Terrorism Should Not Be a Crime: How Political Labels Are Dangerous to American Democracy

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ABSTRACT

This Note calls for a dismantling of the United States’ current method of prosecuting terrorism, rejecting the “terrorism” label as a mechanism for charging crimes. Prosecutors should instead charge individuals in terrorism cases for their underlying criminal actions rather than rely on material support statutes and political innuendos to secure a conviction. By examining the implications of the terrorism label in post-9/11 America, this Note addresses how a moral panic enabled the executive branch to overstep its constitutional restraints and threatened the delicate balance of powers central to American democracy. Next, it proposes, as many have before, that Article III courts are the most adept forum to prosecute crimes relating to terrorism. However, the way they do so should be depoliticized and focus on substantive crimes, rather than offenses political in nature. Lastly, it addresses how nationwide hysteria surrounding “terrorism” gives rise to increased Islamophobia and intolerance, thus becoming a de facto campaign against Muslim Americans.

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INTRODUCTION

For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.¹

It is difficult to conjure a worse criminal act than a terrorist attack on a civilian population. How then, could one argue that the best method to prosecute terrorists in America is to not prosecute “terrorism” at all? This Note examines the implications of the “terrorism” label in the context of post-9/11 America, and it proposes that the best way to handle crimes relating to terrorism is to charge individuals with traditional criminal offenses in our federal civilian criminal court system.

Following the September 11th attacks, a moral panic surrounding terrorism swept across America. Part I of this Note addresses how this frenzy empowered the executive branch to overstep its Constitutional restraints and threatened the delicate balance of powers central to American democracy. Shortly after 9/11, President Bush alleged that Article III courts were an unfit venue to prosecute those responsible; his administration instituted a new system of military commissions unprecedented in both their breadth and inefficiency.² It shielded the operation from intervention by Congress or the Judiciary by opening a new detention center in Guantanamo Bay, Cuba, where several detainees were tortured and held incommunicado for extended periods of time.³ Two decades later, the federal government still struggles in its efforts to close the facility, where thirty detainees remain.⁴

Part II of this Note proposes, as many have before, that Article III courts are the most adept forum to prosecute crimes relating to terrorism.⁵ Historically, federal courts have been the preferred venue for such trials, competently balancing the interests of the government and the rights of defendants.⁶ Despite the proponents of the

⁶. Id.
military commissions’ concerns surrounding the ability of federal courts to hear cases implicating national security interests, the most dangerous weakness of Article III courts actually lay in the over-politicization of terrorism trials. Conducting terrorism trials as similarly as possible to quotidian criminal trials not only increases the likelihood of prosecutorial success, it also better safeguards defendants from infringements on their due process rights.

Lastly, Part III of this Note addresses how sensationalizing the threat of “terrorism” perpetuates discrimination and violence against Muslim Americans. The 9/11 attacks compounded upon pre-existing Islamophobia in America, which mutated into full-scale violence against Muslims. The federal government’s systematic policing and surveillance of Muslim Americans exacerbate this prejudice. Its official and unofficial policies, combined with charged statements made by various public officials, reveal a widespread animus towards the Islamic faith. Masquerading behind a shield of “national security,” the War on Terror has become a de facto campaign against Muslim Americans and non-Americans.

This Note calls for a dismantling of the United States’ current method of prosecuting terrorism. However, the proposed fix relies on a reservoir of tools that the judicial branch has employed for over two centuries. We should first abandon the military commissions and shut down Guantanamo Bay; both operations leave an embarrassing stain on our nation’s moral standing in the international community. If sufficient untainted evidence exists to support a prosecution of remaining detainees, it should take place in federal courts. Otherwise, the government should bear the consequences of its own transgressions and release these forever prisoners. Moving forward, prosecutors should charge individuals in terrorism cases for their underlying criminal actions, rather than rely on material support statutes and political innuendos to secure a conviction.

8. See id. at 23.
10. Id. at 1262–63.
13. Id. at 349.
14. See Zabel & Benjamin, supra note 5, at 46.
15. Masters, supra note 3.
16. See Almukhtar et al., supra note 4.
17. Shields et al., supra note 7, at 23.
The threat of terrorism is undoubtedly real, but we must not allow our fear of external bad actors to blind us to internal threats to our democracy.

