

William & Mary Bill of Rights Journal

Volume 15 (2006-2007)
Issue 3

Article 3

February 2007

Terrorism and the New Criminal Process

John T. Parry

Follow this and additional works at: <https://scholarship.law.wm.edu/wmborj>



Part of the [Criminal Procedure Commons](#)

Repository Citation

John T. Parry, *Terrorism and the New Criminal Process*, 15 Wm. & Mary Bill Rts. J. 765 (2007),
<https://scholarship.law.wm.edu/wmborj/vol15/iss3/3>

Copyright c 2007 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmborj>

TERRORISM AND THE NEW CRIMINAL PROCESS

John T. Parry*

Can we afford the luxury of pretending that the threats today are simply law enforcement problems, . . . rather than threats of a fundamentally different nature, requiring fundamentally different approaches?¹

The paradigm for combating terrorism now involves the application of all elements of our national power and influence. Not only do we employ military power, we use diplomatic, financial, intelligence, and law enforcement activities to protect the Homeland and extend our defenses, disrupt terrorist operations, and deprive our enemies of what they need to operate and survive. We have broken old orthodoxies that once confined our counter-terrorism efforts primarily to the criminal justice domain.²

A war to create and maintain social order can have no end. It must involve the continuous, uninterrupted exercise of power and violence. In other words, one cannot win such a war, or, rather, it has to be won again every day. War has thus become virtually indistinguishable from police activity.³

* Associate Professor, Lewis & Clark Law School. This Article began as a paper for the Working Group on Liberty and Security in an Age of Proliferation and Terror, at the Ridgway Center for International Security Studies, University of Pittsburgh Graduate School of Public and International Affairs. I am grateful for comments from members of that group, particularly Bill Keller and Lisa Nelson. My arguments have also greatly benefitted from the Law of Torture discussion list organized by Marty Lederman and Kim Scheppele, and from exchanges with Elena Baylis, Robert Chesney, Oren Gross, Andrea Hibbard, John Kroger, Sanford Levinson, Erik Luna, Geoff Manne, Ruth Miller, and Steve Vladeck.

¹ Donald H. Rumsfeld, U.S. Sec'y of Def., Address at the 88th Annual American Legion National Convention (Aug. 29, 2006), <http://www.defenselink.mil/Speeches/Speech.aspx?SpeechID=1033>.

² THE WHITE HOUSE, NATIONAL STRATEGY FOR COMBATING TERRORISM 1 (2006), available at http://www.whitehouse.gov/news/releases/2003/02/counter_terrorism/counter_terrorism_strategy.pdf.

³ MICHAEL HARDT & ANTONIO NEGRI, MULTITUDE: WAR AND DEMOCRACY IN THE AGE OF EMPIRE 14 (2004) [hereinafter HARDT & NEGRI, MULTITUDE].

INTRODUCTION	766
I. STRUCTURING A STATE OF EMERGENCY	770
A. <i>The Executive Branch</i>	770
B. <i>Congress</i>	778
C. <i>The Supreme Court</i>	782
1. <i>Hamdi, Padilla, and Detained Citizens</i>	783
2. <i>Rasul and the Detention of Aliens</i>	786
3. <i>Hamdan and Military Commissions</i>	788
II. CRIMINAL PROCESSES, OLD AND NEW	791
A. <i>Comparing Traditional and New Criminal Processes</i>	791
B. <i>Choosing a Process</i>	796
III. THE CONSTITUTION AND THE NEW CRIMINAL PROCESS	797
A. <i>Rights in the Modern State</i>	797
1. <i>Discretionary Power</i>	799
2. <i>Discretionary Rights</i>	800
3. <i>Reasonable Rights-Bearers</i>	805
4. <i>Extraterritoriality</i>	807
B. <i>The Scope of Specific Criminal Procedure Rights</i>	810
1. <i>Search and Seizure</i>	810
2. <i>Interrogation</i>	813
C. <i>Rights, Remedies, and the New Criminal Process</i>	818
D. <i>The Scope of Executive and Legislative Authority to Shape the New Criminal Process</i>	822
IV. THE NEW CRIMINAL PROCESS, EMERGENCY POWER, AND THE STATE OF EXCEPTION	829
CONCLUSION	834

INTRODUCTION

This Article argues that the “war on terror” has accelerated the development of a new criminal process and that this new process has increasingly displaced traditional methods of investigating, prosecuting, and punishing people who have engaged in conduct that is subject to criminal penalties—whether or not that conduct is considered “terrorism.”⁴ I also contend that this new process is largely consistent with constitutional norms that are changing under the same pressures that drive the development

⁴ For a recent definition of “terrorism,” see Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2629–30 (2006) (codified as amended at 10 U.S.C. § 950v(b)(24) (2006)). On the problem of defining “terrorism,” see HELEN DUFFY, *THE “WAR ON TERROR” AND THE FRAMEWORK OF INTERNATIONAL LAW* 17–46 (2005). The definitional problem reflects the more serious theoretical problem that terrorism tends to be conceived of as violence against hegemonic modern states or their allies that themselves employ violence and other forms of power on a global scale. I seek to sidestep these issues here by taking seriously and assessing on their terms the claims that U.S. officials are making about terrorism.

of the new criminal process. Those pressures, in turn, derive not just from specific events but also from the perception of emergency and rapid change that characterizes modern society and political life.

In terms of definition, the new criminal process remains a moving target for at least three reasons: first, it is still a work in progress; second, it extends beyond the boundaries of what we normally think of as criminal process or the criminal justice system; and third—perhaps paradoxically—it overlaps so much with what we have already come to accept as normal or traditional criminal processes. Throughout this Article, I will treat the indefinite detention and trial by military commission of suspected terrorists as emblematic (but not exhaustive) of the new criminal process. Not only have these efforts been central to the Bush administration's anti-terror efforts, but they have also resulted in Supreme Court opinions—most recently the decision in *Hamdan v. Rumsfeld*⁵—that bear on and to some degree constrain the development of the new criminal process. Despite their importance, however, these cases risk diverting attention from the ways in which the new criminal process has already expanded executive power, licensed state violence, and transformed the citizen-state relationship.

The third epigraph to this Article comments on these developments. It suggests not only that war has changed in its functions, to become more like policing, but also that policing too has changed, to become more like war. To accompany this blurring of functions, legal structures for controlling violent state actions seem less likely to make distinctions between the two—or at least they have made it easier for state actors to move from crime to war and back again in their efforts to maintain social order. As these activities have converged, the question of what is a police action and what is a military action has become more difficult to answer.

My use of this epigraph has an additional purpose. My analysis throughout this Article is indebted to Michael Hardt and Antonio Negri's influential books, *Empire* and *Multitude*.⁶ I also draw on the pathbreaking work of Giorgio Agamben, whose *Homo Sacer* and *State of Exception* pose important challenges for liberal theory.⁷ Despite the importance of the work of these authors, few U.S. legal scholars have made serious efforts to engage with them. One reason may be that they must be handled with care. *Empire* and *Multitude* are full of sweeping assertions, alternately brilliant and infuriating.⁸ Agamben's analysis is often dense, and his call for "deactivat[ing]"

⁵ 126 S. Ct. 2749 (2006).

⁶ MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* (2000) [hereinafter HARDT & NEGRI, *EMPIRE*]; HARDT & NEGRI, *MULTITUDE*, *supra* note 3.

⁷ GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (Daniel Heller-Roazen trans., 1998) [hereinafter AGAMBEN, *HOMO SACER*]; GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., 2005) [hereinafter AGAMBEN, *STATE OF EXCEPTION*].

⁸ *Accord* David Singh Grewal, *Empire's Law*, 14 *YALE J.L. & HUMAN.* 211, 213 (2002) (book review) (describing the argument of *Empire* as "complex and nuanced, but sometimes difficult to follow and maddeningly impenetrable"). For a useful collection of critical essays, see *EMPIRE'S NEW CLOTHES: READING HARDT AND NEGRI* (Paul A. Passavant & Jodi Dean eds., 2004) [hereinafter *EMPIRE'S NEW CLOTHES*].

law so that “[o]ne day humanity will play with law just as children play with disused objects,”⁹ does not gibe with his diagnosis of modernity,¹⁰ let alone with legal sensibilities. Nonetheless, these theorists say much that is useful about the nature and functions of law in modern states, and one of the goals of this Article is to integrate their work with more familiar forms of legal analysis.¹¹

The convergence of police and military activities that Hardt and Negri describe maps to the choice between traditional and new criminal processes, and the acceleration of this convergence results from the perception of emergency created by the 9/11 attacks.¹² Consider the assertion that “everything changed” after 9/11. When legal or political figures make this claim, their goal is more than rhetorical. They seek to convince us that we live in an exceptional moment, and they call us to a state of exception as a matter of law and politics. That is the basic point of the first two epigraphs from the then-Secretary of Defense and the White House. The aspects of the new criminal process that relate to the war on terror provide a legal structure for implementing the idea that everything has changed. They codify a state of emergency, but the perception of emergency should not be equated with panic. Many of these new processes were carefully planned. And, although executive power has expanded, Congress has shown increasing willingness to second guess executive power claims and substitute its own judgment. The new criminal process is thus a deliberate, sturdy, and evolving construct for what are arguably exceptional times.

Many observers, of course, reject the foundational claims of the new criminal process as a response to terrorism. They deny the assertion that we are at war, and they

⁹ AGAMBEN, STATE OF EXCEPTION, *supra* note 7, at 64, 88.

¹⁰ This point is also made by many of the essays in POLITICS, METAPHYSICS, AND DEATH: ESSAYS ON GIORGIO AGAMBEN'S *HOMO SACER* (Andrew Norris ed., 2005) [hereinafter POLITICS, METAPHYSICS, AND DEATH], and by Nasser Hussain and Melissa Ptacek in their review, *Thresholds: Sovereignty and the Sacred*, 34 LAW & SOC'Y REV. 495 (2000).

¹¹ Although Hardt and Negri draw on Agamben, their analyses do not thoroughly complement each other. Agamben focuses his attention on the sovereign power of the state, whereas Hardt and Negri suggest a world in which state-centered notions of sovereignty have begun to fragment and in which power circulates through global networks. My use of Hardt and Negri in an article about the ways in which U.S. criminal procedure reflects modern state power thus presents an incomplete picture of their project. Further, my emphasis on modern state power distorts Agamben's analysis to some extent, because his project stresses “a revelation or a coming to light of what was present in the West's conception of politics from the start.” Hussain & Ptacek, *supra* note 10, at 498.

¹² See PHILIP B. HEYMAN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR 20–22 (2003); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1032–37 (2004); see also THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY (Mark Tushnet ed., 2005) [hereinafter CONSTITUTION IN WARTIME]; Samuel Issacharoff & Richard H. Pildes, Essay, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, in *id.* at 161 (suggesting the development of new criminal processes is a common and not surprising response to insurgency and terrorism).

contend that the traditional criminal process can handle terrorism. Terrorism may have moved to the center of the national agenda and significant changes may have been made in our strategies for fighting it, but one might agree with Bruce Ackerman that while terrorist campaigns are destabilizing and deadly, they do not threaten the existence of the United States or the functioning of our constitutional system.¹³ Much remains the same, and daily life for the majority of Americans goes on as before. If this response is correct, then the acceleration of the new criminal process is at best an overreaction based on a misperception.

I make no effort in this Article to resolve the debate over what has changed since 9/11. Nor, for that matter, do I seek to define or assert a proper balance between liberty and security in response to terror. My goal is to analyze the new criminal process on its own terms and in relation to traditional processes and also to suggest that “traditional” processes already reflect the new process. My focus will be descriptive, interpretive, and to some extent predictive; I advance no calls for “reform.” To that end, my schematic account of the debate over post-9/11 change seeks primarily to isolate diverging lines of thought that support, respectively, the traditional and new criminal processes. Both are defensible; neither can be entirely proven or falsified absent some kind of value judgment or normative baseline that no law professor has any special ability to provide.

Having made these assertions, I will admit that I think the federal government has shifted too far in favor of military and other solutions to terrorism at the expense of traditional responses. Terrorism may be more than aggravated crime, but traditional processes should remain the presumption because they are more familiar, fairer, better supported by developed legal doctrine, and more in accord with separation of powers values. I also see traditional criminal processes—even to the extent they already reflect the new criminal process—as part of a more restrained model for responding to the risk of terrorism we are likely to experience for the foreseeable future. Still, my views rest upon a chain of reasoning and a baseline that the new criminal process contests, and that deeper contest and its implications—rather than simple normative claims—are the focus of this Article.

Part I of this Article describes executive and congressional actions in the war on terror to illustrate the ways in which anti-terror efforts have changed since 9/11. The last section of Part I considers the Supreme Court’s response to some of these actions—a response that seeks with varying success to accommodate emergency claims with rule of law and due process values. Part II makes a short detour by presenting a more policy-oriented assessment of the strengths and weaknesses of the new criminal process

¹³ See Ackerman, *supra* note 12, at 1040. From the international law perspective, the war-crime distinction is significant but not determinative for the scope of human rights protections. As Helen Duffy points out, “recourse to the legal standards applicable in ‘war’ has been selective post 9/11, invoked to justify what would be impermissible under [international human rights law], yet without acknowledging that corresponding rights under [international humanitarian law] take effect.” DUFFY, *supra* note 4, at 340.

as compared to traditional processes. It also suggests that the ability to choose between the two is becoming increasingly difficult. Part III explains why this is through an examination of “everyday” constitutional criminal-procedure doctrine, which reveals that doctrinal change has already brought us well down the road of the new criminal process. Part IV concludes by discussing the relationship between the new criminal process and the idea of emergency power and suggesting that the new criminal process is simply part of a larger shift in state power and the practice of governing.

I. STRUCTURING A STATE OF EMERGENCY

A. *The Executive Branch*

Two months after the 9/11 attacks, on November 13, 2001, President Bush issued an executive order that authorized the detention and military trial of non-citizens “at an appropriate location designated by the Secretary of Defense outside or within the United States” if “there is reason to believe that such individual” (1) was a member of al Qaeda, (2) had “engaged in [or] aided . . . acts of international terrorism” intended to cause “injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy,” or (3) had harbored someone described in the first two categories.¹⁴

Under the authority of the November 13 order, the government began to use the Guantanamo Bay naval base, as well as other locations inside and outside the U.S., to confine people detained during law enforcement, military, and intelligence operations in the United States, Afghanistan, Iraq, and other places.¹⁵ At least in the first year or so after 9/11, one’s ultimate destination did not depend on whether military or law enforcement officials made the initial stop. Individuals picked up during law enforcement operations might find themselves in military custody, as was the case with Ali Saleh al-Marri¹⁶ and, initially, Jose Padilla,¹⁷ while individuals captured by the military might find themselves facing civilian criminal process, as was the case with John Walker Lindh.¹⁸ Still others were placed in the custody of the CIA.¹⁹

¹⁴ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. § 918 (2002).

¹⁵ See John Sifton, *United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutorial Gaps*, 43 HARV. J. ON LEGIS. 487, 488–89 (2006).

¹⁶ See *Al-Marri v. Hanft*, 378 F. Supp. 2d 673 (D.S.C. 2005).

¹⁷ See *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). Padilla was subsequently indicted and transferred to civilian custody. See *United States v. Hassoun*, No.04-60001-CR-COOKE (S.D. Fla. Nov. 17, 2005) (superseding indictment), available at <http://www.flsd.uscourts.gov/default.asp?File=cases/index.html#>; see also *Hanft v. Padilla*, 126 S. Ct. 978 (2006).

¹⁸ See *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002). For discussion of all three cases, see Tung Yin, *Coercion and Terrorism Prosecutions in the Shadow of Military Detention*, 2006 BYU L. REV. 1255.

¹⁹ See OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, SUMMARY OF THE HIGH VALUE

Lawyers at the White House, the Justice Department, the State Department, and the Defense Department drafted and debated a series of legal memoranda on the application to these “detainees”²⁰ of the Geneva Conventions, other sources of international law, and domestic constitutional and statutory law. Ultimately, the President concluded that the Geneva Conventions apply to the Taliban, but that members of the Taliban are unlawful combatants who “do not qualify as prisoners of war,” and that the Conventions do not apply to members of al Qaeda.²¹ He also directed that all persons detained by U.S. armed forces be treated “humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.”²²

The administration resisted efforts to review its decisions to hold people in military detention. In response, however, to the Supreme Court’s *Hamdi v. Rumsfeld*²³ and *Rasul v. Bush*²⁴ decisions the Department of Defense created Combatant Status Review Tribunals for people held at Guantanamo.²⁵ The tribunals found that a handful of prisoners—38 out of 558—should no longer be classified as enemy combatants, although not all of them have been released.²⁶ The Defense Department also created an Administrative Review Board that provides an annual review to determine whether each detainee “should be released, transferred or continue to be detained.”²⁷ As of February 9, 2006, this process resulted in decisions to release 14 people, transfer 120, and continue to detain 329.²⁸

TERRORIST DETAINEE PROGRAM (2006), available at <http://www.defenselink.mil/pdf/thehighvaluedetaineeprogram2.pdf>; George W. Bush, U.S. President, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html> [hereinafter President Discusses Military Commissions].

²⁰ On the significance of using the term “detainee,” with its suggestion of suspended or absent rights, rather than the word “prisoner,” to describe the people held in places like Guantanamo Bay, see JUDITH BUTLER, *PRECARIOUS LIFE: THE POWERS OF MOURNING AND VIOLENCE* 64 (2004).

²¹ Memorandum from George W. Bush, U.S. President, to the Vice President et. al. (Feb. 7, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 134 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter *THE TORTURE PAPERS*].

²² *Id.*

²³ 542 U.S. 507 (2004).

²⁴ 542 U.S. 466 (2004).

²⁵ Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., to the Sec’y of the Navy (July 7, 2004), <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

²⁶ Department of Defense, *Combatant Status Review Tribunal Summary*, <http://www.defenselink.mil/news/Mar2005/d20050329csrt.pdf> [hereinafter *CSRT Summary*].

²⁷ Memorandum from Gordon England, Deputy Sec’y of Def., to the Sec’y of State et al. (Sept. 14, 2004), <http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf>.

²⁸ News Release, Dep’t of Def., Guantanamo Bay Detainee Administrative Review Board Decisions Completed (Feb. 9, 2006), <http://www.defenselink.mil/releases/2006/nr20060209-12464.html>.

The administration also resisted efforts to obtain review of CSRT decisions, and district courts split on their ability to hear claims about the CSRTs.²⁹ Congress ultimately stepped in to allow a limited form of review. The Detainee Treatment Act (DTA) bars habeas review of CSRT decisions for prisoners at Guantanamo and substitutes review by the D.C. Circuit on two issues only: whether the decision of the CSRT was consistent with standards and procedures developed by the Secretary of Defense, and whether those standards and procedures are themselves consistent with federal law.³⁰ Under the Military Commissions Act (MCA), the DTA's denial of habeas and provision of limited D.C. Circuit review now applies to any alien detained by the United States as an enemy combatant.³¹

With respect to the interrogation of people detained in military and CIA custody, administration officials concluded that international and domestic law places few constraints on the aggressive interrogation of suspected terrorists. Federal statutes and international law prohibit torture,³² and international law also prohibits cruel, inhuman, or degrading treatment or punishment.³³ In addition, the Constitution puts limits on the government's ability to use violence, as with the Supreme Court's interpretation of the due process clauses to prevent state action that "shocks the conscience."³⁴ But in August 2002, the Justice Department's Office of Legal Counsel (OLC) concluded that these prohibitions permit interrogation that is not specifically intended to cause severe pain and that "severe pain" for purposes of the ban on torture means only pain

²⁹ See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005) (holding CSRTs fail to provide due process); *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005) (finding no substantive legal basis to review complaint about detention). The D.C. Circuit recently upheld the application of the Military Commissions Act to all of these detainees. See *Boumediene v. Bush*, No. 05-5062, 2007 U.S. App. LEXIS 3682 (D.C. Cir. Feb. 20, 2007).

³⁰ Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, § 1005(e)(2), 119 Stat. 2680, 2742 (2006).

³¹ MCA, Pub. L. No. 109-366, §§ 7(a), 10, 120 Stat. 2600, 2635-36 (2006); see *Boumediene*, 2007 U.S. App. LEXIS 3682.

³² See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]; International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, S. TREATY DOC. NO. 95-2, 999 U.N.T.S. 171 [hereinafter ICCPR]. Federal statutes criminalize a variety of conduct that may rise to the level of torture. See 18 U.S.C. §§ 113 (assault), 114 (maiming with intent to torture), 241 (conspiracy against civil rights), 242 (deprivation of civil rights), 956 (conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country), 1111 (murder), 1112 (manslaughter), 1117 (conspiracy to murder), 1201 (kidnapping), 1203 (hostage taking), 2241 (aggravated sexual abuse), 2242 (sexual abuse), 2244 (abusive sexual contact), 2245 (sexual abuse resulting in death), 2340A (torture committed overseas), 2441 (war crimes).

³³ ICCPR, *supra* note 32, art. 7. Whether article 16 of the Convention Against Torture prohibits cruel, inhuman or degrading treatment is less clear. See John T. Parry, "Just for Fun": *Understanding Torture and Understanding Abu Ghraib*, 1 J. NAT'L SEC. L. & POL'Y 253, 266 (2005).

³⁴ See *Rochin v. California*, 342 U.S. 165, 172 (1952).

of a level “that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of bodily functions.”³⁵ Both the merits of this opinion and the professionalism of the attorneys who drafted it have been strongly challenged.³⁶ On December 30, 2004, OLC issued a new memorandum that repudiated the definition in the earlier memorandum and instead concludes that interrogators cannot engage in conduct that is “extreme and outrageous.”³⁷

For its part, the Defense Department convened a “working group on detainee interrogations.” The working group reviewed the law of interrogation and proposed a list of thirty-five acceptable interrogation techniques that could be used on people held “outside” the U.S.³⁸ Secretary of Defense Donald Rumsfeld ultimately authorized twenty-four of those techniques (generally the least severe) for use at Guantanamo Bay, with the proviso that four of them could only be used in cases of “military necessity” but that he might approve additional techniques on written request in individual cases.³⁹ The techniques used at Guantanamo migrated to Afghanistan and Iraq and mingled with aggressive methods adopted by troops on the ground as commanders shared information and interrogators moved from one location to another.⁴⁰ More generally, the sense that the government was “taking the gloves off” with respect to the treatment of suspected terrorists sent a strong signal that tough tactics were appropriate—in the words of one interrogator, that “[i]f you don’t violate someone’s human rights some of the time, you probably aren’t doing your job.”⁴¹

³⁵ Memorandum from the U.S. Dep’t of Justice Office of Legal Counsel to Alberto R. Gonzalez, Counsel to the President (Aug. 1, 2002), in *THE TORTURE PAPERS*, *supra* note 21, at 172, 176; *accord* Letter from John C. Yoo, Deputy Assistant Atty. Gen., Office of Legal Counsel, to the Honorable Alberto R. Gonzales (Aug. 1, 2002), in *THE TORTURE PAPERS*, *supra* note 21, at 218.

³⁶ See Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT’L SEC. L. & POL’Y 455 (2005); Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT’L L. 641 (2005); David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005).

³⁷ Memorandum from the U.S. Dep’t of Justice Office of Legal Counsel to James B. Comey, Deputy Atty. Gen. (Dec. 30, 2004), in *THE TORTURE DEBATE IN AMERICA* 361, 368 (Karen J. Greenberg ed., 2006) [hereinafter Memorandum to James B. Comey].

³⁸ WORKING GROUP, *DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS* (2003), in *THE TORTURE PAPERS*, *supra* note 21, at 286, 341–43.

³⁹ Memorandum from Donald Rumsfeld, Sec’y of Def., to the Commander, U.S. S. Command (Apr. 16, 2003), in *THE TORTURE PAPERS*, *supra* note 21, at 360.

