

A Comparative Approach to Counter-Terrorism Legislation and Legal Policy

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Abstract

After September 11th terrorist attacks, the United States government was forced to quickly formulate a complete strategy for combatting terrorism. This strategy necessarily included legislation and legal policy for the detainment and treatment of captured terrorists. The Bush and Obama administrations pursued differing policies focusing, respectively, on indefinite detainment and criminal trial in civilian courts. Over the course of 16, the United States learned two main lessons from the policies of these two administrations: (1) captured terrorists are not typical prisoners of war and thus their detainment must involve more legal scrutiny than the later; and (2) captured terrorists are not ordinary criminals and thus the civilian criminal court system, due to constitutional constraints, is not capable of adequately trying every count of terrorism. Other nations around the world have been struggling to find a balance between these same two truths. France approaches the issue by employing special court jurisdictions and empowered judges to specifically handle cases of terrorism. Israel, on the other hand, enacted robust legislation to define terrorism, identify terrorist organizations, and describe what constitutes supporting terrorism, introducing such concepts as significant aggravating factors in criminal proceedings. Now the Trump administration is faced with the task of formulating new policy using the past 16 years of trial and error as well as the working strategies of other countries. Such policy should revolve around drafting proper legislation to define and punish acts of terror as well as create court jurisdictions capable of handling the unique challenges that come with trying counts of terrorism.

A Comparative Approach to Counter-Terrorism Legislation and Legal Policy

After the tragic events of September 11th, 2001, the United States government was suddenly introduced to a challenging new threat to national security, international terrorism. These international terrorists had been active against the United States and other countries several years before 9/11, such as in the bombings of the World Trade Center basement in 1993 and USS Cole in 2000. Despite a decade of interaction with such groups, before 2001, the United States government lacked and failed to adapt their definitions and policy in order to effectively deal with this new brand of terrorism, which differed greatly from the conventional notions of terrorism that had existed before the late 20th century. It was not until after the destruction of the twin towers and the subsequent “war on terror” that the United States government constructed specific policies and procedures to counter the threat of international terrorism. (Perrow, 2006) Included within these policies is the process for detaining and convicting captured terrorists. Since 9/11, the United States has had two different presidential administrations with two different sets of policies to detain and convict captured terrorists. While effective and streamlined, the Bush administration’s policies were criticized for a lack of transparency and violations of constitutional due process. (Neas, 2004) The Obama administration’s policy, differing from the Bush administration, attempts to achieve more transparency and “fairness” by bringing the matter to civilian criminal courts in the United States. (Sullivan, 2013) This approach fixed many of the legal issues with the previous administration's policy but quickly revealed the crippling limitations of trying terrorists under civilian criminal procedure. As the best possible system has yet to be implemented, the nascent Trump Administration must craft and introduce new policy and procedure relative to captured

terrorists using the positive elements of the past two administrations as well as elements from effective systems used by other nations around the world.

The Judicial Process

Policies on the judicial process for captured terrorists denote the protocol for everything happening after the capture of a suspected terrorist, including interrogation, detainment, trial, conviction, and any further detainment, punishment, or release post-conviction. The Bush and Obama administrations are the only two presidential administrations to date to have such policies for international terrorists and the two administrations' policies differ greatly.

Bush Administration

The Bush administration's policy on dealing with captured terrorists revolves around the administration's classifying terrorists as "enemy combatants." First defined by President Franklin D. Roosevelt in Proclamation 2561 as, "all persons...at war with the United States...who during a time of war...are charged with committing...hostile or warlike acts" (Roosevelt, 1942). Proclamation 2561 goes on to establish that, "such persons shall not be privileged to seek any remedy...in the courts of the United States...except under such regulations as the Attorney General...may from time to time prescribe" (Roosevelt, 1942). In other words, the members of a war effort against the United States, who are captured by US forces, are subject to the sole jurisdiction of the military, not the United States civilian judicial system. Previously, as such captured members were generally uniformed soldiers of a nation at war with the United States, this went without saying and needed no real application. But, after the events of 9/11, the United States found itself at war with an enemy that wore no uniform, flew no flag, and belonged to no nation or country. On September 18, 2001, Congress passed the "Authorization for Use of Military Force" joint resolution, which gave President Bush

authorization to use, “all necessary and appropriate forces” to find and punish those responsible for the 9/11 attacks as well as prevent further acts of international terrorism against the United States (AUMF, 2001). This included the ability to determine which organizations and individuals are associated with terrorism and structure systems to detain, charge and convict them. (AUMF, 2001) In furtherance of this goal, the Bush administration expanded the original definition of an “enemy combatant” to include international terrorists. Attorney General Alberto Gonzales (2004) said:

Under these rules, captured enemy combatants, whether soldiers or saboteurs, may be detained for the duration of hostilities. They need not be 'guilty' of anything; they are detained simply by virtue of their status as enemy combatants in war. This detention is not an act of punishment but one of security and military necessity. It serves the important purpose of preventing enemy combatants from continuing their attacks. (p. 8)

Under the Bush administration, upon seizure, captured terrorists would be moved to secret “blacksites” for interrogation by the military and intelligence community. Once the immediate need for the terrorist’s information has abated, they were then detained in military prisons, such as Guantanamo Bay, should the need for more intelligence arise. (Silver, 2006) The Bush administration held that this was legal because, as “enemy combatants,” the captured terrorists were not entitled to any civilian legal counsel, appeals, or interrogation protections. (Silver, 2006)