A. Mohamedou’s Story

In the summer of 2022, following an intimate showing in Geneva of the film The Mauritanian, an adaptation of Mohamedou Ould Slahi’s written memoir of his time at Guantanamo Bay detention center, Nancy Hollander silenced the crowd in a few words when she stated: “[w]e shouldn’t have the crime of terrorism.” Hollander, an internationally recognized American criminal defense attorney, is Slahi’s lawyer-turned-close friend. Slahi himself, seated two rows in front of me, buckled over in tears as the final credits rolled on the screen. Onstage, he joined Hollander and Colonel Stuart Couch, the Marine prosecutor who refused to prosecute Slahi after learning of the use of torture to extract his confession. A formerly alleged terrorist, a defense attorney, and a military prosecutor—three unlikely friends with starkly different notions of justice—bonded together with a simple understanding: the United States’ treatment of Slahi (and many like him) was unjust, inhumane, and illegal.

On November 20, 2001, Mohamedou drove himself from his brother’s homecoming party to be interrogated. Based on attenuated evidence of a personal connection to al-Qaeda, U.S. officials suspected Slahi’s involvement in the Millennium Plot and the recruitment of three 9/11 hijackers. He was subsequently kidnapped and transported by the CIA to detention facilities in Jordan and Afghanistan before finally being transferred on August 5, 2002 to

19. See Zoom Interview with Nancy Hollander, Partner, Freedman Boyd (Nov. 1, 2022) [hereinafter Hollander Interview] (“I would say we’re like brother and sister, but . . . we’re more like mother and son.”).
20. SLAHI, supra note 18, at xxxix.
21. Id.
22. Id. at 124–29.
the Guantanamo Bay Detention Center (GTMO). After officials at GTMO failed to elicit a confession from Slahi, they used Enhanced Interrogation Techniques (EITs), now commonly understood as methods of torture, to obtain a false confession. While detained, Slahi suffered physical, sexual, and psychological abuse at the hands of the U.S. government. Nine years after his initial abduction, the U.S. District Court for the District of Columbia granted Slahi’s writ of habeas corpus on March 22, 2010. Unfortunately, the Obama administration appealed this decision, and the case was never reheard. Slahi remained at GTMO for another six years until finally, on October 17, 2016, he returned home to Mauritania upon suggestion from a Periodic Review Board. In the fourteen years he was detained by the United States, he was never charged with a crime.

B. An Amorphous Term with Grave Consequences

Mohamedou’s tragic story, along with the hundreds like it, explains Nancy Hollander’s statement about eradicating the crime of terrorism. She has made similar arguments before; in an interview with Best Lawyers magazine, she explained:

We shouldn’t have the crime of terrorism. It is always a political crime. Charge people with what they may be guilty of: murder, rape, ethnic cleansing, genocide, espionage. We have all those. We don’t need terrorism, which always becomes a collective crime. You charge someone with murder, you’re looking at that person. You charge someone with terrorism, you start looking at his ethnicity, and then you start looking at others like him.

Hollander is joined by others in this sentiment. In 1974, American jurist R.R. Baxter wrote: “We have cause to regret that a legal

25. SLAHI, supra note 18, at xvii.
26. Id. at xix–xx.
27. Mohammedou Ould Salahi v. Obama, 710 F. Supp. 2d 1, 16 (D.D.C. 2010) (“The question, upon which the government had the burden of proof, was whether, at the time of his capture, [Slahi] was a part of al-Qaida. On the record before me, I cannot find that he was.”) (internal quotations removed).
30. THE MAURITANIAN, supra note 18.
31. Id.
32. Shrewsbury, supra note 18.
concept of ‘terrorism’ was ever inflicted upon us. The term is in-
precise; it is ambiguous; and above all, it serves no operative legal
purpose.” 33 Nearly thirty years after these foreboding words were
written, the United States would wage an endless war against this
“ambiguous” term in the name of national security and retaliation.34

The belief that “terrorism” is a “contentious and politically
freighted term” is not constrained to America’s borders.35 Phil
Gurski, who worked in Canadian counterterrorism for thirty-two
years, raises questions as to the efficacy of the terrorism charge in
Canada’s Criminal Code in securing prosecutions.36 He argues the
Crown’s use of the statute in criminal cases “ha[s] little to do with . . .
the acts themselves . . . and more with the ‘message’ the . . . govern-
ment wants to deliver.”37 He too prefers the alternative of charging
such acts with the underlying crime, highlighting that doing so
often produces an equally favorable or more favorable result for the
prosecution.38

