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DITCHING "THE DISPOSAL PLAN":
REVISITING MIRANDA IN AN AGE OF TERROR↑

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On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a fetal position on the floor, with no chair, food, or water.[35] Most times they urinated or defecated [sic] on themselves, and had been left there for 18 or 24 hours or more[.] On one occasion, the air conditioning had been turned down so far and the temperature was so cold in the room, the barefoot detainee was shaking with from the cold[.] When I asked the MP’s [Military Police] what was going on, I was told interrogators from the day prior ordered this treatment, and the detainee was not to be moved[.] On another occasion, the A/C had been turned off.

↑ This Essay was completed and accepted for publication in September 2007. It will be published sometime in the early summer of 2008. Although the passage of time will no doubt require the researcher to update some of the materials used in this Essay, no event has yet preempted the Author’s conclusion. That is, the concerns of the Miranda court retain a remarkable currency in today’s War on Terror where the use of torture by interrogators to extract information from suspected terrorists has been well-documented. But rather than easing regulations on interrogations by creating an ad hoc national security court with special admissibility rules, the United States should treat alleged terrorists as criminals and prosecute them in federal district courts.

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Christina M. Sautter, my colleague in the Westerfield Fellows program, read a draft of this Essay and provided insightful comments which improved the final version. All errors, however, are my own.

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making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling out his own hair throughout the night. On another occasion, not only was the temperature unbearably hot, but extremely loud rap music played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor.

Excerpt of FBI e-mail describing conditions observed at the Guantánamo Bay detention camp.

What are you going to do with these people? The utility of someone like K.S.M. is, at most, six months to a year. You exhaust them. Then what? It would have been better if we had executed them.

Tyler Drumheller, former division chief for the Directorate of Operations, CIA, Europe.

I. INTRODUCTION

Since the terrorist attacks on September 11, 2001 ("September 11th"), President George W. Bush has repeatedly vowed to bring terrorists "to justice." The Bush Administration's quest for justice, however, has been tainted with recurring allegations of torture. Torture is illegal under U.S. and international law, and although the administration denies that the United States tortures its captives in the War on Terror, in 2006, President Bush announced his approval of the Central Intelligence Agency's ("CIA") use of an "alternative set of procedures" to extract intelligence information from terror suspects. These alternatives included beatings, extreme

3. See, e.g., President George W. Bush, Address to a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347 (Sept. 20, 2001); President George W. Bush, U.S. President Remarks on Departure for Camp David, Maryland, and an Exchange with Reporters, 39 WEEKLY COMP. PRES. DOC. 613, 614 (May 16, 2003).
4. President George W. Bush, U.S. President Remarks on Signing the Military Commissions Act of 2006, 42 WEEKLY COMP. PRES. DOC. 1831, 1832 (Oct. 17, 2006) ("As I've said before, the United States does not torture."); Condoleeza Rice, U.S. Sec'y of State, Remarks En Route to Germany (Dec. 5, 2005), http://www.state.gov/secretary/rm/2005/57643.htm ("The United States does not permit, tolerate, or condone torture under any circumstances.").
5. President George W. Bush, U.S. President, Remarks on the War on Terror, 42 WEEKLY COMP. PRES. DOC. 1569, 1571 (Sept. 6, 2006) [hereinafter Bush Press Conference Transcript].
isolation, hooding, mock executions, use of dogs, sleep deprivation, and waterboarding.\(^6\)

In addition to raising doubts about the fairness and legitimacy of the U.S. detainee policies, torturing suspected terrorists poses the more immediate problem of, as former CIA chief of European operations Tyler Drumheller phrased it: "[w]hat are you going to do with these people?"\(^7\) If a detainee is prosecuted, the accused will argue that his confession and any corroborating evidence elicited through torture should be excluded.\(^8\) Consequently, CIA interrogators have little incentive to keep terror suspects alive after their intelligence value has been exhausted.\(^9\) Moreover, a living victim of CIA interrogation methods is a prospective witness in the potential criminal prosecution of the CIA agent who performed the interrogation.\(^10\) The fear of prosecution for violating federal torture statutes is so real for CIA interrogators that many of them have purchased professional liability insurance to offset the costs of any legal fees associated with their criminal defense.\(^11\) For any agent, a tempting solution is "the disposal plan," a euphemism for the extrajudicial killing of terror suspects.\(^12\)

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7. Mayer, supra note 2.


10. See Mayer, supra note 2.

11. Id.

12. Id. Mayer reports CIA officials voiced objections to the Executive's plan to hoist detention and interrogation duties on the CIA, an agency which "had virtually no trained
Six years have passed since President Bush signed the military order authorizing trials of non-citizen terrorists in military commissions, but only ten detainees out of the 355 remaining at the U.S. Naval Station at Guantánamo Bay ("Guantánamo") have been charged. David Hicks, the first of those detainees, agreed to a guilty plea which allowed him to return to his native Australia to serve nine months of a suspended sentence. Charges against two others have been dismissed for lack of jurisdiction, and the Defense Department has not announced when commissions for the seven others will convene. The hundreds of remaining detainees foreseeably could be held in preventative detention for years without being charged with a crime. Clearly, the government's record in prosecuting the accused, reputed to be "the worst of the worst," has been disappointing. Perhaps out of frustration with this entire sordid state of affairs, some lawyers and legal scholars have recently proposed that the United States invent a new court, one specifically tasked with bringing terrorists to justice. The specifics of each proposal for a new court differ

interrogators." Id. Tyler Drumheller, a former chief of European operations, explained: "the problem from the start . . . was that no one had thought through . . . the disposal plan." Id.


14. Bush Press Conference Transcript, supra note 5. Since September 11, 2001, Guantánamo has hosted some 770 detainees. Id.


16. See also infra Part II.A.2.

17. Id.

18. Speaking at the Pentagon in January 2002, Rear Admiral John D. Stufflebeam described the detainees under U.S. control thusly: "They are bad guys. They are the worst of the worst, and if left out on the street, they will go back to the proclivity of trying to kill Americans and others."


It's important for Americans and others across the world to understand the kind of people held at Guantánamo. These aren't common criminals, or bystanders accidentally swept up on the battlefield . . . . Those held at Guantánamo include suspected bomb makers, terrorist trainers, recruiters and facilitators, and potential suicide bombers. They are held in our custody so they cannot murder our people.

