MILITARY COMMISSIONS, CRIMINAL COURT, AND THE CHRISTMAS DAY BOMBER

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Abstract: On December 25, 2009, Umar Farouk Abdulmutallab attempted to detonate an explosive device on a plane landing in Detroit. The attack was unsuccessful, but it spurred an important domestic debate regarding U.S. anti-terrorist programs and policies. In particular, the event fueled an argument over the proper forum for the interrogation and prosecution of terrorist suspects captured in the United States. Focusing on national security issues, some contended that treating Abdulmutallab as a criminal defendant in an Article III court, rather than subjecting him to a military commission, was imprudent and dangerous, while others insisted that it was entirely appropriate and responsible. This Note will probe this debate by comparing the two tribunals as each relates to the legal protections for suspects during interrogation. The Note argues that although some differences do exist, it is quite plausible that treating Abdulmutallab and other captured terrorist suspects as criminal defendants in Article III courts does not adversely impact intelligence gathering and national security.

INTRODUCTION

At approximately noon on Christmas Day in 2009, federal officials were notified about a passenger on Northwest Flight 253 who had attempted to detonate an explosive device while on board the aircraft.[1] Just prior to landing in Detroit, Umar Farouk Abdulmutallab, the so-called "Christmas Day Bomber," lit a device concealed in his clothing, igniting a fire on the plane.[2] The device failed to fully explode, and passengers and crew restrained the Nigerian national until officials could board the plane and take him into custody.[3]

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[1] Devlin Barrett, *Rights of Plane Bomb Suspect at Issue*, NEWSDAY, Jan. 25, 2010, at A20.

[2] Indictment at 2, 3, United States v. Abdulmutallab, No. 2:10-cr-20005 (E.D. Mich. Jan. 6, 2010).

[3] Barrett, s*upra* note 1.

The event understandably touched a nerve in the American public, as some observed that the series of intelligence failures which culminated in allowing Abdulmutallab to board the plane were frighteningly similar to the failures that led to 9/11.[4] In addition to the intelligence failures, there was also a firestorm of political controversy over the treatment of Abdulmutallab in the time immediately after the failed terrorist attack.[5] The argument generally divided along party lines, with Republicans contending that it was a mistake to bring criminal charges in an Article III court against Abdulmutallab rather than holding him as an unprivileged enemy belligerent before a military commission; Democrats, meanwhile, argued that criminal charges in civilian court were appropriate and customary.[6]

This Note analyzes the primary premise underlying the Republican criticism; namely, that putting Abdulmutallab in an Article III court grants him rights during interrogation that undermine American national security. This Note concludes that, indeed, there are some differences between the two tribunals in terms of the right to counsel and rights during interrogation, but the differences are not as significant as Republicans suggest. In fact, in the case of Abdulmutallab, it is quite possible that putting him in an Article III court does not adversely impact intelligence gathering at all.

Part I of this Note provides information about the events surrounding the interrogation of Abdulmutallab and an explanation of the Republican criticism of the process. It also provides a brief history of and the current state of military commissions. Part II evaluates features of both Article III criminal courts and military commissions. In particular, it analyzes a suspect's right to counsel and limitations on interrogation as conferred by domestic and international law. Finally, Part III of this Note compares the differences between the two tribunals and concludes that the differences are quite likely irrelevant to intelligence gathering in the case of Abdulmutallab and other similar situations where terrorists are captured in the United States.

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[4] *See, e.g.*, Thomas H. Kean & John Farmer Jr., Op-Ed., *How 12/25 Was Like 9/11*, N.Y. Times, Jan. 6, 2010, at A23.

[5] *See* Evan Perez, *Christmas Day Bomber: Criminal or Enemy Combatant?*, Wall St. J. (Jan. 5, 2010, 17:20 EST), http://blogs.wsj.com/washwire/2010/01/05/christmas-day-bomber-criminal-or-enemy-combatant/tab/article/.

[6] *See id.*; Letter from Eric Holder, U.S. Att'y Gen., U.S. Dep't of Justice, to Mitch McConnell, Senator, U.S. Senate (Feb. 3, 2010), at 3, *available at* http://www.justice.gov/cjs/docs/ag-letter-2–3–10.pdf.

I. Background

A. Miranda *and Political Controversy*

1. *Miranda* Warnings

Federal and local authorities apprehended Abdulmutallab when the plane landed.[7] While in their custody, he made incriminating statements regarding his efforts to bomb the plane.[8] Following initial treatment for his injuries, FBI and other federal agents questioned the terrorist suspect for fifty minutes without administering *Miranda* warnings, relying on an exception which allows custodial interrogation before *Miranda* warnings in cases where it is reasonable to believe that there is a threat to public safety.[9] After the fifty minutes, investigators took a five-hour break from questioning because Abdulmutallab's "deteriorating" medical condition required surgery.[10] Later, when a second team of agents started to question him, approximately ten hours after being arrested, he refused to speak and investigators subsequently read him his *Miranda* rights.[11] In the month that followed, after federal agents indicted Abdulmutallab in Article III criminal court and brought his family to the United States, reports indicate that he changed course and substantially cooperated with investigators at the urging of his relatives.[12]

2. Political Controversy

In the aftermath of the failed attack, Republican politicians and others forcefully questioned the prudence of trying Abdulmutallab and terrorists like him in a civilian court.[13] Sarah Palin led the charge from

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[7] Barrett, *supra* note 1.

[8] *Id.*

[9] Walter Pincus, *Christmas Day Bomb Suspect Was Read* Miranda *Rights Nine Hours After Arrest*, Wash. Post, Feb. 15, 2010, at A6. *Miranda* warnings were first established in the seminal case of *Miranda v. Arizona*, 384 U.S. 436 (1966). Briefly stated, *Miranda* requires that during custodial interrogation and before any questioning occurs, law enforcement must notify the suspect of his right to remain silent, right to an attorney, and inform him that any statements made could be used in his prosecution. *Miranda*, 384 U.S. at 444.

[10] Pincus, *supra* note 9.

[11] *Id.* Initial reports suggested that he stopped speaking after the *Miranda* warnings, but a subsequent account indicated he received *Miranda* warnings only after refusing to speak. *See* Barrett, *supra* note 1; Pincus, *supra* note 9.

[12] Jeff Zeleny & Charlie Savage, *Official Says Terrorism Suspect Is Cooperating*, N.Y. Times, Feb. 3, 2010, at A11.

[13] *See, e.g.*, Press Release, Lindsey Graham, Sen., U.S. Senate, Graham on Christmas Day Bomber Interrogation (Feb. 3, 2010), http://lgraham.senate.gov/public/index.cfm?Fuse

her Facebook account, proclaiming that "it simply makes no sense to treat an al-Qaeda trained operative willing to die in the course of massacring hundreds of people as a common criminal."[14]

Although the criticism has not always been focused, the main tenet of the Republican argument is that interrogating the accused as a criminal defendant and providing a defense attorney impedes intelligence gathering and threatens national security.[15] As an alternative, Republicans advocate for the use of military commissions, which were constituted to provide hearings for a number of the Guantánamo Bay detainees as a way for them to challenge their detainment.[16] In a letter to the Attorney General, high-ranking Senate Republicans blamed the administration for misguidedly treating Abdulmutallab as a criminal defendant, "rather than . . . an intelligence resource to be thoroughly interrogated in order to obtain potentially life-saving information."[17] The letter charged that the administration sacrificed valuable opportunities because of a "preoccupation with reading the Christmas Day bomber his *Miranda* rights."[18] Senator Lindsey Graham separately leveled a slightly different criticism, focusing on the legal counsel argu-

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Action=PressRoom.PressReleases&ContentRecord_id=94b692e5–802a-23ad-4641–1a34b485c7dd.

