *See* Salahi v. Obama, 625 F.3d 745, 750, 753 (D.C. Cir. 2010) (reversing and remanding grant of habeas petition for further fact-finding; assuming, without discussing, that a petitioner could be militarily detained as "part of" al Qaeda even if he lacked connection to the armed conflict in Afghanistan).

237. *Hamdi*, 542 U.S. at 533, 537–38 (plurality opinion) (holding that the military process provided to petitioner fails to satisfy the Due Process Clause's requirement of adequate notice and a meaningful opportunity to be heard before a neutral decision-maker).

238. *Boumediene*, 553 U.S. at 792, 798 (holding that review of Combatant Status Review Tribunal determinations under the restrictive standards of the Detainee Treatment Act of 2005 does not provide an adequate and effective substitute for habeas corpus).

239. *Id.* at 744–45; *Hamdi*, 542 U.S. at 509.

240. *See Boumediene*, 553 U.S. at 783–85 (suggesting, by reference to the CSRT's shortcomings, what an adequate fact-finding process would require in cases of executive detention); *Hamdi*, 542 U.S. at 537–38 (noting that a properly constituted military tribunal could provide an adequate fact-finding process for individuals seized on the battlefield during armed conflict). The Suspension Clause would additionally require collateral review through habeas to correct errors in that process. *Boumediene*, 553 U.S. at 786. The scope and intensity of that habeas review would depend in part on the robustness of that underlying process. *Id.*

(*Boumediene*) required judicial fact-finding to remedy the flaws.[241] In *Hamdi*, the Court's ruling meant that the petitioner was entitled to a judicial determination of whether he fell within the enemy combatant category, as defined by the Court in that case;[242] in *Boumediene*, it meant that the petitioners and all other Guantánamo detainees were entitled to a judicial determination of whether there was a lawful basis to hold them.[243] Moreover, the *Boumediene* Court ruled that judicial determination had to allow for independent fact-finding in order to satisfy the Suspension Clause.[244] While *Hamdi* and *Boumediene* said that the judicial review must be meaningful, they also instructed lower courts to take into account the government's legitimate security interests in establishing a framework for review of individual detainee cases.[245] Ultimately, the Court left it to lower courts to resolve the various evidentiary and procedural issues presented by the habeas litigation in the first instance.[246]

Hamdan involved a similar exercise of judicial review, only there the Court examined the legality of trying detainees in military commissions rather than holding them in law-of-war detention.[247] *Hamdan* invalidated the military commissions created by President Bush because they failed to conform to the Uniform Code of Military Justice ("UCMJ") [248] and, by incorporation,

241. *Boumediene*, 553 U.S. at 785 ("[W]e agree with petitioners that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact . . . [which] is a risk too significant to ignore."); *Hamdi*, 542 U.S. at 537–38.

242. *Hamdi*, 542 U.S. at 533.

243. *Boumediene*, 553 U.S. at 779.

244. *Id.* at 732, 788–89 (finding that federal appellate review of military CSRT determinations under the Detainee Treatment Act of 2005 does not provide an "adequate and effective" substitute for habeas review because, *inter alia*, the appeals court cannot consider new evidence produced by the detainee).

245. *See id.* at 796 ("We make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees' habeas corpus proceedings. We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible."); *Hamdi*, 542 U.S. at 533–34 (explaining that "enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict" and noting, for example, that "[h]earsay . . . may need to be accepted as the most reliable available evidence from the Government in such a proceeding" and that "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided").

246. *Boumediene*, 553 U.S. at 796 (leaving various "evidentiary and access-to-counsel" issues to the "expertise and competence" of the district courts to address in the first instance).

247. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

248. *Id.* at 567.