Bush Press Conference Transcript, supra note 5.

somewhat, but they all conclude that trying suspected terrorists under the regular criminal justice system in the U.S. federal courts is an unsatisfactory option.\textsuperscript{20}

This Essay will show that the creation of an exceptional ad hoc court for the purpose of trying suspected terrorists in the United States would be a misguided approach to solving the problem of the military commissions. It will also demonstrate that, in a society based on the rule of law, the justice which President Bush seeks for terrorists must include proper treatment in detention and fair trials. The regular criminal justice process in the federal courts has served and can continue to serve as an adequate, efficient, and fair method to bring terrorists to justice. Moreover, the exclusionary rule doctrine available to defendants in criminal courts may provide due process protections and curb torturous interrogation practices.

Part II presents three of the problems the United States currently faces in its quest to bring suspected terrorists to justice. First, the military commissions, the current regime for trying detainees at Guantánamo, has failed. It will describe the military commissions' regime as it currently operates, or rather, as it would operate if it ever reconvenes. Because detainee litigation and subsequent remedial legislation have affected the operations of the military commissions, this Part discusses the relevant Supreme Court cases and also describes the relevant provisions of the Detainee Treatment Act of 2005 ("DTA") and the Military Commissions Act of 2006 ("MCA"). Second, the ad hoc court, which some propose as an alternative to the military commissions, will not be seen as fair or legitimate. In part, this is because the ad hoc court likely would admit evidence obtained through torturous interrogation practices. Third, and finally, the torture of terror suspects by agents of the United States creates perverse incentives to dispose of suspects by killing them, consequently making them unavailable to stand trial in any venue.

\textsuperscript{20} See, e.g., Goldsmith & Katyal, supra note 19; Sulmasy, \textit{Momentum}, supra note 19; Sulmasy, \textit{supra} note 19 at 10. Commentators have suggested a variety of terms for the proposed court, including the terrorists' court, the national security court, and the homeland security court. I use these names interchangeably throughout this Essay.
Part III will show that the military commission scheme is deeply flawed, and the creation of an ad hoc court to try suspected terrorists will not provide the remedies sought, efficient, fair trials for the accused, and a legitimate system for preventative detention. Only regularly-constituted criminal courts, such as the federal district courts, can provide due process protections for the accused. Finally, this Essay will conclude that justice and fairness demand individuals accused of terrorism crimes must be treated as criminals and tried in regular criminal courts.

II. BRINGING SUSPECTED TERRORISTS TO JUSTICE

A. THE FAILURES OF THE MILITARY COMMISSION

1. The Military Order

On November 13, 2001, President Bush signed a Military Order ("the Order") authorizing certain non-citizen terrorist suspects be tried in military commissions.21 Under the Order, suspected members of al Qaeda were "to be detained, and, when tried, tried for violations of the laws of war and other applicable laws by military tribunals."22 Warning of the probability of further terrorist attacks against the United States, President Bush declared "an extraordinary emergency exists" and "issuance of this order is necessary to meet the emergency."23

Furthermore, the Order established "it is not practicable to apply . . . the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."24 The President delegated authority to prescribe procedural and evidentiary rules for the military commissions to the Secretary of Defense.25 The Order, however, set a specific baseline for the standard of admissibility for evidence. Any evidence that "would have probative value to a reasonable person" could be admitted to the trial proceedings, a significantly lower standard than applied in U.S. district courts or in courts-martial.26

22. Id.
23. Id. at 57,833–34.
24. Id. at 57,833.
25. Id. at 57,834.
26. Id. at 57,835.
2. Judicial Review and Attempts at Remedial Legislation

The original designs for the military commissions under the Order were modified substantially after Guantánamo detainees won key victories in the Supreme Court. In the first of these cases, *Rasul v. Bush*, the Court held that federal courts have jurisdiction over habeas petitions filed by aliens held at Guantánamo under the federal habeas corpus statute. Congress responded to the *Rasul* ruling by promulgating the Detainee Treatment Act of 2005 ("DTA"), a legislative effort to strip the federal courts of jurisdiction over habeas corpus petitions filed by Guantánamo detainees. Under new provisions in the DTA, instead of habeas petitions, detainees were entitled to receive Combatant Status Review Tribunals ("CSRTs") to determine whether they were being held properly as "enemy combatants." A 2004 CSRT found Salim Ahmed Hamdan, Osama bin Laden's personal driver, was an enemy combatant. The Appointing Authority charged him with conspiracy to commit terrorism and convened a military commission for his trial. Before the commission could get under way, Hamdan's habeas petition reached the U.S. Supreme Court.

The Supreme Court's decision in *Hamdan v. Rumsfeld* dealt another blow to the Executive's military commissions' scheme. In *Hamdan*, the Supreme Court rejected the Government's argument the DTA divested federal courts of jurisdiction for habeas actions pending before the DTA

32. The unsigned charging document contained allegations that Hamdan: willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with [named members of al Qaeda] to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism. *Hamdan*, 126 S. Ct. at 2761.
33. *Id.* at 2761–62.
34. See generally *id.* , 126 S. Ct. 2749.
was enacted, and therefore undertook certiorari review of Hamdan’s habeas petition.\textsuperscript{35} Citing \textit{Ex Parte Milligan},\textsuperscript{36} the Court explained even during times of war, the President’s power to convene military commissions is subject to Congress’ specific authorization and these are the separate roles for the respective political branches envisioned by the Constitution.\textsuperscript{37} The Court held neither the 2001 Authorization for Use of Military Force\textsuperscript{38} ("AUMF") nor the DTA provides the specific congressional authorization necessary to legitimize the military commission.\textsuperscript{39} When, as in this case, Congress had not sanctioned the tribunals, the courts must decide whether the military commissions are justified by “a controlling necessity.”\textsuperscript{40} The Court concluded the President had not successfully demonstrated that requisite military necessity existed.\textsuperscript{41}

A major concern of the \textit{Hamdan} court was the military commissions would operate under a separate set of rules and procedures, significantly different from both civilian criminal justice and military justice paradigms.\textsuperscript{42} The Uniform Code of Military Justice ("UCMJ") requires military commissions to comply with the U.S. common law of war, the UCMJ itself, and with the “rules and precepts of the law of nations,” including the four Geneva Conventions.\textsuperscript{43} Article 36(b) of the UCMJ provides whether or not military commission rules conform with the Federal Rules of Evidence, they must be “uniform insofar as practicable.”\textsuperscript{44} In \textit{Hamdan}, the Court acknowledged the principle of uniformity was not rigid, but read the UCMJ to require proof from the Executive it was “impracticable” to apply the same rules in military commissions as are applied in courts-martial.\textsuperscript{45}

