

## “ANYTHING BUT BUSH?”: THE OBAMA ADMINISTRATION AND GUANTANAMO BAY

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During the 2008 presidential campaign, Barack Obama soundly criticized the Bush Administration’s execution of the war on terrorism, especially the use of the detention facility at Guantanamo and the manner of interrogations conducted there.<sup>1</sup> The counterterrorism policy that then-Senator Obama described was robust—he declared willingness to order American military forces to take action in Pakistan upon receipt of “actionable intelligence” if Pakistan were unwilling to act<sup>2</sup>—but distinct from the policy then in place.

As President Obama has now surpassed the two-year anniversary of his inauguration, it is an opportune time to compare his administration’s counterterrorism policies with those of his predecessor. In a different symposium article, I concluded that there are high-level similarities between the policies of the two presidents.<sup>3</sup> Among the areas of agreement are the policies that military force is an appropriate (but not the only) tool for responding to al Qaeda, and that indefinite military detention of suspected al Qaeda and Taliban fighters is lawful.

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1. See Senator Barack Obama, Address at the United Church of Christ General Synod: A Politics of Conscience (June 23, 2007), [www.barackobama.com/2007/06/23/a\\_politics\\_of\\_conscience\\_1.php](http://www.barackobama.com/2007/06/23/a_politics_of_conscience_1.php) (“[W]e should close Guantanamo Bay and stop tolerating the torture of our enemies.”); see also Peter Finn, *Guantanamo Closure Called Obama Priority*, WASH. POST, Nov. 12, 2008, at A1; Kate Zernike, *McCain and Obama Split on Justices’ Ruling*, N.Y. TIMES, June 13, 2008, at A23.

2. See, e.g., Jeff Zeleny, *Obama Calls for Military Shift in U.S. Focus on Terrorism*, N.Y. TIMES, Aug. 2, 2007, at A12.

3. Tung Yin, *Broken Promises or Unrealistic Expectations? Comparing the Bush and Obama Administrations on Counterterrorism*, 20 TRANSNAT’L L. & CONTEMP. PROBS. (forthcoming 2011) (on file with author) [hereinafter Yin, *Broken Promises*].

George Santayana famously wrote, “Those who cannot remember the past are condemned to repeat it.”<sup>4</sup> If President Obama has largely followed his predecessor’s counterterrorism policies—including the continuing use of the detention facility at the U.S. naval base at Guantanamo Bay, Cuba—then it is fair to consider whether he is repeating the mistakes of the Bush Administration. To be clear, the “mistakes” discussed in this paper are ones of law and not of politics or military strategy. Reasonable minds can disagree about the wisdom of the 2007 “surge” in Iraq, President Obama’s decision to withdraw all U.S. combat brigades from Iraq in August 2010, or his decision to increase the number of U.S. combat troops in Afghanistan,<sup>5</sup> but proper evaluation of those decisions lies outside the realm of legal analysis.

This Article provides a critical assessment of the various legal issues arising out of the Bush and Obama administrations’ use of Guantanamo Bay as a detention facility for captured al Qaeda and Taliban fighters, as well as related proposals to prosecute the detainees in either military commissions or federal courts. President Obama has followed many of President Bush’s policies, though in some areas (such as advocating the use of federal court trials) he has charted a new course. Examination of each discrete legal issue reveals that some of the legal criticisms of the Bush Administration’s Guantanamo policy were wrong, and therefore the Obama Administration has not erred legally in continuing the course. In other areas, President Obama has rightly changed policy to avoid practices, such as waterboarding, that were regarded by many as of questionable legal validity. President Obama has thus avoided some of the past mistakes of the Bush Administration, but he has also arguably made new ones. President Obama’s bold campaign promise to close the detention facility at Guantanamo Bay within his first year in office has become an albatross around his neck with no prospect of fulfillment anytime soon.<sup>6</sup> His Justice Department’s proposal to prosecute several high-level al Qaeda detainees, including the suspected 9/11 mastermind, has

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4. GEORGE SANTAYANA, *THE LIFE OF REASON* 82 (Charles Scribner’s Sons 1955).

5. For a detailed discussion of the White House’s internal debate on the last point, see BOB WOODWARD, *OBAMA’S WARS* (2010).

6. See, e.g., Charlie Savage, *Closing Guantanamo Fades as a Priority*, N.Y. TIMES, June 26, 2010, at A13.

passed its one year anniversary and has managed only to generate bipartisan opposition.<sup>7</sup>

Part I of this Article identifies and analyzes whether different aspects of the government's Guantanamo detention program can be characterized as legal mistakes. Part II then develops the central thesis that President Obama's Guantanamo mistakes stem from the absence of a clear strategy for integrating military force and law enforcement in responding to the threat posed by al Qaeda. To be sure, the Bush Administration's policy suffered from a similar flaw. Whereas President Bush's policies reacted and overreacted to 9/11 with a short-term, "ends justify the means" approach, President Obama's policies appear in large measure to be a reaction and overreaction to President Bush's policies: "anything but Bush," in many respects.

#### I. IDENTIFYING AND ANALYZING OLD AND NEW MISTAKES

There is little doubt that the detention facility at the Guantanamo Bay naval base has contributed significantly to a negative worldwide impression of the United States's armed conflict against al Qaeda. But to call Guantanamo a mistake obscures the exact nature of the mistake or mistakes that one has in mind. Was the mistake the detention without criminal charges of several hundred suspected al Qaeda and Taliban fighters?<sup>8</sup> Was it the abusive and coercive tactics used in interrogating numerous detainees?<sup>9</sup> Was it the failure to implement any formal process to ascertain the combatant status of detainees until the summer of 2004?<sup>10</sup> Was it taking aggressive legal positions, such as the argument that federal courts lacked jurisdiction over the naval base because it was outside the United States?<sup>11</sup> Or was the mistake a new one: President Obama's failure to carry out his promise to close the Guantanamo detention

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7. See *infra* note 106 and accompanying text.

8. See David Bowker & David Kaye, Op-Ed, *Guantánamo by the Numbers*, N.Y. TIMES, Nov. 10, 2007, at A15.

9. See Carrie Johnson & Josh White, *Audit Finds FBI Reports of Detainee Abuse Ignored: Tactics Continued Against Detainees*, WASH POST, May 21, 2008, at A1.

10. Memorandum from the Deputy Sec'y of Def. to the Sec'y of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), <http://www.defense.gov/news/jul2004/d20040707review.pdf>.

11. See *Boumediene v. Bush*, 553 U.S. 723 (2008); *Rasul v. Bush*, 542 U.S. 466 (2004).

facility within his first year in office? Was the Obama Administration's insistence on federal court prosecutions for high-level al Qaeda suspects a mistake? Part I evaluates the legal issues underlying each of these potential mistakes, primarily from the perspective of whether President Obama appears to have learned from his predecessor's experiences.

#### A. *Detention Without Charges*

Because President Obama has yet to close the detention facility at Guantanamo Bay, there were still almost two hundred detainees at Camp Delta as of February 2011.<sup>12</sup> Although a small number of detainees have been designated for prosecution in military courts, most remain uncharged.<sup>13</sup>

During the early days of the armed conflict in Afghanistan, critics of the Bush Administration—primarily human rights groups, but also various European officials—decried the detention of suspected al Qaeda and Taliban fighters absent criminal charges.<sup>14</sup> Although this policy was controversial, it is far from clear that it was legally mistaken. In *Hamdi v. Rumsfeld*,<sup>15</sup> the Supreme Court upheld the President's authority, when augmented by congressional authorization for the use of military force,<sup>16</sup> to detain even U.S. citizens as "enemy combatants" without the need to bring criminal charges against them.<sup>17</sup> Justice Scalia wrote in dissent that the Constitution prohibited the indefinite military detention of an American citizen, and that the President's lawful options were to charge the citizen-detainee with a crime such as treason, release him, or seek congressional suspension of the privilege of habeas corpus.<sup>18</sup> To be

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12. See *By the Numbers*, MIAMIHERALD.COM (Nov. 27, 2007; updated Feb. 3, 2011), <http://www.miamiherald.com/2007/11/27/322461/by-the-numbers.html>.

13. See Charlie Savage, *U.S. Prepares to Lift Ban on Guantánamo Cases*, N.Y. TIMES, Jan. 20, 2011, at A11.

14. See, e.g., Joseph Lelyveld, "The Least Worst Place": *Life in Guantánamo*, in THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM 100, 101–02 (Richard C. Leone & Greg Anrig, Jr. eds., 2003); David Luban, *The War on Terrorism and the End of Human Rights*, in THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 219, 221–23 (Mark Tushnet ed., 2005).

15. 542 U.S. 507 (2004).

16. Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)).

17. *Hamdi*, 542 U.S. at 517.

18. *Id.* at 554 (Scalia, J., dissenting).

clear, Hamdi was detained at a naval brig in Virginia, not at Guantanamo Bay, and Justice Scalia's position relied crucially on Hamdi's American citizenship. As for the Guantanamo detainees, Justice Scalia's dissent in *Rasul v. Bush* argued forcefully that as aliens outside U.S. territory, they had no legal recourse to challenge their detention in U.S. courts.<sup>19</sup> Thus, Justice Scalia's objection to military detention of Hamdi was based on the unusual circumstance of his American citizenship and not a generalized objection to military detention of suspected al Qaeda or Taliban fighters.

The absence of an international equivalent of the *Hamdi* decision makes it harder to demonstrate conclusively that President Bush's decision to detain captured al Qaeda and Taliban fighters as enemy combatants was not a mistake. Nevertheless, there are reasons to doubt that indefinite military detention of such persons is a per se violation of international law. The International Committee of the Red Cross has, after a five-year study, concluded that in a noninternational armed conflict—which is how the Supreme Court characterized the war against al Qaeda in *Hamdan v. Rumsfeld*<sup>20</sup>—members of nonstate groups can be targeted as combatants where they have a “continuous combat function.”<sup>21</sup> Targeting is not the same as detaining,<sup>22</sup> but it would be anomalous to allow a nation to shoot non-state actors engaged in a continuous combat function but not to detain them should they be captured.

President Obama has not deviated from his predecessor's legal position regarding the legality of military detention of non-state actors such as al Qaeda members. It does not appear to have been a legal mistake, as domestic law clearly permits the President to detain persons pursuant to the Authorization for Use of Military Force (AUMF), and international law appears to permit it as well.

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19. 542 U.S. 466, 506 (2004) (Scalia, J., dissenting).

20. 548 U.S. 557, 629–30 (2006).

21. NILS MELZER, INTERPRETATIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 27 (2009).

22. *But see* Matthew C. Waxman, *Detention As Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365 (2008) (applying the rules of targeting with their acceptance of inherent error to justify detention).

