THE CASE AGAINST NATIONAL SECURITY COURTS

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I. INTRODUCTION

Since September 11, calls for a hybrid "national security" court to handle such circumstances have taken on a newfound prominence, as courts and policymakers alike have struggled with the complex series of legal and logistical problems posed by the U.S. government's detention of "enemy combatants," especially the hundreds of non-citizens so detained at Guantánamo Bay, Cuba. Moreover, whereas the vast bulk of these proposals were initially promulgated in academic circles,[3] the past two years have seen

solution has become all the more appealing, given both the judicial review that the Supreme Court's decision mandates and the complexity of the issues that it nevertheless leaves unresolved.[9]

As popular as such proposals have been, though, there has been little sustained discussion of their details, which have seldom been fleshed out. Even with respect to those calls for national security courts including *some* discussion of the specifics, the proposals vary widely both substantively and procedurally. For example, some proponents have called for national security courts for detention decisions—to review whether a particular terrorism suspect can be held as an enemy combatant without criminal charges.[10] Others have called for such tribunals as a forum in which to criminally prosecute suspected terrorists—as an alternative either to the traditional Article III criminal process[11] or to trial by military commission pursuant to the controversial Military Commissions Act of 2006.[12] Whatever the merits of each individual proposal, little has been written about the broader implications of such a "third way."

In the article that follows, I attempt to provide a comprehensive introduction to the various proposals for a national security court, and to suggest some of the pros and cons of these efforts. Part II begins by summarizing the proposals and their differences, especially the distinction between detention-related national security courts and national security courts for criminal prosecution. In Part III, the article turns to the fundamental questions implicated by the debate over national security courts. Finally, Part IV considers whether, ultimately, we *need* national security courts.

Ultimately, I argue that proposals for national security courts are dangerously myopic proxies for larger debates that must first be resolved, including, most prominently, the debate over the extent to which the government should be able to preventively detain terrorism

9. *See, e.g.*, Stephen I. Vladeck, *On Jurisdictional Elephants and Kangaroo Courts*, 103 NW. U. L. REV. COLLOQUY 172, 172 (2008) (noting the impact of *Boumediene* on reform proposals).

10. *See, e.g.*, Goldsmith & Katyal, *supra* note 6.

11. Indeed, even during World War II, individuals within the United States suspected of giving aid and comfort to the enemy were tried in civilian criminal courts, rather than subjected to military detention and/or trial. *See, e.g.*, Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863 (2006).

12. Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of 10, 18, and 28 U.S.C.). On the potential overbreadth of the Military Commissions Act of 2006, see Vladeck, *supra* note 9, at 173.

suspects, and the equally significant definitional question of just *who* qualifies as such an individual.[13] Until and unless meaningful progress is made on these issues, calls for national security courts are little more than form without substance.

II. NATIONAL SECURITY COURTS: THE PROPOSALS

A. The Nature of Terrorism and the Need for a "Third Way"

At the heart of each argument for a national security court is the assertion that the "traditional" models of criminal process or military detention are inadequate to deal with the particular nature of the threat posed by international terrorism. As Professors Chesney and Goldsmith describe:

> Neither model in its traditional guise can easily meet the central legal challenge of modern terrorism: the legitimate preventive incapacitation of uniformless terrorists who have the capacity to inflict mass casualties and enormous economic harms and who thus must be stopped before they act. The traditional criminal model, with its demanding substantive and procedural requirements, is the most legitimate institution for long-term incapacitation. But it has difficulty achieving preventive incapacitation. Traditional military detention, by contrast, combines associational detention criteria with procedural flexibility to make it relatively easy to incapacitate. But because the enemy in this war operates clandestinely, and because the war has no obvious end, this model runs an unusually high risk of erroneous long-term detentions, and thus in its traditional guise lacks adequate legitimacy.[14]

Thus, on their view (and that of many others), the central difficulty is that the criminal model is insufficiently preventative and thus dangerously underbroad, while the military model is insufficiently accurate and thus dangerously overbroad—assuming that the military model can be applied to terrorism *at all*, a point that has itself been hotly contested.

13. Indeed, in a draft white paper released as this article went to print, Jack Goldsmith argued that, for this very reason, proposals for a national security court are a "canard." *See* Jack Goldsmith, Long-Term Terrorist Detention and Our National Security Court (Feb. 4, 2009) (unpublished manuscript), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2009/0209_detention_goldsmith/0209_detention_goldsmith.pdf. On that point, at least, he and I are in complete agreement.

14. Chesney & Goldsmith, *supra* note 3, at 1081.

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below).[18] Nonetheless, proceeding off that assumption, proposals for detention-related national security courts have generally extolled such courts as the best way to ensure that preventative detention is not overbroad, and that both substantive and procedural rules are applied fairly and effectively.[19] Calls for national security courts for "detention" decisions are therefore invariably cast as a better way to protect the rights of the detainees than the status quo.

