Applying the Rule of Law in the War on Terror: An Examination of Guantanamo Bay through the Lens of the U.S. Constitution and the Geneva Conventions

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By JOHN R. PARISEAULT*

Following the September 11, 2001, terrorist attacks against the United States, the U.S. government waged a war against terrorism by invading Afghanistan and pursuing the terrorist network known as Al Qaeda.1 This "war on terror" is largely focused upon an unknown and clandestine enemy whose strength is dispersed around the globe. In order to anticipate future attacks, cripple terrorist organizations, and punish those who have committed terrorist acts, the United States must be able to gather intelligence. The naval base at Guantanamo Bay has become a vital and controversial forum in which the United States military currently detains and interrogates Taliban fighters from Afghanistan and those with alleged connections to Al Qaeda.2

This article will examine the detention of prisoners by the United States at the naval base on Guantanamo Bay, Cuba, through the lens of the Geneva Conventions3 and the United States Constitution. This article will consider President Bush’s November 13, 2001 Executive

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1. Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (Congress authorized President Bush to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks).


Order regarding the indefinite detention of non-U.S. citizens, consider the special need for interrogation and intelligence gathering presented by this war on terror, and look at mechanisms foreign governments have used to deal with terrorism. Finally, this article will propose ways in which the United States can achieve its security goals while also extending international and Constitutional protections to its non-citizen prisoners.

BACKGROUND

I. The United States is Engaged in an Armed Conflict to Which the Geneva Conventions Should Apply

The Geneva Conventions "apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." Even if one party to a conflict is not a party to the Geneva Convention, the Convention is nevertheless binding on the power that is a contracting party. The United States is a party to the Convention and must abide by its rules governing the treatment of captured forces in the event of an armed conflict.

However, it is unclear whether the Taliban or Al Qaeda can be characterized as "parties" to a conflict as contemplated by the Geneva Conventions. The United States did not recognize the Taliban as the controlling party of Afghanistan. Additionally, Al Qaeda is not a state - it is a group of private actors who do not abide by the laws of war. It is helpful at this point to examine how the United States is justified in using military force against private actors, and whether this type of armed conflict invokes the Geneva Conventions.

Protocol I Additional to the Geneva Conventions of August 12, 1949 makes clear that:

[the armed forces of a Party to a conflict consist of all organized

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5. Geneva Convention III, supra note 4, part I, art. 1
6. Id. at art. 2.
7. Id.
9. Geneva Convention III, supra note 4, part I, art. 3 (terrorist acts violate the principle that parties to a conflict must not attack civilians who take no active part in the hostilities).
armed forces... under a command responsible to that Party... even if that Party is represented by a government or an authority not recognized by an adverse party.\footnote{10}

The Taliban regime, although largely unrecognized by foreign states, governed much of Afghanistan.\footnote{11} It therefore should qualify as a “party” under the Geneva Conventions.

Al Qaeda, on the other hand, is a worldwide terrorist network.\footnote{12} Terrorist acts by private individuals are not generally construed as acts of war:

War is a condition between states or between a state and an identifiable force. Because terrorists are not states and generally refuse to fulfill the requirements for becoming an identifiable warring party under Geneva Convention III, terrorists, by definition, are never engaged in a legal act of war under accepted customary definitions.\footnote{13}

No evidence has been brought forward to suggest that Afghanistan or the Taliban controlled Al Qaeda.\footnote{14} As an independent and international terrorist organization, Al Qaeda’s actions violate the laws of war as prescribed by the Geneva Conventions.\footnote{15} Terrorist groups commit crimes not legal acts of war, yet the United States’ use of military force against Al Qaeda appears to be acceptable under international norms.\footnote{16}

Article 51 of the United Nations Charter identifies the right of self-defense in response to armed attack.\footnote{17} Neither the U.N. Charter