B. *Abusive and Coercive Interrogation Tactics*

Stories about the abusive and coercive interrogation tactics used at Guantanamo Bay<sup>23</sup> (and their comparison to the abuses that occurred at the Abu Ghraib prison in Iraq with disastrous consequences)<sup>24</sup> no doubt played a significant role in inflaming public opinion about the detention facility. Other rumored mistreatment, such as the deliberate destruction of copies of the Koran, did not occur, was not substantiated, or was exaggerated or otherwise wrongly described, but was so incendiary as to add to the outrage over Guantanamo.<sup>25</sup> (Waterboarding, or simulated drowning, does not appear to have been used at Guantanamo, only in secret prisons operated by the Central Intelligence Agency (CIA) in Eastern Europe.)<sup>26</sup>

The Bush Administration sought, and obtained, legal opinions regarding the legality of the CIA's so-called enhanced interrogation techniques from the Office of Legal Counsel (OLC). The infamous "Standards of Conduct for Interrogation" memorandum authored by then-Deputy Attorney General John Yoo, which was not publicly released until 2005, opined that interrogation tactics might constitute degrading conduct but not torture so long as they did not cause physical pain equivalent to that caused by organ failure.<sup>27</sup> However, when Jack Goldsmith took over as Assistant Attorney General for OLC, he withdrew the Yoo memorandum because he concluded that it was flawed.<sup>28</sup> After Goldsmith's departure, then-Acting Assis-

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23. ERIK SAAR & VIVECA NOVAK, *INSIDE THE WIRE: A MILITARY INTELLIGENCE SOLDIER'S EYEWITNESS ACCOUNT OF LIFE AT GUANTANAMO* (2005).

24. See MAJOR GENERAL ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 8 (2004), available at [http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf) ("[Major General] Miller's team recognized that they were using JTF-GTMO operational procedures and interrogation authorities as baselines for its observations and recommendations."); Josh White, *Abu Ghraib Tactics Were First Used at Guantanamo*, WASH. POST, July 14, 2005, at A1.

25. See, e.g., Howard Kurtz, *Newsweek Apologizes: Inaccurate Report on Koran Led to Riots*, WASH. POST, May 16, 2005, at A1.

26. See JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 171-75 (2008).

27. U.S. Dep't of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, at 1-2 (Aug. 1, 2002), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf> [hereinafter OLC Interrogation Conduct Memo].

28. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 146 (2007).

tant Attorney General Dan Levin wrote a replacement memorandum that began by stating: "Torture is abhorrent both to American law and values and to international norms."<sup>29</sup> By the latter part of President Bush's tenure, the CIA had apparently abandoned its enhanced interrogation techniques.<sup>30</sup>

Even with the withdrawal of the Yoo memorandum and the elimination of waterboarding, the Bush Administration remained defined to its end by the aggressive interrogations that took place at Guantanamo and in the secret CIA prisons. Upon assuming office, President Obama issued an executive order limiting U.S. government interrogation methods to those approved of in the U.S. Army Field Manual<sup>31</sup>—a widely applauded decision.<sup>32</sup>

The weaknesses of the original "Standards of Conduct" memorandum have been catalogued in detail elsewhere,<sup>33</sup> but can be summarized as presenting an unpersuasively narrow definition of torture combined with seemingly unnecessary arguments about presidential power. The Levin memo that replaced it avoided those weaknesses, though John Yoo has argued that its primary effect was cosmetic rather than substantive: "Though it criticized our earlier work, the 2004 opinion included a footnote to say that all interrogation methods that earlier opinions had found legal *were still legal*."<sup>34</sup> To the extent that the Levin memo was more persuasive, it provided legal support for the government's interrogation policies at lower political cost.<sup>35</sup> The mistake, in other words, could be seen as relying on a legal memo that asserted more Executive Branch authority than was necessary to justify the government conduct in question.

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29. U.S. Dep't of Justice, Office of Legal Counsel, Memorandum for James B. Comey, Deputy Attorney General, *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A* (Dec. 30, 2004), <http://www.justice.gov/olc/18usc23402340a2.htm>.

30. See WOODWARD, *supra* note 5, at 49.

31. Exec. Order No. 13,491, 74 Fed. Reg. 4893, 4894 (Jan. 22, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/EnsuringLawfulInterrogations/](http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/).

32. See, e.g., Jim Dwyer, *An Honor Guard Comes Out for Obama's Ban on Torture*, N.Y. TIMES, Jan. 24, 2009, at A16; Scott Shane et al., *Obama Reverses Key Bush Policies, but Questions on Detainees Remain*, N.Y. TIMES, Jan. 23, 2009, at A16.

33. GOLDSMITH, *supra* note 28, at 146–51.

34. JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 183 (2006) (emphasis in original).

35. See, e.g., GOLDSMITH, *supra* note 28, at 164–65 (describing the Levin memo as "much more rigorous and balanced" and "more careful and nuanced").

President Obama avoided the controversy of his predecessor's mistakes regarding coercive interrogation policy by, in essence, banning such interrogation tactics altogether. This is a bright-line rule that has the virtue of publicly reaffirming our widely-accepted moral values. One can imagine, however, a situation (such as the "ticking time bomb" hypothetical)<sup>36</sup> in which the torture ban might be seen as a mistake, at least, in consequentialist terms. But the virtual impossibility of proving such a counterfactual suggests that President Obama's discontinuance of coercive interrogation methods cannot be seen as a mistake.

### C. Lack of Formal Process

Having captured thousands of suspected fighters in late 2001 in Afghanistan, the Bush Administration had to determine which individuals were the "worst of the worst" to be transferred to Guantanamo. If the United States, as has been alleged, paid the Northern Alliance a bounty of approximately \$5,000 for each suspected Taliban or al Qaeda fighter it turned over,<sup>37</sup> the mistaken identification of some noncombatants as enemy combatants is not surprising.

As described by then-Defense Secretary Donald Rumsfeld, the government used an informal process administered by an ad hoc group of lawyers, soldiers, and CIA agents to classify captured fighters, sending some to Guantanamo Bay and leaving others in Afghanistan.<sup>38</sup> Detainees were not provided counsel to contest their classification and had no opportunity to appeal.<sup>39</sup>

If the armed conflict in Afghanistan against the Taliban and al Qaeda was a traditional war between nations, then the Geneva Convention would call for "competent tribunals" to determine, at a minimum, whether detainees have forfeited the right to prisoner of war status: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the

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36. See, e.g., JOHN T. PARRY, UNDERSTANDING TORTURE: LAW, VIOLENCE, AND POLITICAL IDENTITY 73 (2010).

37. See P. Sabin West, Editorial, *Detainees Deserve Trials*, WASH. POST, Nov. 14, 2005, at A21.

38. See Tung Yin, *The Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL OF RTS. J. 1061, 1099 (2005) [hereinafter Yin, *Article III Courts*]; see also Ruth Wedgwood, *War Comes to Court*, WALL. ST. J., Apr. 20, 2004, at A20.

39. See Yin, *Article III Courts*, *supra* note 38.



categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."<sup>40</sup> As a matter of practice, the United States military has also convened such Article 5 hearings to determine whether a captured person is a combatant or a civilian.<sup>41</sup>

Because the likelihood of erroneously classifying a noncombatant as a combatant is higher in a conflict where the adversary engages in asymmetric warfare,<sup>42</sup> there is, if anything, a greater call for hearings in the current conflict than the traditional wars envisioned by the drafters of the Geneva Convention. The Bush Administration's failure to establish a formal process for determining the combatant status of Guantanamo detainees was therefore a legal mistake. The government essentially admitted as much in 2004, when it established Combatant Status Review Tribunals (CSRTs) to ascertain the combatant status for each Guantanamo detainee. The impetus for these CSRTs was the Court's decision in *Rasul v. Bush*, which held that federal courts had jurisdiction to issue writs of habeas corpus to Guantanamo detainees.<sup>43</sup>

Although the CSRTs represented a step up from the informal process used before, they were still subject to a number of criticisms. Detainees were not entitled to counsel and were provided a military officer to assist only as a "personal representative."<sup>44</sup> The detainee was entitled to see only the unclassified evidence supporting his classification as an enemy combatant;<sup>45</sup> the personal representative had access to the classified evidence but could not share it with the detainee.<sup>46</sup> In *Boumediene v. Bush*, the Supreme Court criticized the adequacy of the CSRT procedures in large part because of these perceived flaws.<sup>47</sup>

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40. See Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter Third Geneva Convention].

41. MAYER, *supra* note 26, at 120–21.

42. Terrorists, guerilla fighters, and other practitioners of asymmetric warfare often disguise themselves as civilians. The attacking nation may therefore err on the side of capturing civilians when unsure about their combatant status.

43. See Yin, *Article III Courts*, *supra* note 38, at 1100.

44. Memorandum from the Deputy Sec'y of Def. to the Sec'y of the Navy, *supra* note 10, at 1.

45. *Id.* at 2.

46. *Id.* at 1.

47. 553 U.S. 723, 767 (2008).

One detailed study of declassified transcripts from CSRT hearings noted that detainees were often unable to defend themselves because critical allegations were redacted.<sup>48</sup>

In addition to the CSRTs, which were convened once for each detainee, the Bush Administration also established annual Administrative Review Hearings (ARHs) following *Rasul*.<sup>49</sup> The ARHs were designed to determine whether the government was justified in continuing to hold detainees at Guantanamo. Although these too were criticized for their lack of adequate procedures,<sup>50</sup> numerous Guantanamo detainees were repatriated to their home countries as a result of ARH decisions.<sup>51</sup>

Thus, when President Obama assumed office in early 2009, the United States had in place formal processes for determining the combatant status and continued dangerousness of captured fighters. One could find fault with aspects of the CSRT and the ARH. Such criticisms ultimately reside, however, in the realm of policy debates because the Supreme Court has yet to decide what process is constitutionally due the Guantanamo detainees.<sup>52</sup>

Under President Obama, the Department of Defense has stayed the course: No new combatants have been sent to Guantanamo, and the Guantanamo detainee population has continued to shrink as a result of the determinations of additional ARHs. Here too, President Obama has followed the late-tenure policies of his predecessors. Both Presidents Bush and Obama can be said to have learned from the mistakes that President Bush made during his first term. The Obama Administration

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48. See Mark Denbeaux & Joshua Denbeaux, *No Hearing Hearings: CSRT: The Modern Habeas Corpus?* 21 (2007) (Seton Hall Pub. Law Res. Paper No. 951245, 2006), available at [http://papers.ssrn.com/so13/papers.cfm?abstract\\_id=951245](http://papers.ssrn.com/so13/papers.cfm?abstract_id=951245).

49. Memorandum from Gordon England, Sec'y of the Navy, to Sec'y of State, Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (Sept. 14, 2004), <http://www.defense.gov/news/Sep2004/d20040914adminreview.pdf>.

50. See, e.g., Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Non-criminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149, 209–10 (2005).

51. See, e.g., Press Release, U.S. Dep't of Def., Guantanamo Bay Detainee Administrative Review Board Decisions Completed (Feb. 9, 2006), <http://www.defense.gov/releases/release.aspx?releaseid=9302>.