Hamdan argued the military commission rules deviated from the admissibility and relevance rules applicable in both criminal and court-martial proceedings, and were, therefore, illegal.\textsuperscript{46} For example, under

\begin{itemize}
  \item \textsuperscript{35} \textit{Id.} at 2764–69. The provisions of the DTA went into effect on December 20, 2005. § 1005(h)(1), 119 Stat. at 2680, 2743.
  \item \textsuperscript{36} 71 U.S. 2 (1866).
  \item \textsuperscript{37} \textit{Hamdan}, 126 S. Ct. at 2773–74.
  \item \textsuperscript{39} \textit{See Hamdan}, 126 S. Ct. at 2774–75.
  \item \textsuperscript{40} \textit{See id.} at 2773–74 (quoting \textit{Ex Parte Milligan}, 71 U.S. at 139–40).
  \item \textsuperscript{41} \textit{See id.} at 2785–86.
  \item \textsuperscript{42} \textit{See id.} at 2830.
  \item \textsuperscript{43} \textit{See id.} at 2786.
  \item \textsuperscript{44} \textit{See id.} at 2791 (quoting Uniform Code of Military Justice, 10 U.S.C. §836(b))(emphasis omitted).
  \item \textsuperscript{45} \textit{See Hamdan}, 126 S. Ct. at 2790.
  \item \textsuperscript{46} \textit{See id.} at 2787.
\end{itemize}
Commission Order No. 1, which set forth the procedures for commissions prior to the Manual for Military Commissions ("MMC"), Hamdan could have been convicted on secret evidence and on evidence that would not meet the standards for admissibility in a court-martial.\( ^{47} \) Dismissing the Government's argument that it should abstain from considering Hamdan's argument,\( ^{48} \) the Court concluded that nothing in the record demonstrated there would be "any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility."\( ^{49} \) While the Court deferred to the President's determination it was impracticable to apply the rules and procedures of civilian criminal law,\( ^{50} \) the Court held the Executive had not demonstrated it would be impracticable to apply the rules for courts-martial.\( ^{51} \)

As an additional but independent basis for its ruling in Hamdan, the Court held the military commissions did not comply with the Geneva Conventions.\( ^{52} \) While the majority did not tackle the justiciability issue, it held that Common Article 3 of the Conventions applied regardless.\( ^{53} \) Common Article 3 provides that in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum," certain provisions protecting "[p]ersons . . . placed hors de combat by . . . detention."\( ^{54} \) The Court further held the Geneva Conventions prohibit "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees recognized as indispensable by civilized people."\( ^{55} \) Although the Geneva Conventions do not provide a definition of "a regularly constituted court," a treatise on international humanitarian law by the International Committee for the Red Cross ("ICRC") explains a regularly constituted court means one that is "established and organized in

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47. See id.
48. See id. at 2787–88.
49. See id. at 2792.
50. See id. at 2791 (citing Military Order, supra note 13).
51. Hamdan, 126 S. Ct. at 2792. The rules regulating relevance and admissibility in courts-martial and in U.S. district courts are cognates. Id. at 2795. Compare FED. R. EVID. and Manual for Courts-Martial, United States, 2005, Rules for Courts-Martial. The Hamdan Court noted: "[t]he only reason offered in support of [the impracticability determination] is the danger posed by international terrorism. Without for one moment underestimating that danger, it is not evident to us why it should require, in the case of Hamdan's trial, any variance from the rules that govern courts-martial." Hamdan, 126 S. Ct. at 2792 (footnote omitted).
52. Hamdan, 126 S. Ct. at 2793.
53. Id. at 2795.
54. Id.
55. Id.
accordance with the laws and procedures already in force in a country.\textsuperscript{56} The \textit{Hamdan} decision had the immediate effect of suspending all cases before the military commissions.\textsuperscript{57}

On September 6, 2006, President Bush sent a bill to Congress to authorize the creation of military commissions.\textsuperscript{58} Congress eventually approved a version of the bill that became the Military Commissions Act of 2006 ("MCA") and it was signed into law on October 17, 2006.\textsuperscript{59} The MCA asserted Guantánamo detainees only had a statutory right of habeas, which the MCA withdrew.\textsuperscript{60} In promulgating the MCA, Congress purportedly disempowered federal courts from hearing all pending and future habeas petitions filed by detainees.\textsuperscript{61}

Therefore, after five years of delays, charges in the cases of ten detainees from Guantánamo finally were referred to the military commissions for trial.\textsuperscript{62} The Government's record in prosecuting the accused, reputed to be "the worst of the worst," however, proved to be disappointing.\textsuperscript{63} The first charges were brought in February 2007 against David Hicks, an Australian citizen.\textsuperscript{64} The Government initially charged

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{56} Id. at 2797 (quoting \textsc{Int'l Comm. Red Cross, Customary International Humanitarian Law} 355 (Jean-Marie Henckaerts \& Louise Doswald-Beck eds., 2005)).
\item \textsuperscript{57} \textit{Hamdan}, 126 S. Ct. at 2799.
\item \textsuperscript{60} Military Commissions Act, 28 U.S.C. § 2441(a) amends 28 U.S.C. § 2241(e). The new subsection (e) provides:
\begin{itemize}
\item (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
\item (2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the \textit{DTA}, no court justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or condition of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
\end{itemize}
\item \textsuperscript{61} Id.
\item \textsuperscript{62} This amendment applies retroactively to "any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001" and became effective on October 17, 2006. 28 U.S.C. § 2441(b).
\item \textsuperscript{63} See Lewis \& Schmitt, supra note 18.
\end{itemize}
\end{footnotesize}
Hicks with attempted murder in violation of the law of war and providing material support for terrorism. In the end, Hicks plead guilty to one charge of providing material support for terrorism, received a suspended sentence of seven years, and returned to Australia to serve the remaining nine months of his sentence.