Common Article 3 of the Geneva Conventions, which the Court held applied to all prisoners detained in connection with the armed conflict against al Qaeda (a conflict whose scope the Court declined to define with any precision).[249] The Court's decision had three principal effects on U.S. national security policy. First, it enforced a statutorily based requirement of conformity between military commissions and courts-martial, which in turn required conformity with the law of war.[250] Second, *Hamdan* mandated baseline protections for the treatment of all prisoners in U.S. custody in the war on terror by rejecting the administration's contention that enemy combatants fell outside the ambit of Common Article 3.[251] Third, the decision, which was grounded in the executive's failure to adhere to congressional requirements, invited subsequent legislative action in the field.[252] "Nothing," as Justice Breyer explained in his concurrence, "prevents the President from returning to Congress to seek the authority he believes necessary."[253]

Congress would take up this invitation twice—authorizing military commissions four months after *Hamdan* in the Military Commissions Act ("MCA") of 2006[254] and then further modifying the commissions three years later.[255] Created in the shadow of *Hamdan*, these new commissions would contain procedural safeguards that earlier commissions lacked, including greater opportunities for defendants to confront the evidence against them and stricter protections against the use of evidence obtained through coercion.[256] The 2009 revisions, moreover, eliminated a provision precluding defendants from challenging the commissions for failing to comply with Common Article 3.[257] The new commissions did not, however, resolve concerns surrounding

249. *Id.* at 630, 631 & n.63, 635.

250. *Id.* at 613.

251. *Id.* at 630–32.

252. *See Hamdan*, 548 U.S. at 567 (noting the military commission lacked power to proceed because it violated the UCMJ as passed by Congress).

253. *Id.* at 636 (Breyer, J., concurring).

254. Military Commissions Act of 2006, Pub. L. No. 109-366, § 948b, 120 Stat. 2600, 2602 (codified at 10 U.S.C. § 948b).

255. Military Commissions Act of 2009, Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190, 2574–2614 (codified as amended at 10 U.S.C. §§ 948a–950t (2010)).

256. *See* 10 U.S.C. §§ 948q(b)–948r, 949j (Supp. III 2010).

257. *See* Deborah N. Pearlstein, *Ratcheting Back: International Law as a Constraint on Executive Power*, 26 CONST. COMMENT. 523, 533 (2010) (noting that while the 2006 MCA "could be read to prevent commission defendants from invoking Geneva as any 'source of rights,' even in defense against a criminal action against them, [the 2009 MCA] appeared to prevent defendants only from relying on Geneva to create a separate cause of action in federal court," thus enabling them to claim Geneva's continued availability as applicable law in their commission case).

the admission of hearsay evidence,[258] nor did it significantly alter the government's substantive power to try noncitizens in commissions, including for offenses like material support for terrorism[259] that are generally not recognized as war crimes under international law.[260]

These three decisions suggest the potential role of federal courts in influencing U.S. detention policy in the war on terror. As a general matter, the Court found that at least some military counterterrorism detentions are a proper subject for judicial review, even if they arise in connection with an armed conflict and notwithstanding the government's warnings about interference with core executive functions. *Hamdi* and *Boumediene* demonstrate the Court's willingness to impose constitutionally based process requirements, whether through the Due Process Clause or the Suspension Clause, to provide detainees with an opportunity to challenge the allegations against them in a judicial forum. *Hamdan*'s holding on the applicability of Common Article 3 to the armed conflict with al Qaeda and associated forces—with its prohibition not only on torture but also on lesser forms of mistreatment[261]—reflects the Court's willingness to impose baseline standards for the treatment of detainees and its aversion to a legal vacuum.

The decisions, however, also demonstrate judicial hesitation in reviewing substantive detention standards.[262] Although the Court has made clear that the permissible scope of the "enemy combatant" category is a judicial question, it has shown no great enthusiasm for answering it, whether by crafting a narrow holding in *Hamdi*,[263] declining to address the question in *Boumediene*,[264] or

258. David Glazier, *Playing by the Rules: Combating al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 1033 (2009) (cautioning that "the continued admissibility of hearsay creates real concern that the government might circumvent MCA 2009's prohibitions on admission of evidence obtained by torture or cruel, inhuman, or degrading treatment").

259. 10 U.S.C. § 950t(25).

260. *See* David Weissbrodt & Andrea W. Templeton, *Fair Trials? The Manual for Military Commissions in Light of Common Article 3 and Other International Law*, 26 LAW & INEQ. 353, 362 n.48, 364 (2008).

261. Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

262. *See* Jenny S. Martinez, *Process and Substance in the "War on Terror"*, 108 COLUM. L. REV. 1013, 1015–16, 1028 (2008) (criticizing the Court's extensive focus on procedural questions at the expense of addressing larger substantive questions surrounding the scope of the executive's detention authority); *see also* Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122, 125 (2011) (describing the Court's failure to review the substantive detention standard applied in the Guantanamo habeas cases).

263. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 509, 522 n.1 (2004) (plurality opinion).

264. Boumediene v. Bush, 553 U.S. 723, 798 (2008). Several petitioners in *Boumediene* had pressed the issue of the permissible scope of AUMF-based detention. *See* Brief for the *Boumediene* Petitioners at 33–43, Boumediene v. Bush, 553 U.S. 723 (2008) (No. 06-1195), 2007 WL 2441590 at *33–43.

allowing the government to moot the habeas challenges in *Padilla v. Hanft*[265] and *al-Marri v. Pucciarelli*.[266] In *Padilla* and *al-Marri*, the government avoided a Supreme Court determination on the outer reaches of the President's military detention power by bringing criminal charges against the petitioners and returning them to civilian custody after years of military detention.[267] Additionally, apart from its process-based rulings in *Hamdi* and *Boumediene*, which looked to constitutional norms in mandating judicial review of executive-branch assessments about detainees, the Court rested its decisions on statutory grounds. Thus, while *Hamdan* noted the constitutional limits of the executive's authority to create military commissions that contravened existing legislation,[268] it did not question Congress's authority to create new military commissions nor did it establish any constitutional constraints on that authority.[269] The Court's Suspension Clause holding in *Boumediene*, moreover, occurred only after the Court had previously attempted to address its concerns about unreviewable executive detention in *Rasul v. Bush* through statutory interpretation,[270] and subsequent congressional court-stripping legislation left no alternative except to ground the right to judicial review in the Constitution.[271]

Since *Boumediene*, lower courts have addressed various questions that the Supreme Court left open in the course of exercising their habeas jurisdiction

265. *See* Padilla v. Hanft, 547 U.S. 1062, 1063 (2006).

266. 534 F.3d 213, 216 (4th Cir. 2008), *vacated as moot sub nom.* al-Marri v. Spagone, 129 S. Ct. 1545 (2009).

267. *See al-Marri*, 129 S. Ct. at 1545; *Padilla*, 547 U.S. at 1063; *Padilla*, 547 U.S. at 1064 (Ginsburg, J., dissenting). In *Padilla* and *al-Marri*, the Bush Administration claimed the legal authority to seize suspected terrorists arrested in the United States and detain them indefinitely as enemy combatants as part of the global armed conflict against al Qaeda. *Padilla*, 547 U.S. at 1062 (majority opinion); *id.* at 1064 (Ginsburg, J., dissenting); *al-Marri*, 534 F.3d at 217 (Motz, J., concurring). In *Padilla*, this power was applied to a U.S. citizen. *Padilla*, 547 U.S. at 1062 (majority opinion). In *al-Marri*, to a noncitizen who had lawfully entered the country. *Al-Marri*, 534 F.3d at 219.

268. Hamdan v. Rumsfeld, 548 U.S. 557, 593 n.23 (2006) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)) ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

269. *See id.* at 594–95.

270. Rasul v. Bush, 542 U.S. 466, 477–78, 484 (2004) (holding that Guantánamo detainees have a right to challenge their detention under the federal habeas corpus statute, but declining to decide whether the detainees have a constitutionally protected right to habeas corpus under the Suspension Clause).

271. *See* Boumediene v. Bush, 553 U.S. 723, 732–33 (2008) (finding that section seven of the Military Commissions Act of 2006 was an unconstitutional suspension of the writ of habeas corpus).