52. *Boumediene*, 553 U.S. at 723, did hold that Congress could deny the Guantanamo detainees the right to file habeas petitions only in accordance with the Suspension Clause, but it said nothing about what due process rights the detainees have.

further refined matters by convening a special task force charged with evaluating the remaining detainees and recommending final dispositions for them. The task force concluded that most detainees should be repatriated, but that about fifty warranted indefinite detention.<sup>53</sup>

*D. Taking Aggressive Legal Positions*

In the initial round of litigation before the Supreme Court over the legality of indefinite military detention at Guantanamo, the Bush Administration first argued that federal courts lacked jurisdiction to entertain the federal habeas corpus petitions filed by the detainees, because they were noncitizens outside U.S. territory.<sup>54</sup> This legal position was based substantially on a post-World War II case, *Johnson v. Eisentrager*, in which the Court had held that German citizens convicted of war crimes and imprisoned in the U.S. controlled part of Berlin, Germany, had no constitutional rights and no right to challenge their detention by way of habeas corpus petitions.<sup>55</sup> Indeed, federal courts repeatedly held during the Clinton Administration that they lacked jurisdiction to hear claims by Haitian refugees who were diverted to Guantanamo by the U.S. Coast Guard.<sup>56</sup>

Notwithstanding these legal precedents, numerous critics complained that the Bush Administration had created a “legal black hole” in which it could act with impunity.<sup>57</sup> Had the President ordered the detainees to be taken out and shot to death, for example, there would have been no process with which to hold him legally accountable if federal courts lacked jurisdiction. The Bush Administration sought to allay this con-

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53. Peter Finn, *Panel on Guantanamo Backs Indefinite Detention for Some*, WASH. POST, Jan. 22, 2010, at A1.

54. See Brief for Respondents at 13, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 425739, at \* 12.

55. 339 U.S. 763, 780–81 (1950).

56. See *Cuban Am. Bar Ass’n v. Christopher*, 43 F.3d 1412, 1425 (11th Cir. 1995); *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1513–15 (11th Cir. 1992); *Bird v. United States*, 923 F. Supp. 338, 340–42 (D. Conn. 1996).

57. See, e.g., Kate Allen, *U.S. Administration Should Think Again About the Legal Black Hole Created at Guantanamo*, FIN. TIMES (London), Jan. 14, 2004, at 18 (calling Guantanamo a “legal black hole”); Matthew Hay Brown, *Detainees Await an Unknown Fate; Hundreds of Men Captured by Allied Forces in Afghanistan Remain in Custody, Uncharged, at the U.S. Navy Base in Cuba*, ORLANDO SENTINEL, July 20, 2003, at A1 (quoting British judges calling Guantanamo a “legal black hole”).

cern by declaring that the detainees would be treated humanely and “consistent[ly]” with the Geneva Convention,<sup>58</sup> but subsequent disclosure of the abuses at Guantanamo cast doubt on that declaration.

The Supreme Court rejected the Bush Administration’s “no jurisdiction” argument in *Rasul v. Bush*.<sup>59</sup> The opinion contained at least three different lines of reasoning as to why federal habeas corpus was available to the Guantanamo detainees. First, the Court found that there was a critical distinction between the Guantanamo detainees and the prisoners in *Eisen-trager*, namely that the latter had been convicted of military offenses, whereas the former had not had any status adjudication.<sup>60</sup> Second, the Court held that *Eisen-trager* was no longer good law insofar as its “statutory predicate” had been overruled.<sup>61</sup> Finally, the Court concluded that the extraterritorial location of the detainees was irrelevant because the writ could be directed against the Secretary of Defense, rather than the actual custodian.<sup>62</sup>

Each of these lines of reasoning had flaws.<sup>63</sup> For example, if the writ could be directed against the Defense Secretary, then it is hard to understand why Jose Padilla’s habeas petition was dismissed on the very same day for having been filed in a district that had no jurisdiction over his immediate custodian.<sup>64</sup> Under *Rasul*’s reasoning, Padilla should have been able to maintain his habeas petition in the Southern District of New York by also naming Defense Secretary Rumsfeld as his ultimate custodian. Regardless of whether *Rasul*’s reasoning was sound, however, it may have been an inevitable result given the Bush Administration’s hard-line position that (1) courts had no jurisdiction over habeas petitions from Guantanamo detain-

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58. See, e.g., Katharine Q. Seelye & Steven Erlanger, *A Nation Challenged: Captives; U.S. Suspends the Transport of Terror Suspects to Cuba*, N.Y. TIMES, Jan. 23, 2002, at A1.

59. 542 U.S. 466 (2004).

60. *Id.* at 476.

61. *Id.* at 479. The “statutory predicate” referred to in the opinion was *Ahrens v. Clark*, 335 U.S. 188 (1948). For more on this line of reasoning, see Yin, *Article III Courts*, *supra* note 38, at 1074–75.

62. See *Rasul*, 542 U.S. at 483–84.

63. See Yin, *Article III Courts*, *supra* note 38, at 1073–78.

64. *Rumsfeld v. Padilla*, 542 U.S. 426, 442 (2004).

ees and (2) there was then no existing reliable process for assessing the combatant status of detainees.<sup>65</sup>

To the extent that it was a mistake for the Bush Administration to have argued against all federal court jurisdiction by relying upon *Eisentrager* and the Haiti refugee precedents, it appears that President Obama has not learned from his predecessor, given the litigation posture that his Justice Department has taken in a key case involving habeas petitions filed by detainees at Bagram Air Base in Afghanistan.<sup>66</sup> Notwithstanding *Rasul* and subsequent Guantanamo cases, the Bush Administration had argued that federal courts lacked jurisdiction to hear these petitions. The case was still pending before the district court when President Obama assumed office, so the court asked whether the government intended to change its legal position on the jurisdictional question: "The government informed the district court that it 'adheres to its previously articulated position.'"<sup>67</sup>

The D.C. Circuit ultimately agreed with the government and reversed the district court's grant of the writ of habeas corpus in favor of the Bagram detainee.<sup>68</sup> One might conclude, therefore, that the Obama Administration somehow learned from the Bush Administration's mistakes.<sup>69</sup> This, however, would be an overly optimistic assessment. After all, the government had prevailed in the same D.C. Circuit in *Al Odah v. United States*,<sup>70</sup> using a similar lack of jurisdiction argument predicated on *Eisentrager*, only to be reversed by the Supreme Court in *Rasul*.

Predicting the Court's potential response to the government's argument in *Al-Maqaleh* is a dubious endeavor at best. If the Court were to affirm the D.C. Circuit, that result might

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65. See Yin, *Article III Courts*, *supra* note 38, at 1125 ("*Rasul* can best be defended as a shot across the bows of Congress and the President, warning the political branches that if they do not clean up their own mess, the Court will.>").

66. See *Al-Maqaleh v. Gates*, 605 F.3d 84, 87 (D.C. Cir. 2010).

67. *Id.* at 88.

68. *Id.* at 99.

69. Facetiously, one could surmise that the Obama Administration followed the old adage "if you can't beat 'em, join 'em" by hiring Neal Katyal as Deputy Solicitor General and having Katyal argue *Al-Maqaleh* on behalf of the government; Katyal had previously successfully argued *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), on behalf of the detainee against the United States.

70. 321 F.3d 1134, 1145 (D.C. Cir. 2003), *rev'd sub nom.*, *Rasul v. Bush*, 542 U.S. 466 (2004).

stem from two key factors. First, intervening authority (specifically, *Boumediene v. Bush*) has provided a more sophisticated legal framework for evaluating when federal courts have jurisdiction to hear habeas petitions filed by non-state-actor detainees. Second, Justice Elena Kagan has replaced Justice John Paul Stevens on the Court.

When the *Al Odah* case was argued to the Supreme Court (as *Rasul v. Bush*), the Bush Administration's argument against the Guantanamo detainees' habeas petitions was a brute force attack on the courts' jurisdiction to hear those petitions. Given the Haitian refugee precedents and *Johnson v. Eisentrager*, this was not an unreasonable strategy, but it would have required the Court to acknowledge that federal courts would be powerless to stop even the most outrageous government conduct at Guantanamo Bay.<sup>71</sup> In *Boumediene*, the Court devised a three-factor test for determining whether the Suspension Clause limited Congress's ability to restrict the availability of habeas at Guantanamo (as it sought to do through the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006): (1) the detainee's citizenship and status (that is, combatant or civilian), and the process used to make those determinations; (2) the places of capture and detention; and (3) "the practical obstacles inherent in resolving the prisoner's entitlement to the writ."<sup>72</sup> This test provides courts with much greater flexibility than the binary acceptance-rejection of *Eisentrager* urged by the parties in *Rasul*. The third factor in particular potentially allows courts to tailor habeas relief based on the extent to which such relief would intrude on the executive's war-waging capabilities; a habeas claim that would call for battlefield commanders to be recalled from the front line to testify at Guantanamo would likely be seen as too burdensome on the military.<sup>73</sup>

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71. For example, if federal courts lacked jurisdiction to hear habeas petitions from Guantanamo detainees, then the courts would be unable to stop the President from ordering the military to line up the detainees and shoot them. Perhaps that is the unavoidable consequence of the fact that federal courts have limited jurisdiction (both in subject matter and territorial reach), but it is not a palatable conclusion.

72. *Boumediene v. Bush*, 553 U.S. 723, 766 (2008).

73. *Cf. Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950) ("It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention . . .").

At first blush, the changeover in Court personnel from Justice Stevens to Justice Kagan might seem a strange factor to consider. From a purely partisan standpoint, one might wonder why the shift from Republican-appointed Justice Stevens to Democrat-appointed Justice Kagan would result in a decision favoring the government. Apart from the general unreliability of such crude assessments,<sup>74</sup> a key distinction is that Justice Kagan, unlike Justice Stevens but like Chief Justice John Roberts and Justice Samuel Alito, previously served in the Executive Branch. Based in part on this past experience, and in part on her previous academic writings, a number of commentators predicted when Justice Kagan was nominated that she would be a proponent of a strong Executive.<sup>75</sup> To be sure, Justice Kagan previously rejected the extreme form of the unitary executive theory that would free the President from any legislation purporting to restrict his executive powers.<sup>76</sup> Still, her *Presidential Administration* article argued that, as a matter of statutory interpretation, the President had far more authority to control administrative agencies than has generally been accepted.<sup>77</sup> In other words, then-Professor Kagan did not see the President as having the constitutional authority to disregard clearly binding

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74. A prime example of such unreliability is *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), in which the issue was whether the Executive Branch had the legal authority to detain a U.S. citizen without criminal charges as an “enemy combatant.” The vote was 5-4 in favor of such authority, but the majority lineup was not the usual five “conservatives”; rather, Justice Breyer joined Chief Justice Rehnquist and Justices O’Connor and Kennedy in a narrow plurality opinion, while Justice Thomas concurred in a broad, pro-Executive Branch opinion. Justice Scalia, joined by Justice Stevens, dissented in an opinion that went beyond the more narrow concurrence-dissent authored by Justice Souter.

75. See, e.g., Charlie Savage, *Kagan’s Writings Back Wider Executive Powers*, N.Y. TIMES, May 22, 2010, at A11 (quoting numerous law professors); see also JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 246 (2008) (describing how key Republican officials believed that Chief Justice Roberts and Justice Alito would be committed conservatives on the Court in part because their principles had been tested by the criticism they endured during their prior executive branch experience, which left-drifting Justices like Souter and Kennedy lacked). But see John Yoo, *An Executive Without Much Privilege*, N.Y. TIMES, May 26, 2010, at A27 (arguing that then-Professor Kagan’s rejection of the unitary executive theory belies the view that she is pro-Executive Branch).

76. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251 (2001) (“I accept Congress’s broad power to insulate administrative activity from the President.”).

77. *Id.*

congressional statutes, but she would read ambiguous statutes broadly in favor of the President.

When applied to the legal issues raised by Guantanamo Bay and the armed conflict against al Qaeda, Justice Kagan's position sounds familiar. She rejects the inherent Commander-in-Chief power thesis,<sup>78</sup> but her position also accepts the AUMF enabling thesis.<sup>79</sup> To the extent this is an accurate predictor of her future votes in counterterrorism cases, her position perhaps marks an important difference from her predecessor. For example, in *Hamdi v. Rumsfeld*,<sup>80</sup> one key issue was whether the President had the power to classify a U.S. citizen as an "enemy combatant" subject to indefinite military detention. Four Justices concluded that the AUMF, Congress's joint resolution passed a week after the 9/11 attacks, provided sufficient legal authority to the President.<sup>81</sup> A fifth, Justice Thomas, agreed that the AUMF empowered the President to detain U.S. citizens but also opined that the Commander-in-Chief Clause itself provided unilateral authority.<sup>82</sup> Two Justices concluded that Congress could provide such authority, but had not done so with the clarity needed under the circumstances.<sup>83</sup> The remaining two Justices, including Justice Stevens, dissented on the ground that citizens could not be subject to military detention.<sup>84</sup> Justice Kagan's *Presidential Administration* position would align her with the four-Justice plurality that read the AUMF broadly—and would appear to shift the center of gravity on presidential power matters in favor of the White House.

To be sure, nothing in the AUMF explicitly or even implicitly divests federal courts of jurisdiction that they would otherwise retain, so the assessment of Justice Kagan's potential vote is not that she would read the AUMF as doing so. Rather, the point is that although she, unlike proponents of a truly robust Article II, would accept that explicitly clear congressional statutes lim-

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78. See Tung Yin, *Structural Objections to the Inherent Commander-in-Chief Power Thesis*, 16 *TRANSNAT'L L. & CONTEMP. PROBS.* 965, 972–73 (2007).

79. *Id.* at 985.

80. 542 U.S. 507 (2004).

81. *Id.* at 517 (plurality opinion of O'Connor, J). Chief Justice Rehnquist and Justices Kennedy and Breyer joined the plurality opinion. *Id.*

82. *Id.* at 579 (Thomas, J., dissenting).

83. *Id.* at 544–45 (Souter, J., concurring in part and dissenting in part). Justice Ginsburg joined Justice Souter's opinion. *Id.*

84. *Id.* at 554 (Scalia, J., dissenting). Justice Stevens joined the dissent. *Id.*



iting the President's power would be binding, there are numerous ways in which she could vote to affirm the D.C. Circuit without having to conclude that the President was free to disregard explicit language in the federal habeas statute.

All of this is to say that if the Supreme Court were to grant certiorari in the *Al Maqaleh* case and to affirm the ruling that federal courts lack jurisdiction over Bagram Air Base, it might be because of the difference between Justices Kagan and Stevens on the scope of presidential power when augmented by Congress, not because of any lesson that President Obama learned from his predecessor's mistakes. And if the Court were to grant certiorari and reverse the D.C. Circuit, then President Obama would have made essentially the same mistake as President Bush by pressing the lack of jurisdiction argument.

#### *E. Prosecuting al Qaeda leaders*

The question of what to do with captured high-level al Qaeda leaders, such as suspected 9/11 mastermind Khalid Sheikh Mohammed, has vexed both the Bush and Obama Administrations. For those who believe that terrorists must be delegitimized and denied status as combatants, the appropriate course of action would be criminal prosecution. On the other hand, for those who want to exact lawful retribution, but fear that federal court trials will compromise national security by revealing classified information,<sup>85</sup> the appropriate course of action might be prosecution in a military court. Perhaps the best course of action is to leave the high-level suspected terrorists like KSM in military detention for the indefinite future.<sup>86</sup>

Faced with this conundrum, President Bush proposed the use of military commissions with rules and procedures that had the appearance, if not reality, of not cutting back too much on the rights of defendants.<sup>87</sup> As a result, much of the international community condemned the proposed military trials as

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85. See *Boumediene v. Bush*, 553 U.S. 723, 830 (2008) (Scalia, J., dissenting) (citing S. Rep. No. 110-80, at 14–15 (2007), for the proposition that Osama bin Laden received critical information from the “Blind Sheikh’s” defense lawyers).

86. See Benjamin Wittes & Jack L. Goldsmith, *The Best Trial Option for KSM: Nothing*, WASH. POST, Mar. 19, 2010, at A23 (noting the “great energy [expended] on a battle over the proper forum for an unnecessary trial” and arguing that leaving KSM in indefinite detention is a better solution).

87. See David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131 (2008).

sham courts. Former Attorney General Alberto Gonzales has candidly admitted that a primary reason his Justice Department prosecuted “shoe bomber” Richard Reid in a federal court, rather than leaving it to the Defense Department to try him in a military court, was that Reid’s home nation, Great Britain, would not have tolerated having its citizen tried in such a forum.<sup>88</sup> Although the Bush Administration’s decision may be understandable as a matter of international diplomacy—placating a much needed ally in the armed conflict in Afghanistan and the then-impending war in Iraq—it makes less sense as legal policy when citizens of other equally friendly nations such as Canada and Australia were designated for prosecution in those same military commissions.<sup>89</sup>

As a candidate, Senator Barack Obama consistently criticized the Bush Administration’s military commissions.<sup>90</sup> Upon assuming the Presidency, however, Obama charted a less definitive course. Criminal prosecution has indeed been a staple of President Obama’s counterterrorism efforts. During the past two years, the Obama Administration has prosecuted a number of high-profile terrorists in federal court, including: Faisal Shahzad, the Times Square bomber;<sup>91</sup> Najibullah Zazi;<sup>92</sup> Umar Farouk Abdulmutallab, the “underwear” bomber;<sup>93</sup> and Ahmed Khalfan Ghailani, suspected of being the al Qaeda member who plotted the 1998 bombings of the United States Embassies in Kenya and Tanzania.<sup>94</sup> And Attorney General Holder controversially de-

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88. Alberto R. Gonzales, *Waging War Within the Constitution*, 42 TEXAS TECH L. REV. 843, 867 (2010).

89. The first Guantanamo detainee to be convicted (by guilty plea) in a military commission was David Hicks, an Australian citizen. See William Glaberson, *Australian to Serve Nine Months in Terrorism Case*, N.Y. TIMES, March 31, 2007, at A10. Canadian Omar Khadr had long been slated for prosecution in a military commission, eventually pleading guilty in such a forum. Charlie Savage, *Judge Delays Resumption of Guantanamo Trial*, N.Y. TIMES, Oct. 14, 2010, <http://www.nytimes.com/2010/10/15/us/15gitmo.html>

90. See Scott Shane et al., *Obama Reverses Key Bush Security Policies*, N.Y. TIMES, Jan. 23, 2009, at A16.

91. See Michael Wilson, *Judgment Day in Two High-Profile Cases: Times Square’s Would-Be Bomber is Defiant as He Gets a Life Term*, N.Y. TIMES, Oct. 6, 2010, at A25.

92. A.G. Sulzberger & William K. Rashbaum, *Guilty Plea Made in Plot to Bomb New York Subway*, N.Y. TIMES, Feb. 22, 2010, at A1.

93. Carrie Johnson, *Detroit Airline Bomb Suspect Indicted*, WASH. POST, Jan. 7, 2010, at A4.

94. Benjamin Weiser, *Ex-Detainee Gets Life Sentence in Embassy Blasts*, N.Y. TIMES, Jan. 25, 2011, at A18.

clared his intention to prosecute 9/11 mastermind KSM and several other high-level al Qaeda suspects in a federal court in New York City, though that effort has been stalled for a year because of fierce resistance from multiple sources.<sup>95</sup>

President Obama did not disavow the use of military commissions, however, and in the second half of 2010 his administration successfully prosecuted Ibrahim Ahmed Mahmoud al-Qosi and Omar Khadr in military courts.<sup>96</sup> Numerous other detainees remain slated for military prosecution. Of course, the procedural rules in place had changed because of Congress's enactment of the Military Commissions Act of 2009.<sup>97</sup> Accordingly, the point is not to suggest here that President Obama has simply replicated President Bush's military commissions. It is to say that President Obama has apparently agreed that some cases are appropriately prosecuted in the military system.

Moreover, of the federal court prosecutions identified above, it is likely that most, if not all, would have been handled in identical fashion by the Bush Administration. The clearest analogue to Abdulmutallab is Richard Reid, who tried to blow up a transatlantic flight by setting off explosives concealed in his shoes. Abdulmutallab's use of his underwear to conceal explosives was a natural response to a Transportation Security Agency requirement that airline passengers pass their shoes through machine scanners. Reid was indicted in a federal court and chose to plead guilty.<sup>98</sup>

While there are no perfect analogues to Shahzad and Zazi, the Bush Administration did prosecute in federal court a number of Americans who formulated plots (of varying degrees of seriousness) to blow up buildings: the Fort Dix pizza delivery

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95. See *infra* note 106 and accompanying text.

96. Stipulation of Fact, *United States v. Khadr*, 717 F. Supp. 2d 1215 (C.M.C.R. 2010) (No. 07-001), available at [http://media.miamiherald.com/smedia/2010/10/26/19/stip2.source.prod\\_affiliate.56.pdf](http://media.miamiherald.com/smedia/2010/10/26/19/stip2.source.prod_affiliate.56.pdf); Charlie Savage, *Guantanamo Detainee Pleads Guilty in Terror Case*, N.Y. TIMES, July 7, 2010, at A15; see also Scott Shane & Mark Lander, *Obama, in Reversal, Clears Way for Guantanamo Trials to Resume*, N.Y. TIMES, Mar. 8, 2011, at A19 ("President Obama on Monday reversed his two-year-old order halting new military changes against detainees at Guantanamo Bay, Cuba, permitting military trials to resume with revamped procedures but implicitly admitting the failure of his pledge to close the prison camp.").

97. Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 1801-07, 123 Stat. 2190 (2009).

98. Shelley Murphy, *Defiant Reid Pleads Guilty*, BOSTON GLOBE, Oct. 5, 2002, at A14.

plot;<sup>99</sup> the Lackawanna Six;<sup>100</sup> the Portland Cell,<sup>101</sup> and others.<sup>102</sup> It is true that Shahzad and, to a lesser extent Zazi, posed a far greater and more imminent threat than those Bush Administration targets posed, but it seems unlikely that the degree and imminence of threat would have affected classification decisions. After all, John Allen Muhammad and Lee Boyd Malvo, who together terrorized the Washington, D.C. area in a shooting spree that killed ten people in October 2002,<sup>103</sup> were prosecuted—and not even in federal court, but in state courts<sup>104</sup>—even though there was evidence that Muhammad was an al Qaeda sympathizer.<sup>105</sup>

The key difference between the Bush and Obama Administrations regarding criminal prosecution of al Qaeda-related terrorism, then, has been the proposed disposition of KSM and other high-level al Qaeda suspects. If the decision to try KSM in a military commission was a mistake because of the international and domestic condemnation of those commissions, then

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99. Dale Russakoff & Dan Eggen, *Six Charged in Plot To Attack Fort Dix: 'Jihadists' Said To Have No Ties to Al-Qaeda*, WASH. POST, May 19, 2007, at A1.