\footnotetext{10}{Protocol I Additional to the Geneva Conventions of August 12, 1949, 1125 U.N.T.S. 3, part III, § 2, art.43.}\footnotetext{11}{Manooher Mofidi & Amy E. Eckert, “Unlawful Combatants” or “Prisoners of War”: The Law and Politics of Labels, 36 CORNELL INT'L L. J. 59, 81 (2003).}\footnotetext{12}{PBS: Frontline, Hunting Bin Laden, at \texttt{<http://www.pbs.org/wgbh/pages/frontline/shows/binladen/who/alqaeda.html>}} (visited Mar. 1, 2004) (containing excerpts from U.S.’s 1989 indictment of Osama Bin Laden: “In approximately 1989, bin Laden and co-defendant Muhammad Atef founded “Al Qaeda,” “an international terrorist group... which was dedicated to opposing non-Islamic governments with force and violence.”).}\footnotetext{13}{Mofidi & Eckert, supra note 12, at 74.}\footnotetext{14}{Id. at 75.}\footnotetext{15}{See infra note 9.}\footnotetext{16}{U.N. CHARTER art. 51. The United Nations Charter provides that the UN Security Council “shall” determine if a threat to international peace exists and what measures are necessary to restore peace. The United States is a member of the United Nations and would presumably be required to allow the Security Council to assess the current situation rather than acting unilaterally.}\footnotetext{17}{U.N. CHARTER art. 51:}
nor international practice "circumscribes the identity of aggressors against whom states may respond: private actors as well as governments may be the sources of catastrophic conduct."\(^\text{18}\) The United States has taken aim at Al Qaeda, the Taliban, and anyone else who commits or conspires to commit terrorist acts against the country.\(^\text{19}\) The war on terror finds its justification in the right of a state to defend itself against armed attack.\(^\text{20}\) The United States is a signatory to the Geneva Conventions and should be guided by it in the exercise of military force against all enemies.

**II. Guantánamo Bay Detainees and the Geneva Conventions**

If we consider the armed conflict with Afghanistan and other measures taken around the world to root out terrorism following the September 11, 2001 attacks to be a war, then how must the United States characterize its enemy? Most accounts suggest that there are both alleged Taliban and Al Qaeda members being held at the U.S. base on Guantánamo Bay.\(^\text{21}\) These individuals were captured on the battlefield in Afghanistan and discovered in other locations around the world.\(^\text{22}\) Although quick to refer to its use of military force as a war on terrorism, the Bush administration has been less willing to classify the Guantánamo detainees\(^\text{23}\) pursuant to the clear directive of Geneva Convention III.\(^\text{24}\)

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Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

*Id.*

A. Prisoners of War

Prisoner of war status entitles detainees to important benefits. First, a prisoner of war must be treated humanely - the detaining party may not physically or mentally harm or threaten to harm any prisoner of war. The detaining party must also provide living conditions and medical care necessary for the life and physical well being of prisoners of war. When questioned by his captor, a prisoner of war is bound only to provide his surname, first name and rank, date of birth, and army serial number. No coercion may be used to gain information from a prisoner of war. Finally, prisoners of war must be released and returned to their home country when the armed conflict has ended.

Geneva Convention III enumerates six categories of persons who qualify as prisoners of war. The first category includes armed military personnel of a party to a conflict. The Taliban fighters defended the de facto government of Afghanistan from U.S. invasion and would appear to warrant prisoner of war status. The Bush administration has stated that captured Taliban fighters are covered by the Geneva Conventions, will be treated humanely, but will not receive prisoner of war status.

An additional category of persons who qualify as prisoners of war are members of militias and other warring groups who operate independently of a government's armed forces. These persons may obtain prisoner of war status so long as they (1) have a chain of command, (2) wear uniforms or are otherwise identifiable, (3) follow the laws of war, and (4) carry arms openly. Al Qaeda, and terrorist groups in general, achieve their ends by secrecy and sabotage. Members of Al Qaeda may have a chain of command, but they do not wear uniforms, carry arms openly, or follow the rules of war.

27. Id. at art. 17.
28. Id.
29. Id. at § II, art. 118.
30. Id. at art. 4.
33. Id.
Therefore, they cannot be classified as prisoners of war pursuant to Geneva Convention III.

**B. Unlawful Combatants**

The Bush administration has identified Al Qaeda detainees as “unlawful combatants,” a term that refers to individuals who “directly join in hostilities outside the limits imposed by the international law of armed conflict.” Unlawful combatants are persons, such as civilians and non-combat members of the military, who engage in a war without authorization and do not meet the criteria for prisoner of war status.