and resolving individual Guantánamo detainee petitions. Together, the D.C. Circuit and district courts have thus far decided approximately eighty Guantánamo detainee cases.[272] In determining whether a particular petitioner's detention is lawful, these courts have addressed various questions affecting U.S. detention practices, including the standard under which individuals may be confined pursuant to the AUMF,[273] the evidentiary rules governing the habeas review process,[274] and the remedy available to those petitioners whose detention has been found unlawful.[275] The results of this lower court habeas litigation reveal a marked shift over time: in the first nineteen months after *Boumediene*, district courts granted thirty-three of the forty-four habeas petitions they decided;[276] since then, the D.C. Circuit has decided sixteen appeals ruling for the government in all except two cases.[277] Since the D.C. Circuit began reviewing district habeas decisions and articulating rules that make it more difficult for a detainee to prevail, district courts have increasingly ruled in the government's favor—a trend that has accelerated sharply with the number of D.C. Circuit decisions.[278]

The D.C. Circuit has upheld a more expansive AUMF-based detention standard than either the Supreme Court applied in *Hamdi*[279] or the district

272. *See* Jonathan Hafetz, *Calling the Government to Account: Habeas Corpus After* Boumediene, 56 WAYNE L. REV. (forthcoming 2012). District courts have issued merits decisions in sixty-three Guantánamo habeas cases, and the D.C. Circuit has decided sixteen appeals from these cases. *See id.*; *see also* Stephen I. Vladeck, *The D.C. Circuit After* Boumediene, 41 SETON HALL L. REV. 1451, 1453–54 (2011) (noting the deep divide these cases have caused between the D.C. Circuit and D.C. District Courts).

273. *See* Vladeck, *supra* note 272, at 1456–65.

274. *See id.* at 1466, 1469–73.

275. *See id.* at 1476–88.

276. *See* Marc D. Falkoff & Robert Knowles, *Bagram,* Boumediene, *and Limited Government*, 59 DEPAUL L. REV. 851, 853 n.8, 861 (2010).

277. Hafetz, *supra* note 272. In those two cases, the D.C. Circuit reversed a habeas denial and remanded for further proceedings. *Id.* For the remaining cases, the breakdown is as follows: in eight cases, the appeals court affirmed a habeas denial; in three cases, it reversed a habeas grant and directed judgment for the government; and in three cases it vacated a habeas grant and remanded the case to the district court for further proceedings. Hafetz, *supra* note 272; E-mail from Brian Foster to author (Oct. 14, 2011, 17:08) (on file with author).

278. Since July 2010, for example, district judges have not granted any Guantánamo habeas petitions, while denying ten petitions—yet twenty-two habeas petitions were granted, with only fifteen denied in the two previous years. Editorial, *Reneging on Justice at Guantánamo*, N.Y. TIMES, Nov. 20, 2011, at SR 10; *see also* MARK DENBEAUX & JONATHAN HAFETZ, SETON HALL LAW CTR. FOR POLICY & RESEARCH, NO HEARING HABEAS: D.C. CIRCUIT RESTRICTS MEANINGFUL REVIEW 1, 6 (2012) (describing the impact of D.C. Circuit decisions on district court fact-finding in Guantánamo habeas cases and tracking the increasing rate of acceptance of by district judges of the government's allegations), *available at* http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/upload/no-hearing-habeas.pdf.

279. *See supra* notes 229–33 and accompanying text.

courts recognized in post-*Boumediene* Guantánamo detainee habeas cases.[280] The appeals court has ruled that individuals may be held in military detention if they were part of al Qaeda, the Taliban, or associated forces or purposefully and materially supported such forces in hostilities against the United States or its allies.[281] In applying this standard, the Circuit has rejected any rigid test, such as one that would require the government to show that detainees received and executed orders as part of the enemy organization's "command structure," in favor of a more flexible, case-by-case approach.[282] It has not required that the petitioner was on a battlefield or directly participated in hostilities.[283] While most of the Guantánamo habeas cases involve detainees apprehended in connection with the armed conflict in Afghanistan**,** the D.C. Circuit has not placed any geographic limit on the government's military detention power or otherwise suggested that the conflict itself is territorially limited.[284]

The D.C. Circuit has also upheld the use of hearsay evidence[285] and rejected efforts by detainees to invoke rights under the Constitution's Confrontation Clause.[286] Most significantly, the D.C. Circuit has required district courts to take a highly deferential approach to the government's evidence. It has repeatedly criticized district judges for failing to view the government's evidence in its totality and focusing instead on specific weaknesses in its case.[287] Some D.C. Circuit judges have suggested that the government's evidence in Guantánamo detainee habeas cases should be subjected merely to a "some evidence" test, rather than to the more rigorous