⁴⁰ THE SCHLESINGER REPORT: FINAL REPORT TO THE INDEPENDENT PANEL TO REVIEW DOD/DETENTION OPERATIONS (2004), in *THE TORTURE PAPERS*, *supra* note 21, at 908, 923–26.

⁴¹ Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1; *Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001: Hearings Before the S. Select Comm. on Intelligence and the Permanent H. Comm. on Intelligence*, 107th Cong. 601 (2002) (statement of Cofer Black, Former Chief, DCTS Counterterrorist Center, Central Intelligence Agency) (“After 9/11 the gloves come off.”), available at <http://www.gpoaccess.gov>.

Responding to the President's order on trying non-citizens suspected of terrorism, the Defense Department also issued a series of "Military Commission Instructions" that define both the procedures to be used by military tribunals and the crimes triable before them.⁴² In the Detainee Treatment Act, Congress barred habeas review for military commissions and gave the D.C. Circuit exclusive jurisdiction to review military commission decisions for consistency with military commission orders, and to review whether the standards and procedures in the military commission orders are consistent with the Constitution and federal law.⁴³ Review was to be discretionary except for persons sentenced to death or to more than ten years imprisonment.⁴⁴

Several persons were designated for trial before the commissions, and counsel were assigned to some of them, but no trials have taken place. At first, trials were delayed as debate continued within the administration over the rights of detainees and whether the military commission rules were appropriate.⁴⁵ With the Supreme Court's decision in *Hamdan v. Rumsfeld*, the commissions were unable to operate until Congress enacted the Military Commissions Act, which codified much of the military commission instructions but also nudged the process closer to the standards of the Uniform Code of Military Justice.⁴⁶ The Military Commissions Act also confirmed the limited federal court review previously established by the Detainee Treatment Act.⁴⁷ In February 2007, President Bush signed an executive order establishing military commissions pursuant to the statute, and the Department of Defense released Notifications of Sworn Charges against three people held at Guantanamo.⁴⁸

In addition, the administration expanded the use of existing laws and practices with the goal of preventing future attacks. Perhaps most important is the Justice Department's creative and expansive interpretations of conspiracy law and of the material support of terrorism statutes.⁴⁹ Prosecutors have also used the federal

⁴² 32 C.F.R. pts. 9–14 (2006).

⁴³ DTA, Pub. L. No. 109-148, § 1005(e)(3), 119 Stat. 2680, 2740–41 (2006).

⁴⁴ *See id.*

⁴⁵ Tim Golden, *Administration Officials Split Over Stalled Military Tribunals*, N.Y. TIMES, Oct. 25, 2004, at A1; Tim Golden, *U.S. Is Examining Plan to Bolster Detainee Rights*, N.Y. TIMES, Mar. 27, 2005, at A1.

⁴⁶ *See* MCA, Pub. L. No. 109-366, §§ 3, 4, 9, 120 Stat. 2600, 2600–31, 2636–37 (2006).

⁴⁷ *Id.* §§ 3, 9. Section 9 of the Act also provides that D.C. Circuit review is as of right, not discretionary as it had been in the DTA. *Id.* § 9.

⁴⁸ *See* Press Release, The White House, Executive Order Trial of Alien Unlawful Enemy Combatants by Military Commission (Feb. 14, 2007), available at <http://www.whitehouse.gov/news/releases/2007/02/print/20070214-5.html>. The Notifications of Sworn Charges are available at the Department of Defense Web page on press materials about military commissions. *See* <http://www.defenselink.mil/news/commissionspress.html>.

⁴⁹ *See* Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1 (2005) [hereinafter Chesney, *Sleeper Scenario*]; Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. (forthcoming 2007), available at <http://ssrn.com/abstract=932608> [hereinafter Chesney, *Beyond Conspiracy?*].

material-witness statute to arrest and imprison suspicious individuals who may have information relevant to grand jury investigations into terrorist activity.⁵⁰ In many cases, prosecutors have enforced relatively minor provisions of the immigration laws more strictly in order to detain, interrogate, and ultimately remove illegal immigrants deemed suspicious—usually Muslims or people of Arab ethnicity.⁵¹

The government has also employed its investigative capabilities to their fullest. In 2002, then–Attorney General John Ashcroft changed FBI guidelines to allow agents to attend religious and political events that are “open to the public,” for the purpose of gathering information on the activities of these groups.⁵² In addition, not only have intelligence officials made full use of the Foreign Intelligence Surveillance Act (FISA) process,⁵³ but the National Security Agency intercepted some international calls involving people in the U.S. without obtaining FISA warrants.⁵⁴ This practice may be unconstitutional after *Hamdan*,⁵⁵ and the administration recently announced that it had discontinued the program after obtaining warrants to intercept such calls from the Foreign Intelligence Surveillance Court.⁵⁶ The administration has also engaged in extensive data mining of communications and financial information and expanded the use of “national security letters.”⁵⁷ These broad efforts to obtain information domestically and internationally about citizens and aliens alike justify Jack Balkin and

⁵⁰ See Ricardo J. Bascuas, *The Unconstitutionality of “Hold Until Cleared”: Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 VAND. L. REV. 677 (2005); Laurie L. Levenson, *Detention, Material Witnesses & the War on Terrorism*, 35 LOY. L.A. L. REV. 1217 (2002).

⁵¹ See, e.g., Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576–80 (2002) (describing some of these initiatives).

⁵² See Eric Lichtblau, *F.B.I. Scrutinizes Antiwar Rallies*, N.Y. TIMES, Nov. 23, 2003, at A1; see also Press Release, Am. Civil Liberties Union, Documents Shed New Light on Pentagon Surveillance of Peace Activists (Oct. 12, 2006), available at <http://www.aclu.org/safefree/spyfiles/27050prs20061012.html> (discussing cooperation between DOJ and DOD). The old policy was itself a response to perceived excesses of the F.B.I. under J. Edgar Hoover and during the Nixon administration. See SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94–755 (1976); Lichtblau, *supra*.

⁵³ 50 U.S.C. § 1801–1863 (2006).

⁵⁴ For a good discussion of the issues raised by the decision to bypass FISA, see John Cary Sims, *What NSA Is Doing . . . and Why It’s Illegal*, 33 HASTINGS CONST. L.Q. 105 (2006).

⁵⁵ See *ACLU v. Nat’l Sec. Agency/Cent. Sec. Serv.*, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (holding the program unconstitutional).

⁵⁶ See Letter from Alberto R. Gonzales, Atty. Gen., to Senators Patrick Leahy and Arlen Specter (Jan. 17, 2007), available at <http://fas.org/irp/agency/doj/fisa/ag011707.pdf>. The House of Representatives had passed legislation to authorize certain forms of warrantless surveillance, see *House Passes Bill to Allow Surveillance Without Warrant in Face of Imminent Threat*, 75 U.S.L.W. 2182 (2006), available at <http://pubs.bna.com>, but the Senate did not take up the legislation.

⁵⁷ See Eric Lichtblau & Mark Mazzetti, *Military Expands Intelligence Role In U.S.*, N.Y. TIMES, Jan. 14, 2007, at A1.

Sanford Levinson's claim that the U.S. is turning into a "National Surveillance State" and their argument that these technologies will inevitably be used for domestic crime control purposes.⁵⁸

The administration also expanded the practice of "rendition"—the informal transfer of a person from one country to another for purposes of trial or interrogation. Federal immigration and international extradition statutes govern executive efforts to move aliens and citizens from the United States to another country, and the President has no plenary authority to extradite a person who is lawfully in the United States.⁵⁹ But those statutes do not apply to the efforts of U.S. officials overseas to transfer or encourage the transfer of a person from one foreign country to another foreign country.⁶⁰ Operating under a policy initiated by the Clinton administration, the Bush administration increased the practice of "extraordinary rendition," in which suspected terrorists were sent to countries whose interrogators would use torture or other cruel, inhuman or degrading interrogation techniques that U.S. officials were unwilling to use directly or at least were unwilling to use on these particular suspects.⁶¹

Some "high value" suspects, by contrast, have been detained and interrogated by CIA operatives outside the United States, independent from the military or domestic law enforcement.⁶² News reports suggest that a variety of coercive practices have been used on these "ghost detainees."⁶³ Without detailing those practices, President Bush confirmed on September 6, 2006 that "the CIA used an alternative set of procedures"

⁵⁸ Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *FORDHAM L. REV.* 101 (2006).

⁵⁹ See John T. Parry, *The Lost History of International Extradition Litigation*, 43 *VA. J. INT'L L.* 93, 121–24 (2002) [hereinafter Parry, *Lost History*]. Doctrinally, an alien who is on U.S. soil for the purpose of seeking entry into the United States has not entered the country. See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

⁶⁰ For discussion of rendition prior to 9/11, see Ethan A. Nadelmann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 *N.Y.U. J. INT'L L. & POL.* 813 (1993).

⁶¹ See ASS'N OF THE BAR OF THE CITY OF N.Y. & CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, *TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS"* 22–23 (2004), available at http://www.umaryland.edu/healthsecurity/docs/TORTURE_BY_PROXY.pdf; Margaret L. Satterwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 *GEO. WASH. L. REV.* (forthcoming 2007) (N.Y.U. Law Sch., Pub. Law Res. Paper No. 06-36), available at <http://ssrn.com/abstract=945711>; David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 *VA. J. INT'L L.* (forthcoming 2006) (Minn. Legal Stud. Res. Paper No. 06–39), available at <http://ssrn.com/abstract=925880>.

⁶² See President Discusses Military Commissions, *supra* note 19 and accompanying text; see also Michael Hirsh et al., *Aboard Air CIA*, *NEWSWEEK*, Feb. 28, 2005, at 32; Josh White, *Army Documents Shed Light on CIA 'Ghosting'*, *WASH. POST*, March 24, 2005, at A15; HUMAN RIGHTS WATCH, *THE UNITED STATES' "DISAPPEARED": THE CIA'S LONG-TERM "GHOST DETAINEES"* (2004), available at <http://www.hrw.org/backgrounder/usa/us1004/us1004.pdf>.

⁶³ See HUMAN RIGHTS WATCH, *supra* note 62.

in its interrogations.⁶⁴ According to the President, “the procedures were tough, and they were safe, and lawful, and necessary.”⁶⁵ The CIA is not specifically included in President Bush’s February 2002 “humane treatment” directive, and OLC’s August 2002 memorandum is widely viewed as intended to give the CIA considerable room to choose among potential interrogation tactics and practices to be inflicted on the “ghosts.”⁶⁶ A footnote in the December 30, 2004 OLC opinion indicates that OLC has prepared other memoranda on interrogation that have not been made public and that the conclusions in those memoranda remain valid,⁶⁷ and President Bush’s September 6 speech affirms that “[t]he Department of Justice reviewed the authorized methods extensively and determined them to be lawful.”⁶⁸ Put plainly, the CIA has been operating a parallel system for detention and coercive interrogation, and both the existence of this system and the use of these techniques have been validated by classified legal memoranda and policy decisions.

After *Hamdan*, CIA officials apparently “refused to carry out further interrogations and run the secret facilities . . . until the legal situation was clarified.”⁶⁹ In his September 6 speech, President Bush announced the transfer of fourteen men from CIA custody to Guantanamo Bay so that they could be tried by military commissions.⁷⁰ He also declared that “[t]he current transfers mean that there are now no terrorists in the CIA program.”⁷¹ Further, he admitted that *Hamdan*’s conclusion that Common Article 3 of the Geneva Conventions applies to the conflict with al Qaeda “has put in question the future of the CIA program” because it raised the possibility that CIA officials could be prosecuted under the War Crimes Act for violations of Common Article 3.⁷² But the President also insisted that, “as more high-ranking terrorists are

⁶⁴ President Discusses Military Commissions, *supra* note 19.

⁶⁵ *Id.*

⁶⁶ See Posting of Marty Lederman to Balkinization, *Understanding the OLC Torture Memos*, http://balkin.blogspot.com/2005_01_02_balkin_archive.html (Jan. 7, 2005, 09:15 CST).

⁶⁷ Memorandum to James B. Comey, *supra* note 37, at 362 n.8 (“[W]e have reviewed this Office’s prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.”).

⁶⁸ President Discusses Military Commissions, *supra* note 19.

⁶⁹ Guy Dinmore, *CIA Agents ‘Refused to Operate’ at Secret Jails*, FINANCIAL TIMES, Sept. 20, 2006, <http://search.ft.com/> (search according to title keywords).

⁷⁰ President Discusses Military Commissions, *supra* note 19.

⁷¹ *Id.*

⁷² *Id.*; 18 U.S.C. § 2441 (2000), amended by MCA, Pub. L. No. 109-366, § 6, 120 Stat. 2600, 2631–35 (2006). Common Article 3 appears in all four of the 1949 Geneva Conventions and creates minimum standards for the protection of people caught up in armed conflicts. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, *opened for signature* Aug. 12, 1949,

captured, the need to obtain intelligence from them will remain critical—and having a CIA program for questioning terrorists will continue to be crucial to getting life-saving information.”⁷³ The subsequent enactment of the Military Commissions Act effectively allows the CIA to restart the ghost detainee program by redefining the conduct that is subject to prosecution under the War Crimes Act.⁷⁴

Finally, the executive branch has also asserted the power to inflict summary execution on suspected terrorists, as with the killing of alleged al Qaeda member Qaed Salim Sinan al-Harethi on November 3, 2002 in Yemen.⁷⁵ To the extent the “war on terror” really is a war, this killing can be described as a targeted military operation.⁷⁶ Yet at the same time, the deliberate choice to kill al-Harethi rather than capture him for purposes of prosecution provides a powerful example of the choices available under the new criminal process.

B. Congress

Although it has conducted little oversight of the administration’s actions, Congress has not been idle. On September 18, 2001, Congress passed an Authorization for Use of Military Force (AUMF) that empowered 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, or harbored such organizations or persons, in order to prevent any future

6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

⁷³ President Discusses Military Commissions, *supra* 19. By contrast, the Department of Defense quickly responded to *Hamdan* by declaring that Common Article 3 of the Geneva Conventions would apply to “all DoD personnel.” Memorandum from Gordon England, Deputy Sec’y of Def., to the Secretaries of the Military Departments et al. (July 7, 2006), *available at* <http://www.washingtonpost.com/wp-srv/nation/nationalsecurity/genevaconvdoc.pdf>.

⁷⁴ MCA, § 6, 120 Stat. at 2631–35; Press Release, The White House, The Military Commissions Act of 2006 (Oct. 17, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/10/20061017.html>.

⁷⁵ See James Risen, *Threats and Responses: C.I.A. Is Reported to Kill a Leader of Qaeda in Yemen*, N.Y. TIMES, Nov. 5, 2002, at A1.

⁷⁶ For a good discussion of the incident, its international law implications, and its bearing on the war/crime debate, see David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT’LL. 171 (2005). For the Israeli Supreme Court’s recent discussion of the circumstances under which targeted killings are consistent with international law, see H CJ 769/02 Public Committee Against Torture in Israel v. Israel [2005], *available at* http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

acts of international terrorism against the United States by such nations, organizations or persons.⁷⁷

The administration has cited this resolution as authority to undertake a wide variety of anti-terror and military activities against citizens and aliens.

On October 26, 2001, the USA PATRIOT Act became law.⁷⁸ The Act expands the powers of law enforcement officials to investigate criminal activity, whether or not that activity is defined as “terrorist.”⁷⁹ Among other things, the provisions of the Act

loosen the restrictions on the government’s use of electronic surveillance, loosen the secrecy that attaches to grand jury deliberations, add to its authority to address money laundering, give it additional procedural power in certain kinds of immigration matters, and facilitate cooperation between government agents focused on intelligence gathering and those whose goal is arrest and prosecution.⁸⁰

Several of the Act’s provisions were set to expire on December 31, 2005, but Congress made most of them permanent in the USA PATRIOT Improvement and Reauthorization Act after extensive debate that included modifying some provisions to address civil liberties concerns.⁸¹

The Homeland Security Act⁸² became law on November 25, 2002. Part of the Act abolishes the Immigration and Naturalization Service and replaces it with a Bureau of Citizenship and Immigration Services within the new Department of Homeland Security.⁸³ The goal is to increase cooperation between the immigration bureaucracy and other agencies in order to enhance the government’s ability to secure borders and prevent the entry of terrorists into the country. The Intelligence Reform and Terrorism Prevention Act⁸⁴ pursued a variety of goals. It created a Director of National Intelligence, modified standards for deportation and inadmissibility, amended the definition of the crime of providing “material support” to a terrorist organization, and generally sought to increase the tools available to law

⁷⁷ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

⁷⁸ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

⁷⁹ *Id.*

⁸⁰ NORMAN ABRAMS, *ANTI-TERRORISM AND CRIMINAL ENFORCEMENT* 10 (2d ed. 2005).

⁸¹ Pub. L. No. 109-177, 120 Stat. 192 (2006).

⁸² Pub. L. No. 107-296, 116 Stat. 2135 (2002).

⁸³ *Id.* §§ 451, 471, 116 Stat. at 2195–97, 2205.

⁸⁴ Pub. L. No. 108-458, 118 Stat. 3638 (2004).

enforcement and the level of cooperation among the various entities engaged in anti-crime and anti-terror activities.⁸⁵ The REAL ID Act of 2005 takes a significant step toward the creation of a national identity card by requiring certain information and technological features on all state-issued driver's licenses and also narrows the legal standards for achieving refugee status, all with the ostensible goal of preventing terrorist acts.⁸⁶

The Detainee Treatment Act provides a structure for reviewing the decisions of CSRTs and military commissions, as discussed above.⁸⁷ The Act also mandates that interrogations under the auspices of the Department of Defense must conform to the "United States Army Field Manual on Intelligence Interrogation" and declares that "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."⁸⁸ The phrase "cruel, inhuman, or degrading treatment or punishment" appears in both the Convention Against Torture and the International Covenant on Civil and Political Rights, but is not defined in either document.⁸⁹ The Act defines the phrase, in accordance with the United States's understanding of its obligations under the Convention, as "the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution."⁹⁰ Another provision of the Act requires CSRTs to determine "whether any statement[s] derived from or relating to" a prisoner were "obtained as a result of coercion."⁹¹ If the answer is yes, the CSRT must assess the statement's "probative value."⁹² Finally, the Act provides a defense for officials charged with using abusive interrogation techniques.⁹³

Most recently, Congress passed the Military Commissions Act, which broadens the definition of "unlawful enemy combatant" to include anyone, citizen or alien, who

⁸⁵ *Id.* For a good summary, see ABRAMS, *supra* note 80, at 33–39.

⁸⁶ Pub. L. No. 109-13, div. B, 119 Stat. 231 (2005). For a good analysis, see David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. (forthcoming 2006).

⁸⁷ See *supra* notes 29–31 and accompanying text.

⁸⁸ DTA, Pub. L. No. 109-148, §§ 1002(a), 1003(a), 119 Stat. 2680, 2739 (2006). The current version of the Army Field Manual on interrogation is DEP'T OF THE ARMY, FIELD MANUAL NO. 2-22-3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (2006), available at <http://www.army.mil/references/FM2-22.3.pdf>.

⁸⁹ Convention Against Torture, *supra* note 32, art. 16(1); ICCPR, *supra* note 32, art. 7.

⁹⁰ DTA, § 1003(d), 119 Stat. at 2740; see also Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, pt. I(1), 136 CONG. REC. S17486, S17491 (Oct. 27, 1990). Similar language appears in Resolution of Ratification, International Covenant on Civil and Political Rights, pt. I(3), 138 CONG. REC. S4781, S4783 (Apr. 2, 1992).

⁹¹ DTA, § 1005(b), 119 Stat. at 2741.

⁹² *Id.*

⁹³ *Id.* § 1004, 119 Stat. at 2740. For discussion of this new defense, see Sifton, *supra* note 15, at 509–10.

has “materially supported hostilities against the United States and its co-belligerents.”⁹⁴ The goal of this broad definition is elusive, because the Act also provides that only alien unlawful enemy combatants may be tried before military commissions.⁹⁵ Perhaps the definition is meant to be read in combination with the Authorization to Use Military Force, the Supreme Court’s decision in *Hamdi v. Rumsfeld* approving detention of combatants for the duration of the relevant conflict (although the Court carefully limited its discussion to operations in Afghanistan), and inherent presidential power, with the goal of allowing detention of any person who fits within it. Whether the administration will advance this view remains to be seen. The likelihood of a federal court accepting such a claim is small, I think, especially after *Hamdan*.

The Military Commissions Act responds directly to *Hamdan* on the issue of military commissions by authorizing and providing a detailed set of rules for them.⁹⁶ The Act also extends the Detainee Treatment Act’s provisions for eliminating habeas corpus—and other legal proceedings—in favor of limited D.C. Circuit review for detention and military commission decisions.⁹⁷ Although the Act reaffirms the Detainee Treatment Act’s prohibition on the use of cruel, inhuman, or degrading treatment or punishment, it also sharply narrows the acts of U.S. personnel that can be prosecuted under the War Crimes Act by creating a detailed list and definition of conduct that violates Common Article 3 of the Geneva Conventions.⁹⁸ Going further, that Act declares that its limited definitions “fully satisfy” the obligation of the United States to implement Common Article 3 “in the context of an armed conflict not of an international character,” bars the invocation of the Geneva Conventions as a source of rights in “any habeas corpus or other civil action or proceeding,” and states that “the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions”—albeit in a way that does not “affect the constitutional functions . . . of Congress and the judicial branch of the United States.”⁹⁹ Finally, to ensure that interpretation of the Geneva Conventions-derived conduct prohibited by the War Crimes Act is entirely a matter of domestic law, the Act provides that “[n]o foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting” those provisions.¹⁰⁰

These recent statutes and ongoing efforts join an array of earlier legislation designed to combat terrorism and other emergencies.¹⁰¹ Also worth noting—as the

⁹⁴ MCA, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2601 (2006) (codified as amended at 10 U.S.C. § 948a(1)(i) (2006)).

⁹⁵ *Id.*, 120 Stat. at 2602 (codified as amended at 10 U.S.C. § 948b(a) (2006)).

⁹⁶ *Id.* §§ 3, 4, 120 Stat. at 2600–31.

⁹⁷ *Id.* §§ 7, 9, 10, 120 Stat. at 2635–37.

⁹⁸ *Id.* §§ 5, 6, 120 Stat. at 2631–35.

⁹⁹ *Id.*

¹⁰⁰ *Id.* § 6(a)(2), 120 Stat. at 2632.

¹⁰¹ See, e.g., The International Emergency Economic Powers Act, 50 U.S.C. § 1702 (2000); The National Emergencies Act, 50 U.S.C. § 1601 (2000); The Classification Act, 18 U.S.C. 4001(a) (2000) (preventing imprisonment or detention of citizens “except pursuant to an Act

Detainee Treatment Act and to some extent the debate over reauthorizing the USA PATRIOT ACT indicate—is that Congress has rejected or modified some of the administration’s proposals and may pull back further in years to come. My narrative here, in other words, should not be mistaken as simply a story about executive aggrandizement and legislative abdication—although I think it is clear that executive power has expanded during the war on terror.

Taken together, these executive and legislative actions demonstrate a shift in the way the federal government combats terrorism. Traditional law enforcement entities have been given new powers that have long been on the government’s wish list, both for anti-terror efforts and for ordinary law enforcement purposes. Law enforcement discretion has expanded. Military and intelligence personnel have taken on a new prominence. Numerous criminal prosecutions are still being brought against persons suspected of terrorist activity,¹⁰² but the administration seems less willing to recognize criminal trials as central to its anti-terror efforts. In short, the events of 9/11 and the responses to those events crystallized a new criminal process for terrorism, a process that in many cases bypasses federal courts and the Department of Justice, and instead operates through the military and CIA, largely outside the territorial boundaries of the United States. Some aspects of this process have been curtailed, and more restrictions are likely, but it remains significant that many of these practices are now established as within the realm of “thinkable” or “reasonable” policy options.