Persons who are not prisoners of war may be detained during times of armed conflict for reasons of national security pursuant to Geneva Convention II. A person who does not qualify as a prisoner of war may be detained within U.S. territory if he or she is definitely suspected of, or engaged in, activities hostile to the security of the United States. Detention without trial can last until the armed conflict has ended or earlier, if no longer necessary for security purposes. In addition, such persons are entitled to humane treatment and, “in case of trial shall not be deprived of the rights of fair and regular trial prescribed” by the Geneva Conventions.

What is the significance of classifying Al Qaeda as unlawful combatants as opposed to prisoners of war or simply criminals? Some commentators suggest that the U.S. government has assigned this label to bolster its ability to use military commissions to try members of Al Qaeda. President Bush made clear his intention to detain and try by military tribunal any individual who he determines has engaged in, aided, or conspired to commit terrorist acts against

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38. Geneva Convention II, *supra* note 4, art. 5-6, 6 U.S.T. 3516.
the United States, or anyone who has harbored such individuals.\footnote{41}{Exec. Order, 66 Fed. Reg. 57,833, (Nov. 13, 2001).}

Labeling Al Qaeda detainees as unlawful combatants makes it easier for the Bush administration to defend its intention to use non-reviewable military tribunals. In \textit{Ex parte Quirin v. Cox}, the Supreme Court distinguished between lawful and unlawful combatants:

Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.\footnote{42}{Exec. Order, 66 Fed. Reg. 57,833, (Nov. 13, 2001).} An enemy combatant who without uniform comes secretly through [the military lines of a belligerent in time of war] for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.\footnote{43}{317 U.S. 1, 31 (1942).}

The \textit{Quirin} Court denied the argument that a military trial for offenses against the laws of war was subject to the Fifth and Sixth Amendments of the Constitution. The Fifth Amendment provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury."\footnote{44}{U.S. CONST. amend. V.} The Sixth Amendment mandates that juries in a civilian court hear such trials.\footnote{45}{U.S. CONST. amend. VI.}

\textit{Quirin} explained that indictment by a grand jury and trial by jury were familiar parts of both criminal and civil trials at the time of the adoption of the Constitution. However, such judicial mechanisms were not part of military tribunals at that time. Moreover, it was not the purpose of the Amendments to enlarge the then-existing right to a jury trial.\footnote{46}{Quirin, 317 U.S. at 39.} Rather, the purpose was:

\begin{quote}
[T]o preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right ... [S]ection 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to
\end{quote}
trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.\textsuperscript{46}

The \textit{Quirin} Court refused to extend important constitutional protections to German soldiers who were deemed unlawful combatants for allegedly violating the laws of war. Similarly, by labeling the Guantanamo detainees unlawful combatants the Bush administration seeks to try them before military commissions, which function differently than United States federal courts.

Specifically, military tribunals do not require grand jury indictment or trial by jury.\textsuperscript{47} In addition, according to the November 13 Executive Order, the standard for admitting evidence will differ significantly.\textsuperscript{48} All evidence that would, in the opinion of the presiding officer of the military commission, have probative value to a reasonable person will be admitted.\textsuperscript{49} The proposed military commissions will also provide the only form of relief available to detainees. They will not have the opportunity to have their case reviewed by a U.S. civilian court, a foreign national court, or an international court.\textsuperscript{50}

\section*{DISCUSSION}

\subsection*{I. Problems With the November 13 Order}

\textit{A. The Geneva Conventions Require a Hearing to Determine if a Detainee is a Prisoner of War}

Article 5 of Geneva Convention III states that all persons who have committed a belligerent act against the party by whom that person is being detained will enjoy the protections of the prisoner of war status as described by the Conventions.\textsuperscript{51} If there is any doubt as

\begin{itemize}
  \item \textsuperscript{46} \textit{Id.} at 39-40 (citations omitted).
  \item \textsuperscript{47} \textit{Id.}
  \item \textsuperscript{49} 66 Fed. Reg. 57,833 at sec. 4 (c)(3).
  \item \textsuperscript{50} 66 Fed. Reg. 57,833 at sec. 7(b)(2). (The President's November 13 Order also denies detainees tried by military commission the ability to have their case heard by any other adjudicatory body: "the [detainee] shall not be privileged to seek any remedy or maintain any proceeding . . . or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.").
  \item \textsuperscript{51} Geneva Convention III, \textit{supra} note 4, art. 5, 6 U.S.T. 3316.
\end{itemize}
to whether a detainee falls within the enumerated categories of prisoner of war status, then that person's status must be determined by a competent tribunal.\textsuperscript{52} Notably, the American military adopted this international guideline into its own rules of conduct.\textsuperscript{53}

