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The Case Against A Special Terrorism Court

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About Us

Human Rights First believes that building respect for human rights and the rule of law will help ensure the dignity to which every individual is entitled and will stem tyranny, extremism, intolerance, and violence.

Human Rights First protects people at risk: refugees who flee persecution, victims of crimes against humanity or other mass human rights violations, victims of discrimination, those whose rights are eroded in the name of national security, and human rights advocates who are targeted for defending the rights of others. These groups are often the first victims of societal instability and breakdown; their treatment is a harbinger of wider-scale repression. Human Rights First works to prevent violations against these groups and to seek justice and accountability for violations against them.

Human Rights First is practical and effective. We advocate for change at the highest levels of national and international policymaking. We seek justice through the courts. We raise awareness and understanding through the media. We build coalitions among those with divergent views. And we mobilize people to act.

Human Rights First is a non-profit, nonpartisan international human rights organization based in New York and Washington D.C. To maintain our independence, we accept no government funding.

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SUMMARY

Terrorist suspects should be prosecuted in the federal criminal courts

- **The federal criminal justice system has a proven track record of success in international terrorism cases:** More than 100 terrorism cases have been prosecuted in the federal courts since September 11, 2001.
- **The federal criminal justice system is capable of handling complex terrorism cases without compromising national security or sacrificing standards of fairness and due process:** Based on the public record, none of the international terrorism cases brought since September 11, 2001 has been dismissed on grounds related to classified information, and there have been no important security breaches in any terrorism cases in which the Classified Information Procedures Act has been invoked.
- **Criminal prosecutions often assist rather than inhibit intelligence gathering:** Historically, criminal prosecutions have assisted intelligence gathering. Defendants have the incentive to cooperate with government prosecutors and interrogators because successful cooperation may result in shorter prison sentences.

Proposals for a special terrorism court should be rejected

- **A special terrorism court is unnecessary and impractical:** Among the many lessons learned from the misguided Guantánamo episode are the practical difficulties of trying to create new, ad hoc justice systems. Just like the military commissions at Guantánamo, a new court inevitably would be bogged down in litigation and delay.
- **Our procedural safeguards and evidentiary standards comprise the bedrock of American justice:** A new court would undermine the integrity of the justice system and perpetuate the damage to America's reputation for fairness and transparency done by unjust military commissions and prolonged detention without charge at Guantánamo.
- **Special courts and detention without trial undermine U.S. counterterrorism strategy:** Creating a state-side replica of the Guantánamo legal regime would impair counterterrorism cooperation with our allies and fuel terrorist recruitment.

Proposals for a system of detention without charge should be rejected

- **Detention without charge is inconsistent with core concepts of liberty and due process:** The Supreme Court has repeatedly condemned detention without charge based solely on a perceived risk of future dangerousness.
- **A system of detention without charge would be prone to error, and it inevitably would be exploited to pursue those with little, if any, connections to terrorist activities:** Without proven mechanisms for predicting future dangerousness, decision makers would likely resort to racial profiling and stereotypes. Errors would be made, innocent people would be detained, and scarce resources would be wasted, further eroding U.S. counterterrorism efforts.

INTRODUCTION

One of the U.S. government's foremost obligations since the September 11th attacks has been to bring those implicated in the horrific acts of that day to justice. There is little doubt that the military commissions at Guantánamo have failed to accomplish this goal. In almost seven years since the commissions were authorized, only two military commission trials were conducted, and none of the suspects implicated in the 9/11 attacks were tried.

President Barack Obama's January 22, 2009 executive order[1] directing the closure of Guantánamo within one year and the suspension of all military commission proceedings has sparked increasing debate about the future of terrorism prosecutions. Some advocate the creation of another substitute system for detaining and trying terrorist suspects. Such proposals envision a system with fewer due process protections than those guaranteed in ordinary criminal courts and one that might also be empowered to detain suspects, potentially indefinitely, without criminal charge.

Proponents of a new system argue that the existing criminal courts are ill-equipped to handle serious terrorism cases.[2] Some also speculate that there are dangerous people—in Guantánamo and at large in the world—who cannot be prosecuted, but who nevertheless pose a threat to our national security and must be detained.[3]

The Obama Administration has not expressed its support for a special terrorism court or for specific indefinite detention proposals. To the contrary, President Obama's executive order on Guantánamo highlights the "significant concerns raised by these [prolonged] detentions" without charge at Guantánamo and requires individualized case reviews and the "prompt and appropriate disposition" of Guantánamo cases in order to "further the national security and foreign policy interests of the United States and the interests of justice."[4]

At the same time, however, the President's executive order leaves open the possibility of "other disposition[s]" in cases where transfers or release are not "possible" and federal court prosecutions are not "feasible." The term "other disposition" might imply a variety of options, such as the creation of an entirely new court system or the continued detention of prisoners without criminal charge. Members of the Obama Administration, including Attorney General Eric Holder, have implicitly recognized the possibility of continuing to detain some "dangerous" Guantánamo prisoners without charge.[5] In a recent filing in the Guantánamo habeas cases, the Administration

[1] Executive Order no. 13,492, *Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities* (2009).

[2] *See, e.g.,* Jack Goldsmith, "Long-Term Terrorist Detention and Our National Security Court," (working paper, Series on Counterterrorism and American Statutory Law, a joint project of the Brookings Institution, the Georgetown University Law Center, and the Hoover Institution, 2009); Charles D. Stimson, *Holding Terrorists Accountable: A Lawful Detainment Framework for the Long War*, Heritage Foundation, January 23, 2009; Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (New York: Penguin Press, 2008); Testimony of Prof. Amos N. Guiora, Senate Committee on the Judiciary, *Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System*, 110th Cong., 2nd sess., June 4, 2008, pp. 8-10; Matthew Waxman, "The Smart Way to Shut Gitmo Down," *Washington Post,* October 28, 2007; Jack L. Goldsmith and Neal Katyal, "The Terrorists' Court," *New York Times,* July 11, 2007; Glenn M. Sulmasy, *The Legal Landscape After Hamdan: The Creation of Homeland Security Courts*, 13 New Eng. J. Int'l & Comp. L. 1 (2006).