The dismissal of charges against the next two detainees, Omar Ahmed Khadr and Salim Ahmed Hamdan, demonstrates the procedures under the MCA for referring charges from CSRTs to the military commissions contain serious defects. In both cases, military judges found the military commissions lacked jurisdiction over the accused and dismissed the charges without prejudice. In Hamdan's case, a 2004 CSRT had determined he was "a part of or associated with al-Qaeda forces," and therefore was "properly detained as an 'enemy combatant.'" When Hamdan's case was referred to military commission, however, the military judge ruled under the MCA, military commissions have jurisdiction to try offenses only when committed by an "alien unlawful enemy combatant." In granting Hamdan's motion to dismiss all charges, the military judge reasoned the 2004 CSRT determination was made for the sole purpose of ascertaining whether his detention was proper, not to qualify him to stand trial by military commission. The distinction is important because the standards used by the CSRT to determine "enemy combatant" status is "less exacting" than the definition of "unlawful enemy combatant" provided by the MCA.

The series of events described above highlights the distinction between military and civilian modes of justice some critics have suggested are insufficient models to try suspected terrorists. For these critics, the criminal justice paradigm is a poor fit for accused terrorists. Formal federal prosecutor and legal commentator Andrew McCarthy argues: "Here the executive is not enforcing American law against a suspected criminal but exercising national defense powers to protect the nation against external..."
threats.” Instead of dealing with the constraints on prosecution associated with U.S. district courts, some argue a new court, one with special rules and procedures tailor made to meet the unique logistical problems posed by prosecuting terrorists, should be created to replace the failed military commission scheme.

B. THE AD HOC COURT OPTION

Most would agree the current methods for detaining and trying suspected terrorists is unsatisfactory. Of the ten detainee cases referred from CRSTs to the military commissions, only one case has been adjudicated and hundreds more are still detained at Guantánamo without charges. Commentators from the United States and abroad have criticized this system of indefinite detention as unfair, inefficient, and violative of international law. Certainly, the moment to address the shortcomings of the military commissions and indefinite detention scheme and to proffer solutions is now. Many commentators in the legal community have risen to the challenge and have concluded the answer to the problem of the military commissions is the creation of a new homeland security court.

For the purposes of this discussion, it is helpful to first identify the various goals to be achieved by the creation of an ad hoc national security court. The primary goal is replacing the failed military commission system, but advocates of such an approach also seem concerned with establishing a universally-recognized, legitimate means of processing, prosecuting, and punishing individuals accused of terrorism. Indeed, proponents often cite winning international support for the United State’s war effort as a justification for the creation of such a court. Professor Glenn Sulmasy foresees: “Creating a homeland security court system will

74. McCarthy & Velshi, supra note 19 at 7–8.
75. Rhem, supra note 30.
77. Sulmasy, After Hamdan, supra note 19, at 12.
78. Id. at 2.
enable us to adequately fight the war, maintain international support, and continue to display our resolve to hold up the rule of law." 79 Professors Jack L. Goldsmith and Neal Katyal echo these sentiments: "the government’s system of detaining terrorists without charge or trial has harmed the reputation of the United States, disrupted alliances, hurt us in the war of ideas with the Islamic world[,] and has been viewed skeptically by our own courts." 80 The objectives cited above, legitimacy and justice, are laudable. The means they have proposed utilizing to achieve those goals, however, are incompatible with the rule of law. These commentators have concluded the only answer to the quagmire that is the military commission scheme is to invent a new court, one specially designed to try terrorists free from the burdens of constitutional due process rights. 81

For example, the ad hoc court could allow the Government to introduce evidence obtained through torturous interrogation practices. Although no proponent of a new terrorist court has furnished any specific details regarding what standards of admissibility for evidence would apply in that court, it is reasonable to assume the standards for the new court would be less strict than the federal rules and not more strict than the rules set forth under the Manual for Military Commissions ("MMC"); the MMC sets a low bar.

The MCA amended the UCMJ to establish procedural and evidentiary rules for trials under the military commissions. 82 In January 2007, the Secretary of Defense submitted the MMC to Congress, which contains the Military Commissions Rules of Evidence. 83 Rule 304(a) provides generally that statements obtained by use of torture shall not be admitted into evidence against any party. 84 This general rule is subject to a significant exception in Rule 304(c), which contemplates admission of torture evidence "[w]hen the degree of coercion inherent in the production of a statement . . . is disputed." 85 In summary, although evidence obtained by torture specifically is excluded from such trials, if the totality of the

79. Id. at 3.
80. Goldsmith & Katyal, supra note 19.
81. See generally McCarthy & Velshi, supra note 19. "[This new tribunal] would inject judicial participation into the process to promote procedural integrity and international cooperation, but would avoid the perilous prospect of judicial micromanagement of the executive branch's war on terror." Id. at 2.
83. Id.
84. MIL. COMM’N R. EVID. 304(a).
85. MIL. COMM’N R. EVID. 304(c).
circumstances renders statements obtained by coercion reliable and probative in the judgment of the Military Judge, they may be admitted.\textsuperscript{86}

The proponents of the ad hoc court have proposed a series of alarming departures from the minimum requirements for due process long-recognized in this country.\textsuperscript{87} These proposed changes indicate the rules of the ad hoc court will be designed to follow the trend towards weakening procedural protections for terror suspects set by the military commission system. This problem is exacerbated by the United State’s continued use of torture as an interrogation method.

C. TORTURE AND THE “DISPOSAL PLAN”

Although torture is illegal under both U.S. and international law, the United States has a long history of using torture to achieve intelligence goals. In his book, \textit{A Question of Torture}, History Professor Alfred W. McCoy documents the last fifty years in the CIA’s experiments with torture.\textsuperscript{88} Professor McCoy traces the roots of the abuses recorded at Abu Ghraib prison to CIA interrogation practices dating back to at least the Cold War era.\textsuperscript{89} The physically and psychologically coercive interrogation techniques the CIA uses on torture suspects violates the absolute prohibition on torture enshrined in domestic and international law.\textsuperscript{90}

\textsuperscript{86.} The Manual for Military Commissions, pt. I, § 1(g), provides:

Statements obtained by torture are not admissible (10 U.S.C. §948r(b)), but statements ‘in which the degree of coercion is disputed’ may be admitted if reliable, probative, and the admission would best serve the interests of justice (10 U.S.C. §948r(c)). In addition, for such statements obtained after December 30, 2005, the methods used to obtain those statements must comply with the [DTA], enacted on that date (10 U.S.C. §948r(d)(3)).


\textsuperscript{87.} These include suggestions that the standard of admissibility for evidence be relaxed, the Government’s duty to provide exculpatory evidence to the accused be eliminated, and the burden of proof be lowered. \textit{See} Goldsmith & Katyal, \textit{supra} note 19 (suggesting the standards for admitting evidence should be less stringent than those required by the Federal Rules of Evidence); McCarthy, \textit{supra} note 19 (arguing the government’s duty to provide exculpatory evidence to the accused be narrowed or eliminated altogether and advocating that, instead of the guilt beyond a reasonable doubt burden, the government should only be required to prove its allegations by a preponderance of the evidence).