President Bush's blanket determination that neither Al Qaeda nor Taliban fighters will be considered prisoners of war\textsuperscript{54} contravenes Article 5 of Geneva Convention III as well as American military regulation. The President is not a tribunal and "cannot substitute for one under Article 5."\textsuperscript{55} Additionally, Article 5 of Geneva Convention III makes clear that detainees are presumed to be prisoners of war and treated as such until a finding to the contrary is made by a competent tribunal.\textsuperscript{56}

In their amicus curiae brief, several retired military officers took issue with the November 13 Order and the President's blanket denial of prisoner of war status to detainees at Guantanamo Bay.\textsuperscript{57} The amicus brief explained that the policy by which nations treat foreign prisoners is based on the principle of reciprocity.\textsuperscript{58} Therefore, how the United States conducts itself in this conflict will influence how other nations treat captured American soldiers in the future.

The United States has consistently insisted that foreign countries apply the basic protections of the Geneva Conventions to captured American soldiers, even where the Geneva Conventions would not technically apply.\textsuperscript{59} In addition, the United States serves as an example to the world. Authoritarian regimes are already using the United States' treatment of the Guantanamo detainees as justification for indefinitely detaining people in those nations.\textsuperscript{60}

Based on these observations, the retired military officers

\textsuperscript{52} Id.
\textsuperscript{54} See White House Fact Sheet, supra note 32 (relating the President's determinations as to the status of Guantanamo detainees).
\textsuperscript{56} Geneva Convention III, supra note 4, art. 5, 6 U.S.T. 3316.
\textsuperscript{58} Id. at 16.
\textsuperscript{59} Id. at 12-13.
\textsuperscript{60} Id. at 14.
concluded that "it is essential that the [U.S.] government follow American military regulations that incorporate the 'competent tribunal' guarantee of the Geneva Conventions."61 Failure to do so "may well provide foreign authorities, in current or future conflicts, with an excuse not to comply with the Geneva Conventions with respect to captured American military forces."62

The President’s blanket determination that no Guantanamo detainee qualifies as a prisoner of war contravenes the competent tribunal guarantee and substitutes the rule of law with independent executive decision-making. As the Bush administration moves further away from the Geneva Conventions and established U.S. military regulations, the more its conduct will appear to be arbitrary and capricious. This is especially dangerous, as the amicus brief notes, in a context of reciprocity because many non-Democratic regimes notice the United States' actions and will respond accordingly.

B. There Have Been No Charges and No Trials: Indefinite Detention

In his November 13, 2001 Executive Order, President Bush essentially suspended the writ of habeas corpus. The order precludes those imprisoned at Guantanamo Bay from challenging the validity of their detention in U.S. courts.63 Recently, however, in Rasul v. Bush, the Supreme Court took on this issue and held that non-citizen detainees held by the U.S. military on Guantanamo Bay are entitled to file a petition for a writ of habeas corpus in federal court to challenge their detention.64

A writ of habeas corpus serves to bring a person before a court of law, most frequently to ensure that the person’s imprisonment or detention is not illegal.65 The writ of habeas corpus is of immemorial antiquity in English law,66 and the privilege is recognized in Article I, Section 9 of the U.S. Constitution.67

The Supreme Court’s decision in Rasul is a significant step
Applying the Rule of Law in the War on Terror

In this context, it is necessary to bring the U.S.'s effort to combat terrorism within the rule of law. Nevertheless, important questions remain as to how such trials will be conducted, and what role the judiciary should play in this war on terror. In pondering these questions it is helpful to consider the governmental interest served by extended detention of persons having suspected connections to terrorist activities.

II. Modern Practical Justifications for Indefinite Detention Without Trial

The November 13 Order, which allows for indefinite detention of non-citizens who are suspected of being or having connections to terrorists, states:

The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.68

Part of this effort includes the gathering of people and information to gain intelligence. The war on terror is very different than traditional concepts of war because of the clandestine nature of the enemy. Terrorists are effective because their plans are secret and their attacks are surprising. Therefore, the war on terror involves a great deal of intelligence gathering in order to anticipate attacks and break down the networks that perpetrate them.

