COURTS, COMMISSIONS AND DETENTION AS TOOLS IN COMBATING OVERSEAS TERRORISM: CRITERIA FOR CHOOSING THE CORRECT FORUM

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ABSTRACT

As the ten-year anniversary of 9/11 approaches, the United States government remains undecided as to how it should proceed against those individuals believed to be responsible for the terrorist attacks. Both the Bush and Obama administrations, as well as Congress, have made policy announcements, promulgated Executive Orders and passed legislation that would allow for the prosecution of these individuals in either an Article III court (a criminal trial in federal district court) or before a military commission, or determine whether they should remain in military detention without trial for the duration of hostilities against al Qaeda and those entities responsible for 9/11. To this day, however, Khalid Sheikh Mohammed, the alleged mastermind of the 9/11 plot, remains in U.S. military custody, the future of legal proceedings against him no more certain than they were in 2003, the year he was first detained by U.S. forces. Similarly, should Osama bin Laden or another high level al Qaeda leader be captured in the near future, no policy currently exists that would definitively determine which, if any, judicial forum is most appropriate for the disposition of their case. The lack of a coherent analytical framework that allows for consistent forum determinations when assessing the merits of a case against an overseas terrorist suspect has led to inconsistent decision-making and has fostered a growing credibility gap in U.S. counterterrorism policy. By applying a set of proposed criteria to individual cases, it is possible for policymakers to assess whether an Article III prosecution should be pursued in a given case or whether application of the criteria mitigates toward an alternative disposition, such as military commission or preventive detention.
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INTRODUCTION

Speaking at the National Archives four months after his inauguration, President Obama announced a “new approach” for executing the war against al Qaeda and its affiliates, an approach imbued with the rule of law and due process that would eradicate the Bush Administration’s “ad hoc legal approach for fighting terrorism that was neither effective nor sustainable --a framework that failed to rely on our legal traditions and time-tested institutions, and that failed to use our values as a compass.” 1 Unfortunately, nearly two years have passed since the promise of a “new approach” and no definitive legal framework has emerged to define how the United States will combat the threat posed by overseas terrorist suspects. Professor Jack Goldsmith strikingly illustrates this point by contrasting the different statements of senior Administration officials from the defense, law enforcement and intelligence agencies over a 24-hour period in February 2011. Posed with a hypothetical question concerning which framework would be utilized if Osama bin Laden were to be captured, the following comments were noted:

- CIA Director Leon Panetta (February 16, 2011): “We would probably move [Osama Bin Laden and his deputy, if captured] quickly into military jurisdiction at Bagram for questioning and then, eventually, move them probably to Guantanamo.”

- White House Press Secretary Jay Carney (February 16, 2011): President Obama “remains committed to closing the prison at Guantánamo Bay, because, as our military commanders have made clear, it’s a national security priority to do so. . . . I’m not going speculate about what would happen if we were to capture Osama bin Laden.”

- Defense Secretary Robert Gates (February 17, 2011): “The prospects for closing Guantánamo as best I can tell are very, very low given very broad opposition to doing that here in the Congress.”

- Chairman of the Joint Chiefs of Staff Admiral Mike Mullen (February 17, 2011), when asked where the United States would send a high-level al Qaeda terrorist captured outside Iraq or Afghanistan: “We don’t have an answer to that question.”

- Attorney General Eric Holder (February 17, 2011): “Our goal is to kill or to capture Osama bin Laden. . . . If he were to be captured, we would — the national

security team would get together and would determine where appropriately he would be held.”

As the first decade since the 9/11 attacks comes to a close, uncertainty continues to pervade the highest echelons of the country’s national security apparatus regarding the legal disposition of suspected terrorists.

The existing legal framework that the President referenced included: (1) Article III courts, or the federal courts provided for by the U.S. Constitution to try those accused of violating federal criminal laws; (2) military commissions, a forum with historical antecedents tracing back to the American Revolutionary War, for trying wartime detainees for violations of the laws of war; and (3) continued detention, lasting for the duration of hostilities, of those individuals determined to be too dangerous for release or transfer to another country, or, for evidentiary reasons, cannot be tried before either a federal court or military commission. In announcing this “new approach,” President Obama did not propose a novel legal framework for addressing how the American judicial system would handle suspects alleged to have committed terrorist acts against the United States; rather, he promised a reinvigorated, more robust examination of the predecessor Administration’s approach and sought reform of those practices.

Specifically, the President stated a preference for trying suspected terrorists in federal court, whenever “feasible,” and cited past terrorism prosecution successes in the Article III forum as proof of the viability of this approach. He similarly recognized the necessity of

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3 While each of these existing frameworks will be discussed in more detail in later sections, it is worth noting at the outset that the forthcoming discussion presupposes the legality of each of these frameworks, based on legal authorities that are based constitutionally, statutorily and pursuant to the laws of war. The term “forum” is used throughout the thesis to refer to the three discussed frameworks: (1) Article III courts; (2) military commissions; and (3) preventive detention.
military commissions for those situations where the presentation of evidence gathered from the battlefield “cannot always be effectively presented in federal courts” and “sensitive sources and methods of intelligence-gathering” could not otherwise be adequately protected. As for military detention, the existing framework would continue to exist for those individuals at Guantanamo deemed to pose a continuing threat to the security of the United States, but for reasons such as tainted evidence, cannot be prosecuted for their past terrorist acts or crimes in support of terrorism. These individuals, as characterized by the President, included those who “received extensive explosives training at al Qaeda training camps, or commanded Taliban troops in battle, or expressed their allegiance to Osama bin Laden, or otherwise made it clear that they want to kill Americans.” While recognizing the continued necessity for this framework, the detention model too would be significantly reformed so as to reflect new standards of periodic review and procedures to ensure that “prolonged detention is carefully evaluated and justified” and comports with accepted law of war and rule of law norms.4

To date, the “new approach” has failed to yield any clarification or consistency regarding the determination of which legal framework will be utilized for a particular terrorist suspect. Suspects apprehended in the U.S. for attempted domestic acts of terrorism have routinely been prosecuted by Article III courts, whereas individuals apprehended overseas, even where the target was in the U.S., are recommended either for military commission or preventive detention. For example, on May 4, 2010, nearly one year after the President’s remarks, Faisal Shazad was charged with several terrorism-related crimes after his arrest in the failed Times Square car bombing. Despite admitting his role in the attempted attack, acknowledging that he received explosives training from Tehrik-i-Taliban Pakistan (“TTP”), and his providing the Federal Bureau of Investigation (FBI) “valuable intelligence and evidence,” the decision of the

4 Obama, “Remarks by the President on National Security.”
Department of Justice (DOJ) to charge Shazad in an Article III court reignited a political debate as to whether suspects who commit terrorist acts against the United States should be tried in federal civilian court or by military commission. Similar debates have ensued in the wake of the successful arrest and filing of criminal charges in federal civilian court against Umar Farouk Abdulmutallab after his failed Christmas Day attempt to detonate a bomb aboard a Detroit-bound passenger plane, a plot for which he admitted receiving operational direction from al Qaeda in the Arabian Peninsula (“AQAP”) leader Anwar al-Awlaki. After Attorney General Eric Holder’s announcement, in November 2009, that Khalid Sheik Mohammed (“KSM”), the alleged al Qaeda mastermind of the 9/11 attacks, and four of his co-conspirators, would be tried in federal civilian court, rather than in a military commission, a similar political and public furor ensued. Subsequent legislatively-imposed prohibitions on the transfer of Guantanamo detainees to the U.S. for federal civilian trial had left the fate of KSM in legal limbo until April 4, 2011, when Attorney General Holder announced that KSM and the 9/11 co-conspirators held at Guantanamo would be tried by military commission, marking yet another reversal in the Administration’s policy. The Attorney General’s announcement was devoid of any discussion as to how the decision was rendered to try before a military commission a suspect whose terrorist acts were perpetrated on U.S. soil, but whose capture was effectuated overseas. In fact, although he expressed confidence in the fairness of the military tribunal process, the Attorney General suggested that the Administration’s preference remained to prosecute KSM in an Article III

7 H.R. 6523 (“Ike Skelton National Defense Authorization Act for Fiscal Year 2011”) bars the use of funds to transfer Guantanamo detainees into the United States, effectively preventing the prosecution in federal civilian court of KSM and the other 9/11 co-conspirators held at Guantanamo.
court, as originally planned, but that political obstacles, demonstrated by Congress barring detainee transfers to the U.S., dictated the decision.⁸

These debates partially result from the Administration’s failure to establish clear policy direction as to how the U.S. will hold accountable those who perpetrate terrorist acts against the homeland or U.S. interests abroad. The indecision and wavering by the Administration regarding which judicial forum is most appropriate for trying suspected terrorists has resulted in a credibility gap, both domestically and internationally, as to the U.S. commitment to democratic values and the rule of law. The polarizing political objections and responses that have followed DOJ’s decision to try a suspected terrorist in federal civilian court has also significantly hampered the Administration’s ability to pursue justice against certain individuals and has prevented the federal civilian court system from being fully realized as an effective counterterrorism tool.⁹ In response to this failing, the Administration must issue a clear mandate stating what the U.S. Government’s policy will be going forward in regard to prosecuting suspected terrorists. It is only through such an unequivocal policy statement, and an accompanying analytical framework that applies established criteria to specific cases, that the U.S. can reestablish its credibility and commitment to the rule of law in combating terrorism and reaffirm the legitimacy of the U.S. for meting out justice impartially.

The uncertainty attending forum choice for terrorism suspects is reflective of the policy shift that occurred after 9/11 within the U.S. Government regarding how terrorism suspects

⁹ For example, after Abdulmuttalab’s attempt to detonate a bomb aboard the Northwest Airlines plane on Christmas Day, Senator Joseph Lieberman (I-CT) sponsored Senate Bill S.2943 requiring the Attorney General to consult with appropriate officials within the executive branch prior to making the decision to try an unprivileged enemy belligerent in Federal civilian court. In a similar vein, Senator Lindsey Graham (R-SC) responded to the Attorney General’s announcement that KSM would be tried in federal civilian court by sponsoring a legislative amendment prohibiting the use of any DOJ funds to commence or continue the prosecution in federal civilian court of any individual suspected of involvement with the 9/11 attacks.
should be incarcerated.\textsuperscript{10} Prior to 9/11, federal criminal prosecution in Article III courts was the primary means by which suspected terrorists were detained for an extended duration.\textsuperscript{11} This paradigm changed, however, in the aftermath of 9/11, when the U.S. “buttressed its existing options for long-term detention of terrorism suspects by asserting that some such persons are combatants subject to military detention for the duration of hostilities pursuant to the law of armed conflict, and also by establishing military commissions to oversee war crimes trials for a subset of those individuals.”\textsuperscript{12} Glaringly absent from these models as they were proposed, and implemented, in the aftermath of 9/11 was an accompanying set of criteria that would determine the particular forum to which an individual terrorist suspect would be subject, based upon the particularized facts of each case. This lack of clear guidance has caused forum selections to appear \textit{ad hoc} and inconsistent from a comparative standpoint. It has also been the subject of an impassioned political debate throughout the last decade.\textsuperscript{13} Despite the Obama Administration’s clarion call for reform, such objective criteria remains absent from the decision-making calculus, leading to an incoherent policy undergirding a vital counterterrorism tool.

Whether this decision favors federal civilian court as the venue for holding terrorism trials, and the attendant disestablishment of military commissions, or preserving both options (or others, to include preventive detention or the creation of a hybrid national security court)

\textsuperscript{12} Chesney, p. 98; Chesney and Goldsmith, p. 1079.
\textsuperscript{13} \textit{See} “Protecting Our National Security From Terrorist Attacks: A Review of Criminal Terrorism Investigations and Prosecutions,” \textit{Hearing Before the Committee on the Judiciary, United States Senate}, 108\textsuperscript{th} Cong., 1\textsuperscript{st} ses., October 21, 2003; “The Authority to Prosecute Terrorists under the War Crime Provisions of Title 18,” \textit{Hearing Before the Committee on the Judiciary, United States Senate}, 109\textsuperscript{th} Cong., 2\textsuperscript{nd} ses., August 2, 2006; “Prosecuting Terrorists; Civilian and Military Trials for GTMO and Beyond,” Subcommittee on Terrorism, Technology and Homeland Security, \textit{Hearing Before the Committee on the Judiciary, United States Senate}, 111\textsuperscript{th} Cong., 1\textsuperscript{st} ses., July 28, 2009.
depending on whether the specific facts of the case meet pre-established criteria, the decision must be rendered with certainty. Knowing which forum is most appropriate for the legal disposition of a given case requires an objective evaluation of the following criteria: (1) the character of the evidence; (2) the circumstances of apprehension; (3) the political and public will to endure a particular type of trial; and (4) the perceived legitimacy of the proceedings. As demonstrated by the application of these factors to specific cases of overseas terrorist suspects across a defined range of categories, the recommendation as to what forum is most appropriate will ultimately be dictated by the preponderance of civilian or military characteristics constituting or inherent in the alleged offense, the target and victims of the terrorist act, the status of the perpetrator of the terrorist act and the operational authority directing the terrorist act.