Criticisms. The Bush administration’s “enemy combatant” policy is heavily criticized for violations of American legal concepts and international law. First, the critics claim that such policy denies the American notion of due process. (Neas, 2004) Captured terrorists, some of which are American citizens, were detained indefinitely and not given the right to a speedy trial,

presumption of innocence, evidentiary rules, civilian defense counsel, or the ability to appeal their convictions or detainment. In cases where the captured terrorist is an American citizen, critics argue that American citizens are always entitled to their constitutional rights and protections, no matter how heinous the acts they commit, and that such denial of rights and protections is wholly unacceptable. (Neas, 2004) In regards to captured terrorists who are not American citizens, the critics argue that, although the captured terrorists are not innately entitled to due process rights, the United States Constitution still secures specific rights and protections for all that are detained or charged under its government's authority, thus conferring such rights upon the captured terrorist. (Neas, 2004) While this argument makes conceptual sense, it bases itself on the notion that international terrorists are really just international criminals, rather than the enemy combatants as the Bush administration classifies them. Gonzales (2004) expounds upon this:

The terminology that many in the press use to describe the situation of these combatants is routinely filled with misplaced concepts. To state repeatedly that detainees are being held without 'charge' mistakenly assumes that charges are somehow necessary or appropriate. But nothing in the law of war has ever required a country to charge enemy combatants with crimes, provide them access to counsel, or allow them to challenge their detention in court and states in prior wars have generally not done so. (p. 8)

In other words, the Bush administration does not see international terrorists as glorified criminals; they consider them as enemy soldiers in a war.

In regards to international law, critics of the Bush administration policy target the administration's use of blacksites for detainment and interrogation as a violation of international law. (Weissman, 2012) While it is unclear as to if the act of detaining an enemy combatant in an

“undisclosed location” in and of itself is illegal, critics argue that such “extraordinary rendition,” the term used by Congress and some international organizations, prevents the legal accountability and scrutiny necessary to prevent torture and illegal treatment of prisoners. (Weissman, 2012) Furthermore, the critics argue that the United Nations Human Rights Council has designated several of the “advanced interrogation” methods, openly authorized by the Bush administration, as torture, thus solidifying their previous argument. (Weissman, 2012) Such methods include, “forced nudity, continuous exposure to ‘white noise/loud sounds’ and light, sleep deprivation, ‘dietary manipulation,’ waterboarding, and psychological and physical ‘corrective techniques’” (Weissman, 2012, p. 15).

Legal challenges. The Bush Administration’s “enemy combatant” classification and detainment policy faced legal challenge. In 2004, the Supreme Court upheld the Bush Administration’s authorization, granted by the “Authorization for Use of Military Force” resolution, to identify enemy combatants and detain them, even if they are American citizens, however, the Court also determined that the detainees who are US citizens must be entitled to due process to hear the facts supporting their status as an “enemy combatant” as well as challenge their place in such classification. (*Hamdi*, 2004, p. 533) The US military had been directed to detain enemy combatants without charge or due process, citing normal prisoner of war procedures, requiring only that an individual is a member of a party in armed conflict with the United States, as justification for internment. (*Hamdi*, 2004, p. 517) The Supreme Court agreed that, since detaining captured members of hostile parties in an armed conflict is a fundamental and essential part of warfare, Congress’s authorization to use military force against terrorist organizations necessarily included the authorization to detain captured combatants. (*Hamdi*, 2004, p. 518-9) The Court reasoned that such detainment is essential because it is done

with the purpose of preventing combatants from continuing to contribute to the conflict. (*Hamdi*, 2004, p. 518-9) For this reason, the court also upheld the authorization to exercise such detainment even against US citizen enemy combatants. (*Hamdi*, 2004, p. 518-9) However, the Court also held that a citizen-detainee must be given “notice of the factual basis of their classification, and a fair opportunity to rebut the Government’s assertions (*Hamdi*, 2004, p. 533).” The Court left it up to the Government to create this “fair opportunity” and acknowledged that the limitations of war may necessitate evidence or procedure usually unacceptable in normal hearings, such as hearsay evidence, be legitimate in the proceeding. (*Hamdi*, 2004, p. 534)

In the same term as *Hamdi*, the Supreme Court also ruled that non-citizen detainees in Guantanamo had the ability to challenge the legality of their internment, as well as submit tort claims, in Federal court. (*Rasul*, 2004, p. 484) In *Rasul*, fourteen Australian and Kuwaiti Guantanamo detainees, captured by the US military in association with Taliban forces in Afghanistan, challenged the legality of their detainment as well as their denial of counsel, formal charge, and trial, claiming that they did not contribute to the Taliban or any hostilities towards the United States. (*Rasul*, 2004, p. 470-1) Following the dismissal of their claims for lack of jurisdiction, the Supreme Court reasoned that federal courts did have jurisdiction over such claims because the detainees were not nationals of a country at war with the United States and because the territory in which they were detained is solely controlled by the United States. (*Rasul*, 2004, p. 484) The Supreme Court thus remanded the detainees’ claims to the lower courts for reconsideration.

In 2006, the Supreme Court invalidated the authority of military commissions, created by military order of the President in November 2001, convened to try detainees for war crimes.