The fix seems easy enough: eliminate the charge of terrorism
and indict people instead for their substantive crimes under tradi-
tional criminal statutes. Prosecuting terrorism in a post-9/11 United
States, however, has never been so cut and dry. In fact, unlike the
Canadian Criminal Code, there is no standalone crime of “terror-
ism” in the federal criminal code.39 The majority of terrorism prose-
cutions in recent years invoke terrorism-adjacent offenses such as
the “material support” statutes, in combination with an array of
other federal offenses.40 In contrast with the federal system, several
states added a terrorism charge to their criminal codes after 2001.41

33. R.R. Baxter, A Skeptical Look at the Concept of Terrorism, 7 AKRON L. REV. 380,
34. Id.
35. Michael German & Sara Robinson, Wrong Priorities on Fighting Terrorism,
BRENNAN CTR. FOR JUST. 1, 5 (Oct. 2018), https://www.brennancenter.org/sites/default
(Oct. 13, 2022) (explaining that Canada’s terrorism statute uses “a highly problematic
set of terms.”).
37. Phil Gurski, Why ‘terrorism’ shouldn’t be in Canada’s Criminal Code, OTTAWA
-be-in-canadas-criminal-code [https://perma.cc/9DV3-BETB].
38. Id.
39. Orin S. Kerr, Searches and Seizures in a Digital World, 119 HARV. L. REV. 531,
Support or Resources to Designated Foreign Terrorist Organizations, 18 U.S.C. § 2339(B);
ZABEL & BENJAMIN, supra note 5, at 6.
41. Donna Lyons, States Enact New Terrorism Crimes and Penalties, 27 NCSL STATE
LEGISLATIVE REPORT, Nov. 2002, at 1, 1 (“[a]t least 33 states have passed legislation that
amends criminal codes related to acts of terrorism.”).
Thus, while an individual cannot technically be charged with terrorism by the federal government, they may be by, for example, the state of Michigan.42 This said, Guantanamo detainees are tried in neither federal nor state courts.43 Had charges been filed against Slahi, he, like others held at GTMO, would have been tried by military commission.44 These tribunals have limited jurisdiction to prosecute certain individuals of specific offenses, including terrorism.45 To add an extra layer to this confusion, should a member of the armed forces be suspected of terrorist activities, they would be tried for the substantive offence by court martial.46

With all the different mechanisms for charging terrorism offenses, it is unsurprising that nearly every department and agency in the United States has its own definition for “terrorism.”47 Generally, they all contain factors relating to a terrorist’s motives, the methods employed in the commission of the crime, and the targeting of noncombatants.48 One definition within the U.S. Code distinguishes between acts of international and domestic terrorism.49 Both involve violent activities that violate either the laws of the United States or any individual State and are intended to intimidate a civilian population, influence a government’s policies, or disrupt a government’s conduct through criminal means.50

However, while domestic terrorism primarily takes place within U.S. borders,51 international terrorism happens outside of the United States or involves actions that transcend national boundaries, either in their methods, the groups or individuals they aim to intimidate, or the locations where the perpetrators operate or seek refuge.52 It is important to note that under this definition, acts committed within America’s borders but with a connection to an outside group are still considered international terrorism.53

44. Id.
47. S HIELDS ET AL., supra note 7, at 11.
48. Id. at 11–12.
49. 18 U.S.C.S. § 2331(1), (5).
50. Id. Neither of these entries assign criminal penalties, and thus are only definitional in nature.
51. Id. § 2331(5)(C).
52. Id. § 2331(1)(C).
53. Id. § 2331(1)(A), (C).
This Note focuses only on crimes associated with international terrorism. While there currently is a movement to have acts of domestic terrorism distinguished from other crimes in the same way acts of international terrorism are, this Note largely advocates for the inverse: acts of international terrorism should (like acts of domestic terrorism) be charged according to the substantive action underlying the offense. Those accused of murder should be charged with murder, those accused of kidnapping with kidnapping, those accused of conspiracy with conspiracy, and so on. The argument that labeling a crime as “terrorism” is political, tenuous, and ineffective therefore extends to the context of domestic terrorism.

