

An Analysis of Suspected Terrorists' Rights Post 9/11

by

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I. Introduction

Terrorist crimes arguably differ from other transnational crimes, in that they are politically motivated and pose a threat to national security. On September 20, 2001, former U.S. President George W. Bush declared the ‘war on terror.’ In response to the fatal 9/11 attacks in New York and Washington, D.C., President Bush identified the U.S. military response as having long-lasting consequences. It was, he argued, “our war on terror” that began “with al Qaeda, but...it will not end until every terrorist group of global reach has been found, stopped and defeated.”¹ This was to be a war that would, in the words of former British Prime Minister Tony Blair, seek to eliminate a threat that was “aimed at the whole democratic world.”² Blair claimed that “this threat is of such magnitude that unprecedented measures would need to be taken to uphold freedom and security.”³

¹ Barbara Hudson & Reece Walters, *Introduction: Justice in a Time of Terror*, 49 *Brit. J. Criminology* 603 (September 2009).

² Tony Blair, *US Declares War on Terror*, 2001, BBC NEWS, available at http://news.bbc.co.uk/onthisday/hi/dates/stories/september/12/newsid_2515000/251239.stm.

³ *Id.*

This article will explore the treatment of suspected terrorists captured and detained by the United States following the terrorist attacks of 11 September 2001. Part II of this paper will focus on the War on Terror and the many questions left unanswered concerning what rights and privileges should be granted to terrorist detainees. In Part III, recent U.S. Supreme Court decisions will be analyzed, together with international treaties and policies implemented by foreign governments in response to the war on terror. The paper will examine U.S. government policy changes from the transition of the Bush administration to the Obama administration, including the detainment and treatment of prisoners at the U.S. military prison in Guantanamo Bay, Cuba. In Part IV, thoughts from current legal scholars concerning proposals of new Domestic Security Courts and an International Terror Court to hear cases involving suspected terrorists will be evaluated, as well as the possibility of a new classification status for terrorist detainees. Finally, Part V will conclude with a human rights approach to changes the Obama administration might consider in order to formulate a more global perspective on the issue.

II. Background-The War on Terror

Congress responded to the 9/11 attacks by passing the resolution “Authorization for Use of Military Force.”⁴ The substance of the resolution was to add a note to 50 U.S.C.A. § 1541 of the War Powers, providing “That the president is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the

⁴ Pub. L. No. 107-40, S.J.Res. 23.

United States by such nations, organizations or persons.”⁵ Shortly after the 9/11 terrorist attacks, Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Obstruct Terrorism Act (USA PATRIOT Act).⁶ The USA PATRIOT Act expanded the grounds for terrorism by broadening the definition of “terrorist activity” and the range of organizations that could constitute foreign terrorist organizations.

The war on terror has been one of the most significant international events in the past three decades, alongside the collapse of the former Soviet Union, the end of apartheid in South Africa, and the unification of Europe and the marketization of the People’s Republic of China.⁷ Since the invasions of Afghanistan in October 2001 and Iraq in May 2003, there has been ongoing global political debate regarding the war on terror. Issues of human rights, the rule of law, policing and civil liberties, notions of security, sovereignty and freedom, and the role of international law and enforcement have all been questioned and challenged.

The threat that Iraq presented to the United States was speculative. The reason for invasion, noncompliance with United Nations weapons disclosure requirements, dissipated when the weapons of mass destruction were never located. The outgoing UN Secretary General, Kofi Annan, criticized the war, claiming that “No nation can make itself secure by seeking supremacy over all others. No state can make its own actions legitimate in the eyes of others...When power, especially military force, is used, the world will consider it legitimate only when convinced that it is being used for the right purpose-for broadly shared aims-in accordance with

⁵ *Id.*

⁶ Pub. L. No. 107-56, 115 Stat. 272 (2001).

⁷ Barbara Hudson & Reece Walters, *Introduction: Justice in a Time of Terror*, 49 *Brit. J. Criminology* 603 (September 2009).

broadly accepted norms.”⁸ Post 9/11, there remains much disagreement and uncertainty regarding rights granted to suspected terrorists and in what jurisdictional courts terrorists should be tried for their alleged crimes.

Politics and politicians essentially determine who is or is not a terrorist and what constitutes an act of terrorism, without the need for evidence and without even a widely agreed definition of what and who constitute terrorism and terrorists. The label ‘terrorism’ precedes, extends beyond and exists independently of reasonable suspicion and evidenced-based criminal justice processes.⁹

In agreeing upon the most appropriate forum for trying terrorists, several key issues must be considered. How we define suspected terrorists (their status) is key in considering what fundamental rights and protections should be accorded to them. The guiding principle must be the obligation of civil, democratic society to respect and uphold the rule of law.

III. Bringing Terrorists to Trial

A critical issue in determining the appropriate forum is the terrorist-defendant’s right to confront his accuser. In the American criminal and constitutional law context, the 6th Amendment guarantees a defendant the right to “be confronted with the witnesses against him.”¹⁰ Should that right be granted to a terrorist/defendant? Bringing terrorists to trial would potentially require exposing intelligence sources, raising significant national security concerns.

⁸ Kofi Annan, UN Secretary-General Kofi Annan address at the Truman Presidential Museum and Library in Independence, Missouri, December 11, 2006, available online at www.un.org/News/Press/docs/2006/sgsm10793.dochtm.

⁹ J. Hocking, *Terror Laws: ASIO, Counter Terrorism and the Threat to Democracy*. Sydney: University of New South Wales Press, 1-12 (2004).

¹⁰ U.S. Constitution, Amendment VI.

The primary purpose of any country's judicial regime is two-fold: 1) to provide the country with an opportunity to punish the wrongdoer, and 2) to enable the defendant to have his day in court.¹¹ The issue facing law makers is how to effectively implement these two goals when dealing with counter-terrorism. At present, our "war on terrorism" can be defined as "armed conflict short of war" (a term used by the Israel Supreme Court).¹² So, while civil, democratic states are not engaged in "war" as defined by international law, neither are they confronting the common criminal as defined by traditional law.