[14] Perez, *supra* note 5.

[15] *See* Graham, *supra* note 13; Press Release, Kit Bond, Sen., U.S. Senate, Bond Takes Aim at Administration's Dangerous Terror Policies (Feb. 2, 2010) (on file with author); Press Release, Orrin Hatch, Sen., U.S. Senate, Hatch, GOP Senators to Attorney General Holder: Christmas Bomber Is Not a Civilian (Jan. 21, 2010), http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=531c20c6–1b78-be3e-e08e-c8170a55c91f&Month=1&Year=2010.

[16] *See* Charlie Savage & Scott Shane, *Experts Urge Keeping Two Options for Terror Trials*, N.Y. Times, Mar. 9, 2010, at A15; Hatch, *supra* note 15. In addressing the closure of Guantánamo Bay, President Obama highlighted another possible category for some of the alleged terrorists held at Guantánamo: continued detention without trial before a military commission. Press Release, Barack Obama, President, Remarks by the President on National Security (May 21, 2009) [hereinafter Presidential Remarks], *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5–21–09. Such detainees would receive "periodic review" under "an appropriate legal regime . . . [that is] consistent with our values and our Constitution." *Id.* President Obama explained that for certain detainees a trial before a military commission would not be prudent because, while the government has proof that these individuals are dangerous due to their terrorist connections, it could not prove these specific charges in a military commission considering the deficiencies in the cases such as tainted evidence. *See id.* An analysis of this second system of review is beyond the scope of this Note, as Republicans have generally called for trying the suspect before military commissions. *See* Savage & Shane, *supra*.

[17] Letter from Mitch McConnell, Senator, U.S. Senate, to Eric Holder Jr., Att'y Gen., U.S. Dept. of Justice (Jan. 27, 2010), *available at* http://republican.senate.gov/public/index.cfm?FuseAction=Blogs.View&Blog_Id=2e202a47-d3a2–4135-a343–91cb3a8d720a.

[18] *Id.*

ment and asserting that there is a "reason why we have never given unlawful enemy combatants legal counsel at the time of capture . . . it was a mistake to read him Miranda rights after he was apprehended and to suggest otherwise is just political spin."[19]

Attorney General Holder responded to these various criticisms with a pointed letter of his own, underscoring that after 9/11, without exception, the practice has been to criminally charge any suspected terrorist captured in the United States.[20] The Attorney General further disputed the notion that valuable information could not be acquired while charging a terrorist criminally; he argued that "history shows that the federal justice system is an extremely effective tool for gathering intelligence."[21]

B. *Establishing Military Commissions*

Since the 9/11 attacks, the U.S. government has grappled with the question of the proper forum in which to hold terrorists accountable for their actions.[22] Proposals of what should be done have ranged from trying such individuals in traditional criminal courts to fashioning a brand new international tribunal.[23] Ultimately, the Bush administration favored creating a unique military tribunal now known as military commissions.[24]

The first iteration of these commissions was established by executive order.[25] The order limited the jurisdiction of the commissions to non-citizen members or associates of Al-Qaeda and delegated the duty of promulgating rules and procedures to the Secretary of Defense.[26] Notably, the order explicitly rejected any form of judicial review in a domestic court or international tribunal for verdicts rendered by the commissions.[27]

The first military commission hearing commenced in 2004, approximately thirty months after President Bush's order.[28] That hearing and others did not go smoothly, and critics at home and abroad criti-

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[19] Graham, *supra* note 13.

[20] *See* Holder, *supra* note 6, at 2.

[21] *Id.* at 4.

[22] *See* David J.R. Frakt, *An Indelicate Balance: A Critical Comparison of the Rules and Procedures for Military Commissions and Courts-Martial*, 34 Am. J. Crim. L. 315, 317–18 (2007).

[23] *Id.* at 318.

[24] *See id.*

[25] David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil Over the Guantánamo Military Commissions*, 12 Lewis & Clark L. Rev. 131, 147, 148 (2008).

[26] *See* Exec. Order No. 222, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

[27] *Id.*

[28] *See* Glazier, *supra* note 25, at 161.

cized the ostensibly ad hoc procedures that suggested the U.S. government was not fully prepared to provide an adequate adjudicatory body.[29] In fact, the United Kingdom successfully removed two of its own citizens from facing the commission, insisting that they must be given "fair trials."[30]

All of the military commissions were abruptly halted in 2006, when a 5–3 ruling by the Supreme Court invalidated the rules of the commission in *Hamdan v. Rumsfeld*, holding that their "structure and procedures violate both the [Uniform Code of Military Justice] and the Geneva Conventions."[31]

The Bush Administration and Congress responded quickly in 2006, passing the Military Commissions Act (MCA), which sought to adhere to the guidance of the Supreme Court in *Hamdan*, thus establishing a system consistent with international and U.S. legal standards.[32] The military commissions began to take the shape of the military's court-martial system.[33] The MCA implemented many changes to the military commissions; included among these changes are that the MCA: 1) created an appellate review board of military judges for rulings made by the trial panel presiding over the commission; 2) permitted further judicial review of these rulings by the Court of Appeals for the District of Columbia and the Supreme Court of the United States; 3) rendered secret evidence inadmissible, only allowing the adjudicator to consider evidence that the accused also could hear; and 4) assured the accused the right to be present at trial.[34]

Though distinct from the original commissions, the new commissions established by the MCA would nonetheless fail under the judicial scrutiny of the Supreme Court in 2008.[35] In *Boumediene v. Bush*, the Court struck down § 7 of the statute, which sought to strip Guantánamo Bay detainees of their habeas corpus rights, thus recognizing that such detainees could challenge their ongoing detention with a proper hearing in an Article III court or a sufficiently similar forum.[36] While the decision focused on detention and left the overall

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[29] *See id.*
[30] *Id.* at 157.
[31] Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006).
[32] *See* Frakt, *supra* note 22, at 318–19.
[33] *See* Glazier, *supra* note 25, at 176.
[34] *See id.* at 176–77.
[35] *See* Boumediene v. Bush, 553 U.S. 723, 732–33 (2008).
[36] *See id.*

system of military commissions intact, questions persisted as to its viability and constitutionality.[37]

In 2009, Barack Obama assumed the presidency, promising changes to military commissions.[38] On January 22, 2009, he signed an executive order suspending all commissions,[39] while underscoring that they had only led to three convictions in seven years of existence.[40] He called for Congress to amend the MCA, and improve upon the tribunal's faults.[41] Accordingly, Congress amended the Military Commissions Act (2009 MCA), which, among other important changes, bans the use of evidence obtained by "cruel, inhuman, or degrading treatment" and reverses the burden of proof with regards to the admissibility of hearsay evidence so that the accused no longer has to prove such evidence is unreliable.[42] The jurisdiction of the 2009 MCA extends to "unprivileged enemy belligerents."[43] Essentially, unprivileged belligerents encompass any person who is a member of al-Qaeda or an individual that engages or materially assists in hostilities against the United States.[44] In observing these changes, at least some scholars noted that military commissions evolved quite a bit since their first iteration and are substantially more fair and effective.[45]

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[37] *See* Gregory S. McNeal, *Beyond Guantánamo, Obstacles and Options*, 103 Nw. U. L. Rev. Colloquy 29, 31 (2008).

[38] *See* Presidential Remarks, *supra* note 16.

[39] Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

[40] Presidential Remarks, *supra* note 16.