This article is divided into five sections and begins by reviewing the existing legal frameworks for disposing of cases against alleged terrorist suspects and assesses the prevailing arguments for and against each forum. The second section discusses the situation of the Guantanamo Bay detainees, or “legacy detainees,” who remain in military detention, many since 2001, without being subject to a hearing before military commission or trial in federal criminal court. The third section proposes certain criteria and develops an analytical framework that senior Administration officials might apply when deciding whether an individual captured or apprehended overseas in connection with armed conflict or counterterrorism operations should be prosecuted in an Article III court, military commission or subject to military preventive detention. Section four applies the proposed criteria to different potential categories of terrorist suspects and, using publicly available data of individuals alleged to have perpetrated acts of terrorism against the United States, suggests which forum would be most appropriate in each given case. The article concludes with proposed recommendations as to how this analytical
framework can be best implemented and the policy implications for failing to develop a coherent approach to forum determinations in the future.

EXISTING FRAMEWORKS FOR THE DISPOSITION OF TERRORISM CASES

The contrasting judicial forums that have been utilized since 9/11 to treat terrorism suspects is a reflection of the uncertain legal status accorded those who have been apprehended for committing alleged acts of terrorism against the United States. As one commentator has observed, this status has been described in varying degrees in different contexts:\(^{14}\):

[S]hould the Government determine that the defendant has engaged in conduct proscribed by the offenses now listed...the United States may...capture and detain the defendant as an unlawful enemy combatant\(^ {15}\); while in another forum:

You are not an enemy combatant- you are a terrorist. You are not a soldier in any way-you are a terrorist\(^ {16}\);

and still:

[Enemy combatants] are not there [Guantanamo Bay detention facility] because they stole a car or robbed a bank....They are not common criminals. They’re enemy combatants and terrorists who are being detained for acts of war against our country and this is why different rules have to apply.\(^ {17}\)

The current Administration’s failure to develop objective criteria to determine the appropriate legal status and forum for a terrorist suspect is a consequence of its repeated wavering over whether it would dismantle, maintain or reform the framework it inherited from the previous administration, a problem exacerbated by the Administration’s own indecision and public pronouncements regarding forum choice. Upon assuming office in January 2009,


\(^{15}\) Plea Agreement at ¶ 21, United States v. Lindh, Crim No. 02-37A (E.D. Va 2002) (emphasis added).


President Obama announced his intention to close the Guantanamo Bay detention facility within one year, effectively signifying a policy shift that would no longer countenance the long-term detention of terrorism suspects away from the immediate sphere of combat operations near the battlefield. Executive orders contemporaneous with this announcement suspended military commissions and prohibited all enhanced interrogation techniques. Within a few months, however, the President agreed to reform the military commission system rather than permanently suspend the process and indefinitely extended the timeframe for Guantanamo’s closure. An Executive Order issued on March 7, 2011, directed that military commissions resume against those Guantanamo detainees whose cases were identified as most appropriate for that forum. Additionally, this same Executive Order sanctioned a preventive detention regime, subject to a periodic review process, applicable to enemy combatants for the duration of hostilities.

Despite the ultimate embrace of all forum options, the lack of established, objective criteria for determining whether a suspected terrorist will be tried by federal civilian court or military commission, or remain subject to preventive detention, will continue to engender confusion and contribute to the domestic and international community wondering whether the Administration is committed to the rule of law in bringing terrorists to justice, or rather, if its decisions are dictated by countervailing political pressures. Absent the formulation of a

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19 Mayer, p. 60. By issuance of Executive Order 13492 of January 22, 2009, “Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities,” the President directed a case review of each of the approximately 300 detainees then held at Guantanamo and required an individualized recommendation for the disposition of each case, either prosecution in an Article III court, release, transfer or other options for cases not warranting the other forms of proposed disposition (i.e. continued detention). The Executive Order also mandated closure of the Guantanamo detention facility within one year and ordered the suspension of any military commission proceedings during the period of the ordered review.
20 Executive Order, March 7, 2011.
coherent policy, this issue will continue to frustrate and thwart the ability of the United States to effectively engage in global counterterrorism efforts.

**Article III Courts**

Article III, Section 2 of the U.S. Constitution establishes the federal court system. In the federal system, criminal trials are conducted in a U.S. District Court in one of 93 designated federal judicial districts. The presiding officer, a U.S. District Court Judge, is a member of the Judicial Branch of government, is independent of the prosecutorial arm of the Executive Branch, and is vested with life tenure. Trials are conducted in this forum for alleged violations of the criminal statutes of the U.S. Code, enacted by Congress. The rules of procedure and evidence incorporate procedural rights demanded by the Constitution and other statutes. Article III courts are part of the federal judiciary, a separate and co-equal branch of the government, independent of the executive and legislative branches, “designed to be insulated from the public passions.”

Although its official policy choices now recognize the viability of all forums as tools in the counterterrorism arsenal, the Administration has repeatedly expressed its preference for the Article III court prosecution model. As early as January 2009, when the President issued Executive Order 13492 calling for an immediate interagency review of all detainees then held at Guantanamo Bay (“Guantanamo Review Task Force” or “Task Force”), the Department of Justice and Department of Defense agreed upon a joint protocol to establish a process whereby

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those cases recommended for prosecution would be reviewed to assess whether trial should be pursued in federal court or before a military commission. Even under this protocol, there was a “presumption that prosecution will be pursued in a federal court wherever feasible, unless other compelling factors make it more appropriate to pursue prosecution before a military commission.” The Task Force’s final review decisions are reflective of this preference for federal court prosecution. President Obama’s announcement of the March 7, 2011, Executive Order, as well as Attorney General Holder’s April 4, 2011, comments accompanying the announcement of KSM’s forum selection only further evince the Administration’s preference despite a policy that does not foreclose any of the available forum options.

Although the United States expanded its existing options for incarcerating suspected terrorists after 9/11 and no longer relied exclusively on federal criminal prosecution, and, by so doing, ignited the maelstrom of controversy that exists to this day, an “important point of consensus [...] emerged- namely, that there is a need for a criminal justice system that is maximally capable of trying and disabling suspected terrorists.” Advocates of utilizing the criminal justice system argue that such a model is necessary for situations such as when citizens are arrested domestically or when foreign governments refuse to transfer individuals for detention without accompanying criminal process or for trial by military commission, a reason cited explicitly by the Task Force in its final report. Proponents also cast the federal prosecution model as the salve to a military commission system legally flawed and lacking and credibility.

25 The Task Force reviewed 240 detainees and concluded that 126 detainees should be approved for transfer outside the United States subject to appropriate security measures; 44 detainees were referred for prosecution either in federal court or a military commission (36 of which remained the subject of active investigations); 48 detainees were deemed to dangerous for transfer, but not feasible for prosecution, and were recommended for continued detention under the AUMF enacted by Congress in 2001; and 30 detainees from Yemen were recommended for continued “conditional” detention based on current security conditions in Yemen making transfer impracticable. Id., pp. 9-13.
26 Chesney, p. 98.
A) Advantages of the Article III Forum:

Advocates for using federal civilian courts to prosecute terrorist suspects point to that system’s proven track record in handling complex terrorism cases, as demonstrated by over 400 terrorism-related convictions since 9/11; by contrast, only five military commissions have transpired since 9/11 (four resulting in guilty pleas), and the process has been plagued by court interventions, suspensions, rule changes and uncertainty as to how cases would proceed. Proponents of Article III courts further argue that the prospect of a lengthy prison sentence, often awarded for terrorism-related offenses, provides a powerful incentive for suspects to cooperate with law enforcement in exchange for leniency at sentencing, which in turn enhances the opportunity for accurate and reliable intelligence gathering. Additionally, Article III courts have proven themselves extremely effective in protecting sensitive, classified information from public disclosure through use of the Classified Information Procedures Act (“CIPA”), as demonstrated by the fact that in federal civilian court trials since 9/11, not a single case can be identified where CIPA was invoked and a substantial leak of sensitive information resulted.

The unquestioned legitimacy of the Article III forum is an advantage that academics, commentators and practitioners proclaim as the most compelling reason why federal civilian courts should be utilized in lieu of military commissions. Attributes contributing to this perceived legitimacy include the fact that Article III federal judges enjoy life-tenure, are not

beholden to the Executive, and enjoy an independence that inspires confidence that decisions are rendered impartially. Military commission judges do not share a similar independence. The civilian jury that decides guilt or innocence in an Article III court is similarly viewed as bestowing legitimacy upon the process. These jurors represent a diverse cross-section of the community who bring varied perspectives to their deliberations, as opposed to a military commission jury that is comprised exclusively of military officers, appointed to the tribunal by the very same military authority who brings charges against the alleged terrorist suspect, thus not viewed with the same sense of fairness and impartiality as its civilian counterpart. The legitimacy of Article III courts is also bolstered by the certainty that attends its rules of evidence and procedure; tried and tested, these rules have passed constitutional scrutiny, thus trials held pursuant to those rules satisfy due process. The same degree of certainty does not apply to the military commission forum, whose post-9/11 history is marked by Supreme Court cases that have found, at different times, various aspects of the military commission process constitutionally infirm. In a similar vein, appellate review for Article III courts is well established, whereas for military commissions, new intermediary courts were created specifically for the purpose of reviewing commission decisions and thus, no precedence exists upon which to rely. As a final point as to how Article III courts are more legitimate than military commissions, advocates insist that the rule of law is vindicated in the Article III forum because the jurisdiction of the court applies to both U.S. citizens and non-citizens. Thus, the U.S.

32 Id.
33 Id., pp. 3-4.
demonstrates its principled, value-laden approach by applying the same laws and rules to Americans suspected of terrorism as it would to the citizens of allied and enemy states alike.\textsuperscript{34}

\textbf{B) Disadvantages of the Article III Forum:}

Critics often cite the greater procedural protections afforded defendants in Article III courts as the primary reason why the forum is ill equipped to prosecute terrorism suspects. Premised upon the belief that terrorist attacks targeting Americans or U.S. interests are acts of war, critics contend that those suspected of committing terrorist acts are unlawful enemy combatants, or unprivileged enemy belligerents, who do not warrant the protections of the Geneva Conventions under the laws of war. As such, prosecuting unprivileged enemy belligerents in federal civilian courts, rather than in the military commissions established to try war crimes, grants the terrorism suspect greater protections than what a lawful, or privileged, prisoner of war (protected by the Geneva Convention) would receive, thus rewarding violators of the laws of war.\textsuperscript{35} Asserting that the fight against al Qaeda and associated terrorist networks equates to wartime hostilities, the “rule of law” in this context necessarily means military commissions and not a system that allows the U.S. to “wrap our enemies in our Bill of Rights.”\textsuperscript{36} Critics of the federal criminal prosecution model maintain that traditional criminal trials are restricted by evidentiary and procedural rules that not only make convictions difficult to obtain, but also are insufficiently crafted to ensure the protection of classified material and sensitive sources and methods that may have to be disclosed publicly in order to secure a conviction.\textsuperscript{37}

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\textsuperscript{36} Mayer, p. 52.
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Suspects tried in a federal civilian court enjoy a Sixth Amendment constitutional right to a speedy trial, a right not granted by the Military Commissions Act of 2009 (“MCA”). To those arguing against the use of Article III courts, the nature of terrorism cases, which often necessitate the prolonged interrogation of a suspect for intelligence gathering, means longer periods between apprehension and trial. In an Article III court, such a delay could potentially result in the dismissal of charges.\textsuperscript{38} These same critics also point to the rule in federal civilian court that prohibits the admission of hearsay evidence, or out-of-court statements, against a suspect. In war crimes or overseas terrorism cases, it is argued, hearsay evidence is essential to prove an alleged offense, given the impracticality of being able to secure direct testimony from witnesses who may be overseas, engaged in active hostilities or no longer available.\textsuperscript{39}