One of the critical issues facing policy makers today is what rights, privileges, and obligations are owed to a suspected terrorist who has been captured? Where should suspected terrorists be detained and tried? What are the limits of interrogation? What are the limits of detention? What standard of review should they be granted? For what crimes may they be tried? None of these questions have been resolved since 9/11.

Justice O'Connor in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) addressed the definition of enemy combatant:

The threshold question before us is whether the Executive has the authority to detain citizens who qualify as "enemy combatants." There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such. It has made clear, however, that, for purposes of this case, the 'enemy combatant' that it is seeking to detain is an individual who, it alleges, was "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and who "engaged in an armed conflict against the United States" there.¹³

¹¹ Douglas N. Husak, *Retribution in Criminal Theory*, 37 San Diego L. Rev. 959 (2000).

¹² See, e.g., Amos N. Guiora, *Qurin to Hamdan: Creating a Hybrid Paradigm for the Detention of Terrorists*, 19 Fla. J. Int'l L. 511 (2007).

¹³ Justice O'Connor's opinion, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

In November, 2001, President Bush issued a Presidential Order establishing military commissions for the express purpose of trying individuals suspected of involvement in terrorism. Shortly after the Presidential Order was issued, the U.S. Senate's Armed Services and Judiciary committee's held a series of hearings.¹⁴ Administration witnesses justified the establishment of the military commission by arguing that to effectively fight terrorism and alternate judicial regime was required. According to the Bush administration, Article III courts were inappropriate for trying terrorists and those who provided them safe harbor. When establishing the military tribunals, the Administration relied on the Supreme Court's holding in *Ex Parte Quirin*, 317 U.S. 1 (1942). The Court used three different terms (illegal combatant, enemy belligerent, enemy combatant) in referring to captured German Nazi saboteurs who had entered the United States during World War II.¹⁵ What the court held in *Quirin* was that because the defendants had entered the United States to engage in acts of spying and sabotage, they were not only liable to be captured and detained (like POWs), but in addition could be tried before a military commission for acts violating the laws of war.¹⁶ Though the Court upheld President Roosevelt's decision to bring the German saboteurs before a military tribunal, the Court did not resolve the larger, more crucial issue of defining the saboteurs. The Court stated that "we have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military

¹⁴ U.S. Senate Committee on Armed Services, Dec. 12, 2001, To Receive Testimony on the Department of Defense's Implementation of the President's Military Order on Detention, Treatment, and Trial by Military Commission of Certain Non-Citizens in the War on Terrorism, <http://armed-services.senate.gov/hearings/2001/c011212.htm>. U.S. Senate Committee on the Judiciary, *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism*, Nov. 28, 2001, available at <http://judiciary.senate.gov/hearing.cfm?id=126>.

¹⁵ *Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942).

¹⁶ *Id.* at 36-37, 47-48.

tribunals to try persons according to the law of war.”¹⁷ The assumption is that the Court was referring (illegal combatant, enemy belligerent, enemy combatant) to an individual, engaged in combat with the U.S., and not a soldier. The term “unlawful enemy combatant” cannot be found in the Geneva Conventions or other treatises on the law of war.

The appellants in *Quirin* were German soldiers who lost their status when they purposefully discarded their uniforms. Unlike terrorists, who do not belong to a regular army,¹⁸ the 1942 Supreme Court appeared to apply the definition of “enemy combatant” to individuals who had been soldiers. The loss of their status, resulting from their own actions, enabled the Court to determine that they were not acting as soldiers at the time of their capture and thus were not entitled to prisoner of war status.

In relying on *Quirin*, the Bush Administration established a unique judicial regime for the express purpose of trying terrorist detainees. It was premised on two ideas: 1) that the detainees were not Prisoners of War, and therefore could be brought to trial; and 2) that the detainees were not entitled to traditional Article III protections afforded to defendants in the criminal law process. Thus, the Executive Branch developed the doctrine of using the term “unlawful enemy combatant,” and was subsequently defined in the Military Commissions Act of 2006.¹⁹

¹⁷ *Id.* at 46, 63.

¹⁸ Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A)(2), Aug. 12, 1949, 6 U.S.T 3316, 75 U.N.T.S. 135.

¹⁹ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, §948a.

The fundamental purpose of the 2001 Presidential Order was to being “justice to persons charged with offenses under the laws of armed conflict”²⁰ and to “target a narrow class of individuals – terrorists.”²¹ Criticism of the Presidential Order was centered on the following issues: the lack of an independent judiciary, the lack of an appeals process, the lack of a sentencing structure known to the detainee, the process by which counsel is assigned, the broad rules of evidence and the ability of the prosecutor to submit classified evidence to the court that the defendant would not be entitled to review.

The presumption of innocence has a long history, and was first codified in the famous French *Declarations des droits de l’homme et du citoyen*.²² It was included in article 11(1) of the Universal Declaration of Human Rights, and subsequently codified in article 14 of the International Covenant on Civil and Political Rights, which provides that “everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.”²³

But U.S. government officials argue that detainees at Guantanamo Bay and other military prisons are not covered by this prohibition, because they have not been charged with any crime

²⁰ Testimony of The Honorable Michael Chertoff, Assistant Attorney General, Criminal Division, U.S. Dept. of Justice, Nov. 28, 2001, *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism*, Nov. 28, 2001, available at http://judiciary.senate.gov/testimony.cfm?id=126&wit_id=66.

²¹ Testimony of The Honorable John Ashcroft, Attorney General, U.S. Dept. of Justice, U.S. Senate Committee on the Judiciary, Dec. 6, 2001, *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism*, Nov. 28, 2001, available at http://judiciary.senate.gov/testimony.cfm?id=121&wit_id=42.