(*Hamdan*, 2006, p. 612) The Bush administration claimed that Congress's "Authorization for Use of Military Force" resolution as well as the 2005 Detainee Treatment Act, which gave the President power to convene military commissions in circumstances justifiable under the Constitution and federal law, gave it the power to create such commissions to try Guantanamo detainees for terrorism related war crimes. (*Hamdan*, 2006, p. 593) Nevertheless, the court held that the 2001 resolution only gave the President authority to deploy the military in counter-terrorism as well as the power to militarily detain individuals who are a part of active hostilities towards the United States, not legislative authority to establish new judiciary bodies for trial of crimes. (*Hamdan*, 2006, p. 594) Furthermore, while the Detainee Treatment Act did authorize the President general authority to convene military commissions, this power is limited in that the commissions must be justifiable under the Constitution or acts of Congress. (*Hamdan*, 2006, p. 595) Since the military commissions in Guantanamo are not established by the Constitution or an act of Congress, they lack proper authority even under the Detainee Treatment Act. (*Hamdan*, 2006, p. 595). The court did, however, acknowledge that while, "Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary (*Hamdan*, 2006, p. 636)."

Issues with enemy combatants, commissions and indefinite detainment. The Bush Administration's expansion of the definition of "enemy combatant" to include members of non-state hostile parties, such as the Taliban and Al-Qaeda, was, in reality, a very small departure from the historical western policy on enemy POW's, which did not take into account the unique political nature of the adversary. The United States had generally been operating under Von Clausewitz's theory of war, which defines war as, "mere continuation of policy by other means

(Clausewitz, 1832, p. 77).” Under this ideology, armed conflicts only persist for as long as the conflict of interest or political matter persists. Enemy soldiers, while trained to kill, do not fight for fighting’s sake, they follow orders and are used as a means to force action out of an adversary. Captured enemy soldiers are detained for the remainder of hostiles, not out of punishment but to prevent them from returning to the fight. Should the conflict end, through reaching an agreement or defeat of the adversarial party, the captured soldiers can be trusted to not resume fighting upon release just as the enemy soldiers who were not captured can be trusted to end hostile operations. This thought process on POW’s remained accurate throughout each of the United States’ military conflicts, being strained only in the Vietnam war when Vietcong guerilla fighters made it difficult to confirm if an individual was a militant or civilian.

Seeing Islamic terrorism as a military problem requiring a primarily military response, the Bush Administration, conscious of it or not, applied Clausewitzian thought to its action, including the matter of detaining captured militants. Unforeseen to policy makers at the time, the very nature of Islamic terrorism and its proponents would make applying historical POW procedure problematic. The first area in which this is evident is in the issue determining when, or if, the conflict will end. Prisoners of war are generally detained under the presumption that one day, when hostilities have abated, they will be released. With Islamic terrorist groups, it is more difficult to determine the duration of hostilities. Since Islamic terrorist organizations are not state actors, there are no formal declarations or cessations of war issued to mark when prisoners can be released. Beyond that, there is not even much ability to determine what sort of progress has been made in the “war” or predict its end. The Supreme Court acknowledged this problem in *Hamdi*, reasoning that the US could be considered at war, even though there had never been a formal declaration, because the military was actively deployed in operations in

Afghanistan and Iraq, although they chose not to elaborate on the impact the end of those operations would have on their assessment. (*Hamdi*, 2004, p. 518) In the “war on terror,” victory can only be marked by the destruction of radical ideology itself, which, if even possible, can only be achieved by the neutralization of each of its proponents or else convincing them to depart from the ideology. The terrorist organizations created by the Islamic radicals of our time are comprised of a vast number of highly independent cells and groups widely hidden around the globe. Capturing or destroying each of these cells is a highly unlikely goal and some measures taken in furtherance of this goal can even have the consequential effect of rallying others to their cause, a phenomenon which many speculate occurred in Iraq and Afghanistan due to the deployment of US ground troops in the region.

Applying typical POW procedure to proponents of Islamic terrorism hits a snag when considering the indefinite time span of the “war on terror,” which has already lasted 16 years in America and has the potential to continue for several more generations. Where captured combatants could expect release at the end of hostilities, captured terrorists effectively face a life sentence. Furthermore, even if the “war on terror” was to be considered at an end, many detainees would remain too dangerous to simply release. Among the ranks of those in the custody of the United States are foot soldiers, strategists, explosive experts, and scientists with the expertise of weaponizing chemicals and biological agents. (Tomlinson, 2016) These individuals can neither be trusted to resist returning to committing acts of terror, nor should they be allowed freedom based on their previous crimes. Since, generally, it is unknown when or if these detainees will be released, the process must have more procedure and legal safeguards.

In *Hamdi* and *Rasul* the Supreme Court ruled that, since determining combatants is not as straightforward here as in conflicts between state actors, there needed to be some mechanic to

allow detainees to challenge the basis of their detainment, their status as an enemy combatant.

(*Hamdi*, 2004, p. 533) (*Rasul*, 2004, p. 487) Commissions had previously been used by military officials in a similar situation, in the Vietnam War, to satisfy Article 5 of the Geneva Convention in regards to the POW status of captured belligerents questionable as to their classification.