Other criticisms of Article III courts focus on the legal standards required to bring a suspected terrorist before the forum. For example, one disadvantage of the criminal law model to supporters of the unlawful enemy combatant/military commission framework is that an Article III court’s jurisdiction over a suspect is dependent upon a showing of probable cause that a federal criminal offense has been committed. In the context of terrorism-related offenses, this would frequently result in the inability to apprehend two categories of individuals: (1) those whose “dangerousness is manifested” in a manner not constituting a traditional federal crime; and (2) those whose suspected activities constitute a crime, but that suspicion has yet to reach the probable cause threshold.\textsuperscript{40} As a counterterrorism tool, another disadvantage of an Article III court is that any detained terrorist suspect would have to be released if the government was unable to collect useable evidence that could be publicly disclosed or if a jury acquitted the

\textsuperscript{38} Id., p. 3.
\textsuperscript{39} Id., p. 4.
\textsuperscript{40} Blum and Heymann, pp. 102-03.
suspect of the charged offenses; under a law of war paradigm, such circumstances would not necessarily mandate release, but, rather, still permit preventive military detention.\footnote{id., p. 103.}

In an Article III court, statements elicited from interrogating a suspect after arrest or indictment would generally not be admissible as part of the prosecution case in federal court unless that suspect received his Miranda rights.\footnote{id.} Just as some criticism of using Article III courts for terrorism offenses focuses on the criminal law vs. law of war paradigm, another strand of criticism for using the criminal law model holds that in combating terrorism, the competing law enforcement vs. intelligence gathering models mitgate against the use of federal civilian courts. To these critics, the requirement of providing Miranda warnings impedes intelligence gathering, a vital priority when an overseas terrorist suspect is apprehended because national security interests demand that as much information be acquired from the suspect to ensure no future threats are imminent. Once Miranda warnings are received, these critics contend, suspected terrorists become reluctant to answer their interrogator’s questions.\footnote{Testimony of Stephanie Hessler Before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security,” April 5, 2011, Justice for America: Using Military Commissions to Try the 9/11 Conspirators, pp. 6-7, http://judiciary.house.gov/hearings/pdf/Hessler040520011.pdf.}

Another criticism of Article III courts is that they are unable to adequately protect classified information from disclosure to the terrorist networks intent on causing the U.S. harm. Although the procedural mechanisms of CIPA allow government prosecutors to substitute unclassified summaries of sensitive information, a federal judge has the discretion to reject the proposed substitutions if he deems them inadequate, placing the government in the position of having to either reveal sensitive sources and methods or see the indictment against the suspected terrorist dismissed. To these critics, this “catch-22 of either disclosing classified intelligence or...
risking dismissal of charges” is a burden that should not, or need not, be confronted in counterterrorism efforts, where penetrating and disrupting terrorist networks is a paramount national security priority, as is the need to safeguard the classified communications and intelligence acquired to further these efforts. And even when information does not rise to the level of being classified, it may still be so sensitive that its public disclosure would allow for terrorist networks to alter their capabilities and strategies, frustrating U.S. efforts to disrupt their operations. It is alleged that during the trial of Omar Abdel-Rahman, the “Blind Sheikh,” for the 1993 World Trade Center bombings, prosecutors provided the defense a list of unindicted co-conspirators in fulfillment of their discovery obligations; the list was in bin Laden’s hands approximately ten days later.

Three additional criticisms of prosecuting suspected terrorists in Article III courts focus on the burdens that such an endeavor places on the American citizenry, global counterterrorism efforts and the judicial system. An oft-cited rallying point for Article III opponents is that holding a public trial poses heightened security concerns for the local citizenry of the jurisdiction, both for jurors and people in the vicinity of the courthouse, who become targets for retaliatory attacks by other terrorists or sympathizers. In addition to the safety issue, these opponents also claim that security for the trial will be prohibitively expensive and disruptive. Opponents also insist that Article III prosecutions burden ongoing counterterrorism and military operations abroad. Since transnational terrorism prosecutions typically involve information and statements gleaned through connections and linkages, often provided second-hand, and given the inadmissibility of such statements in federal court, the witnesses necessary to provide this testimony in court are often military personnel or CIA operators who captured the suspect

44 Id., p. 4.
46 “Testimony of Stephen A. Saltzburg,” pp. 4-6.
overseas. Given that the very same individuals whose testimony would be required in an Article III forum are likely to still be engaged in ongoing combat and counterterrorism efforts overseas, interruptions mandated by court orders requiring personnel to appear in court could adversely impact that mission.\textsuperscript{47} Lastly, opponents of Article III courts denigrate the public nature of the trial and insist it only furthers the ability of terrorists to communicate their anti-U.S. agenda by providing a platform for violent messages or extremist ideology. The consequence of tolerating such a statement thus has the potential of creating a spectacle that mocks the judicial system.\textsuperscript{48}

\textbf{C) Rejoinder to Article III Forum Criticism}

Numerous independent reports have concluded that federal criminal courts are well suited to handle terrorism prosecutions, able to achieve the dual goal of enhancing intelligence collection by way of gathering reliable intelligence from a suspect in exchange for potentially lessened sentences and securing periods of lengthy incarceration through a conviction rate of over 90% for terrorism-related offenses.\textsuperscript{49} In its exhaustive study of more than 120 international criminal terrorism cases prosecuted since the early 1990s, \textit{In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts}, Human Rights First concluded that federal courts were “fully capable of prosecuting complex and sensitive cases of international terrorism.”\textsuperscript{50} Specifically, the report found that the criminal statutes available to prosecutors allow for a

\textsuperscript{47} “Testimony of Stephanie Hessler,” pp. 7-8.
\textsuperscript{48} “Testimony of Stephen A. Saltzburg,” p. 7.
robust, fair and effective counterterrorism tool. The authors further found that using CIPA has not resulted in substantial leaks of classified information. Additionally, Miranda warnings were not preventing intelligence professionals from interrogating terrorism suspects and collecting valuable information. Other findings indicated that prosecutors were able to avail themselves of a wide array of evidence to establish their cases and that surrounding communities had not incurred any harm or heightened security threat.

The criticism that prosecuting terrorism suspects in federal court hinders intelligence gathering has the most resonance politically and has generally been the rallying point of the most outspoken Article III critics. It has also proven to be one of the most specious claims. In the last two years alone, numerous terrorism suspects with overseas connections have been successfully prosecuted in Article III courts, while still allowing law enforcement and intelligence agencies to gather valuable intelligence regarding transnational terrorist networks. Examples of this include Najibullah Zazi, who pled guilty in federal court to plotting to bomb the New York City subway system and who continues to provide valuable intelligence regarding al Qaeda; David Headley, who pled guilty for his involvement in the 2008 Mumbai terror attacks and continues to provide valuable intelligence concerning Pakistan-based terrorist activities and the organization Lashkar y Tayyiba; Faisal Shahzad, who despite pleading guilty in an Article III court and receiving a life sentence for attempting to detonate a bomb in New York City’s Times Square, still provided intelligence pertaining to his operational ties to the Pakistan-based Taliban (“TTP”); and Umar Farouk Abdulmutallab, who still awaits a federal court trial for attempting to

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51 Zabel and Benjamin.
52 Id., pp. 1-2.
detonate a bomb onboard an airline on Christmas Day, 2009, but provided intelligence to his interrogators establishing his connection with Anwar Aulaqi and al Qaeda in the Arabian Peninsula (“AQAP”).

These examples provide particular credence to the Attorney General’s claim that the criminal justice system has proven to be one of the most effective weapons available to the U.S. for both incapacitating terrorists and collecting intelligence from them. These suspects provided law enforcement invaluable intelligence post-arrest and after they received their constitutionally guaranteed Miranda warnings. Similarly, they continued to provide intelligence to law enforcement post-arrest, post-indictment and post-Miranda warnings, countering disproving the claim that once Mirandized, a suspected terrorist will cease to cooperate with law enforcement or intelligence officers. To the contrary, as these cases reflect, “the conventional [Article III] court system has proved surprisingly effective at extracting intelligence.” The claim of Article III opponents that trying terrorist suspects in federal court poses a greater security risk to the public and to impaneled jurors belies the success of high-profile transnational terrorism cases that have transpired without a security incident, to include Abdulmutallab,


56 Mayer, at 56.
Shahzad and Zazi in the past year.\textsuperscript{57} Additionally, selecting a forum other than federal court will not deter individuals intent on retaliation; any target, not just the courthouse, that is symbolic of the U.S. could be attacked in retaliation for prosecuting a terrorist. Likewise, the contention that a federal trial provides a platform for espousing extremist rhetoric and will lead to a public spectacle, ignores the reality that civilian trials are formal, controlled proceedings in which federal judges have the authority to remove unruly participants from the courtroom. And, despite any statement a defendant may make, federal judges with experience handling terrorism cases have noted the greater power of having the last word at sentencing when a convicted terrorist is informed that he is nothing more than a criminal.\textsuperscript{58}

In its endorsement of the federal prosecution model, \textit{In Pursuit of Justice} maintains that greater utilization of Article III courts will improve U.S. “standing in the world” and promote greater cooperation among our western allies and foreign partners who remain skeptical of law of war paradigm that promotes preventive detention and military commissions as the most effective way of incapacitating transnational terrorists.\textsuperscript{59} Despite its clear preference for the federal criminal prosecution model, the study caveats its findings with the recognition that a category of individuals remain, namely, those suspected terrorists who cannot be tried in federal court because admissible evidence against them is absent and they are determined to be too dangerous or too high a risk to be released. The report’s authors also explicitly recognize a common battlefield situation whereby in the theatre of military operations, enemy fighters will be detained without punishment in order to prevent their continued fighting against U.S. and Allied forces.

\textsuperscript{58}“Testimony of Stephen A. Saltzburg,” pp. 6-7.
\textsuperscript{59}Blum and Heymann, p. 105; Zabel and Benjamin, p. 129.
This category, a “lawful and fundamental [aspect] to the effective prosecution of war,” did not generally implicate the criminal justice system.  

**Military Commissions**

Military commissions have been utilized by the United States during most of the major wars in its history to bring to trial, both during and after armed conflict, perpetrators of war crimes and other crimes in connection with war that take place during armed conflict. They are designed to try foreign combatants for violations of the law of war and represent an established legal framework with historical precedence under the Laws of War.  

On March 7, 2011, nearly two years after announcing the suspension of military commissions and ordering the interagency review of detainee policy, the President issued an Executive Order rescinding this prior suspension and allowing new commissions to go forward. Resumption of military commissions, according to a White House press release accompanying the Executive Order, was conditioned upon the successful enactment of key reforms that marked the prior commission process, such as ban on the use of statements taken as a result of cruel, inhuman or degrading treatment, as well as an improved process for handling classified information. In issuing this Executive Order, the President maintained his commitment to closing the Guantanamo Bay, but tacitly acknowledged that the detention facility would remain open as the venue for any military

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60 Id.
commission, as well as for the long-term detention of detainees for whom prosecution, release and/or transfer has been determined unfeasible.\textsuperscript{63}

Although military commissions have an established history as a lawful and practical means to prosecute war crimes, President Bush’s decision to detain the perpetrators of 9/11 and other members of al Qaeda as enemy combatants and convene military tribunals to hear these cases represented a “paradigm shift” in U.S. national security strategy. This strategic shift is a consequence of the 9/11 attacks being viewed as an act of war, demanding a military response, whereas historically, the U.S. response to terrorism exclusively relied upon a law enforcement strategy that often resulted in federal criminal prosecutions.\textsuperscript{64} In fact, military commissions were never used to try members of al Qaeda or like-minded terrorist organizations prior to 9/11.

\textit{A) Advantages of the Military Commission Forum}

Supporters of military commissions note that the forum provides a degree of flexibility necessary to handle the challenges uniquely inherent to a terrorism prosecution. For example, since the more restrictive Federal Rules of Evidence are not applicable to a military commission, evidence can be presented against an accused under relaxed admissibility and relevance standards. To advocates of the commission process, this departure from traditional evidentiary rules represents a “common-sense step toward realistic standards of evidence” in the context of terrorist suspects apprehended on a foreign battlefield or through the cooperative efforts of a foreign government.\textsuperscript{65} Overall, those favoring military commissions contend that a suspected


terrorist is more likely to be convicted in this forum than in federal civilian court. One such difference that military commission advocates highlight to illustrate this “flexibility” is that hearsay evidence is admissible as long as the proponent of the statement can adequately demonstrate to the tribunal that the hearsay evidence is reliable, material and probative of the fact that it is offered to prove. In determining whether to admit hearsay statements, the military commission judge is specifically required to consider the “adverse impacts on military or intelligence operations” that would likely result by requiring the production of the witness. This requirement is designed to prevent the need for witnesses of the military and intelligence services to abandon ongoing operations in order to testify in court. It is significant that the rule is reciprocal; a terrorist suspect may offer hearsay evidence to support his defense, an approach that could not be employed under the evidentiary rules governing Article III courts. If admitted, the commission jurors can decide what weight, if any, they will assign to the hearsay evidence.