100. David Staba, *New York Man in Qaeda Case Will Serve 8 Years*, N.Y. TIMES, Dec. 10, 2003, at A28.

101. Press Release, FBI, *Two Defendants in 'Portland Cell' Case Plead Guilty to Conspiracy to Contribute Services to the Taliban, Federal Weapons Charge* (Sept. 18, 2003), <http://www.fbi.gov/news/pressrel/press-releases/two-defendants-in-portland-cell-case-plead-guilty-to-conspiracy-to-contribute-services-to-the-taliban-federal-weapons-charges>.

102. Indeed, the only American citizens suspected of al Qaeda or Taliban membership who were not treated as criminal defendants by the Bush Administration were Jose Padilla and Yaser Esam Hamdi. Both were classified as enemy combatants and detained in naval briggs in the United States. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004). However, even before the end of President Bush's first term in office, the government had repatriated Hamdi to Saudi Arabia pursuant to a negotiated agreement. *See* Tung Yin, *Procedural Due Process To Determine "Enemy Combatant" Status in the War on Terrorism*, 73 TENN. L. REV. 351, 357 (2006). As for Padilla, before President Bush left office in early 2009, the Defense Department transferred Padilla to the Justice Department's custody, and the government successfully prosecuted him for providing material support to a designated foreign terrorist organization. *See* Abby Goodnough & Scott Shane, *Padilla Is Guilty On All Charges in Terror Trial*, N.Y. TIMES, Aug. 17, 2007, at A1.

103. *See* Ian Urbina, *A Sniper Who Killed 10 Is Executed in Virginia*, N.Y. TIMES, Nov. 11, 2009, at A20.

104. Tom Jackman, *Sniper Case Goes Before Va. High Court*, WASH. POST, Nov. 3, 2004, at B1.

105. *John Allen Muhammed*, N.Y. TIMES, Nov. 10, 2009, [http://topics.nytimes.com/topics/reference/timestopics/people/m/john\\_allen\\_muhammad/index.html](http://topics.nytimes.com/topics/reference/timestopics/people/m/john_allen_muhammad/index.html).

President Obama largely avoided that mistake. But his administration's continuing inability to initiate criminal prosecution of KSM suggests a new mistake of legal policy.

The fierce resistance to the planned KSM trial plan stems from a political mistake, in the sense that the objections to the plan rested on pragmatic, political grounds, not legal ones. Politicians such as New York Mayor Michael Bloomberg and Senator Charles Schumer, among others, complained about the anticipated cost of providing adequate security during the trial as well as the massive disruption to downtown New York that such security procedures would cause.<sup>106</sup> The aspect of the mistake that can be ascribed to law or legal policy, however, is the Obama Administration's failure, as of late 2010, to propose a way of implementing civilian trials that respond to those concerns while maintaining the critical attributes of federal courts—namely, public juries and Article III judges. To address security concerns without causing upheaval in New York City, the government could, for example, hold the trial with a federal judge and a jury selected from within the Southern District of New York, but on a nearby military base.<sup>107</sup> The Obama Administration's continuing paralysis—insisting that it will still try KSM in a civilian trial but making no effort to implement such a trial—must be viewed as a mistake, both political and legal.

#### *F. Seeking to Close Guantanamo Bay*

President Bush recognized the negative impact that Guantanamo Bay had on the United States's image and even indicated in 2006 that he would have preferred to close the base if he could have; however, he continued to assert the need for the detention facility to incapacitate "some people that are darn dangerous," at least until the government could find suitable courts to prosecute them.<sup>108</sup> Notwithstanding this defense of the Guantanamo Bay detention facility, the Bush Administration was at the same time working steadily to reduce the number of detainees by returning them to their home countries.

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106. Jane Mayer, *The Trial: Eric Holder and the Battle over Khalid Sheikh Mohammed*, THE NEW YORKER, Feb. 15, 2010, at 52.

107. Fort Dix, New Jersey, for example, is about seventy-five miles from New York City.

108. Josh White, *Military Officials Cancel Guantanamo Visits by Lawyers and Journalists*, WASH. POST, June 15, 2006, at A22.

Some of these repatriated detainees were prosecuted in their home countries,<sup>109</sup> others were simply monitored,<sup>110</sup> and still others were essentially free of any restrictions.<sup>111</sup>

Both presidential candidates during the 2008 general election campaign (John McCain and Barack Obama) pledged to close the Guantanamo detention facility upon assuming office.<sup>112</sup> As the victor, President Obama issued an executive order within days of his inauguration directing the Defense Department “promptly to close detention facilities at Guantanamo.”<sup>113</sup>

Had President Obama fulfilled his campaign promise to close Guantanamo within his first year in office, the question of whether he had learned from the mistakes of the past administration might have been answered quite differently. As it is, whatever goodwill President Obama earned during his campaign for plotting a different course than his predecessor has largely dissipated because of his unwillingness or inability to fulfill his pledge.

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109. Peter Finn, *Most Guantanamo Detainees Low-Level Fighters*, WASH. POST, May 29, 2010, at A3.

110. William Glaberson, *Hurdles Frustrate Effort To Shrink Guantanamo*, N.Y. TIMES, Aug. 9, 2007, at A1.

111. In a few instances, detainees were not returned to their home countries, but to other foreign countries that had agreed to accept them. One high profile case involved twenty-two Chinese Uighurs captured in Afghanistan after having allegedly trained with the Taliban, supposedly in an effort to fight the Chinese government’s oppression of their ethnic group. After the Defense Department determined that most of the Uighurs were “no longer enemy combatants,” it sought to release them from Guantanamo. The Uighurs, however, did not want to return to China, where they believed they would face torture and political persecution. They wanted admission to the United States, but the Bush Administration refused. Five of the Uighurs were eventually sent to Albania, and several others to Palau and Bermuda. Warren Richey, *Supreme Court Declines Case: US Can Move Detainees Without Notice*, CHRISTIAN SCI. MONITOR, March 22, 2010, at 1, available at <http://www.csmonitor.com/USA/Justice/2010/0322/Supreme-Court-declines-case-US-can-move-detainees-without-notice>.

112. See Obama, *supra* note 1 (“[W]e should close Guantanamo Bay and stop tolerating the torture of our enemies.”); see also Peter Finn, *Guantanamo Closure Called Obama Priority*, WASH. POST, Nov. 12, 2008, at A1; Steven Lee Myers, *Bush Decides to Keep Guantánamo Open*, N.Y. TIMES, Oct. 21, 2008, at A16 (“Both presidential candidates, Senators John McCain and Barack Obama, have called for closing Guantánamo.”).

113. Exec. Order No. 13,492, 74 Fed. Reg. 4897, (Jan. 22, 2009).

## II. A NORMATIVE ANALYSIS OF MISTAKES, OLD AND NEW

The preceding part of this article analyzed a number of legal issues surrounding military detention at Guantanamo Bay and suggested that on some matters, President Obama learned from the mistakes of his predecessor and charted an error-free course (aggressive interrogation methods), on others he appears to be on course to make the same mistakes (aggressive legal positions with regard to courts' jurisdiction), and on still others he had avoided his predecessor's mistakes but seems to be making new ones (military commissions). Part II seeks to diagnose the likely causes of those new mistakes.

Some of the Obama Administration's new mistakes are probably the result of overreaction to Bush Administration practices and policies. To be clear, the adoption of different policies is not, in itself, reflective of overreaction; a new administration, especially of a different political party, would be expected to change course in a number of areas. Rather, mistakes from overreaction are symptomatic of taking a contrary position seemingly for the sheer sake of doing so, without adequate consideration of the consequences of such a position or development of the legal theory underlying that position. The Obama Administration's pledges to close the Guantanamo Bay detention facility and to prosecute KSM in a federal court bear the hallmarks of overreaction.

A. *Guantanamo*

The decision to close—or try to close—the Guantanamo detention facility could have resulted from various underlying motivations. President Obama could have decided to abandon the military force paradigm altogether and rely strictly on criminal prosecutions in federal courts to incapacitate suspected al Qaeda and Taliban fighters. Alternatively, he could have decided to close the Guantanamo detention facility simply because of its indelible association with the excesses (coercive interrogation, the legal “black hole”) of the Bush Administration. Or he might simply have desired to improve the conditions of detention for the Guantanamo detainees, possibly even going so far as to accord POW-equivalent status to all remaining detainees.

Each of these motivations and justifications would lead to different approaches to pursuing the war on terrorism. Forsak-

ing the tools of military force would mean that al Qaeda suspects would have to be captured or arrested by Afghan or Pakistani law enforcement (depending on where Osama bin Laden and others are hiding) and then extradited (or rendered)<sup>114</sup> to the United States. Many Guantanamo detainees would have to be either charged with a federal crime or repatriated to their home countries.<sup>115</sup> Although doubts might exist about the ability of Afghan and Pakistani law enforcement to carry out such arrests,<sup>116</sup> this approach would also symbolically define al Qaeda's terrorism as a mere crime, as opposed to warfare. Some counterterrorism experts have argued that defeating terrorist groups requires delegitimizing them by treating them as common criminals because terrorists want to be seen as freedom fighters.<sup>117</sup>

On the other hand, the closing of the Guantanamo detention facility—while ending the perceived excesses of the Bush Administration—would not be inconsistent with continuing detention of suspected al Qaeda fighters as enemy combatants. Humane detention for purely preventative incapacitation, with appropriate due process standards to verify the combatant status of each detainee, could take place anywhere that the detainees are not exposed to battlefield attacks.<sup>118</sup>

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114. Rendition is the use of methods other than formal extradition to obtain custody of a person in a foreign country.

115. Suspected Taliban fighters could still be detained as part of the state of armed conflict in Afghanistan, although the nature of that armed conflict has changed from an international conflict between the U.S. and Afghanistan to a counterinsurgency fight.

116. See, e.g., STEVE COLL, *GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001*, at 292–94 (2004); C.J. Chivers et al., *The War Logs: The Afghan Struggle: A Secret Archive*, N.Y. TIMES, July 26, 2010, at A1 (noting government documents showing that Pakistani military is “at best uncooperative and at worst [working] from the shadows as an unspoken ally” of the Taliban).

117. See, e.g., MIKE GERMAN, *THINKING LIKE A TERRORIST: INSIGHTS OF A FORMER FBI UNDERCOVER AGENT* 35, 81–82 (2007) (noting that terrorists “hate being called criminals” and that terrorists see themselves as soldiers fighting against an oppressive government); Wesley K. Clark & Kal Raustiala, *Why Terrorists Aren't Soldiers*, N.Y. TIMES, Aug. 8, 2007, at A19.

118. But see Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003–2010*, 51 VA. J. INT'L L. 549, 629–32 (2011) (suggesting that the U.S. will have to begin shutting down overseas detention facilities due to developing strategic and diplomatic changes).