This emphasis on intelligence requires detainment and interrogation of persons suspected of terrorism or of having knowledge about terrorists. Michael Koubi, the former chief interrogator for Israel's General Security Services has extensive experience interrogating hostile Arab prisoners. The importance that fear of the unknown plays in interrogation is key because "People are afraid of the unknown. They are afraid of being tortured, of being held for a long time.... When the captive believes that anything could happen - torture, execution, indefinite imprisonment, even the persecution of his loved ones - the interrogator can go to work."69

The Bush administration maintains that the detainees will not be

subjected to physical or mental abuse or cruel treatment. The International Committee of the Red Cross has visited the prisoners, will continue to have access to Guantanamo, and will be able to raise concerns to the U.S. government about the condition of prisoners. Nevertheless, it remains unclear whether the U.S. will or has employed other coercive forms of interrogation, such as isolation, cooperation-based rewards, sleep deprivation, depriving the prisoner of outside information, and other methods known as "torture lite."

Amnesty International has called on the United States to keep detailed records of any interrogation of a detainee including the duration, frequency and the identity of those present. These records should be accessible to the detainee and his counsel. Prisoners must be given counsel, they must be informed of their right to lodge complaints about their treatment, and given the opportunity to challenge their detention before a competent tribunal.

It seems clear that allowing the Guantanamo detainees access to counsel and the ability to challenge their detention, at least at the initial stages of their imprisonment, would seriously hinder U.S. interrogation efforts, by eliminating the detainee's fear of the unknown. In addition, such disclosure by the U.S. government with regard to the captives would greatly decrease the value of the intelligence gained. "Once a top-level suspect is publicly known to be in custody, his intelligence value falls. His organization scatters, altering its plans, disguises, cover stories, codes, tactics, and communication methods."

Therefore, in order to prevent new attacks, it may be imperative to keep the capture of certain persons undisclosed.

70. White House Fact Sheet, supra note 32.
71. Id.
72. Bowden, supra note 71, at 6.
74. Id.
75. Id.
76. Bowden, supra note 7.
77. Id. at 7.
III. **Balancing the Needs of the War Effort with the Mandates of the Geneva Convention and the Protections of the U.S. Constitution**

The remainder of this paper is dedicated to discussing how the U.S. government can continue to gather valuable information and conduct a war on terror while also abiding by the rule of law as provided by the Constitution and international standards.

A. **Competent Tribunals to Determine Status**

The U.S. government should abide by Article 5 of Geneva Convention III and provide a competent tribunal to determine the status of the detainees. Doing so will help to ease the impression that Guantanamo is a rights-free zone. It is significant to note that the Supreme Court recently held that U.S. citizens who have been designated "enemy combatants" are entitled to a meaningful opportunity to challenge the factual basis of their detention before a neutral decision-maker, with the aid of counsel. In *Hamdi*, the Court was not presented with the question of whether non-citizens detained at Guantanamo Bay were entitled to the same protections. However, the Court's decision suggests its disfavor of indefinite detention.

Some may argue that conducting tribunals and granting prisoner of war status will preclude interrogation and the gathering of valuable information. Geneva Convention III provides that "prisoners of war are obliged to give only their name, rank, serial number and date of birth." However, nothing in Geneva Convention III prohibits interrogation on other matters. It merely relieves prisoners of war of the duty to respond. Therefore, "whether or not prisoner of war status is granted, interrogators still face the formidable task of encouraging, with limited tools at their disposal, hostile detainees to provide information." Prisoners of war can be interrogated and pressured; "they just cannot be coerced or tortured."

Merely providing a competent tribunal to determine the status of a detainee will not hinder the effectiveness of interrogations. There is no requirement that the determination of status must be made public.

79. *Id.* at 2652.
82. *Id.*
83. *Id.*
Perhaps the International Committee of the Red Cross could play a part in the competent tribunals by being allowed to observe them and confirm to the international community that a process for evaluating the status of the prisoners is in place. The Red Cross could be prohibited from offering input into the determinations or releasing information about the captives.