(Blocher, 2006, p. 669) Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War (1949) states:

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 categories enumerated in Article 4 [defining POWs], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal. (article 5)

Essentially, whenever an individual is captured as a belligerent in an armed conflict they are assumed to have POW status and the legal protections that come with it, such as legal counsel and an expectation of release at the end of hostilities, unless a “competent tribunal” can conclude that POW status is not appropriate. Army Regulation 190-8, adopted by the US military to implement the Article 5 standards from the Geneva Convention, establishes “Article 5 Tribunals” to:

Determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists. (Blocher, 2006, p. 669)

These Article 5 Tribunals were used to clear up any doubt as to the POW status of each belligerent captured in Vietnam, generally concluding in verifying the presumptive POW status.

(Blocher, 2006, p. 669) The US military continued to convene Article 5 Tribunals in Grenada and the first Persian Gulf War for the very same purposes. (Blocher, 2006, p. 669-70)

To comply with the court's directions in *Hamdi* and *Rasul*, the Bush Administration and US military implemented Combatant Status Review Tribunals. These commissions convene to provide a mechanic for verifying that a detainee is an enemy combatant, reliant on their membership in one of the terrorist organizations designated by the president, as well as provide some opportunity for the detainee to rebut this conclusion. Opponents of the CSRT's argue that they do not pass as an Article 5 Tribunal because they only sought to answer the question as to the detainee's status as an enemy combatant and not at all addressing presumptive POW status. (Blocher, 673) CSRT supporters counter that POW status is irrelevant altogether because terrorist organizations, like the Taliban and Al-Qaeda fail to meet the standards of parties whose members are entitled to POW status, set forth in Article 4 of the Geneva Convention. (Corn, 2007) Article 4 of the Geneva Convention (1949) confers POW status to:

Members of militias and members of other volunteer corps...belonging to a Party to the conflict...provided that such militias...fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war. (4(A)(2))

CSRT supporters claim that terrorist organizations fail to fulfil these standards, mainly due to their covert nature and failure to observe the law and customs of war in their operations, which frequently, if not exclusively, target civilians with no military value. (Bybee, 2002, p. 10) For these reasons, the Bush Administration declared that the Geneva Conventions did not apply, specifically, to the Taliban and Al-Qaeda, arguably eliminating the need for any Article 5

review. Nonetheless the question remains, if enemy combatants are not POW's, a status which would usually allow the detaining party power to intern indefinitely, can the United States Government intern them, for a potentially life sentence, with little more due process than simply showing the individual was an unprotected hostile in the conflict?

The Supreme Court addressed this issue for a final time in *Boumediene v. Bush*. After receiving proper Congressional approval through the 2006 Military Commission Act, pursuant to the *Hamdan* ruling, the court sought to determine the Constitutionality of CSRT's as well as the denial of constitutional protections to detainees held in Guantanamo Bay based on their enemy combatant status. The main protection in question here is that of habeas corpus review, the right to challenge the legitimacy of one's detention before a federal judge. (*Boumediene*, 2008, p. 732) In *Boumediene*, the court found that detainees were entitled to the right of federal habeas corpus review, even if they are not a United States citizen, because they were being detained in a territory in which the United States has sovereignty. (*Boumediene*, 2008, p. 771) Furthermore, the court ruled that the government designation of enemy combatant could not preclude the detainees from this right because such designation does not fall into one of the acceptable circumstances for the suspension of habeas corpus, limited in the Suspension Clause only to times of rebellion or invasion should the public safety require it. (*Boumediene*, 2008, p. 780) Finally, the court ruled that the CSRT's proceedings did constitute an acceptable substitute for a habeas corpus hearing because the tribunals were too conducive to an erroneous finding of fact, due in part to the lack of legal counsel for the detainees as well as the difficulties for the detainees to confront to the integrity of the evidence against them and present their own exculpatory evidence. (*Boumediene*, 2008, p. 786) Since the CSRT's were incapable of hearing the detainees' habeas corpus claims, the duty must fall on the federal jurisdiction. (*Boumediene*,

2008, p. 793) While the Supreme Court did rule on the legitimacy of the CSRT's, the court did not weigh in on whether a federal court could actually order the release of a detainee whom it found to be unlawfully detained or as to the limits of the government's indefinite internment of enemy combatants.

Obama Administration

In November 2008, Barack Obama, who avidly criticized Bush administration's policies throughout his campaign, was elected President. One of the issues that President Obama promised to rectify was the issue of detainees in the war on terror, specifically those in Guantanamo Bay. Almost immediately after entering office, President Obama issued Executive Order No. 13492, which called for a halt on military commissions, including CSRT's, and the closure of the Guantanamo Bay facility. The Obama administration had also promised to bring more transparency to the detainment system as well as involve the civilian court system in the equation, which resulted in the closing of all CIA blacksites and a prohibition on specific advanced interrogation techniques. (Cloud, 2010) The administration did, however, realize that captured terrorists did possess valuable intelligence about their networks and plans, which needed to be obtained by the military and intelligence community. To this end, the Obama administration settled on a "hybrid model" where captured terrorists are first detained on US warships, in international waters, to be interrogated by US military and intelligence personnel, fulfilling the role that blacksites had previously occupied. (Sullivan, 2013) Upon these warships, not much has changed for the captured terrorists. The Obama Administration cited the same authority to detain members of Al-Qaeda and other terrorist organizations as the Bush Administration had, albeit forgoing the "enemy combatant" designation, under the Authorizing use of Military Force resolution. The detainees are still held for an indefinite amount of time and