[41] *Id.*

[42] Scott L. Silliman, *Prosecuting Alleged Terrorists by Military Commission: A Prudent Option*, 42 Case W. Res. J. Int'l L. 289, 291 n.11 (2009).

[43] 10 U.S.C. § 948b(a) (Supp. III 2009).

[44] *Id.* § 948a(7). The 2009 MCA also excludes "privileged enemy belligerents" from the category of "unprivileged enemy belligerents." *Id.* §§ 948a(6), 948a(7), 948b(a). In order for a captured detainee to be considered a "privileged enemy belligerent" they must fall under one of the eight categories of protected individuals in Article IV of the Geneva Conventions Relative to the Treatment of Prisoners of War. *Id.* § 948a(6).

[45] *See, e.g.*, Silliman, *supra* note 42, at 291.

II. Discussion

A. *Right to Counsel*

1. Right to Counsel in Military Commissions

Some, perhaps even all, unprivileged belligerents being tried before a military commission enjoy a constitutional right to counsel.[46] In 2004, after the Fourth Circuit Court of Appeals ruled that Yaser Hamdi did not have a right to immediately meet with an attorney, the Supreme Court asserted that Hamdi, a U.S. citizen detainee captured on the battlefield of Afghanistan and held in the United States, "unquestionably has the right to access counsel" with respect to proceedings on remand.[47]

In addition, the 2009 MCA provides that unprivileged belligerents "shall be represented" by defense counsel.[48] The statute allows the detainee to select any military or civilian counsel for representation in the commission; however, the civilian counsel, among other requirements, must be a U.S. citizen and obtain permission to handle sensitive national security information.[49] Moreover, if civilian counsel is selected, then military counsel, also known as Judge Advocates Generals (JAG), must assist as part of the defense team.[50]

With the integral role that JAGs play in the defense of the accused, obvious questions arise about their independence because they are lawyers employed by the military.[51] Such questions are merely speculative, however, because JAGs have been zealous advocates and "stubborn rule of law defenders" in the war on terrorism, even to the point that pro-

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[46] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 539 (2004). The reach of due process rights and the right to counsel for unprivileged belligerents mandated by *Hamdi* is still an unsettled legal issue. David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 Cal. L. Rev. 693, 743 n.227 (2009). Particularly complicated in the case of Abdulmutallab is that he had not established significant ties to the United States before being apprehended within U.S. borders. *See* Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) (noting that "once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment").

[47] *Hamdi*, 542 U.S. at 539. The Court avoided the question of whether Hamdi was immediately entitled to see an attorney after he was detained, only confirming that he should continue to have access going forward. *See id.*

[48] 10 U.S.C. § 949c(b) (Supp. III 2009).

[49] *See id.*

[50] *Id.*

[51] *See* David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 Stan. L. Rev. 1981, 1999 (2008).

ponents of the unitary executive theory in the Bush Administration viewed JAGs' penchant for independence as a major challenge to increasing Department of Defense control of the military.[52]

As a practical matter, even though the Constitution and the statutory rules affirm a detainee's right to counsel, some advocates have complained about the significant logistical impediments to meeting with individuals located at Guantánamo Bay.[53] Complaints include difficulty traveling to the island, two-week notice requirements before a meeting, and a limited number of scheduling slots due to a lack of facilities.[54] The continued relevancy of these concerns is called into question, however, by a recent review which found that in 2008, the detention facility hosted approximately 1800 attorney visits on behalf of approximately 200 detainees being held there.[55] Moreover, in the case of future unprivileged belligerents who are not detained at Guantánamo Bay, the logistical concerns related to traveling will presumably not be as cumbersome, where the detention occurs off of the isolated island.[56]

2. Right to Counsel for a Civilian Criminal

In relevant part, the Sixth Amendment of the U.S. Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel."[57] The Supreme Court interprets this right to not only require access to counsel, but to bar the government from eliciting statements from the accused in the absence of an attorney once criminal proceedings commence.[58] The right to counsel under the Sixth Amendment does not attach, however, until

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[52] *Id.* at 2000, 2001–02.

[53] *E.g.*, David Frakt, *The Difficulty of Defending Detainees*, 48 WASHBURN L. J. 381, 393–94 (2009).

[54] *Id.*

[55] *See* Presidential Remarks, *supra* note 16 (mentioning the approximate number of detainees in Guantánamo); Rev. of Dep't Compliance with President's Executive Order on Detainee Conditions of Confinement, U.S. Department of Defense 66 (2010) [hereinafter Detainee Report], http://www.defense.gov/pubs/pdfs/REVIEW_OF_DEPARTMENT_COMPLIANCE_WITH_PRESIDENTS_EXECUTIVE_ORDER_ON_DETAINEE_CONDITIONS_OF_CONFINEMENTa.pdf (stating that there were 1800 attorney-detainee visits in 2008).

[56] *See* Frakt, *supra* note 53, at 393–94 (describing some of the logistical difficulties of traveling to Guantánamo); Charlie Savage, *Closing Guantánamo Fades as a Priority*, N.Y. TIMES, June 26, 2010, at A13 (reporting that the Guantánamo prison is set to be closed but progress has stalled along with President Obama's proposal for alternative detainment camp locations).

[57] U.S. CONST. amend. VI.

[58] Massiah v. United States, 377 U.S. 201, 206 (1964).

the government initiates adversarial judicial proceedings, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[59]

Even though there are no specific Sixth Amendment obligations, a defendant is still protected before adversarial judicial proceedings commence because the Fifth Amendment demands the government provide the accused certain protections known as *Miranda* warnings.[60] Generally, under *Miranda*, once a defendant is taken into custody and before any interrogation can take place, law enforcement must advise the individual of their right to remain silent and their right to retain counsel.[61] If the accused asserts his right to counsel, all questioning must cease until an attorney is present.[62]

There are also significant exceptions to the *Miranda* doctrine.[63] Pertinent to this Note is the public safety exception, where the mandate for law enforcement to issue *Miranda* warnings before interrogation is suspended if there is a substantial threat to public safety.[64] The public safety exception provides that law enforcement may temporarily elect not to administer the warnings if the "need for answers to questions in a situation posing a threat to public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[65] In evaluating the exigency of each situation in which the exception is invoked, the judicial branch will defer to the decisions of the officials on the ground.[66]

B. *Interrogation Limits*

1. Limitations on Interrogations in Military Commissions

In 2006, the Supreme Court of the United States issued a decision in *Hamdan v. Rumsfeld* that struck down the Bush Administration's procedures for military commissions because, among other requirements, the commissions failed to comport with Article III of the 1949 Geneva Conventions (known as "Common Article III").[67] The majority seized

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[59] Kirby v. Illinois, 406 U.S. 682, 689 (1972).
[60] *See* Miranda v. Arizona, 384 U.S. 436, 439, 444 (1966).
[61] *See id.* at 444.
[62] *Id.* at 444–45.
[63] *See, e.g.*, New York v. Quarles, 467 U.S. 649, 657 (1984).
[64] *Id.* at 657.
[65] *Id.*
[66] *See id.* at 659.
[67] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006).

on the language in Common Article III that affords combatants "all the judicial guarantees which are recognized as indispensable by civilized peoples," and then reasoned that the MCA of 2006 did not meet that standard.[68]