In addition, the Geneva Conventions allow for the continued captivity of those detainees who are not found to be prisoners of war if premised on the need for security. The use of competent tribunals to determine the status of the detainees will not adversely affect the government’s ability to detain and interrogate its prisoners. However, the presence of an international body would help restore international and domestic confidence in U.S. policy and conduct.

B. Habeas Petition: The Opportunity to Challenge One’s Detention

As mentioned above, the Supreme Court recently held that non-citizen detainees held by the U.S. military on Guantanamo Bay are entitled to file a petition for a writ of habeas corpus in federal court to challenge their detention. Prior to this decision, critics argued that allowing federal courts to hear challenges by Guantanamo Bay detainees would allow confidential information to enter into the public domain. Others lamented that “relaxed rules of evidence” are necessary to the prosecution of international terrorists. Rules such as hearsay and authentication would place too high a burden on the prosecution to develop a record when much information is classified or unknown. The level of security throughout such a proceeding to protect the judges and jury would also be very expensive. Critics argued that granting habeas jurisdiction to alleged terrorists would result in the loss of valuable security information and the release of culpable and dangerous persons due to the unique nature of terrorist cases and the inadequacies of ordinary courts of law.

84. Geneva Convention II, supra note 4, part I, art. 5.
85. Rasul, 124 S.Ct. at 2698.
88. Rishikof, supra note 88.
1. Can Federal Courts Handle Habeas Petitions From Alleged International Terrorists?

Federal district courts are well equipped to handle terrorist cases.\(^9\) Congress "has already addressed the dangers of the release of national security information in such trials with the enactment of the Classified Information Procedures Act (CIPA) in 1980."\(^9\) CIPA provides for the use of such procedures for maintaining security of information as "non-public hearings, \textit{ex parte} and \textit{in camera} reviews, and redacted evidence."\(^9\)

In addition, the Fourth Amendment’s\(^9\) warrant requirement would not be an impediment to the prosecution’s ability to introduce valuable evidence against alleged terrorists. The Fourth Amendment requires the procurement of a warrant only for that evidence obtained in the United States. The Fourth Amendment does not apply to evidence attained outside of the United States, nor does it apply to non-government actors (such as reporters) who are not acting as agents of the government.\(^9\)

As to the issue of security, a federal judge can move a trial to a secure location, even to a military base in a military courtroom, if presented with a “credible threat” that the current forum is in danger.\(^9\) The identity of both judge and jurors can also be protected.\(^9\)

History also supports the belief that federal courts are able conduct trials involving terrorism. Federal courts have heard important terrorist cases in the past without incident and without allowing guilty terrorists to go free. For instance, in \textit{United States v. Yousef},\(^9\) the Second Circuit affirmed the District Court for the Southern District of New York’s conviction of defendants Yousef, Ismoil, and Murad on charges of conspiracy to bomb United States commercial airliners, and on charges relating to the 1993

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90. \textit{Id.} at 746.
91. \textit{Id.}
92. U.S. CONST. amend. IV.
94. \textit{Id.} at 748.
95. \textit{Id.}
96. 327 F.3d 56 (2nd Cir. 2003).
bombing of the World Trade Center in New York.\textsuperscript{97} Yousef was sentenced to 240 years of imprisonment and life imprisonment, to be served consecutively; Murad, another defendant, was sentenced to life imprisonment and 60 years of imprisonment, to be served consecutively; and Ismoil was sentenced to 240 years of imprisonment.\textsuperscript{98}

On appeal, the defendants claimed that the District Court erred in admitting a letter found in Yousef's apartment in Manila, for failing to redact it, and in not suppressing Murad's confession to FBI agents during his flight from the Philippines to the United States.\textsuperscript{99} The Second Circuit upheld the lower court's rulings in admitting the unredacted letter on the grounds that the risks entailed in admitting the evidence did not substantially outweigh its probative value.\textsuperscript{100}

The Court of Appeal's standard of review in evaluating the district court's ruling in a suppression motion is "clearly erroneous."\textsuperscript{101} The Court found that the District Court was not clearly erroneous, given the facts of the case, in admitting the confession.\textsuperscript{102} Nevertheless, this article recognizes the substantial differences between the Yousef case and the September 11, 2001 attacks. The magnitude of the September 11 attacks and the American government's significant commitment to uprooting terrorist cells around the world, present different problems that require a more streamlined and effective process for finding, questioning, and punishing terrorists.