\textsuperscript{88.} \textit{See generally} ALFRED W. MCCOY, \textit{A QUESTION OF TORTURE: CIA INTERROGATION, FROM THE COLD WAR TO THE WAR ON TERROR} (Metropolitan Books 2006).

\textsuperscript{89.} \textit{Id.} at 5–7.

The Eighth Amendment to the U.S. Constitution forbids “cruel and unusual punishment” in the United States.\(^91\) In the international arena, the 1984 United Nations Convention Against Torture (“CAT”), which the United States ratified on October 21, 1994, specifically prohibits torture.\(^92\) In its 1999 report to the United Nations Committee Against Torture, the State Department averred:

- Every act of torture within the meaning of the Convention is illegal under existing federal and state law, and any individual who commits such an act is subject to penal sanction as specified in criminal statutes.
- Torture cannot be justified by exceptional circumstances, nor can it be excused on the basis of an order from a superior officer.\(^93\)

For example, the federal torture statute, which implements U.S. obligations under CAT, criminalizes torture, attempted torture, and conspiracy to torture.\(^94\) Anyone prosecuted under the torture statute is subject to fines or imprisonment for up to twenty years.\(^95\) The statute provides the perpetrator shall be sentenced to life in prison or death, if the victim dies from the torture.\(^96\)

Other federal statutes provide for the criminal prosecution of military service members and military contractors accused of torture. The UCMJ explicitly criminalizes torture and provides military personnel who abuse prisoners can be prosecuted by a court-martial.\(^97\)

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\(^91\) U.S. CONST. amend. VIII.
\(^92\) Article I of CAT, provides in relevant part:

> Any act which by severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession . . . or intimidating or coercing . . . when such pain or suffering is inflicted . . . with the consent or acquiescence of a public official.


\(^94\) 18 U.S.C. § 2340A(a) (2007). Section 2340 of the U.S. Code defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions) upon another person within his custody or physical control.” 18 U.S.C. § 2340(1) (2007). “Severe mental pain or suffering” is further defined as the “prolonged mental harm caused by or resulting from (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.” Id. at § 2340(2)(A-B).

\(^95\) 18 U.S.C. § 2340A(a).

\(^96\) Id.

Extraterritorial Jurisdiction Act of 2000 provides military personnel and contractors working for the Department of Defense may be prosecuted in U.S. district courts for certain felony offenses, including torture committed abroad while employed by or accompanying U.S. forces overseas. Other nations have adopted similar laws criminalizing torture and providing for the prosecution of offenders. Many legal commentators and jurists agree the prohibition against torture now has become a peremptory norm of international human rights and humanitarian law from which no derogation is allowed.

The September 11th attacks, however, furnished visceral incentives for lawyers in the Justice Department to launch a legal assault against the unqualified prohibition against torture. In early 2002, Jay Bybee wrote a memo to former White House Counsel Alberto Gonzales effectively re-defining torture to provide legal justification for the use of more severe interrogation techniques against terror suspects. The memo began by concluding “certain acts may be cruel, inhuman, or degrading, but still not

101. See, e.g., Jordan J. Paust, The Reality of Jus Cogens, 7 CONN. J. INT’L L. 81, 81 (1991); M. Cherif Bassiouni, International Crimes: Jus Cogens and Obligatio Erga Omnes, 59 LAW & CONTEMP. PROBS. 63, 68 (1996) (naming, inter alia, torture, genocide, and slavery as international crimes that are jus cogens); Jeremy Waldron, Torture and Positive Law: Jurisprudence for the White House, 105 COLUM. L. REV. 1681, 1711 (2005) (torture is jus cogens); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n. See also In re Estate of Marcos, 978 F.2d 493, 500 (9th Cir. 1992) (quoting Siderman de Blake v. Argentina, 965 F.2d 699, 715, 717 (9th Cir. 1992) (acknowledging that official acts of torture are now widely recognized as jus cogens violations)).
produce pain and suffering of the requisite intensity to fall within Section 2340A’s proscription against torture.”

The remainder of the memo explains how such a parsing, between torture and “cruel, inhuman, or degrading” acts, or between torture and “torture lite” is legally defensible. Bybee argued the prohibition against torture was limited to “extreme, deliberate, and unusually cruel practices.” He reasoned the physical or mental pain attending the predicate act “must be of such a high level of intensity that the pain is difficult for the subject to endure.”

By requiring proof of corporeal impact upon a victim, Bybee eviscerated the CAT’s clear prohibition against psychological torture. With these definitions as his baseline, Bybee concluded interrogators who used certain techniques to obtain intelligence from detainees likely would not be subject to criminal prosecution under the U.S. Code. According to Bybee’s logic, to qualify as torture, the interrogator must specifically intend to commit not only the prohibited act, but also the consequence of that act. In other words, Bybee reasoned an interrogator could perform actions approximating torture, but escape prosecution as long as he did not specifically intend to cause the victim prolonged mental harm. Moreover, to qualify as “prolonged,” the mental harm must be “endured over some period of time,” not limited to the period of interrogation itself. In sum, Bybee’s memo concluded that the standard of proof for prosecuting interrogators for violations of U.S. laws prohibiting torture would be very high indeed.

103. Id. at 1.
104. See Seth F. Kreimer, “Torture Lite,” “Full Bodied” Torture, and the Insulation of Legal Conscience, 1 J. NAT’L SECURITY L. & POL’Y 187, 224 (2005). Professor Kreimer explains the difference between torture, “in which physical assaults on the body of the victim result in excruciating pain,” and “torture lite” techniques which “involve the infliction of severe physical or psychological stress by means other than physical assault.” Id. at 188 n.3. Sleep deprivation, stress and duress positions, physical isolation, and subjection to loud noises or very bright lights are all examples of “torture lite” techniques. Id.
105. Bybee Memo, supra note 102, at 28–29 (relying on the European Court of Human Right’s decision in Ireland v. United Kingdom, 2 Eur. Ct. H.R. 25 (1978), which held that while interrogation techniques such as wall standing, hooding, use of loud noise, sleep deprivation, and deprivation of food and drink were inhumane and degrading, they did not amount to torture).
106. See id. at 5.
107. Convention Against Torture, supra note 90, at art. 1(1).
108. Bybee Memo, supra note 102, at 46.
109. See id. at 3 (reasoning “because Section 2340 requires a defendant act with specific intent to inflict severe pain, the infliction of such pain must be the defendant’s precise objective”).
110. Id. at 7.
While the ban on torture in domestic and international law is absolute, lawyers working for the U.S. Government searched for a legal loophole.\textsuperscript{111} This type of overly legalistic approach to real-life interrogation situations proved to be disastrous in the field. In essence, interrogators without legal educations were left to determine, on their own, what techniques were permissible and which were prohibited. Observers have linked the abuses at Abu Ghraib prison, for example, to poor leadership and lack of specific regulations for interrogations, beginning at the top levels of government, and with the Bybee memo in particular.\textsuperscript{112}