Those in favor of using military commissions emphasize that the reformed system codified in the MCA provides “robust protections to detainees, more so than any other international war crimes tribunal ever created.” Accordingly, unlawful enemy combatants who violated the laws of war still receive a degree of due process protections that are “unparalleled in the history of war crimes tribunals,” to include the right to counsel, the presumption of innocence throughout the proceeding, proof beyond a reasonable doubt is required to convict, the right to present and call witnesses, and a myriad of other trial rights that closely mirror those afforded U.S. military personnel being tried by a court-martial.

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70 Id.
71 Id., pp. 2; 4-5; “Testimony of Stephanie Hessler,” pp. 8-9.
Military commissions serve to alleviate two other concerns associated with prosecuting transnational terrorists in an Article III court: (1) revealing classified and sensitive information to our adversaries; and (2) hampering intelligence gathering. Military commissions are designed to diminish these risks in a fashion that Article III courts cannot, while still affording substantial procedural protections to the suspected terrorist.\textsuperscript{72} In a military commission the government cannot be compelled to disclose classified information to any person without a security clearance; if the judge determines that the information is necessary, then redacted portions, summaries or a substitute admitting facts that the classified material would tend to prove can be provided to the defendant. Because the open, public nature of federal criminal trials may undermine the goal of protecting sensitive national security information, the military commission judge has the prerogative to limit public access to the hearing and can require that classified or sensitive evidence be presented during closed proceedings, so as to ensure that intelligence sources, methods and activities are safeguarded.\textsuperscript{73} Military commissions are largely premised on the assumption that providing terrorists Miranda warnings would curtail counterterrorism efforts by foreclosing vital intelligence collection opportunities from the suspect. Thus, in this forum a detainee’s statements are admissible if the judge finds that they are reliable, probative and made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement. They are also admissible if provided voluntarily, even in the absence of a rights advisement.\textsuperscript{74}

To those commentators who have expressed reticence that a federal criminal trial for terrorism endangers those civilians randomly selected for jury duty because of an increased risk of retaliation, supporters of military commissions claim that this concern is largely alleviated in

\textsuperscript{72} “Testimony of Stephanie Hessler,” pp. 3-4.
\textsuperscript{73} \textit{Id.}, pp. 5-6.
\textsuperscript{74} \textit{Id.}, p. 7.
the commission forum, where military officers comprise the potential juror pool. Similarly, the security concerns voiced by Article III critics are seemingly not applicable to military commissions, where the tribunal’s locus on a military installation purportedly provides a greater degree of safety and capability to limit access to the commission and detention facilities.

B) Criticisms of the Military Commission Forum

The tribunals originally envisioned by the Bush Administration to prosecute transnational terrorists for war crimes failed in 2006 when the Supreme Court ruled, in *Hamdan*, that the military commission system was unconstitutional. The military commission system was re-established when Congress enacted the MCA in 2006, subsequently amended in 2009. Although the MCA cured the constitutional deficiencies identified by the Supreme Court, critics of military commissions maintain that they represent a lesser form of justice since defendants are afforded fewer legal protections than those that attend a federal civilian trial, such as the right to public proceedings and trial by jury. Additionally, these critics hold, military officers serve as judges and jurors, with the right of appeal not guaranteed, creating a system of inherent bias. Critics also claim that the Constitution is vague regarding the scope of military commissions, as it is with war powers generally, consequently creating a system with rules promulgated exclusively by the Executive Branch. Criticism of the military commission model also

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75 Parry, pp.13-15.
emphasizes that on three distinct occasions the Supreme Court found the system as initially promulgated in the aftermath of 9/11 constitutionally infirm.\textsuperscript{79}

This lack of precedent and the repeated starts and stops over its tortured post-9/11 history has led critics of military commissions to question their legitimacy and effectiveness as a reliable and just institution.\textsuperscript{80} Because the original procedures enacted to govern military commissions were discredited, skepticism remains about the regime, even in the wake of the 2009 reforms. And despite being hailed by the Bush Administration as a vital mechanism for bringing those responsible for 9/11 to justice, the fact that only five individuals to date have been tried by military commission since 9/11, three by way of plea agreement, has only further undermined their perceived effectiveness as an appropriate and lawful forum for prosecuting suspected terrorists.\textsuperscript{81} While military commission advocates commend the increased likelihood of conviction as an advantage of the forum over Article III courts, critics emphasize the heightened risk that prejudicial, inaccurate and misleading evidence will be presented under this more relaxed regime, especially when the evidence may have resulted from coercion and was presented to the court in a manner shielding it from public view and scrutiny.\textsuperscript{82} An increased likelihood of conviction also does not necessarily equate with “fair and just proceedings” to many critics, who distrust the commission process and are concerned that ultimately, the rules governing the system will be deemed violative of due process.\textsuperscript{83} The concern over legitimacy is


\textsuperscript{80} Id., p. 13.


\textsuperscript{82} Parry, pp. 13-15.

\textsuperscript{83} “Testimony of Stephen A. Saltzburg,” p. 6.
palpable; the Guantanamo Review Task Force Final Report noted that repeatedly, certain foreign governments “had been reluctant to cooperate with military commissions,” yet they could be approached to determine whether they would provide cooperation in a federal prosecution.”\(^\text{84}\)

Legal controversy also remains regarding some of the new offenses added to the MCA. Specifically, the MCA established criminal liability for conspiracy and for the provision of material support to al Qaeda and/or the Taliban. Since these two offenses did not constitute war crimes under traditional law of war principles prior to the MCA’s enactment, critics assert that prosecuting them as law of war violations for conduct predating the MCA would amount to a violation of the Constitution’s \textit{ex post facto} clause. While still unsettled as a point of law, no similar issue arises with charging conspiracy or material support offenses in federal criminal court.\(^\text{85}\) Critics of military commissions state that transnational terrorists who commit murder on U.S. soil should not be dignified as “warriors,” and thus entitled to law of war constructs.\(^\text{86}\)

\textbf{C) Rejoinder to Criticisms of the Military Commission Forum}

One of the Bush Administration’s architects of the military commission model in the aftermath of 9/11, Colonel William Lietzau, has suggested that beside the procedural hurdles that naturally accompanied the implementation of a framework that had remained dormant for 60 years, the generally hostile reception to military commissions by the public, academic and legal community, as well as U.S. foreign allies, was caused by two factors. First, the law enforcement and criminal prosecution model had prevailed for so long in combating terrorism that not one of the audiences mentioned above was prepared for the Administration’s treatment of 9/11 as terrorist conduct amounting to an act of war and the consequent use of “old laws,” or military

\(^{84}\)“Final Report,” p. 20.
\(^{85}\)Chesney, pp. 117-18.
\(^{86}\)“Testimony of Stephen A. Saltzburg,” p. 2.
commissions, “for new wars.” The other reason military commissions were so roundly criticized, according to Lietzau, is that the legal and policy basis for the U.S. decision to initiate this model was not well explained to allies who maintained a steadfast reluctance to accept a framework that appeared anathema to existing notions of abidance with the rule of law.

Nearly a decade has passed since 9/11 and the nation is now bracing for a trial of KSM and his co-conspirators before a military commission. The untested status of the reformed commission system under MCA 2009 looms as a significant risk that may ultimately unhinge any verdict reached by the KSM tribunal, particularly if the relaxed evidentiary standards do not pass constitutional muster upon appellate review. The MCA reforms do, however, more closely align the military commission system with the federal courts, and, consequently, enhance the legitimacy of military commissions, as a discrete means for adjudicating violations of the law of war. For critics who maintain that evidence deemed inadmissible in an Article III court (i.e., evidence derived from involuntary statements) would have been admissible in a military commission, the MCA 2009 reforms ensure that any statement acquired through coercive interrogation or torture is also inadmissible. KSM’s voluntary, un-Mirandized statements are inadmissible in an Article III court; in the commission where he will be tried these statements re-admissible due to relaxed hearsay rules. Also, evidence can be more easily authenticated and foreign intelligence sources are more likely to cooperate because military commission rules provide greater latitude in protecting their assistance and information. Thus, despite the unique attributes of the MCA, the closer that military commissions approximate federal standards, the

87 Lietzau, p. 272.
88 Id., pp. 272-74.
greater the possibility that KSM’s tribunal will “signify a step forward in the nation’s ability to counter terrorism in a rational fashion” and restore confidence that justice can be effectively administered within the confines delineated by a novel type of warfare- a war on terror without historical precedence.  

**Preventive Detention**

Perhaps no aspect of the competing legal regimes in effect since 9/11 has been more controversial than the preventive, or non-criminal, detention of suspected terrorists and battlefield captures of those aligned against Coalition forces in Afghanistan, Iraq, Pakistan and elsewhere. The U.S. has adopted two distinct detention frameworks since 9/11, both rooted in traditional law of armed conflict principles, to justify its detention of individuals without criminal charge. Primarily, the U.S. has relied on the established law of armed conflict tenet that combatants may be detained for the duration of hostilities, a practice triggered by Congress’ enactment of the September 2001 “Authorization to Use Military Force” (“AUMF”), and expressly recognized subsequently by the Supreme Court. The AUMF’s scope of detention authority extends to those who “planned, authorized or committed or aided” the 9/11 attacks, persons who “harbored those responsible for those attacks,” or “were part of, or substantially supported, Taliban or al Qaeda forces or associated forces that are engaged in hostilities” against the U.S. and its coalition partners. Preventive detention is preserved only for those detainees meeting this exacting standard. Additionally, the U.S. has detained a smaller cadre of individuals for the purpose of prosecuting them for war crimes through the military commission process. Reliance on both detention frameworks “has proven exceedingly controversial,” as

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91 Greenberg, B4.
critics have claimed that in both instances the government has exceeded whatever authority existed to implement a detention framework.  

Military detention is premised on law of war principles that recognize that the authorization to use force encompasses the authorization to detain in an international armed conflict. This principle was explicitly upheld by the Supreme Court in *Hamdi v. Rumsfield*. In the immediate context, detention authority stems from Congress’s authorization to the President to use force "against those ... organizations" responsible for "the terrorist attacks that occurred on September 11, 2001," a descriptor that expressly includes members of al Qaeda, and under traditional principles of co-belligerency includes al Qaeda's affiliated terrorist organizations. In *Hamdan v. Rumsfeld*, the Supreme Court recognized the current conflict with al Qaeda to satisfy the criteria for non-international armed conflict and, accordingly, found that pursuant to the AUMF, traditional detention principles applied. In an Executive Order issued in November 2001, President Bush authorized the detention of individuals who were either members of al Qaeda or who had engaged in, assisted, or conspired to commit acts of international terrorism against the United States, or who had harbored such persons or any al Qaeda member.

According to The Brookings Institution scholar, Benjamin Wittes, the framework remains controversial because the “Western world does not believe in detention. Even when Western nations need detention, they do not believe in it or want to acknowledge it, and so, over the

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93 Chesney, p. 114.
94 *Hamdi v. Rumsfield*, 542 U.S. 507, 519-21 ("[W]e understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.").
years, they have developed elaborate systems for pretending they do not engage in it.”96 Thus, while the specter of detainees at Guantanamo has become the rallying point of domestic and international critics, in fact, U.S. forces have regularly exercised the authority to hold Taliban fighters and al Qaeda operatives captured in Afghanistan and Iraq. The U.S. has embarked on this practice unilaterally, since its Coalition partners do not engage in protracted detention, and has filled detention facilities in both countries with hundreds of thousands of captures. In places like Afghanistan and Iraq, the U.S. has turned over the majority of its captures to the respective criminal justice systems of those countries for prosecution or other disposition.97 Yet, a population of detainees remains at Guantanamo. And should overseas military involvement rise to the levels they reached at the outset of operations in Afghanistan and Iraq, a possibility emerging in the wake of the recent political turmoil in the Middle East, detention will remain an inevitable reality of the U.S. approach to combating the battlefield and dispersed transnational threat it faces. As Wittes states, a coherent political conversation on detention policy has been ignored by officials of both the Bush and Obama Administrations since 9/11, however, to “protect U.S. security and the security of its allies, the United States simply has to maintain some detention capacity in a world that doesn’t believe in the project of detention anymore.”98

President Obama’s Executive Order of March 7, 2011, officially recognized the U.S. continued commitment to a preventive detention framework. In the context of the remaining Guantanamo detainees, preventive detention applies to those individuals held without formal charge before either an Article III court or military commission, or who have not been designated for transfer to another country, but are considered too dangerous for release. For this category of detainees, those that “in effect, remain at war with the United States,” the new Executive Order

96 Wittes, Detention and Denial, p. 3.
97 Id., pp. 103-08.
98 Id., p. 5-7.
establishes a “thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified.” This periodic review is designed to ensure that those individuals for whom long-term detention was deemed necessary continue to be detained “only when lawful and necessary to protect against a significant threat to the security of the United States.” If a final determination is made that the significant security threat necessitating long-term detention ceases to exist, then a suitable transfer location outside the United States is to be identified. The detention framework has been the source of numerous legal challenges, landmark Supreme Court decisions, and, in the absence of legislative action formalizing the criteria, procedural rules and substantive standards defining detention, an experimental landscape for U.S. counterterrorism efforts. Largely due to the glaring absence of legislative initiative, a problem only partially ameliorated by the most recent Executive Order, the courts hearing the cases brought by individuals challenging the legality of their detention have, through their decisions, created the substantive laws and rules of detention.