denied both legal counsel and appeals, however, proponents of this change argue that it is better because the warships allow for more transparency and legal scrutiny, thus acknowledging the whereabouts and well-being of the captured individuals as well as preventing the use of prohibited interrogation measures. (Sullivan, 2013) Once military and intelligence officials are finished gathering information from the captured terrorist, a process that can take several years, the individual is transferred into the custody of FBI agents, who officially place the individual under arrest. (Clench, 2013) After being read their Miranda rights, the individuals are then interviewed by the FBI agents, covering much of the same material as the military and intelligence officials, and then prosecuted in Federal court, using testimony from their interview. (Sullivan, 2013) After conviction, the now convicted terrorists are sentenced to prison terms to be served in Federal prison, where they are still reachable should the need for more intelligence arise. (Clench, 2013)

Criticism. Despite these changes, the Obama administration still runs afoul of critics. While the administration has never officially dumped the classification of terrorists as enemy combatants for that of international criminals, the administration's rhetoric and actions, specifically the adamant push for trial in civilian courts, has effectively done so. (Burkeman, 2009) However, seeing the value of exercising the law of war on captured terrorists for the purposes of extracting intelligence, the administration attempts to "have its cake and eat it too" by changing its treatment of captured terrorists based upon what the captured individual has to offer. This "hybrid model" is not only fundamentally flawed in its logic, as the individual cannot be an enemy soldier one moment but no more than a common criminal the next based solely on their usefulness, but also draws criticism from proponents of both classification usages. Individuals who push for classifying terrorists as enemy soldiers are outraged that they would be

given trial in civilian courts and detained in prisons so close to home. (Gonzalez, 2013)

Meanwhile, those that believe terrorists are simply a new brand of criminal, while pleased to see more transparency and the use of the courts system, still heftily oppose the denial of rights and indefinite internment that precede the captured terrorist's transfer to federal law enforcement. (Clench, 2013) Ironically, it is actually the detainment upon warships that allows the administration to side step the *Boumediene* holding and deny detainees habeas corpus review and other constitutional protections, since the non-citizen detainees are not being held in a territory where the United States is sovereign. Finally, it seems that interning captured terrorists upon US naval vessels could violate international law. Article 22 of the Third Geneva Convention (1949) states that prisoners of war, "may only be interned in premises located on land," which the administration is violating, if captured terrorists are indeed enemy soldiers, by interning them at sea. Therefore, whether captured terrorists are prisoners of war or international criminals, the Obama administration is violating either international or criminal law, respectively, by interning the individuals on US naval vessels. The Obama administration never clarified the issue, by neither explaining what classification they were giving to terrorists nor if the Geneva Convention does not apply to the interned terrorists.

The pitfalls of trial in civilian courts. The lack of clear classification for terrorists, combined with the move to punish their actions in civilian courts, brings with it some alarming legal issues. As stated earlier, if terrorists, whether American citizens or not, are ordinary criminals who must be tried in civilian court, any evidence obtained from military internment and interrogation is generally inadmissible in court, since it most often contains hearsay or was obtained through coercive means. The Obama administration seems to have acknowledged this problem in some respect and attempts to rectify it by directing federal law enforcement to

interview the terrorist again, once they are arrested and read their Miranda rights. (Sullivan, 2013) Despite this procedure, prosecuting terrorists in civilian court brings with it specific procedural pitfalls.

Inadmissible evidence. One pitfall in prosecuting captured terrorists in civilian courts are the Federal Rules of Evidence, as well as the Fifth Amendment, provisions against inadmissible evidence. These provisions exclude several different types of evidence, including those that are obtained illegally, obtained through coercion, classified as hearsay, or unnecessarily confuse the jury as to the issues. In regards to alleged terrorists, originally captured by the military, much of the evidence against the individual is hearsay, compelled through interrogation, or obtained in some other manner which makes it inadmissible in civilian court. The Supreme Court acknowledged this problem, although specifically referring to Combatant Status Review Tribunals, in *Hamdi*, acknowledging that the government would be limited in court proceedings due to the nature of its evidence. (*Hamdi*, 2004, p. 534) In the criminal trials that have proceeded against captured terrorists thus far, much of the prosecution's evidence has been excluded under the Federal Rules of Evidence, encumbering convictions. One such example is the trial of Ahmed Khalfan Ghailani, the first Guantanamo Bay detainee to be tried in United States civilian court. Ghailani, who was accused of involvement in the bombings of U.S. Embassies in Kenya and Tanzania in 1998, was indicted on 285 counts of conspiracy and murder, yet, due to key evidence being excluded, was only convicted of a single count of conspiracy. (Ariosto, 2011)

Key evidence in *Ghailani* was excluded mainly as evidence obtained through coercion. At trial, Ghailani moved to have testimony and evidence excluded because the evidence and the identities of certain witnesses had been obtained through coercion, in violation of Fifth