²² Declaration des Droits de L’homme et du Citoyen de 1789, art. IX, available at <http://www.assemblee-nationale.fr/histoire/dudh/1789.asp>.

²³ International Covenant on Civil & Political Rights, art. 14(2), 999 U.N.T.S. 171 (1966); See also, Universal Declaration of Human Rights, G.A. Res. 217A, art. 11(1), U.N. GAOR, 3d Sess., 1st plen. mtg. U.N. Doc A/810 (December 12, 1948).

but are being held instead as unlawful enemy combatants. Most detainees will never be charged nor brought before a court of law or a military commission. Defending the indefinite detention of non-US citizens without charge or trial at Guantanamo Bay, former Secretary of State, Condoleezza Rice, argued that “we have never fought a war like this before where...you can’t allow somebody to commit the crime before you detain them. Because if they commit the crime, thousands of innocent people die.”²⁴

A. International

International human rights tribunals, including the European Court of Human Rights and the Inter-American Court of Human Rights have condemned indefinite detention without charges, including terrorism cases, holding in one case that even a fourteen day period without judicial intervention is “exceptionally long.”²⁵ In fact, the European Court of Human Rights and the Inter-American Court of Human Rights have both stated that even undisputed terrorists remain protected by human rights law.²⁶

The UK anti-terrorist branch, in a document written after the July 2005 London bombings, sets out the rationale for an altered domestic legislative framework and policing environment focused on preventing attacks. It maintains that:

The threat from international terrorism is so completely different that it has been necessary to adopt new ways of working...The advent of terrorist attacks designed to cause mass casualties, with no warning, sometimes involving the use of suicide, and with the threat of chemical, biological, radiological or nuclear weapons means that we can no longer wait until the point of attack before intervening. The threat to the

²⁴S. Hudson, *Rice to Erase Europe’s Fears*, THE AGE, 12 (November 30, 2005).

²⁵ *Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2260, at para. 78.

²⁶ *Brogan v. United Kingdom*, 11 Eur. Ct. H.R. 117 (ser. A), P 62 (1988); see also *Durand & Ugarte Case*, 2001 Inter-Am Ct. H.R. (ser. C) No. 68, at 118 (August 16, 2000).

public is simply too great to run that risk...the result of this is that there are occasions when suspected terrorists are arrested at an earlier stage in their planning and preparation than would have been the case in the past.²⁷

Similarly, Australian police maintain that:

Quite properly the risk associated with acts of terrorism has been reflected in legislation that recognizes that the consequences of a terrorist act on Australian soil are significant and everything possible should be done to prevent that occurring. This legislation reflects the need to prevent and to intervene in the early stages of terrorism related behavior as an appropriate response to the level of threat or risk created by terrorism.²⁸

The terrorist organization and association offenses are essentially “status offenses” that target people on the basis of whom they know and associate with rather than what they have done. We must balance the needs of preventing an incident from occurring against the need to have gathered as much evidence as possible to ensure successful prosecution. This sometimes means the subsequent prosecution can be difficult and protracted because we are dealing with the elements of conspiracy, which often relies on circumstantial evidence.²⁹

B. United States

Eight years after 9/11, we are still in a quandary as to how to classify the status of those deemed engaged in terrorism, and what rights they should be granted. Have the attacks of September 11 resulted in a shift from metaphorical war/actual crime control to actual armed conflict? The suggestion that international terrorists pose a criminal threat is met with impatience in some quarters, as if it somehow diminishes the magnitude of the events of

²⁷ London Anti-Terrorist Branch (SO13), *Submission in Support of Three Month Pre-Charge Detention*, (October 5, 2005).

²⁸ Queensland Police Service, *Submission to Haneef Inquiry* at 1.3 (2008).

²⁹ M. Keely, *Terrorism: Policing's New Paradigm*, THE SYDNEY PAPERS, 94-105 (2008).

September 11. However, in democratic societies, crimes against national security—espionage, for example—are not generally handled by military commissions. The Military Order of November 13 appears to rest on a perception that the current terrorist emergency is legally of a warlike character, and not simply a danger to national security or suitable grounds for military involvement in law enforcement.”³⁰

As part of the ‘war on drugs’ the United States invaded Panama in 1989, purportedly in pursuit of ‘narco terrorists’. In the wake of the invasion, 5,000 Panamanians were held in detention inside Panama without charge for many years by the United States, violating basic human rights and denying due process. The invasion and subsequent detentions provide an early example of the extension of the long arm of globally dominant United States justice outside of the domestic arena.³¹

The rationale for integrating national security into criminal justice and preventing terrorism through pre-crime measures is that the human costs of terrorist incidents are so high that the traditional post-crime due process protection is unreasonable or unaffordable. On this basis, a whole raft of new laws has been passed, which aim to preempt harmful acts and manage the risk of terrorism through disruption, restriction and incapacitation. These new laws target a broader range of people and a broader range of activities than the post-crime criminal law. The laws aim to intervene prior to harmful acts being executed or even being planned. Counter-terrorism laws and measures that target crimes before crime focus on threats before threat. The pre-crime security measures introduced to counter-terrorism have been termed ‘laws against law’

³⁰Joan Fitzpatrick, *Military Commissions: Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 A.J.I.L. 345, April, 2002.

³¹J. James, *Hunting Prey: The US Invasion of Panama*, in J. James, ed., *Resisting State Violence: Radicalism, Gender, and Race in U.S. Culture*, 63-83 (1996).

because they are the antithesis of criminal justice due process that commences with the presumption of innocence and moves through a number of discrete stages from investigation to charge, trial and verdict.³²

The criminal law process guarantees the accused the following protections: 1) a presumption of innocence until proven guilty; 2) evidence is submitted to an open court of law; 3) the right to confront witnesses;³³ 4) the right to remain silent;³⁴ 5) the right to appeal to an independent judiciary;³⁵ and 6) the right to trial by jury of peers.³⁶ One of the fundamental rights in the criminal law process is the defendant's right to confront his accusers. But because counter-terrorism is based on intelligence information, the prosecution would be obligated to make intelligence sources available for cross-examination, which is a significant risk.