The Bush Administration's splitting-hairs approach leads down a slippery slope, posing the problem some CIA officials unofficially term "the disposal plan."\textsuperscript{113} At the bottom of that slope, Professor McCoy asserts, "is a chasm . . . called extrajudicial execution."\textsuperscript{114} Stated differently, when CIA interrogators subject high value detainees to treatment that stops short of "extreme, deliberate, and unusually cruel practices" in order to extract intelligence information, the detainees become "tainted for trial."\textsuperscript{115} At this stage, the temptation to dispose of the detainee through summary execution is great because, besides having destroyed any chance for prosecuting the detainee, interrogators fear their treatment of the detainee will make themselves vulnerable to future criminal prosecution under federal torture statutes.\textsuperscript{116} A living survivor of the interrogation, after all, is a potential witness. More pointedly, Tyler Drumheller, former chief of European operations at the CIA explains: "What are you going to do with these people? The utility of someone like K.S.M. is, at most, six

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\textsuperscript{111.} See McCoy, supra note 88, at 112–13. McCoy also describes various memos penned for the Executive by David S. Addington, John Yoo, Alberto Gonzales, and Jay Bybee that effectively allowed the CIA to use torture when interrogating suspected members of al Qaeda and the Taliban. Id. at 112–16.


\textsuperscript{113.} Mayer, supra note 2. "In the Vietnam War, the CIA . . . avoid[ed] the formalities of prosecution with pump and dump—pumping suspects for information by torture and then dumping the bodies." McCoy, supra note 88, at 119.

\textsuperscript{114.} McCoy, supra note 88, at 195.


\textsuperscript{116.} Mayer, supra note 2. Some CIA agents have reportedly purchased professional liability insurance policies to assist with potential legal fees. Id. As discussed in Part II.C., perpetrators of torture are subject to both criminal prosecution and civil lawsuits. See infra Part II.C.
months to a year. You exhaust them. Then what? It would have been better if we had executed them.”117 But effective alternatives to torture exist.

Before the Executive turned control over interrogations to the CIA, the Federal Bureau of Investigation (“FBI”) had been running quite a successful counterintelligence program in Afghanistan.118 Under strict orders to “work by the book,” FBI agents used empathetic, non-coercive tactics to encourage terror suspects to talk.119 These techniques, which included building trust and rapport with the detainees rather than fear and loathing, produced solid, actionable intelligence.120 In stark contrast, when CIA or military interrogators using harsh techniques took over from the FBI, “the detainee would stop being cooperative.”121

Using torturous methods to interrogate suspects for either intelligence or evidence is illegal and immoral.122 Moreover, torturing suspects is counterproductive.123 Torture does not lead to credible information which can be used to rout the terrorist threat;124 and allegations of U.S. sponsored torture practices potentially can lead to the radicalization of new generations of terrorists.125 If bringing terrorists to justice is indeed a paramount objective, in order to accomplish that objective, prosecutors need evidence clean of the taint of torture.

III. TERROR SUSPECTS SHOULD BE TRIED IN THE NORMAL CRIMINAL JUSTICE SYSTEM

The military commission system has failed, but inventing an ad hoc terroris court will not repair the damage done by President Bush’s failed

117. Mayer, supra note 2.
118. See MCCOY, supra note 88, at 118.
119. Id. Federal Bureau of Investigation (“FBI”) agent Jack Cloonan specifically instructed his operatives in Kabul to use interrogation techniques “that would allow later prosecution.” Id.
120. Id. at 118–19.
121. Id. at 159. FBI agent Dan Coleman succinctly observed: “Brutalization doesn’t work. We know that. Besides, you lose your soul.” Id. at 203.
124. See Guiora & Page, supra note 122, at 429. See also Mayer, supra note 2 (quoting a former top CIA official who estimated that “ninety percent of the information [obtained through the CIA’s interrogation and detention program] was unreliable”).
125. See, e.g., MCCOY, supra note 88, at 201. A former MI5 agent is quoted as stating that the British approach to containing IRA terrorists had the paradoxical effect of creating even more terrorists. Id. “It did nothing but exacerbate the situation. Most of those interned went back to terrorism. You’ll end up radicalizing the entire population.” Id.
experiment. In order to win support for the United State’s war effort, the trials of suspected terrorists must be viewed as legitimate and fair by both the domestic and international community. Thus, the urgent need to try and punish terrorists efficiently must be tempered with the obligation to do so in accordance with the established rule of law. Any criminal tribunal used to try terror suspects must provide the accused with due process rights acknowledged internationally. However, the Bush Administration’s quest to bring terrorists to justice has been haunted by the specter of inappropriately coercive interrogation methods “tantamount to torture.”

It is beyond debate that using torture to elicit either intelligence information or confessions of criminal activity is illegal under both U.S. and international law. Federal district courts, unlike military commissions or the proposed ad hoc national security court, have developed a sophisticated jurisprudence which imposes a harsh penalty on the Government for violations of the prohibition against torture, namely the exclusion of evidence tainted by illegal interrogation practices. For these reasons, U.S. district courts are the most appropriate venues to bring suspects accused of terrorism offenses to justice.