Amendment protections against self-incrimination. (*Ghailani*, 2010, p. 264) Keep in mind that, although torture would constitute coercion, coercion enough to warrant exclusion via the Fifth Amendment does not require the presence of torture. In fact, virtually all interrogation tactics used by military and intelligence officials, while not necessarily torture, would be coercive enough to warrant exclusion of the evidence in civilian court. The prosecution acknowledged this truth, rather than detailing the specific means by which evidence was obtained, by asking to the court to assume that all evidence collected, while Ghailani was detained by the CIA, to have been done so by coercive means. (*Ghailani*, 2010, p. 264) The question then remained as to if the prosecution's evidence was far enough removed from the coercive collection to allow for admission. The court held that the evidence was not far enough removed, holding that the evidence and testimony in question was the logical "fruit" of information obtained through coercive methods and thus inadmissible. (*Ghailani*, 2010, p. 287-8)

Presumption of innocence. Flowing from the inadmissible evidence pitfall, presumption of innocence is another pitfall in obtaining convictions for terrorists in civilian court. Stemming from Fifth Amendment protections, presumption of innocence is the American legal principle that all defendants are considered to be innocent until the prosecution can prove that they are guilty of the charges facing them. Since individuals are protected from self-incrimination, the burden is placed solely on the prosecution to prove guilt. Defendants need not say anything in their defense, nor anything at all if they choose so, and have no obligation to help the prosecution build a case against them. If the prosecution is unable to prove guilt in their main argument, then the defendant must be declared not guilty and the defense need not even argue their case.

In light of the *Ghailani* case, we can see that, legally, virtually all of the evidence collected during an indicted terrorist's internment with the military is considered to have been

collected by coercive means and has a high likelihood of being excluded in future cases. Should enough evidence be excluded, the prosecution could find themselves with too few admissible pieces of evidence to secure any conviction at all. Furthermore, a captured terrorist, after being read his Miranda rights, could elect not to give the FBI any information during interview, further stemming the flow of admissible evidence to the prosecution. Even more alarmingly, what would happen in the event of a legal acquittal of a captured terrorist? Would the presidential administration allow a terrorist, captured by United States military forces, to go free, potentially back into committing acts of terror against the United States? Worse still, would the administration elect to return the individual, after being acquitted of charges, into indefinite detainment under the pretenses of an “enemy combatant,” a move which would spit in the face of virtually all American concepts of justice? Neither answer brings with it positive consequences.

Case Studies from Around the Globe

As of yet, the United States has still to find the best legal mechanism for handling captured terrorists, one which would appropriately balance national security concerns with maintaining the legal safeguards and constitutional ethic worthy of an American system. The past 16 years, while not successful in producing that system, have taught valuable lessons on the matter. In seeking to further improve the legal process relative to captured terrorist, the United States must also consider the designs of other constitutionally bound states who also face the threat of terrorism in a distinguishable magnitude. The nations examined here are France and Israel.

Counter-Terrorist Courts in France

As a colonial power, France was one of the first nations to experience the threat of terrorism within its borders, coming from Algerian nationals in the 1950's seeking to pressure

France into removing its influence from Algeria and North Africa. These Algerian nationals formed a few different terrorist organizations, such as the Algerian National Liberation Front, who carried out attacks on French troops in Algeria. (Schofield, 2012) Moving forward to the late 20th and early 21st century, despite involvement with UN coalition forces in both Persian Gulf conflicts, France did not face retribution from terrorist groups arising from such involvement, like other members of the UN coalition had. However, beginning in the 1980's, France began to experience the development of radical Islamic organizations within the growing Muslim population immigrating into France from Syria and North Africa. (Shapiro, 2003) These terror networks were generally comprised of young, second or third generation Muslim French nationals of Middle Eastern or North African descent. These networks are generally not concerned with carrying out "attacks" against the French people and government, but rather providing a base of supporting activities for the rest of the organization's cells. (Shapiro, 2003) These supporting actions include recruitment and procurement of safe houses, as well as criminal operations used to fund the organization, such as drug trafficking, prostitution, sex trade, and human trafficking. That said, in recent times, with the Charlie Hebdo attacks in 2015 and the Bastille Day bombing in 2016, individual radicals or small groups have pursued actual acts of terror. Nevertheless, throughout this time France has relied on special courts built into its criminal justice system to counter the underground networks.

France has enacted four major pieces of legislation which form the basis of its counter-terrorism judiciary, the 1986 bill which establishes the court and the subsequent bills in 1996, 2001, and 2006 which define the offences which constitute terrorism. (Sunderland, 2008, p. 10) The 1986 Law no. 86-1020 establishes one centralized court in Paris with national sole jurisdiction to hear all cases related to terrorism arising both within France and from the actions

of French nationals committed abroad. (Sunderland, 2008, p. 10) These cases are prosecuted by a specialized corps of prosecutors from the Central Counterterrorism Department of the Prosecution Service, also known as the “14th section.” (Sunderland, 2008, p. 10) Likewise, each case is presided over by investigating judges who specialize in terrorism related matters. Both the prosecutors and judges have a close relationship with law enforcement and national intelligence forces, the latter of which can request documents and evidence from the intelligence agency as well as direct them to place wiretaps and other surveillance on relevant individuals.