Under the laws of war, once the United States invaded Afghanistan and Iraq, the applicable international law was set out in the four Geneva Conventions of 1949, which since World War II, have been the standards regarding the capture, detention, treatment, and trial of prisoners of war and civilian internees.³⁷ The Geneva Conventions require prisoners be treated humanely, forbids secret detention sites, and appoints the International Committee of the Red

³² Jude McCulloch & Sharon Pickering, *Pre-Crime and Counter-Terrorism: Imagining Future Crime in the 'War on Terror'*, 49 *Brit. J. Criminology* 628 (September 2009).

³³ U.S. Constitution, Amendment VI.

³⁴ U.S. Constitution, Amendment V.

³⁵ U.S. Constitution, Article III.

³⁶ U.S. Constitution, Amendment VI.

³⁷ See generally Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; see generally Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

Cross as the international monitor for Geneva compliance.³⁸ The ICRC determined that either the Third Geneva Convention applies if detainees are POWs, or the Fourth Geneva Convention applies to detainees if they are not POWs.³⁹ And during armed conflict, captives are normally entitled to POW status, unless an article five tribunal determines otherwise.⁴⁰

However, lawyers in the U.S. Department of Justice argued that the United States should abandon the provisions of the Geneva Conventions in favor of a *de novo* legal regime they believed would be superior for the capture, detention, treatment, and trial of enemy prisoners, whether captured in the United States or in foreign countries. Alberto Gonzales, then Counsel to President Bush, said, “the new paradigm” of “the war against terrorism rendered obsolete Geneva’s strict limitations on questioning of enemy prisoners and rendered quaint some of its provisions...”⁴¹

Former President Bush ultimately accepted the Department of Justice’s arguments, and declined to apply Geneva law to either Al-Qaeda or Taliban detainees held in U.S. custody. In a series of memos, the Bush Administration maintained that those detained in the war on terrorism were not guaranteed Geneva Convention rights, and that “al Qaeda is not a High Contracting Party to Geneva.”⁴² Former President Bush also determined that “the Taliban detainees are

³⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75, June 8, 1977, 1125 U.N.T.S. 3.

³⁹ See Geneva Convention III *supra* note 24; Geneva Convention IV, *supra* note 24.

⁴⁰ Geneva Convention III, *supra* note 24, art. 5.

⁴¹Memorandum from Alberto R. Gonzales, Counsel to the President to George W. Bush, President, Decision Re: Application of the Geneva Convention on Prisoners of War to the Conflict with Al-Qaeda and the Taliban (January 25, 2002), reprinted in *The Torture Papers*, *supra* note 29, at 119.

⁴² Memorandum from George W. Bush, President to Richard B. Cheney, Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees (February 7, 2002), reprinted in *The Torture Papers*, *supra*

unlawful combatants and therefore, do not qualify as prisoners of war under Article 4 of Geneva.”⁴³ The International Committee of the Red Cross has protested to the contrary. It is the view of the ICRC that either the Third Geneva Convention applies if detainees are POWs; or the Fourth applies if they are not.⁴⁴

Under the laws of war, a prisoner of war is defined as a person belonging to one of the following categories and who has fallen into the power of the enemy:

- A. Members of the armed forces of a Party to the conflict, as well as members of militias of volunteer corps forming part of such armed forces;
- B. Members of other militias and member of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militia or volunteer corps, including such organized resistance movements, fulfill the following conditions:
 - 1. That of being commanded by a person responsible for this subordinates;
 - 2. That of having a fixed distinctive sign recognizable at a distance;
 - 3. That of carrying arms openly;
 - 4. That of conducting their operations in accordance with the laws and customs of war.⁴⁵

Accordingly, a detained terrorist fits neither the definition of civilian nor prisoner of war. Thus, the detainees were to be denied basic international law rights with the exception of receiving food, water, shelter and basic medical care. They were denied independent judicial

note 29, at 134; see also Memorandum from Jay Bybee, Assistant Attorney General, to Alberto Gonzales, Counsel to the President, August 1, 2002.

⁴³ *Id* at 135.

⁴⁴ See Geneva Convention III *supra* note 24; Geneva Convention IV, *supra* note 24.

⁴⁵ See Field Manual No. 27-10, Department of the Army, Washington, D.C., page 19, 20 (July 18, 1956).

review and subject to indefinite detention.⁴⁶ Because the detainees were not citizens of a state with which the United States was officially at war, military rules did not apply. And because the detainees were not citizens of the United States, nor were they detained in the United States or any of its territories, they were not within the jurisdiction of American civil law.

Some criticize that Guantanamo Bay was set up as a legal loophole.⁴⁷ The detainees were exceptions to the conventions on prisoners of war, and the place of detention was an exception as well. The ability to make exceptions and to identify an enemy is one of the strongest marks of sovereignty. Designation of a condition as exceptional and an enemy as uniquely dangerous was said by German Carl Schmitt to justify the exercise of sovereignty through suspension of normal rule of law.⁴⁸

The use of torture at Guantanamo Bay has been the subject of much global criticism. In its 2005 annual report, Amnesty International suggested Guantanamo Bay had become the “gulag of our times.”⁴⁹ Is torture ever permissible in ‘exceptional circumstances’ when considering terrorism? The Haynes memorandum to Donald Rumsfeld listed three categories of techniques for use with uncooperative detainees. Category I techniques included shouting and giving deceptive information. If the detainee remained uncooperative, the interrogator could use

⁴⁶Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Military Order of Nov. 13, 2001, 66 Fed. Reg. 222 § 4 (Nov. 16, 2001).