At the outset, it is important to acknowledge federal district courts successfully have prosecuted terrorists in the past using established mechanisms that balance the Government’s national security interests with the due process rights of the accused. Unlike the military commissions or the proposed terrorist court, whose procedures are untested, the district courts have an established record of completed prosecutions. The perpetrators of the 1993 bombing of the World Trade Center, including later, Ramzi Yousef; the perpetrators of the 1995 bombing of the

128. See infra. Part II.A.–II.B.
131. James McKinley, Jr., The Terror Conspiracy: The Verdict: Mountains of Evidence, But Questions Remain, N.Y. TIMES, Oct. 2, 1995, at B5. Sheik Omar Abdel Rahman and nine others were convicted of conspiracy to commit terrorist acts. Id.
Oklahoma City federal building,\textsuperscript{133} the perpetrators of the 1998 bombing of the U.S. embassies in Kenya and Tanzania,\textsuperscript{134} and the “twentieth” 9/11 terrorist, Zacarias Moussaoui,\textsuperscript{135} have all been tried and convicted using normal criminal procedures in U.S. district courts. In August 2007, as this Essay was being written, the jury in the federal trial of the alleged “dirty bomber,” Jose Padilla,\textsuperscript{136} returned a guilty verdict.\textsuperscript{137} Certainly, the criminal trials of accused terrorists have suffered logistical difficulties,\textsuperscript{138}
but they also have withstood the scrutiny the legal community has reserved for proceedings under a military tribunal system.\(^{139}\)

**A. EVOLUTION OF THE LEGAL DOCTRINE EXCLUDING COERced CONFESSIONS**

The U.S. Supreme Court has managed, through a long history of cases involving police interrogation practices, to strike a workable balance between legitimate government needs to question criminals and due process protections for the individuals subjected to such interrogations. Courts in the United States inherited the English common law rule that coerced confessions should not be admitted into evidence against the accused because they were unreliable.\(^{140}\) Courts also reasoned that forced confessions should be excluded because they were involuntary.\(^{141}\) Over time the separate rationales became somewhat entangled with each other, and courts continued to exclude coerced confessions because they were inherently untrustworthy, often conflating this with the voluntariness test.\(^{142}\)

In the United States, the Supreme Court adopted the voluntariness test\(^{143}\) and the confusion regarding its underlying rationale that


\(^{140}\) Professor Wigmore insisted the privilege against self-incrimination was in place solely to exclude unreliable evidence. See J.H. Wigmore, *Treatise on Evidence* §820 (2d ed. 1923).


\(^{143}\) Hopt v. Utah, 110 U.S. 574, 584 (1884); Bram v. United States, 168 U.S. 532, 549 (1897).
accompanied it. In cases where interrogation tactics were challenged, the Court reasoned that violence and threats by the police could result in unreliable evidence. The end result of this rationale, however, was that challenges to forced confessions were rejected if the Court was satisfied that the confession was truthful.

Nevertheless, the Court continued to utilize the amorphous voluntariness test throughout the Jim Crow period, during which white law enforcement officials regularly used violence to force black suspects to confess. In Brown v. Mississippi, the Court reversed the defendants' convictions for murder, finding they "were void for want of the essential elements of due process." After learning of the murder, the local sheriff and his posse approached Yank Ellington, one of the defendants, in his home and accused him of the crime. When Ellington denied his involvement, the sheriff's posse hanged him by a rope to the limb of a tree, and, having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and still declining to accede to the demands that he confess, he was finally released, and he returned with some difficulty to his home, suffering intense pain and agony.

Ellington's torment continued when the sheriff's deputy returned to Ellington's house two days later to arrest him. En route to the jail facility, the deputy drove through Alabama, stopped, and beat Ellington with a whip until he confessed to the murder. At trial, Ellington and his co-defendants argued their confessions were false and obtained through "physical torture." Announcing "[i]t is difficult to conceive of methods

144. WHITE, supra note 142, at 42 (citing Stein v. New York, 346 U.S. 156, 192 (1953), where the majority declared: "Reliance on a coerced confession... vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusive and deceptive evidence").

145. WHITE, supra note 142, at 42 (citing Lyons v. Oklahoma, 322 U.S. 596 (1944) and Stein v. New York, 346 U.S. 156 (1953)).


147. 297 U.S. 278, 287 (1936).

148. Id. at 287.

149. Id. at 281.

150. Id.

151. Id.

152. Id. at 281–82.

153. Brown, 297 U.S. at 279. The murder, indictment, trial, conviction, and sentence in this case all occurred within a week's time. Id.
more revolting to the sense of justice than those taken to procure the
confessions of these petitioners.[49] the Court determined the confessions
were both untrustworthy and involuntary, and reversed the conviction.[50]

The Court's 1961 ruling in Rogers v. Richmond marked the Court's
attempt to construct a due process analysis, eliminating the truthfulness
inquiry.[51] Unlike Brown, in Rogers, there was no allegation the defendant
had been subject to any physical violence, but the Court's concern about
the coercive nature police interrogations animates its reasoning and holding
here.[52] Rogers confessed to killing the victim of a liquor store robbery
only after the local chief of police threatened to take Roger's wife into
custody.[53] During his trial, Rogers testified he had confessed to spare his
arthritic wife the pain of being transported by the police.[54] The Court
ordered Rogers be discharged because the state trial court applied the
wrong test in determining whether Rogers's due process rights had been
violated.[55] The trial judge ruled Rogers's confession was "freely and
voluntarily made," basing this determination solely on the probable
veracity of the confession itself.[56] In other words, the trial court weighed
the likelihood of the substantive truth of Rogers's confession as the only
factor in determining its voluntariness.[57] The Court held the truth or
falsity of Rogers's confession had no place in a due process inquiry.[58] The
Court explained under the Due Process Clause of the Fourteenth
Amendment, coerced confessions could not be the bases for criminal
convictions.[59] This was

not because such confessions are unlikely to be true but because the
methods used to extract them offend an underlying principle in the
enforcement of our criminal law: that ours is an accusatorial and not an
inquisitorial system—a system in which the State must establish guilt
by evidence independently and freely secured and may not by coercion
prove its charge against an accused out of his own mouth.[60]
Instead of evaluating the truth of the confession, the Supreme Court held the trial judge should have inquired whether the police chief's actions broke Rogers's will to resist.\(^{166}\)

The Court's effort to find a judicial solution to the widespread problem of abusive police interrogation has been well-chronicled.\(^{167}\) The voluntariness test announced in \textit{Rogers}, however, did not satisfy the Court's desire to curb police abuses because this fact-dependent inquiry allowed trial court judges to make factual findings that limited the Court's ability to determine voluntariness on appellate review.\(^{168}\) Therefore, in its 1966 decision in \textit{Miranda v. Arizona}, the Court announced a rule simultaneously eliminating the fact-specific determinations of its previous Fifth Amendment due process jurisprudence, and provided clear guidelines for future interrogations by law enforcement.\(^{169}\)