Finally, keeping the detention facility open but reforming the detention conditions would bring the United States into clear compliance with the Supreme Court's interpretation of Common Article 3 of the Geneva Conventions.<sup>119</sup>

None of these underlying motivations matches up to the reality of the Obama Administration's counterterrorism policies. Not only has the U.S. continued to detain suspected al Qaeda members without charges, but it has also increased the rate of targeted killings via unmanned aerial drones in Afghanistan and Pakistan.<sup>120</sup> Such drone strikes are arguably legal under domestic and international law as either self-defense<sup>121</sup> or armed conflict,<sup>122</sup> though this is far from settled.<sup>123</sup> Targeted killings of this sort, however, cannot generally be justified as law enforcement actions.<sup>124</sup>

Nor has the Obama Administration appreciably improved the conditions of detention for Guantanamo detainees compared to those in existence at the end of President Bush's term. If anything, President Obama's proposal to buy an unused state prison facility and to transfer detainees there<sup>125</sup> would be a step in the wrong direction from the standpoint of conditions of confinement.

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119. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 629 (2006) (holding that Common Article 3 is applicable to the armed conflict between the United States and al Qaeda, which is "not of an international character").

120. Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in *LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM* 346, 346–47 (Benjamin Wittes ed., 2009).

121. See U.N. Charter art. 51; Anderson, *supra* note 120, at 366–70.

122. The most prominent statement in this regard may be State Department Legal Advisor Harold Koh's speech to the American Society of International Law, in which he defended the use of unmanned aerial drones as lawful within the law of armed conflict or self-defense. See Renee Dopplick, *ASIL Keynote Highlight: U.S. Legal Adviser Harold Koh Asserts Drone Warfare Is Lawful Self-Defense Under International Law*, INT'L LAW BLOG (Mar. 26, 2010), [http://insidejustice.com/law/index.php/intl/2010/03/26/asil\\_koh\\_drone\\_war\\_law](http://insidejustice.com/law/index.php/intl/2010/03/26/asil_koh_drone_war_law).

123. See Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, in *SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT* (Simon Bronitt ed., forthcoming 2011), available at <http://ssrn.com/abstract=1501144>.

124. See Yin, *Broken Promises*, *supra* note 3.

125. Peter Slevin, *Illinois Prison Picked for Detainees: Congress Must Vote on Plan*, WASH. POST, Dec. 16, 2009 at A3. This proposal was blocked by Congress's unwillingness to appropriate the necessary funds. Stephen Dinan, *Obama's Gitmo Plan Takes Another Hit*, WASH. TIMES, May 28, 2010, <http://www.washingtontimes.com/news/2010/may/28/senate-panel-strips-funding-illinois-prison>.

Transferring military detainees to a prison facility would likely violate the Third Geneva Convention, if it were to apply. The Third Geneva Convention forbids the interning of prisoners of war in “penitentiary establishments (prisons, penitentiaries, convict prisons, etc.) to undergo disciplinary punishment therein.”<sup>126</sup> At present, Camp Delta, the Guantanamo detention facility, consists of numerous camps with different levels of security. Camp 4’s dormitory units are “aimed at enabling a limited number of captives the opportunity to interact with one another.”<sup>127</sup> Camp 4 detainees can play sports, chess, cards, and other games; eat together; and have access to books and magazines.<sup>128</sup> Camp 4 fairly resembles a prisoner of war camp.<sup>129</sup> Granted, one might argue that the transfer proposal was not for the purpose of punishment, but those detainees being housed in Camp 4 would have experienced a severely negative change in conditions of confinement. The Third Geneva Convention also obligates the Detaining Power (that is, the U.S.) to intern prisoners of war “under conditions as favorable as those for the forces of the Detaining Power who are billeted in the same area.”<sup>130</sup>

Of course, al Qaeda members are not entitled to prisoner of war status because they do not meet the requirements for such status.<sup>131</sup> The Taliban, on the other hand, are arguably entitled to prisoner of war status because they are at a minimum “[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining

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126. Third Geneva Convention, *supra* note 40, art. 97.

127. See *Guantanamo Bay—Camp Delta*, GLOBALSECURITY.ORG, [www.globalsecurity.org/military/facility/guantanamo-bay\\_delta.htm](http://www.globalsecurity.org/military/facility/guantanamo-bay_delta.htm) (last visited Feb. 15, 2011) [hereinafter *Guantanamo Bay*]; see also Peter Jan Honigsberg, *Inside Guantanamo*, 10 NEV. L.J. 82, 94–101 (2009).

128. *Guantanamo Bay*, *supra* note 128.

129. See David Glazier, *Playing by the Rules: Combating al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 1041–42 (2009).

130. Third Geneva Convention, *supra* note 40, art. 25.

131. See, e.g., *id.* art. 4; U.S. Dep’t of Justice, Office of Legal Counsel, Memorandum Opinion for the Counsel to the President, Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949, at 2 (Feb. 7, 2002) [hereinafter OLC Geneva Convention Memo], <http://www.justice.gov/olc/2002/pub-artc4potusdetermination.pdf>. One need not be a professional or conscripted soldier to qualify as a prisoner of war, but such nonarmed forces members must fight in conformity with the laws of war. See Third Geneva Convention, *supra* note 40, art. 4(2),(6). Because al Qaeda engages in terrorism specifically directed against civilians, it violates the requirement of distinguishing between lawful targets (combatants) and unlawful targets (civilians).

Power.”<sup>132</sup> The Bush Administration had declared the Taliban covered by the Third Geneva Convention but ineligible en masse for prisoner of war status because of their violations of the laws of war.<sup>133</sup> This legal conclusion was heavily criticized on the ground that prisoner of war status should have been forfeited for violating the laws of war based on individual determinations.<sup>134</sup>

Notwithstanding its determination that the al Qaeda and Taliban fighters were not entitled to prisoner of war status, the Bush Administration nevertheless declared in 2002 that it would treat them consistent with such status.<sup>135</sup> The actual treatment of many detainees belied this claim.<sup>136</sup> To the extent that the opening of Camp 4 represented something of a subsequent effort to fulfill President Bush’s promise to treat al Qaeda and Taliban detainees consistent with the Third Geneva Convention, President Obama’s unsuccessful effort to move them to an unused state prison facility would have returned them to something like pre-Camp 4 conditions. To be fair, the prison move would not represent a complete return to the 2002 version of the Bush Administration’s policies. There was no indication, for example, that President Obama intended to reinstitute coercive interrogations. Still, it would have been a regression from the conditions of confinement in existence when President Obama assumed office.

The unused state prison transfer proposal is symptomatic of an overreaction on the part of the Obama Administration.

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132. See Third Geneva Convention, *supra* note 40, art. 4(3).

133. See OLC Geneva Convention Memo, *supra* note 131, at 2 (“We believe that, based on the facts provided by the Department of Defense . . . the President has reasonable grounds to conclude that the Taliban, as a whole, is not legally entitled to POW status . . .”).

134. See, e.g., Lawrence Azubuike, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint*, 19 CONN. J. INT’L L. 127, 143–54 (2003) (examining the POW status of Taliban and al Qaeda detainees); Omar Akbar, Note, *Losing Geneva in Guantanamo Bay*, 89 IOWA L. REV. 195, 215–20 (2003) (analyzing POW status of both al Qaeda and Taliban detainees under the Third Geneva Convention); Amnesty Int’l, Memorandum to the US Government on the Rights of People in U.S. Custody in Afghanistan and Guantanamo Bay (Apr. 13, 2002), <http://www.amnesty.org/en/library/info/AMR51/053/2002>; Human Rights Watch, Background Paper on Geneva Convention and Persons Held by U.S. Forces (Jan. 29, 2002), <http://hrw.org/legacy/backgrounder/usa/pow-bck.htm>.

135. See Seelye & Erlanger, *supra* note 58.

136. See *id.*

Rather than identify and address the remaining problems with the Guantanamo detention facility, the proposal simply would have worsened the conditions of confinement for many detainees without any countervailing benefit. True, by bringing the detainees onto United States soil, the government would have to recognize and afford constitutional due process, but in light of the Court's rulings in *Rasul* and *Boumediene*, that geographic distinction may be of less significance than it was previously. Transferring detainees from Guantanamo to an unused state prison facility would have been change merely for its own sake, without any meaningful motivation other than to do something different from what the previous administration had done. Of course, President Obama did not stake out the approach most contrary to his predecessor's, which would have been to prosecute detainees in federal court where possible and otherwise to release them. That approach at least would have had the virtue of transparent and clear principles (no matter how potentially disastrous). Instead, what the President has left us with is an approach untethered to any underlying articulation of the government's basis for detention.

A more coherent approach would have been first to articulate the legal status of those persons captured pursuant to the AUMF and their corresponding rights (whether based on the President's interpretation of the Constitution or the Geneva Convention or on a new executive order), then determine the disposition of their detention. For example, President Obama could have declared that he would treat all Guantanamo detainees as if they were prisoners of war unless they were individually stripped of such status by a competent tribunal, as provided for in the Third Geneva Convention. This would have entailed dismantling parts of the detention facility and interning all detainees in Camp 4-like conditions. Whether detention continued at Guantanamo Bay or within the U.S. or elsewhere in the world would fade in significance compared to the actual conditions of detention. As it is, President Obama's promise to close the Guantanamo Bay detention facility appears unlikely to be fulfilled any time soon, and it is increasingly difficult to avoid drawing the conclusion that the promise was made rashly with the primary motivation of staking out a position different from that of the Bush Administration.

*B. Federal Court Trials*

As with the quixotic pledge to close Guantanamo, the Obama Administration's as of yet unfulfilled plan to try KSM in a federal court bears the hallmarks of overreaction. No overarching principle, apart from expedience, explains the Obama Administration's determination that some Guantanamo detainees, like KSM, should be tried in civilian court while others should be tried in military commissions.

To the extent that one's baseline of appropriate procedures is that of a federal court, governed by the Constitution, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence, then it is readily clear that the Bush Administration's military commissions fell short of that baseline. One of the reasons the Supreme Court invalidated the Bush Administration's military commissions was that the procedural rules for those commissions violated the uniformity requirement set forth in Article 36 of the Uniform Code of Military Justice.<sup>137</sup> That statutory provision requires that the procedures used in military courts, including military commissions, follow the rules and procedures in federal courts where the President "considers [it] practicable," and apply the same rules and regulations throughout all military courts "insofar as practicable."<sup>138</sup> According to *Hamdan*, the President's decision to prescribe rules and procedures in military commissions that would deviate from federal court rules was not invalid, in part because his determination of impracticability was owed substantial, if not complete, deference.<sup>139</sup> The Court concluded that it did not owe the President the same deference with regard to the determination that it was not practicable to use the same rules and regulations in the military commissions as in courts-martial and that the President had failed to demonstrate such impracticability.<sup>140</sup>

The Court identified two distinct deviations from federal court and courts-martial procedures and rules. First, in the Bush Administration military commissions, "[t]he accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of

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137. *Hamdan v. Rumsfeld*, 548 U.S. 557, 620–22 (2006).