In the wake of this highly litigious, and uncertain, legal environment, certain categories of individuals have emerged as lawfully subject to the detention framework. The first category includes fighters, or that group of individuals who use, attempt to use, or conspire to use, lethal force against U.S. personnel overseas. In a traditional armed conflict, these individuals would be considered “privileged belligerents,” with a right to use lethal force without

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99 Executive Order, March 7, 2011.
being subject to domestic criminal prosecution. This privilege does not extend, however, to members of the insurgency fighting in Afghanistan and Iraq. A second category of persons subject to military detention includes members of al Qaeda, the Taliban and other hostile forces, regardless of whether that individual actively engaged in hostilities. A last group of persons falling within the detention framework include supporters of those groups falling within the Government’s “enemy combatant” definition; individuals who cannot be shown to have been actual members of al Qaeda or the Taliban, for example, and have not engaged in fighting themselves. The AUMF specifically recognized al Qaeda and the Taliban as legitimate categories of persons to detain for the duration of hostilities, as well as defining an enemy combatant as any individual or group that rendered support to either one. Since the authority to detain for the duration of hostilities only applies to these three categories, it is unclear as to which other individuals or groups may also be subject to detention in the future.102

102 Chesney, pp. 115-17 (setting forth the underlined categories of persons subject to military detention under the current model relied upon by the U.S.).
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<th>Advantages</th>
<th>Military Commissions</th>
<th>Preventive Detention</th>
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<tr>
<td>• Established success</td>
<td>• Reliable hearsay admissible</td>
<td>• Recognized as lawful exercise of wartime authority</td>
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<td>• Incentives to provide intelligence</td>
<td>• Suspect’s voluntary statements admissible without <em>Miranda</em> warnings</td>
<td>• Remove viable security threats from battlefield for duration of hostilities</td>
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<td>• Effective protection of classified information</td>
<td>• Courtroom closed to protect national security information</td>
<td>• Length of detention effective deterrent</td>
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<td>• Established legitimacy</td>
<td>• Persons with clearances only receive access to classified information</td>
<td>• Provides opportunity for increased intelligence gathering</td>
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<td>• Jurisdiction applies to U.S. citizens and non-citizens</td>
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<td>• Historical interruptions and court-mandated reforms have damaged legitimacy</td>
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<td>• Judges independent of Executive</td>
<td>• Suspect can admit hearsay evidence in his defense</td>
<td>• Risk of inaccurate evidence admitted</td>
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<td>• Civilian jurors assess evidence</td>
<td>• Greater due process than any other war crime tribunal</td>
<td>• Uncertainty as to legality of some offenses under MCA</td>
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<td>• Treats terrorists as mere criminals</td>
<td>• Forum prevents foreign partner cooperation in counterterrorism efforts</td>
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<td>• Extraterritorial jurisdiction of terrorism statutes</td>
<td>• Reliability of hearsay evidence in his defense</td>
<td>• Propaganda tool for terrorist recruitment</td>
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<td>• Forum encourages cooperation from foreign partners</td>
<td>• Suspect in admissible only if pursuant to <em>Miranda</em> warnings</td>
<td>• Uncertainty as to duration of hostilities</td>
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<td>• Suspect released if charges dismissed or acquitted at trial</td>
<td>• Expansion of <em>habeas</em> body of law allowing review of individual detention grounds</td>
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<td>• Condemnation of international community frustrates overseas cooperative counterterrorism efforts</td>
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<th>Disadvantages</th>
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<td>• Terrorists receive full procedural protections</td>
<td>• Limited post-<em>9/11</em> record</td>
<td>• Uncertainty as to duration of hostilities</td>
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<td>• Provides platform to voice extremist ideology</td>
<td>• Military officers serve as judge and jury, appointed within a military system</td>
<td>• Expansion of <em>habeas</em> body of law allowing review of individual detention grounds</td>
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<td>• Convictions harder to obtain</td>
<td>• No precedential rulings on evidentiary/procedural rules</td>
<td>• Condemnation of international community frustrates overseas cooperative counterterrorism efforts</td>
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<td>• Insufficient measures to close court to protect sensitive information</td>
<td>• Historical interruptions and court-mandated reforms have damaged legitimacy</td>
<td>• Propaganda tool for terrorist recruitment</td>
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<td>• Suspect has right to speedy trial</td>
<td>• Risk of inaccurate evidence admitted</td>
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<td>• Hearsay evidence inadmissible</td>
<td>• Uncertainty as to legality of some offenses under MCA</td>
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<td>• Probable cause required to detain</td>
<td>• Forum prevents foreign partner cooperation in counterterrorism efforts</td>
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<td>• Suspect’s statements admissible only if pursuant to <em>Miranda</em> warnings</td>
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Table 1: Advantages and Disadvantages of Forums for Disposing of Transnational Terrorists

**PROPOSED CRITERIA FOR SELECTING AN APPROPRIATE FORUM**

Since the March 7, 2011, Executive Order, the most current U.S. counterterrorism policy now recognizes that each forum is necessary because a “one-size-fits-all policy for the prosecution of suspected terrorists, whether for past or future crimes, undermines our Nation’s counterterrorism efforts and harms our national security.”103 Knowing what the options are, however, does not translate to knowing under what circumstances a particular framework is most

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103 “Fact Sheet: New Actions on Guantanamo and Detention Policy,” p. 3.
appropriate for accomplishing the goals of incapacitation, deterrence and justice. Each framework, therefore, exists as a tool of U.S. counterterrorism policy, but no cohesive guidance or criteria has been promulgated to suggest when each framework should be deployed. As a result, the various government agencies charged with executing counterterrorism strategies lack the capacity to launch coordinated efforts in approaching suspected terrorists. Recent legislative action prohibiting the transfer of any Guantanamo detainee to the U.S. for trial in federal court, partially settled the furor over the approximately 172 legacy detainees who remain at Guantanamo, at least as to forum choice. The question that remains, however, is one that is much more salient to the future of U.S. counterterrorism efforts: how will the U.S. render decisions regarding forum choice for future terrorism suspects? In the future, in order to avoid the incoherence, inconsistency and criticism that has marred this decision-making process and created a credibility gap in U.S. counterterrorism policy, the U.S. needs to develop a framework, or set of objective criteria, to guide future determinations. By applying the proposed criteria and balancing these enumerated factors against one another, it will be possible for policymakers to assess whether an Article III or military commission prosecution should be pursued in a given case, or whether application of the criteria mitigates toward an alternative disposition.

**Methodology**

In proposing certain criteria and evaluating whether the application of the proposed factors favor one forum of another, the criteria proposed here and labeled as “Favorable” in Table 2 refers to factors favoring an Article III prosecution. The reason for this is that Article III courts remain the explicitly stated preference of the current Administration and both President Obama and Attorney General Holder have expressed their commitment to challenge the congressionally-enacted restrictions on the prosecution of Guantanamo detainees in federal
courts, as well as any contemplated future legislative initiatives designed to hamper the ability of the Executive Branch to make prosecutorial decisions in the interest of U.S. national security.\textsuperscript{104} The Administration’s preference noted, certain circumstances make the Article III venue less viable. For instance, in the event that a terrorism suspect has not been \textit{Mirandized} and his statements are essential to the government’s prosecution, or if CIPA cannot adequately protect classified information critical for the prosecution, or if the live testimony of clandestine U.S. military or intelligence officials deployed overseas is pivotal and these witnesses are unavailable, thus requiring the admission of hearsay testimony, then “Character of Evidence” criteria supersedes all others and a military commission presents the most viable forum.

The criteria proposed in this paper are designed to evaluate the most appropriate forum choice for \textit{overseas} terrorism suspects of whom the U.S. has a national security interest in apprehending or capturing. The focus on this subset of overall potential terrorism suspects is deliberate; it is this group that has historically proven to be the most controversial (i.e. Guantanamo) and which will continue to be the most fiercely debated in the foreseeable future, as evidenced by the recent legislative initiatives seeking to impose restrictions on transferring persons to the U.S. for federal civilian trials. It is also established policy under current legal authorities to treat suspected terrorists arrested on U.S. soil in accordance with traditional domestic law enforcement investigative practices and to criminally charge these persons with violations of federal law.\textsuperscript{105} As commentator Benjamin Wittes has observed, absent a more formalized, coherent approach, the United States will again be caught off-guard should it be


confronted with another situation when it is forced to detain large numbers of individuals overseas. Presciently, Wittes also notes that the lack of established policy plagues U.S. government officials striving for a ready-made solution to address the Abdulmutallab scenario, i.e., an act of terrorism committed on U.S. soil when law enforcement prerogatives battle against intelligence-driven priorities; the scenario of an overseas capture during a counterterrorism operation, i.e., a raid on a safe-house; and the situation where a foreign government captures a suspect at the bequest of the United States, but the foreign government lacks the legal authority or political will to continue detaining the individual, as may the United States.106

In order to test the criteria, the factors will be applied both to past cases where a criminal prosecution was pursued and prospectively to individuals suspected of committing terrorist acts overseas. In applying the criteria to past prosecutions, it can be determined whether the Article III forum was an appropriate choice for that given case. Applying the same criteria prospectively to known suspected terrorists, it can be determined whether policymakers and law enforcement officials should pursue their target with a view toward Article III prosecution and if so, how that decision will impact the means utilized to attain custody of that suspect. In making this evaluation, the criteria will be applied to different categories of individuals and will include known members of a terrorist organization, unaffiliated perpetrators of terrorist acts, military commanders of recognized forces, such as the Taliban, and battlefield insurgent.

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106 Wittes, pp. 94-104.
The Criteria Framework

Variable: Category of Overseas Terrorism Suspect

<table>
<thead>
<tr>
<th>Criteria to Assess Viability of Article III Prosecution</th>
<th>Favorable</th>
<th>Unfavorable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Character of the Evidence</td>
<td></td>
<td></td>
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<tr>
<td>• Mirandized interrogation by U.S. law enforcement</td>
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<tr>
<td>• Non-Miranda interrogation by U.S. intelligence/law enforcement/military</td>
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<td>• Interrogation by foreign authorities</td>
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<td>• Validity of any torture allegations</td>
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<tr>
<td>• Necessity for foreign witnesses/foreign government officials</td>
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<td>• Manner of evidence collection (authentication/chain of custody/preservation)</td>
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<tr>
<td>• Necessity of classified intelligence information</td>
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<td>• Classified information from foreign source</td>
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<tr>
<td>Circumstances of Apprehension or Capture</td>
<td></td>
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<tr>
<td>• Capture by U.S. forces or foreign government</td>
<td></td>
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<tr>
<td>• Degree of cooperation with foreign authorities</td>
<td></td>
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<td>• Existence of extradition treaty</td>
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<tr>
<td>Political and Public Will for Criminal Prosecution</td>
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<tr>
<td>• Security of jurors/witnesses/court personnel/community</td>
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<tr>
<td>• Nature of the victims</td>
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<tr>
<td>• Status of perpetrator of terrorist act</td>
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<tr>
<td>Perceived Legitimacy of the Proceedings</td>
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<tr>
<td>• Exercise of rights w/o significant variance from established rule of law norms</td>
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<td>• Reaction of domestic/international community</td>
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<td>• Jurisdiction over the alleged offense</td>
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Table 2: Criteria to Assess Viability of Article III Prosecution

Discussion

The proposed framework can be applied to any scenario that may confront U.S. officials in forthcoming overseas counterterrorism operations. The potential targeted categories of individuals who might be apprehended overseas and subject to prosecution in the U.S. includes:
(1) leaders, planners, operatives, and facilitators involved in terrorist plots against U.S. targets (affiliated with al Qaeda or associated groups directly implicated in terrorist plots against U.S. interests); (2) individuals with significant organizational roles within al Qaeda or associated terrorist organizations (responsible for overseeing or providing logistical support to al Qaeda’s training operations, facilitators who move money and personnel for al Qaeda, and highly trained operatives being groomed for future terrorist operations); (3) Taliban leaders and members of anti-Coalition militia groups (individuals holding significant positions within the Taliban or who were involved in local insurgent networks implicated in attacks on Coalition forces); and (4) low-level foreign fighters (fighters with varying degrees of connection to al Qaeda, the Taliban, or associated groups, but lacking a significant leadership or specialized role and not necessarily selected for terrorist operations abroad).  