B. MIRANDA AND THE PUBLIC SAFETY EXCEPTION

In \textit{Miranda}, the Court decided the prohibition against coercive police interrogation practices and the right against self-incrimination had a firm constitutional basis in the Fifth Amendment.\(^{170}\) The Court ruled the police must, prior to interrogation, inform a person in custody of her right to remain silent, her right to legal counsel, and her right to court-appointed counsel if she is indigent.\(^{171}\) In its decision, the \textit{Miranda} court specifically announced its disapproval of methods of brutality ("beatings, hanging, whipping") used by the police to force suspects to confess.\(^{172}\) Rejecting its previous totality of the circumstances approach, the Court explained:

The Fifth Amendment privilege is so fundamental to our system of constitutional law and the expedient of giving an adequate warning as to the applicability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given.\(^{173}\)

In other words, if police do not give the required warnings, courts would close their ears to prosecution arguments that the defendant

\(^{166}\) \textit{Id.} at 544.

\(^{167}\) See e.g., \textit{WHITE}, supra note 142.

\(^{168}\) \textit{Id.} at 40–41.


\(^{170}\) \textit{Id.} at 467. See also \textit{United States v. Dickerson}, 530 U.S. 428, 444 (2000) (affirming in \textit{Miranda}, the Court had pronounced a constitutional rule).

\(^{171}\) \textit{Miranda}, 384 U.S. at 479.

\(^{172}\) \textit{Id.} at 445–46 (citing, inter alia, \textit{Nat'l Comm'n on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement} (1931)).

\(^{173}\) \textit{Id.} at 468.
somehow knew of these rights. Rather, courts faced with future unwarned confessions would simply exclude such evidence from the prosecution’s case-in-chief.

That the *Miranda* court sought a long-term solution to the problem of police brutality is evident in its opinion. As the Court reasoned: “Unless a proper limitation upon custodial interrogation is achieved—such as [this] decision[] will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future.” Using torture to force suspected terrorists to provide information is no less shocking than police brutality, yet, if proponents of a new ad hoc national security court prevail, *Miranda*’s promise to protect against government violations of this kind will go unfulfilled.

National security court advocates argue it is too burdensome on the Government to make domestic due process rights available to terror suspects when they are detained during a combat situation. For example, Professors Goldsmith and Katyal assert: “Detainees . . . need not be given the full panoply of criminal protections . . . . A terrorist captured in Afghanistan should not be able to seek release because he was not read his *Miranda* rights.” The sensible argument implied here is requiring soldiers on the battlefield to provide a list of rights to a captured enemy combatant is overly burdensome. However, the prerequisites for admissibility under *Miranda* are not so inflexible to be unworkable in the War on Terror.

Although the warning rule in *Miranda* is constitutionally-based, the Court has recognized several exceptions to its strictures, including a narrow exception for public safety. In *New York v. Quarles*, police pursued a rape suspect, who according to the victim was armed with a gun, into a supermarket. The arresting officer drew his service revolver as he

174. See id. at 468–69.  
175. Id. at 447.  
176. See Goldsmith & Katyal, supra note 19.  
177. Id.  
180. Id. at 651–52.
approached the suspect and ordered him to stop. The suspect complied, but while he was frisking him, the officer saw the suspect’s gun holster was empty. The officer handcuffed the suspect and asked him about the location of the gun. The suspect indicated with a nod of his head and said, “the gun is over there.” Only after pausing to retrieve the gun did the officer read the suspect his Miranda rights. The trial court suppressed the defendant’s in-custody statement about the location of his gun and the gun itself because the statement was obtained before the arresting officer read him his Miranda rights. The Supreme Court reversed, holding the defendant’s pre-warning statement and the gun itself were admissible because of “the immediate necessity” to secure the safety of the location.

The public safety exception under Quarles would certainly apply in circumstances, like those described by Professors Goldsmith and Katyal above, when capturing a suspect on the battlefield might not provide a safe opportunity for a recitation of rights. Under Quarles, the duty to inform a terror suspect of his rights hypothetically can be delayed until military forces have secured the safety of the location. Then, as FBI agents working in counterintelligence have done for decades, the suspect can be warned and lawful interrogation can commence.

Using the Miranda case as a base upon which to create guidelines on interrogation practices in the battlefield will promote several goals. First, it will provide detailed instructions to guards and interrogators on the proper treatment of detainees. By reorienting the mindset of interrogators, the Government will benefit by receiving admissible evidence to use in criminal cases against suspected terrorists. Second, confessions and other evidence that lack a high indicia of reliability will be excluded. As previously discussed, information gleaned from suspected terrorists using practices “tantamount to torture” does not yield reliable information.
Under threats of physical and/or psychological violence from his captor, a suspect will “say almost anything” to end the interrogation session.\(^{191}\)

Thus, using veracity as the sole test for admissibility is unworkable from a due process standpoint as long as trial courts can admit forced confessions if the confessions are deemed truthful. Therefore, as the Supreme Court announced in *Rogers* and *Miranda*, forced confessions should be excluded from evidence presented at a criminal trial because government coercion constitutes a violation of the accused’s due process rights.\(^{192}\)

Finally, and perhaps most importantly, by guaranteeing even those accused of the most heinous crimes will be accorded due process rights, the United States will satisfy the demand for fair and legitimate trials.

**IV. CONCLUSION**

In its landmark *Miranda* decision, the Supreme Court announced confessions obtained by the police would be excluded from trial unless the criminal defendant had been warned of certain constitutional rights prior to questioning. *Miranda* was the culmination of years of efforts by the Court to curb abuses of police power.

The social issues confronted by the *Miranda* court—abusive police interrogation, procedural protections for criminal defendants, and the legitimacy of the legal system in which these issues are tried—are as relevant in today’s Age of Terror as they were at the time of the Supreme Court’s decision in 1966. The CIA currently is engaged in an interrogation and detention program of suspected terrorists that relies on torture to extract intelligence information. However, rather than easing regulations on interrogations by creating an ad hoc national security court with special admissibility rules, the United States should treat alleged terrorists as criminals and prosecute them in the federal courts. The exclusionary rule announced fifty years ago in *Miranda* should be applied in the criminal trials of accused terrorists. Doing so would satisfy international demands for fair trials and could also lead to the eventual abolition of torture as an interrogation method.

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\(^{192}\) *See Rogers*, 365 U.S. at 540; *see also* *Miranda*, 384 U.S. at 462.