The current American system for addressing crimes associated with “terrorism” is nothing short of pandemonium. Even ignoring the lawless blunders of the Bush administration subsequently denounced by federal courts and the egregious legacies of Guantanamo Bay and the CIA’s black site program, our current system of prosecuting crimes of terrorism remains convoluted and ineffective. In a country that prides itself on being bound by its Constitution, hysteria blinds our adherence to it when faced with the threat of “terrorism.”

I. THE EXECUTIVE BRANCH

With the debris from the World Trade Center still burning from the 9/11 attacks, legislators in the Capital Building hastily drafted and signed a resolution that would allow the President to retaliate against those responsible for the deadliest attacks to ever occur on U.S. soil. On September 18, 2001, Congress released a joint resolution entitled “Authorization for the Use of Military Force” (AUMF), which permitted the President to use “all necessary and appropriate force” against those involved in the attacks. President Bush quickly seized the extensive power delegated to him.

54. German & Robinson, supra note 35, at 1.
56. Masters, supra note 3.
58. Id. at v.
61. Id.
A. The Military Commissions

On November 13, 2001, the President issued a Military Order, which called for the detention of any non-citizen who either is a member of al-Qaeda or has engaged in acts of international terrorism (or has knowingly harbored such individuals). The Military Order also established a system of military commissions to prosecute these individuals.

Military commissions are a type of military tribunal historically convened to try violations of the laws of war; before Bush’s Order, they were last used on U.S. soil by President Roosevelt, who used the commissions to try, convict, and ultimately sentence eight Nazi saboteurs who covertly entered the United States in June 1942. However, the tribunals created by the Military Order were, in comparison to historical military commissions, unprecedented in both breadth and kind. Whereas the World War II tribunal’s jurisdiction only covered the eight named Nazis for specified crimes, Bush’s Order expanded the military commissions’ jurisdiction to a seemingly unlimited group of individuals for a vast array of crimes. Notably, despite the Supreme Court hearing the WWII saboteur’s habeas petitions, the Military Order specified that individuals charged through military commission could not “seek any remedy” or “maintain any proceeding . . . in . . . any court of the United States, or any State thereof.” Review was limited to the Secretary of Defense or the President himself.

Civil liberties groups immediately raised concerns about the constitutionality of permitting the “United States criminal justice system to be swept aside.” Other critics found issue with the lowered evidentiary standards and the secrecy of the procedures, in addition

63. Id. § 4(a).
64. Ex Parte Quirin, 317 U.S. 1, 21 (1942). Six of the petitioners were sentenced to death, and the remaining two had their sentences commuted to life.
65. David Glazier, A Self-Inflicted Wound: A Half-Dozen Years of Turmoil Over the Guantanamo Military Commissions, 12 LEWIS & CLARK L. REV. 131, 131 (2008) (“President Bush’s . . . decision to try suspected terrorists by military commissions . . . [is a] judicial shortcut[] unjustified by either historic practice or accepted legal principles.”).
66. Quirin, 317 U.S. at 22; Military Order of November 13, 2001, supra note 2, §§ 1–2, 4, 7(e).
68. Id. § 4(C)(8).
70. Military Order of November 13, 2001, supra note 2, § 4(C)(3), (C)(4) (Evidence may be admitted if it would have “probative value to a reasonable person.”).
to the broad language permitting the indefinite detention of individuals that the President determined fit the Order’s criterium.71

Despite the outrage by criminal defense attorneys and civil rights groups, the military commissions created by President Bush are still active, although in amended form.72 Changes to the military commissions began when the Supreme Court started chipping away at the expansiveness of the Military Order.73 What followed was an interbranch cat-and-mouse game, with the other. In Hamdi v. Rumsfeld, the Court held that the executive branch must provide detainees with certain due process rights, including the ability to refute their designation as an “enemy” or “unlawful” combatant before a neutral decision maker.74 In a companion case decided the same day, Rasul v. Bush, the Supreme Court held that, despite the Military Order’s language signaling otherwise, federal courts do have the jurisdiction to hear habeas petitions from foreign nationals detained at Guantanamo.75