C. *The Supreme Court*

The Supreme Court’s explicit responses to the war on terror have come in a series of four cases: *Hamdi v. Rumsfeld*,¹⁰³ *Rasul v. Bush*,¹⁰⁴ *Rumsfeld v. Padilla*,¹⁰⁵ and *Hamdan v. Rumsfeld*.¹⁰⁶ Although these decisions have rejected the administration’s most far-reaching executive power claims, they will not prevent the Bush administration from accomplishing a net increase in executive power. More important for purposes of this Article, they are unlikely to have a significant impact on the development of a new criminal process by the President, Congress, and the Court itself.

of Congress”). According to one study, 470 statutes provided some kind of emergency authority to the executive branch by the 1970s. Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1408 (1989). For additional sources discussing recent legislation, see Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1017–18 nn.19–28 (2003) [hereinafter Gross, *Chaos and Rules*].

¹⁰² For discussion of recent prosecutions, see Chesney, *Beyond Conspiracy?*, *supra* note 49; Chesney, *Sleeper Scenario*, *supra* note 49; and Yin, *supra* note 18.

¹⁰³ 542 U.S. 507 (2004).

¹⁰⁴ 542 U.S. 466 (2004).

¹⁰⁵ 542 U.S. 426 (2004).

¹⁰⁶ 126 S. Ct. 2749 (2006).

1. *Hamdi, Padilla, and Detained Citizens*

Yaser Hamdi, at that time an American citizen, was captured by U.S. forces in Afghanistan and held in military custody in the United States.¹⁰⁷ He challenged the government's authority to detain him and its refusal to give him a hearing at which he would have the chance to rebut the assertion that he was an "enemy combatant."¹⁰⁸ A fractured Supreme Court ruled in his favor in *Hamdi v. Rumsfeld*.¹⁰⁹ The plurality opinion by Justice O'Connor declared that "indefinite detention [of citizen enemy combatants] for the purpose of interrogation is not authorized" by any relevant federal statute, but it also found that the AUMF provided authority to detain enemy combatants, including citizens, for the duration of the conflict so long as they received some form of process.¹¹⁰

The plurality seemed to hint that there is no inherent executive emergency power to detain indefinitely, and it made clear that any such power would be reviewable.¹¹¹ But the plurality said nothing about inherent power to detain for a limited period or about what other authority—such as the ability to interrogate—might flow from such a power.¹¹² Instead, emphasizing the role of Congress, the plurality implied that interrogation may be limited to "appropriate" actions by relevant legislation and therefore possibly also limited by domestic and international laws that the U.S. recognizes, such as the Geneva Conventions.¹¹³

On the issue of process, the Court applied the balancing test of *Mathews v. Eldridge*, which "weigh[s] 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process."¹¹⁴ According to the plurality, *Mathews* requires

that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker. . . . At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be

¹⁰⁷ *Hamdi*, 542 U.S. at 510–11.

¹⁰⁸ *Id.* at 510–12.

¹⁰⁹ *Id.* at 508.

¹¹⁰ *Id.* at 521 (plurality opinion) (emphasis added). For the plurality, the duration of the conflict is at least as long as "United States troops are still involved in active combat in Afghanistan." *Id.*

¹¹¹ *Id.* at 535–37.

¹¹² *See id.*

¹¹³ *Id.* at 520–21.

¹¹⁴ *Id.* at 529 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.¹¹⁵

Justice Souter, joined by Justice Ginsburg, rejected the idea that Congress has authorized detention of citizens, but he was willing in principle to recognize “an emergency power of necessity . . . limited by the emergency” that would justify unauthorized executive detention and, presumably, interrogation of a citizen who is “an imminent threat to the safety of the Nation and its people.”¹¹⁶ Justice Scalia, joined by Justice Stevens, rejected an inherent emergency power to detain a citizen indefinitely, found no adequate congressional authorization, and insisted that the government must release Hamdi or put him on trial for treason.¹¹⁷ Yet his statement that his views “apply only to citizens” left open the possibility that he would approve detention and interrogation of an alien (and perhaps even of a citizen for a limited period).¹¹⁸ For his part, Justice Thomas was willing to recognize a broad emergency power to detain and, presumably, interrogate.¹¹⁹

Taking these opinions together, *Hamdi* emerges less as victory for civil liberties and more as a speed bump on the road to the new criminal process. The procedure endorsed by the plurality heavily favors the government, and the likelihood that a citizen suspected of being an enemy combatant and held in military custody can marshal “persuasive” arguments of innocence, even with the aid of counsel, seems small. Government officials may have performed well at the initial stage of deciding whom to detain, but the fact that only 38 out of 558 people who appeared before CSRTs were declared “non-enemy combatants” supports the conclusion that there was little chance for suspected detainees to prevail.¹²⁰

¹¹⁵ *Id.* at 533. For example,

Hearsay . . . may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.

Id. at 533–34.

¹¹⁶ *Id.* at 552 (Souter, J., concurring in part and dissenting in part).

¹¹⁷ *Id.* at 554, 573 (Scalia, J., dissenting).

¹¹⁸ *Id.* at 577.

¹¹⁹ *Id.* at 579 (Thomas, J., dissenting).

¹²⁰ See *CSRT Summary*, *supra* note 26; Mark Denbeaux et al., *No-Hearing Hearings: CSRT: The Modern Habeas Corpus?: An Analysis of the Proceedings of the Government’s Combatant Review Tribunals at Guantanamo*, http://law.shu.edu/news/final_no_hearing_hearings_report.pdf; Mark Denbeaux et al., *Report on Guantanamo Detainees: A Profile of 517 Detainees*

Further, the precedent of using the *Mathews* test, with its balancing methodology and concern for government interests, to assess the process accorded people swept up in the war on terror is unlikely to lead to significant restraints on executive authority. After all, *Mathews* was widely interpreted as a retreat from rigorous due process requirements when it was decided,¹²¹ and there is little reason to believe it will operate differently when the government interest includes national security. In short, even the most rights-protective reading of *Hamdi* will leave considerable room for executive action and relatively little space for the assertion of rights by citizens suspected of being enemy combatants.

Rumsfeld v. Padilla implicated the President's authority to hold in military detention a citizen taken into custody on U.S. soil.¹²² The Supreme Court avoided that question by parsing habeas doctrine to hold that Padilla's habeas petition must be dismissed because he had failed to sue in the district in which his "immediate custodian" was located.¹²³ In dissent, Justice Stevens strongly objected to the majority's effort to avoid the merits: "Executive detention of subversive citizens . . . may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure."¹²⁴

Padilla filed a new petition in the District of South Carolina.¹²⁵ The case ultimately came to the Fourth Circuit, which ruled that the AUMF allows detention without prosecution for the duration of hostilities of a citizen enemy combatant, regardless of where he or she is captured.¹²⁶ The court also stressed that detention without trial is both a legitimate goal on its own and also serves other legitimate goals, such as "gather[ing] intelligence from the detainee and . . . restrict[ing] the detainee's communication with confederates so as to ensure that the detainee does not pose a

through Analysis of Department of Defense Data, http://law.shu.edu/news/Guantanamo_report_final_2_08_06.pdf. For discussion of *Hamdi* and the scope of detention under the laws of war, see Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005); Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2658–62 (2005); Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293 (2005).

¹²¹ See Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

¹²² 542 U.S. 426 (2004).

¹²³ *Id.* at 432–36.

¹²⁴ *Id.* at 465 (Stevens, J., dissenting); see also *id.* at 464 n.9 ("Respondent's custodian has been remarkably candid about the Government's motive in detaining respondent: "[O]ur interest really in his case is not law enforcement, it is not punishment because he was a terrorist or working with the terrorists. Our interest at the moment is to try and find out everything he knows so that hopefully we can stop other terrorist acts."") (alteration in original).

¹²⁵ *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

¹²⁶ *Id.*

continuing threat to national security even as he is confined.”¹²⁷ The Fourth Circuit thus expanded on *Hamdi*’s interpretation of “appropriate force” in the AUMF¹²⁸ to approve detention without trial for purposes—isolating, controlling, and thoroughly, perhaps coercively, interrogating a prisoner—that go beyond the core law of war concern about preventing enemy soldiers from returning to combat.¹²⁹ While arguably consistent with *Hamdi*, this decision was plainly in tension with Justice Steven’s dissent in *Rumsfeld v. Padilla*,¹³⁰ and further review seemed likely. Then, while Padilla’s petition for writ of certiorari was pending, the government indicted him and sought his transfer from military custody.¹³¹ The Supreme Court approved the transfer¹³² and ultimately denied certiorari.¹³³

2. *Rasul* and the Detention of Aliens

Hamdi’s other companion case, *Rasul v. Bush*, considered whether aliens detained at Guantanamo could seek writs of habeas corpus in federal court to challenge their detention.¹³⁴ The Court held that federal courts have statutory subject matter jurisdiction to hear habeas corpus claims by aliens in U.S. custody at Guantanamo Bay and suggested that jurisdiction might apply anywhere in the world so long as a federal court has jurisdiction over the applicant’s custodian.¹³⁵ Put differently, *Rasul* suggests

¹²⁷ *Id.* at 395.

¹²⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

¹²⁹ *Padilla*, 423 F.3d at 395–96.

¹³⁰ See *supra* note 124 and accompanying text.

¹³¹ *Padilla v. Hanft*, 126 S. Ct. 978, 978 (2006).

¹³² *Id.* The Fourth Circuit had denied the motion to transfer. *Padilla v. Hanft*, 432 F.3d 582 (4th Cir. 2005).

¹³³ For the Supreme Court’s approval of the transfer and denial of certiorari, see 126 S. Ct. 978 (2006), and 126 S. Ct. 1649 (2006).

¹³⁴ 542 U.S. 466 (2004).

¹³⁵ *Id.* at 483–84 (“No party questions the District Court’s jurisdiction over petitioners’ custodians. [28 U.S.C. §] 2241, by its terms, requires nothing more.” (citation omitted)). Justice Scalia claimed to understand the Court’s decision as “extend[ing] the scope of the habeas statute to the four corners of the earth” and “permit[ting] an alien captured in a foreign theater of active combat to bring a § 2241 petition against the Secretary of Defense.” *Id.* at 498 (Scalia, J., dissenting). Note, however, that the Court also said the case involved “territory over which the United States exercises plenary and exclusive jurisdiction, but not ‘ultimate sovereignty,’” *id.* at 475 (majority opinion), and that it did not have to consider the relevance “of the ‘long-standing principle of American law’ that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested,” *id.* at 480. Yet the majority then went on to say,

Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the

that the executive branch could be forced to provide some justification for the prolonged detention of anyone anywhere, not just a citizen held in the U.S.¹³⁶

Whether or not the geographic implications of the case ultimately prevail—and the Military Commissions Act will put the Court to the test—the establishment by the Defense Department of Combatant Status Review Tribunals is as much a response to *Rasul* as it is to *Hamdi*.¹³⁷ But as I have already suggested, the results of those proceedings may be triumphs of due process only to the extent that obtaining any process at all is a victory. Consider the *Hamdi* plurality's statement that "[a] burden-shifting scheme" would satisfy due process because it "would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant."¹³⁸ While the plurality's concern about tourists, journalists, and aid workers is understandable, this scheme holds out little hope for the local military-age inhabitant. That is to say, the cases that came before the Court addressed as a group the process due those detained in indefinite military custody, whether citizen or alien. The minimal procedural protections accorded in *Hamdi* might assist citizens, but they are less likely to assist non-resident aliens who, even after *Rasul*, are entitled at most to an equivalent amount of process.¹³⁹ Under *Hamdi* and *Rasul*, detained aliens risk being deemed enemy combatants nearly as a matter of law.

Describing *Rasul*—and for that matter *Hamdi*—as triumphs of due process and the rule of law may thus require defining that idea in almost exclusively formal terms. The plain fact is that people detained in the war on terror have some procedural protections as well as the occasional tangible benefit, but their hearings will never approach the kinds of due process standards that are commonplace in domestic civil or criminal

claims of persons detained in the so-called "exempt jurisdictions," where ordinary writs did not run, and all other dominions under the sovereign's control. . . . Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of "the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown."

Id. at 481–82 (internal citations and footnotes omitted).

¹³⁶ See *id.* at 483–84.

¹³⁷ The D.C. Circuit recently concluded that Congress could constitutionally withdraw habeas jurisdiction from aliens detained outside the sovereign territory of the United States. See *Boumediene v. Bush*, No. 05-5062, 2007 U.S. App. LEXIS 3682, at *17–35 (D.C. Cir. Feb. 20, 2007).

¹³⁸ *Hamdi*, 542 U.S. at 534.

¹³⁹ See *Zadvydas v. Davis*, 533 U.S. 678, 692–94 (2001). Dissenting in *Boumediene v. Bush*, Judge Rogers argued that courts hearing habeas petitions brought by aliens detained outside the U.S. should determine whether the government has "credible evidence" that the detainee is an enemy combatant and "must accept" that evidence "as true 'if not traversed' by the person detained." *Boumediene*, 2007 U.S. App. LEXIS 3682, at *90 (quoting 28 U.S.C. § 2248).

litigation, and their chances of obtaining relief will be slim regardless of the quality of evidence against them.¹⁴⁰ The mixed quality of the decisions gains force from the fact that *Hamdi* and *Rasul* also suggest a moderate receptiveness to claims of a limited and justified emergency power to detain and interrogate, even as they signal a familiar and clear preference for congressional authorization and participation.

3. *Hamdan* and Military Commissions

In *Hamdi*, a plurality of the Supreme Court suggested that “an appropriately authorized and properly constituted military tribunal” could provide sufficient due process to justify detention of an enemy combatant.¹⁴¹ Although the plurality did not endorse the specific military commissions established by the Bush administration, its reading of the AUMF hinted that it would have found the commissions to be “appropriately authorized,” if not necessarily “properly constituted.”¹⁴² *Hamdan v. Rumsfeld* raised these issues again.

The Bush administration charged Salim Hamdan with conspiracy and brought him before a military commission.¹⁴³ Hamdan petitioned for habeas review, claiming the commission was contrary to law.¹⁴⁴ On the merits, the Court avoided the question whether the President may convene military commissions “in cases of ‘controlling necessity.’”¹⁴⁵ The Court grudgingly seemed to accept that existing statutes, as well as the AUMF and the Detainee Treatment Act, provided sufficient authority for the commissions.¹⁴⁶ Significantly, however, the majority insisted that Congress had limited the jurisdiction of military commissions to “‘offenses that by statute or by the law of war may be tried by such military commissions.’”¹⁴⁷ Thus, under basic separation of powers principles,¹⁴⁸ the military commission convened to try Hamdan

¹⁴⁰ For related skepticism about *Rasul*, see Tung Yin, *The Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL RTS. J. 1061 (2005).

¹⁴¹ *Hamdi*, 542 U.S. at 538.

¹⁴² *Id.*

¹⁴³ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2753 (2006).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 2774. *Madsen v. Kinsella*, 343 U.S. 341, 348 (1952), states that the President “may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States,” but that comment does not clearly apply to the commission established to try Hamdan. *See Hamdan*, 126 S. Ct. at 2776.

¹⁴⁶ *Hamdan*, 126 S. Ct. at 2774–75. The existing statutes are 10 U.S.C. §§ 821, 836 (2000).

¹⁴⁷ *Hamdan*, 126 S. Ct. at 2774 (quoting 10 U.S.C. § 821).

¹⁴⁸ The Court observed that the President “may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.” *Id.* at 2774 n.23 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). Justice Kennedy also analyzed the case within Justice Jackson’s framework. *See id.* at 2800–01 (Kennedy, J., concurring).

could be valid only if it was “justified under the ‘Constitution and laws,’ including the law of war.”¹⁴⁹

By statute, rules for courts-martial and military commissions must follow procedures applicable in ordinary criminal cases “so far as [the President] considers practicable,” and rules for military commissions and courts-martial must be “uniform insofar as practicable.”¹⁵⁰ According to the Court, “the ‘practicability’ determination the President has made is insufficient to justify variances from the procedures governing courts-martial,” because the President had in fact made no determination at all on this specific issue.¹⁵¹ Because the procedures that would be used to try Hamdan varied in significant respects from court-martial rules (such as dispensing with the right to be present), the prosecution was unauthorized.¹⁵²

The Court also ruled that the military commission procedures violated the Geneva Conventions, which were made applicable by statute.¹⁵³ For that to matter, however, the struggle with al Qaeda must be either an armed conflict between parties to the Conventions (which it clearly is not) or “a ‘conflict not of an international character occurring in the territory of’” a party to the Conventions, in which case Common Article 3 of the Conventions would apply.¹⁵⁴ The Court held that the conflict with al Qaeda falls into this second category, with the results that Common Article 3 applies and military commission rules must comply with it.¹⁵⁵ One of the requirements

¹⁴⁹ *Id.* at 2775. Justice Stevens, who at this point spoke only for a plurality, also insisted that a military commission of the kind convened for Hamdan can consider only “offenses cognizable during time of war,” *id.* at 2776, and that conspiracy is not one of those offenses. *See id.* at 2777–85 (plurality opinion).

¹⁵⁰ 10 U.S.C. § 836 (2000).

¹⁵¹ *Hamdan*, 126 S. Ct. at 2791. Such a determination would be entitled to some deference, but not as much as the determination that it is impracticable to follow the rules of ordinary criminal cases, which the Court assumed was entitled to “complete deference.” *Id.* at 2791 & n.51.

¹⁵² *See id.* at 2792.

¹⁵³ *See id.* at 2793–98. The Court left open the possibility that the Conventions apply of their own force and can be asserted by individual claimants. *See id.* at 2794. For further discussion, see *infra* notes 254–58 and accompanying text.

¹⁵⁴ *Hamdan*, 126 S. Ct. at 2795 (quoting Common Article 3).

¹⁵⁵ *Id.* at 2795–96. The full scope of this holding is unclear for two reasons. First, the extent of the conflict is ambiguous because the nature of al Qaeda is amorphous and its “membership” is fluid. *See* FAISAL DEVJI, *LANDSCAPES OF THE JIHAD: MILITANCY, MORALITY, MODERNITY* 19–20 (2005). Second, the extent to which the Court equated a struggle with al Qaeda with the “war on terror” is not clear. Most commentators reject the notion that the laws of war apply to the war on terror in its entirety. *See, e.g.*, U.N. Comm’n on Human Rights, *Situation of Detainees at Guantanamo Bay*, ¶ 83, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006) (“The war on terror, as such, does not constitute an armed conflict for the purposes of the applicability of international humanitarian law.”); DUFFY, *supra* note 4, at 250–55; George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT’L L. 891 (2002); Silvia Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the “War on Terror,”* 87 INT’L REV. RED CROSS 39, March 2005; *The*

of Common Article 3 is that trials must be before “regularly constituted” courts, and the Supreme Court found that military commissions could not meet that standard because they were not already established, in force, or justified by some “practical need.”¹⁵⁶

In short, *Hamdan* accepts that Congress authorized the use of military commissions, but rejects the specific method that the administration selected to put them into practice.¹⁵⁷ Along the way, the Court rejected the administration’s most far-reaching executive power claims and insisted on compliance with Congress’s determination that traditional standards of international humanitarian law must apply to military action.¹⁵⁸ Further, *Hamdan*’s holding that Common Article 3 of the Geneva Conventions applies to the conflict with al Qaeda meant that U.S. personnel who violated its provisions could be prosecuted under the War Crimes Act as it existed before the Military Commissions Act extensively modified it.¹⁵⁹

But the penultimate line of the *Hamdan* majority opinion observed that “*Hamdan* does not challenge, and we do not today address, the Government’s power to detain him for the duration of . . . hostilities.”—which in this context apparently means the conflict with al Qaeda and not the conflict with Afghanistan.¹⁶⁰ That statement means no one will be released from detention as a result of *Hamdan*. *Hamdi* and *Rasul* will continue to govern that issue, and as we have seen, their requirements do little to prevent indefinite detention. Nor does *Hamdan* prevent military commissions. Rather, it simply required—at most—statutory authorization, which the Military Commissions Act now provides.¹⁶¹ In *Youngstown* terms, the issue has gone from category three to category one, and convincing a majority of the Court to strike down a scheme backed by both political branches will be much more difficult.

Perhaps most significantly, *Hamdan* ratifies the war model for confronting terrorism. The consequence, in turn, is not simply the beneficent one that Common Article 3 applies. Indeed, Common Article 3’s application as a backstop indicates that the fundamental issue in cases like this is how few rights will be accorded to people caught up in that war. There is no indication that anything close to a majority of the Court will treat these people as full rights-holders under the Constitution. For the purposes of this Article, in other words, the Court has as much as said there is a new

Cleveland Principles of International Law on the Detention and Treatment of Persons in Connection with “The Global War on Terror,” No. 1 (Oct. 7, 2005), http://www.law.case.edu/centers/cox/content.asp?content_id=85.

¹⁵⁶ *Hamdan*, 126 S. Ct. at 2796–97. Justice Stevens, again speaking only for a plurality, also contended that the failure to require the presence of the accused at the trial violated Common Article 3. *See id.* at 2797–98.

¹⁵⁷ *See supra* notes 141–52 and accompanying text.

¹⁵⁸ *See supra* notes 153–56.

¹⁵⁹ 18 U.S.C. § 2441 (2000 & Supp. IV 2005).

¹⁶⁰ *Hamdan*, 126 S. Ct. at 2798.

¹⁶¹ The administration could also have tried to make a convincing “practicability” showing—although such an attempt might not have satisfied the Geneva Conventions and in fact would have put significant pressure on the Court’s reliance upon them.

criminal process for the war on terror (even recognizing that at the same time the Court has also said that there is no need for a new type of wartime process). Going further, *Hamdan*'s acceptance of the war model reveals the limits of the Court's power. Once the executive branch declared that terrorism requires war—and especially once Congress authorized the use of military force—the Court was essentially powerless to say differently. Taken as a group, then, the detention cases (a category in which I include *Hamdan*) work within the war model, not against it, and they seek to mitigate its harshest effects.

Finally, the Court's easy acceptance of the war model and its effort to find a meaningful accommodation between the rule of law and the exigencies of conflict should also provoke the question whether it has adopted the same approach in other "wars," such as the war on crime and the war on drugs. As the last two parts of this Article will describe, the answer is a resounding "yes." And if this last observation is true, then being a "full rights-holder" may not be all that different from being in *Hamdan*'s shoes.

II. CRIMINAL PROCESSES, OLD AND NEW

The last section of Part I explained how one aspect of the new criminal process—extended detention—survived Supreme Court review relatively intact, while another aspect—the military commission—can satisfy constitutional norms only if Congress plays a larger role than the Bush administration would desire. This short part broadens the focus to compare and evaluate the traditional and new criminal processes at a policy level. To that end, I sketch what might best be called ideal types of each process: police investigations leading to actual trials for the traditional criminal process, and counterintelligence operations leading to military tribunals along the lines of those created by the Bush administration before *Hamdan*. The second section of this part asks whether we still have a meaningful choice between the two types of process, and sets the stage for a discussion of constitutional law and the emergency power in the last parts of this Article.