The *Hamdan* ruling set the stage for President Obama's executive order, issued soon after taking office in 2009, in which he pronounced Common Article III as a minimum standard for all interrogations of individuals in U.S. custody.[69] The order further stipulated that interrogations would be consistent with the nation's other international obligations, such as the Convention Against Torture (CAT), as well as domestic laws like the Detainee Treatment Act (DTA).[70] President Obama specifically identified Army Field Manual 2–22.3 as the appropriate guide for interrogators in the field, as it was deemed to be in compliance with all of the aforementioned legal obligations.[71]

a. *Common Article III Limitations*

In relevant part, Article III of the 1949 Geneva Conventions requires parties to refrain from "violence to life and person" including "torture" when dealing with detainees, and it prohibits "outrages upon personal dignity, in particular, humiliating and degrading treatment."[72] Early in his presidency, President Obama ordered a Department of Defense commission to undertake the question of the specific application of Common Article III to detainee treatment.[73] As part of evaluating the treatment of individuals at Guantánamo, the specially-convened commission elaborated on the more specific obligations that flowed from Common Article III's broad principles.[74]

Specifically, the commission noted that in accordance with Common Article III, any form of sensory deprivation is prohibited.[75] They further explained that the broad mandate prohibits humiliation including rape, sexual assault, and subjecting detainees to "public curiosity"; moreover, it barred violence, threats of violence, or any physical force upon detainees except when in self-defense or other narrowly defined

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[68] *See id.* at 633–34 (quoting Geneva Conventions Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva]).

[69] Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

[70] *Id.*

[71] *See id.*

[72] Geneva, *supra* note 68, art. 3.

[73] Detainee Report, *supra* note 55, at 4.

[74] *See id.*

[75] *See id.* at 29.

emergency situations.[76] As a general rule, the commission announced that if all interrogators adhered to the instructions of Army Field Manual 2–22.3, the methods used would be in concert with Common Article III.[77]

b. *Army Field Manual 2–22.3 Limitations*

Army Field Manual 2–22.3, written and published in 2006, established a minimum standard for the treatment of any detainee in military custody and it identifies interrogation techniques consistent with international law.[78] The Manual very deliberately lays out the many forms of permissible interrogation methods in extended detail,[79] and its general overview of forbidden techniques tracks the language of Common Article III by prohibiting "cruel, inhuman or degrading treatment."[80] Specifically, among other more extreme techniques, it bans: forced nudity or sexually suggestive poses; placing tape or a hood over the eyes of a detainee; using military dogs in interrogation; and the deprivation of food, water, or medical care.[81]

The overall policy of the Manual is further underscored by its proposed method of evaluation for interrogators that question whether a particular technique crosses the line into a banned procedure.[82] It instructs soldiers to ask, "if the . . . technique were used by the enemy against one of your fellow soldiers, would you believe the soldier had been abused?"[83] Consequently, the Army Field Manual not only prohibits certain techniques in accordance with international law, but it also drives home the broader notion that enemies should only be subjected to tactics which soldiers would be comfortable having their comrades experience.[84]

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[76] *See id.* at 40, 49.

[77] *See id.* at 61.

[78] John Hendren, *Manual Defines Limits of Prisoner Interrogation*, NAT'L PUB. RADIO, (Sep. 6, 2006), http://www.npr.org/templates/story/story.php?storyId=5776992.

[79] *See* Dep't of the Army, Field Manual 2–22.3, Human Intelligence Collector Operations [hereinafter Field Manual], ch. 8.

[80] *Id.* at 5–74.

[81] *Id.* at 5–75.

[82] *See id.* at 5–76.

[83] *Id.*

[84] *See id.*

c. *Convention Against Torture and Detainee Treatment Act Limitations*

In addition to Common Article III and the Army Field Manual, the CAT and the DTA were also identified by President Obama in Executive Order 13491 as establishing the lawful parameters of detainee interrogation.[85] While the CAT is an international agreement and the DTA is domestic law, both documents ban torture as well as any "cruel, inhuman or degrading treatment or punishment."[86] What is more, in both the CAT and DTA, the United States interprets "cruel, inhuman or degrading treatment or punishment" according to the Fifth, Eighth, and Fourteenth Amendments of the U.S. Constitution.[87] That is, the interrogation or punishment that would contravene those constitutional limitations would also violate the government's international obligations under the CAT and its domestic law obligations under the DTA.[88] In this way, two of the laws which President Obama highlights as constraints on interrogation methods are coextensive with the legal protections of the U.S. Constitution on interrogation.[89]

2. Limitations on Interrogation for a Civilian Criminal

Just as the decision by the Supreme Court in *Miranda v. Arizona* expanded the opportunity of a criminal defendant to access counsel, the case similarly impacted a defendant's protections against law enforcement interrogation.[90] Once in custody, under *Miranda* and its progeny, a criminal defendant invoking his right to remain silent cuts off all questioning unless he freely chooses to subsequently waive that right and speak with authorities.[91]

In addition to the accused's right to end questioning as articulated in *Miranda*, the Due Process Clause also limits the conduct of law enforcement officials during the interrogation process.[92] Due process demands that any confession be voluntary, while taking into account

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[85] Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

[86] 42 U.S.C. § 2000dd(a) (2006); Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment art. 16, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 100–20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT].

[87] *See* 42 U.S.C. §§ 2000dd(a), 2000dd(d); William A. Schabas, The Abolition of the Death Penalty in International Law 403 (3d ed. 2002).

[88] *See* 42 U.S.C. §§ 2000dd(a), 2000dd(d); Schabas, *supra* note 87, at 403.

[89] *See* 42 U.S.C. §§ 2000dd(a), 2000dd(d); Schabas, *supra* note 87, at 403.

[90] *See Miranda*, 384 U.S. at 444.

[91] *See* Robert M. Bloom & Mark S. Brodin, Criminal Procedure: The Constitution and the Police 282 (5th ed. 2006).

[92] *See* Rogers v. Richmond, 365 U.S. 534, 541 (1936).

characteristics of the suspect as well as the degree of misconduct and coercion by law enforcement.[93] The case law holds that physical force during an interrogation makes any confessions or evidence obtained from those tactics involuntary and thus inadmissible at trial.[94] Similarly, threats of physical violence also are considered involuntary and violate the Due Process Clause.[95]

In establishing the contours of due process outside of the categorical prohibitions against violence and threats of violence, an inquiry into what is permissible by law enforcement is very fact sensitive.[96] For instance, the Supreme Court of Minnesota ruled that police threatening to charge a defendant with more crimes if he lied is involuntary, but the Second Circuit Court of Appeals upheld a confession when law enforcement referenced the electric chair as punishment and blatantly misrepresented evidence.[97] As another example, where police threatened to cut off state aid to a suspect's children if she did not confess, the Supreme Court found such actions "impellingly coercive" and thus involuntary,[98] but the Eighth Circuit Court of Appeals ruled that police bursting into a suspect's room at 6:30 in the morning, holding him naked, and asserting that he would go to jail for life if he did not cooperate did not render his subsequent confession involuntary.[99]

In another line of cases and constitutional restraints, the Supreme Court held that the substantive due process rights conferred by the Fifth and Fourteenth Amendments bars executive abuse of power that "shocks the conscience."[100] This inquiry is also fact sensitive as "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another."[101] As a constitutional matter, considering this standard as well as the aforementioned voluntariness requirement, courts have found the following conduct violates the Constitution: hand-cuffing a detainee to a post while standing up for a substantial period of time and beyond the time needed to ensure order; keeping the temperature at unreasonable levels in detention facilities; and questioning that lasts an entire day over the course of multiple

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[93] *See* Bloom & Brodin, *supra* note 91, at 232.

[94] *See* Commonwealth of Pennsylvania v. Claudy, 350 U.S. 116, 118 (1956).

[95] Sims v. Georgia, 389 U.S. 404, 407(1967).