That depends, though, on what the status quo actually *is*. Notwithstanding the Supreme Court's decision in *Boumediene*,[20] substantial questions remain concerning both the scope and the adequacy of the Combatant Status Review Tribunal (CSRT) process[21]—along with the D.C. Circuit's review thereof.[22] Separate from the CSRT process, the D.C. district court has struggled mightily in the months since *Boumediene* sorting out the scope of its authority to adjudicate the detainees' habeas petitions,[23] especially given the D.C. Circuit's decision in *Kiyemba v. Obama* (notwithstanding *Boumediene*) that the Guantánamo detainees have no substantive constitutional rights.[24] And, perhaps even more fundamentally, the en banc Fourth Circuit divided bitterly over whether the detention authorized by the September 18, 2001 Authorization for the Use of Military Force (AUMF)[25] extends to the detention of non-citizens arrested within the United States; a question answered in the negative

18. In his dissent in the *Hamdi* case, Justice Scalia, joined by Justice Stevens, was adamant that, where U.S. citizens held within the United States are concerned, the Constitution only authorizes detention without trial pursuant to a suspension of the writ of habeas corpus—a measure that has, as yet, not been a serious

decision-makers should be life-tenured Article III judges, selected by the Chief Justice in the same way as the judges on various specialized Article III courts (including, as an important related example, the Foreign Intelligence Surveillance Court and Court of Review).[31] Although Katyal and Goldsmith believe that "traditional" procedural and evidentiary rules should be relaxed, they nevertheless trumpet that:

> The court would have a permanent staff of elite defense lawyers with special security clearances as part of its permanent staff. Defense lawyers trained in the nuances of taking apart interrogation statements, particularly translated statements, are crucial because often the legal proceedings will involve little else in the way of evidence.[32]

They also argue for meaningful appellate review from the initial decision, for review of whether there is "a continuing rationale to detain people years after their initial cases were heard,"[33] and, importantly, for the collapsing of any distinction between citizens and non-citizens.[34]

Missing from their proposal, though, are two critical points: The burden of proof, and, more basically, the substantive criteria for detention—the definition of who *can* be held, if the evidence so provides, and, as importantly, who must be released. Thus, even while arguing that courts should continually review whether there is a "continuing rationale" for detention, Katyal and Goldsmith decline to offer what such a rationale might be. And these are hardly trifling details. To the contrary, these questions go to the heart of the problem: Just who would such a regime apply to, and under how much (and what) evidence? Without these details, it is difficult—if not impossible—to truly assess the extent to which such a proposal is even a departure from prevailing norms, let alone a departure that is warranted.

Other proposals suffer from similar defects. Thus, in the American Enterprise Institute white paper prepared by Andrew McCarthy and Alykhan Velshi,[35] perhaps the most detailed and widely circulated proposal to date, the authors propose a national

31. *See* Goldsmith & Katyal, *supra* note 6.

32. *Id.*

security court for *both* detention decisions *and* criminal prosecutions (more on the latter below); the proposal for the former focuses on who the judges should be and where they should sit.[36] In terms of substance, McCarthy and Velshi propose that the court merely entertain appeals from the currently established CSRTs at Guantánamo Bay,[37] a function already assigned to the D.C. Circuit under the Detainee Treatment Act of 2005 (DTA)[38]

Unlike preventive detention, where there are fewer established norms from which the proposals can (and do) deviate, the proposals for a national security court for criminal prosecutions are replete with departures from the traditional criminal process. These distinctions generally run along two axes: the nature of the evidence that may be introduced (both by the government and by the detainee), and the means by which that evidence is reviewed (including the prospect that certain secret evidence be withheld from the detainee). Most proposals therefore start with perceived constraints of the Article III process, including: the right to confront witnesses under the Sixth Amendment's Confrontation Clause; the exclusion of hearsay evidence and evidence obtained through coercion; the right to self-representation; and the right to a trial by a jury of the defendant's peers.[41] Emphasizing these constraints, proponents of national security courts suggest that the Article III courts simply are not in a position to adequately handle such cases, and that any attempt to do so risks long-term damage to the civilian criminal justice system as a whole.[42]

A national security court, in contrast, would be marked by relaxed evidentiary rules, including the ability to introduce hearsay testimony and perhaps even evidence that is produced by governmental coercion.[43] As importantly, the government would also be able, under most proposals, to use classified information as evidence withouverl-0..1302 TD-0.0005class(l thscl)5.ty

> transmit what they learn in discovery to their confederates—and we know that they do so.[44]

Similarly, but in somewhat more detail, Professor Guiora also proposes that national security courts have the ability to consider classified information without disclosure to the defendant:

> [I]ntelligence information would be presented in camera by the prosecutor and a representative of the intelligence services who would be subject to rigorous cross-examination by the court. The judges who would sit on the domestic terror courts would be trained in understanding intelligence information. In addition, the bench would be expected to fulfill a "double role"—that of fact-finder and defense counsel alike. As the latter will be barred from attending the hearings when intelligence information is submitted, the domestic terror courts would have to proactively engage the prosecutor. The burden on the court would be enormously significant because the defendant, who would not be present, would not have counsel representing him with respect to the submission of intelligence information into the record.[45]