280. *See* Gherebi v. Obama, 609 F. Supp. 2d 43, 68–69 (D.D.C. 2009) (quoting Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3) (focusing on whether an individual "'receive[s] and execute[s] orders' from [the enemy organization's] 'command structure'" in determining whether that individual is "part of" al Qaeda and thus detainable under the AUMF), *abrogated by* Uthman v. Obama, 637 F.3d 400 (D.C. Cir. 2011); *see also* Hamlily v. Obama, 616 F. Supp. 2d 63, 75 (D.D.C. 2009) (applying a similar "command structure" test), *abrogated by* Uthman v. Obama, 637 F.3d 400 (D.C. Cir. 2011).

281. *See, e.g.*, Al-Bihani v. Obama, 590 F.3d 866, 872 (D.C. Cir. 2010).

282. *Uthman*, 637 F.3d at 400, 403.

283. *See, e.g.*, *Al-Bihani*, 590 F.3d at 869, 873.

284. Salahi v. Obama, 625 F.3d 745, 750–51 (D.C. Cir. 2010) (concluding that the AUMF would authorize the detention of an individual seized in Mauritania and who was not alleged to have taken part in the current armed conflict in Afghanistan because the relevant inquiry was whether the defendant was "part of" al-Qaida when captured).

285. *E.g.*, Awad v. Obama, 608 F.3d 1, 7 (D.C. Cir. 2010) (ruling that hearsay is always admissible in detainee habeas cases and that the operative question is what weight to give it); *Al-Bihani*, 590 F.3d at 879.

286. *Al-Bihani*, 590 F.3d at 879 (ruling that the rights protected under the Sixth Amendment's Confrontation Clause apply only to criminal trials).

287. *See, e.g.*, *Salahi*, 625 F.3d at 753 (criticizing the district judge for taking an "unduly atomized" view of the government's evidence); Al-Adahi v. Obama, 613 F.3d 1102, 1105–06 (D.C. Cir. 2010) (same).

preponderance of the evidence standard that the government itself has advocated.[288] The Circuit has further ruled that district judges must presume the accuracy of government intelligence reports unless rebutted by the petitioner,[289] causing the dissenting judge to note that the ruling "comes perilously close to suggesting that whatever the government says must be treated as true."[290] With such a ruling, the dissent explained, "it is hard to see what is left of the Supreme Court's command in *Boumediene* that habeas review be 'meaningful.'"[291] Additionally, the D.C. Circuit has held that district courts have no authority to order the release of a prisoner into the United States—even if the prisoner prevails on his habeas petition but cannot be safely returned to his home country or repatriated to a third country.[292]

These post-*Boumediene* lower court decisions provide an additional perspective on federal court review of post-9/11 detention cases. In evaluating the lawfulness of an individual petitioner's law-of-war-based confinement, they have served as *de facto* national security detention courts. Through a common law process of adjudication, they have developed substantive and procedural rules for a new form of executive confinement based on an individual's participation in, support for, or connection to a global armed conflict with al Qaeda and affiliated terrorist groups.[293] (Congress recently

288. *See* Esmail v. Obama, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring) (advocating the adoption of a more deferential approach to the government's evidence); *see also Al-Bihani*, 590 F.3d at 878 & n.4. The D.C. Circuit has rejected arguments by detainees that the Constitution requires a more rigorous standard than preponderance of the evidence. *Id.* at 878.

289. Latif v. Obama, 666 F.3d 746, 748–49 (D.C. Cir. 2011).

290. *Id.* at 779 (Tatel, J., dissenting) (quoting Parhat v. Gates, 532 F.3d 834, 849 (D.C. Cir. 2008)).

