



A CRITIQUE OF "NATIONAL SECURITY COURTS"

A REPORT BY THE CONSTITUTION PROJECT'S
LIBERTY AND SECURITY COMMITTEE &
COALITION TO DEFEND CHECKS AND BALANCES

JUNE 23, 2008

CONSTITUTION PROJECT STAFF

Tara Beech
Program Coordinator

I. Scott Messinger
Chief Operating Officer

Lauren J. Cooper
Program Assistant

Becky L. Monroe
Policy Counsel

Sharon Bradford Franklin
Senior Counsel

Corey Owens
Communications Director

Virginia E. Sloan
President and Founder

The Constitution Project
1025 Vermont Avenue, NW
Third Floor
Washington, DC 20005
(202) 580-6920 (tel)
(202) 580-6929 (fax)
info@constitutionproject.org
www.constitutionproject.org

A CRITIQUE OF “NATIONAL SECURITY COURTS”*

I. INTRODUCTION

Recently, some scholars and government officials have called for the creation of “national security courts”—specialized hybrid tribunals that would review the preventive detention of suspected terrorists (both within and outside of the territorial United States), conduct the detainees’ criminal trials, or, in some cases, both.¹ Advocates for these courts claim that they offer an attractive middle ground between adherence to traditional criminal processes and radical departures from those processes.²

For the reasons that follow, we, the undersigned members of the Constitution Project’s Liberty and Security Committee and its Coalition to Defend Checks and Balances, believe that the proposals to create these courts should be resisted. The proposals are surprisingly—indeed alarmingly—underdeveloped. More seriously, they neglect basic and fundamental principles of American constitutional law, and they assume incorrectly that the traditional processes have proven ineffective. The idea that there is a class of individuals for whom neither the normal civilian or military criminal justice systems suffice presupposes that such a class of individuals is readily identifiable—and in a manner that does not necessarily pre-judge their guilt. The idea that national security courts are a proper third way for dealing with such individuals presupposes that the purported defects in the current system are ones that cannot adequately be remedied within the confines of that system, and yet *can* be remedied in new tribunals without violating the Constitution.

We believe that the government can accomplish its legitimate goals using existing laws and legal procedures without resorting to such sweeping and radical departures from an American constitutional tradition that has served us effectively for over two centuries. We separately address below proposals for a national security court for criminal prosecutions of terrorism suspects and proposals for such a court to review preventive detention decisions, and the reasons why each should be rejected.

* The Constitution Project sincerely thanks Stephen I. Vladeck, Associate Professor, American University Washington College of Law, for his extensive researching and drafting work on this statement as well as a background report for committee members, and for his work in guiding committee members to consensus on these issues.

1. For a non-exhaustive (but largely representative) sampling of discussions of the proposals for such hybrid courts, see Andrew C. McCarthy & Alykhan Velshi, *We Need a National Security Court* (2006), http://www.defenddemocracy.org/usr_doc/NationalSecurityCourt.doc; Harvey Rishikof, *Is It Time for a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes*, 8 *Suffolk J. Trial & App. Advoc.* 1 (2003); Glenn M. Sulmasy, *The Legal Landscape After Hamdan: The Creation of Homeland Security Courts*, 13 *New Eng. J. Int’l & Comp. L.* 1 (2006); Amos Guiora & John T. Parry, *Debate, Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists*, 156 *U. Pa. L. Rev. PENumbra* 356 (2008), <http://www.pennumbra.com/debates/terrorcourts.pdf>; Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (2008). See also Robert M. Chesney & Jack L. Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 *Stan. L. Rev.* 1079, 1081 (2008).
2. See, e.g., Jack L. Goldsmith & Neal Katyal, *Op-Ed.*, *The Terrorists’ Court*, *N.Y. Times*, July 11, 2007, at A19; see also Michael B. Mukasey, *Op-Ed.*, *Jose Padilla Makes Bad Law*, *Wall St. J.*, Aug. 22, 2007, at A15.