Congress responded to the Rasul decision by passing the Detainee Treatment Act of 2005 (DTA), which created Combatant Status Review Tribunals (CSRTs) to review the factual basis behind GTMO detainees’ designation as unlawful combatants.76 Congress also passed the Military Commissions Act of 2006 (2006 MCA), which “gave congressional imprimatur to the military commissions to try enemy combatants for war crimes.”77 Both acts placed significant restrictions on the reviewing capabilities of the federal courts, which the Supreme Court invalidated in Boumediene v. Bush when it declared that the DTA and 2006 MCA unconstitutionally limited

71. Id. § 2(a).
74. Id. at 536 (“We have long since made clear that a state of war is not a blank check for the President.”). Designation as an enemy combatant (also called “unlawful combatant” and subsequently, in the 2009 MCA “alien unprivileged enemy belligerent”) is essential to trying these individuals by military commission and detaining them at Guantanamo Bay. Noncombatants, regardless of citizenship, are tried in the civilian criminal court system, and lawful combatants need to be tried by military court martial under the Third Geneva Convention and the Uniform Code of Military Justice. Lawful combatants are also “privileged” to Prisoner-of-War status under the Geneva Conventions and entitled to certain protections that unlawful or enemy combatants are not. The Geneva Convention Relative to the Treatment of war victims (prisoners of war), Aug. 12, 194, 6 U.S.T. 3316, 3320–22 (1949). 75 U.N.T.S. 135, Art. 4.
the writ of habeas corpus.\textsuperscript{78} In 2009, under the Obama administration, Congress amended both acts to address, in part, the concerns raised by the Court in \textit{Boumediene}.\textsuperscript{79}

The Military Commissions Act of 2009 brought the commissions more in line with the procedural safeguards of federal courts and military courts martial.\textsuperscript{80} Even so, the tribunals have been largely unsuccessful—in the two decades since their creation, they have only secured eight convictions, and of these, “[o]nly one conviction [by trial] (al Bahlul) has survived a postconviction appeal to the D.C. Circuit.”\textsuperscript{81} Proceedings are plagued with pretrial issues, and logistical problems arise from their location at Guantanamo Bay.\textsuperscript{82} Furthermore, the trials still suffer from evidentiary disputes surrounding testimony gathered via torture.\textsuperscript{83}

President Bush opted to try international terrorists in military commissions for their historical benefits; in \textit{Quirin}, officials arrested the Nazi saboteurs, tried, and convicted them within one month of their surreptitious entry into the United States.\textsuperscript{84} Many proponents of the Guantanamo commissions praised the flexibility of the system; in the wake of 9/11, officials did not want to risk allowing the guilty to go free due to technicalities imposed by strict federal procedural rules.\textsuperscript{85} Despite these wishes, it is now clear that military tribunals remain unable to efficiently try the remaining detainees at Guantanamo Bay.

\textbf{B. Guantanamo Bay}

The military commissions proved to be the least of concerns for Guantanamo detainees, as the government never charged nor tried the vast majority of them.\textsuperscript{86} When the Bush administration announced

\begin{flushleft}{78. Military Commissions Act of 2006, supra note 77, § 950(g); Detainee Treatment Act of 2005, supra note 76, § 1005(e); Boumediene v. Bush, 553 U.S. 723, 732–33 (2008).}
\begin{flushright}{80. Rufener, supra note 72, at 170; 10 U.S.C. § 948 (2009).}
\begin{flushright}{81. DASKAL & VLADECK, supra note 59; Al Bahlul v. United States, 840 F.3d 757, 759 (D.C. Cir. 2016); Human Rights Watch, \textit{The Guantanamo Trials}, https://www.hrw.org/guantanamo-trials [https://perma.cc/7LTQ-EQYT] (“US federal appellate courts have overturned his convictions of material support for terrorism and solicitation but upheld his conviction for conspiracy.”).}
\begin{flushright}{82. Human Rights Watch, supra note 81. Id.}
\begin{flushright}{83. Id.}
\begin{flushright}{84. Rufener, supra note 72, at 163–64.}
\begin{flushright}{86. See Almukhtar et al., supra note 4.}
plans to use the U.S. naval base located in Guantanamo Bay, Cuba, as a detention facility, officials claimed it would house the “worst of the worst,” individuals who “would gnaw through hydraulic lines in the back of a C-17 [military plane] to bring it down.”\(^87\) However, of the 780 detainees who have been housed at Guantanamo Bay, the government has released over 700.\(^88\) Even today, the government has taken no responsibility for unjustly holding these men captive, in many cases, for over a decade.\(^89\) The United States never exonerates or acknowledges the innocence of an individual released from Guantanamo Bay; instead, they become subject to “transfer” when a Periodic Review Board issues a report that the detainee is no longer “a continuing significant threat to the security of the United States.”\(^90\) Upon release, the United States also collaborates with the receiving country to impose certain measures under the guise of national security.\(^91\) Mohamedou Ould Slahi, the subject of the Introduction of this Note, returned home to Mauritania to discover that his own country’s officials granted a request by the United States to not issue Slahi a passport for three years.\(^92\)