291. *Id.*

292. *See* Kiyemba v. Obama, 555 F.3d 1022, 1028 (D.C. Cir. 2009) (finding that district courts have no authority to order the release of a prisoner, whose habeas petition was successful, into the United States); *see also* Kiyemba v. Obama, 605 F.3d 1046, 1047–48 (D.C. Cir. 2010) (upholding continued indefinite detention of prisoners under such circumstances). The Court had previously granted certiorari to determine "whether a federal court exercising habeas jurisdiction has the power to order the release of" a Guantánamo detainee into the United States, where such release is the only effective remedy. *See* Kiyemba v. Obama, 130 S. Ct. 1235, 1235 (2010). Before the case was argued, however, the U.S. government had obtained offers of resettlement for all of the *Kiyemba* petitioners. *Id.* The Court, accordingly, vacated the D.C. Circuit's opinion holding that federal courts had no power to order release, *Kiyemba v. Obama*, 555 F.3d 1022, 1028 (D.C. Cir. 2009), and remanded to the appeals court to reconsider the case in light of these new facts. *Kiyemba*, 130 S. Ct. at 1235. The D.C. Circuit subsequently reinstated its prior determination that federal courts have no power to order a Guantanamo detainee's release into the United States under any circumstance. *Kiyemba*, 605 F.3d at 1048. This time, the Court denied certiorari. Kiyemba v. Obama, 131 S. Ct. 1631, 1631 (2011).

293. *See supra* notes 273–92 and accompanying text. *See* Baher Azmy, *Executive Detention,* Boumediene, *and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 505 (2010)

ratified the D.C. Circuit's broad construction of the President's detention power under the AUMF, expressly authorizing the detention of individuals who were part of or substantially supported al Qaeda, the Taliban, or associated forces).[294] Detentions remain subject to judicial review via habeas corpus under *Boumediene*.[295] But they are examined under standards and procedures that provide substantial latitude and a heightened degree of deference to the government.[296] *Boumediene*, like *Hamdi*, may extol federal courts as providing an important checking function by protecting "the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account."[297] The post-*Boumediene* litigation, however, has significantly cabined that review function and rendered it of little practical effect.

Two other considerations are relevant to understanding federal-court review of post-9/11 detentions. First, not all national security detentions are subject to judicial review. The current statutory framework does not expressly provide for habeas jurisdiction over overseas detentions, while explicitly barring the exercise of that jurisdiction over noncitizens detained as enemy combatants.[298] Under *Boumediene*, the availability of habeas jurisdiction under the Suspension Clause for overseas detentions is determined by a functional test that examines "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[299] The application of this test may have compelled habeas jurisdiction over detentions at Guantánamo, but it has not led to habeas review over detentions at Bagram, where the D.C. Circuit has deemed the Suspension Clause not to extend.[300] Thus, even as *Boumediene* establishes the potential for federal courts' review of overseas counterterrorism detentions by rejecting any categorical bars to jurisdiction based on a prisoner's citizenship or

(recognizing the expanded definition of "enemy combatant" to any individual who was part of *or supporting* Taliban or al Qaeda forces).

294. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No 112-81, § 1021, 125 Stat. 1298, 1562 (2011). The D.C. Circuit had previously held that the AUMF authorized the military detention of individuals who were part of al Qaeda, the Taliban, or associated forces or purposefully and materially supported such forces in hostilities against the United States or its allies. *See supra* note 281 and accompanying text.

295. Boumediene v. Bush, 553 U.S. 723, 786–87 (2008).

296. *See supra* notes 285–90 and accompanying text.

297. *Boumediene*, 553 U.S. at 745.

298. 28 U.S.C. § 2241(e) (2006).

299. *Boumediene*, 553 U.S. at 766.

300. Al Maqaleh v. Gates, 605 F.3d 84, 98 (D.C. Cir. 2010) (applying *Boumediene* and finding that the Suspension Clause does not apply to U.S. detentions at Bagram).

location,[301] it allows for continued extrajudicial detention, depending on how its multi-factored test is applied.