II. CRIMINAL TRIALS FOR TERRORISM SUSPECTS

Advocates of national security courts that would try terrorism suspects claim that traditional Article III courts are unequipped to handle these cases. This claim has not been substantiated, and is made in the face of a significant — and growing — body of evidence to the contrary. A recent report released by Human Rights First persuasively demonstrates that our existing federal courts are competent to try these cases. The report examines more than 120 international terrorism cases brought in the federal courts over the past fifteen years. It finds that established federal courts were able to try these cases without sacrificing either national security or the defendants' rights to a fair trial.³ The report documents how federal courts have successfully dealt with classified evidence under the Classified Information Procedures Act (CIPA) without creating any security breaches. It further concludes that courts have been able to enforce the government's *Brady* obligations to share exculpatory evidence with the accused, deal with *Miranda* warning issues, and provide means for the government to establish a chain of custody for physical evidence, all without jeopardizing national security.

Of course, our traditional federal courts have not always done everything that the government would like them to do. They are, after all, constrained by well-established constitutional limits on prosecutorial power. For example, no federal court would permit the prosecution to present witnesses without protecting the defendant's constitutional right to confront those witnesses against him or her.⁴ Nor would a federal court permit the prosecution to rely on a coerced confession in violation of a defendant's Fifth Amendment right against self-incrimination. But creating a new set of courts would not repeal existing constitutional rights. Conversely, to the extent that the existing rules are not constitutionally compelled, ordinary federal courts (or Congress, where applicable) can modify them when it is shown that the modification is necessary to accommodate the government's legitimate interests.

Most importantly, there is the intrinsic and inescapable problem of definition. Whereas the argument for specialized courts for tax and patent law is that expert judges are particularly necessary given the complex subject-matter, proposals for specialized courts for terrorism trials are based on the asserted need for relaxed procedural and evidentiary rules and are justified on the ground that terrorists do not deserve full constitutional protections.⁵ This creates two fundamental constitutional problems. First, justifying departures from constitutional protections on the basis that the trials are for terrorists undermines the presumption of innocence for these individuals. Second, if a conviction were obtained in a national security court using procedural

3. Richard B. Zabel & James J. Benjamin, Jr., Human Rights First, In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts (May 2008), <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>.

4. See, e.g., *Crawford v. Washington*, 541 U.S. 36 (2004).

5. Although some proponents of national security courts analogize their proposals to the Foreign Intelligence Surveillance Court, there is a marked difference between a specialized court for obtaining a particular type of warrant and a specialized court to conduct a criminal trial. The Foreign Intelligence Surveillance Court does not handle contested trials; rather, its only role is to handle government surveillance applications under FISA. In the analogous context of specialized non-Article III courts, the Supreme Court has itself warned that the legitimacy of such courts is closely linked to the limited nature of their jurisdiction. See, e.g., *CFTC v. Schor*, 478 U.S. 833, 851 (1986).

and evidentiary rules that imposed a *lesser* burden on the government, then the defendant would be subjected to trial before a national security court based upon less of a showing than would be required in a traditional criminal proceeding. The result would be to apply less due process to the question of guilt or innocence, which, by definition, would increase the risk of error. And, if the government must make a preliminary showing that meets traditional rules of procedure and evidence in order to trigger the jurisdiction of a national security court, such a showing would also enable it to proceed via the traditional criminal process.

National security courts for criminal prosecutions are not just unnecessary; they are also dangerous. They run the risk of creating a separate and unequal criminal justice system for a particular class of suspects,⁶ who will be brought before such specialized courts based on the very allegations they are contesting. Such a system undermines the presumption of innocence for these defendants, and risks a broader erosion of defendants' rights that could spread to traditional Article III trials.⁷ It was Justice Frankfurter who wrote that "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."⁸ Committee members strongly believe that the shadow of terrorism must not be the basis for abandoning these fundamental tenets of justice and fairness.

In addition, these proposals are alarmingly short on details with respect to the selection of judges for these national security courts. Although there *is* a history of creating specialized federal courts to handle particular substantive areas of the law (e.g., taxation; patents), unlike tax and patent law, there is simply no highly specialized expertise that would form relevant selection criteria for the judges. Establishing a specialized court solely for prosecutions of alleged terrorists might also create a highly politicized process for nominating and confirming the judges, focusing solely on whether the nominee had sufficient "tough on terrorism" credentials — hardly a criterion that lends itself to the appearance of fairness and impartiality.