A. Comparing Traditional and New Criminal Processes

Under the traditional view, investigation with the goal of proving criminal charges in an ordinary criminal court is presumptively the appropriate way to assess the responsibility of and assign punishment to people who have carried out, attempted to carry out, or conspired to carry out crimes, including terrorist attacks.¹⁶² Before 9/11, the

¹⁶² For a good example of the claim that traditional criminal processes, slightly modified, are well-suited to dealing with terrorism, see HEYMANN, *supra* note 12. For an interesting argument in favor of military commissions by the Chief Prosecutor of the Office of Military Commissions, see Morris D. Davis, *The Role of Military Commissions in the Global War on Terrorism*, 37 CASE W. RES. J. INT'L L. 537 (2006). For good discussions of the reasons for and against using military tribunals or ordinary courts for the trial of terrorists, see *Agora: Military Commissions*, 96 AM. J. INT'L L. 320 (2002), especially the contributions by Ruth

United States conducted several successful trials of accused terrorists, including the trial of the first World Trade Center bombers. Suspected terrorists or persons with links to them continue to be prosecuted in U.S. courts.¹⁶³

Supporters of traditional process can point to several desirable features. Investigations are conducted by an increasingly professional force of police who have been instructed in the constitutional, statutory, and administrative rules relevant to police activity.¹⁶⁴ By contrast, the new criminal process relies on military action or counter-intelligence networks that are institutionally less willing, able, required, or even suited to conform to such norms. Further, the constitutional and other rules for the conduct of criminal trials are well-developed and easily applied, and the substantive rules of federal criminal law are grounded in a large body of statutes, rules, and case-law.¹⁶⁵

Yet the existence of the military justice system, with a separate investigatory, prosecutorial, and judicial system codified in the Uniform Code of Military Justice,¹⁶⁶ confirms that traditional processes have never been the only option. So, too, a long history of creating and using special military tribunals supports their legitimacy in at least some circumstances.¹⁶⁷ In addition, the military justice system has expertise in applying criminal law principles and the laws of war—expertise that is also available to personnel who participate in military commissions—while some of the federal criminal statutes dealing with terrorism have received little interpretation. Finally, counter-terror activities—at least those with international overtones—have never been the sole province of traditional, domestic law enforcement and criminal courts.

That said, the primary advantage of the new criminal process is its flexibility and efficiency. To the extent constitutional and statutory rules apply more leniently, executive officials have discretion to craft strategies for the specific needs of a particular investigation or other activity. Investigators can engage in broad collection of information about people who have little or no apparent relation to terrorist activities (depending, of course, upon how one defines “terrorist activities” in light of such things as the material support statutes).¹⁶⁸ Once suspects are identified, they can be detained, or not, and officials can decide to interrogate, or not, to bring charges, or not, bound by only mild time constraints. Because interrogation is not necessarily directed at obtaining admissible evidence, rules that would ordinarily limit the available range

Wedgwood and Harold Koh.

¹⁶³ See *supra* note 102 and accompanying text.

¹⁶⁴ For discussion of the constitutional significance of professionalism and training, see *infra* notes 217–18 and accompanying text.

¹⁶⁵ For example, Title 18 of the U.S. Code and the Federal Rules of Criminal Procedure.

¹⁶⁶ 10 U.S.C. §§ 801–941 (2000).

¹⁶⁷ Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249, 250–52 (2002). For more detailed histories, see LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* (2005); David Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2023–73 (2003).

¹⁶⁸ 18 U.S.C. §§ 2339A, 2339B (2000 & Supp. IV 2005).

of tactics may not apply. Further, the new criminal process includes the possibility of having the “sentence” follow immediately after the investigation, as with efforts to kill suspected terrorists rather than put them on trial.¹⁶⁹

Traditional processes accord familiar rights to the subjects of investigations, as well as at trial.¹⁷⁰ By contrast, although constitutional norms apply to at least some aspects of the new criminal process, current rules for counter-terror activities provide few protections.¹⁷¹ Once charged, a defendant in a traditional case has a broad right to counsel of his or her choosing,¹⁷² whereas defendants in military proceedings will be assigned a military lawyer.¹⁷³ This disparity is not as great as it might first appear, however, because the formal right to counsel of one’s choice in federal court is often limited by the inability of many defendants to pay for an attorney, so that they must rely on an often overburdened court-appointed lawyer. For their part, military lawyers are ethically bound and fully able to represent their clients zealously, and defendants before a military tribunal have a qualified right to obtain civilian counsel.¹⁷⁴

In addition, the Federal Rules of Evidence draw upon long experience with problems of proof to provide a framework for advocacy that largely focuses on the most reliable evidence. The Classified Information Procedures Act adds a method for addressing many—but not all—of the government’s concerns about disclosing sensitive information.¹⁷⁵ Defendants in a criminal trial may invoke the aid of the court to obtain documents or the testimony of expert witnesses, and prosecutors are required to disclose exculpatory evidence.¹⁷⁶ The Federal Rules of Evidence do not apply to military tribunals, with the result that relaxed standards of relevance and admissibility are available.¹⁷⁷ To some observers, relaxation of traditional rules is a common-sense step toward realistic standards of evidence, while others would highlight the risks of

¹⁶⁹ See *supra* notes 75–76 and accompanying text.

¹⁷⁰ Examples include the warrant requirement, *see* U.S. CONST. amend. IV; *Groh v. Ramirez*, 540 U.S. 551 (2004); the prohibition on compelled self-incrimination, *see* U.S. CONST. amend. V; *Missouri v. Seibert*, 542 U.S. 600 (2004); the exclusionary rule, *see* *Mapp v. Ohio*, 367 U.S. 643 (1961); and the due-process protection against “conscience-shocking” conduct, *see* *Rochin v. California*, 342 U.S. 165 (1952). Part III of this Article provides an extended qualification of this broad description.

¹⁷¹ See *infra* notes 247–54 and accompanying text (discussing the complexity of extra-territoriality doctrine).

¹⁷² See U.S. CONST. amend. VI; *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006).

¹⁷³ Although a military defendant will be “detailed” a military lawyer as defense counsel, 10 U.S.C. § 827 (2000), this does not preclude the defendant from obtaining civilian counsel at his expense. 10 U.S.C. § 838 (2000).

¹⁷⁴ For example, civilian counsel appearing before military commissions must be U.S. citizens, members of a domestic bar, and have a security clearance. *See* MCA, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2610 (2006) (codified as amended at 10 U.S.C. § 949c(b)(3) (2006)).

¹⁷⁵ See 18 U.S.C. app. § 3 (2000).

¹⁷⁶ See FED. R. CRIM. P. 16; *Brady v. Maryland*, 373 U.S. 83 (1963).

¹⁷⁷ MCA, § 3(a)(1), 120 Stat. at 2608–09 (codified as amended at 10 U.S.C. § 949a (2006)).

using prejudicial, inaccurate, or misleading evidence—particularly when the information was obtained by coercion and presented at secret proceedings.¹⁷⁸

The decision-makers at a traditional trial (including the jury) and on appeal are independent, acquittals are final, and the appellate process provides rigorous review. By contrast, military commissions do away with the need for a randomly selected jury which must be protected from threats or retaliation—a particularly serious issue in the terrorism context—even as it must be educated about the issues in the trial. The members of military commissions and review panels are appointed officials within the command hierarchy of the U.S. military.¹⁷⁹ They may be more capable and better prepared for trial than the average juror, but their independence will be suspect because they will have been selected by and will be a part of the executive branch.¹⁸⁰ Review of military commission decisions in federal court is limited,¹⁸¹ which serves the government's interests in finality, but increases the possibility that errors will go undetected and uncorrected.

Further, defendants in federal court have a right to a speedy trial,¹⁸² and acquittal usually means that they will be freed. For detainees in the war on terror, the combination of detention and military commissions may translate into no trial or a trial after several years in custody, and acquittal may not lead to release if executive officials decide it is important to continue holding such detainees (and if habeas review remains unavailable or limited on the merits). The critical fact for detention is the duration of the conflict, and if the conflict is the war on terror, the end is nowhere in sight.

Importantly, traditional processes need not be static. The federal courts draw on a common-law tradition that takes as a fundamental premise the need for the law to adapt to changing circumstances. Consistent with evolving constitutional norms, law enforcement agencies and courts can experiment with procedural mechanisms, particularly if those experiments would maintain the primacy of core traditional processes (although the degree of permissible experimentation is a topic of fierce debate). Military commissions were not used for trying al Qaeda-style terrorists before 9/11, and although the commissions can draw on the experience of the military justice

¹⁷⁸ The MCA provides that a statement obtained by coercion may be admitted if it is reliable, its admission would serve the interests of justice, and it was not obtained by the use of cruel, inhuman, or degrading treatment. *Id.*, 120 Stat. at 2607 (codified as amended at 10 U.S.C. § 948r(c)–(d) (2006)).

¹⁷⁹ *Id.*, 120 Stat. at 2603–04 (codified as amended at 10 U.S.C. §§ 948i, 948j (2006)).

¹⁸⁰ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2806–07 (2006) (Kennedy, J., concurring). Note that the MCA borrowed from the UCMJ to create some protections for members of military commissions. *See* MCA, § 3(a)(1), 120 Stat. at 2604 (codified as amended at 10 U.S.C. §§ 948j(f), 949b (2006)). The Navy's refusal to promote and instead end the career of Hamdan's military lawyer two weeks after the Supreme Court ruled in his favor suggests the need for such protections. *See* Carol Rosenberg, *Lawyer Is Denied Promotion*, MIAMI HERALD, Oct. 8, 2006, at A1.

¹⁸¹ DTA, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2741–43 (2006); MCA, § 9, 120 Stat. at 2636–37.

¹⁸² *See* U.S. CONST. amend. VI; 18 U.S.C. §§ 3161–3174 (2000).

system, the lack of precedents and processes that have evolved over time may hamper their effectiveness, at least in the initial stages. Moreover, to the extent they remain extraordinary courts (even if “regularly constituted”) and are infrequently used compared to the routine of the traditional process, including traditional military criminal processes, the risk exists that they will be unable to develop into efficient, reliable, and just institutions.

The characteristics of the traditional criminal process and trial resonate with history and with ideas of due process to form a system that is widely perceived as fair both in the aggregate and in most individual cases. The perception of fairness in the federal system also derives from the separation of powers. Life-tenured judges and the requirement of jury trials provide examples of separation of powers at work in the traditional criminal trial, and they serve as counterweights to executive power.¹⁸³ Significantly, this familiar model of separated power goes beyond control of power at the highest levels and beyond providing counterweights in the machinery of law-making, law enforcement, and legal interpretation. Separation of powers is also, and at least as importantly, about fragmenting the government’s ability to exercise power over individual lives and preventing total control over people’s bodies, minds, and circumstances. Robert Cover accurately observed that “[l]egal interpretation takes place in a field of pain and death,”¹⁸⁴ but separation of powers may lower the body count.

Because separation of powers constraints are lowered for the new criminal process, officials have greater control over the present circumstances and ultimate fate of the defendant. Detention, coercive interrogation, military trial, and punishment, summary or otherwise, form an overall approach that treats the suspected terrorist or associate of terrorists as a person over whose body and circumstances the government should exercise total and exclusive power. To many readers, this will seem a patently illegitimate goal, but if the magnitude of the threat of terrorism is sufficiently great, one can easily imagine the argument that such an approach is justified, although perhaps only as a temporary measure.

Finally, the new criminal process serves a domestic political function. Terrorism can cause panic and uncertainty with wide ranging impact, and elected leaders may respond by seeking to project an image of resoluteness and reassurance. Forceful, sweeping action—that is, a new level of state violence that is central to the new criminal process—is one way to achieve this goal. I suspect most readers will find this to be a thoroughly inadequate “justification” and may even interpret it as authoritarian. Yet such action can be described as drawing, however shakily, on the separation of powers because it rests on an idea of inherent but limited executive authority to defend the nation against attack. And, support in liberal theory for some kind of

¹⁸³ For elaboration of this claim with respect to juries, see AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 81–119 (1998).

¹⁸⁴ ROBERT M. COVER, *Violence and the Word*, 95 *YALE L.J.* 1601 (1986), reprinted in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 203 (Martha Minow et al. eds., 1992).

“prerogative power” goes back at least to Locke.¹⁸⁵ The constitutional merits and obvious risks of this approach are a topic for the last part of this Article.

B. Choosing a Process

In comparing the traditional and new criminal processes, I have indulged two assumptions. The first is that the traditional criminal process is presumptively superior to the new criminal process for addressing issues relating to terrorism, despite the new criminal process’s greater flexibility. The second is that we can easily choose between the two forms of process. Both assumptions are open to question.

I referred to the first objection in the Introduction. Even if there should be a presumption in favor of traditional criminal processes in normal times, the “war on terror” puts us in a situation in which the presumption has shifted. Hard-headed analysis, in short, arguably suggests that we are in the exceptional situation in which the “war approach” trumps the “crime approach,” with the result that the new criminal process has also become the new presumption. Some things, in other words, have changed after all, at least for a while. To some extent, as I also indicated in the Introduction, the answer to this objection depends on whether one accepts the claim that everything changed and we are at war. It also relies on the idea that exceptional situations require different legal rules—an idea that I discuss more fully in the last Part of this Article.

Second, one could take a further step to argue there is simply no basis for a presumption in favor of the traditional criminal process. Terrorism is not just a problem of law enforcement; it also implicates national security, diplomacy, economic policy, immigration, the role of the military, and many other issues. Seen in this way, reasonable people can easily assert that, at best, traditional criminal processes should be merely one option along with other more violent, but perhaps also more effective, responses. This objection, then, goes beyond the war/crime dichotomy to suggest that terrorism is a complex issue that requires a nuanced and flexible response along a variety of policy and legal paths. A narrow focus on one form of legal process is short-sighted and ultimately ineffective.

I do not wish to dispute this point at a general level, except to suggest that it obviously also applies to the problem of “ordinary” crime and any other issue of public importance, as much as to the problem of terrorism. Once faced with this insight, moreover, we still have to decide what processes to use under what circumstances. Traditional criminal processes remain an available choice, and we need some way of deciding what kind of process is best in what situations. Also, to the extent issues once seen as the province primarily of legal process and ordinary policing are now seen as larger issues of social concern along a variety of metrics, this shift simply reflects the fact of increasing rationalization and expansion of modern state power.¹⁸⁶

¹⁸⁵ See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 374–80 (Peter Laslett ed., Cambridge Univ. Press. 1988) (1690).

¹⁸⁶ See MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: LECTURES AT THE COLLÈGE

The interesting question, especially for purposes of this Article, is the role that emergencies play in this process.

Most important, one could dispute that the traditional process exists at all. It may once have existed, but we abandoned it long ago, and the new criminal process is simply the process that we have achieved. Less dramatically, one might argue that the new criminal process is a permanent part of our everyday criminal process, alongside and partially overriding the remnants of the traditional process. The rise of the plea bargain as the overwhelmingly dominant mode of resolving criminal charges is but one example of the ways in which traditional processes have eroded (in this instance, in favor of what looks more like an administrative proceeding).

If either version of this third objection has weight, then we have already made a choice. The idea that the new criminal process is already well established also raises important issues about the content of constitutional rules on criminal procedure outside the contexts of detention and interrogation of suspected terrorists. So, too, the possibility that we already live under the new criminal process poses questions about the difference between exceptional and ordinary conditions, and between emergency and normal powers. The next Part considers the ways in which the new criminal process is already woven into our constitutional fabric, while the last Part considers the issues raised by the emergency power and the convergence in the new criminal process of military and police action.

III. THE CONSTITUTION AND THE NEW CRIMINAL PROCESS

Outside the case-law of the war on terror, in the realm of “everyday” criminal procedure, the new criminal process is already well entrenched. Indeed, a survey of established and developing criminal procedure doctrine suggests that the scope of the new criminal process is broader and deeper than a mere recitation of actions taken in the war on terror might suggest. This Part looks more closely at everyday constitutional law to describe the ways in which the new criminal process has already become the criminal procedure that we have.

A. Rights in the Modern State

One reason for constitutional law’s embrace of the new criminal process is that doctrine has changed to reflect the needs of the modern regulatory state. Civil rights

DE FRANCE, 1975–76, at 246 (Mauro Bertani & Alessandro Fontana eds., David Macey trans., 2003) (discussing the ways in which modern sovereignty employs pervasive regulation “to establish an equilibrium” and “optimize a state of life”). Agamben’s description is more suggestive: “the sovereign is entering into an ever more intimate symbiosis not only with the jurist but also with the doctor, the scientist, the expert, and the priest.” AGAMBEN, *HOMO SACER*, *supra* note 7, at 122. For a more straightforward account in the specific context of criminal law and procedure’s regulation of the family, see Jeannie Suk, *Criminal Law Comes Home*, 116 *YALE L.J.* 2 (2006).

play a central role in these regulatory processes. After all, rights are largely dependent upon and exist only in relation to state power. As a result, the expansion of civil rights and liberties in the second half of the twentieth century must be placed in the context of an increase in state power that is at least as significant, especially in terms of the government's power to influence, intervene in, and even control our daily lives, for better or worse. And, as rights are entwined with state interests, they also change in ways that reflect those interests.¹⁸⁷ Agamben describes this process in language that suggests, perhaps hyperbolically, the dire potential of rights discourse:

the spaces, the liberties, and the rights won by individuals in their conflicts with central powers always simultaneously prepared a tacit but increasing inscription of individuals' lives within the state order, thus offering a new and more dreadful foundation for the very sovereign power from which they wanted to liberate themselves.¹⁸⁸

Whether or not "dreadful" is a fair conclusion,¹⁸⁹ Agamben's analysis suggests that reliance on civil liberties arguments to counter the new criminal process may expand or entrench certain rights, but only against a background of increased state power and regulation.¹⁹⁰

¹⁸⁷ Cf. William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1034 (1995) ("Wherever the regulatory state engages in any form of compelled information gathering (and it does so everywhere), there is an enormous cost to taking privacy interests seriously.").

¹⁸⁸ AGAMBEN, HOMO SACER, *supra* note 7, at 121. For a strong criticism of Agamben's views on human rights, see Volker Heins, *Giorgio Agamben and the Current State of Affairs in Humanitarian Law and Human Rights Policy*, 6 GERMAN L.J. 845 (2005), available at http://www.germanlawjournal.com/pdf/Vol06No05/PDF_Vol_06_No_05_845_860_Articles_Heins.pdf. To my mind, Heins seems more often to misunderstand Agamben's arguments, and his real objection is normative rather than analytical: Agamben's writings stray too close to the work of Carl Schmitt, and his willingness to explore commonalities between authoritarian and democratic regimes is simply illegitimate. *See id.* at 860 ("Ultimately, he offers a version of Schmitt's theory of sovereignty that changes its political valence and downplays the difference between liberal democracy and totalitarian dictatorship—a difference about which Adorno once said that it 'is a total difference. And I would say,' he added, 'that it would be abstract and in a problematic way fanatical if one were to ignore this difference.'"). For a more persuasive discussion that is sanguine about—and thus implicitly critical of Agamben's position on—the interplay between rights and regulation in modern states, see Mattias Kumm, *Who's Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 GERMAN L.J. 341 (2006), available at http://www.germanlawjournal.com/pdf/Vol07No04/PDF_Vol_07_No_04_341-370_Articles%20Kumm.pdf.

¹⁸⁹ Cf. Vik Kanwar, Book Review, 4 INT'L J. CONST. L. 567, 568 (2006), available at <http://icon.oxford.journals.org/cgi/reprint/4/3/567> ("[O]ne must become accustomed to [Agamben's] signature rhetorical devices of hyperbole, paradox, and 'indistinction.'").

¹⁹⁰ This is not to say that critical approaches reject rights discourse altogether. *See, e.g.*,

1. Discretionary Power

The first step in examining the interplay of constitutional law and the new criminal process is to consider the role that constitutional law plays in the delegation of power to federal and state officials. The scope of authority to investigate and interrogate an individual is not detailed in any federal statute or regulation. The Attorney General may appoint officials “to detect and prosecute crimes against the United States” and “to conduct such other investigations regarding official matters . . . as may be directed by the Attorney General.”¹⁹¹ Department of Justice regulations in turn delegate the authority to investigate to the FBI.¹⁹² For their part, FBI agents have been given specific statutory authority to “carry firearms, serve warrants and subpoenas . . . and make arrests.”¹⁹³ Other grants of authority take the same general tone.¹⁹⁴

In short, federal statutes do not specify either the powers of law enforcement officers or the limits on their powers.¹⁹⁵ Nor has the Supreme Court held that the Constitution requires such a statute.¹⁹⁶ Instead, the specific powers of federal law enforcement officers derive from ideas about the nature of executive authority, common law, and constitutional restrictions on investigative techniques.¹⁹⁷ Another way

Patrick Hanafin, *The Writer's Refusal and the Law's Malady*, 31 J.L. & SOC'Y 3 (2004), reprinted in LAW AND LITERATURE 3, 12 (Patrick Hanafin et al. eds., 2004) (describing efforts “to use the rhetoric of rights to subvert its normal functioning in the hands of the disciplinary state”); Michel Foucault, *Is It Useless to Revolt?*, LE MONDE, May 11–12, 1979, at 1, reprinted in JANET AFARY & KEVIN B. ANDERSON, *FOUCAULT AND THE IRANIAN REVOLUTION: GENDER AND THE SEDUCTIONS OF ISLAMISM* 263, 266 (Karen de Bruin trans., 2005) (“Inviolable laws and unrestricted rights must always be opposed to power.”). Still, rights in these formulations are plainly different from or at least more than juridical rights.

¹⁹¹ 28 U.S.C. § 533 (Supp. III 2004). Other sections provide authority to investigate specific crimes. See 28 U.S.C. §§ 535 (crimes involving government officers and employees), 538 (aircraft piracy), 540 (felonious killings of state or local law enforcement officers), 540A (violent crimes against travelers), 540B (serial killings) (2000).

¹⁹² 28 C.F.R. § 0.85 (2006); see also 28 C.F.R. §§ 8.1, 8.2 (2006) (power to seize property delegated to FBI).

¹⁹³ 18 U.S.C. § 3052 (2000).

¹⁹⁴ See 18 U.S.C. §§ 3105, 3107 (2000) (authority to serve warrants and make seizures pursuant to them); FED. R. CRIM. P. 41(a), (d) (search warrants may be issued upon the request of federal law enforcement officers so authorized by the Attorney General). For Department of Justice policies on subpoenas, interrogation, indictment, and arrest of members of the news media, see 28 C.F.R. § 59.1–.6 (2006).

¹⁹⁵ This is despite the demand thirty years ago by a special Senate committee for “[a] basic law—a charter of powers, duties, and limitations—[for the] . . . FBI’s domestic intelligence [activities].” SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, bk. II, at x (1976).

¹⁹⁶ E.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 736–37 (2004) (rejecting the idea that an “officially sanctioned” detention is arbitrary merely because it “exceed[s] positive authorization to detain”).

¹⁹⁷ E.g., *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (relying on common law

of making this point is to say that unless the Constitution prohibits a particular practice, law enforcement officials have broad discretion to investigate crimes; search, seize, and interrogate people; and search and seize property. The picture is more complicated at the state level because many state and local governments have adopted detailed procedures for arrests, use of force, and other practices.¹⁹⁸ Police departments, like the military, tend to operate according to rules and procedures, and they are becoming increasingly professionalized. But those rules still leave a great deal of room for discretion, and the Constitution has relatively little to say about the scope of that discretion.

Importantly, this approach to state violence and state law enforcement power is not the only way to structure governmental authority. When the Supreme Court of Israel ruled that the General Security Service could not use coercive interrogation techniques on detained Palestinians, it grounded its decision on the proposition that, without a positive grant of authority, executive officials have no power to act.¹⁹⁹ The court explained that, “[i]n a state adhering to the Rule of Law, interrogations are therefore not permitted in [the] absence of clear statutory authorization.”²⁰⁰ It followed that “an administrative body, seeking to interrogate an individual . . . must point to the explicit statutory provision which legally empowers it.”²⁰¹ Going further, the court declared that where there is no legislation that provides authority to executive officials, “the relevant field is entirely occupied by the principle of individual freedom.”²⁰² Whether or not such an approach is desirable, it is emphatically not the one taken by the U.S. legal system.²⁰³

2. Discretionary Rights

The next step is to examine the nature of constitutional rights in contemporary U.S. legal discourse. In 1886, the Supreme Court spoke in *Boyd v. United States* of an “indefeasible right of personal security, personal liberty and private property,” such that the rights articulated in “the Fourth and Fifth Amendments run almost into each other” and “should be liberally construed.”²⁰⁴ Under this conception, constitutional

powers of arrest to uphold the power to make warrantless misdemeanor arrests).