[3] *See, e.g.,* Benjamin Wittes, "Needed: A New Detentions Law," *New York Times*, January 13, 2009; David Cole, "Defining Our Enemies," *New York Times*, January 13, 2009; *Washington Post*, "Workable Terrorism Trials," July 27, 2008 (*Washington Post* editorial page calling for a "specialized national security court" to oversee non-criminal detention); Wittes, *Law and the Long War: The Future of Justice in the Age of Terror*; Waxman, "The Smart Way to Shut Gitmo Down"; Goldsmith and Katyal, "The Terrorists' Court".

[4] Executive Order no. 13,492.

[5] See, e.g., Testimony of Eric H. Holder, Senate Committee on the Judiciary, Executive Nomination, 111th Cong., 1st sess., January 15, 2009 ("I think substantial numbers of those people can be sent to other countries safely. Other people can be tried in a jurisdiction and put in jail. And there are possibly going to be other people who we're not going to be able to try, for a variety of reasons, but who nevertheless are dangerous to this country. And we're going to have to try to figure out what we do with them.").

gave some indication of how this might be done. The government retired its use of the term "enemy combatant," a concept created by the Bush Administration to justify the indefinite detention of prisoners both at Guantánamo and on U.S. soil. But the government nonetheless maintained that the Authorization for Use of Military Force (AUMF), passed by Congress in the wake of the 9/11 attacks, provides an adequate domestic legal basis for executive detention.[6] The category of prisoners the government claimed the right to detain was substantially similar to the group encompassed by the definition of "enemy combatant" employed by the Bush Administration.[7] However, the filing was specifically limited to Guantánamo prisoners, and the Administration maintained the right to modify its position after an inter-agency task force completes a wide-ranging review of detention policy in the next six months.

Human Rights First believes that all indefinite detention and special court proposals—whatever form they might take—are unwise, unnecessary and should be rejected. The federal criminal courts have proven to be fully capable of handling the challenges posed by complex terrorism cases without compromising national security or sacrificing standards of fairness and due process. Our procedural safeguards and evidentiary standards comprise the bedrock of American justice. A decision to jettison them, even for a small number of suspects, would weaken our system as a whole, undermine America's efforts to forge an international coalition to combat terrorism, and perpetuate the damage to America's reputation for fairness and transparency done by unjust trials and prolonged detention without charge at Guantánamo.

Moreover, the problems that plagued the military commission system—with prolonged litigation over the applicable procedures and rules and increasingly widespread dissention within the military command structure—do not favor the creation of a new court to deal with these cases. Establishing another separate, and secondary, system for terrorism suspects would only result in more legal challenges and would negate many of the strategic advantages of closing Guantánamo and ending military commissions.

Just as importantly, a special terrorism court is not smart counterterrorism policy. Current U.S. counterinsurgency doctrine underscores the important strategic value of treating terrorism suspects as criminals, rather than as military combatants, in order to deprive them of legitimacy and undermine their support in the societies from which they seek recruits to their cause. Unjust detentions and trials at Guantánamo have fueled animosity toward the United States. These decisions also have undermined U.S. efforts to advance the rule of law around the world, which is critical to confronting the threat of terrorism. Creating a special terrorism court and a substitute system of detention without charge would perpetuate these errors rather than solve them.

The new Congress and the Obama Administration have a window of opportunity to signal to the American people and the world that the policies of the Bush Administration were an aberration and that, as it confronts the threat of terrorism, the United States is prepared to uphold the Constitution, restore the rule of law, and honor its international obligations. At stake are the effectiveness of our counterterrorism strategy and the integrity of the American justice system.

[6] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

[7] Respondents' Memorandum, *In re* Guantanamo Bay Detainee Litigation, no. 08- 442 (D.D.C. Mar. 13, 2009). President Bush's "enemy combatant" definition encompassed "anyone who is part of or *supporting* Taliban or Al Qaeda forces or associated forces," while President Obama has claimed the right to detain anyone who "*substantially* supported" terrorists (emphases added). The most significant difference between the two administrations' views is that President Bush claimed commander-in-chief authority to practice detention without charge, while President Obama argues that his detention authority was granted by Congress in the AUMF.

THE FEDERAL SYSTEM

Proponents of a new regime contend that the federal courts are ill-equipped to handle serious terrorism cases and that a system with fewer procedural safeguards and relaxed evidentiary standards would enable more prosecutions and convictions. This view is partially grounded in the belief that terrorism is unique and cannot be adequately dealt with under criminal law.[8]

The most widely-articulated argument against federal court prosecutions is that public criminal trials create a risk of revealing classified information. In some cases, critics say, the government may have credible, classified evidence of criminal conduct but cannot run the risk of exposing that evidence in court.[9] Some national security court proponents cite the absurdity of reading *Miranda* warnings to suspects captured on the battlefield or the difficulty of applying strict rules of evidence, especially in cases where evidence was gathered abroad.[10] Some advocates also argue that criminal law itself is not adequate—that it is designed to punish crimes already committed on U.S. soil, but that it is a poor tool to disrupt terrorist plots.[11] And some claim that the assignment of counsel in criminal cases inhibits intelligence gathering from terrorism suspects.

These arguments have facial appeal, but they do not stand up to scrutiny. Of course terrorism cases have posed new challenges for the courts. However, these challenges have not stood in the way of successful prosecutions. In fact, the U.S. courts have a long history of prosecuting terrorism suspects, including Zacarias Moussaoui, Ahmed Ressam, Abdel Rahman, and Jose Padilla.