None of the above is to deny that there *is* a class of individuals who may be tried in appropriate military tribunals. Persons captured by the U.S. military as part of an armed conflict have traditionally been subject to military jurisdiction under the laws of war. This principle is well-established, but it has long coexisted with the complementary principle that *only* individuals who are properly subject to military jurisdiction under the laws of war may be so tried. Military

6. Indeed, it is also likely that the overwhelming majority of defendants in such proceedings would be of particular national and religious backgrounds, a point that would only further undermine the appropriateness of such a "separate" system. Cf. Neal Kumar Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365 (2007). The creation of a different court to try suspects, most of whom, if not all of whom, are likely to be Muslims, would be widely seen as the creation of a second-class justice system for Muslims. That result would further tarnish the United States' reputation for justice and fairness in the Arab and Muslim world, and would be counterproductive for U.S. foreign policy and our efforts to combat terrorism.

7. This concern is more than speculative. As Professor Laura Donohue has recently documented, a series of "temporary" relaxed judicial procedures adopted by the United Kingdom in response to perceived threats of terrorism from Ireland ultimately became permanent, and were broadened to apply to non-terrorist crimes as well. See LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY* 14–16 (2008).

8. *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

tribunals may not try offenders or offenses unless they are encompassed by traditional laws of war.⁹

Just as there is no need to establish national security courts to replace traditional Article III courts, so too there is no need to create such tribunals to handle cases that would normally be tried by military courts. Individuals should be tried either in our traditional criminal justice system or in properly constituted military courts.

III. PREVENTIVE DETENTION OF TERRORISM SUSPECTS

National security courts have also been proposed to serve as a forum for resolving challenges to preventive detention, not only for individuals currently detained at Guantánamo, but also for both citizens and non-citizens arrested within the United States. We reject the proposals because we believe that such a forum would be both unnecessary and unconstitutional. As the Supreme Court's recent decision in *Boumediene v. Bush* illustrates, existing Article III courts are fully capable of adjudicating issues regarding the legality of detention.¹⁰ There is no need to create a specialized tribunal either for the Guantanamo detainees or for anyone else who may be subject to detention under existing law.

The Supreme Court has held that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”¹¹ Committee members recognize that individuals can be detained for limited time periods for certain specific and carefully delineated purposes. Thus, non-citizens in immigration proceedings may lawfully be detained pending deportation where they pose a risk of flight or a danger to the community and detention is necessary to effectuate removal. Criminal suspects may lawfully be detained pending trial, again, if they pose a risk of flight or a danger to the community. And, during armed conflicts, members of the enemy armed forces may lawfully be detained as prisoners of war until the cessation of hostilities. The precise scope of detention authorized in the course of the conflict

9. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (plurality). Thus, although the substantive provisions of the Military Commissions Act of 2006 (“MCA”), Pub. L. No. 109-366, 120 Stat. 2600, include within their scope authorization for military tribunals for offenses and offenders that *were* traditionally subject to military jurisdiction, it also sweeps *much* more broadly. To the extent that the MCA’s personal and subject-matter jurisdiction extend beyond the confines of that military jurisdiction consistent with the laws of war, the Committee believes that the MCA is unconstitutional.

10. *Boumediene v. Bush*, No. 06-1195, 2008 WL 2369628 (U.S. June 12, 2008). The decision recognizes the constitutional rights of the Guantanamo detainees to challenge their detentions through federal *habeas* petitions. Traditional Article III courts are fully capable of handling such *habeas* petitions and are the proper forum for resolving these claims.