¹⁹⁸ For discussion of state law and additional discussion of federal law, see John T. Parry, *Judicial Restraints on Illegal State Violence: Israel and the United States*, 35 VAND. J. TRANSNAT'L L. 73, 122–25 (2002) [hereinafter Parry, *Judicial Restraints*].

¹⁹⁹ HJC 5100/94 Pub. Comm. Against Torture v. Israel [1999] IsrSC 53(4) 817, reprinted in 38 I.L.M. 1471, 1478 (1999).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*, 38 I.L.M. at 1479.

²⁰³ The *Public Committee* rule may echo European jurisprudence. See Lord Irvine of Lairg, *Sovereignty in Comparative Perspective: Constitutionalism in Britain and America*, 76 N.Y.U. L. REV. 1, 15–16 (2001); Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 394–10 (1982).

²⁰⁴ 116 U.S. 616, 630, 635 (1886).

rights must be strong, broad, and nearly absolute rules in order to protect individual privacy and liberty from possibly arbitrary government authority.

The *Boyd* approach is a perfectly sensible way to think about rights, but it bears little resemblance to the analytical structure of contemporary constitutional doctrine. As Sanford Levinson recently explained in the context of the First Amendment, enumeration of a right, even one prefaced with the command that “no law” shall be passed abridging it (as opposed to the Fourth Amendment’s textual embrace of reasonableness), does not make the scope of that right clear.²⁰⁵ “The fact is that ‘no law’ does not mean ‘no law’; rather, it means, in our contemporary world, that the state must demonstrate what we call a ‘compelling state interest’ in order to justify the transgression of the stipulated norm.”²⁰⁶ With equal candor, Justice Scalia wrote for the Court in *Anderson v. Creighton* that “regardless of the terminology used, the precise content of most of the Constitution’s civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable.”²⁰⁷

Further, as William Stuntz has noted, *Boyd* is out of sync with the needs and discourses of the modern regulatory state, which requires a broad and intrusive investigatory power.²⁰⁸ By the mid-1960s, the Supreme Court had declared in *Schmerber v. California* that the privilege against self-incrimination “has never been given the full scope which the values it helps to protect suggest.”²⁰⁹ As for the Fourth Amendment, the Court said in the same case that its “proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.”²¹⁰ One year later, the Court stressed that the government’s “interest in solving crime” is relevant to the reasonableness of a search, and it introduced the doctrine that the Fourth Amendment protects only reasonable expectations of privacy, not all privacy interests.²¹¹ The result is that “rights”

²⁰⁵ Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699, 718–19 (2006).

²⁰⁶ *Id.* at 719.

²⁰⁷ 483 U.S. 635, 643–44 (1987).

²⁰⁸ Stuntz, *supra* note 187, at 1030–31, 1052–54.

²⁰⁹ 384 U.S. 757, 762 (1966).

²¹⁰ *Id.* at 768.

²¹¹ *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring); *Warden v. Hayden*, 387 U.S. 294, 306 (1967). The Warren Court’s legacy in criminal procedure includes the idea of limiting police discretion. See Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998). But because the Court’s methodology often turned on reasonableness and balancing tests, the resulting doctrine did not eliminate discretion so much as channel and manage it. Discretion thus became a legitimate interest with the power to shape evolving doctrine. For good discussions of the ways in which the Warren Court’s methodology had consequences that the Court may not have intended, see Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33 (2005); Silas J. Wasserstrom, *The Court’s Turn Toward*

in contemporary criminal procedure doctrine are rarely more than the term we use to describe a balance of policies and interests that ends up favoring the individual claimant rather than the government.²¹²

Under the reasonableness approach to criminal procedure, the privacy interests that the Constitution protects have been steadily narrowed and watered down.²¹³ The Court's decision in *Kyllo v. United States*, which forbade "obtaining [without a warrant and] by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,'"²¹⁴ only confirms that conclusion. In applying the idea of reasonable expectations of privacy, the Court described the "the interior of homes" as the baseline,²¹⁵ so that the domestic space is the presumptive location of constitutional privacy, and the Fourth Amendment risks ending up protecting a limited list of places, not people.²¹⁶

Further, the Court has signaled a willingness not to impose constitutional restrictions when other sources of norms might suffice to manage police discretion. Last Term for example, in *Hudson v. Michigan*, the Court refused to apply the exclusionary rule to violations of the Fourth Amendment's knock-and-announce rule, in part because the professionalism of police departments leads them to take constitutional

a General Reasonableness Interpretation of the Fourth Amendment, 27 AM. CRIM. L. REV. 119 (1989).

²¹² For a classic discussion of rights and balancing tests, see Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1371–73 (1984). For the argument that legal rights have value precisely because they contribute "to the efficiency and effectiveness of governmental activities" in a properly constructed system, see David A. Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 CAL. L. REV. 1051, 1056 (2005). While Super describes rights as part of the balance rather than a way of describing certain results of the balance, his larger claim that rights have value because of their utility to governance dovetails with my argument. For a different account of the utility of rights, see Kumm, *supra* note 188, at 368 ("The point of human and constitutional rights is to focus and structure the court's assessment of whether the actions of public institutions are reasonable under the circumstances. The language of rights has provided the authorization for courts to play a role in protecting the legitimate interests of individuals, thereby helping to hold public institutions to standards of good government in liberal constitutional democracies worldwide.").

²¹³ See Sherry F. Colb, *What is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119 (2002).

²¹⁴ 533 U.S. 27, 34 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961)).

²¹⁵ See *id.* ("[I]n the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*.").

²¹⁶ See David A. Sklansky, *Back to the Future: Kyllo, Katz, and Common Law*, 72 MISS. L.J. 143, 160 (2002); *cf. Katz*, 389 U.S. at 351 ("[T]he Fourth Amendment protects people, not places."). For discussion of the ways in which substantive criminal law intrudes into the home in multiple ways, see Suk, *supra* note 186.

rights seriously and to instruct officers in appropriate rules of conduct.²¹⁷ A blunter characterization of this holding is that making constitutional law would be redundant. Indeed, Justice Kennedy suggested that, if “training police officers and imposing discipline for failures to act competently and lawfully . . . prove[s] ineffective,” those procedures “can be fortified with more detailed regulations or legislation”—not with constitutional law in the form of constitutionally mandated remedies.²¹⁸

Hudson's preference for adaptable rules of internal police regulations instead of constitutional law is metonymic for the shift to the new criminal processes. Further, the Court's deliberate choice of internal police regulation over constitutional law echoes Hannah Arendt's distinction between totalitarian law and positive law, where “positive laws . . . are primarily designed to function as stabilizing factors for the ever changing movements of men,” while in a totalitarian state “all laws have become laws of movement.”²¹⁹ Extending Arendt's analysis, the tendency of modern states to embrace flexibility and movement over permanence—a tendency reflected to a significant degree in administrative law itself—thus carries enormous risks for what she calls “the living space of freedom.”²²⁰ To the extent this similarity is more than an echo,

²¹⁷ 126 S. Ct. 2159, 2168 (2006).

²¹⁸ *Id.* at 2170 (Kennedy, J., concurring). I do not think *Hudson* can be described more simply as an exercise in judicial restraint. The Court did not decide the case on non-constitutional grounds; nor did it put off making constitutional law in deference to local law enforcement procedures. Instead, it declared a constitutional rule—no exclusionary rule for knock-and-announce violations—and its decision turned in part on the idea that internal police regulation is an effective substitute for constitutional law. Note that the Court also rested its decision on the availability of civil remedies for violations of the knock-and-announce rule. *See id.* at 2167–68 (majority opinion); *id.* at 2170 (Kennedy, J., concurring). As my discussion of remedies later in this Part indicates, however, damages claims are unlikely to generate robust constitutional doctrine. Nor does *Hudson* make a contrary claim. Justice Scalia's precise words are revealing: “As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts.” *Id.* at 2167–68 (majority opinion). Doctrine thus results from reasonable balancing of all the relevant interests, but factors in play are often based on nothing more than reasonable assumptions, perhaps even guesses. With this kind of methodology, constitutional rules will not place significant constraints on official discretion.

²¹⁹ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 463 (new ed. 1979); *see also id.* at 464 (“In these ideologies, the term ‘law’ itself changed its meaning: from expressing the framework of stability within which human actions and motions can take place, it became the expression of the motion itself.”).

²²⁰ *Id.* at 466. Nor is this claim at all foreign to the study of administrative law. *See* KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1971). The Supreme Court's approach to administrative law recognizes that it is a “law of movement,” so much so that the Supreme Court has announced that federal court decisions construing ambiguous regulatory statutes are “not authoritative” and can be disregarded by the agencies charged with interpreting those statutes. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *see also Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984); Kathryn A. Watts, *Adapting to Administrative Law's Erie Doctrine*, 101 *Nw.U.L. REV.* (forthcoming 2007), available at <http://ssrn.com/abstract=900582>.

it also dovetails with Agamben's effort to understand "the otherwise incomprehensible rapidity with which twentieth-century parliamentary democracies were able to turn into totalitarian states and with which this century's totalitarian states were able to be converted, almost without interruption, into parliamentary democracies."²²¹ To be clear, I am not arguing that the United States is a totalitarian state.²²² Rather, I mean to suggest that developments such as the new criminal process rest less on ideas specific to liberal democracy and more on ideas of governance that are common to modern states in general.

The Supreme Court's decision in *Terry v. Ohio*²²³ exemplifies the importance of discretion and reasonableness in contemporary constitutional doctrine. *Terry* held that the Fourth Amendment permits police who have reasonable suspicion that a person may be engaged in criminal behavior to detain that person briefly and, if there is reason to believe that person may be armed, to also frisk him for weapons.²²⁴ In his majority opinion, Chief Justice Warren never asked whether a state or local statute authorized this conduct.²²⁵ He simply assumed that police officers have authority to stop and frisk potentially dangerous people, unless the Constitution limits this authority.²²⁶ In addition, the Court's analysis began with the assertion—reminiscent of *Boyd*—that

²²¹ AGAMBEN, HOMO SACER, *supra* note 7, at 122. Making this connection requires a bit more work. For Agamben, this process reflects the fact that,

[i]n both cases, these transformations were produced in a context in which for quite some time politics had already turned into biopolitics, and in which the only real question to be decided was which form of organization would be best suited to the task of assuring the care, control, and use of bare life.

Id. Thus, he does not draw the strong distinction between liberal democracy and totalitarian states that Arendt appears to describe and instead stresses a common approach to governing based on Michel Foucault's idea of biopolitics and an idea of western political history as being as much about continuities as disjunctures. *See id.* at 119; *see also* FOUCAULT, *supra* note 186, at 241, 245–47 (defining "biopolitics"); Hussain & Ptacek, *supra* note 10, at 497–98 (discussing Agamben's conception of western political history). Also worth noting is that this part of *Homo Sacer* consciously attempts to combine and extend the analysis of Arendt and Foucault. *See* AGAMBEN, HOMO SACER, *supra* note 7, at 119–20. Working in the other direction, Mattias Kumm provides a good argument for the claim that the developments Arendt describes, in the context of liberal democracies, should not be described as "total," let alone "totalitarian." *See* Kumm, *supra* note 188, at 365–69. Whether his argument is successful is a question well beyond the scope of this Article. But note that the developments in constitutional criminal procedure that I describe here—to the extent they overlap with the constitutional state Kumm describes—indicate not only that one must take the bitter with the sweet in such a system, but also that there is a lot of bitter to swallow.

²²² But the authoritarian resonances of the Bush administration's executive power claims are a legitimate subject of scholarly concern. *See* Levinson, *supra* note 205, at 705–06.

²²³ 392 U.S. 1 (1968).

²²⁴ *Id.* at 30–31.

²²⁵ *See id.*

²²⁶ *See id.*

“‘[n]o right is held more sacred . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.’”²²⁷ But the Court then explained that the idea of “clear and unquestionable authority of law” translates into a right “to be free from unreasonable governmental intrusion.”²²⁸ The move from a conception of rights as near-absolutes and a need for clear legal authority to restrain liberty, to a willingness to balance interests and to accept reasonable restraints, even if they are not specifically authorized, occurs so quickly that it almost slips past unnoticed. Yet it exemplifies the move from one view of rights and liberties to another, from a popular conception of strong rights to a more diminished, “realistic” idea of what they mean in practice.²²⁹

3. Reasonable Rights-Bearers

In the process of interpreting constitutional rights the Supreme Court has also described how rights-bearing subjects should behave. In *Florida v. Bostick*, the Court rejected a defendant’s claim that he did not voluntarily “consent” to have his luggage searched when police officers boarded a bus on which he was riding.²³⁰ The Court recognized that Bostick did not feel free to leave the bus during the stop, but it noted that this fact alone did not mean that he had been seized by the police—which would have made his interaction with them nonconsensual as a matter of law.²³¹ Rather, “the appropriate inquiry is whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.”²³² And, when Bostick argued that his consent could not have been voluntary because no reasonable person in his situation—someone carrying cocaine in his luggage—would consent to a search, the Court responded that “the ‘reasonable person’ test presupposes an innocent person.”²³³

In the post 9/11 case of *United States v. Drayton*²³⁴—another bus search case—the Court elaborated on the characteristics of the reasonable innocent person. The Court began by stressing the “cooperative” nature of the interaction between police and passengers: “There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat,

²²⁷ *Id.* at 9 (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

²²⁸ *Id.*

²²⁹ Here, one might analogize to acoustic separation between conduct rules and decision rules. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984). Yet acoustic separation in this context is harder edged, because it leads people to believe in a broad, rule-like conception of rights (the conduct rule), while the actual doctrine (the decision rule) is less capacious and far more flexible.

²³⁰ 501 U.S. 429 (1991).

²³¹ *Id.* at 435–36.

²³² *Id.* at 436.

²³³ *Id.* at 438 (emphasis omitted).

²³⁴ 536 U.S. 194 (2002).

no command, not even an authoritative tone of voice.”²³⁵ To be sure, the police officer was armed and in uniform, but these facts would not alarm the normal citizen:

Officers are often required to wear uniforms and in many circumstances this is cause for assurance, not discomfort. Much the same can be said for wearing sidearms. That most law enforcement officers are armed is a fact well known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon.²³⁶

Justice Kennedy then instructed readers on the thought processes of reasonable, innocent persons confronted by armed and uniformed police officers: “bus passengers answer officers’ questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them.”²³⁷

The final part of the opinion considered Drayton’s claim that he should have been informed of his right not to consent to a search.²³⁸ The Court rejected the suggestion that “police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search”; rather the failure to provide this information is just “one factor to be taken into account.”²³⁹ Justice Kennedy closed with the following comments on citizenship, police conduct, and the rule of law:

In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes [whether or not he or she actually knows what his or her rights are, as the Court had just held] and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.²⁴⁰

Read with *Bostick*, this passage from *Drayton* confirms that the normal or desirable rights-holder is the reasonable innocent person.²⁴¹

²³⁵ *Id.* at 204.

²³⁶ *Id.* at 204–05.

²³⁷ *Id.* at 205.

²³⁸ *Id.* at 206.

²³⁹ *Id.*

²⁴⁰ *Id.* at 207.

²⁴¹ *See id.*

Last Term's decision in *Samson v. California*,²⁴² which held that parolees have diminished expectations of privacy and may be subjected to suspicionless searches—in part because they are simply more likely to violate the law²⁴³—confirms the idea that full rights are granted only to the reasonable innocent person. One might even read the series of cases allowing the warrantless search or inspection of the homes of people seeking welfare benefits as evidence that the reasonable person capable of having full rights is not just innocent but also financially self-sufficient.²⁴⁴

Further, *Drayton* indicates that the reasonable innocent person best asserts his rights, whether or not he knows what they are, by refusing to invoke them and instead cooperating with state authority. Indeed, to the extent state authority is represented by the armed and uniformed police officer, the *Drayton* Court asserts that people are likely to feel increasingly “assured” and “safe,” with the implication that cooperation and refusal to assert rights in these circumstances becomes more voluntary and more consistent with good citizenship, not less.²⁴⁵ In sum, cases such as *Drayton* provide doctrinal support for my suggestion that one of the important functions of rights in a modern state is to manage one's subjugation to state power.²⁴⁶

4. Extraterritoriality

The last Part of this analysis is the manner in which the Constitution applies to conduct by U.S. officials outside the territory of the United States. The answer remains uncertain after decades of litigation. In the *Insular Cases*, the Supreme Court held that inhabitants of territory that is under U.S. sovereignty but has not been “incorporated” into the United States are not entitled to the full panoply of constitutional

²⁴² 126 S. Ct. 2193 (2006).

²⁴³ *Id.* at 2200. Probationers also have diminished expectations of privacy with respect to warrantless searches. See *United States v. Knights*, 534 U.S. 112 (2001); see also *Wilkinson v. Austin*, 545 U.S. 209 (2005) (holding prisoners have due process rights with respect to prison regulations but making clear that their rights are easily overcome by state interests). Although *Samson* signed a document that noted the possibility of suspicionless searches, the Court expressly declined to find that he had consented to be searched. See *Samson*, 126 S. Ct. at 2199 n.3.

²⁴⁴ See *Wyman v. James*, 400 U.S. 309 (1971); *Sanchez v. San Diego County*, 464 F.3d 916 (9th Cir. 2006).

²⁴⁵ By contrast, “scientific findings about the psychology of compliance and consent” suggest that “the extent to which people feel free to refuse to comply is extremely limited under situationally induced pressures.” Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155.

²⁴⁶ This dynamic also occurs in the interpretation of constitutional provisions to permit preventive approaches to crime and other forms of undesirable behavior. See Chesney, *Sleeper Scenario*, *supra* note 49, at 63–64; Eric S. Janus, *The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence*, 40 CRIM. L. BULL. 576 (2004); Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 130 (2005); Carol S. Steiker, *The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771 (1998).

rights, but only to those deemed “fundamental.”²⁴⁷ Exactly what that means, especially after the incorporation debate and the recent detention cases, remains unclear.²⁴⁸ U.S. citizens have rights against the actions of U.S. officials on territory that is not controlled by the United States,²⁴⁹ but there may be few constitutional constraints on U.S. officials overseas when they act against people who are not citizens.²⁵⁰ In addition, the Supreme Court has held that the Constitution has little to say about the manner in which foreign nationals residing overseas end up in the United States to face criminal proceedings. Thus, the Court said in response to a defendant’s claim that he had been kidnapped by U.S. agents, “the court need not inquire as to how respondent came before it.”²⁵¹

Plainly, these geographic limits bear heavily on the Constitution’s relation to a criminal process that includes investigation, detention, interrogation, and possibly adjudication on a global scale. They also bear on the nature of rights in general. Note particularly the apparent centrality of the border or citizenship to the reach of constitutional constraints but not to the reach of federal power. To the extent borders are critical, everything outside the U.S. is an exceptional space. The alien who has not made it into the country, the ghost detainee held at an undisclosed overseas “black site,” and the resident of another country in which U.S. forces operate—all inhabit a space that is in many respects without law from the U.S. perspective but in which U.S. power remains present. That is, in most of the world as a matter of U.S. law, enforceable rights may not exist, only bare life and state power. It is precisely this

²⁴⁷ *E.g.*, *Dorr v. United States*, 195 U.S. 138 (1904); *Downes v. Bidwell*, 182 U.S. 244 (1901).

²⁴⁸ See T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* (2002); GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* (1996); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 *TEX. L. REV.* 1 (2002). For post-*Rasul* discussions, see Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After Rasul v. Bush*, 153 *U. PA. L. REV.* 2073 (2005); Kal Raustiala, *The Geography of Justice*, 73 *FORDHAM L. REV.* 2501 (2005); Kermit Roosevelt III, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 *U. PA. L. REV.* 2017 (2005).

²⁴⁹ See *Reid v. Covert*, 354 U.S. 1 (1957) (plurality opinion).

²⁵⁰ See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding Fourth Amendment warrant requirement does not apply to actions by U.S. officials overseas against non-citizens and suggesting the same is true for Fifth Amendment rights); *Harbury v. Deutch*, 233 F.3d 596, 602–04 (D.C. Cir. 2000) (applying *Verdugo* to deny Fifth Amendment claim relating to alleged torture under CIA auspices of non-citizen overseas), *rev’d on other grounds*, 536 U.S. 403 (2002); *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 276–79 (E.D.N.Y. 2006) (suggesting *Rasul* is in tension with *Verdugo* such that due process rights of aliens, particularly those with a connection to the U.S., are “unresolved”); Mark A. Godsey, *The New Frontier of Constitutional Confession Law—The International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigations from Non-Americans Abroad*, 91 *GEO. L.J.* 851 (2003).

²⁵¹ *United States v. Alvarez-Machain*, 504 U.S. 655, 662 (1992).

condition that Agamben highlights and analyzes.²⁵² Further, he warns that this space of no-rights may be less a reassurance that rights exist somewhere else than it is a harbinger of what might be a more general condition.²⁵³

There is an important caveat to the extraterritoriality issue. The Court's holding in *Hamdan* that Common Article 3 of the Geneva Conventions applies to U.S. actions against al Qaeda suggests that as a matter of enforceable federal law the government is bound to respect international law rights that are roughly similar to those provided in the Constitution when it acts extraterritorially.²⁵⁴ Yet the extent to which those rights are enforceable remains to be seen. Before the Military Commissions Act, government officials could be prosecuted for violations of Common Article 3 under the War Crimes Act.²⁵⁵ After the Military Commissions Act, prosecutions remain possible under the new domestic law interpretation of Common Article 3, but not for all of the conduct that would violate Common Article 3 as a matter of international law.²⁵⁶

Yet at the end of the day, prosecutorial discretion and public opinion make it unlikely that there would be many prosecutions under either version of the War Crimes Act. The most likely application of Common Article 3 has always been defensive, by an alleged member of al Qaeda in proceedings brought by the government. The Military Commissions Act prevents any use of the Geneva Conventions as a source of rights in habeas or other "civil" proceedings, but it appears not to bar the use of the Geneva Conventions in military commission or criminal court proceedings.²⁵⁷

The possible application of Common Article 3 hovers over the analysis in this Article and raises the prospect of significant limitations on the new criminal process. My prediction, however, is that even in the absence of the Military Commissions Act, the Court would not apply Common Article 3 in a way that expands individual rights beyond those in the Constitution.²⁵⁸ Put differently, Common Article 3 may eventually

²⁵² See AGAMBEN, STATE OF EXCEPTION, *supra* note 7.

²⁵³ See *id.*

²⁵⁴ See *supra* notes 153–59 and accompanying text.

²⁵⁵ See *supra* notes 72–74 and accompanying text.

²⁵⁶ See MCA, Pub. L. No. 109-366, § 6, 120 Stat. 2600, 2632–35 (2006).

²⁵⁷ See *id.* § 5, 120 Stat. at 2631–32. This provision also prohibits the use of Common Article 3 to obtain civil remedies, such as damages, in addition to habeas relief, or other forms of injunctive relief, even though the *Hamdan* majority never suggested the possibility of damages for violations of Common Article 3. Of course, *Hamdan* did not provide any meaningful explanation of exactly when and how Common Article 3 might operate as federal law. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2794, 2794 (2006); see also Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995).