The criteria listed within the framework are pertinent for assessing the viability of prosecution in either an Article III court or military commission, or whether preventive detention will be the most feasible disposition. It is developed from a survey of the primary studies that have analyzed national security terrorism cases in the U.S. over the last decade and aims to summarize those factors that have recurred most frequently during these federal civilian trials. The Federal Judicial Center’s National Security Case Studies: Special Case-Management Challenges is the most informative, providing background factual information on numerous cases and a discussion as to how the court fashioned a solution to the evidentiary or procedural challenge it confronted. Case file reviews, media accounts and interviews with the presiding judge of each examined terrorism trial form the basis of the study’s findings. Likewise, Human Rights First’s In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts dissects

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numerous cases and addresses many of the same unique challenges that a national security trial poses upon a federal civilian court.\textsuperscript{108}

The following highlights the salient characteristics of each of the proposed criteria:

I. \textbf{Character of the Evidence}

\begin{itemize}
  \item \textit{Interrogation by U.S. law enforcement, intelligence agencies or military}
  
  Statements obtained by the U.S. military and U.S. intelligence officers may be the primary source of evidence relating to an overseas terrorism suspect, especially since in this environment law enforcement agents are usually not the first on the scene to interrogate. Military and intelligence personnel operating on the battlefield or overseas typically conduct an interrogation of a suspect without providing \textit{Miranda} warnings, making any statement potentially inadmissible in an Article III court. This scenario arises in the realm of combat operations when battlefield captures are questioned by military and intelligence officials concerned with ascertaining information about hostile forces, munitions and other pressing matters relating to force protection and military strategy in the midst of combat. In past terrorism prosecutions, the statements of the suspect have assumed a central role in the prosecution evidence. Therefore, if officials hope to use any statement resulting from a non-\textit{Miranda} interrogation in federal civilian court, they must strive to remove the “taint” of the unwarned statement by inserting a “clean team” uninvolved with the initial interrogation to provide a rights advisement and then interview the suspect.\textsuperscript{109} If a “clean team” has not been employed in the manner, a military court may prove a justifiable alternative.

  \item \textit{Interrogation by foreign authorities}

\end{itemize}


\textsuperscript{109} “Interview with Matthew C. Waxman,” p. 3; \textit{In Pursuit of Justice}, pp. 101-05.
Interrogations by foreign officials often produce valuable evidence, but the suspect’s statements may not be admissible in an Article III court on voluntariness grounds due to differences in interrogation law and detention tactics overseas. Many foreign officials have testified in terrorism cases and some judges have fashioned practical solutions to various impediments to testimony.\textsuperscript{110} If foreign government or intelligence interviews were conducted, and the suspect provided foreign authorities incriminating statements, Article III admissibility may still depend on whether U.S. officials conducted a subsequent “clean” interview to alleviate the taint of the unwarned statement.\textsuperscript{111}

- \textit{Validity of any torture allegations}

Depending on the fact-specific allegations of each suspect and the reliability of the evidence he possesses to support claims of abusive interrogation or detention conditions, the ability of a suspected terrorist to prevail on these claims in federal court may result in the government having to forego the presentation of certain evidence that directly or indirectly stemmed from the abusive or coercive circumstances of apprehension, interrogation or detention. Substantiated allegations of torture will likely result in the inadmissibility of evidence derived from that abusive or coercive conduct in both the Article III and military commission forum.\textsuperscript{112}

- \textit{Necessity for foreign witnesses/foreign government officials}

Due to ongoing counterterrorism intelligence and military operations abroad, it may be difficult to obtain the testimony of both U.S. and foreign witnesses whose presence would be


\textsuperscript{111}In Pursuit of Justice, pp. 101-05.

required in an Article III court in order to admit evidence or incriminating statements of a suspect. Foreign officials may be reluctant to testify so as not to reveal their cooperation with the U.S., yet they may be necessary to explain the circumstances of an overseas interrogation or the procedures followed relating to specific evidence collection.\textsuperscript{113}

\textbullet \textit{Manner of evidence collection}

Overseas evidence collection by foreign officials, the U.S. military and U.S. intelligence officers is often not done in accordance with law enforcement standards, making it potentially difficult to use such information in an Article III court. For example, a company of U.S. marines may raid a safe-house where battlefield intelligence indicates IEDs are being rapidly assembled and dispatched to roadside locations near large contingencies of transiting U.S. forces. The battlefield exigency of this scenario makes it unrealistic to expect, or desire, that military personnel will dedicate the time necessary to implement chain-of-custody, forensic exploitation and other law enforcement evidence collection protocols used when striving to preserve a crime scene for later prosecution. Authentication of the evidence and directly attributing the incriminating evidence to the suspected terrorist is particularly difficult in these circumstances and could make prosecution in a federal court unfeasible absent other direct evidence.\textsuperscript{114}

\textbullet \textit{Necessity of classified intelligence information}

Transnational terrorism cases rely on sensitive classified intelligence information. It is therefore necessary to assess whether CIPA or similar protective rules in military commissions will provide an adequate means to protect this information. It also must be determined whether a court is likely to find that the failure of providing the information to the suspect violates his constitutional trial rights. Depending on the sensitivity of the information, the government may

\textsuperscript{113} \textit{National Security Case Studies}, pp. 48, 126-28, 169.
\textsuperscript{114} \textit{In Pursuit of Justice}, pp. 108-10.
have to forsake a prosecution to protect sensitive sources and methods from disclosure. In a military commission a suspect must still be afforded an opportunity to review the evidence used against him, however, the forum’s more lenient rules allow for the government to provide redacted summaries or sanitized substitutions of classified evidence.

- **Classified information from a foreign source**

  Intelligence information may be provided to the U.S. government by foreign authorities with the caveat that it cannot be used for prosecution. Foreign intelligence services may thus be unwilling to provide evidence out of concern that U.S. courts will not be able to protect the source of the information, a concern of particular importance to those countries not wishing to publicly acknowledge their cooperation with U.S. counterterrorism efforts.

II. **Circumstances of Apprehension or Capture**

- **Capture by U.S. forces or foreign government**

  Even if CIPA or other protections are available in the chosen forum, U.S. intelligence and military officers must be able to gather information on the battlefield unconstrained by considerations as to whether they may have to ultimately testify in criminal proceedings. The covert nature under which many of these individuals operate also renders the possibility of their testifying remote. Military exigencies may make it unrealistic to preserve the integrity of a “crime scene” for eventual presentation in court, since the procedures followed by domestic law enforcement agents to preserve an evidentiary chain of custody are often difficult to replicate when operating in foreign countries or conflict zones. If a foreign government is involved in the

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capture, detention and interrogation of a suspect, it too may be unlikely to allow its personnel to testify about the circumstances or nature of its involvement in the operations.\footnote{117}{Eric Rosenbach and Aki J. Peritz. \textit{Trials by Fire: Counterterrorism and the Law} (Cambridge, MA: Belfer Center for Science and International Affairs, 2010), p. 123.}

\begin{itemize}
\item \textbf{Degree of cooperation with foreign authorities}

This will vary from country to country, but may be difficult if the suspected terrorist is a citizen of the foreign country where he is located; conversely, cooperation will likely be greatest when the U.S. seeks foreign assistance in apprehending and transferring a U.S. citizen.\footnote{118}{In January 2007, U.S. citizen Daniel Maldonado was captured by Kenyan military authorities as he tried to flee Somalia, where he had participated in a jihadist training program that included weapons and explosives training. After his capture, Maldonado was interviewed on several occasions by FBI agents who provided him with a \textit{Miranda} warning, after which he made various admissions to receiving military-type training from a foreign terrorist organization. Maldonado was turned over to American authorities in February 2007, and pleaded guilty in April of that year. \textit{See United States v. Maldonado}, No. 4:07-cr-00124-GHM (S.D. Tex., April 2, 2007).}  
\item \textbf{Existence of extradition treaty}

Extradition and other forms of transfer have long been recognized as legitimate by foreign partners and are a means to bring terrorism suspects to justice in the U.S. The willingness of a foreign government to transfer a terrorism suspect to the U.S. for prosecution often depends on the existence of such a treaty. Since 9/11, some foreign governments have not honored these agreements due to the possibility that the suspect would be transferred to Guantanamo or potentially subject to enhanced interrogation techniques.\footnote{119}{A. John Radsan, “A New Recipe for Renditions and Extraditions,” \textit{in} John Norton Moore and Robert F. Turner, eds., \textit{Legal Issues in the Struggle Against Terror} (Durham, N.C.: Carolina Academic Press, 2010), pp. 264-73.}
\end{itemize}

III. \textbf{Political and public will for criminal prosecution}

The Executive Branch ultimately has the prerogative to decide who is prosecuted in federal civilian court and who will face a military commission, as well as determining who is subject to a preventive detention regime. President Obama’s recent signing of the Defense Authorization Bill indicated at least tacit acceptance of the restrictions Congress imposed on the transfer of any Guantanamo detainees to the U.S. for trial (his approval was accompanied by a
“signing statement” indicating disapproval with those restrictions); whether his Administration challenges these restrictions is to be seen. The willingness to contravene clear congressional sentiment on this issue is a factor for consideration. Any decision will invariably be influenced by popular opinion. A recent poll from December 2010 showed that 63% of voters strongly opposed trying any Guantanamo terrorist suspects in federal civilian courts, preferring instead that these suspects be tried before military commissions (23% preferred federal civilian courts). Additionally, 46% favored a ban on transferring the suspected terrorists to the U.S. Ideally, the issue over forum selection will become less politicized once a set of guidelines helping determine venue based on pragmatic criteria is established.

- **Perceived security of jurors/witnesses/court personnel/community**

During the federal civilian trial of Zacarias Moussaoui, there were tremendous security concerns for safety of the defendant, trial teams, court personnel and members of the community. In addition, it created tremendous strain on the community to make the place “safe,” as streets are closed, police forces ramp up, snipers are in place for defendant movement, and witness security demands extensive resources. Attorney General Holder’s initial announcement that KSM would be tried in federal civilian court in New York was greeted with vituperative objection by the New York citizenry, state elected officials and New York’s congressional delegation, largely focused on the perceived security risk and endangerment to public safety that would result from having a high-profile trial within its jurisdiction. Although commentators and practitioners largely agree that terrorism trials do not impose any greater security concerns than other high-profile criminal trials and that federal civilian courts have adequately addressed

security concerns in past terrorism trials, the political and public perception of this issue will continue to impact decision makers.\textsuperscript{122}

- \textit{Target and victim traits of the terrorist acts}

Whether the suspected terrorist offenses were directed at civilian or military targets and, if fatalities resulted, whether those deaths were of civilians or military personnel, impacts the decision of which forum is most appropriate for prosecution. The decision to try Ghailani in an Article III court was largely influenced by the fact that the target was a U.S. embassy, the casualties were civilian personnel, law enforcement officials from Kenya, Tanzania and the U.S. preserved evidence and provided suspects rights warnings from the outset. The attack occurred in 1998, prior to the AUMF and the concomitant establishment of military commissions to try violations of the laws of war perpetuated by al Qaeda and its affiliates. Abd al-Rahim al-Nashiri, the alleged mastermind of the attack on the warship \textit{U.S.S. Cole} in Yemen in 2000, has by contrast been referred to a military commission, a decision explained by the fact that the attack was against an American military target abroad and the fact that the victims of the attack were exclusively members of the U.S. forces.\textsuperscript{123}

- \textit{Status of perpetrator of terrorist act}

The perpetrator’s role, whether he is a member of al Qaeda or an affiliated organization recognized by the AUMF, or a member of the Taliban or another insurgent group whose operational scope is limited to the conflict zones of the battlefield in Afghanistan, is an important factor to weigh in deciding an appropriate forum. This criteria is subsumed under the “Political/Public Will” category because of a greater level of acceptance of law of war


\textsuperscript{123} “Testimony of Charles D. Stimson,” p. 2; “Testimony of Stephen A. Saltzburg,” p. 3.
constructs, such as military commissions and preventive detention for the duration of hostilities, the closer the individuals and operations approximate traditional wartime activities. Thus, Taliban leaders and low-level fighters would clearly be appropriate for military commissions or detention, whereas al Qaeda operatives may or may not be considered for this forum depending on the nature of the operations they plotted (directed against U.S. forces, civilian targets, etc.).