[96] *See* Bloom & Brodin, *supra* note 91, at 232.

[97] *See* Green v. Scully, 850 F.2d 894, 903, 904 (2d Cir. 1988); State v. Garner, 294 N.W.2d 725, 727 (Minn. 1980).

[98] Lynumn v. Illinois, 372 U.S. 528, 534–35 (1963).

[99] U.S. v. Gallardo-Marquez, 253 F.3d 1121, 1123 (8th Cir. 2001).

[100] County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998).

[101] *Id.* at 850.

days.[102] In contrast, courts have not struck down practices such as extended solitary confinement or constant lighting during detention so long as authorities are doing so in order to promote order or safety.[103]

III. Analysis

The provisions for access to counsel and the legal limitations on interrogations for detainees tried before military commissions are substantially similar to those involving an Article III criminal suspect.[104] The principal ground for any differentiation is that, unlike Article III suspects, military commission detainees are not entitled to *Miranda* warnings.[105] Nevertheless, any adverse impact on national security caused by administering or not administering *Miranda* warnings is tenably refuted by scholarship which concludes that *Miranda* does not negatively affect law enforcement efforts in any empirically demonstrable way.[106] Moreover, as a matter of anecdotal evidence, the case of Abdulmutallab does not undermine this argument.[107]

A. *Right to Counsel Comparison*

In certain respects, the right to counsel under military commissions is commensurate with the right to counsel enjoyed by criminal defen-

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[102] *See* Leyra v. Denno, 347 U.S. 556, 561 (1954); Michael John Garcia, Interrogation of Detainees: Requirements of the Detainee Treatment act, H.R. Rep. No. RL33655, at 4 (2009), *available at* http://assets.opencrs.com/rpts/RL33655_20090826.pdf.

[103] Garcia, *supra* note 102, at 4–5.

[104] *See* 10 U.S.C. § 949c(b) (Supp. III 2009) (stating that unprivileged belligerents shall be represented by counsel before a military commission); 42 U.S.C. §§ 2000dd(a), 2000dd(d) (2006) (asserting that no individual in U.S. custody shall be subject to cruel, inhuman, or degrading treatment as defined by the Fifth and Fourteenth Amendments of the U.S. Constitution); Massiah v. United States, 377 U.S. 201, 206 (1964) (holding that a criminal defendant must be represented by counsel after indictment); Bloom & Brodin, *supra* note 91, at 231–32 (discussing the Due Process Clause limitations on interrogations for Article III criminal suspects).

[105] *Compare* 10 U.S.C. §§ 948, 949 (Supp. III 2009) (containing no reference to *Miranda* rights or any analogous protections in military commissions), *and* Ronald Sievert, *A New Historical Perspective on National Security Law Policies During the Bush Administration and Their Implications for the Future; Constitutional in Conception, Problematic in Implementation*, 7 Rutgers J. L. Pub. Pol'y 35, 92 (2009) (asserting that detainees do not enjoy *Miranda* rights in military commissions), *with* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding that criminal defendants are entitled to *Miranda* warnings).

[106] *See* Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U. L. Rev. 500, 506 (1996).

[107] *See* Pincus, *supra* note 9 (noting that Abdulmutallab stopped speaking with authorities before being read his *Miranda* rights).

dants.[108] The 2009 MCA states the accused "shall be represented . . . before a military commission," and the Constitution similarly requires that the right of the accused to counsel attaches at the commencement of adversarial judicial proceedings.[109] What is more, there is no evidence to suggest the caliber and zeal of counsel representing an unprivileged belligerent—whether it is JAG or a team consisting of civilian attorneys and JAG—would necessarily be less than that of an attorney representing an Article III criminal.[110] Despite some past problems with attorney access at Guantánamo, a recent Department of Defense report concludes the attorneys of the most recent detainees who were charged under the MCA have "access to their detainee clients and the means to seek redress in the event they believe their access is unreasonably curtailed."[111] In the interests of not being too sanguine, it should be underscored that there are a range of challenges still faced by attorneys representing military commission detainees,[112] but as a comparative matter, many defense lawyers in Article III courts also operate in an imperfect criminal justice system with glaring inequities and difficulties.[113]

Despite the aforementioned similarities, a critical difference between military commissions and Article III courts is that no constitutional or legal authority asserts that unprivileged belligerents are entitled to the warnings and protections of *Miranda*.[114] At the beginning of any custodial interrogation, *Miranda* requires, among other things, that a suspect be explicitly informed of his right to counsel and that questioning cannot proceed in the absence of an attorney without an affirmative waiver of the right.[115] Thus, although unprivileged belligerents possess the right to an attorney for the military commission proceedings once they are charged, there is no legal obligation that they be offered

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[108] *See* 10 U.S.C. § 949c(b); *Massiah*, 377 U.S. at 206.

[109] *See* 10 U.S.C. § 949c(b); *Massiah*, 377 U.S. at 206.

[110] Luban, *supra* note 51, at 2000 (suggesting that JAGs may even be more effective rule of law defenders than civilian attorneys).

[111] Detainee Report, *supra* note 55, at 67.

[112] *See* Matthew Ivey, *Challenges Presented to Military Lawyers Representing Detainees in the War on Terrorism*, 66 N.Y.U. Ann. Surv. Am. L. 211 *passim* (2010) (surveying the many challenges faced by military lawyers representing military commission detainees).

[113] *See* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 Hastings L.J. 1031 *passim* (2006) (highlighting the myriad difficulties for indigent defendants in the criminal justice system).

[114] *Compare* 10 U.S.C. §§ 948, 949 (containing no reference to *Miranda* rights or any analogous protections in military commissions), *and* Sievert, *supra* note 105, at 92 (asserting that detainees do not enjoy *Miranda* rights in military commissions), *with Miranda*, 384 U.S. at 444 (holding that criminal defendants are entitled to *Miranda* warnings).

[115] *Miranda*, 384 U.S. at 444.

access to an attorney before that point.[116] Moreover, a very important legal question remains in situations where an unprivileged belligerent requests counsel at the beginning of custodial interrogation. This precise question has not yet been resolved by the courts.[117]

Another important difference between military commissions and Article III proceedings is that, once formal charges are filed in an Article III court, the attorney becomes the intermediary between the state and the accused, and the Sixth Amendment bars the government from eliciting statements outside the presence of counsel.[118] No such constitutional right exists with military commissions, and the 2009 MCA does not prohibit custodial interrogation of the suspect once the military commission commences.[119]

B. *Comparison of Limitations on Interrogation Techniques*

Myriad sources of law are now interpreted to apply to terrorists held as unprivileged belligerents.[120] In fact, the standards of treatment in some of those sources explicitly peg the protections of detainees to what is permitted by the U.S. Constitution under the Fifth, Eighth, and Fourteenth Amendments.[121] Both the DTA and CAT use the Constitution to mark the outward bounds of permissible techniques.[122]

Still, the fact that the Constitution is invoked as a marker of sensible treatment of unprivileged belligerents does not mean that the permissible interrogation techniques of an alleged purse-snatcher will be the same as that for a terrorist suspect.[123] Justice Jackson famously remarked that the Constitution is not a "suicide pact,"[124] and Supreme

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[116] *See* 10 U.S.C. § 949c(b); Sievert, *supra* note 105, at 92.

[117] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 539 (2004) (observing that Hamdi "unquestionably has the right to access counsel" regarding proceedings on remand, but not addressing whether he had the right to counsel immediately after he was detained); Cole, *supra* note 46, at 742 n.227 (noting that the extent of the right to counsel is still being debated by advocates).

[118] *Massiah*, 377 U.S. at 206.