²⁵⁸ Doing so arguably creates tension with more recent human rights treaties that overlap with Common Article 3's articulation of humanitarian law. During ratification of the ICCPR, for example, the administration and the Senate agreed that it was not self-executing and would not change U.S. law. See International Covenant on Civil and Political Rights, S. EXEC. DOC. NO. 102-23, at 4, 12 (1992); Resolution of Ratification, ICCPR, pt. III(1), 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728–35 (2004) (suggesting non-self-execution declarations bar federal courts from "interpreting and

be applied in a way that is functionally equivalent to extraterritorial application of the Constitution. Yet, even then, to the extent the Constitution creates space for the new criminal process, Common Article 3 will not stand in the way.

B. The Scope of Specific Criminal Procedure Rights

This section considers some of the ways in which Fourth and Fifth Amendment and due process doctrine have developed to make room for the new criminal process in “ordinary” criminal cases. I want to stress that my aim is not to criticize these doctrines, most of which—whether or not I agree with them—are quite reasonable in at least some senses of the word. My point is simply that the overall shape of criminal procedure rights creates a significant amount of space for discretionary government action that has tangible and often harmful impacts on what an earlier generation described as life, liberty, and property.²⁵⁹

1. Search and Seizure

Justice Souter recently described the Court’s overall approach to Fourth Amendment doctrine in *Atwater v. City of Lago Vista*: “Courts attempting to strike a reasonable Fourth Amendment balance . . . [will] credit the government’s side with an essential interest in readily administrable rules.”²⁶⁰ These words go beyond Justice Scalia’s concern in *Anderson v. Creighton* about finding “reasonable” accommodations

applying international human rights law” and prevent treaties from creating “obligations enforceable in the federal courts”). Whether the MCA is itself a retrospective declaration that the Geneva Conventions are not self-executing is a close question that goes beyond the scope of this Article.

²⁵⁹ In addition to the doctrines discussed in the text, Eighth Amendment doctrine is also relevant. Officials may harm inmates if force is “applied in a good faith effort to maintain or restore discipline,” but they will be civilly liable if they act “maliciously and sadistically for the very purpose of causing harm.” *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)). Officials are likely to receive a great deal of latitude when order “reasonably” appears to be at stake. Still, the Eighth Amendment’s ban on “unnecessary and wanton” infliction of pain in the course of incarceration or other punishment seems clearly to outlaw gratuitous sadism. *Hudson v. McMillian*, 503 U.S. 1, 6–9 (1992); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); see *Hope v. Pelzer*, 536 U.S. 730 (2002) (holding Eighth Amendment violated when inmate was handcuffed to a hitching post for seven hours with his hands above his head as punishment for misbehavior on a work squad). *Hope* notwithstanding, the trend of court decisions runs against prisoner claims, and federal legislation has imposed significant procedural roadblocks. See Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996); *Woodford v. Ngo*, 126 S. Ct. 2378 (2006) (requiring prisoners to exhaust state administrative remedies before bringing federal claims, whether under § 1983 or in habeas); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003).

²⁶⁰ 532 U.S. 318, 347 (2001).

“between governmental need and individual freedom,”²⁶¹ because here Justice Souter admits that, for reasonableness to work in the interpretation of the right that limits police authority to search and seize, courts must put a thumb on the government’s side of the scale when they craft doctrine.²⁶²

To anyone who follows Fourth Amendment law, Justice Souter’s statement is remarkable only for its candor. Consider the following familiar doctrines. Warrants may not issue without probable cause, which the Supreme Court has defined, in a self-conscious departure from more restrictive possibilities, as a “practical, common-sense decision” that turns on whether, under the totality of the circumstances, there is “a fair probability that contraband or evidence of a crime will be found.”²⁶³ The determination “by resident judges and local law enforcement officers” that probable cause exists is reviewed deferentially by courts.²⁶⁴ When police do not have a warrant, they can still conduct a search if they obtain the target’s consent, and the target of the search has no right to be informed of her right to refuse consent.²⁶⁵ The predictable result is that a significant percentage of searches are consent searches, in large part because suspects feel that they cannot refuse their consent when a law enforcement official asks for it.²⁶⁶

Police also do not need a warrant if they have probable cause and an exception to the warrant requirement applies, such as exigent circumstances, plain view, or automobile searches.²⁶⁷ Although case-law has resisted expanding the exigent circumstances exception very far,²⁶⁸ the kinds of pressures created by a war on terror will put new strains on it.²⁶⁹ For its part, the reasonableness-based stop-and-frisk doctrine of *Terry v. Ohio*²⁷⁰ has expanded considerably. The Court now speaks, for example, of “a police officer’s prerogative, in accord with *Terry*, to conduct a protective search of a person who has already been legitimately stopped.”²⁷¹ In addition to the *Terry* doctrine, investigators may conduct some kind of search based on a showing of

²⁶¹ 483 U.S. 635, 643–44 (1987).

²⁶² *See id.* at 644–45.

²⁶³ *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The *Gates* Court rejected the “two-pronged test” of *Spinelli v. United States*, 393 U.S. 410 (1969). *See Gates*, 462 U.S. at 238.

²⁶⁴ *See Ornelas v. United States*, 517 U.S. 690, 699 (1996).

²⁶⁵ *See United States v. Drayton*, 536 U.S. 194, 206 (2002); *Ohio v. Robinette*, 519 U.S. 33 (1996).

²⁶⁶ *See Nadler, supra* note 245.

²⁶⁷ *See, e.g., California v. Acevedo*, 500 U.S. 565 (1991) (comparing search requirements for containers and automobiles); *Horton v. California*, 496 U.S. 128 (1990) (illustrating plain view); *Mincey v. Arizona*, 437 U.S. 385 (1978) (providing limits to exigency).

²⁶⁸ *Compare Flippo v. West Virginia*, 528 U.S. 11, 12, 14 (1999) (per curiam) (“process[ing] the crime scene” for 16 hours not justified by exigent circumstances), *with Warden v. Hayden*, 387 U.S. 294, 298–300 (1967) (upholding search of home entered by fleeing suspect).

²⁶⁹ *See Colorado v. Higbee*, 802 P.2d 1085 (Colo. 1990) (upholding warrantless search for a bomb as proper application of exigent circumstances exception).

²⁷⁰ 392 U.S. 1 (1968).

²⁷¹ *Florida v. J.L.*, 529 U.S. 266, 274 (2000).

reasonableness when they have “special needs.”²⁷² Indeed, the discretion and balancing, not to mention the preventive focus, that characterize the special needs doctrine make it a central part of the new criminal process. The Second Circuit’s recent, brief, and unanimous decision that special needs support suspicionless container searches of subway passengers in New York City indicates how easily war on terror concerns mesh with existing reasonableness and balancing methodologies and also demonstrates how normal, even central, the special needs doctrine has become.²⁷³

Officers seeking to execute a warrant “must announce their presence and provide residents an opportunity to open the door.”²⁷⁴ They must wait a “reasonable” amount of time before using force to gain entry, but the idea of exigent circumstances also applies to create an exception when police have “a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous, or futile, or . . . would . . . allow[] the destruction of evidence.”²⁷⁵ And, last Term, the Court held that the Constitution does not require an effective remedy for violations of the knock-and-announce rule.²⁷⁶

Importantly, police may use force on people as well as property when they execute a warrant. This power includes a “categorical” authority to detain people on the premises for the duration of the search, and the power to detain includes the ability to restrain with handcuffs or other “reasonable” force where the situation is “inherently dangerous.”²⁷⁷ The categorical power to detain, in turn, licenses increasing state violence. In the words of Justice Stevens, in inherently dangerous situations “it may well be appropriate to use both *overwhelming force and surprise* in order to secure the premises as promptly as possible.”²⁷⁸ While the analogy may seem tendentious, Justice Stevens’s words bring to mind the military’s “shock and awe” approach to the war in Iraq.²⁷⁹ At least rhetorically, then, Hardt and Negri may be correct that

²⁷² *Brown v. Texas*, 443 U.S. 47, 50–51 (1979), provides the analytical structure for the special needs exception that has been applied in complex—or perhaps simply inconsistent—ways in cases such as *Illinois v. Lidster*, 540 U.S. 419 (2004), *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), and *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990).

²⁷³ *MacWade v. Kelly*, 460 F.3d 260 (2d Cir. 2006).

²⁷⁴ *Hudson v. Michigan*, 126 S. Ct. 2159, 2162 (2006).

²⁷⁵ *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997). When the knock-and-announce rule applies, a wait of only fifteen to twenty seconds is reasonable when police are searching for drugs that can be disposed of relatively easily. See *United States v. Banks*, 540 U.S. 31, 38 (2003).

²⁷⁶ *Hudson*, 126 S. Ct. 2159; see *supra* notes 217–18 and accompanying text.

²⁷⁷ *Muehler v. Mena*, 544 U.S. 93, 98–100 (2005). Police also have authority to detain residents outside their home while waiting for approval of a warrant application. See *Illinois v. McArthur*, 531 U.S. 326 (2001).

²⁷⁸ *Muehler*, 544 U.S. at 108 (Stevens, J., concurring) (emphasis added).

²⁷⁹ See *Iraq Faces Massive U.S. Missile Barrage*, CBSNEWS, Jan. 24, 2003, http://www.cbsnews.com/stories/2003/01/24/evening_news/main537928.shtml (describing initial attacks on Iraq as a “shock and awe” strategy). The shock and awe approach is described in the National Defense University Press book by HARLAN K. ULLMAN & JAMES P. WADE, *SHOCK AND AWE: ACHIEVING RAPID DOMINANCE* (1996), available at <http://purl.access.gpo.gov/GPO/LPS29021>.

military and police activity are converging.²⁸⁰ Of course, it is the argument of this Article that doctrine does not lag too far behind the rhetoric.

The use of force, even overwhelming force, is thus part of the baseline police conduct that the Fourth Amendment permits. What is forbidden is the use of *excessive* force in the context of searches and seizures, which include arrests. The distinction between permitted force and excessive force turns on reasonableness,²⁸¹ a doctrine that serves—as I just suggested—as both a limitation and a delegation of power. Further, the Supreme Court has instructed lower courts that application of this standard turns not just on the reasonableness of the force itself, but also on the reasonableness of an official's belief about the need to use force.²⁸² In theory, then, the Fourth Amendment bars unreasonable force, but in practice, officials are likely to receive a great deal of latitude regarding their decisions on how much force to use because reasonable mistakes about whether to use force and how much force to use do not violate the Constitution. For an example of what this means on the ground, a police officer's belief that he must use deadly force to prevent the escape of a suspect—which the Supreme Court has permitted where there is “probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others”²⁸³—will receive little second-guessing from courts.²⁸⁴ This relatively deferential review weakens the Fourth Amendment's power to deter officers considering whether to use deadly force.

2. Interrogation

The Fifth Amendment's self-incrimination clause at first seems like a good candidate to restrain the new criminal process,²⁸⁵ but as with the Fourth Amendment the story is more complicated. Today, self-incrimination issues relating to the admission at trial of allegedly coerced statements usually fall under the doctrine of *Miranda v. Arizona*, which holds that before interrogating a suspect, police must inform him of his rights to remain silent and have the assistance of counsel, and that the exclusionary rule will apply to statements obtained in violation of this doctrine.²⁸⁶ Yet the

²⁸⁰ See HARDT & NEGRI, *MULTITUDE*, *supra* note 3.

²⁸¹ See *Graham v. Connor*, 490 U.S. 386, 388 (1989).

²⁸² See *Saucier v. Katz*, 533 U.S. 194, 205 (2001) (“If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, . . . the officer would be justified in using more force than in fact was needed.”).

²⁸³ *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). For a more recent application of the *Garner* rule, see *Brosseau v. Haugen*, 543 U.S. 194 (2004) (*per curiam*).

²⁸⁴ Indeed, because the *Garner* rule turns on probable cause, courts reviewing claims about the use of deadly force presumably must “give due weight to inferences drawn . . . by . . . local law enforcement officers.” *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

²⁸⁵ One of its original purposes was to prevent torture. See Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2651 (1996).

²⁸⁶ 384 U.S. 436 (1966).

Court also held that suspects can waive the right to remain silent, even though waiver takes place in the same atmosphere of psychological coercion that characterizes police interrogation generally.²⁸⁷ And, in fact, one study found that only 22% of suspects take advantage of their *Miranda* rights; the remaining 78% waive their rights.²⁸⁸

Commentators tend to agree that the combination of recognizing inherent psychological coercion while also allowing waivers creates tension in the doctrine.²⁸⁹ In my view, this tension largely dissipates if we read *Miranda* more modestly, as a case that backed away from the implications of *Escobedo v. Illinois*²⁹⁰ to hold that inherently coercive police interrogation is permissible.²⁹¹ The goal of *Miranda*, in other words, was to dispel only some of the psychological coercion inherent in custodial interrogation,²⁹² thus leaving open the possibility that the remaining coercion may be desirable.²⁹³ Whether or not Chief Justice Warren meant to insulate a baseline amount of coercion when he wrote the majority opinion, later cases that make exceptions to *Miranda* seem to adopt this reading.²⁹⁴ Contemporary interrogators have also, in Welsh White's phrase, "adapted to *Miranda*" by developing permissible methods for obtaining waivers of the right to remain silent.²⁹⁵ While not physically violent, these methods are often extremely coercive in the ways in which they deceive suspects and manipulate their fear, uncertainty, and deference to authority.²⁹⁶

²⁸⁷ *Id.* at 444, 475.

²⁸⁸ Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 653–54 (1996).

²⁸⁹ See Tracey Maclin, *A Criminal Procedure Regime Based on Instrumental Values*, 22 CONST. COMMENT. 197, 221 & n.44 (2005) (reviewing DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE (2003)).

²⁹⁰ 378 U.S. 478 (1964).

²⁹¹ *Miranda*, 384 U.S. 436.

²⁹² See *id.* at 467, 469–70 (stating the goal of the warnings is to "combat" coercion but that warnings cannot dispel the coercion inherent in interrogation).

²⁹³ John T. Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation after Chavez v. Martinez*, 39 GA. L. REV. 733, 812–13 (2005) [hereinafter Parry, *Constitutional Interpretation*].

²⁹⁴ For a summary of the exceptions, see WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §§ 9.5–.6 (4th ed. 2004). In addition, persistent uncertainty about the constitutional status of *Miranda* undercuts any effort to treat it as a robust doctrine. Recent cases declare both that it is prophylactic and that it cannot be overruled by Congress—hardly a stable view. For discussion of these issues, see Parry, *Constitutional Interpretation*, *supra* note 293, at 781–97.

²⁹⁵ WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 76 (2001).

²⁹⁶ White gives the example of a man suspected of sexually abusing his daughter. *Id.* at 88. The suspect was told that he had "a problem" and was "not normal," but neither was he "a very dangerous person," nor a criminal who's going to frighten people." *Id.* Rather, he was informed that he needed "help" for his own and his family's sake and that police could help him obtain it. *Id.* After an officer conducted a similar interrogation of Frank Miller, "he collapsed in a state of shock. He slid off his chair and onto the floor with a blank stare on his

Admissibility of statements in criminal trials is also governed by the due process voluntariness test, which the Court developed in the years before it held that the self-incrimination clause applied to the states and before *Miranda* transformed self-incrimination doctrine.²⁹⁷ A confession is involuntary in violation of due process if, under the totality of the circumstances, “‘a defendant’s will was overborne’ by the circumstances surrounding the giving of a confession.”²⁹⁸ Although this standard seems definitive, the due process test in fact has little traction. Not only is the voluntariness test famously difficult to apply, but few courts will find a confession to be involuntary in violation of due process if the suspect received the *Miranda* warnings, waived them, and thus apparently spoke free of Fifth Amendment compulsion.²⁹⁹

Going beyond admissibility, some cases from the mid-twentieth century suggest that due process or the privilege against self-incrimination could provide substantive protection against coercive interrogation regardless of whether the government ever seeks to use that information.³⁰⁰ More recently, however, four justices stated clearly in *Chavez v. Martinez* that the privilege against self-incrimination is only a trial right.³⁰¹ It applies only to efforts to introduce coerced testimony in a legal proceeding, has no other relevance to conduct outside the court, and will not support a claim for damages.³⁰² Concurring on this issue, Justices Souter and Br yer agreed that the plaintiff could not seek damages, but they were not willing to go as far as the plurality.³⁰³ For them, the privilege would almost never apply outside the courtroom, but they did not dismiss the possibility that it might apply in extreme cases in which plaintiffs made

face. The police officers sent for a first aid squad that took him to the hospital.” *Miller v. Fenton*, 796 F.2d 598, 603 (3d Cir. 1986). The court rejected Miller’s claim that the confessions had been obtained by coercion. *Id.* at 600.

²⁹⁷ See *Dickerson v. United States*, 530 U.S. 428, 434 (2000).

²⁹⁸ *Id.* (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)).

²⁹⁹ For difficulties applying the test, see WHITE, *supra* note 295, at 39–48. For the test’s functional overlap with *Miranda*, see *id.* at 120–22 and *Missouri v. Seibert*, 542 U.S. 600, 608–09 (2004).

³⁰⁰ In *Brown v. Mississippi*, a deputy sheriff whipped three suspects until they confessed. The court reversed the resulting convictions, stating that “[i]t would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions.” 297 U.S. 278, 286 (1936). In *Ashcraft v. Tennessee*, Justice Jackson dissented from reversal of a conviction based on a confession obtained after thirty-six hours of near continuous interrogation, but he took care to assert that “[i]nterrogation *per se* is not, while violence *per se* is, an outlaw.” 322 U.S. 143, 160 (1944) (Jackson, J., dissenting). In *Chambers v. Florida*, law enforcement officials obtained confessions from a group of tenant farmers after a five day interrogation that likely involved physical coercion. 309 U.S. 227 (1940). The Court’s opinion indicated that torture and related practices violate the Constitution, whether or not the government ever seeks to introduce the resulting confession. *Id.* The Court also rejected the claim that the interrogation was justified as an effort to solve a particularly heinous crime. *Id.*

³⁰¹ 538 U.S. 760, 766–67 (2003) (plurality opinion).

³⁰² *Id.*

³⁰³ *Id.* at 777–78 (Souter, J., concurring).

“powerful showing[s].”³⁰⁴ Presumably they had something like torture in mind, but given the facts of *Chavez*—in which a severely wounded man who believed he might be dying was interrogated relentlessly in a hospital emergency room by police who sought to take advantage of his pain and fear³⁰⁵—their definition of torture is not expansive. Similarly, given these facts, their idea of conduct that would provide a “powerful showing” does not include what international law and recent statutes describe as “cruel, inhuman, or degrading treatment.”³⁰⁶ By contrast, Justice Stevens considered the conduct in *Chavez* to be “the functional equivalent of an attempt to obtain an involuntary confession from a prisoner by torturous methods,” although he did not say that damages should be available for violation of the privilege.³⁰⁷

Interrogation issues thus are litigated along two tracks. When the government attempts to introduce allegedly coerced testimony at trial, the self incrimination and due process clauses will apply. When a person seeks damages for an allegedly coercive interrogation, courts will apply Fifth and Fourteenth Amendment substantive due process doctrine, which in turn has two prongs. First, conduct that “shocks the conscience” violates the Constitution.³⁰⁸ This test suggests the possibility of imposing meaningful—if vague—restraints on state violence and the new criminal process. But the Court declared in *County of Sacramento v. Lewis* that conduct does not shock the conscience unless it is “unjustifiable by any government interest.”³⁰⁹ Three justices applied this doctrine in a very straightforward way in *Chavez*: “the need to investigate whether there had been police misconduct constituted a justifiable government interest [allowing interrogation of Martinez] given the risk that key evidence would have been lost if Martinez had died without the authorities ever hearing his side of the story.”³¹⁰ Only three of the remaining six justices were willing to disagree publicly with that conclusion.³¹¹

If “any government interest” will justify otherwise conscience-shocking behavior, then this doctrine does not stand for much more than the proposition that the state

³⁰⁴ *Id.* at 778 (quoting *Miranda v. Arizona*, 384 U.S. 436, 515, 517 (1966) (Harlan, J., dissenting)).

³⁰⁵ *Id.* at 764 (plurality opinion).

³⁰⁶ See *supra* notes 87–100 and accompanying text (discussing the Detainee Treatment Act, the Military Commissions Act, the Convention Against Torture, and the International Covenant on Civil and Political Rights).

³⁰⁷ *Chavez*, 538 U.S. at 783 (Stevens, J., concurring in part and dissenting in part). Justice Stevens may agree with the *Chavez* plurality that the Fifth-Amendment privilege is only a trial right and will not support a damages claim. See Parry, *Constitutional Interpretation, supra* note 293, at 752 n.108, 773 n.230.

³⁰⁸ See *Rochin v. California*, 342 U.S. 165, 172 (1952).

³⁰⁹ 523 U.S. 833, 849 (1998).

³¹⁰ 538 U.S. at 775 (opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia, J.).

³¹¹ *Id.* at 787–88 & n.3 (Stevens, J., concurring in part and dissenting in part); *id.* at 796–99 (Kennedy, J., concurring in part and dissenting in part). Justice Ginsburg joined the relevant portions of Justice Kennedy’s opinion. *Id.* at 799 (Ginsburg, J., concurring in part and dissenting in part).

must have a purpose when it harms people; it cannot do so arbitrarily. The recent district court decision in *Arar v. Ashcroft*, concerning U.S. involvement in rendition and torture, suggests just such a possibility.³¹² Under the “any interest” language, individual claimants can win (and have rights) only if they prove that their interests outweigh those of the government. And all of this simply reflects Justice Scalia’s statement in *Anderson* and Justice Souter’s in *Atwater*.³¹³ In the new criminal process, rights are not trumps; they are merely the outcome of balancing tests between government and individual interests in which courts place a thumb on the government’s side of the scale.

The second way that conduct can offend substantive due process principles is by violating a fundamental right.³¹⁴ Although this doctrine likely provides stronger protection than the shocks-the-conscience test, it still makes room for exceptions. Conduct narrowly tailored to serve a compelling state interest is constitutional even if it violates fundamental rights.³¹⁵ Add to that the sometimes-enforced requirement that the claimed right be described with particularity, and the doctrine becomes conceptually malleable enough to allow at least some coercive or violent actions in the service of gathering information, especially under the compelling circumstances that many believe are presented by the war on terror.³¹⁶

³¹² The court’s analysis bears out the logical potential of substantive due process doctrine:

While one cannot ignore the “shocks the conscience” test established in *Rochin v. California*, that case involved the question whether torture could be used to extract evidence for the purpose of prosecuting criminal conduct, a very different question from the one ultimately presented here, to wit, whether substantive due process would erect a *per se* bar to coercive investigations, including torture, for the purpose of preventing a terrorist attack. . . . [W]hether torture always violates the Fifth Amendment . . . remains unresolved from a doctrinal standpoint.

414 F. Supp. 2d 250, 274 (E.D.N.Y. 2006) (internal citation omitted). For discussion of *Arar*, compare Julian Ku, *Why Constitutional Rights Litigation Should Not Follow the Flag*, A.B.A. NAT’L SECURITY L. REP., July 2006, at 1, with Stephen I. Vladeck, *Rights Without Remedies: The Newfound National Security Exception to Bivens*, A.B.A. NAT’L SECURITY L. REP., July 2006, at 1. For a thorough discussion of *Arar*’s interaction with Canadian and U.S. officials, and the treatment he received after being removed by U.S. officials to Syria, see COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS (2006), available at <http://www.ararcommission.ca>.

³¹³ See *supra* notes 260–61 and accompanying text.