11. *United States v. Salerno*, 481 U.S. 739, 755 (1987) (upholding preventive detention pending a criminal trial only where there is a showing of a threat to others or risk of flight, the detention is limited in time, and adequate procedural safeguards are provided). Also, as Justice Thomas explained in *Kansas v. Hendricks*, “States have in certain narrow circumstances provided for the forcible civil detention of people who are unable to control their behavior and who thereby pose a danger to the public health and safety.” 521 U.S. 346, 357 (1997) (citations omitted). While the Supreme Court has “consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards,” that is not to say that such “civil commitment” statutes do not raise their own panoply of constitutional questions. But regardless of those issues, such cases are easily distinguishable from preventive detention of terrorism suspects. The purported danger from suspected terrorists stems from alleged criminal conduct. Consequently, a suspected terrorist should be prosecuted in a criminal court.

with the Taliban and Al Qaeda in Afghanistan, remains a matter of dispute, but there is no reason that traditional Article III courts cannot resolve it.¹² But potentially indefinite preventive detention, either for the purposes of interrogation and intelligence-gathering or because the government believes it cannot prosecute the detainee but does not want to release the individual, falls into none of these categories. And because such preventive detention without charge is unconstitutional, there is no reason to create national security courts to supervise it.

In short, existing law, administered by existing courts, authorizes the government to detain individuals where they fit recognized limited categories of persons subject to detention. Even if an individual is not subject to detention under the laws of war, the government may seek to detain an individual suspected of a terrorism-related offense by bringing charges and asking for denial of bail before trial. Once charges are filed and a probable cause showing has been made, the Bail Reform Act empowers the government to seek to detain criminal suspects without bail, upon a showing of potential dangerousness.¹³ If the government is not yet ready to proceed to trial at the time of such a showing, the Speedy Trial Act includes substantial flexibility, especially where “the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial,”¹⁴ or where relevant evidence is located in a foreign country.¹⁵

IV. RECOMMENDATIONS

For these reasons, we, the undersigned members of the Constitution Project’s Liberty and Security Committee and Coalition to Defend Checks and Balances, make the following recommendations:

1. Prosecutions for terrorism offenses can and should be handled by traditional Article III courts, except that combatants captured on the battlefield who would be subject to traditional military jurisdiction may be tried by military courts for offenses properly triable by such courts. We do not need to, and should not, create specialized national security courts for this purpose.

12. Justice O’Connor’s plurality opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)(plurality) stated that even beyond the authority to hold prisoners of war, the government may also detain individuals captured on the battlefield as “enemy combatants” until the cessation of active hostilities. There is some disagreement among committee members as to whether the *Hamdi* plurality position is correct. Some committee members find Justice Souter’s opinion more convincing. As Justice Souter explained in *Hamdi*, the government *could* have detained alleged “enemy combatants” such as Hamdi *as* POWs. Because it chose not to do so, Justice Souter concluded that the Authorization for Use of Military Force (“AUMF”) was an insufficiently clear statement of congressional intent for *other* forms of preventive detention. However, even under the plurality’s formulation, the detention authority extending beyond POWs only applies to individuals who are captured on the battlefield. As several studies have shown, the percentage of post-9/11 detainees actually captured on the battlefield is comparatively small. *See, e.g.*, MARK DENBEAUX ET AL., REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA (2006).

13. *See generally Salerno v. United States*, 481 U.S. 739 (1987).

14. *See* 18 U.S.C. § 3161(h)(8)(A).

15. *See id.* § 3161(h)(9).

2. We should not create specialized national security courts to oversee a system of preventive detention for terrorism suspects. Apart from detention under the laws of war, the United States government should only be permitted to detain an individual suspected of a terrorism offense if it can make a probable cause showing to a judge and it intends to prosecute that individual, or if appropriate, as part of immigration removal proceedings.

V. CONCLUSION

No one denies that hard questions remain to be asked and answered concerning the most appropriate means by which our legal system deals with the continuing threat posed by international terrorism. But establishing a new, unprecedented, and unnecessary system of tribunals risks undermining the constitutional protections enshrined in our criminal justice system, and would ultimately create far more problems than it could possibly solve.

The idea that national security courts are a proper third way for dealing with such individuals presupposes that the purported defects in the current system are ones that cannot adequately be remedied within the confines of that system, and yet *can* be remedied in hybrid tribunals without violating the Constitution. We strongly disagree. Traditional Article III courts can meet the challenges posed by terrorism prosecutions, and proposals to create national security courts should be rejected as a grave threat to our constitutional rights.