The fact that the U.S. is currently engaged in a war on terrorism raises the concerns expressed by the Supreme Court in \textit{Johnson v. Eisentrager} about the ability of enemy aliens to challenge their detentions.\textsuperscript{103} The Court warned that such trials would be detrimental to the U.S. war effort by causing the judiciary to second-guess field commanders and divert their attention from the battlefield.\textsuperscript{104}

In proposing a solution to these issues it may be helpful to consider the experience of the United Kingdom in curbing terrorism in Northern Ireland.

\textsuperscript{97} Id. at 77-78, 173.
\textsuperscript{98} Id. at 80.
\textsuperscript{99} Id. at 120, 122.
\textsuperscript{100} Id. at 121.
\textsuperscript{101} Id. at 124.
\textsuperscript{102} Id. at 124-27.
\textsuperscript{103} Johnson v. Eisentrager, 339 U.S. 763, 779 (1950).
\textsuperscript{104} Id. at, 779.
Applying the Rule of Law in the War on Terror

2. Examining the United Kingdom's Effort to Combat Terrorism in Northern Ireland

In 1972, Lord Diplock, Chairman of the Commission to consider legal procedures to address terrorist activities in Northern Ireland, presented his findings and recommendations to Parliament. The scope of the Commission's inquiry was to determine what "arrangements for the administration of justice" could be made to deal with terrorism and terrorist organizations in Northern Ireland. This article will consider three aspects of the Commission's recommendations as illustrative of the ways in which a government can respond to the particular difficulties of trying terrorists.

The Commission explained that ordinary trial by jury was not practicable in the case of terrorist crimes in Northern Ireland due to the threat of intimidation by terrorist organizations on jurors. Therefore, to help obtain impartial judgments, the better practice would be to conduct trials for terrorist offenses before a single judge who would act as the finder of fact and law. Nevertheless, the defendant would retain her right to appeal the judge's decision. And, the judge would have to deliver a statement of some sort regarding the issues in the case and describing his determinations.

Another problem the Commission addressed was the intimidation of the government's witnesses by terrorist organizations. To help combat this problem of being able to obtain witnesses, the Commission reconsidered the customary right of the accused to refuse to provide an explanation of his conduct either at his trial or before it.

The Commission recommended that once the prosecution has proven certain facts capable of implicating the accused in the offence, the burden would shift to the accused to furnish an explanation of the facts consistent with his innocence. While preserving the mandate that the prosecution prove its case, the change would alleviate the
prosecution’s difficult task of proving the defendant’s intent or knowledge without the ability to draw on credible witnesses.  

For example, if a firearm or explosive were found on a particular premises, the presumption would be that the occupier or any person residing at the premises was in possession of the firearm, unless he could prove that he did not know and had no reason to know that the firearm was there. If the court was satisfied after the accused’s testimony and cross-examination, that it was more likely to be true than not, then the accused would be acquitted.

The proposed changes for terrorist trials would also weaken the rules relating to the admissibility of confessions. The Commission explained that the emphasis should be on whether the “confession is reliable evidence of the guilt of the accused” rather than on technical rules of “voluntariness,” which rendered inadmissible any statement made by the accused after his arrest unless he volunteered it without any persuasion or encouragement. The technical rules made futile the efforts of law enforcement to interrogate suspected terrorists because the information they gleaned was inadmissible. The new rule would make inculpatory admissions admissible subject to the condition that the trier of fact consider whether the alleged admission was in fact made, and if so, whether the circumstances suggest that the accused may have inculpated himself falsely.

While the problems presented to the United States in trying terrorists may not be identical to those presented in the context of Northern Ireland, the example may be helpful in crafting special U.S. terrorist court procedure.

IV. Specialized Federal District Courts on Terrorism

Specialized, Congressionally-authorized terrorism courts may be the best solution to the issues raised in this article. Congressional authorization would avoid the separation of powers criticism garnered by military commissions. They could also handle the

113. Id.
114. Id. at 27.
115. Id. at 27-28.
116. Id. at 28.
117. Id. at 29.
118. Id. at 31.
119. Id. at 32.
peculiar needs of the government in its war on terror, such as allowing for mandatory detention periods, and evidentiary rules that take into account the security and availability constraints on the prosecution in making its case. Such variations would garner greater acceptance because they would be a product of a working democratic system as opposed to independent Executive decision-making.