[119] *See* 10 U.S.C. §§ 948, 949 (containing no reference to *Miranda* rights or any analogous protections); Padilla *ex rel.* Newman v. Bush, 243 F. Supp. 2d 564, 600 (S.D.N.Y. 2002) (finding no Sixth Amendment rights for detained enemy combatants), *aff'd in part and rev'd in part sub nom.* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *rev'd and remanded* 542 U.S. 426 (2004).

[120] Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

[121] *See* 42 U.S.C. §§ 2000dd(a), 2000dd(d); SCHABAS, *supra* note 87 (indicating that the obligations of CAT are coextensive with the Fifth and Fourteenth Amendments).

[122] *See* 42 U.S.C. §§ 2000dd(a), 2000dd(d); SCHABAS, *supra* note 87.

[123] *See* County of Sacramento v. Lewis, 523 U.S. 833, 850 (1998).

[124] Terminello v. City of Chicago, 337 U.S. 1, 37 (1948) (Jackson, J. dissenting).

Court jurisprudence quite reasonably holds that due process is not subject to a "mechanical application" and law enforcement conduct that "shocks in one environment may not be so patently egregious in another."[125] To this end, commentators note that permissible techniques for those accused of more pedestrian crimes may be different than those permitted for use on suspected terrorists;[126] however, this would be the case irrespective of whether the accused is held as an unprivileged belligerent or an Article III criminal.[127]

The notion that the protection for alleged terrorists during interrogation is equivalent to the constitutional safeguards for accused criminals in the Article III context is further bolstered by recent interpretations of Common Article III in the Geneva Conventions.[128] In a 2009 executive order, President Obama identified Common Article III as a "minimum baseline" for treatment of all detainees under authority of the United States.[129] Common Article III explicitly bans physical violence, and the Department of Defense interprets the provision to also ban threats of physical violence.[130] Similarly, the constitutional requirement of due process also prohibits violence and threats of violence in the interrogation process.[131]

Conversely, while international and domestic legal limitations on the interrogation of detainees are equivalent to the protection of Article III criminal suspects under the Constitution, unprivileged belligerents do not enjoy the prophylactic constitutional protection of *Miranda*.[132] Just like the safeguards of the right to counsel, law enforcement is not required to advise belligerents of their right to remain silent as they would with an Article III criminal suspect.[133] Of course, the significance of this difference is somewhat mitigated by the current practice at Guantánamo Bay, which makes all of its interrogations voluntary and reports that one-third of its interrogations are initiated by detainees.[134]

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[125] *Lewis*, 523 U.S. at 850.
[126] GARCIA, *supra* note 102.
[127] *See id.*
[128] *See* Geneva, *supra* note 68, art. 3; Detainee Report, *supra* note 55, at 40.
[129] Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).
[130] *See* Geneva, *supra* note 68, art. 3; Detainee Report, *supra* note 55, at 40.
[131] *See* Sims v. Georgia, 389 U.S. 404, 407(1967).
[132] Sievert, *supra* note 105, at 92.
[133] *See Miranda*, 384 U.S. at 444; Sievert, *supra* note 105, at 92.
[134] *See* Detainee Report, *supra* note 55, at 61.

C. *Are the Republican Criticisms Merited?*

Republicans are right to assert that the accused in an Article III criminal court enjoys different rights with respect to counsel and interrogation as compared to a detainee prosecuted in a military commission.[135] Although unprivileged belligerents and criminal suspects are entitled to the same protection under the Due Process Clause of the Fifth and Fourteenth Amendments as it relates to physical and mental abuse, belligerents do not enjoy the prophylactic constitutional protection of *Miranda*.[136] Additionally, although there is a right to counsel in military commissions as well as Article III criminal courts,[137] there is no constitutional mandate requiring belligerents to be advised of this right and no Sixth Amendment obligation that limits authorities from speaking with the belligerent unless his lawyer is present, once adjudicatory proceedings commence.[138] Importantly, then, the question becomes whether these differences actually undermine intelligence gathering and national security. And, more specifically, whether the treatment of Abdulmutallab as an Article III criminal defendant was sensible in terms of national security, as the Obama Administrations insists, or if this argument is "ridiculous" and the "whole process of criminalizing the war is misguided," as one leading Republican asserted.[139]

1. Practical Effects of the Differences in Procedural Rights

Undermining the Republican argument and perhaps contrary to popular perceptions, it is likely that the issuing of *Miranda* warnings to terrorist suspects does not make a significant difference as far as intelligence gathering goes.[140] Among law enforcement officials, the "pervasively shared" view is that "*Miranda* safeguards do not pose any serious

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[135] *Compare* 10 U.S.C. §§ 948, 949 (containing no reference to *Miranda* rights or any analogous protections in military commissions), *and* Sievert, *supra* note 105, at 92 (asserting that detainees do not enjoy *Miranda* rights in military commissions), *with Miranda*, 384 U.S. at 444 (holding that criminal defendants are entitled to *Miranda* warnings).

[136] *Compare* 10 U.S.C. §§ 948, 949, *and* Sievert, *supra* note 105, at 92, *with Miranda*, 384 U.S. at 444. *See* Rogers v. Richmond, 365 U.S. 534, 541 (1936) (holding that due process limits interrogation methods by law enforcement); SCHABAS, *supra* note 87, at 403 (indicating that the obligations of CAT are coextensive with the Fifth and Fourteenth Amendments).

[137] *See* 10 U.S.C. § 949c(b); *Massiah*, 377 U.S. at 206.

[138] *See* 10 U.S.C. §§ 948, 949 (containing no reference to *Miranda* rights or any analogous protections); *Massiah*, 377 U.S. at 206.

[139] *See* Holder, *supra* note 6; Graham, *supra* note 13.

[140] *See* Schulhofer, *supra* note 106, at 506.

impediment to effective law enforcement."[141] Generally, academics concur with this assessment.[142] In attempting to quantify the effects of *Miranda*, one important study maintained that even accepting an opponent's questionable methodology, the adverse impacts of *Miranda* could only be estimated to have lost convictions 0.78% of the time.[143] Moreover, the study concludes that, "[f]or practical purposes, *Miranda*'s empirically demonstrable harm to law enforcement is essentially nil."[144]

A likely rebuttal to this argument is that the metric behind the *Miranda* data focuses on convictions, whereas the argument of Republicans is not that the United States will experience a decline in convictions, but that issuing *Miranda* rights decreases the likelihood of obtaining important intelligence.[145] This line of argument is suspect, however, because the explanation for why so little convictions are lost is that the same information can be obtained using alternative interrogation techniques while nonetheless employing the prophylactic procedure of *Miranda*.[146] That is, experience shows that *Miranda* warnings do not protect against investigators finding the truth, but rather, the warnings protect criminals from investigators' use of coercive methods of getting to the truth.[147] If one accepts this notion, then it becomes difficult to make the argument that *Miranda* is somehow unduly restrictive of intelligence gathering and should never be issued to a terrorist suspect who could possibly possess national security information.[148] Indeed, scholars and law enforcement generally believe that *Miranda*'s adverse impact on law enforcement is minimal.[149]

Even if one does not accept this argument, two more related but distinct points still undercut the assertion that putting alleged terrorists

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[141] *Id.* at 501.

[142] Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 389 (1996).

[143] Schulhofer, *supra* note 106, at 506.