IV. Perceived legitimacy of the proceedings

• Exercise of rights without significant variance from established rule of law norms

Article III courts enjoy unquestioned legitimacy both within the U.S. constitutional system and from public perception abroad. The potential employment of military commissions rather than trial in federal court, by contrast, has impeded the U.S. government’s ability to gain international cooperation in obtaining evidence, identifying witnesses, and extraditing defendants charged with or suspected of acts of terrorism. Although the MCA 2009 reforms more closely align military commission evidentiary and procedural rules with federal civilian court rules, they are as yet untested and have not been subjected to appellate judicial review. By contrast, prosecution in federal district court would experience no such legitimacy questions, where the governing procedural and evidentiary rules are well established and fully defined by case law.

• Reaction of domestic/international community

President Obama has repeatedly asserted that Guantanamo is shrouded in negative symbolism and perpetuates a perception around the world that the U.S. is prone to excesses and disingenuous about its stated commitment to the rule of law in combating international terrorism. To the extent that Guantanamo remains the situs for military commissions and for housing detainees subject to preventive detention, these legitimacy concerns will not dissipate in the view of the international community and may hamper future necessary cooperative efforts with

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124 Taylor and Wittes, p. 289.
foreign partners.\textsuperscript{125} The legitimacy problems attendant to proceeding with military commissions may jeopardize the U.S.’s ability to cultivate these cooperative efforts. Continued indecision regarding trial forum selection, with trial by military commission offered as an available option only when, seemingly, there is a popular backlash to an initial decision to pursue an Article III prosecution, as occurred with the decision where to try KSM, fosters problems of legitimacy for U.S. efforts in combating terrorism. The ad hoc practice of determining whether a terrorist suspect is tried by military commission or by federal civilian court has, in effect, created a \textit{de facto} two-tiered justice system.

This perception that military commissions lack the legitimacy of Article III courts is borne out by the repeated repudiation of their procedures by the U.S. Supreme Court, followed by Congressional legislative action to cure these constitutional defects.\textsuperscript{126} This band-aid approach has led to the present-day incarnation of the military commission and does not contribute favorably to any notion of legitimacy for the process.\textsuperscript{127} For many critics, the perceived illegitimacy of the military commission process is a constant albatross attached to the U.S. because the tribunals are viewed with “skepticism outside the U.S., [and seen as] a justice for non-residents of the U.S.”\textsuperscript{128} It remains to be seen if implementation of recent MCA reforms will assuage lingering legitimacy concerns.

\begin{itemize}
  \item \textit{Jurisdiction over the alleged offense}

  Federal district courts possess extraterritorial jurisdiction over offenses involving acts of terrorism on and off the battlefield. A number of key offenses in combating terrorism have

\begin{footnotesize}
\textsuperscript{125} Wittes, \textit{Detention and Denial}, pp. 113-15, 139-43.
\end{footnotesize}
extraterritorial reach, allowing for crimes committed overseas against U.S. persons and targets to be prosecuted in Article III courts, to include committing an act of terrorism transcending national boundaries, the use of a weapon of mass destruction, and providing material support, resources or financing to a designated foreign terrorist organization. In contrast to military commission proceedings, there is no jurisdictional requirement in a federal criminal prosecution that the subject is shown to be an unlawful alien enemy combatant. The criminal statutes apply to all suspects alike without regard to military status or nationality. These terrorism crimes are well settled and not generally open to judicial challenge. In contrast, several key violations of the MCA, including conspiracy, providing material support to terrorists, and murder by an unprivileged combatant, lack precedence as violations of the law of war, and therefore subject to challenge on the grounds that their codification as such both contravenes international law and violates the ex post facto clause.

In evaluating whether the prosecution of terrorism offenses in an Article III court is a truly feasible alternative to trial by military commission, it is essential to understand that, in some instances, a particular detainee may not be subject to a criminal indictment or may be virtually immune from any prosecution in any forum due to the sensitivity of the incriminating evidence or the government’s inability to obtain necessary cooperation in the production of evidence from a foreign government. For example, while the government may possess compelling information demonstrating the defendant’s active participation in acts of terrorism, such information may be derived from intelligence sources that would be compromised by a

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129 For “Federal crimes of terrorism” with extraterritorial jurisdiction, see those identified in 18 USC §2332b(g). Also see 18 USC §2332a (Use of weapons of mass destruction); 18 USC §2332b (Acts of terrorism transcending national boundaries - murder, kidnapping, maiming, and specified assaults against named victims, including members of the uniformed services; 18 USC §2339B (Providing material support or resources to designated foreign terrorist organizations); 18 USC §2339C (Prohibitions against financing of terrorism).

criminal prosecution or originate from foreign government with the caveat that it not be used in a criminal prosecution. Moreover, in some cases, even when the government is able to undertake a prosecution, the defendant may be acquitted or his sentence may be such that he will be subject to release after brief incarceration. In such cases, where the subject is known to present a continuing threat to the United States, will likely return to the battlefield or resume terrorist activities, the government’s preventive detention regime should fill this void until such time as the hostilities have terminated, the individual can be transferred to the custody of another nation, or safely released. In short, any regime of criminal prosecution, whether via a federal civilian trial or military commission proceeding, must be backstopped by a robust administrative detention system that is consistent with international law and the municipal law of the U.S.\textsuperscript{131}

\textbf{APPLYING THE CRITERIA TO CATEGORIES OF SUSPECTED TERRORISTS}

In order to gauge how the proposed criteria would apply to prospective overseas terrorist suspects, the framework will be first applied to two Guantanamo detainees for whom a forum selection has already been determined, Abd al-Rahim al-Nashiri and Ahmed Ghailani. Al-Nashiri, the alleged mastermind of the bombing of the \textit{U.S.S. Cole} in October 2000, has been held at Guantanamo since 2006. On November 13, 2009, the Attorney General announced that al-Nashiri would be prosecuted before a military commission, a decision that was reinstated after the announcement of the March 7, 2011 Executive Order.

\textbf{Case Study 1: Abd al-Rahim al-Nashiri} (Leader/planner/operative of al Qaeda)

Al-Nashiri is suspected of being the primary planner of the \textit{U.S.S. Cole} bombing. He is experienced in military and explosives training, having participated in these activities in

Afghanistan, Bosnia and Chechnya. Al-Nashiri was identified by Mohammed Rashid Daoud al-Owhali as the individual who facilitated his obtaining a passport and traveling to Yemen and Nairobi, Kenya in order to participate in the 1998 U.S. embassy bombing. Al-Owhali confessed to his involvement in the embassy bombing and was convicted in New York federal district court for those terrorist acts. In October 2000, the Cole bombing occurred in Yemen, killing 17 U.S. sailors aboard the military vessel and injuring approximately 40 military personnel. Jamal Ahmed Mohammed Ali al-Badawi, convicted for his role in the Cole bombing, told investigators that al-Nashiri requested that al-Badawi purchase the boat used in the operation, that he had personally bought explosives and stored them aboard the boat, asked al-Badawi to videotape the operation from the port, and, essentially, planned and funded the operation.\footnote{\textit{Summary of Evidence for Combatant Status Review Tribunal- Al Nashiri, Abd Al Rahim Hussein Mohammed,” U.S. Department of Defense, Office for the Administrative Review of the Detention of Enemy Combatants at U.S. Naval Base, Guantanamo Bay, Cuba, February 8, 2007, http://projects.nytimes.com/guantanamo/detainees/10015-abd-al-rahim-al-nashiri/documents/7/pages/67#1}}

An FBI source also identified al-Nashiri as an important al Qaeda facilitator and operative; when he was arrested by United Arab Emirates authorities in October 2002, he was carrying numerous fraudulent passports with identities suspected of involvement with al Qaeda-sponsored terrorism.\footnote{\textit{Id.}} In February 2008, CIA Director Hayden publicly confirmed that al-Nashiri had been subject to waterboarding during his interrogation, along with Abu Zubaydah and KSM.\footnote{\textit{The Guantanamo Docket- Abd Al Rahim Hussein Mohammed Al Nashiri,” http://projects.nytimes.com/guantanamo/detainees/10015-abd-al-rahim-al-nashiri; “Biography, Abd Al Rahim Hussein Mohammed Al Nashiri,” http://www.defense.gov/pdf/detaineebiographies1.pdf}} The charges against al-Nashiri include conspiracy, factually supported by his alleged meetings with bin Laden to specifically discuss the planning for the Cole bombing, and murder in violation of the laws of war. Other charged offenses include destruction of property in violation of the law of war, intentionally causing bodily injury, terrorism, providing material...
support to terrorism, and attempt to commit murder in violation of the law of war.\textsuperscript{135} Given the “character of evidence,” which includes allegedly coerced and un-\textit{Mirandized} statements, as well as the “circumstances of capture” by foreign authorities, and the “nature of the victims,” which included members of the U.S. Navy, al-Nashiri’s trial was predictably assigned to a military commission. The cited rationale, namely, that the attack was centered on a U.S. naval vessel, only partially explains why military commission may be the most appropriate forum choice. The government’s admitted use of coercive interrogation techniques undoubtedly presents a high risk that an Article III court will suppress any of al-Nashiri’s confessions, as well as any evidence derived from those coerced admissions. Since evidence collection occurred in Yemen, at the site of the bombing, under the lead of Yemeni authorities, the feasibility of prosecution would largely be dependent on cooperation provided by the Yemeni government in making key evidence and witnesses available for trial. \textit{See Appendix A for application of full criteria.}

\textbf{Case Study 2: Ahmed Ghailani (Leader/planner/operative of al Qaeda)}

Ghailani was found guilty for his role (purchased the truck used to carry the bomb that detonated at the embassy in Dar es Salaam and placed gas tanks in the truck to magnify the blast) in the 1998 bombings of the United States Embassies in Kenya and Tanzania that took the lives of 224 people, including 12 Americans. Ghailani, a Tanzanian national and the first detainee held at Guantanamo to be tried in a civilian court, was found guilty of conspiring to destroy property and buildings of the United States. He was acquitted of the remaining 284 counts against him. In January 2011 Ghailani was sentenced to life without parole. One factor that may have influenced the decision to prosecute Ghailani in an Article III court is that he, unlike other detainees, had an existing indictment against him in the Southern District of New York federal

court, stemming from 1998 when he was first alleged to have been involved as a co-conspirator in the embassy bombings.\textsuperscript{136}

The charges referred against Ghailani for military commission while he was detained at Guantanamo included alleged law of war violations for conspiracy, terrorism, material support to terrorism, murder of protected persons (embassy staff), attacking civilians and civilian objects, murder and destruction of property.\textsuperscript{137} The federal charges against Ghailani included destruction of property resulting in death (the offense resulting in conviction) and 224 individual counts of murder. The case proceeded to trial in federal court despite the judge ruling that the government would be barred from calling an important witness who supposedly sold Ghailani the explosives used in the attack. This witness was barred by the court because the government learned about him through the coerced interrogation of Ghailani while he was in CIA custody. Prosecutors also elected not to introduce inculpatory statements made by Ghailani while he was detained at Guantanamo; although the government viewed these statements as tantamount to confessions (Ghailani voluntarily claiming he learned of the plan to bomb the embassy in Tanzania from a plotter one week before the attack; his training with al Qaeda in Afghanistan during the six years following the bombing; allegations that he worked as bin Laden’s bodyguard) that were not tainted by accompanying allegations of abuse, prosecutors made a strategic decision to not introduce any statement of Ghailani because of the specter of torture that loomed after his initial CIA interrogation.\textsuperscript{138} The factors favoring an Article III prosecution for Ghailani as compared to

\begin{itemize}
\end{itemize}
al-Nashiri are not so overwhelming as to suggest that a federal civilian trial was a clearly more appropriate forum selection. See Appendix B for application of full criteria.