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[8] It is further based on the notion that terrorism cases do not fit neatly within the law of war paradigm. For this reason, some proponents of a new regime propose a "hybrid" system, offering a "true mix of both the criminal law and prisoner of war paradigms without full Constitutional and criminal procedure rights." Amos N. Guiora, *Quirin to Hamdan: Creating a Hybrid Paradigm for the Detention of Terrorists*, 19 Fla. J. Int'l L.511, 512 (2008). *See also* Wittes, *Law and the Long War: The Future of Justice in the Age of Terror*; Robert M. Chesney and Jack L. Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 Stan. L. Rev. 1079 (2008). Others propose extending traditional law of war detention. *See, e.g,* Goldsmith, "Long-Term Terrorist Detention and Our National Security Court"; David B. Rivkin Jr. and Lee A. Casey, "The Laws of War Have Served Us Well: Our armed forces shouldn't have to play catch and release," *Wall Street Journal,* January 24, 2009; David Cole, "Closing Guantánamo: The problem of preventive detention," *Boston Review*, December 13, 2008; Cole, "Defining Our Enemies." Though Cole's preventive detention proposal is more limited than others', he incorrectly extends law of war detention to non-international armed conflicts. *See infra* note 25.

[9] Stimson, *Holding Terrorists Accountable: A Lawful Detainment Framework for the Long War*; Jack Goldsmith, "The Laws in Wartime: Boost trust, Close Guantánamo, and establish a national-security court," *Slate,* April 2, 2008; Michael B. Mukasey, "Jose Padilla Makes Bad Law: Terror trials hurt the nation even when they lead to convictions," *Wall Street Journal*, August 22, 2007.

[10] In testimony before the Senate Judiciary Committee, for example, then Acting Assistant Attorney General Steven G. Bradbury stated: "Granting terrorists prophylactic Miranda warnings and extraordinary access to lawyers is inconsistent with security needs and with the need to question detainees for intelligence purposes. The very notion of our military personnel regularly reading captured enemy combatants Miranda warnings on the battlefield is nonsensical." Testimony of Mr. Steve Bradbury, Senate Committee on the Judiciary, *Hamdan v. Rumsfeld: Establishing a Constitutional Process*, 109th Cong., 2nd sess., July 11, 2006.

[11] David B. Rivkin Jr. and Lee A. Casey, "Judges vs. Jihadis," Wall Street Journal, November 8, 2007; John B. Bellinger, Remarks on the Military Commissions Act, 48 Harv. Int'l L.J. Online 1 (2007) ("Our criminal courts simply do not have extraterritorial jurisdiction over the vast majority of these individuals or the vast majority of their activities"). Another line of argument is that, unless terrorism cases are segregated, the relaxed standards applied to these cases will infect the entire justice system, undermining the procedural protections afforded to ordinary criminal defendants. See, e.g., Andrew C. McCarthy and Alykhan Velshi, "We Need a National Security Court," (white paper, American Enterprise Institute, 2006); John Farmer, "A Terror Threat in the Courts," New York Times, January 13, 2008. These arguments, however, must be weighed against the parallel—and equally plausible—risk that the relaxed rules and procedures established for a special terrorism court will eventually seep into the ordinary criminal courts.

Trying Terrorism Cases

In 2007, Human Rights First asked two former federal prosecutors, Richard Zabel and James Benjamin, to examine and evaluate international terrorism cases already brought in the federal courts. Their report, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts,*[12] published by Human Rights First in May 2008, studies 123 federal terrorism prosecutions, ranging from epic mega-trails for completed acts of terrorism to individual pre-emptive prosecutions geared toward prevention. The focus of the report is on the legal and practical issues that confront courts, law enforcement and Congress regarding terrorism-related crimes. *In Pursuit of Justice* concludes that the federal system has capably handled important and challenging cases without infringing on the government's right to protect sensitive national security information or defendants' rights to due process.

Among the report's most important findings is that the existing array of federal criminal statutes provides prosecutors with a "more-than-adequate set of tools" to try terrorism cases. In recent years, prosecutors have invoked specially-tailored anti-terrorism laws and many generally applicable federal criminal statutes to prosecute terrorist suspects. Successful prosecutions have been both backward- and forward-looking; the government has succeeded in both interrupting terrorist plots in preparation and punishing terrorists for crimes that have already occurred.[13]

The terrorism statutes employed most often by federal prosecutors are those prohibiting the provision of "material support" to designated terrorist organizations and organizations that have engaged in terrorism. Since 9/11, the government has secured material support convictions against defendants who have attended terrorist training camps, acted as messengers for terrorist leaders, acted as doctors to terrorist groups, and donated funds to the humanitarian activities of designated terrorist groups. The most common criticism of material support law is not that it is too narrow, but rather that it is too broad. In fact, many have argued that 18 U.S.C. § 2339B, which criminalizes material support to designated terrorist organizations, is unconstitutional on its face because it lacks a requirement that defendants have the specific intent to support a terrorist act.[14]

In many terrorism cases, the government seeks to rely on sensitive evidence that implicates national security, particularly sources and means of intelligence gathering. Dealing with classified evidence can be one of the most challenging aspects of trying a terrorism case. Over the years, however, courts have proved up to the task. The Classified Information Procedures Act (CIPA) outlines a comprehensive set of procedures for federal criminal cases involving classified information. Among other things, the statute allows the government to substitute the introduction of classified evidence at trial with an unclassified summary of the evidence. Applying CIPA, courts have successfully balanced the need to protect national security information, including the sources and means of intelligence gathering, with defendants' fair trial rights. In fact, based on the public record, *none* of the more than 100 international terrorism cases brought since September 11 has been dismissed on grounds related to classified information, and there have been *no* important security breaches in any terrorism cases in which CIPA has been invoked.[15] The Supreme Court also has recognized that federal courts are capable of protecting classified

[12] Richard B. Zabel and James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, Human Rights First, May 2008. An update to the May 2008 report will be released in 2009.

[13] As an example, Ahmed Ressam, the so-called "millennium bomber" was tried and convicted for plotting to bomb the Los Angeles airport on New Year's Eve in 1999. He was arrested crossing the border between Canada and the United States on December 14, 1999, two weeks *prior* to the planned attacks. Sarah Kershaw, "Terrorist in '99 U.S. Case Is Sentenced to 22 Years," *New York Times*, July 28, 2005.

[14] *See, e.g.,* Pretrial Motions (November 1, 2007) and Post-Hearing Submission in Further Support of Pretrial Motions, *United States v. Zeinab Taleb-Jedi* (May 16, 2008) (E.D.N.Y., 06-CR-652).