⁴⁷Charles D. Weisselberg, *The Detention and Treatment of Aliens Three Years After September 11: New New World?* 38 U.C. Davis L. Rev. 815, 837 (March 2005).

⁴⁸ Carl Schmitt, *The Concept of the Political*, trans. T.B. Strong, Chicago: University of Chicago Press (1996).

⁴⁹ Irene Khan, Foreword to Amnesty International, amnesty international report 2005: The state of the world’s human rights (2005) available at <http://www.amnesty.org/en/library/asset/POL10/001/2005/en.6287f77f-d53a-11dd-8a23-d58a49c0d652/pol100012005en.html>.

Category II techniques, aimed at humiliation and sensory deprivation. These techniques included: stress positions for up to four hours; hooding during transportation; twenty-hour interrogations; removal of religious and all other comfort items; removal of clothing; forced grooming, such as shaving of facial hair. Category II techniques, which needed permission from further up the military chain of command, also included the use of individual phobias, like fear of dogs, to induce stress. Category III methods were designed for the small percentage of unusually uncooperative and resistant detainees. There were four Category III techniques: mild physical contact, such as grabbing and poking; use of scenarios to make the detainee think death or torture was imminent; exposure to cold weather or water; and use of a wet towel and dripping water to induce the sensation of drowning.⁵⁰ “Although the incidences of torture and humiliation at Abu Ghraib prison in Iraq (hooding, use of dogs, sexual humiliation and other degradations) were said to be shocking and the result of a small number of ‘bad’ personnel when first revealed, they are the same techniques endorsed by Rumsfeld when he undersigned the Haynes memorandum.”⁵¹ These doctrines have led to the systematic use of torture and cruel, inhuman and degrading treatment used on prisoners detained in Guantanamo Bay, Kandahar prison in Afghanistan, Abu Ghraib, as well as the rendition of terror suspects to third countries and to “black sites” scattered around the world for detention, interrogation, mistreatment, and sometimes death.⁵²

⁵⁰Phillipe Sands, *Lawless World*, 2nd edition, London: Penguin, 5-6 (2008).

⁵¹ Barbara Hudson, *Justice in a Time of Terror*, 49 *Brit. J. Criminology* 702, (September 2009).

⁵²Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 *Geo. Wash. L. Rev.* 1200 (2007).

A memorandum of August 2002, signed by Assistant Attorney General Jay S. Bybee, stated that infliction of pain only rises to the level of torture ‘if the level of pain is as severe as that accompanying death, organ failure or serious impairment of body functions’; that infliction of psychological pain only rises to the level of torture if the interrogator intended to cause lasting psychological trauma; that it would be unconstitutional to apply anti-torture laws to interrogations authorized by the President in the war on terror; and that ‘under the current circumstances, necessity or self-defense may justify interrogation methods that might violate’ the criminal prohibition on torture.⁵³

Even U.S. citizens detained in military jails inside the United States as “unlawful enemy combatants” have been denied basic rights. As reported in the *Los Angeles Times*, officers in charge of the detention of Jose Padilla and Yasser Hamdi (both U.S. citizens), became alarmed when the prisoners were deprived of all natural light for months, repeatedly interrogated, denied access to attorneys and mail from home, denied contact with anyone other than prison guards, and deprived for years of such things as exercise or access to even a dictionary.⁵⁴

The question remains: do suspected terrorists deserve basic human rights? As reported in the *Washington Post*, Rumsfeld described the Guantanamo detainees as ‘the worst of the worst’, and therefore undeserving of rights and protection.⁵⁵ Former Vice President Cheney said using

⁵³ Bybee Memorandum 2002, quoted by David Luban, *Liberalism, Torture, and the Ticking Bomb*, *Virginia Law Review*, 91: 1435 (2005).

⁵⁴ Pamela Hess, *Officer Wrote of Harsh Treatment of U.S. Detainee*, *LOS ANGELES TIMES*, at A9 (October 8, 2008).

⁵⁵ T. Otty, *Honour Bound to Defend Freedom? The Guantanamo Bay Litigation and the Fight for Fundamental Values in the War on Terror*, *European Human Rights Law Review*, 447 (2008).

water-boarding in interrogating terrorists was a “no-brainer.”⁵⁶ In contrast, the International Committee of the Red Cross,⁵⁷ the State Department lawyer responsible for detainee cases,⁵⁸ the top Bush administration official in charge of deciding whether to bring detainees at Guantanamo to trial,⁵⁹ have all concluded that acts of torture were committed. The United States, when it ratified the Convention Against Torture, obligated itself to extradite or prosecute those who torture, or are complicit in its use.⁶⁰ In addition to being illegal, the use of torture, despite claims to the contrary by Cheney and others, does not produce useable intelligence.⁶¹

The Geneva Conventions on the treatment of prisoners, the requirement for military action by one state against another to be authorized by the Security Council of the United Nations, the range of techniques that are proscribed under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the meaning of the right to freedom from deprivation of liberty other than by a due process decisions of a court of law are subject to different interpretation and different levels of compliance among nation states. Many

⁵⁶Tom Regan, *Cheney Confirms Use of Waterboarding*, CHRISTIAN SCI. MONITOR, October 26, 2006, available at <http://www.csmonitor.com/2006/1026/dailyUpdate.html>.

⁵⁷Mark Danner, *The Red Cross Torture Report: What It Means*, 56 N.Y. Review of Books, April 30, 2009; Joby Warrick & Julie Tate, *Report Calls CIA Detainee Treatment ‘Inhuman’*, WASHINGTON POST, A06 (April 7, 2009).

⁵⁸ Andrew O. Selsky, *Ex-State Dept. Lawyer Decries Torture after 9/11*, ASSOCIATED PRESS, (March 27, 2009).