[144] *Id.*; *see also* George C. Thomas III, *Plain Talk About the* Miranda *Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933, 935 (1996) (concluding that according to available data, *Miranda* "has had no effect on the overall confession rate, using 'confession' to include all incriminating statements"). One of the leading studies pointed to by opponents of *Miranda* concludes that *Miranda* has led to 3.8% lost convictions. Cassell, *supra* note 142, at 438. However, the methodology leading to this figure has been vigorously disputed. Schulhofer, *supra* 106, at 505–06.

[145] *See* Schulhofer, *supra* note 106, at 506 (analyzing the social impacts of *Miranda* in terms of lost convictions).

[146] *See id.* at 561, 562 (the fundamental purpose of *Miranda* is "not to eliminate confessions, but to eliminate compelling pressure in the interrogation process").

[147] *See id.*

[148] *See id.*

[149] *Id.* at 501; Cassell, *supra* note 142.

in Article III criminal courts, and thus following *Miranda* and its progeny, impedes intelligence gathering.[150] First, only one out of every five criminal defendants will actually exercise their *Miranda* rights.[151] Moreover, those with felony records are four times as likely to invoke their rights as those without because of their past experience with the criminal justice system.[152] Thus, even if one believed *Miranda* significantly impacted an interrogator's ability to collect national security information, presumably most terrorist suspects would not have previous experience with the U.S. criminal justice system, and thus would be less likely to invoke their *Miranda* rights.[153]

Second, and more importantly, *Miranda* jurisprudence factors in exigencies such as critical national security matters, and makes exceptions in instances where the "need for answers to questions in a situation posing a threat to public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[154] Therefore, even if one accepts the argument that *Miranda* warnings restrict intelligence gathering, the public safety exception of *Miranda* mitigates the potential effect of this point because it allows law enforcement to not issue the warnings when there is an immediate need for answers.[155] The fact that *Miranda* entails a balancing test which weighs the potential threat suggests that courts and law enforcement would apply the exception even more broadly in the context of terrorist interrogations.[156] Attorney General Eric Holder has acknowledged the value of this exception to *Miranda* for law enforcement in the case of terrorist plots, and he recently asked Congress for more clarity and guidance in applying the decades-old doctrine in the modern age.[157]

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[150] *See* New York v. Quarles, 467 U.S. 649, 657 (1984); Richard Leo, *The Impact of* Miranda *Revisited*, 86 J. Crim. L. & Criminology 621, 654 (1996).

[151] *See* Leo, *supra* note 150, at 654.

[152] *Id.* at 654–55.

[153] *See id.*

[154] *See Quarles*, 467 U.S. at 657.

[155] *See id.*

[156] *See id.*; *see also* John M. Allen, Note, *Expanding Law Enforcement Discretion: How the Supreme Court's Post-September 11th Decisions Reflect Necessary Prudence*, 41 Suffolk U. L. Rev. 587, 595 (2008) (positing that the public safety exception of *Quarles* is "necessary to [a] successful antiterrorism investigation").

[157] *See The Justice Department: Hearing of the H. Comm. on the Judiciary*, 111th Cong. (2010) (response to questioning by Eric Holder, Att'y Gen. of the United States). In the hearing, Attorney General Holder explained his prior remarks to major press outlets about the Department of Justice seeking guidance with respect to applying the public safety exception of *Miranda:* "[W]e think that with regard to that small sliver—only terrorism-related matters, not in any other way, just terrorism cases—that modernizing, clarify-

Moving beyond *Miranda*, another difference between the interrogations and right to counsel of an unprivileged belligerent in a military commission versus the accused in an Article III criminal court is that a belligerent possesses no Sixth Amendment right barring questioning outside the presence of counsel once judicial proceedings commence.[158] If an alleged terrorist were tried in an Article III court, the required presence of an attorney during interrogations could render interrogations less effective, or simply create a logistical impediment.[159] Thus, it is certainly plausible that this difference could hamper intelligence gathering, as the Sixth Amendment attaches as early as the prosecutor filing an indictment or arraigning the accused.[160]

Nevertheless, the Sixth Amendment right to have counsel present during interrogations may be waived by a defendant at any time during the judicial proceedings.[161] Moreover, once the military commission commences, although there is no right to have counsel present during interrogations, the unprivileged belligerent still has access to at least one attorney.[162] Thus, whatever supposed interference results from an attorney's presence during interrogations in an Article III proceeding could nonetheless occur during pre-interrogation detainee-counsel meetings; the belligerent can even condition his speaking with authorities on his attorney being present.[163] In this way, although there is a difference between Article III courts and military commissions in terms of legal rights, these differences become much less apparent when one examines their practical effects.[164]

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ing, making more flexible the use of the public safety exception would be . . . something beneficial." *Id.* Reports on his initial comments preceding the Congressional hearing framed the issue as the Obama Administration asking the legislature to "carv[e] out a broad new exception" and to "loosen the Miranda rule." *See* Charlie Savage, *Holder Backs a* Miranda *Limit for Terror Suspects*, N.Y. Times, May 10, 2010, at A1. However, his testimony before the House Judiciary Committee made clear that he was only seeking the imprimatur and wisdom of the legislature in applying the Supreme Court case holding to the realities of the threat of terrorism. *See Justice Department Hearing*, *supra*.

[158] *Compare* 10 U.S.C. §§ 948, 949 (containing no reference to *Miranda* rights or any analogous protections), *and Padilla*, 233 F. Supp. 2d at 600 (finding no Sixth Amendment rights for detained enemy combatant), *with Massiah*, 377 U.S. at 206 (holding that a criminal defendant enjoys a constitutional right to counsel after he is indicted).

[159] *See* Kirby v. Illinois, 406 U.S. 682, 689 (1972).

[160] *See id.*

[161] Montejo v. Louisiana, 129 S.Ct. 2079, 2085 (2009).

[162] *See* 10 U.S.C. § 949c(b).

[163] *See id.*

[164] *See id.*

2. Application to Abdulmutallab

Applying the aforementioned analysis to the case of Abdulmutallab underscores why it is quite plausible that treating the Christmas Day Bomber as an Article III criminal suspect did not make a significant difference in terms of national security intelligence.[165] Abdulmutallab would have received a lawyer regardless of whether he was charged as an Article III criminal or an unprivileged belligerent.[166] In addition, the Fifth and Fourteenth Amendments would have limited the interrogation practices of authorities irrespective of his status.[167]

Of course, if Abdulmutallab were held as an unprivileged belligerent, he would not have been read *Miranda* warnings, and early reports indicate that Abdulmutallab stopped talking to authorities after receiving *Miranda* warnings.[168] Later reports, however, asserted that authorities did not issue *Miranda* warnings until after he refused to speak,[169] and that he was legally questioned by authorities under *Miranda*'s public safety exception in the time before the warnings were issued.[170] Indeed, the event which seemed to trigger his reluctance to speak was not the *Miranda* warnings, but the fact that he spent about four hours in surgery improving what was a "deteriorating" condition over the course of the initial interrogations.[171]

Whatever the exact course of events, it is undisputed that Abdulmutallab resumed answering questions about a month later, in January 2010.[172] The Federal Bureau of Investigation enlisted the help of his family, and reports indicate that Abdulmutallab subsequently cooperated for a number of days and provided significant intelligence to authorities.[173]

Thus, the case of Abdulmutallab illustrates precisely why treating him as a criminal defendant did not significantly undermine intelligence gathering efforts.[174] The *Miranda* warnings issued to him do not

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[165] *See id.*; *Massiah*, 377 U.S. at 205; *Rogers*, 365 U.S. at 541; SCHABAS, *supra* note 87 (indicating that the obligations of CAT are coextensive with the Fifth and Fourteenth Amendments).

[166] *See* 10 U.S.C. § 949c(b); *Massiah*, 377 U.S. at 205.