[15] Zabel and Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, p. 88.

information. Upholding the Guantánamo detainees' right to challenge their detention in federal court, the Court stated in *Boumediene v. Bush*:

> We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible…These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance.[16]

In Pursuit of Justice also evaluates the way courts have applied the Federal Rules of Evidence to terrorism cases and concludes that judges have devised creative approaches for safeguarding defendants' rights to receive exculpatory evidence and other relevant discovery while protecting national security information. Moreover, *Miranda* warnings are not required in non-custodial interrogations or interrogations conducted purely for intelligence gathering purposes, and there are strong arguments against their application in battlefield situations.[17] Most importantly, *Miranda* requirements have not impeded successful criminal terrorism prosecutions.

Finally, *In Pursuit of Justice* finds that criminal prosecution often assists rather than inhibits intelligence gathering. The Sixth Amendment to the U.S. Constitution entitles any suspect who has been criminally charged to legal representation. But many suspects with lawyers end up cooperating with the government in exchange for leniency in sentencing. "The cooperation process has proven historically to be one of the government's most powerful tools in gathering intelligence," write Zabel and Benjamin. "Indeed, the government recognizes that cultivating cooperation pleas is an effective intelligence gathering tool for all types of criminal investigations, including significant terrorist cases."[18]

There are some additional challenges in cases involving suspects captured by the military on the battlefield, or by intelligence officers, rather than by law enforcement authorities. According to one former federal prosecutor, historically the Department of Defense and the CIA have been reluctant to permit their U.S. military personnel and intelligence officers, respectively, to testify in criminal proceedings. This reluctance can have adverse consequences for the admissibility of important evidence. It merits improved communication between the Department of Justice, the Department of Defense, and the CIA, and perhaps even the consideration of modified protections for military personnel or intelligence officers who testify in court. It does not, however, warrant the creation of an entirely separate system.

Detaining Terrorist Suspects

Existing laws already provide an adequate basis to detain and monitor terrorist suspects. As outlined in *In Pursuit of Justice,* there are four means of detention under existing law:

- Under the Bail Reform Act, the government may arrest and seek to detain suspected terrorists when it files criminal charges again them.[19] After arresting a defendant, the government must promptly bring the defendant

[16] *Boumediene v. Bush,* 128 S. Ct. 2229 (2008).

[17] *See e.g., New York v. Quarles*, 467 U.S. 649 (1984) (recognizing a "public safety" exception to the *Miranda* rule).

[18] Zabel and Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, p. 118. *See also,* Kelly Moore, *The Role of Federal Criminal Prosecutions in the War on Terrorism,* 11 Lewis & Clark L. Rev. 837, 847 (2007).

[19] 18 U.S.C. § 3142(e).

before a magistrate judge, who decides whether the defendant should be detained or released on bail. The government is entitled to a presumption that terrorism defendants should be detained.[20]

- Immigration law permits the government to arrest—and in many circumstances detain—aliens alleged to be unlawfully present in the United States, pending a decision whether they should be removed from the country.[21] This power to detain does not require the filing of criminal charges.

- When a grand jury investigation is underway, the government may apply to a federal judge for authority to arrest an individual who is deemed to be a "material witness" in the investigation.[22] The material witness procedure is subject to judicial oversight, carries a number of procedural protections, and may only be used for a limited period of time.[23]

- The law of war, also known as International Humanitarian Law (IHL), authorizes detention during international armed conflict for the duration of hostilities to prevent those who participate in hostilities or pose a serious security threat from rejoining the fight.[24] This authority to detain is limited to international armed conflicts, meaning conflicts between two states. It does not apply to non-international conflicts with non-state actors such as al Qaeda. IHL does not establish a detention scheme for non-international armed conflicts and instead presumes domestic law will apply.[25]

In Pursuit of Justice closely studies each of these tools and concludes they have provided the government with authority to detain "the overwhelming majority" of terrorist suspects it has arrested since 9/11. In fact:

> [g]iven the breadth of the federal criminal code, the energy and resourcefulness of law enforcement agents and federal prosecutors, and the fact that terrorists, by definition, are criminals who often violate many laws,

[20] *Id*.

[21] 8 U.S.C. § 1226(a). Where an alien has a prior aggravated felony conviction or is reasonably likely to have engaged in terrorist activity, detention is mandatory. *See* 8 U.S.C. §§ 1226(c)(1), 1226a(a)(3).

[22] 18 U.S.C. § 3144.

[23] Following the September 11th attacks, the government abused its detention authority under immigration law and the material witness statute. The government arrested more than 1,000 aliens within months of 9/11, holding many of them for months before eventually releasing or deporting them and admitting they had no connection to terrorist activity. *See Elmaghraby v. Ashcroft,* No. 04-cv-01809, 2005 WL 2375202, at *2 (E.D.N.Y. Sept. 27, 2005) (subsequently reversed on other grounds). Similarly, the government detained more than 70 people as "material witnesses," some for up to six months, many of whom were never called to testify before a grand jury or connected to terrorist activity in any way. *See, e.g.,* Anjana Malhotra, *Overlooking Innocence: Refashioning the Material Witness Law to Indefinitely Detain Muslims Without Charges*, American Civil Liberties Union and Human Rights Watch, December 10, 2004, pp. 1-2; *Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11*, American Civil Liberties Union and Human Rights Watch, June 2005.

[24] Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135.; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

[25] Gabor Rona, *An Appraisal of U.S. Practice Relating to 'Enemy Combatants,'* 10 Y.B. of Int'l Humanitarian L. 232, 240-231 (2007). *See also* Brief for Petitioner at p. 32, *Al-Marri v. Spagone,* Ali Saleh Kahlah Al-Marri, no. 08-368 (4th Cir. Jan. 21, 2009). In a recent court filing, *see supra* note 7, the Department of Justice withdrew its use of the term "enemy combatant" but maintained the right to detain suspects without charge under an interpretation of the AUMF "informed by principles of the laws of war." The government's brief incorrectly interpreted both the AUMF and IHL. The AUMF does not explicitly mention detention. Rather it authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). And IHL only authorizes the detention of a select category of individuals during *international* armed conflict. Otherwise, detention is governed by domestic law. In 2004, a plurality of the Supreme Court held in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) that, as a necessary incident to the AUMF, the President was authorized to detain fighters captured on a battlefield during armed conflict. In so doing, the *Hamdi* Court made specific reference to the laws of war as informing the scope of detention authority under the AUMF but never addressed the distinction between international and non-international armed conflict. Though the international phase of the war between Afghanistan and the United States had ended by the time the case was decided, Hamdi was captured several years before that, during the period of international armed conflict.