Boumediene, moreover, does not address proxy detention, where actual U.S. direction and control is masked by a foreign sovereign's nominal exercise of custody over a prisoner.[302] Although one district court has held that habeas jurisdiction can be asserted over proxy detentions on a theory of constructive custody,[303] establishing the factual basis for such custody is difficult given the potentially secret and fluid nature of the custodial arrangements. Whether there is any federal court review of constructive custody cases thus depends largely on a judge's willingness to allow jurisdictional discovery to flesh out those custodial arrangements in the face of government objections that such discovery will "interfere with the internal affairs of another sovereign nation and encroach on sensitive foreign policy concerns."[304]

Second, not all claims are subject to judicial review even where habeas jurisdiction exists, as the post-*Boumediene* Guantánamo detainee litigation shows.[305] The D.C. Circuit has held that judges cannot review the executive's decision to transfer a prisoner to another country, even where that prisoner claims it would result in their likely torture or continued imprisonment.[306] It has also denied habeas review when sought by former Guantánamo detainees based on the collateral consequences flowing from their prior—and still unrescinded— designation as enemy combatants.[307] Thus, to the extent *Boumediene* creates a role for federal courts as national security detention courts—to review counterterrorism detentions outside the criminal justice system—that role has been confined to a limited category of detentions as well as a limited scope of claims.

As a result of the Guantánamo habeas corpus litigation, courts have helped shape the broader rules governing war on terrorism detentions and prosecutions as well as evaluated the merits of individual detainee cases. In its trio of "enemy combatant" decisions—*Hamdi*, *Hamdan*, and *Boumediene*—the Supreme Court created the possibility of judicial oversight by rejecting strict

301. *Boumediene*, 553 U.S. at 747, 771.

302. Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 850 n.601 (2011).

303. Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 68 (D.D.C. 2004) (holding that habeas jurisdiction would lie over a U.S. citizen detained abroad by a foreign government if the United States actually exercised custody or control over the detention).

304. HAFETZ, *supra* note 17, at 197–98.

305. *See* Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 110 (D.D.C. 2010).

306. Kiyemba v. Obama (Kiyemba II), 561 F.3d 509, 514 (D.C. Cir. 2009).

307. Gul v. Obama, 652 F.3d 12, 14, 17–18 (D.C. Cir. 2011) (affirming the dismissal of habeas petitions by former Guantánamo detainees challenging their unrescinded designation as enemy combatants and holding that the collateral consequences of that designation did not satisfy justiciability requirements under Article III).

territorial limits on the Constitution's application; enforced separation of powers principles by requiring legislative authorization for military commissions; rejected the notion that war-on-terrorism detentions are exempt from international norms; and mandated individualized judicial review of Guantánamo detainee habeas cases.[308]

Guantánamo thus can no longer be described as a legal black hole: detainees there have access to the courts through habeas corpus—however limited the habeas right may be—and substantive protections under Common Article 3. Further, just as Suspension Clause-mandated habeas review has provided greater legitimacy to AUMF-based detentions, post-*Hamdan* congressional reforms to military commissions have enhanced their viability as an alternative to federal criminal prosecution through a process of legalization.[309] Guantánamo, in short, has become a competing model to federal criminal prosecution for the long-term incapacitation of terrorism suspects—a model whose more limited procedural protections and laxer evidentiary standards, its supporters argue, are justified by the government's need to protect intelligence sources and methods, the dangers of interfering with military operations, and the limited competence of the judiciary in matters affecting national security. If the post-9/11 habeas litigation suggests the resilience of judicial review, it also accepts a judicial role that is less public, less protective of individual rights, and less willing to scrutinize the government's evidence than terrorism prosecutions in Article III courts.

V. CONCLUSION

In *Representing Justice*, Professors Resnik and Curtis remind us of the importance of contextualizing the post-9/11 shift towards military tribunals within a larger, decades-long transformation of courts in the United States.[310] Focusing only on apparent change, they note, obscures continuities, including how the United States relies increasingly on non-Article III forums and alternative dispute mechanisms to resolve controversies.[311] This Article argues that this increased reliance on alternative methods of adjudication, in turn, affects the perception and operation of Article III courts. In particular, the Article demonstrates how the creation of an alternative military detention system after 9/11 has transformed federal courts, reshaping their role as forums for criminal prosecutions and civil damages actions, while creating a new species of federal adjudication in which courts hear challenges to detentions under this alternative system.

308. *See supra* notes 226–53 and accompanying text.
309. *See* RESNIK & CURTIS, *supra* note 1, at 327–28.
310. *Id.* at 334–35.
311. *Id.* at 335.