[167] *See Rogers*, 365 U.S. at 541; SCHABAS, *supra* note 87 (indicating that the obligations of CAT are coextensive with the Fifth and Fourteenth Amendments).

[168] *See* Sievert, *supra* note 105, at 92; Barrett, s*upra* note 1.

[169] Pincus, *supra* note 9.

[170] Holder, *supra* note 6, at 4.

[171] Pincus, *supra* note 9.

[172] *See* Zeleny & Savage, *supra* note 12.

[173] *Id.*

[174] *See id.*

appear to have altered his decision to stop talking to authorities, and even if they had, shrewd and resourceful interrogation tactics managed to get him to speak again.[175] Moreover, the apparent success with cajoling him to speak a second time suggests that the attached right to counsel was not a major impediment to interrogation efforts.[176]

Abdulmutallab's case is not an aberration.[177] There are many cases in recent history where law enforcement treated suspected terrorists with the same procedures as Article III criminal defendants and got similar results.[178] Richard Reid, the infamous shoe bomber, received *Miranda* warnings multiple times over a two-day period without exercising his rights or discontinuing cooperation as a result.[179] Similarly, alleged terrorists L'Houssaine Kherchtou and Nuradin Abdi both provided important counter-terrorism intelligence after receiving *Miranda* warnings.[180] In this way, practical experience does not suggest that putting a terrorist suspect in an Article III court necessarily undermines intelligence collection.[181]

D. *Are Military Commissions Useless?*

In spite of the similarities highlighted in the previous discussion between the rights of detainees in military commissions to those of an Article III criminal suspect, military commissions are not useless.[182] Indeed, there are other concerns which support the use of military commissions.[183] For one, military commissions are "portable" and can be held on any U.S. military base throughout the world; thus, municipal

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[175] *See* Pincus, *supra* note 9; Zeleny & Savage, *supra* note 12. This course of events fits one of the central arguments made by those who argue the social costs of *Miranda* are low. *See, e.g.*, Schulhofer, *supra* note 106, at 561–62. The reason that *Miranda* does not sacrifice confessions is because law enforcement can get a confession even when a person is aware of his constitutional rights. *See id.*

[176] *See* Zeleny & Savage, *supra* note 12.

[177] *See* Mike Allen, *Shoe Bomber Was Read His* Miranda *Rights*, Politico (Feb. 2, 2010, 14:40 EST), http://www.politico.com/news/stories/0210/32399.html.

[178] *See, e.g.*, *id.*; Holder, *supra* note 6, at 4.

[179] Allen, *supra* note 177.

[180] Holder, *supra* note 6, at 4.

[181] *See id.*

[182] *See* 10 U.S.C. § 949c(b) (stating that unprivileged belligerents shall be represented by counsel before a military commission); 42 U.S.C. §§ 2000dd(a), 2000dd(d) (asserting that no individual in U.S. custody shall be subject to cruel, inhuman, or degrading treatment as defined by the Fifth and Fourteenth Amendments of the U.S. Constitution); *Massiah*, 377 U.S. at 206 (holding that a criminal defendant must be represented by counsel after indictment); Bloom & Brodin, *supra* note 91, at 231–32 (discussing the Due Process Clause limitations on interrogations for Article III criminal suspects).

[183] *See* Silliman, *supra* note 42, at 294.

and state governments would not shoulder the considerable expense of providing security for a terrorist trial.[184] In addition, military commissions are typically considered more efficient and may deliver verdicts more quickly.[185]

Another very significant difference between Article III courts and military commissions is that the latter offer the possibility of more flexibility with evidentiary rules.[186] For instance, at a time of military conflict, it may be too onerous for the government to adhere to the strict rules of hearsay, and evidentiary requirements may be adjusted to reflect this reality.[187]

Finally, there is some force to the argument that international terrorists are committing acts of war, and thus ought not to be treated as domestic criminals simply as a matter of principle.[188]

Yet, while these concerns (and more) are certainly legitimate and may lead one to conclude that military commissions are the most appropriate forum for international terrorists, it goes too far to say that treating the Christmas Day Bomber and other terrorist suspects as Article III criminal suspects inevitably puts the United States at risk.[189] The legal protections provided to suspects in Article III courts in terms of access to counsel and interrogation limits are largely the same as in

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[184] *Id.*

[185] *Id.*

[186] *See* Keith S. Alexander, Note, *In the Wake of September 11th: The Use of Military Tribunals to Try Terrorists*, 78 Notre Dame L. Rev. 885, 913 (2003).

[187] *See Hamdi*, 542 U.S. at 533–34.

[188] *See* Fred Kaplan, *Cheney's War*, Slate (Feb. 18, 2010), http://www.slate.com/id/2245172/pagenum/all/. Of course, this sort of position cuts both ways, as some have argued al-Qaeda terrorists represent no State and recognizing their attacks as acts of war confers an undeserved "mark of respect" upon them. Wesley K. Clark & Kal Raustiala, Op-Ed., *Why Terrorists Aren't Soldiers*, N.Y. Times, Aug. 8, 2007, at A19. The inimitable Judge William Young more forcefully asserted this notion when presiding over the sentencing hearing of the Shoe Bomber Richard Reid. *See* Hon. William G. Young, *A Lament for What Was Once and Yet Can Be*, 32 B.C. Int'l & Comp. L. Rev. 305 app. at 328 (2009). In response to Reid's declaration that "I am at war with your country," Judge Young replied:

> You are not an enemy combatant. You are a terrorist. You are not a soldier in any war. You are a terrorist. To give you that reference, to call you a soldier gives you far too much stature. Whether it is the officers of government who do it or your attorney who does it, or that happens to be your view, you are a terrorist. And we do not negotiate with terrorists. We do not treat with terrorists. We do not sign documents with terrorists. We hunt them down one by one and bring them to justice.

See Reid: "I Am at War with Your Country," CNN (Jan. 31, 2003, 11:10 EST), http://www.cnn.com/2003/LAW/01/31/reid.transcript/.

[189] *See* Schulhofer, *supra* note 106, at 506.

military commissions, and it is quite plausible that the type of tribunal used to handle these types of criminals does not make a difference in terms of national security.[190]

Conclusion

The issue of terrorism and how the United States treats captured terrorist suspects evokes significant criticism and debate from academic, legal, and political circles as well as everyday citizens. There is no doubt that people passionately disagree on many of the central issues including what to do with terrorists such as Abdulmutallab. Those who argue that terrorists should be treated as unprivileged enemy belligerents and thus tried before military commissions rightfully deserve a place at the table to advance their ideas; however, there is no place for debating without facts, and mischaracterizing the obligations of the United States under domestic and international law. There are some differences between the way Abdulmutallab and terrorists like him would be treated in Article III criminal court as compared to military commissions, but it is far from certain that such differences would adversely impact intelligence gathering efforts. While there are other good reasons to support military commissions, politicians, administration officials, and citizens who passionately care about this issue must not lose sight of this point.

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[190] *See* 10 U.S.C. § 949c(b) (stating that unprivileged belligerents shall be represented by counsel before a military commission); 42 U.S.C. §§ 2000dd(a), 2000dd(d) (asserting that no individual in U.S. custody shall be subject to cruel, inhuman, or degrading treatment as defined by the Fifth and Fourteenth Amendments of the U.S. Constitution); *Massiah*, 377 U.S. at 206 (holding that a criminal defendant must be represented by counsel after indictment); Bloom & Brodin, *supra* note 91, at 231–32 (discussing the Due Process Clause limitations on interrogations for Article III criminal suspects).