> we believe that it would be the rare case indeed where the government could not muster sufficient evidence to bring a criminal charge against a person it believes is culpable.[26]

Critics argue that this conclusion fails to take into account the full universe of terrorism cases. These critics presuppose that there have been a significant number of "dangerous" terrorist suspects whom prosecutors pursued but never charged because they lacked sufficient admissible evidence against the suspects or were reluctant to risk the disclosure of sensitive national security information in open court. But the public record contains little—if any—information about the names, number, or types of individuals who purportedly fall into this group. Without specific examples of cases where the current system has failed, it is impossible to know whether critics' speculations are true. Nonetheless, if this group of suspects does indeed exist, the government is not always powerless to pursue them. In at least some cases where the government cannot immediately charge or detain an individual, it may confront, disrupt, and/or monitor the individual until a criminal case is built.

Others argue that existing detention authority may be insufficient for specific Guantánamo prisoners because exceptional circumstances may prevent prosecution of these cases in the federal courts. Many Guantánamo prisoners were subjected to torture and other cruel and abusive interrogation methods, the fruits of which are inadmissible in federal courts under the Due Process Clause to the U.S. Constitution. Additionally, some federal anti-terrorism laws did not have extraterritorial application in September 2001. But these challenges do not necessarily preclude prosecutions. In some Guantánamo cases, the government may already possess and—with the assistance of experienced federal prosecutors and agents—could still gather untainted evidence, including witnesses who come forward voluntarily, as well as physical and documentary evidence. Several Guantánamo prisoners, including Khalid Sheikh Mohammed, have already been federally indicted based upon allegations of pre-9/11 criminal activity.[27] Some federal terrorism statutes had extraterritorial reach even prior to 9/11.[28] And some Guantánamo prisoners might be charged with generally applicable criminal offenses if terrorism statutes do not apply. In cases where federal court prosecutions are not feasible, the government may consider the possibility of court-martial proceedings under the Uniform Code of Military Justice. But the possibility that some Guantánamo prisoners may never be tried—due largely to the U.S. government's own misconduct—does not justify the creation of yet another substitute and inferior system for their continued detention without charge.

Judges and Prosecutors Weigh In

Many former judges and former federal prosecutors across the country support our view that the federal system adequately meets the special challenges presented by terrorism cases.[29] For example, in testimony before the Senate Judiciary Committee in June 2008, Judge John Coughenour, who presided over the trial of Ahmed Ressam, remarked:

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[26] Zabel and Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, p. 8.

[27] Khalid Sheikh Mohammed was indicted in the Southern District of New York in 1996 for an alleged plot to blow up U.S.-bound airliners. Ahmed Khalfan Ghailani was indicted in 1998 for his alleged role in helping to plan the bombing of the United States embassy in Tanzania. *United States v. Usama Bin Laden, et. al.*, 98 Cr. 1023 (LBS) (S.D.N.Y. 1998). And Abd al-Rahim Al-Nashiri was named as an unindicted co-conspirator in an indictment accusing two individuals of planning the USS Cole bombing. *United States v. Jamal Ahmed Mohammed Ali Al-Badawi, et. al.*, 98 Cr. 1023 (KTD) (S.D.N.Y. May 2003).

[28] *See, e.g.,* Use of weapons of mass destruction, 18 U.S.C. § 2332a; Acts of terrorism transcending national boundaries, 18 U.S.C. § 2332b; Murder or manslaughter of foreign officials, officials guests, or internationally protected persons, 18 U.S.C. § 1116; Destruction of aircraft or aircraft facilities, 18 U.S.C. § 32.

[29] In fact, more than fifteen such judges and prosecutors have signed a statement prepared by the Constitution Project in opposition to special terrorism courts. Liberty and Security Committee, *A Critique of "National Security Courts,"* The Constitution Project, December 18, 2008. *See also* Kelly Anne Moore, "Take Al Qaeda to Court," *New York Times,* August 21, 2007.

> It is my firm conviction, informed by 27 years on the federal bench, that the United States courts, as constituted, are not only an adequate venue for trying suspected terrorists, but also a tremendous asset against terrorism. Indeed, I believe it would be a grave error with lasting consequence for Congress, even with the best of intentions, to create a parallel system of terrorism courts unmoored from the constitutional values that have served us so well for so long.[30]

Judge Coughenour has further observed that special terrorism courts risk becoming politicized:

> If politically vulnerable actors start redesigning courts, it is conceivable that popular pressure would soon demand the admission of statements obtained by harsh interrogation techniques, or dictate that defense counsel cannot access information needed to mount a defense or cannot represent a defendant without undergoing a background check of undefined scope. Such practices are not without recent precedent at Guantánamo.[31]

Along those same lines, Judge Leonie Brinkema, presiding judge in the trial of Zacarias Moussaoui, has said:

> I think that we need seriously to think about the implications of getting away from the standard criminal justice model for these cases…I think the concept of checks and balances done as much as possible in the open is the way to go…You can address the terrorist threat with the tools that we have if the people who are running those tools do their job.[32]

Remedy by Revision

The criminal justice system is not perfect, nor is it a one-stop solution to the problem of international terrorism. Intelligence gathering, diplomacy, interrupting the flow of terrorism financing, and military force are all part of the equation. But experience shows that criminal prosecutions have an important role to play. Human Rights First urges Congress and the Obama Administration to explore ideas for bolstering the existing criminal justice system rather than creating a system of detention without charge or an entirely new terrorism court.

[30] Testimony of Honorable John C. Coughenour, Senate Committee on the Judiciary, *Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System*, 110th Cong., 2nd sess., June 4, 2008, p. 3.

[31] John C. Coughenour, "The Right Place to Try Terrorism Cases," *Washington Post,* July 27, 2008.