In the process, these proposals bemoan as hopelessly inadequate the provisions of the Classified Information Procedures Act (CIPA),[46] which prescribe procedures for the use of classified information in criminal proceedings. The criticisms rest on two separate grounds: First, proponents of national security courts view CIPA as too

D. Common Themes of the Proposals

Once these proposals are placed side-by-side, one conclusion emerges: The substance of the proposals invariably focuses on evidentiary issues—the government's need to use: (1) classified evidence without disclosing that evidence to the terrorism suspect; (2) evidence that would otherwise be inadmissible in traditional legal proceedings (e.g., hearsay or coerced statements); or (3) both. In other words, deviation from the current system is necessary because the current system cannot adequately handle the evidence the government might potentially have against terrorism suspects. Even assuming for the sake of argument that such an assertion is true, the proposals all skirt the difficult questions that necessarily follow—what limits the Constitution might place on departures from these standards; what definition will dictate to whom such departures may be applied; and so on.

III. THE ASSUMPTIONS PERVADING THE PROPOSALS

As alluded to above, virtually every proposal for a national security court, in whatever guise, has at its core a series of assumptions that are not necessarily true. Although the specific assumptions vary, they fall into four rough groups: (1) that preventative detention of terrorism suspects is not unlawful; (2) that CIPA and other evidentiary rules render traditional criminal prosecutions of terrorism suspects unworkable; (3) that, in general, the Article III courts are inappropriate forums for terrorism cases; and (4) that there are no analogous tribunals and/or procedures already available under extant law. In important ways, each of these assumptions is incomplete—if not altogether unconvincing.

A. The Lawfulness of Preventive Detention

Without question, the most significant assumption undergirding the proposals for national security courts is that preventative detention, in general, is lawful. Thus, with respect to detention decisions, the various proposals catalogued above might best be understood as a search for the most appropriate *process*. But it is hardly a given that the preventative detention of *any* terrorism suspect comports with federal statutes, with the U.S. Constitution, or with international law.

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insurrectionists) during a declared "internal security emergency."[63] The statute provided for detailed administrative review of the detentions within 48 hours of the initial arrest, with subsequent appeals to the federal courts.[64] The EDA was hotly criticized, and was ultimately repealed in 1971 (largely as a symbolic repudiation of the internment camps from World War II)[65] in the same statute in which Congress enacted the so-called "Non-Detention Act," 18 U.S.C. §4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained except pursuant to an Act of Congress."[66] Given the significance of the repeal of the EDA, one question for current proponents of a national security court for detention decisions is whether the reasons for repeal of the EDA in 1971 are less salient today.

2. Mandatory Detention and the USA PATRIOT Act

Along lines echoing the EDA, six weeks after September 11, Congress expressly provided for the short-term detention of suspected terrorists in section 412 of the USA PATRIOT Act, which authorizes the Attorney General to detain *any* non-citizen "engaged in any . . . activity that endangers the national security of the United States."[67] In other words, the USA PATRIOT Act provides the government with statutory detention authority to detain *any* non-citizen terrorism suspect without charges, albeit for a short period of time. Critically, the mandatory detention provision expressly contemplates review of the detention decision, both internally by the Attorney General, and externally via petitions for writs of habeas corpus in the D.C. federal district court.[68] That the U.S. government has, to date, declined to exercise its authority under the statute does not vitiate its applicability to potential future cases.

63. *Id.*

64. For helpful academic discussions of the EDA, see Richard Longaker, *Emergency Detention: The Generation Gap, 1950-1971*, 27 W. POL. Q. 395 (1974), and Leslie W. Dunbar, *Beyond* Korematsu: *The Emergency Detention Act of 1950*, 13 U. PITT. L. REV. 221 (1952).

65. *See* Stephen I. Vladeck, Note, *The Detention Power*, 22 YALE L.

3. Combatant Status Review Tribunals

Separate from the USA PATRIOT Act, the U.S. government has already established a process to decide whether terrorism suspects can be detained as enemy combatants—the Combatant Status Review Tribunals (CSRTs) launched in July 2004 and noted above.[69] Although the CSRTs are composed only of military officers, and provide exceedingly minimal process, the DTA confers upon the detainees a statutory right to appeal their CSRT determination to the D.C. Circuit,[70] and *Boumediene*

What is perhaps so disconcerting about the proposals, then, is the extent to which proposals for national security courts for detention decisions *resemble* the currently prevailing military paradigm, and the extent to which proposals for national security courts for criminal prosecutions *resemble* the currently prevailing criminal paradigm. The former set of proposals focus on the ability to incapacitate terrorism suspects for a long period of time, and trifle mostly over what evidence can be used in reviewing the decision to detain. The latter set focus on the ability to prosecute terrorism suspects in courts, albeit non-Article III courts, and, again, trifle over what evidence can be used in attempting to convict the defendant of the charges against him. If neither paradigm is apt, why hew so closely to their traditional structures?

At their core, proposals for national security courts suggest that, as a legal system, we do not want to relax the rules in *all* cases—just those involving terrorism suspects. And yet, that's precisely the nub of the problem; even if one were tempted to ignore Justice

critical questions as to the scope of the government's authority to incapacitate terrorism suspects, and the scope of those suspects'