³¹⁴ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

³¹⁵ *Id.*

³¹⁶ *Cf. Chavez*, 538 U.S. at 761–75 (opinion of Thomas, J.). It is not completely clear whether the shocks-the-conscience and fundamental rights approaches provide alternative footholds for damages claims. Justice Thomas treated them as distinct tests for this purpose in *Chavez*, and no other justice specifically disagreed with that view. Yet a majority of the Court suggested in *Lewis* that the fundamental rights approach applies only to legislative action, while executive action is judged solely under the shocks-the-conscience test. See *County of Sacramento v. Lewis*, 523 U.S. 833, 845–47 & n.8 (1998).

To close out this section and gesture toward the one that follows, consider the following statement by Justice Scalia for a majority of the Court last term in *Hudson v. Michigan*:

Assuming . . . that civil suit is not an effective deterrent, one can think of many forms of police misconduct that are similarly “un-deterred.” When, for example, a confessed suspect in the killing of a police officer, arrested (along with incriminating evidence) in a lawful warranted search, is subjected to physical abuse at the station house, would it seriously be suggested that the evidence must be excluded, since that is the only “effective deterrent”?³¹⁷

Justice Scalia’s point is that the exclusionary rule should apply only when it can deter police misconduct.³¹⁸ Yet he also admits that some police misconduct may go un-deterred,³¹⁹ which raises serious questions about the scope of constitutional rights to be free of such misconduct. Along the way, Justice Scalia—again, speaking for a majority of the Court—seems also to have rejected the idea, applied in the widely cited, but rarely followed, case of *United States v. Toscanino*, that outrageous government conduct might support dismissal of an indictment on due process grounds.³²⁰ At the end of the day, the new criminal process blurs the space between police and military action, and between due process and less refined methods. Yet that blurring sometimes goes in only one direction. While the new criminal process has achieved ample room in the criminal courtroom, at times it also restricts the space in which constitutional rights operate to the courtroom alone.

C. Rights, Remedies, and the New Criminal Process

Constitutional analysis of the new criminal process is not complete until we examine the remedies available for claimed violations of criminal procedure rights.

³¹⁷ 126 S. Ct. 2159, 2166–67 (2006).

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ 500 F.2d 267 (2d Cir. 1974) (requiring dismissal of indictment if defendant proved he was abducted and tortured by agents of the United States). *Contra* *United States v. Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995) (refusing to dismiss indictment of defendant who was kidnapped and claimed he was tortured by federal agents); *Matta-Ballesteros v. Henman*, 896 F.2d 255 (7th Cir. 1990) (holding government torture will not support dismissal of an indictment); Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 786 & n.358 (1995) (citing *Toscanino* as an example of a decision “repeatedly distinguished, even in the circuit of origin”). Less clear is whether there was much left of *Toscanino* to reject after *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). *See also* *United States v. Best*, 304 F.3d 308, 312–13 (3d Cir. 2002) (concluding there is not much left to reject).

The primary remedy for misconduct in criminal investigations is the exclusionary rule. Despite continued criticism by the Supreme Court, most recently in *Hudson*, the rule continues to be applied to most violations of the Fourth and Fifth Amendments that are litigated in the course of a criminal case.³²¹ But the exclusionary rule has an important limitation. By its terms, it only applies when the government seeks to introduce evidence in a state or federal judicial proceeding. It has no application to conduct outside the courtroom—however abusive that conduct may be—unless and until the government seeks to introduce the resulting evidence. This limit is important to the new criminal process because investigations may be less closely linked to seeking evidence for a criminal trial. As a consequence, application of constitutional doctrine to the investigative aspects of the new criminal process may require other remedies. To the extent those remedies fall short, the new process will operate with few legal constraints.

The most obvious alternate remedy for the violence that is often part of the new criminal process is criminal prosecution of the officials responsible for the conduct. But bringing a criminal prosecution requires police and prosecutors to exercise their discretion to collect evidence and seek charges—perhaps subject to pressure from their political superiors. Even when they do bring charges, prosecutors may seek a plea bargain in such cases, so that officials will not be held completely responsible for their actions. Other actors in the criminal justice system also play a role in the general failure of prosecution. Grand juries are often reluctant to indict police officers who testify that they were trying to do their job, and judges and petit juries are reluctant to convict in all but the most egregious cases. And, where officials can provide an explanation for the conduct for which they are being prosecuted, they likely will be able to raise reasonableness, self-defense, or necessity, either as formal defenses or informally as arguments against indictment to the grand jury and against conviction to the petit jury. Successful prosecutions do happen, but they are relatively rare and the number of prosecutions is small.³²²

Another problem with prosecutions is that they fail to prevent harm, both because they can only react to past events and because the paucity of prosecutions dilutes their deterrent value.³²³ A better remedy is to craft rules that restrain official conduct in advance. One way to accomplish that goal is through legislation and administrative

³²¹ See *Hudson*, 126 S. Ct. at 2165–67 (summarizing criticisms of and restrictions on the exclusionary rule); see also *id.* at 2170 (Kennedy J., concurring) (“[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.”); *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2680–81 (2006) (also taking a restrictive view of the exclusionary rule).

³²² See Sifton, *supra* note 15, at 489–90 (finding that few prosecutions have been brought in response to documented abuses of people detained in counter-terror operations).

³²³ Note here, of course, that I have partially embraced a preventive rationale after suggesting that such rationales should be viewed critically. See *supra* note 246. Yet there is some difference, I think, between attempts to prevent or constrain state power and violence, and efforts to harness state power with the goal of managing people’s lives to prevent undesirable acts.

regulations, which have had limited success, in part because they are likely to legitimate the new criminal process even as they regulate it.³²⁴

A second way to restrain official conduct in advance is through civil suits for injunctions against officials who violate constitutional rights.³²⁵ But in *City of Los Angeles v. Lyons*, the Supreme Court held that to seek injunctions in federal court against official conduct, individual plaintiffs must demonstrate their “standing” to do so, which translates into proof that they are suffering a continuing injury or face a definite, imminent, and personal threat of future injury.³²⁶ The rationale for imposing this requirement is that, without standing, anyone could sue to restrain government action, and such suits would inappropriately take the place of political action.³²⁷ With respect to people who have been harmed and who may seek damages for their injuries, the Court declared that without a continuing injury or credible fear of future harm, they are “no more entitled to an injunction than any other citizen.”³²⁸ Whether or not these reasons are persuasive, the impact of *Lyons* is clear. Most commentators agree that the decision “makes it virtually impossible for the victim of police abuse to secure injunctive relief against a local government entity for practices of its police or sheriff’s department.”³²⁹ The same result holds for injunction claims against federal officials.³³⁰

The remaining judicial remedy is a civil suit for damages against state officials under 42 U.S.C. § 1983 or against federal officials under the *Bivens* doctrine.³³¹ Damages claims raise a host of problems of their own. First is the possibility that, in the context of a suit involving torture or related mistreatment by federal officials, national security concerns would lead to dismissal of the suit—a defense which has, in fact, succeeded in at least two recent cases.³³² Second, claims against individuals confront

³²⁴ The discussion of legislative actions in Part I.B., *supra*, provides a good example.

³²⁵ The federal government has statutory authority to seek injunctions against patterns or practices of law enforcement conduct that violate civil rights, *see* 42 U.S.C. § 14141 (2000), but as with criminal prosecution, this power depends on the energy, resources, and commitment of executive branch officials, and the statute has been invoked infrequently since its enactment. Parry, *Judicial Restraints*, *supra* note 198, at 75.

³²⁶ 461 U.S. 95 (1983).

³²⁷ *Id.* at 111–13.

³²⁸ *Id.* at 111.

³²⁹ HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, *CIVIL RIGHTS LAW AND PRACTICE* 473 (2d ed. 2004); *see also* Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 WM. & MARY BILL RTS. J. 427, 501 n.172 (1997) (*Lyons* is “an almost insurmountable barrier”). On application of *Lyons* to class actions, compare *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (denying standing), and *Rizzo v. Goode*, 423 U.S. 362, 370–77 (1976) (same), with *County of Riverside v. McLaughlin*, 500 U.S. 44, 51–52 (1991) (allowing standing). Nor does the presence alone of a challenged practice in a statute or written policy suffice to show standing. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210–12 (1995).

³³⁰ *See Lewis*, 518 U.S. at 349–50.

³³¹ *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

³³² *See El-Masri v. United States*, No. 06-1667, 2007 U.S. App. LEXIS 4796 (4th Cir.

doctrines of absolute or qualified immunity. Absolute immunity, which applies primarily to judges, legislators, and prosecutors while they are performing those roles, prevents any suit for damages, no matter how egregious the conduct.³³³ Qualified immunity requires a court to dismiss the claim even if it concludes that a defendant's conduct violated the Constitution, if, at the time the defendant acted, the conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."³³⁴ That is to say, recovery is available only for violations of "clearly established" rights, and a right is not clearly established with respect to a specific claim unless "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [I]n the light of pre-existing law the unlawfulness must be apparent."³³⁵

For a damages claim for violation of the Fourth Amendment, a court applying the qualified immunity standard would ask whether an official reasonably believed that his actions amounted to a reasonable use of force under the circumstances, which includes the potential threat posed by the victim/plaintiff.³³⁶ For a substantive due process claim, the court would likely ask whether the official reasonably could have believed that his actions were serving "any government interest."³³⁷ In neither case will it be easy simply to say that the conduct was not only unlawful, but also that the unlawfulness was "apparent."³³⁸

Moving beyond these roadblocks, even in successful cases, damages are often an incomplete remedy. The Supreme Court has said that the primary purpose of damages in such cases is to compensate, not to deter.³³⁹ The resulting possibility, that damages

Mar. 2, 2007) (affirming use of state secrets privilege to dismiss a *Bivens* claim); *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 281–83, 285 (E.D.N.Y. 2006) (holding national security concerns are "special factors counseling hesitation" supporting dismissal of a *Bivens* claim, and not deciding whether dismissal was also required under the state secrets privilege).

³³³ *Compare* *Stump v. Sparkman*, 435 U.S. 349 (1978) (acting as a judge when signing sterilization order), *with* *Archie v. Lanier*, 95 F.3d 438 (6th Cir. 1996) (not acting as a judge when sexually assaulting people in judicial chambers).

³³⁴ *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

³³⁵ *Id.* at 615 (first alteration in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

³³⁶ *Saucier v. Katz*, 533 U.S. 194, 205 (2001).

³³⁷ *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (opinion of Thomas, J.) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)).

³³⁸ *But see* *Al-Kidd v. Gonzales*, No. CV:05-093-S-EJL, 2006 WL 2682346 (D. Idaho Sept. 27, 2006) (rejecting a qualified immunity claim brought in a FED. R. CIV. P. 12(b)(6) motion in a case seeking damages for allegedly unlawful arrest and detention during a terrorism investigation).

³³⁹ *See* *Carey v. Phipps*, 435 U.S. 247, 254–55 (1978). For discussion of additional issues relating to damages and deterrence, see Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 372 (2000). For discussion of inadequate documentation of litigation against police officers, which in turn

awards will be inadequate to deter constitutional violations, only highlights the ex post nature of the remedy. As with prosecutions, damages do not prevent harm. Indeed, one could argue that damages liability merely establishes the non-prohibitive cost of particular kinds of government action.

D. The Scope of Executive and Legislative Authority to Shape the New Criminal Process

Hamdan determined that the President cannot establish the new criminal process in the teeth of contrary legislation.³⁴⁰ It also indicates that the Court will interpret existing legislation generously to check what it determines to be executive overreaching.³⁴¹ How far the President may go in the absence of legislation remains unclear. In the words of Justice Jackson, “any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”³⁴² To the extent the President has unilateral power to accelerate the new criminal process as part of the war on terror, it should be seen as an emergency power that applies only in exceptional circumstances (“the imperatives of events”) and dissipates as the emergency abates.³⁴³ Although I would not press the claim too strenuously, President Bush’s authorization of indefinite detentions and his order creating military tribunals were arguably justified on emergency grounds at the time they were issued. Even if that were true, however, any emergency has long since passed, so that military commissions and indefinite detentions can currently be justified only by an act of Congress—and, of course, the Court dodged the emergency power question and found sufficient statutory authorization in *Hamdi* and *Hamdan*.³⁴⁴

The critical point to remember, however, is that the new criminal process extends beyond the doctrines that are emerging specifically to deal with the war on terror. The evolution of constitutional criminal procedure doctrine suggests that courts will defer to more ordinary efforts to expand the authority and discretion of law enforcement officials and prosecutors. A different way of making this point is to say that one never sees *Youngstown* applied to questions of “ordinary” law enforcement and

impedes meaningful analysis of the impact of § 1983 cases, see Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757 (2004).

³⁴⁰ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2757 (2006).

³⁴¹ *See id.* at 2786.

³⁴² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

³⁴³ *See Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2004) (Souter, J., concurring in part and dissenting in part); *infra* notes 373–82 and accompanying text (discussing emergency power).

³⁴⁴ *Hamdan*, 126 S. Ct. at 2772–74; *Hamdi*, 542 U.S. at 521 (plurality opinion). For good discussions of these issues, see Bradley & Goldsmith, *supra* note 167, at 252–53; Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1292–95 (2002).

prosecutorial power. Also important, and discussed in the next section, is the nature of emergency power itself. Specifically, a doctrine that the President's unilateral authority is confined to emergency situations will be small comfort if we live in a state of permanent emergency.

For its part, Congress has authority to limit the new criminal process through legislation. With the ambiguous exception of the Detainee Treatment Act and the even weaker exceptions of the Military Commissions Act and USA PATRIOT ACT reauthorization, Congress has not done so. Instead it has sometimes acquiesced in executive decisions and sometimes passed statutes that codify or expand the new criminal process.³⁴⁵ Congress's general willingness to date to authorize executive power means that the critical question is whether there are any constraints on the ability of Congress and the President, acting together, to expand the new criminal process. The previous sections have suggested that although the Supreme Court will review and sometimes reject these efforts, it will not put serious roadblocks in the path of the new criminal process. The decision to mold constitutional doctrine—including criminal procedure doctrine—to accommodate the shifting and expanding needs of the modern regulatory state was made long ago.

On the specific issues of detention and military commissions, *Hamdi* and *Hamdan* suggest a significant degree of deference to legislative solutions.³⁴⁶ Here, we are squarely in Justice Jackson's first category of separation of powers analysis, in which executive action pursuant to congressional authorization will be upheld unless the federal government as a whole does not have the power to act.³⁴⁷ Under that framework, Congress almost certainly has the power, for example, to take what could be terrorism prosecutions within the subject matter jurisdiction of the federal courts and put them before military commissions, subject to whatever constitutional requirements will apply to their specific procedures. Courts-martial are an established example of just this kind of structure.³⁴⁸ The statutory links between courts-martial and military commissions and the Court's stress on those links in *Hamdan*³⁴⁹ make the validity of similar treatment for military commissions almost certain.

The caveat to this analysis is a probable requirement for some ultimate federal court review.³⁵⁰ Ordinarily, a habeas corpus petition in federal court would be the

³⁴⁵ For discussion of congressional action in the war on terror, see *supra* Part I.B.

³⁴⁶ *Hamdan*, 126 S. Ct. at 2774–76.

³⁴⁷ *Youngstown Sheet & Tube Co.*, 343 U.S. at 635–37 (Jackson, J., concurring).

³⁴⁸ See *N. Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 66 (1982) (plurality opinion).

³⁴⁹ See 10 U.S.C. § 836 (2006); *Hamdan*, 126 S. Ct. at 2788–93.

³⁵⁰ See *Commodity Futures Trade Comm'n v. Schor*, 478 U.S. 833, 851 (1986) (articulating multi-factor test that includes asking whether “the ‘essential attributes of judicial power’ are reserved to Article III courts”); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 917–18 (1988) (suggesting non-Article III courts are generally permissible if some federal court review is available). I make few distinctions in this part of my analysis between citizens and aliens. I assume, post-*Rasul*, that at

obvious and probably sufficient method for such review. But the Detainee Treatment Act and Military Commissions Act cut off habeas corpus and other ordinary federal court remedies for aliens who have been found by CSRTs to be “illegal enemy combatants” or who have been convicted by military commissions.³⁵¹ These legislative decisions raise the specter of the suspension clause.³⁵² Still, even if aliens have a right to habeas review, “the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus.”³⁵³ Both statutes replace habeas with exclusive review in the D.C. Circuit and the possibility of review by the Supreme Court.³⁵⁴ The critical inquiry thus reduces to whether the limited scope of that review is “neither inadequate nor ineffective”³⁵⁵ for purposes of the suspension clause and whether the “‘essential attributes of judicial power’ are reserved to Article III courts”³⁵⁶ for purposes of the relationship between Article I and Article III courts.

The Detainee Treatment Act, as amended and reinforced by the Military Commissions Act, allows review by the D.C. Circuit on two issues. For review of CSRT decisions, the court may ask:

least some aliens held in U.S. custody overseas have some right to habeas review that is protected by the suspension clause and that aliens held in the U.S. likely have a greater right to habeas review. Whether that is in fact the proper doctrine goes beyond the scope of this Article. In *Boumediene v. Bush*, No. 05-5062, 2007 U.S. App. LEXIS 3682 (D.C. Cir. Feb. 20, 2007), the D.C. Circuit said no such right exists, but the Supreme Court probably will have to decide this issue in the near future. Further, even if the suspension clause applies, one still must determine what claims may be brought, an issue that implicates the complex and ambiguous doctrines of extraterritoriality. See Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 295–98 (2004); Katyal & Tribe, *supra* note 344, at 1303–04; *supra* notes 247–58 and accompanying text. Although the question of what claims are available to aliens is also beyond the scope of this Article, it should be clear that one of my larger points is that the law governing any available claim will reflect the concerns of the new criminal process.

³⁵¹ MCA, Pub. L. No. 109-366, §§ 7, 9, 120 Stat. 2600, 2635–37 (2006); DTA, Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2680, 2741–42.

³⁵² See *Boumediene*, 2007 U.S. App. LEXIS 3682 (holding aliens detained outside the U.S. have no constitutional right to habeas corpus); *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152 (D.D.C. 2006) (holding the MCA unconstitutionally suspended the writ of habeas corpus, but that an alien detained outside the U.S. has no constitutional right to invoke the common law writ of habeas), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (2005), *rev'd*, 126 S. Ct. 2749 (2006). For a good and concise overview of the suspension clause and the issues it raises, see David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59 (2006).

³⁵³ *Swain v. Pressley*, 430 U.S. 372, 381 (1977).

³⁵⁴ MCA, § 3(a)(1), 120 Stat. at 2622 (codified as amended at 10 U.S.C. § 950g (2006)); DTA, § 1005(e)(3), 119 Stat. at 2743; *Hamdan*, 126 S. Ct. at 2819 (Scalia, J., dissenting) (“[T]he Government does not dispute that the DTA leaves unaffected our certiorari jurisdiction . . . to review the D.C. Circuit’s decisions.”).

³⁵⁵ *Swain*, 430 U.S. at 381.

³⁵⁶ *Commodity Futures Trade Comm’n v. Schor*, 478 U.S. 833, 851 (1986).

(i) whether the status determination of the [CSRT] . . . was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs] (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.³⁵⁷

For review of military commission decisions, the questions are similar. As amended by the Military Commissions Act, the Detainee Treatment Act provides:

(i) whether the final decision was consistent with the standards and procedures specified for a military commission . . . ; and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.³⁵⁸

In his *Hamdan* dissent, Justice Scalia contended that this language satisfies any suspension clause concern because it allows review of "every aspect of the military commissions, including the fact of their existence and every respect in which they differ

³⁵⁷ DTA, § 1005(e)(2), 119 Stat. at 2742. The MCA provides that this review is available to all aliens detained by the United States for whom a CSRT has been conducted, not just for aliens detained by the Department of Defense at Guantanamo Bay. MCA, § 10, 120 Stat. at 2637.

³⁵⁸ DTA, § 1005(e)(3)(D), 119 Stat. at 2743, as amended by MCA, § 9(4), 120 Stat. at 2637. The Military Commissions Act also enacted a separate provision on the scope of D.C. Circuit review. 10 U.S.C. § 950g(c) (2006) ("(1) whether the final decision was consistent with the standards and procedures specified in this chapter; and (2) to the extent applicable, the Constitution and the laws of the United States."); MCA, § 3, 120 Stat. at 2622. To the extent this provision—particularly subsection 2—has a different meaning from the amended language of the DTA, it appears broader and more in line with Justice Scalia's interpretation of the DTA language in his *Hamdan* dissent, as discussed in the text. See *infra* text accompanying note 359. Note that the DTA had provided that D.C. Circuit review of military commissions was discretionary in some cases, see DTA, § 1005(e)(3)(B), 119 Stat. at 2743, but the MCA provided that review is as of right in all cases, see MCA, § 9(2), 120 Stat. at 2636–37. The deleted provision of discretionary review likely was unconstitutional for aliens held in the U.S. Whether it was unconstitutional for aliens held overseas is less clear. Finally, the MCA also changed the review process between the trial and the D.C. Circuit to provide for review of legal issues only by a new Court of Military Commission Review composed of military judges. See 10 U.S.C. § 950(f) (2006).

from courts-martial.³⁵⁹ By contrast, Justice Kennedy's *Hamdan* concurrence derided the pre-MCA review provisions for military commissions as compared to the review provisions of the UCMJ, and Judge Rogers recently asserted that the Military Commissions Act's review procedures fail to provide an adequate substitute for habeas with respect to CSRTs.³⁶⁰

If these review provisions are adequate and effective for purposes of the suspension clause—and issue that plainly remains in doubt—they are also likely to preserve the essential attributes of Article III power. The same analysis might hold for review of detention decisions as well, although the fact that a CSRT is far more of a summary proceeding than trial before a military commission weighs heavily against an automatic equation of the two for purposes of evaluating the adequacy of D.C. Circuit review.

Two important caveats. First, the statutes provide no review for people detained without either a CSRT hearing or a military commission trial. To the extent this category includes people present in the United States, the argument for its validity seems elusive at best.³⁶¹ Second, by barring conditions of confinement claims, the Military Commissions Act may also bar claims about transfer or rendition of prisoners to other countries, which again raises due process and related concerns in at least some cases.

The law of international extradition may provide a useful analogy for the review analysis. The person facing extradition is usually arrested and held in federal custody pending a hearing at which a federal judge or magistrate determines whether probable cause exists.³⁶² The procedure is more formal than a CSRT but significantly less extensive than trial before a military commission. There is no appeal from the result of the hearing; instead, if the person is found extraditable, the case goes to the Secretary of State for review and decision.³⁶³ Federal courts tend to characterize the extradition hearing as an Article I proceeding, not an Article III case.³⁶⁴ The extraditee may seek habeas relief in federal court, which goes some way toward satisfying concerns about vesting decisions about individual liberty in Article I tribunals. Critically, however,

³⁵⁹ *Hamdan*, 126 S. Ct. at 2818–19 (Scalia, J., dissenting) (emphasis omitted).

³⁶⁰ *See id.* at 2807 (Kennedy, J., concurring); *Boumediene v. Bush*, No. 05-5062, 2007 U.S. App. LEXIS 3682, at *66–74 (D.C. Cir. Feb. 20, 2007) (Rogers, J., dissenting).

³⁶¹ Whether it is unconstitutional for aliens held overseas is less clear. Plainly the internal-overseas distinctions is fodder for the new criminal process, as I explore to some extent in the discussion of extradition in the text.

³⁶² For discussion of the probable cause standard at both the arrest stage and the hearing stage of international extradition, as well as an argument that probable cause to arrest should be less formal than in domestic cases, see Roberto Iraola, *Foreign Extradition, Provisional Arrest Warrants, and Probable Cause*, 43 SAN DIEGO L. REV. 347 (2006).

³⁶³ For a summary of this process and analysis of the no-appeal rule, see John T. Parry, *No Appeal: The U.S.-U.K. Supplementary Extradition Treaty's Effort to Create Federal Jurisdiction*, 25 LOYOLA L.A. INT'L & COMP. L. REV. 543, 546–50 (2003).