138. 10 U.S.C. § 836 (2006).

139. *Hamdan*, 548 U.S. at 623.

140. *Id.* at 623–24.

the proceeding that either the Appointing Authority or the presiding officer decides to ‘close.’”<sup>141</sup> Second, the military commissions allowed “the admission of *any* evidence that, in the opinion of the presiding officer, ‘would have probative value to a reasonable person.’”<sup>142</sup>

President Obama did order revision of the military commission rules. Even so, two important examples of the potential difference between trial in a federal court and that in a military commission are (1) the handling of hearsay evidence and out-of-court affidavits attesting to scientific or technical test results; and (2) the handling of derivative evidence.

### 1. Hearsay

Under the military commission rules in effect today, hearsay (which has the same definition as in the Federal Rules of Evidence)<sup>143</sup> that would be inadmissible in federal court or in a court-martial may nevertheless be admitted in a military commission, with advance notice to the adversary, if the military judge is satisfied that the hearsay is probative, reliable, and necessary because the witness is not practically available.<sup>144</sup>

This formulation is similar to the rule from *Ohio v. Roberts* that used to govern the admission of hearsay statements in federal criminal cases.<sup>145</sup> However, the Supreme Court’s bombshell decision in *Crawford v. Washington* overruled decades of precedent and held that the Sixth Amendment’s Confrontation Clause requires that the criminal defendant have an opportunity to cross-examine every witness offering testimony against him.<sup>146</sup> *Crawford’s* rule bars not only testimonial hearsay evidence against criminal defendants,<sup>147</sup> even if it would otherwise fall within one of the exceptions to the rule against hearsay, but also such evidence as a state laboratory technician’s certificate

141. *Id.* at 614.

142. *Id.*

143. Compare FED. R. EVID. 801(c), with MIL. COMM. R. EVID. 801(c).

144. See MIL. COMM. R. EVID. 803(b).

145. 448 U.S. 56 (1980). *Roberts* permitted hearsay to be admitted against a criminal defendant if (1) the witness was unavailable; (2) the statement had enough “indicia of reliability” because it fell within a hearsay exception or was backed by “particularized guarantees of trustworthiness.” *Id.* at 66.

146. 541 U.S. 36, 53–54 (2004).

147. In *Davis v. Washington*, 547 U.S. 813, 817 (2006), the Court attempted to define “testimonial” statement.

regarding the results of a chemical test of seized narcotics. According to Justice Scalia's majority opinion in *Melendez-Diaz v. Massachusetts*, *Crawford* requires that the defendant have some opportunity to cross-examine a lab technician because the lab technician's affidavit certifying the lab results is "testimonial."<sup>148</sup>

It may well be that *Crawford* was wrongly decided,<sup>149</sup> or, at the minimum, that the Court went too far in *Melendez-Diaz*.<sup>150</sup> At the same time, the Court's justification for the need for the opportunity to confront one's accusers has undeniable force: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."<sup>151</sup> As Wigmore noted, cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth."<sup>152</sup>

*Crawford* adopts Wigmore. The exceptions found in Rule 803 of the Federal Rules of Evidence, and the corresponding rule in the Manual for Military Commissions, have been calibrated to admit sufficiently reliable hearsay statements, but that is not to say that their reliability can match that generated by statements tested by cross-examination. If the measure of the fairness of a proceeding is the extent to which the defendant is protected against the possibility of an erroneous conviction, then it follows that the potential admissibility of testimonial hearsay in military commissions renders those proceedings less fair than federal court trials.

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148. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009).

149. See, e.g., Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105 (2005) (challenging *Crawford's* historical description); Donald A. Dripps, *Controlling the Damage Done by Crawford v. Washington: Three Constructive Proposals*, 7 OHIO ST. J. CRIM. L. 521, 532 (2010) ("The number of factually-justified prosecutions for violent crime lost as a result of *Crawford* exceeds the number lost as a result of the Fourth Amendment exclusionary rule many times over."); Randolph N. Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 71 BROOK. L. REV. 219 (2005) (criticizing *Crawford's* narrow focus on common law history in determining the scope of the Confrontation Clause).

150. See e.g., Michael H. Graham, *Justice Scalia's Fundamentally Flawed Confrontation Clause Analysis Continues in Melendez-Diaz: It's Time To Begin All Over Again*, 45 CRIM. L. BULL. 1052 (2009); Amber N. Gremillion, *I'll Be Seeing You in Court: Melendez-Diaz v. Massachusetts' Flawed Decision and Its Impact on Louisiana*, 37 S.U. L. REV. 255 (2010).

151. *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

152. JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS ON COMMON LAW § 1367, at 27 (2d ed. 1923).

## 2. Derivative Evidence

Derivative evidence is evidence that the government discovers as a result of statements or evidence that it obtains directly from the suspect. Imagine a particular detainee whose confession has been corroborated through discovery of incriminating evidence, thereby demonstrating its reliability, but where that confession was coerced through waterboarding or similarly questionable interrogation tactic. The confession is direct evidence, but the corroborating and incriminating evidence is derivative evidence.

This hypothetical is loosely based on the case of Ahmed Khalfan Ghailani, who was recently prosecuted for plotting the 1998 bombings of the United States Embassies in Kenya and Tanzania, which killed 224 people. Whether the prosecution was successful has been a matter of debate. On the one hand, the jury convicted Ghailani of conspiracy to destroy buildings, with a potential sentence of twenty years to life imprisonment.<sup>153</sup> On the other hand, the jury acquitted him of every other count—over 280 in total—including every count of murder.<sup>154</sup> It is uncertain but possible that Ghailani would have been convicted successfully on the murder charges in a military commission.

Ghailani was captured in 2004 in Pakistan and held in a secret CIA prison where he was subjected to coercive interrogation methods.<sup>155</sup> As a result of his interrogation, U.S. agents learned of Hussein Abebe, a Tanzanian who allegedly sold the explosives that Ghailani used to bomb the embassy in Tanzania.<sup>156</sup> Later, Ghailani was transferred to Guantanamo Bay and remained there until his transfer to the federal Metropolitan Correction Center in New York to stand trial in federal court in 2009.<sup>157</sup> However, at the beginning of the trial, Judge Kaplan barred the government from calling Abebe as a witness on the ground that the government had discovered Abebe only “as a

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153. See Benjamin Weiser, *U.S. Jury Acquits Former Detainee of Most Charges*, N.Y. TIMES, Nov. 18, 2010, at A1. On January 25, 2011, the court sentenced Ghailani to life in prison. See Weiser, *supra* note 94.

154. Weiser, *supra* note 153; see also Charlie Savage, *Terror Verdict Tests Obama's Strategy on Trials*, N.Y. TIMES, Nov. 19, 2010, at A1.

155. Benjamin Weiser, *Judge Bars Major Witness From Terrorism Trial*, N.Y. TIMES, Oct. 6, 2010, at A1.

156. *Id.*

157. Benjamin Weiser, *Guantanamo Detainee Pleas Not Guilty in a Manhattan Court*, N.Y. TIMES, June 10, 2009, at A25.



close and direct result of statements made by Ghailani” under coercion by the CIA.<sup>158</sup> Judge Kaplan’s decision is analogous to the standard “fruit of the poisonous tree” analysis, where evidence that is derived from the product of illegal government conduct (such as coerced statements) will be suppressed unless the government can demonstrate that the “taint” of illegality has been “attenuated” through intervening events.

The key attenuation case regarding live witnesses is *United States v. Ceccolini*.<sup>159</sup> There, a local police officer engaged in an undisputedly illegal search of an envelope in the cash register in the defendant’s store and wrote a report concerning what he observed. Later, a federal agent followed up by questioning a store clerk in the store, using information gleaned from the first officer’s report. The clerk provided inculpatory testimony against the defendant at his perjury trial. The Supreme Court did not adopt the government’s suggestion that live witnesses never be excluded as the product of an illegal search, but it did conclude that the instant witness’s testimony was proper.<sup>160</sup> More generally, the Court noted that live witness testimony is more likely to be attenuated than physical evidence because “[w]itnesses are not like guns or documents which remain hidden from view until one turns over a sofa, or opens a filing cabinet.”<sup>161</sup> *Ceccolini* does not hold that witnesses will never be excluded, only that they are less likely to be excluded than physical evidence because of witnesses’ free will. In *Ceccolini*, for example, the government was already aware of the witness; the illegal search merely aided the federal agent in interviewing the witnesses.<sup>162</sup> In *Ghailani*, on the other hand, it appears that the government’s discovery of Abebe was derived entirely from the coerced interrogation.

Under the current rules for military commissions, any statement obtained through torture or cruel, degrading, or inhumane conduct would be inadmissible, while any statement obtained through coercion might be admissible depending on its

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158. See *United States v. Ghailani*, No. 51098Crim.1023(LAK), 2010 WL 4006381, at \*1 (S.D.N.Y. Oct. 6, 2010).

159. 435 U.S. 268 (1978).

160. *Id.* at 274–75, 279.

161. *Id.* at 276.

162. See *id.* at 271–72.

perceived reliability and voluntariness.<sup>163</sup> Importantly, however, the military commission rules do not categorically bar the introduction of derivative evidence resulting from coercive interrogation or even torture.<sup>164</sup> Rule 304 of the Military Commission Rules of Evidence contains a subsection entitled “Derivative Evidence” that states in relevant part:

Evidence derived from a statement that would be excluded under section (a)(1) of this rule may not be received in evidence against an accused who made the statement . . . unless the military judge determines by a preponderance of the evidence that—

(i) the evidence would have been obtained even if the statement had not been made; or

(ii) use of such evidence would otherwise be consistent with the interests of justice.<sup>165</sup>

There does not appear to be any reason to believe that the United States would have discovered Abebe independently,<sup>166</sup> but one could argue that permitting Abebe to testify against Ghailani would be “consistent with the interests of justice” for a number of reasons. One of the major concerns (though not the only one) with a confession or statement extracted through torture or coercion has been its lack of reliability because torture induces victims to confess simply to end the torment.<sup>167</sup> That concern, however, has less apparent force in Ghailani’s case, where Abebe’s testimony was allegedly probative and inculpatory, and apparently not the product of coercion. Indeed, because it remains an open question whether substantive

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163. See Military Commissions Act of 2009, 10 U.S.C.A. § 948r(a)–(c) (West 2010); MIL. COMM. R. EVID. 304(a)(1), 304(a)(3).

164. See JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL 40932, COMPARISON OF RIGHTS IN MILITARY COMMISSION TRIALS AND TRIALS IN FEDERAL CRIMINAL COURT 11 (2010), available at <http://www.fas.org/sgp/crs/natsec/R40932.pdf>. Thanks to David Glazier on this point.

165. MIL. COMM. R. EVID. 304(a)(5)(A).

166. Judge Kaplan’s ruling explicitly found that Abebe would not have voluntarily approached U.S. officials. See *United States v. Ghailani*, No. S1098Crim.1023 (LAK), 2010 WL 4058043, at \*12 (S.D.N.Y. Oc. 6, 2010).