⁵⁹ Bob Woodward, *Detainee Tortured, Says U.S. Official*, WASHINGTON POST, A01 (January 14, 2009).

⁶⁰ Convention Against Torture and other Cruel, Inhuman, and Degrading Treatment or Punishment art. 4, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (December 10, 1984).

⁶¹Peter Finn & Joby Warrick, *Detainee’s Harsh Treatment Foiled No Plots*, WASHINGTON POST, A01 (March 29, 2009).

European nations (like France) accuse Britain and the United States of going to war in Iraq illegally, because they did not have a second resolution from the Security Council when the weapons inspections failed and military action was therefore warranted.

Under the Geneva Convention, captured soldiers must be returned to their home state upon the cessation of hostilities.⁶² But unlike an actual war, which has a definitive ending, the end of “the war on terrorism” could be years into the future.

According to Section 2 of the November 2001 Presidential Order, the following individuals will be brought before the military commissions:

- (a) The term “individual subject to this order” shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:
 - (1) there is reason to believe that such individual, at the relevant times,
 - (i) is or was a member of the organization known as al Qaida;
 - (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy;
 - (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order.⁶³

Under the broadest interpretation of the above Presidential Order, an enemy combatant is any individual who in any way came in contact with any member of al-Qaeda with the intent of causing harm to the United States.

⁶² Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T 3316, 75 U.N.T.S. 135.

⁶³ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Military Order of Nov. 13, 2001, 66 Fed. Reg. 222 § 2 (Nov. 16, 2001).

Since 9/11, more than 660 individuals were captured in Afghanistan and transferred to Guantanamo Bay, held under the status of “enemy combatant.”⁶⁴ Since 2003, the number detained has declined. Critics have claimed that some individuals were detained at Guantanamo Bay without cause, because there was no evidence to support their involvement in terrorism.

The court in *Hamdi v. Rumsfeld*, 316 F.3d 450, 185 A.L.R. Fed. 751 (4th Cir. 2003), held that the President constitutionally detained the petitioner, a United States citizen, as an enemy combatant pursuant to the war powers entrusted to him by the United States Constitution, the court noting that one who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated as unlawful enemy combatant and treated as such.

In *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), Justice Stevens addressed the issue of indefinitely holding detainees in a dissenting opinion:

Whether respondent is entitled to immediate release is a question that reasonable jurists may answer in different ways. There is, however, only one possible answer to the question whether he is entitled to a hearing on the justification for his detention.

At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people’s rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process.

Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme

⁶⁴Guantanamo Bay Detainees, http://www.globalsecurity.org/military/facility/guantanamo-bay_detainees.htm.

forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.⁶⁵

The Supreme Court addressed the issue of the military commissions and enemy combatants in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Court stated that:

The commission's procedures...provide...that an accused and his civilian counsel may be excluded from, and precluded from, ever learning what evidence was presented during any part of the proceeding...the presiding officer decides to "close." Grounds for closure include the protection of classified information, the physical safety of participants and witnesses, the protection of intelligence and law enforcement sources, methods, or activities, and 'other national security interests.' Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to the client what took place therein. Another striking feature is that the rules governing Hamdan's commission permit the admission of any evidence that, in the presiding officer's opinion, would have probative value to a reasonable person. Moreover, the accused and his civilian counsel may be denied access to classified and other 'protected information,' so long as the presiding officer concludes that the evidence is "probative" and that its admission without the accused's knowledge would not result in the denial of a full and fair trial.⁶⁶

The Supreme Court most recently addressed this issue in the *Boumediene* case, which though striking down the suspension of habeas corpus in the Military Commission's Act of 2006, did not question the legitimacy of the status classification of Boumediene as an unlawful enemy combatant.⁶⁷

Since 9/11, The Presidential Order established a judicial regime by which terrorists are classified as unlawful enemy combatants and detained until brought to justice. However, the military commissions have been challenged in the Courts and in public opinion around the world. The dehumanization of this category of persons-unlawful enemy combatants, has harmed

⁶⁵*Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (Stevens, J., dissenting).

⁶⁶*Hamdan v. Rumsfeld*, 548 U.S. 557, 2786-2787 (2006).

⁶⁷*Boumediene v. Bush*, 128 S.Ct. 2229, 2234-35 (2008).

the country's international standing. Amidst harsh criticism of the U.S. military prison at Guantanamo Bay, Cuba, President Obama announced plans to close the prison during his first week in office. However, the January 2010 deadline he imposed seems unlikely. Though the White House is making progress finding countries to accept the remaining detainees, a U.S. prison has yet to be designated for those prisoners deemed too dangerous for release. Critics of Obama's plan to close Guantanamo Bay claim it remains the safest facility in which to keep suspected terrorists, and that moving detainees to a supermax prison (such as Florence, Colorado), would result in less humane conditions for the detainees and less security for American citizens.⁶⁸

Unlike other countries including Israel, Russia, India and Spain which regularly try terrorists, the Bush Administration's initial handling of the fundamental issues has resulted in perceived policy failure. Israel, Spain, India and Russia have consistently defined terrorism as a criminal act and terrorists as criminals. But India and Russia have been criticized for violations of human rights once terrorists caught in their countries are classified as criminals. By establishing a judicial system inconsistent with Article III requirements and international law guarantees, the Bush Administration opened the door to widespread criticism here in the U.S. Israel has the most fully developed judicial approach to terrorism in that defendants may be brought either to court for a full criminal trial, or detained administratively subject to independent judicial review. A terrorist detained in Israel brought to trial in a military court is provided full criminal rights and protections akin to the judicial process before a civilian court.

⁶⁸United Press International, Inc., *Detainees may face harsh U.S. prison life*, October 4, 2009, available at http://www.upi.com/Top_News/US/2009/10/04/Detainees_may_face_harsh_U.S._life_.