[32] Honorable Judge Leonie Brinkema, "Terrorists and Detainees: Do We Need a New National Security Court?" (lecture, American University Washington College of Law and the Brookings Institution, Washington, D.C., February 1, 2008).

SPECIAL TERRORISM COURTS

Combating Terrorism

One important lesson learned from the military commission system at Guantánamo is that creating special courts for terrorism cases can undermine counterterrorism strategy. At least some terrorists do not wish to be viewed as ordinary criminals, but as "warriors" engaged in a worldwide struggle against the United States. Labeling Guantánamo prisoners as "combatants" in a "war on terror" unwittingly ceded an important advantage to al Qaeda. Accused 9/11 planner Khalid Sheikh Mohammed reveled in this status at his Combatant Status Review Tribunal hearing at Guantánamo in March 2007: "For sure I'm [America's enemy]," he said. "[T]he language of any war in the world is killing…the language of the war is victims."[33] He and his co-defendants capitalized on their warrior status once again in December 2008, when they offered to plead guilty immediately—and before President Obama took office—preferring to martyr themselves in unjust military commission proceedings rather than risk prosecution in an ordinary criminal court.

Those whose job it is to take the fight to al Qaeda understand what a profound error it was to reinforce al Qaeda's vision of itself as a revolutionary force. The Army-Marine Corps Counterinsurgency Manual, drafted under the leadership of General Petraeus and incorporating lessons learned in a variety of counterinsurgency operations (including Iraq), stresses repeatedly that defeating non-traditional enemies like al Qaeda is primarily a *political* struggle, and one that must focus on isolating and delegitimizing the enemy rather than elevating it in stature and importance. As the Manual states: "It is easier to separate an insurgency from its resources and let it die than to kill every insurgent…Dynamic insurgencies can replace losses quickly. Skillful counterinsurgents must thus cut off the sources of that recuperative power."[34]

But U.S. counterterrorism policy has taken just the opposite approach. In a 2008 blueprint for closing Guantánamo, the Center for Strategic and International Studies reported that researchers at West Point's Combating Terrorism Center uncovered scores of references to Guantánamo by al Qaeda leaders between 2002 and January 2008.[35] Coercive interrogations, prolonged detention without trial and flawed military commissions have only nurtured the "recuperative power" of al Qaeda, increasing rather than decreasing the danger to the United States.

The policies of detention, interrogation and trial at Guantánamo have also negatively impacted the reputation of the United States and impaired our ability to lead the world in counterterrorism operations. Secretary of Defense Robert Gates has said, "[t]here is no question in my mind that Guantánamo and some of the abuses that have taken place in Iraq have negatively impacted the reputation of the United States."[36] Indeed, Guantánamo has become a symbol—in much the same way as the picture of the hooded Iraqi prisoner at Abu Ghraib—of expediency over fundamental fairness and of this country's willingness to set aside its core values and beliefs.

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[33] Verbatim transcript of Combatant Status Review Tribunal Hearing for ISN 10024 [Khalid Sheikh Muhammad], March 10, 2007, pp. 21-24.

[34] U.S. Department of Defense, Counterinsurgency Field Manual, FM 3-24/MCWP 3-33.5, 1-23 (December 2006).

[35] Sarah E. Mendelson, *Closing Guantánamo: From Bumper Sticker to Blueprint*, Center for Strategic and International Studies, September 2008, p. 5 (referring to the author's email correspondence with Natasha Cohen and Reid L. Sawyer, Combating Terrorism Center, West Point, N.Y. August 15, 2008).

[36] Thom Shanker, "Gates Counters Putin's Words on U.S. Power," New York Times, February 12, 2007. The erosion of human rights protections in the United States in the aftermath of September 11 also has had a profound effect on human rights standards around the world. In recent years, a growing number of countries have adopted sweeping counterterrorism measures into their domestic systems, at times significantly expanding on the substance of U.S. measures while explicitly invoking U.S. precedent.

None of this should come as a surprise. In the past, overbroad detention practices have only served to alienate and radicalize communities and undermine the work of law enforcement. In the 1970s, for example, Great Britain detained thousands of suspected members of the Irish Republican Army (IRA) without charge or trial. Ultimately, this policy alienated large segments of the Irish Catholic community and aided the IRA's recruitment efforts. The British government ended the program in 1975, and in 1998, the government discarded its power of internment altogether. In so doing, Junior Northern Ireland Minister Lord Dubs announced to the House of Lords: "The Government have [sic] long held the view that internment does not represent an effective counterterrorism measure…The power of internment has been shown to be counter-productive in terms of the tensions and divisions which it creates."[37]

As the Army's Counterinsurgency Manual states, in order to gain the popular support it needs to confront insurgency threats, the United States must send an unequivocal message that it is committed to upholding the law and basic principles of human rights: "A government's respect for preexisting and impersonal legal rules can provide the key to gaining it widespread and enduring societal support…Efforts to build a legitimate government through illegitimate action are self-defeating, even against insurgents who conceal themselves amid non-combatants and flout the law."[38]

Creating another substitute system for trying and detaining terrorist suspects, this time on United States soil, would be a costly step in the wrong direction. In all respects, a special terrorism court would be seen as a mere change of venue for the discredited Guantánamo military commissions. The failure of such courts to comport with international human rights treaty obligations for criminal prosecution would further erode American credibility in, and beyond, the realm of counterterrorism.

Contrast this possibility with the option of terrorism trials in the federal courts. When Federal District Judge William Young sentenced Richard Reid, the so-called "shoe bomber," this is what he said:

> We are not afraid of any of your terrorist co-conspirators, Mr. Reid. We are Americans. We have been through the fire before. There is all too much war talk here. And I say that to everyone with the utmost respect.
>
> Here in this court we deal with individuals as individuals, and care for individuals as individuals, as human beings we reach out for justice.
>
> You are not an enemy combatant. You are a terrorist. You are not a soldier in any war. You are a terrorist. To give you that reference, to call you a soldier gives you far too much stature. Whether it is the officers of government who do it to you or your attorney who does it, or that happens to be your view, you are a terrorist.
>
> ***
>
> So war talk is way out of line in this court. You're a big fellow. But you're not that big. You're no warrior. I know warriors. You are a terrorist. A species of criminal guilty of multiple attempted murders.
>
> ***
>
> You're no big deal.[39]

Mr. Reid is now serving a life sentence at the supermax prison in Florence, Colorado. Since his sentencing hearing in 2003, he has faded from the public view.