³⁶⁴ *Id.* at 549. This conclusion derives from Judge Friendly's concern that the presence of executive review would make the extradition hearing unconstitutional if it were an Article III proceeding. Parry, *Lost History*, *supra* note 59, at 160–65.

the traditional scope of habeas review is narrow in extradition cases: “habeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.”³⁶⁵

If Justice Scalia’s interpretation of the Detainee Treatment Act is correct,³⁶⁶ then federal court review of military commission decisions is at least as broad as extradition habeas, which in turn suggests that this aspect of the Act’s appeal provisions is constitutional. With respect to CSRT review, the analogy of extradition habeas is less clear, because the process being reviewed is more extensive in extradition, with the result that one could argue that an equal or possibly narrower scope of review in extradition habeas is more palatable. Put differently, one could use the extradition analogy either way in the context of CSRT review.³⁶⁷ For the possible third category of people seeking to challenge their rendition or transfer to another country, the extradition analogy could support some kind of federal court review despite the statutory bar. The analogy holds best, however, for situations that are functionally similar to extradition, where the person is “in” the United States, which in turn simply forces the question of how to characterize places that are under U.S. jurisdiction, but outside its formal boundaries.

Once again, two caveats are in order, this time with respect to any use of extradition as an analogy. First, a person facing extradition is not in exactly the same position as a person seeking review of a CSRT or military commission decision—but neither are their situations entirely inapposite. The consequences of an extradition are serious. A person, perhaps a citizen, will be seized, removed from this country, and sent overseas, based solely on a finding of probable cause, to face a criminal process that may be far less rights-protective than our own and that could result in prolonged imprisonment. Second, extradition habeas doctrine also predates the mid- and late-twentieth century revolution in habeas review. Thus, rather than accepting it as authority for the

³⁶⁵ *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925) (emphasis omitted).

³⁶⁶ Note that the language of the second review provision enacted by the MCA, Pub. L. No. 109-366, § 9, 120 Stat. 2600, 2636–37 (2006), which is slightly different from the one created by the DTA (and amended by the MCA), Pub. L. No. 109-148, § 1005(e)(3), 119 Stat. 2680, 2743 (2006), suggests that he was correct or at least that Congress set out to make him correct after the fact.

³⁶⁷ The usefulness of the extradition analogy to the government in both circumstances is enhanced if one also notes that, like the military commission or CSRT decision, extradition touches on international relations, with the result that courts have been extremely deferential to the executive branch, despite the individual liberty issues involved. The Second Circuit went so far as to assert that, if there were no extradition statute, “the Executive Branch would retain plenary authority to extradite.” *Lo Duca v. United States*, 93 F.3d 1100, 1103 n.2 (2d Cir. 1996). Also worth noting, however, is that although such words warm the hearts of executive power proponents, they are flatly wrong from the perspectives of history and precedent. See *Parry, Lost History*, *supra* note 59, at 105–24.

constitutionality of Detainee Treatment Act review, one could respond that extradition habeas is itself inadequate and requires reform.³⁶⁸

My goal in analogizing to extradition is not entirely doctrinal, however. The law of extradition has always dealt with an exceptional situation, in which a sovereign determines whether and how to seize a person lawfully in its territory and transport that person to the territory of another sovereign for the purpose of criminal prosecution. To address this exceptional circumstance, U.S. law provides *less* process than in ordinary criminal cases. Note, too, the role of habeas. Habeas corpus—often portrayed as the bulwark against arbitrary state action—also becomes in this context a way of legitimizing departures from normal processes and affirming the government’s power.³⁶⁹ Put more concretely, habeas functions in extradition as a backstop that imposes minimal due process protections, while most of the real process takes place in other forums—either the Article I courtroom or the office of the Secretary of State. The same arrangement holds for CSRT and military commissions under the Detainee Treatment Act and the Military Commissions Act. In all of these cases, limited review arguably validates the exceptional process.

Going further, in the exceptional circumstance of using state power to expel a person from the country—a situation akin to exile—the law of extradition strips the person of normal rights. The result is that sovereign authority operates more freely on that person’s body and circumstances. Seen in this way, the extraditee is an example of what Agamben calls the *homo sacer*, the person reduced to “bare life” before the power of the state.³⁷⁰ Using the extradition analogy from this angle, we see again that the person held in indefinite military detention, the “ghost detainee” held by the CIA,

³⁶⁸ For citations to cases that favor expanded extradition habeas review and an argument in favor of reform, see Parry, *Lost History*, *supra* note 59, at 155–58 & n.326. A further distinction might be that extradition has often been described as a *sui generis* proceeding, see *United States v. Doherty*, 786 F.2d 491, 498 (2d Cir. 1986) (Friendly, J.), and therefore cannot be analogized to anything else (but query whether CSRT and military commission decisions are not also *sui generis*). One might also argue that extradition questions sound in due process and not under the suspension clause, but the adequate substitute inquiry under the suspension clause is not easily distinguished from a due process inquiry.

³⁶⁹ As Agamben puts it,

If it is true that law needs a body in order to be in force, and if one can speak, in this sense, of “law’s desire to have a body,” democracy responds to this desire by compelling law to assume the care of this body. . . .
Corpus is a two-faced being, the bearer both of subjection to sovereign power and of individual liberties.

AGAMBEN, *HOMO SACER*, *supra* note 7, at 124–25 (emphasis omitted). For criticism of Agamben’s analysis of habeas corpus, see Peter Fitzpatrick, *Bare Sovereignty: Homo Sacer and the Insistence of Law*, in *POLITICS, METAPHYSICS, AND DEATH*, *supra* note 10, at 49. For a more subtle use of habeas corpus as a marker for both liberal rights and submission to state authority, see Roberto Buonomano, *Humanity and Inhumanity: State Power and the Force of Law in the Prescription of Juridical Norms*, in *EVIL, LAW AND THE STATE: PERSPECTIVES ON STATE POWER AND VIOLENCE* 159, 164–65 (John T. Parry ed., 2006).

³⁷⁰ See AGAMBEN, *HOMO SACER*, *supra* note 7, at 6–11, 182–83. In describing the idea of bare life, Agamben uses the example of exile. See *id.* at 109–11.

the person facing trial before a military commission, and the person subjected to extraordinary rendition are also held in space that is exceptional as a matter of law. They, too, are reduced to bare life.

The analogy has one more step. The law of extradition is not reserved for aliens. The same process and the same limited rights also apply to citizens who face extradition to other countries,³⁷¹ with the result that they too may be reduced to bare life.³⁷² The exceptional space created by extradition law thus expands beyond aliens, the group of people that one might think are doomed to reside in a such a condition (indeed, their status typically helps define the contrasting status of the citizen who is thought not to be in that condition). Similarly, at least some of the new and exceptional processes associated with the war on terror are applied to citizens as well as aliens. The risk with the creation of exceptions is always that they will expand beyond their original, limited scope. And here the import of the new criminal process—the process that includes constitutional criminal procedure as well as the law of the war on terror—kicks in, because the doctrines that make up the new criminal process reveal that the exception is already becoming the rule across the bodies of citizens and aliens, residents and non-residents alike.

IV. THE NEW CRIMINAL PROCESS, EMERGENCY POWER, AND THE STATE OF EXCEPTION

At the beginning of this essay, I argued that the President and Congress have created a legal structure for a state of emergency. Since 9/11, constitutional law scholars have renewed the debate over the existence and constitutionality of emergency powers.³⁷³ Unlike the constitutions of many other countries, the U.S. Constitution

³⁷¹ See 18 U.S.C. § 3196 (2000); *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8–9, 18 (1936) (holding executive branch may extradite a citizen if authorized to do so by statute or treaty). The process created by the international extradition statute makes no distinction between citizens and aliens. See 18 U.S.C. § 3184 (2000); see also Parry, *Lost History*, *supra* note 59, at 123–24 (discussing treatment of aliens in extradition law and practice).

³⁷² AGAMBEN, *HOMO SACER*, *supra* note 7, at 128 (“Rights are attributed to man (or originate in him) solely to the extent that man is the immediately vanishing ground (who must never come to light as such) of the citizen.”); *id.* at 188 (“[W]e are not only . . . animals whose life as living beings is at issue in their politics, but also—inversely—citizens whose very politics is at issue in their natural body.”).

³⁷³ Contemporary academic discussion of emergency power and U.S. constitutional law begins at least with Jules Lobel’s prescient and insightful article, *Emergency Power and the Decline of Liberalism*, *supra* note 101. See also Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993). One might also go back to CLINTON ROSSITER’S *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* (1948). For important recent essays, see David Dyzenhaus, *Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order*, 27 CARDOZO L. REV. 2005 (2006); John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT’L J. CON. L. 210 (2004), available at <http://icon.oxfordjournals.org/cgi/reprint/2/2/210>; Levinson,

has little to say on this issue apart from making the President the commander in chief, preventing quartering of soldiers in people's homes, and allowing Congress to suspend the writ of habeas corpus in limited circumstances.³⁷⁴ To some scholars, the text supports a claim that there are no other emergency powers—anything the government does must accord with the Constitution in normal or emergency times.³⁷⁵ Others suggest the Constitution must include some inherent authority to act in cases of emergency (and this power is usually claimed for the executive branch).³⁷⁶ A third position maintains that there is no inherent constitutional emergency power, but the President may violate the Constitution in an emergency and then face whatever consequences Congress and the people wish to impose.³⁷⁷ Institutional and political controls, in short, might be able to limit and contain emergency power even if law cannot.³⁷⁸

In my view, the third position is most satisfying as a matter of doctrine, not simply because it best accords with liberal ideas about limited government and the rule of law, but also because it adopts a pragmatic position without the vice of giving an unrestricted license to the executive branch. That said, this model is not the dominant

supra note 205; Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2004); Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004). See also Gross, *Chaos and Rules*, *supra* note 101, which updates and extends Lobel's analysis.

³⁷⁴ See U.S. CONST. art. I, § 9, cl.2; *id.* art. II, § 2, cl.1; *id.* amend. III. For discussion of emergency provisions in other constitutions, see Gabriel L. Negretto & José Antonio Aguilar Rivera, *Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship*, 21 CARDOZO L. REV. 1797 (2000); Scheppele, *supra* note 373.

³⁷⁵ See Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801 (2004).

³⁷⁶ For varying versions of this view, see JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005); Ackerman, *supra* note 12; Paulsen, *supra* note 373. These views gain support from statements like this:

The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.

In re Debs, 158 U.S. 564, 582 (1895). The suggestion in *Debs* that the executive branch has inherent power to use violence to impose order has been qualified by more recent doctrinal developments, most notably *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), both of which stress the role of Congress. But the specific holding of *Debs*, that the executive has inherent authority to seek injunctive relief, 158 U.S. 564, has never been overruled. For additional discussion of *Debs*, compare Monaghan, *supra* note 373, with Parry, *Judicial Restraints*, *supra* note 198, at 131–34.

³⁷⁷ See Gross, *Chaos and Rules*, *supra* note 101; Lobel, *supra* note 101, at 1386–88.

³⁷⁸ See sources cited *supra* note 377.

approach as a matter of theory or doctrine. The Supreme Court's and Congress's responses to detention, interrogation, and military commissions demonstrate instead that we are more likely to see an uneven oscillation between the first two positions, so that courts and legislatures sometimes will reject claims of emergency power and at other times will accept them, perhaps with caveats. The result is a "two steps forward, one step back" process of increasing state and particularly executive power. Because of their roots in emergency situations, moreover, these increased powers tend to take a special form in which more familiar legal processes are pushed aside in favor of efficient discretionary authority.

Consider the following examples. In 1933, Franklin Roosevelt declared a banking emergency that lasted into the 1970s. In 1950, President Truman declared a national emergency that also lasted until the early 1970s. By the time those "emergencies" finally ended, the U.S. statute books contained roughly 470 pieces of legislation that provided the executive with some form of emergency power in particular circumstances.³⁷⁹ Myriad other statutes have nothing ostensibly to do with emergency power, but they follow what has become the "normal" model of providing relatively unconstrained delegations of lawmaking power or its equivalent from the legislature to the executive.³⁸⁰

Consider, too, the amount of time the U.S. has been at war in recent years. After World War II, the U.S. entered almost immediately into a Cold War with the Soviet Union that lasted until 1989, with numerous sub-wars and proxy wars in Korea, Vietnam, Africa, the Middle East, and Central America. The Gulf War against Iraq followed almost as soon as the Cold War ended, and after that swift victory, the U.S. remained on a military footing with respect to the Middle East that culminated in the second war against Iraq, as well as the war against Afghanistan (which can also be seen as part of an arguably separate war on terror). Military occupation of Afghanistan and Iraq continues, not to mention the persistence for twenty-five years of a cold war with Iran that appears to be spawning its own proxy wars. The idea of war has also played out in domestic policy. At least since the 1970s we have been embroiled in a war on crime that spawned an ongoing war on drugs and that overlaps with the war on terror, which itself has been underway for more than twenty years.³⁸¹ Even more, criminal issues have gone global, so that certain kinds of crime become seen not merely as domestic issues but also as transnational or international, and in the process become

³⁷⁹ See Chesney, *Sleeper Scenario*, *supra* note 49, at 4–5; Lobel, *supra* note 101, at 1404, 1408.

³⁸⁰ See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

³⁸¹ For good discussions of the impact that the war on drugs and the war on terror have on rights, along the lines of my discussion in Part III, see Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389 (1993); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002). For the duration of the war on terror, see Robert M. Chesney, *Careful Thinking About Counterterrorism Policy*, 1 J. NAT. SEC. L & POL'Y 169, 171–77 (2005) (reviewing PHILIP B. HEYMANN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* (2003)).

identified as national security issues. The result is a deepened sense of emergency, increased cooperation between national police forces, and “significant militarization of policing at home and abroad.”³⁸²

The war metaphor has spilled over into other policy issues as well. Indeed, the idea of “war” as a way of addressing social ills has been normalized for quite some time. And, as Hardt and Negri observe, “these discourses of war serve to mobilize all social forces and suspend or limit normal political exchange. . . . In these wars there is increasingly little difference between outside and inside, between foreign conflicts and homeland security.”³⁸³ With less critical distance, then—Secretary of Defense Donald Rumsfeld made the same point when he instructed us that “if we’re punctuated periodically with additional terrorist attacks,” we will remember “that we do have an obligation to ourselves and our system and our friends and allies around the world to behave responsibly” in the sense of maintaining a vigilant stance against terrorism akin to our position during the Cold War.³⁸⁴

Rumsfeld’s words also support Hardt and Negri’s contention that “[o]ne consequence of this new kind of war is that the limits of war are rendered indeterminate, both spatially and temporally.”³⁸⁵ That is to say, as I highlighted at the beginning of this Article.

[W]ar against a concept or set of practices, somewhat like a war of religion, has no definite spatial or temporal boundaries. Such wars can potentially extend anywhere for any period of time. Indeed, when U.S. leaders announced the “war against terrorism” they emphasized that it would have to extend throughout the world and continue for an indefinite period, perhaps decades or even generations. A war to create and maintain social order can have no end. It must involve the continuous, uninterrupted exercise of power and violence. In other words, one cannot win such a war, or, rather, it has to be won again every day.³⁸⁶

The result is that war not only becomes “virtually indistinguishable from police activity,”³⁸⁷ but also “tends to become a form of rule” in all senses of that term.³⁸⁸ While

³⁸² Mark Laffey & Jutta Weldes, *Representing the International: Sovereignty After Modernity?*, in *EMPIRE’S NEW CLOTHES*, *supra* note 8, at 121, 137.

³⁸³ HARDT & NEGRI, *MULTITUDE*, *supra* note 3, at 14.

³⁸⁴ Donald H. Rumsfeld, “*The American People Have Got the Staying Power for This*,” *N.Y. TIMES*, Sept. 4, 2002, at A10.

³⁸⁵ HARDT & NEGRI, *MULTITUDE*, *supra* note 3, at 14.

³⁸⁶ *Id.*

³⁸⁷ *Id.*; see also HARDT & NEGRI, *EMPIRE*, *supra* note 6, at 189 (“[T]he separation of tasks between the external and the internal arms of power (between the army and the police, the CIA and the FBI) is increasingly vague and indeterminate.”).

³⁸⁸ HARDT & NEGRI, *MULTITUDE*, *supra* note 3, at 341; see also HARDT & NEGRI, *EMPIRE*,

Hardt and Negri intend this analysis primarily to describe a global use of military force that takes the form of policing, my suggestion is that it applies nearly as well to domestic or internal politics and state power.

From all of this, one might conclude that “[m]odernity itself is defined by crisis.”³⁸⁹ Whether one goes so far, the examples and analysis above bear out Agamben’s claim that in modern states “the state of exception tends increasingly to appear as the dominant paradigm of government.”³⁹⁰ In a state of exception, normal rules are suspended, and sovereign authority wields discretionary power. When the suspension of normal rules becomes the new norm, then no space remains for anything but the decision; ordinary legal rules are pushed aside. If, therefore, as Carl Schmitt claimed, “the state remains, whereas law recedes” in a time of exception,³⁹¹ then as Mark Tushnet suggests, a permanent condition of emergency threatens “the end of the rule of law itself.”³⁹²

Yet the consequences of the modern state of exception are not so immediately dramatic. The “official” declaration of a war on drugs led not to lawless state action but to legislation: the Comprehensive Drug Abuse Prevention and Control Act of 1970.³⁹³ The same is true with the war on terror. The first part of this Article discusses some of the legislation enacted in response to the perceived threat of terror and refers to that process as the “structuring” of an emergency. In our current political climate, it may even be that the supposedly exceptional and temporary condition is a useful (dare one say necessary?) precondition for the expansion of normal regulation. If that is true, then the common linkage between the state of emergency and the discretionary decision is more complicated than it first appears. Private law and private and civil rights may recede in a state of emergency, but public, regulatory, and administratively-defined law—law that is characterized by discretion—remains and expands.

supra note 6, at 38 (suggesting uses of military force “take the form of police actions because they are aimed at maintaining an internal order. In this way intervention is an effective mechanism that through police deployments contributes directly to the construction of the moral, normative, and institutional order of Empire”).

³⁸⁹ HARDT & NEGRI, *EMPIRE*, *supra* note 6, at 76 (emphasis omitted).

³⁹⁰ AGAMBEN, *STATE OF EXCEPTION*, *supra* note 7, at 2. Not surprisingly, Hardt and Negri agree: “[T]he state of exception has become permanent and general; the exception has become the rule, pervading both foreign relations and the homeland.” HARDT & NEGRI, *MULTITUDE*, *supra* note 3, at 7 (emphasis omitted).

³⁹¹ CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 12 (George Schwab trans., The MIT Press 1985) (1922) [hereinafter SCHMITT, *POLITICAL THEOLOGY*].

³⁹² Mark Tushnet, *Emergencies and the Idea of Constitutionalism*, in *THE CONSTITUTION IN WARTIME*, *supra* note 12, at 45; see also BUTLER, *supra* note 20, at 50–100; Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt’s Theory of Emergency Powers and the “Norm-Exception” Dichotomy*, 21 *CARDOZO L. REV.* 1825, 1854, 1857 (2000); Lobel, *supra* note 101, at 1404.

³⁹³ See *Gonzales v. Raich*, 545 U.S. 1, 10–12 (2005).

Perhaps this is how exceptions and emergencies work in modern, liberal democracies. One does not simply see a general clamor for the firm hand of a leader who will guide and represent us better than a corrupt or indecisive legislature.³⁹⁴ Yet the failure to act is almost unthinkable. As issues arise one by one in a variety of areas, rational and well-intentioned policymakers inevitably conclude that increased government regulation is necessary, which in turn often takes the form of executive discretion girded by procedural frameworks.³⁹⁵ As we have seen with the development of the new criminal process, courts tend to go along with these changes. In short, as Schmitt recognized, “the exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind.”³⁹⁶ Order, moreover, is not just the application of discretion “justified by the appeal to essential values of justice.”³⁹⁷ Rather, as Agamben suggests, “instead of declaring the state of exception,” contemporary democracies “prefer[] to have exceptional laws issued.”³⁹⁸ The increasing room within our constitutional order for states of exception is thus simultaneously lawless and filled with law.

CONCLUSION

This Article has described the ways in which the war on terror has generated extraordinary criminal processes applicable to people suspected of terrorism. Further, I have suggested that these new processes are not contained within the war on terror. Instead, they reflect trends in ordinary criminal procedure. That is to say, the pressures that generate the processes associated with the war on terror apply more broadly,

³⁹⁴ For the claim that a leader who governs through acclamation may be as democratically legitimate as one elected by ballot—an idea that is not completely foreign to some executive power claims—see CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* 16–17 (Ellen Kennedy trans., 2d ed., The MIT Press 1985) (1926). For an idea of democratic participation “that is linked to the vitality of a population and to its capacity to generate a dialectic of counterpowers—a concept, therefore, that has little to do with the classical or the modern concept of democracy,” see HARDT & NEGRI, *EMPIRE*, *supra* note 6, at 373. Explaining exactly how this second concept—which insists on “the absence of every external limit from the trajectories of the action of the multitude,” *id.*—differs from the first is one of the problems that Hardt and Negri never quite overcome.

³⁹⁵ Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946), is the most significant such framework.

³⁹⁶ SCHMITT, *POLITICAL THEOLOGY*, *supra* note 391, at 12; see Paul A. Passavant, *From Empire’s Law to the Multitude’s Rights: Law, Representation, Revolution, in EMPIRE’S NEW CLOTHES*, *supra* note 8, at 95, 104–06.

³⁹⁷ HARDT & NEGRI, *EMPIRE*, *supra* note 6, at 18 (emphasis omitted).

³⁹⁸ AGAMBEN, *STATE OF EXCEPTION*, *supra* note 7, at 21; see also Ferejohn & Pasquino, *supra* note 373, at 216 (“A new model of emergency powers—the legislative model—has evolved over the past half century . . .”); Kanwar, *supra* note 189, at 573 (elaborating on this aspect of Agamben’s argument and linking it to contemporary constitutional theories of emergency power). Arendt’s distinction between positive and totalitarian law once again comes to mind. See *supra* notes 219–22 and accompanying text.

so that we are experiencing a general modification of the way in which our government investigates and imposes punishment on people. Going further, I have argued that these processes—the new criminal process—reflect a larger shift in our approach to governing, in which legally authorized discretion is increasingly valued as a way to respond to a steady stream of perceived crises.

The perils of this shift are large, but not always easily seen. As discretionary state power is mobilized, it may succeed in punishing and preventing harm and delivering security, comfort, and other benefits to specific populations. In addition, courts may shore up rights in one place or another to mitigate the impact of the new criminal process. But the link between the new criminal process and the legal and conceptual problems associated with the normalization of emergencies means that state power over all of us—over our bodies, our mobility, our words and actions, and of course our lives—continues to increase, particularly when our conduct intersects with the criminal law.

Yet in the near term, the extent of the Bush's administration's executive power claims and its insistence on a war paradigm for fighting terrorism have backfired to some degree. A large and sustained reaction could be forming, building to some extent on the Supreme Court's detention decisions, concern among many members of Congress and some military circles about coercion and military trials, and public unease with unconventional tactics. The shift in control of Congress after the 2006 elections and the looming election of a new President in 2008 underscore the possibilities of pushing back against the war model. Certainly many aspects of the new criminal process that relate to the war on terror are vulnerable, although the prospect of reversing the more widespread and entrenched aspects of the new criminal process is remote at best. Perhaps the most optimistic conclusion is to say, with Hardt and Negri, that it remains an open question whether these developments "will allow us to build sites of liberation or rather submit us to new forms of subjugation and exploitation."³⁹⁹

³⁹⁹ HARDT & NEGRI, *MULTITUDE*, *supra* note 3, at 285.