167. See, e.g., JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF 9 (1976) (“[I]nnocent persons might yield to ‘the pain and torment and confess things they never did’ . . .”); see also *Watts v. Indiana*, 338 U.S. 49, 59–60 (1949) (Jackson, J., dissenting) (noting that physical mistreatment of prisoners “not only breaks the will to conceal or lie, but may even break the will to stand by the truth”).

constitutional rights are available to non-citizens outside the United States,<sup>168</sup> it is arguable whether the strict attenuation requirement that remains the law in federal court would be called for in the context of Guantanamo detainees.<sup>169</sup> To be clear, I am not making a normative argument in favor of allowing such derivative evidence; rather, I am making a predictive observation that Rule 304(a)(5)(A)'s "interests of justice" standard would provide substantial leeway to allow testimony by Abebe had Ghailani been prosecuted in a military commission.

Derivative evidence discovered as a result of coercive interrogation (or other illegal government behavior) is not necessarily unreliable in the way that an uncorroborated, coerced confession may be. Exclusion of such derivative evidence, therefore, cannot be defended merely on accuracy grounds. But, as the continued existence of the exclusionary rule demonstrates, U.S. criminal trials are not merely about accurate results; they are also about fair results.

On September 10, 2010, President Obama gave an extended speech in which he said in relevant part:

Now, I am absolutely convinced that the American justice system is strong enough that we should be able to convict people who murdered innocent Americans, who carried out terrorist attacks against us. We should be able to lock them up and make sure that they don't see light of day. We can do that. We've done it before. We've got people who engaged in terrorist attacks who are in our prisons, maximum security prisons, all across the country.

....

So, I've also said that there are going to be circumstances where a military tribunal may be appropriate, and the reason for that is—and I'll just give a specific example. There may be situations in which somebody was captured in-theater, is now in Guantanamo. It's very hard to piece together a chain of evidence that would meet some of the evi-

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168. One can read *Boumediene v. Bush*, 553 U.S. 723 (2008), as implicitly holding as much, but its technical holding was merely that Congress's efforts to limit federal court jurisdiction over habeas corpus petitions from Guantanamo detainees had to comport with the Suspension Clause. *Id.* at 771.

169. *Cf.* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274–75 (1990) (holding that the Fourth Amendment's search warrant requirement did not apply in favor of a Mexican national regarding a search that took place in Mexico).

dentiary standards that would be required in an Article III court. But we know that this person is guilty; there's sufficient evidence to bring about a conviction. So what I have said is the military commission system that we set up—where appropriate for certain individuals that would make it—it would be difficult to try in Article III courts for a range of reasons—we can reform that system so that it meets the highest standards of due process and prosecute them there.<sup>170</sup>

This is, frankly, an incoherent position. The *Ghailani* case would seem to fit President Obama's description of "we 'know' the defendant is guilty" but some of the evidence would not meet the standards of federal courts. If military courts are needed in some cases because some of the evidence needed for prosecution would not be admissible in federal court, then those military courts must necessarily have lower standards than the civilian courts do. It therefore would be impossible for the military courts to "meet[] the highest standards of due process." On the other hand, if the military courts do meet the highest standards of due process, meaning that they are indisputably fair in the President's assessment, why not prosecute all suspected al Qaeda members there?

One potential answer, not supplied by the President, might be that military commissions exist to prosecute violations of international humanitarian law (otherwise known as the laws of war). Consider three possible categories of al Qaeda suspects: (1) those who directly attack targets within the United States or conspire to do so; (2) those in Afghanistan or Pakistan (that is, the "battlefield") who attack U.S. troops in compliance with the laws of war; and (3) those who attack U.S. troops in violation of the laws of war (such as using false white flags or conducting attacks from within hospitals or other protected buildings).

How should we deal with captured persons in each of these three categories? For the first category, criminal prosecution in a federal court for terrorism-related offenses is a possibility.<sup>171</sup>

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170. President Obama's speech was transcribed that same day by a number of commentators. See, e.g., Jack Goldsmith, *President Obama's Two Answers on National Security*, LAWFARE: HARD NATIONAL SECURITY CHOICES (Sept. 10, 2010, 8:55 PM), <http://www.lawfareblog.com/2010/09/president-obama-s-two-answers-on-national-security-law/>.

171. Possibly applicable statutes include 18 U.S.C. § 2332b (2006) (transnational acts of terrorism) and *id.* § 2332f (bombings of public places).

However, if the suspect also happens to fall within the statutory definition of the enemy in the AUMF, then it might be possible to prosecute him for violating the laws of war. For example, although soldiers in an armed conflict are entitled to combatant immunity for certain homicides, such as killing enemy soldiers or the incidental killing of civilians in the course of achieving a military objective, they lose that immunity if they intentionally attack civilians.<sup>172</sup> Of course, as non-state actors, al Qaeda fighters cannot claim combatant immunity even when attacking military targets (which the Pentagon was).<sup>173</sup>

For the second category of persons, there are some federal statutes with sufficiently explicit language to overcome the general presumption against extraterritorial effect of domestic statutes.<sup>174</sup> For example, 18 U.S.C. § 2332a, entitled “Use of weapons of mass destruction,” criminalizes the unlawful use or attempted use of “a weapon of mass destruction” against American citizens “outside of the United States.” Because “weapon of mass destruction” is defined as any “destructive device,”<sup>175</sup> which in turn is defined to include “any explosive, incendiary, or poison gas, . . . bomb, . . . grenade, . . . [or] rocket,”<sup>176</sup> any al Qaeda or Taliban fighter who attacks U.S. soldiers with a bomb or grenade arguably violates section 2332a.<sup>177</sup> Another pos-

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172. See JEAN DE PREUX, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 61 (Jean S. Pictet ed., 1960).

173. Cf. Glazier, *supra* note 129, at 1001–02 (suggesting reasons that the United States might accord al Qaeda fighters “combatant” status and thus impliedly combatant immunity).

174. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (“[U]nless there is the affirmative intention of the Congress clearly expressed, we must presume it is primarily concerned with domestic conditions.”) (internal citations and quotation marks omitted). One federal terrorism statute that would not overcome the presumption against extraterritorial application is 18 U.S.C. § 2332b, entitled “Acts of terrorism transcending national boundaries,” which targets transnational terrorism aimed at “any person within the United States” or “any structure, conveyance, or other real or personal property within the United States.”

175. 18 U.S.C. § 2332a(c)(2)(A) (2006).

176. *Id.* § 921(a)(4)(A).

177. Another potentially applicable statute is *id.* § 2332f, which makes it a federal crime to use “an explosive or other lethal device” to attack “a place of public use, a state or government facility, a public transportation system, or an infrastructure facility.” The statute provides for extraterritorial jurisdiction where “a victim is a national of the United States.” *Id.* § 2332f(b)(2)(B). However, the particular targets designated in the statute make it highly unlikely that one could attack them without also violating the laws of war.

sibility is trial in a court-martial for violating the local (for example, Afghan) laws.<sup>178</sup>

On the other hand, the statute does require that the use or attempted use of the destructive device be “unlawful.” An obvious lawful use of such destructive devices would be by soldiers in an armed conflict, as combatant immunity attaches to homicides where the targets are enemy soldiers. However, another possibility is that even for nonsoldier fighters, such as al Qaeda members, an attack on U.S. troops might be lawful self-defense or defense of others. The general statement in American common law is that the defendant claiming self-defense must show that “the adversary’s force [was], or at least that the defendant reasonably believe[d] it [was], ‘unlawful’ force.”<sup>179</sup> Similarly, Rule 916(e) of the Manual for Courts-Martial states that:

It is a defense to a homicide, assault involving deadly force, or battery involving deadly force that the accused . . . [a]pprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on the accused; and . . . [b]elieved that the force the accused used was necessary for protection against death or grievous bodily harm.<sup>180</sup>

The key issue is whether an al Qaeda or Taliban member living in Afghanistan could reasonably believe that U.S. soldiers posed such a threat of wrongful harm so as to justify counterattack for self-defense purposes. To be sure, this is an uncertain proposition, and the Model Penal Code rule that force may not be used to resist even an unlawful arrest by one whom the defendant “knows” to be a police officer would, if sufficiently analogous, render self-defense unavailable.<sup>181</sup> On the other hand, it may not be reasonable to equate American soldiers in a foreign country with police officers within one’s local jurisdic-

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178. See JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL, UNITED STATES, at pt.II, R. 201(f)(1)(B)(i)(b) (2008 ed.) [hereinafter MCM] (providing jurisdiction for courts-martial to try offenses under “[t]he law of the territory occupied as an incident of war . . . whenever the local civil authority is superseded in whole or part by the military authority of the occupying power.”).

179. WAYNE R. LAFAVE, CRIMINAL LAW § 10.4(a) (4th ed. 2003).

180. MCM, *supra* note 178, pt.II, R. 916(e)(1); see also *id.* at pt.II, R. 916(e)(5) (“The principles of self-defense under section e(1) . . . of this rule apply to defense of another.”).

181. LAFAVE, *supra* note 179, § 10.4(h).

tion. In the latter situation, there are no issues of sovereignty. For example, if Mexican troops crossed the U.S. border and fired at some Arizona citizens in the course of lawful military operation against narco-terrorists, it is difficult to believe that those citizens would not have a self-defense claim if they were to fire back, even if they recognized the attackers as Mexican soldiers. The point is that for category (2) detainees, there are federal statutes and military rules that may provide a textual basis for ordinary criminal prosecution, but there may also be viable self-defense claims that would defeat such prosecutions if the only claim is that the defendant fought back against attacking U.S. troops. Detention, not prosecution, might be the most feasible approach for incapacitating such persons.

Finally, for category (3) persons, law of war violations may provide the best avenue for prosecutions, because the lawfulness of the use of force (that is, self-defense) is not the issue so much as the method of force. False white flags or use of protected buildings cannot be justified even as self-defense under the laws of war. And even if the United States were to accord combatant status to the Taliban, if not al Qaeda as well, intentional targeting of civilians would be a punishable war crime,<sup>182</sup> and the appropriate forum for such prosecution would be a military commission. It would be the nature of the crime—whether domestic or military—that would dictate the nature of the court for trying that violation.

There may be other plausible reasons to use military commissions for some detainees and federal trials for others, based on other underlying principles. However, the same cannot be said for President Obama's forum choice policy.

### III. CONCLUSION

Even as the United States's actual interrogation and detention policies have shifted away from the excesses of the immediate post-9/11 period, Guantanamo Bay has remained perhaps the most visible symbol of the United States's controversial war against al Qaeda. Because symbols retain potency independent of the reality that they represent,<sup>183</sup> President Obama wanted to

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182. See DE PREUX, *supra* note 172, at 61.

183. See MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964).

distance his administration from Guantanamo—and declaring that it would be closed was an effective way to demonstrate the different mindset of the new White House. When it became clear that closing Guantanamo was easier promised than accomplished, and that there was considerable continuity between the Bush and Obama Administrations,<sup>184</sup> the decision to prosecute KSM in a federal court may have seemed like another high-profile way to distinguish the Obama Administration from the Bush Administration. But it also appears that President Obama made these decisions not based on any underlying legal principle, but rather to break with the past. As a result, they represent new Guantanamo mistakes.

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184. See Yin, *Broken Promises*, *supra* note 3.