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[37] Tom Parker, *Fighting an Antaean Enemy: How Democratic States Unintentionally Sustain the Terrorist Movements They Oppose*, 19 Terrorism and Political Violence 155, 160 (2007).

[38] U.S. Department of Defense, Counterinsurgency Field Manual, FM 3-24/MCWP 3-33.5, 1-19 (December 2006).

[39] "Reid: 'I am at war with your country,'" *CNN.com*, January 31, 2003.

The Problems with Creating a New System from Scratch

A practical yet equally serious problem with a special terrorism court is that it would require devising from scratch the procedures, precedents and body of law governing prosecutions. The United States has already walked down that path *twice* since September 11, both times without any success.

The original military commissions, created by the Bush Administration in November 2001, were struck down by the Supreme Court in *Hamdan v. Rumsfeld* in June 2006. The *Hamdan* Court held that President Bush did not have unilateral authority to set up the military commissions and found the commissions illegal under the Uniform Code of Military Justice and the Geneva Conventions.[40]

A second generation of military commissions received congressional approval with the passage of the Military Commissions Act (MCA) in December 2006.[41] But this system was also plagued by disarray, with abundant litigation over the legality of trying individuals for offenses that do not actually constitute war crimes, the potential *ex post facto* problems with prosecuting conduct not considered criminal until the passage of the MCA, and the scope and meaning of the rules and procedures applicable during military commission trials. These rules included permitting the introduction of coerced evidence, expressly permitting the admission of second-hand or hearsay evidence, and rules for classified information that allowed the government to withhold evidence tending to show innocence or lack of responsibility.

The MCA itself was just one component of the problem. Military commissions proved vulnerable at every turn to unlawful command influence, manipulation, and political pressure. Air Force Brig. Gen. Hartmann, formerly the Pentagon's chief advisor to the military commissions, was disqualified from his role in three Guantánamo cases because of the perception that he was biased toward the prosecution.[42] He eventually stepped down from his post.

The military commissions also were an expensive use of scarce government resources. As of November 2007, the estimated annual cost of operating Guantánamo was 90 to 100 million dollars, an unspecified percentage of which was spent on staffing and resourcing the military commissions. The high-security detention facilities at Guantánamo cost 54 million dollars.[43] And the high-security court complex alone—built specifically for the 9/11 defendants who were charged but never tried—cost 12 million dollars. Not one trial was held in the high-security courtroom. The two trials that did occur both took place in a second, less expensive courtroom nearby.

None of this bodes well for the creation of another new system. Human Rights First urges Congress and the Obama Administration to weigh the inevitable costs of a new system against the benefits of trying cases in the federal courts. Terrorism prosecutions would be challenging in any court, but the federal courts have a proven record of success. We should not underestimate the value of adhering to a system with experienced judges, established rules and procedures, and a broadly experienced bar to litigate the complex issues arising in terrorism cases.

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[40] *Hamdan v. Rumsfeld*, 548 U.S. 557, 621-633 (2006).

[41] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

[42] D-026 Ruling on Motion to Dismiss (Unlawful Influence), *United States v. Hamdan*, No. 0149 by Military Commission (May 9, 2008); D-004 Ruling on Motion to Dismiss-Unlawful Influence, *United States v. Jawad*, No. 0900 by Military Commissions (August 14, 2008); D075 Ruling: Defense Motion to Dismiss (due to Unlawful Influence by Senior DOD Officials), *United States v. Khadr*, No. 0766 by Military Commission (September 3, 2008).

[43] David Bowker and David Kaye, "Guantánamo by the Numbers," *New York Times,* November 10, 2007.

The Integrity of American Justice

Finally, it is essential to consider the effects of a special terrorism court on the justice system as a whole. Terrorism court proponents believe a system with fewer procedural safeguards and relaxed evidentiary standards would enable more prosecutions and convictions. But applying fewer due process protections necessarily increases the risk of convicting the innocent. Ultimately, designing a system to guarantee results would undermine the integrity of American justice. As Judge John Coughenour has said in response to complaints about the federal court system:

> Such objections often begin with a false premise: that the threat of terrorism is too great to risk an 'unsuccessful' prosecution by adhering to procedural and evidentiary rules that could constrain prosecutors' abilities. This assumes that convictions are the yardstick by which success is measured. Courts guarantee an independent process, not an outcome. Any tribunal purporting to do otherwise is not a court."[44]

[44] Coughenour, "The Right Place to Try Terrorism Cases".

DETENTION WITHOUT CRIMINAL CHARGE

The Liberty Problem

Those who advocate a system of detention without charge for terrorist suspects contend that the American legal system already tolerates indefinite detention in a variety of other circumstances.[45] This argument is dangerously misleading. In fact, a system of preventive detention for "dangerous" suspects would be entirely inconsistent with core American concepts of liberty and due process.

Freedom from bodily restraint is an essential component of the Due Process Clause to the United States Constitution. It is this principle—more than any other—upon which the American system of justice is based. The Supreme Court has never allowed preventive detention based solely upon a perceived risk of future dangerousness, nor has it permitted the use of preventive detention to bypass the criminal justice system altogether.[46]

In *United States v. Salerno,* the Supreme Court upheld the government's right to engage in pretrial detention on a risk of future dangerousness, but only where probable cause of a suspect's criminal conduct has already been established. The Court found that the government's interest in preventing future crimes by those suspects who have already been charged is "both legitimate and compelling."[47] But the Court went on to state that, "[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[48]

Civil commitment of the mentally ill is permitted, but only where the State is able to prove both mental illness and a risk of dangerousness. The Supreme Court has stated that the government has a legitimate interest in confining those who are ill and therefore dangerous beyond their control. But a dangerous person who recovers his sanity must be released. In *Foucha v. Louisiana*, for example, a plurality of the Supreme Court prohibited detention on a threat of future dangerousness where a suspect had been found not guilty by reason of insanity and was no longer mentally ill. If this sort of detention were permitted, said the Court, "[t]he same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law."[49]

Finally, some state laws permit the civil commitment of charged or convicted sex offenders, but the Supreme Court has held that such detention is permitted only where the risk of dangerousness accompanies "mental abnormality." In *Kansas v. Hendricks*, a case involving a diagnosed pedophile, the Court explained that a "finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite voluntary commitment." To the contrary, "[t]he precommitment requirement of 'mental abnormality' or 'personality disorder' is

[45] *See*, *e.g.,* Wittes, *Law and the Long War: The Future of Justice in the Age of Terror*.