This article recognizes that deference ought to be given to the Executive branch in times of crisis. However, Congress should, as part of its oversight authority, promulgate a framework for the detention and trial of suspected terrorists. Vesting sole authority in the Executive to define who the terrorists are, how they should be detained, and in what way they should be tried, contravenes the intention of the framers of our Constitution in establishing a tripartite separation of powers and a truly independent judiciary. The history and development of American law is clearly focused upon protecting individual liberties and subjecting the Executive branch and the Legislature to the rule of law.

What Would a Federal Terrorism Court Look Like?

1. Mandatory Detention Period for Interrogation Purposes (Need to fit in with other headings in article; I cannot find what HICLR style is on this so I'm following the other headings in this article.)

In order to facilitate the government’s interest in gaining information from suspected terrorists, it may be necessary to restrict the availability of habeas relief until the detainee has been held for a certain period of time to be determined by Congress. Experts could estimate how long effective interrogation should last. They might also be able to tell us how long a person must be detained and questioned before it can be determined that he possesses no information related to terrorism. The military should be able to use these time periods with flexibility - depending on the particular detainee. If the government has gained information from a particular

121. Brief for the American Bar Association as Amicus Curiae in Support of Petitioners, at 22.


123. Id. at 17.
detainee then it may be justified to hold that prisoner for a longer period of time without judicial review.

2. Security

As suggested above, a federal judge could move a trial to a military facility if she believed that there was a threat to the security of the current trial. Terrorist trials should be held at secure locations to avoid the possibility that they will become the targets of additional terrorist attacks and also to ensure the safety of the persons on trial. Perhaps having a federal court hear habeas petitions right at the naval base on Guantanamo Bay would lower the expense of transporting the prisoners and also guarantee the safety of those involved in the trial.

3. Evidence

The focus of the rules of evidence in a terrorism court should be on reliability. They should be aimed at making the country less vulnerable to terrorist attacks, and on capturing the right people. The standards of admissibility can be different from the Federal Rules of Evidence so long as the new rules are consistent and reliable.

In Northern Ireland, because prosecutors had difficulty obtaining witnesses willing to testify, the modified rules shifted the burden to the defendant to explain why he was not culpable once the prosecution brought a certain amount of evidence against him. This approach might be useful in hearing habeas petitions from Guantanamo detainees because the prosecution will often have limited access to secure information.

In addition, confessions and third party information regarding an alleged terrorist should be admissible if it passes a reliability test. In Northern Ireland, the rule was that confessions made after being arrested were admissible if the judge was satisfied that the alleged admission was in fact made, and the circumstances suggested that the accused had not inculpated himself falsely. A similar standard may be appropriate for prosecuting the Guantanamo detainees.

Whatever rules and procedures Congress decides upon for detaining and trying terrorists, they must be applied consistently. By

124. Interview with Richard Boswell, Professor at the University of California, Hastings College of the Law, in San Francisco, Cal. (Feb. 17, 2004).
125. CHAIRMAN LORD DIPLOCK, supra note 107, at 26.
126. Id.
creating and authorizing a terrorism court, the United States will be applying the rule of law over what now appears to be independent and arbitrary conduct by the Executive branch.

CONCLUSION

This article has criticized the U.S. government for its indefinite detention of individuals without a competent tribunal to determine their status under the Geneva Convention III. Allowing the Executive branch to lock people up for an unknown amount of time, no matter where they are located, while insisting that the judiciary cannot restrain such power, contravenes constitutional values of personal liberty, due process, and separation of power. Nevertheless, this article recognizes that terrorists are dangerous people who must be found, interrogated, and punished. The Supreme Court’s decision that prisoners at Guantanamo Bay are entitled to file a habeas petition in federal court is an important step in getting the United States to operate within the rule of law. In addition to habeas protections, this article proposes that the Congress create a terrorism court and establish procedures applicable to dealing with the problem of terrorism, in order to achieve a balance between the needs of the military in fighting the war on terror, and the need to uphold personal liberty and the rule of law.