Here in the U.S., classifying suspected terrorists as enemy combatants as defined by the U.S. allows for basic human right violations of the Geneva Convention.⁶⁹

To date, only three detainees have been tried in U.S. federal courts on criminal charges stemming from their connections to the September 11th attacks, Al Qaeda, or the Taliban: John Walker Lindh, the so-called “American Taliban;”⁷⁰ Jose Padilla, the alleged “dirty bomber;”⁷¹ and Zacharias Moussaoui, the “so-called twentieth hijacker.”⁷² Lindh and Padilla were both U.S. citizens. Padilla was held for 1,307 days in military custody until he was indicted and transferred to U.S. District Court for the Southern District of Florida for trial. Padilla was convicted and sentenced on January 22, 2008 to 17 years and 4 months and is now in a supermax prison in Colorado.⁷³ Of the 775 detainees originally brought to Guantanamo Bay, approximately 270 detainees remain, 200 of whom could be repatriated if another country can be found to receive them.⁷⁴

Besides the three detainees tried in federal courts discussed above, fewer than a dozen have been charged before a military commission. This leaves the remaining detainees in indefinite limbo, without charges. The first detainee to be tried before a military commission at

⁶⁹See, e.g., Amos N. Guiora, *Qurin to Hamdan: Creating a Hybrid Paradigm for the Detention of Terrorists*, 19 Fla. J. Int'l L. 511 (2007).

⁷⁰*U.S. v. Lindh*, 227 F.Supp.2d 565, 565 (E.D. Va. 2002).

⁷¹*Rumsfeld v. Padilla*, 542 U.S. 426, 426 (2004).

⁷²*U.S. v. Moussaoui*, 483 F.3d 220, 220 (4th Cir. 2007).

⁷³Hari M. Osofsky, *The Geography of Justice Wormholes: Dilemmas From Property and Criminal*, 53 Vill. L. Rev. 117, 136 (2008).

⁷⁴Michael Isikoff, *No Country for 270 Men*, NEWSWEEK, June 23, 2008, available at <http://www.newsweek.com/id/141513>.

Guantanamo Bay was Salim Ahmed Hamdan.⁷⁵ Hamdan was captured in November 2001 by the Northern Alliance, then turned over to the U.S. military forces and transferred to Guantanamo in June 2002.⁷⁶ He was acquitted of conspiracy charges and sentenced to only 5- ½ years, with credit for time served while in military detention. Following Hamdan’s military commission trial, President Bush continued to argue that he had the right to hold Hamdan indefinitely-beyond the time of this sentence.⁷⁷

Attorney General Eric Holder announced on November 13, 2009 the decision to bring Khalid Sheikh Mohammed and four others detained at Guantanamo Bay to trial at a federal courthouse in New York City, not far from the site of the World Trade Center, whose twin towers they will be charged with destroying. The case is likely to force the civilian federal court to confront a host of difficult issues, including rough treatment of detainees, sensitive intelligence gathering and the potential spectacle of defiant terrorist disrupting proceedings. U.S. civilian courts prohibit evidence obtained through coercion, and a number of detainees were questioned using harsh methods some call torture. Said Holder, “After eight years of delay, those allegedly responsible for the attacks of September the 11th will finally face justice.”⁷⁸ Holder said he decided to bring Mohammed and the other four before a civilian court rather than a military commission because of the nature of the undisclosed evidence against them, because

⁷⁵*Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁷⁶*Id.*

⁷⁷Peter Finn, *Judge Rejects Government Call to Reconsider Hamdan Sentence*, WASHINGTON POST, A10, (Oct. 31, 2008), available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/30/AR2008103004661.html>.

⁷⁸Devlin Barrett, The Associated Press, *NYC trial of 9/11 suspects poses risks*, THE SIOUX CITY JOURNAL, A10 (November 14, 2009).

the 9/11 victims were mostly civilians and because the attacks took place on U.S. soil. Lawyers for the accused will almost certainly try to have the charges thrown out based on the rough treatments of the detainees at the hands of U.S. interrogators, including the repeated water boarding of Mohammed.⁷⁹

IV. Theoretical Framework for Alternatives to the Military Commissions

Traditional Article III courts seem ill-equipped for such trials as the upcoming Khalid Sheikh Mohammed. Two principle staples of Article III courts are incompatible with terrorism-related trials: the right to confront accusers and trial by a jury of one's peers. A problem with putting a suspected terrorist on trial is that the evidence available is intelligence information gathered by the FBI and CIA, not ordinary criminal evidence. Since this intelligence information is not available to the terrorist, he does not have the right to confront his accuser. Regarding the right to trial by a jury of one's peers, if Osama Bin-Laden were captured today and brought to a federal court of law, would it even be possible to field a jury of his peers?⁸⁰

A. Proposed Domestic Security Courts

Should we instead allow for trials of suspected terrorists to be heard before a bench trial, without a jury, to allow for introduction of intelligence information that would not be made available to the defendant or his counsel? Some legal scholars have suggested the establishment of such national security courts that would be staffed by civilian judges, but with specialized rules for the trial of suspected terrorists. The proposed court will protect the defendant by ensuring that the Court will not automatically accept introduced intelligence into the record. The

⁷⁹*Id.*

⁸⁰Testimony of Amos Guiora, U.S. Senate Committee on the Judiciary, June 4, 2008, *Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System*, June 4, 2008, available at <http://www.judiciary.senate.gov/hearings/testimony.cfm>.

government will first have to show that the intelligence information is valid, viable, relevant and corroborated. Strict scrutiny that balances the legitimate rights of the individual with the legitimate national security rights of the state is one of the advantages of the proposed domestic court. The judges will have to be trained in understanding intelligence information.⁸¹

Opponents of this idea point out that a new national security court would make the unlawful enemy combatant status a permanent one, and has constitutionality issues. The establishment of these new national terror courts has been condemned by the Constitution Project—a commission that found that “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.”⁸² However, the need for national security is paramount. Proponents of new domestic security courts to try terrorists contend the prosecution be restricted to using intelligence information against a suspected terrorist only after the judge has determined that presenting the classified information to the terrorist/defendant would pose a significant threat to national security (a heavy burden for any judge to bear). Moreover, evidence obtained through torture techniques cannot be constitutionally admissible in any federal court. Otherwise, if traditional evidence is available and sufficient for a court to order the suspected terrorists’ continued detention, the state should submit the criminal law evidence, rather than relying on classified intelligence information.