[46] *See Hamdi v. Rumsfeld,* 542 U.S. 507, 556 (2004) (Scalia, dissenting: "It is unthinkable that the executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing.").

[47] 481 U.S. at 739, 749 (1987).

[48] *Id.* at 755.

[49] 504 U.S. at 71, 82-83 (1992).

consistent with requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness."[50]

Those who support detention without charge fail to acknowledge the fundamental constitutional principles at play in these cases. As opposed to the mentally ill, terrorist suspects are not dangerous beyond their control. To the contrary, they are dangerous *because* they have made the conscious choice to engage in dangerous criminal activities. Individuals who commit criminal offenses can and should be prosecuted.

The Accuracy Problem

It has become increasingly clear that many prisoners were sent to Guantánamo, rather than being indicted and tried in federal courts, because sending them to Guantánamo relieved the government of the burden of doing the hard work of investigation and prosecution. A new system of detention without charge would continue to relieve the government of this burden; in fact, it would undercut the government's incentive to use the criminal justice system at all. This would be a costly mistake and one that would increase the risk of detaining the innocent.

Preventive detention proponents argue that individual terrorists and small terrorist networks pose a greater risk to America's national security than ever before.[51] At the same time, however, most fail to provide a clear or specific definition of the class of "dangerous" suspects who present such a risk and should be detained. They simply rely on the supposition that this class can be defined and identified. This assumption is flawed. Without proven mechanisms for predicting future dangerousness, decision makers would likely resort to racial profiling and stereotypes. Errors would be made, and innocent people would be detained. The risk of error would be especially great if the introduction of secret, classified evidence were allowed.

Additionally, such a system inevitably would be exploited to pursue people with few, if any, connections to terrorism. The Combatant Status Review Tribunals (CSRT), created to review "enemy combatant" determinations at Guantánamo, provide fair warning of this possibility. From 2004 to 2007, more than 570 CSRT hearings were conducted with all but 38 detainees designated as enemy combatants.[52] The detainees had no meaningful opportunity to contest their designations, no legal representation at their hearings, and no access to classified evidence.[53] Eventually, more than half of these detainees were released by the Bush Administration, and dozens of others were cleared for release, indicating a lack of credible evidence regarding dangerousness after all.

Some preventive detention proponents envision additional procedural protections in a newly created system, including the right to an attorney and the right to judicial review.[54] But such protections fall far short of the

[50] 521 U.S. 346, 358 (1997). Similarly, the temporary detention of a removable alien who presents a risk to the community is permissible while removal proceedings are underway. But, in most cases, the statutory authority to detain based on a perceived risk of future dangerousness ends shortly after a formal order of removal has been entered. Once removal is authorized, the government generally has ninety days to effectuate it, although this period may be extended in some cases. *See* 8 U.S.C. §§ 1231(a)(1), 1231(a)-(6). The Supreme Court has never authorized the indefinite detention of aliens and in fact rejected the opportunity to do so in *Zadvydas v. Davis*, when it limited detention, following the 90 day post-removal-period, to a time "reasonably necessary to bring about that alien's removal from the United States." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

[51] See e.g., Goldsmith, "Long-Term Terrorist Detention and Our National Security Court," p. 5.

[52] U.S. Department of Defense, *Combatant Status Review Tribunal Summary*, November 2007.

[53] *In re* Guantanamo Detainee Cases, 355 F.Supp.2d 443, 468-69 (D.C. Cir. 2005) (finding that CSRT decisions substantially relied upon classified evidence and that no detainee was ever permitted access to classified information).

[54] For an explanation of possible procedural protections, *see, e.g.*, Matthew C. Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?*, 3.1 Journal of National Security Law & Policy (2009).

safeguards provided by the criminal justice system, where guilty findings require a sufficient degree of certainty through the establishment of proof beyond a reasonable doubt. In fact, there are significant distinctions between the sort of preliminary intelligence gathering upon which some Guantánamo detentions were based, and the construction of a solid criminal case. As explained by former federal prosecutor Kelly Moore:

> [w]orking towards obtaining sufficient evidence to establish the elements of a criminal offense forces agents to fully digest and understand the information that they gather. It is more difficult to draw faulty inferences from new information when a prosecutor is cross-examining you about every detail, demanding a correctly translated transcript, and then insisting on further corroboration. When investigators aimlessly 'gather intelligence,' no one is focusing on what the information is or what it means."[55]

[55] *See also,* Kelly Moore, *The Role of Federal Criminal Prosecutions in the War on Terrorism,* 11 Lewis & Clark L. Rev. 837, 848 (2007).

CONCLUSION

One of the foremost challenges of the Obama Administration will be to devise a system for combating terrorism that protects our national security and upholds American values. Criminal prosecution is not the *only* answer to international terrorism. But it is undeniably part of the equation. As President Obama considers a broader counter-terrorism strategy, he should not underestimate the variety of powerful tools already at his disposal. Nor should he overlook the risk of jettisoning essential Constitutional protections and departing from time-tested institutions and practices. The federal courts are fully capable of handling the complex challenges posed by international terrorism cases. There is no need for detention of terrorist suspects without criminal charge or a special terrorism court. In fact, establishing such a system would undermine the fundamental character and integrity of American justice, serve as an easy recruiting tool for the enemy, and severely impair America's ability to restore its reputation as a nation committed to the rule of law and human rights.

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