Non-Guantanamo Cases

Case Study 3: Adam Yahiye Gadahn (Leader/planner/operative of al Qaeda)

Adam Yahiye Gadahn is a U.S. citizen currently under indictment for treason and material support to al Qaeda. The charges are related to Gadahn's alleged involvement in a number of terrorist activities, including providing aid and comfort to al Qaeda and services for al Qaeda. He has become one of bin Laden’s senior operatives and believed to be hiding in the North Wazirstan area of Pakistan. He is a member of al Qaeda’s “media committee,” responsible for translating materials, producing videos and serving as a cultural interpreter. He serves as an al Qaeda spokesperson and has addressed the U.S. in at least five videos, warning of future terrorist attacks that will target Americans throughout the world. A charge of treason was added to Gadahn’s indictment for his propaganda activities on behalf of al Qaeda, becoming the first American citizen charged with treason in thirty years.139 As Gadahn has yet to be apprehended, much about his capture remains uncertain. Still, given that he is a U.S. citizen, under indictment in a federal civilian court, it can be assumed that foreign extradition or evidence gathering, given the pervasiveness of his videos, will not be problematic, thus satisfying the “circumstances of capture” and “character of evidence criteria” favoring an Article III trial. And while he has become a prominent spokesperson for al Qaeda, the ability to charge him with offenses under the laws of war in a military commission remains tenuous, particularly given the unsettled legal status of the material support and conspiracy offenses under the MCA.

These factors suggest that an Article III forum is most appropriate. See Appendix C for application of full criteria.

**Case Study 4: Adnan Shukrijumah** (Significant organizational roles within al Qaeda)

Shukrijumah was indicted after evidence connected him to Zazi and the co-conspirators involved in the attempted bombing of New York City's subway in 2009. One of the men involved in the New York City subway plot allegedly traveled to a terrorist training camp in North Waziristan during the summer of 2008 where he met with Shukrijumah, suggesting that he has assumed a position as a senior al Qaeda leader. In addition to his role in plotting the attempted subway bombing, Shukrijumah is thought to have had a role in planning a larger plot that included a failed terrorist attack in the United Kingdom. He is a Saudi-born permanent U.S. resident alien identified by KSM as an operative with permission to attack targets in the U.S. previously approved by bin Laden. His suspected activities range from surveillance of high-profile targets in New York's financial district to looking for weaknesses in the Panama Canal, to plotting to blow up apartment buildings in the U.S. Shukrijumah allegedly attended a terrorist summit in Pakistan in March 2004 where he met with a number of key al Qaeda members.

Shukrijumah remains at large so the nature of any evidence collection, interrogation or apprehension by foreign authorities remains speculative. However, the “character of evidence,” including testimony by some of the co-conspirators who pled guilty to the attempted bombing of the New York City Subway in 2009, negates the need for the government to rely on classified information or evidence provided by foreign authorities. As an indicted, named co-conspirator in the subway plot, he would also have to be *Mirandized*, thereby limiting the prospect of future torture or coercion allegations that might cast doubt upon the voluntariness of his statements.

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Based on the likely fulfillment of these criteria, an Article III court would be the most appropriate forum, consistent with where his co-conspirators were tried and convicted. See Appendix D for application of full criteria.

**Case Study 5: Sirajuddin Haqqani** (Taliban leaders or members of anti-coalition forces)

Sirajuddin Haqqani, a senior leader of the Haqqani terrorist network, has admitted planning an attack in 2008 against the Serena Hotel in Kabul that killed six people, including an American citizen. Haqqani also admitted to having planned the April 2008 assassination attempt on Afghan President Hamid Karzai. He has coordinated and participated in cross-border attacks against U.S. and Coalition forces in Afghanistan and is believed to be located in the Federally Administered Tribal Areas of Pakistan. As a leader of the insurgency in eastern Afghanistan, he has sought closer ties with foreign terrorist groups and has cultivated the more brutal tactics that the senior Taliban leadership has employed against coalition forces, to include assassinations, kidnappings, beheadings and deployment of suicide bombers. Afghan and American intelligence indicates that Haqqani collaborates with the Mullah Omar-led Taliban forces. As a leader of Taliban and insurgent forces in Afghanistan, Haqqani’s actions constitute war crimes against U.S. and Coalition forces, to include beheadings and the bombing of civilian structures that has resulted in the death of American citizens.

As a battlefield commander who regularly conducts his operations against U.S. forces and primarily targets military personnel, should Haqqani be captured, the “circumstances of his capture” would dictate that a military commission be convened. Informing this assessment is the fact that the conditions of his capture will likely involve a scenario where military exigencies

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will prevent an on-scene interrogation or search of his military compound or quarters. It is more plausible that any capture would be effectuated by special forces operating on intelligence that provides his whereabouts for a limited duration of time, giving military or intelligence officials a short window to conduct a capture operation. These likely circumstances militate toward a commission forum where hearsay evidence can be used to prove law of war offenses. As a leader of insurgent forces, Haqqani could also be held under a preventive detention regime for the duration of hostilities against the Taliban and its affiliated forces. See Appendix E for application of full criteria.

\[F=\text{Favorable to Article III }\quad U=\text{Unfavorable to Article III }\quad A=\text{Article III Court }\quad M=\text{Military Commission}\]

<table>
<thead>
<tr>
<th>Terrorist Suspect (Category)</th>
<th>Character of Evidence</th>
<th>Circumstances of Capture</th>
<th>Political/Public Will</th>
<th>Legitimacy of Proceedings</th>
<th>Recommended Forum</th>
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Table 3: Summary of Forum Choice Criteria Applied to Selected Terrorist Suspects

**PROPOSED RECOMMENDATIONS AND POLICY IMPLICATIONS**

U.S. counterterrorism efforts will be greatly enhanced by a policy that preserves a myriad of options in pursuing the prosecution of specifically identified overseas terrorism suspects. Relying on established criteria to make these decisions will demonstrate America’s commitment to the rule of law and will imbue the process with a legitimacy that the rest of the world will instantly recognize. A U.S. government policy that steadfastly adheres to the set of objective criteria proposed here will provide a predictable course of action for the future prosecution of
overseas terrorism suspects, cure the decision-making paralysis that has defined the decade since 9/11, and end the “situation where political pressure forces the federal government to forgo criminal prosecution…[as] that would mean the system is fundamentally broken.” Doing so recognizes the reality that any analytical framework is unworkable unless it factors in the importance of the Executive Branch’s willingness to make decisions that may be politically unpopular both domestically and internationally. In a similar vein, Benjamin Wittes noted that with the Administration’s recent acceptance of the controversial military commissions, it was time for President Obama “to embrace Guantanamo” as a symbol for a model detention regime and a rehabilitated military tribunal process consistent with the rule of law.

The Administration’s endorsement of Article III courts, military commissions and preventive detention as forums for incapacitating terrorist suspects explicitly recognizes that both the criminal law and law of war paradigms are applicable to the nation’s counterterrorism efforts. This sea change, while necessary, is fraught with inherent tensions, which can only be clarified through the strict application of the proposed criteria. In order to foster consistency in the forum decisions made within the two competing paradigms, the criteria should be applied to each case, with an enhanced focus placed on establishing a clearer line of demarcation between criminal acts and those offenses punishable under traditional law of war principles.

Through rigorous and sustained application of the criteria to future cases, trends will emerge. In the wake of the March 2011 Executive Order, a review of the most recent forum decisions suggests that certain factors have exerted a greater influence than others. Applying the criteria to these cases retroactively, particularly the jurisdiction of the alleged offense, the nature of the victims, the status of the perpetrator and the circumstances of apprehension or capture, it

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144 Mayer, at 63.
appears that a greater consideration was afforded to the military nature of the offense, targets, victims and affiliations as a means to determine the proper forum. When the target was a military vessel, those responsible were referred to military commission. Application of the criteria to al-Nashiri thus supports the Attorney General’s statement that "with regard to the Cole bombing, that was an attack on a United States warship, and that, I think, is appropriately placed into the military commission setting." Likewise, insurgents with operational command, such as Haqqani, are more apt to be referred to tribunals at Guantanamo. Given the Supreme Court’s proclivity to rely on established law of war doctrine in reaching its decisions in the detainee cases of the last decade, it is likely that it will continue this trend and ultimately rule that military commissions lack jurisdiction to prosecute terrorist suspects for conspiracy and material support offenses. Reinforcing this pattern are battlefield captures, traditionally under the purview of law of war doctrine, who are more likely to produce un-Mirandized statements, and thus, according to the “character of evidence” criteria, be tried by a military commission.

In evaluating the criteria, the factor “status of perpetrator of terrorist act,” i.e. the affiliation with terrorist organizations or insurgent forces, is situated within the framework under “political/public will” because it has become increasingly apparent that the reaction to announced forum choices has disproportionately influenced the decision-making process, as evidenced by the reversal of the KSM forum decision. An increased emphasis on the perpetrator’s status will clearly delineate the position and role that the suspected terrorist played in the operation and, potentially, assuage political and public outcry over decisions. Thus, focusing the criteria on questions such as whether the suspect was a member of those organizations covered by the AUMF and by placing greater emphasis on who planned the

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operation, will help to more clearly determine whether the suspect should be considered under a criminal law or law of war paradigm. This focus too will help alleviate the uncertainty that attends the conspiracy and material support offenses in military commissions; finite war crimes will be charged against those who more closely approximate traditional wartime actors. Since conspiracy and material support predominate the offenses charged in terrorism prosecutions, perpetrators who can only be charged with these crimes based on the nature of the evidence should be recommended for federal court, unless they are members of Taliban or insurgent forces, for which preventive detention is a more appropriate forum.

The broad range of offenses, both criminal and martial, and perpetrators, from operative to insurgent fighter, that will constitute the legal landscape of the future demands that each forum remain viable for the dispensation of justice to terrorists. In a statement regarding the future use of military commissions, House Judiciary Committee Chairman Lamar Smith commented, “[t]he Administration needs to develop a clear and consistent policy that treats all foreign terrorists as enemy combatants” to be tried by military commission. The Chairman is correct that a “clear and consistent policy” is necessary; it is misguided and detrimental to U.S. counterterrorism efforts, however, to implement a policy that predetermines one forum choice over another. Reliance upon a framework of objective criteria to inform forum choice will supplant a decision-making process that has permitted the legacy of Guantanamo to “engender a miasma of popular fear and political cowardice.”

The federal system has proven itself to be adequately equipped to handle national security cases and have proven quite capable of protecting sensitive sources, methods and

techniques of foreign intelligence collection from public disclosure.149 Reformed military commissions have an opportunity to acquit themselves in similar fashion. As the case studies demonstrate, the recommendation to prosecute Ghailani and al-Nashiri in an Article III court and military commission, respectively, were well-informed given the nature of the crimes, evidence and targets of the attacks. Applying the same criteria to KSM demonstrates that a military commission is objectively supportable, yet because he was first recommended for military commission, then for an Article III prosecution, and yet again awaits a military commission, it appears that political and public pressures exerted an undue influence on the decision, thus undermining any legitimacy that would associate with either forum. United States counterterrorism efforts will be greatly enhanced by a policy that not only preserves the option of pursuing prosecutions of specifically identified overseas terrorism suspects in the most appropriate forum, but reaches the decision by remaining faithful to established criteria.

Appendix A: Case Study of Abd al-Rahim al-Nashiri

Variable: Leaders, planners, operatives, facilitators involved in terrorist plots against U.S. targets

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<tr>
<th>Criteria to Assess Viability of Article III Prosecution</th>
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<th>Unfavorable</th>
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Appendix B: Case Study of Ahmed Ghailani

*Variable:* Leaders, planners, operatives, facilitators involved in terrorist plots against U.S. targets

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Appendix C: Case Study of Adam Yahiye Gadahn

Variable: Significant Organizational Role within al Qaeda or Affiliated Organizations

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Appendix D: Case Study of Adnan Shukrijumah

*Variable:* Leaders, planners, operatives, facilitators involved in terrorist plots against U.S. targets

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Appendix E: Case Study of Sirajuddin Haqqani

**Variable:** Taliban leaders and members of anti-Coalition militia groups

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<tr>
<td>• Nature of the victims</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>• Status of perpetrator of terrorist act</td>
<td></td>
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<tr>
<td>Perceived Legitimacy of the Proceedings</td>
<td></td>
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<tr>
<td>• Exercise of rights w/o significant variance from established rule of law norms</td>
<td>X</td>
<td></td>
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<tr>
<td>• Reaction of domestic/international community</td>
<td></td>
<td>X</td>
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<tr>
<td>• Jurisdiction over the alleged offense</td>
<td></td>
<td>X</td>
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