**Members of the Constitution Project's
Liberty and Security Committee &
Coalition to Defend Checks and Balances**
Endorsing the Statement on A Critique of "National Security
Courts" *

CO-CHAIRS:

David Cole, Professor of Law, Georgetown University Law Center

David Keene, Chairman, American Conservative Union

MEMBERS:

Azizah al-Hibri, Professor of Law, The T.C. Williams School of Law, University of Richmond;
President, Karamah: Muslim Women Lawyers for Human Rights

Bob Barr, Former Member of Congress (R-GA); CEO, Liberty Strategies, LLC; the 21st Century Liberties Chair for Freedom and Privacy at the American Conservative Union; Chairman of Patriots to Restore Checks and Balances; practicing attorney; Consultant on privacy matters for the ACLU

David E. Birenbaum, Of Counsel, Fried, Frank, Harris, Shriver & Jacobson LLP; Senior Scholar, Woodrow Wilson International Center for Scholars; U.S. Ambassador to the UN for UN Management and Reform, 1994-96

General Wesley K. Clark (USA, Ret.), Chairman and CEO, Wesley K. Clark Associates, LLC; former Supreme Allied Commander Europe and Commander-in-Chief, United States European Command

Phillip J. Cooper, Professor of Public Administration, Mark O. Hatfield School of Government, Portland State University

John W. Dean, Counsel to President Richard Nixon

Mickey Edwards, Vice President, Aspen Institute; Lecturer, Woodrow Wilson School of Public and International Affairs, Princeton University; former Member of Congress (R-OK) and Chairman of the House Republican Policy Committee

Richard Epstein, James Parker Hall Distinguished Service Professor of Law, the University of Chicago; Peter and Kirsten Bedford Senior Fellow, the Hoover Institution

Eugene R. Fidell, President, National Institute of Military Justice; Partner, Feldesman Tucker Leifer Fidell LLP

Louis Fisher, Specialist in Constitutional Law, Law Library, Library of Congress

Michael German, Adjunct Professor, National Defense University School for National Security Executive Education; Special Agent, Federal Bureau of Investigation, 1988-2004

Melvin A. Goodman, Senior Fellow and Director of the National Security Project, Center for International Policy

Morton H. Halperin, Executive Director, Open Society Policy Center; Senior Fellow, Center for American Progress; Director of the Policy Planning Staff, Department of State, Clinton administration

David Kay, Former Head of the Iraq Survey Group and Special Advisor on the Search for Iraqi Weapons of Mass Destruction to the Director of Central Intelligence

Christopher S. Kelley, Visiting Assistant Professor of Political Science, Miami University (OH)

Philip Heymann, James Barr Ames Professor of Law, Harvard Law School; Deputy Attorney General, Clinton Administration

Harold Hongju Koh, Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law Yale Law School U.S. Assistant Secretary of State for Democracy, Human Rights & Labor, 1998-2001

David Lawrence, Jr., President, Early Childhood Initiative Foundation; former Publisher, *Miami Herald* and *Detroit Free Press*

Joseph Margulies, Deputy Director, MacArthur Justice Center; Associate Clinical Professor, Northwestern University School of Law

Kate Martin, Director, Center for National Security Studies

Thomas R. Pickering, Undersecretary of State for Political Affairs 1997-2000; United States Ambassador and Representative to the United Nations, 1989-1992

L. Michael Seidman, Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center

William S. Sessions, Former Director, Federal Bureau of Investigation; former Chief Judge, United States District Court for the Western District of Texas

David Skaggs, Executive Director, Colorado Commission on Higher Education; Former Member of Congress (D-CO)

Earl Silbert, Partner, DLA Piper; United States Attorney, District of Columbia (1974-1979); Former Watergate Prosecutor

Geoffrey R. Stone, Harry Kalven, Jr. Distinguished Service Professor of Law, the University of Chicago

John F. Terzano, Vice President, Veterans for America

Charles Tiefer, General Counsel (Acting) 1993-94, Solicitor and Deputy General Counsel, 1984-95, U.S. House of Representatives

Patricia M. Wald, Former Judge at the International Criminal Tribunal for the former Yugoslavia; former Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit

John W. Whitehead, President, the Rutherford Institute

REPORTER

Stephen I. Vladeck, Associate Professor, American University Washington College of Law

** Affiliations are listed for identification purposes only*