⁸¹*Id.*

⁸²A Critique of National Security Courts, THE CONSTITUTION PROJECT, June 23, 2008, at 6, available at http://www.constitutionproject.org/pdf/Critque_of_the_National_Security_Courts.pdf.

B. Proposed International Terror Court

While it would seem plausible a treaty based International Terror Court could hear such cases, in reality this would never work, because in order to establish such a court, the nations who would be party to such a court would need to agree on a definition of “terrorism.” The UN’s role following 9/11 has been extremely limited as member nations cannot agree upon the definition of “terrorism.” And even *if* member nations could agree on a definition of terrorism, the fact that the United States still imposes a death penalty is a huge stumbling block in international jurisdiction. There would need to be cooperation regarding intelligence gathering and sharing (highly unlikely) and international rules of evidence (also unlikely), not to mention the need to agree on prison conditions (the US has come under harsh international criticism for conditions at Guantanamo Bay and Abu Ghraib).⁸³

In numerous decisions (*Rasul v. Bush*, *Rumsfeld v. Padilla*, *Hamdan v. Rumsfeld*, *Hamdi v. Rumsfeld*, *Boumediene v. Bush*), the U.S. Supreme Court has failed to define what rights to grant to suspected terrorists. And because only one non-U.S. citizen detainee has been convicted since 9/11 (Zacarias Moussaoui), the military commissions have not proven successful.

C. Proposed New Classification Status for Terrorist Detainees

It seems the United States needs a policy which balances the rights of the individual to a fair trial with the rights/obligations of the State to national security. The government has a duty to respond to national security threats, but they also have obligations to ensure human rights of both citizens and prisoners. Perhaps a new status for suspected terrorists needs to be established,

⁸³Testimony of Amos Guiora, U.S. Senate Committee on the Judiciary, June 4, 2008, *Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System*, June 4, 2008, available at <http://www.judiciary.senate.gov/hearings/testimony.cfm>.

whereby the detainee is neither a criminal nor a POW, but subject to certain rights and privileges not currently afforded to the “unlawful enemy combatant.” Such rights and privileges include interrogation methods that do not use torture (like water-boarding), the right to appeal to an independent judiciary, the right to counsel of the suspected terrorists’ choosing, known terms of imprisonment, and procedures to prevent indefinite detention. President Obama announced plans to close Guantanamo Bay during his Presidential campaign, and seems determined to make good on that promise, although it seems unlikely to happen by the January 2010 deadline Obama set during his first week in office.⁸⁴ “GITMO, whether in its present format or in some re-articulated or re-constituted framework, is an unacceptable model for the military commission process and has been permanently and irrevocably tainted.”⁸⁵ Given that some of the remaining Guantanamo Bay detainees present a true threat to American national security, the U.S. cannot simply agree to release all of them. However, under fundamental concepts of human rights, freedom and democracy, and also obligations under international law, the U.S. cannot continue to indefinitely detain suspected terrorists under the current military commission process.

V. Conclusion

Terrorist crimes arguably differ from other transnational crimes, in that they are politically motivated and pose a threat to national security. In the years following 9/11, we are still in a quandary as to how to classify the status of those deemed engaged in terrorism, and what rights they should be granted. The United States is at the cross roads for needed policy

⁸⁴United Press International, Inc., *Guantanamo unlikely to close in early 2010*, September 26, 2009, available at http://www.upi.com/Top_News/US/2009/09/26/Guantanamo_unlikely_to_close_in_early_2010.

⁸⁵Testimony of Amos Guiora, U.S. Senate Committee on the Judiciary, June 4, 2008, *Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System*, June 4, 2008, available at <http://www.judiciary.senate.gov/hearings/testimony.cfm>.

changes to balance the rights of suspected terrorists with the rights of American citizens for national security.

President Obama could issue an Executive Order mandating humane treatment for all detainees remaining in U.S. custody, regardless of where they are held. “Although the incidences of torture and humiliation at Abu Ghraib prison in Iraq (hooding, use of dogs, sexual humiliation and other degradations) were said to be shocking and the result of a small number of ‘bad’ personnel when first revealed, they are the same techniques endorsed by Rumsfeld when he undersigned the Haynes memorandum.”⁸⁶ There should be no exceptions to the Convention Against Torture. Finally, the United States could also consider establishing its own human rights commission. Most democracies are members of regional human rights regimes, and many have their own national human rights commissions. If the United States took the initiative to do this, perhaps it would strengthen its global reputation. It appears that the European Convention on Human Rights has had some influence on European efforts to address international terrorism.

A critical time for all people is wartime, when the survival of a nation may involve actions, or desire to take such actions, against enemy individuals in a manner which would not be taken in a more peaceful setting. While the conventional rules of warfare have been in place for decades and have helped regulate such conduct, these rules have seemingly gone out the window in this war against terror. The fear following September 11 resulted in the horrors of Guantanamo Bay and Abu Ghraib. However, two wrongs don’t make a right. The bottom line question remains: Do Americans still believe that all human beings are created equal, with

⁸⁶Barbara Hudson, *Justice in a Time of Terror*, 49 *Brit. J. Criminology* 702, (September 2009).

certain inalienable rights? If so, the U.S. needs to amend current policies that, since 9/11, have resulted in torture and rendition victims.