The process begins when law enforcement or intelligence agencies finds evidence of a terrorist cell or network, who then asks a prosecutor to request investigative approval from an investigating judge. The judge then approves the investigation and is kept in the loop as to the progress of the investigation along the way, authorizing warrants and surveillance requests as well as compelling information from intelligence agencies whenever necessary. The logic behind this great authority is that:

A security-cleared, specialized, and experienced judge will, on the basis of all relevant information, including sensitive intelligence material, be able to connect the dots: discern the existence of a terrorist network, even where the material acts demonstrating this existence are limited to common crimes and determine the identities of the members of the network. (Sunderland, 2008, p. 14)

When the investigation is complete and the members of the network are arrested, the alleged members are prosecuted in a closed door criminal proceeding presided over by the investigative judge and decided by a jury panel of professional judges, well versed in the matter, for terrorism related crimes. (Sunderland, 2008, p. 10) The counter-terrorism court relies on these measures to ensure that national security secrets are protected during the proceedings as

well as ensure reliable finding of fact, since the jury is filled with professionals to the matters at hand. Furthermore, this special court operates under its own set of procedural and evidentiary rules, which allow, with approval from the presiding investigative judge, the admission of generally inadmissible evidence such as hearsay and evidence obtained through coercion. The expert jury comes into play here as well to minimize the potentially misleading or confusing impact of allowing generally inadmissible evidence. The most common charge for which alleged network members are charged and convicted, generally alongside other criminal actions committed within its context, is the charge of “criminal association in relation to a terrorist undertaking,” established by the 1996 Law no. 96-647, which is essentially simple membership in a proven terrorist network. (Sunderland, 2008, p. 11) The French label this process as preventative judicial neutralization, by which the courts can identify and root out terrorist network and their members before any damage can be done. (Sunderland, 2008, p. 11)

Criticisms to the French system revolve around the judicial investigations’ tendency to undermine the ability of defendants to establish their own defense. Defense attorney’s often complain that the close ties and lengthy relationship between the investigative judges and the progression of the prosecution’s case tends to prejudice the presiding officer of the court. (Sunderland, 2008, p. 14-5)

Israel

Israel was the first nation to feel the scourge of modern radical Islamic terrorism. After its creation in 1948, and subsequent victory against the surrounding Arab nations, the Israeli forces and citizens became targets for acts of terror within Israel and Palestine, both from individuals and organizations, as well as state sponsored terror supported by the surrounding nations. Initially, under the Prevention of Terrorism Ordinance, Israel adjudicated cases of

terrorism in military court, presided over by an attorney and juried by members of the Israeli Defense Force, using the rules and procedures of military hearings. (Beckman, 200, p. 148) In 1980, the Israeli government suspended this practice by amending the 1948 legislation to hear cases related to terrorism in civilian criminal court using typical criminal rules and procedure, but still uses military tribunals in territorial areas not relocated to the Palestinian Authority, such as portions of the West Bank and the Gaza Strip, as well as for terrorists captured outside of Israel (Beckman, 2007, p. 148)

Perpetrators of terrorism are not charged with “committing terrorism” but rather with whatever specific crimes are committed during their operation, be it murder, assault, destruction of property or otherwise. (*The Counter Terrorism Law 5775-2015*, 2016) The Combatting Terrorism Law, which went into effect in November 2016, established terrorism as an aggravating factor in such cases, doubling the regular penalty if the crime is committed within the context of a terrorist organization or with intent to terrorize the populace or pressure the actions of the government. (*The Counter Terrorism Law 5775-2015*, 2016) In regards to what is considered a terrorist organization, the government publishes a list of terrorist groups, who can appeal their blacklist in the court system, of which membership, support, association or even a display of solidarity with is a crime in and of itself. (*The Counter Terrorism Law 5775-2015*, 2016) However, despite Israel’s commitment to prosecuting these cases in criminal court whenever possible, Israeli civilian courts encounter the same difficulties and limitations as those in the United States. Because of this fact, the Israeli government reserves the right to put suspected terrorists in administrative detention or deport them from the country which draws much criticism for human rights advocates, despite the presence of a judicial appeal mechanism to review such actions.

Trump

The United States has now had 16 years and two presidential administrations worth of experience in combatting terrorism, both on the battlefield and in the legal realm. The newly elected Trump Administration branded itself through the election campaign as both innovative and capable of learning from the mistakes of the past administrations. In the past 16 years, the threat of terrorism has evolved as well. In his first few months, President Trump and his supporters will need to devise a new judicial process in relation to the issue of terrorism, taking into account lessons from past administrations and other nations, in order to more effectively combat the threat of terrorism as well as the counter its change over time.

The Threat of Terrorism in 2017

In 2001, the threat of terrorism from radical Jihadists rested in wide networks, state sponsored or otherwise, strewn mainly across the Middle East and Europe. These networks were mainly concentrated in Afghanistan, Pakistan, and Sudan. (Rollins, 2011, p. 6-7) The leadership and technical minds of these groups were usually educated in American or European universities, where they studied engineering and other applicable subjects. The threat to American lives, at this point in time, came either from members of the organizations skirmishing with US troops in Iraq and Afghanistan or, as it was in the 9/11 attacks, from members in the Middle East traveling to the United States to carry out an attack.

In 2017, the layout has changed significantly. Underground networks still exist numerous but the classically powerful groups, such as the Taliban and Al-Qaeda, have devolved into obscurity. State sponsored terrorism, which still exists from some states such as Iran, has largely given way to one group which has declared itself a state in and of itself. The Islamic State of Iraq and Syria (ISIS) emerged in 2009 from hyper radical cell of Al-Qaeda,

which was ostracized from the rest of the group, and declared a caliphate, an Islamic state, with holdings across war torn Iraq and Syria as well as stated commitment to conquer lands across the Middle East and Europe. (Lister, 2015) Although ISIS troops are currently an enormous threat to Middle Eastern states, increased security in the United States travel network combined with the efforts of the intelligence community has reduced the likelihood of ISIS members travelling to the US to successfully commit a 9/11 style attack. (Rollins, 2011, p. 1) Instead, attacks on American soil have come from young to middle aged American Muslim nationals, many not of Middle Eastern descent, as well as Syrian refugees granted asylum in the states, radicalized through the internet, carrying out attacks either individually or in small groups. Some of these young radicals receive direction in their attacks from ISIS recruiters on the internet and others even travel to Turkey in order to cross the Syrian border and join the Islamic State.

Unique Court for a Unique Issue

The methods of the past two presidential administrations have reflected competing views of terrorism as a military or criminal problem. The Bush Administration's policy of indefinite detainment was an effective military solution to keeping captured terrorists locked away and available to the intelligence community, but failed to consider that, just as captured terrorists are not entitled to the rights of prisoners of war, the government is similarly not permitted to treat them as they would POW's. The Obama Administration's hybrid system of detention on warships ultimately leading to criminal trial, did correct some of the legal problems that come with indefinite detainment, at least in the view of the *Boumediene* court, but also exposed the key issues with trying terrorists in civilian criminal courts. The trial and error of the past 16 years have revealed that terrorism, in far more aspects than just the legal, is neither a purely military

nor purely criminal problem. As a unique issue, terrorism requires a unique process to be effective.

Forgetting classifications and detainment justifications for a moment, proper judicial response to terrorism will ultimately end in court. Regardless of the sentencing, Americans generally only feel that justice has been done when the guilty parties are tried and convicted in court. (Apuzzo, 2014) While the American conscience wants to see terrorists in court, the limitations of typical criminal trial are well known, revolving around the fact that certain evidence either will not be admitted, due to its sensitivity to national security, or cannot be admitted, due to the methods used to obtain it violating normal evidentiary rules. To balance these competing truths, the United States, through Congressional action, should create federal "counter-terrorism" circuit courts, based off of the French model, to hear all cases related to terrorism, with one jurisdiction designated to hear cases involving terrorists captured outside of the United States. Like the French court, these jurisdictions would hold their proceedings behind closed doors, although not in secret, in order to protect national security secrets that are essential aspects to the prosecution's case. The courts must also operate under specifically tailored procedural and evidentiary rules to allow the prosecution to admit essential evidence, gathered by the intelligence community and military, that would generally be inadmissible as hearsay or evidence obtained through coercion, however doing so in a way which still maintains the element of fairness for the defendant. One of the ways this element can be preserved is by utilizing a professional jury of individuals well versed in the law and the issue of terrorism, in order to help remedy any misleadingness or confusion caused by allowing hearsay and other generally inadmissible evidence. Finally, like the French courts, each jurisdiction should have an appointed "investigative judge" who works closely with the prosecutors, law enforcement, and

the intelligence community to approve wiretaps and other surveillance, however this judge would not preside over the resulting criminal trials, in order to maintain the neutrality which critics of the French system claim is lacking there. Ultimately, each conviction would be appealable to a single appeals court, with similar rules and procedures, subsidiary to the Supreme Court.

Legislation and Indefinite Detainment

In conjunction with these new jurisdictions, Congress should also pass comprehensive legislation to update the federal criminal code in relation to terrorism, similar to the recent Israeli legislation. Such legislation would establish terrorism as a mitigating factor, as well as relocating related cases to the jurisdiction of the new courts, and prohibit intentional membership, support, and association with an identified list of terrorist groups. These measures form a system which can preemptively find and root out individuals and groups, who have been radicalized through one of several means, before they can carry out a deadly attack like the 2016 attacks in Orlando and San Bernardino.

In regards to indefinite detainment of terrorists captured abroad; legal or illegal, the United States government has received harsh criticism for pursuing the policy at all. However, the need for a period of detainment, for the purposes of interrogation and intelligence gathering, is well documented. The Obama Administration's policy of detaining captured terrorist on US naval warships seems to be the most legal approach to indefinite detainment, as it avoids the key location aspect of the *Boumediene* ruling. Nonetheless, the Trump Administration should exercise this authority sparingly and for as short a time as possible in each individual case, before turning the detainee over to the new court system, in order to limit the backlash from human rights advocates.

Conclusion

The policies and procedures, relative to captured terrorists, implemented by the Bush and Obama administrations have proven that terrorism is a unique threat to our society, unable to be effectively combated through methods traditional to the United States. Terrorist organizations' nature of criminality operating through military force simultaneously shields them from being treated like members of any legitimate military force while also limiting the amount of evidence that can be entered against them in a criminal trial. Other nations, such as Israel and France, have responded to terrorism's unique nature by likewise updating their criminal code or creating special judicial jurisdictions to handle related cases. The newly inaugurated Trump Administration must call upon the positive aspects of the previous administrations' policies as well as the methods of France and Israel to lead Congress in crafting new legislation to properly identify the presence of terrorism in criminal acts, as well as reveal radicals in the US before they can carry out attacks, and create new criminal court jurisdictions which can properly adjudicate cases of terrorism against the United States both from those inside the United States and individuals captured abroad.

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