The executive branch does not pose these restrictions in an exercise of caution because it deals with dangerous ex-detainees; in many of these cases, the government could not produce a shred of evidence indicating involvement in a criminal action.\(^93\) Most had little to no connection with al Qaeda or the Taliban.\(^94\) Often, Pakistani or Northern Alliance forces would apprehend individuals after


\(^88\). Masters, supra note 3 (President Bush released more than 500 detainees, President Obama released around 200, Trump released 1, and the Biden administration has released 39 thus far).

\(^89\). See, e.g., Almukhtar et al., supra note 4.

\(^90\). U.S. Dept of Defense, *Detainee Transfer Announced (Immediate Release)* (Oct. 17, 2016), https://www.defense.gov/News/Releases/Release/Article/975922/detainee-transfer-announced [https://perma.cc/9MBR-BJD8] (announcing the release of Mohamedou Ould Slahi); SLAHI, supra note 18, at xxii (“The U.S. government dreads the mention of detainees being freed, so it uses its own vocabulary of ‘transfer’ and ‘resettlement,’ as if we were cargo or refugees.”).


\(^94\). Masters, supra note 3.
being offered “large financial bounties for the capture of ‘Arab terrorists.’” Scrambling to provide the American public with someone to blame for the 9/11 attacks, the government resorted to the mass distribution of propaganda-filled pamphlets calling on individuals in the Middle East to “Turn in your terrorist al Qaida or Taliban for cash.” These desperate tactics, in combination with a flawed vetting process, eventually stripped hundreds of innocent men of years of their lives.

Information gathered by civil rights groups and criminal defense attorneys in support of GTMO detainees’ habeas petitions reveal that the government was fully aware that many detainees had no connection to terrorist organizations. An Amicus Brief supporting Abu Zubaydah’s habeas petition quotes a purported CIA informant as estimating that “only like 10 percent of the people [] are really dangerous, [and] should be there and the rest are people that don’t have anything to do with it, . . . don’t even understand what they’re doing here.” While publicly, U.S. officials avowed that al-Qaeda operatives filled the halls of Guantanamo, they knowingly continued detaining innocent individuals primarily for two reasons, political advantage and to avoid public embarrassment.

For example, the United States detained twenty-two Uighurs despite concluding, shortly after their apprehension, that the individuals posed no threat. However, in a shocking abuse of power, the United States designated a Uighur group as an foreign terrorist organization in a “quid pro quo . . . in exchange for Chinese diplomatic acquiescence in the invasion of Iraq.” When the D.C. Circuit reviewed the habeas petitions of the detainees, it found that the allegedly incriminating evidence against each of them appeared to come from a common source, assumed to be the government of China. Although the court ordered the men’s immediate release, it took over two years to repatriate them after they spent over a decade wrongfully imprisoned.

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96. Zoom Interview with Nancy Hollander, Partner, Freedman Boyd (Nov. 1, 2022).
98. Id. at 12.
99. Id. at 11.
100. Id. at 14 (internal quotations omitted).
101. Id. at 14.
102. Id., at 14–15.
Even more harrowing is Abu Zubaydah’s detention story, one of the “forever prisoners” currently at Guantanamo who remain uncharged and unapproved for release.\textsuperscript{104} Zubaydah is not innocent of all wrongdoing; around the time of the 9/11 attacks, he forged passports and facilitated travel plans for jihadists.\textsuperscript{105} Captured in Pakistan in 2002, the CIA held Zubaydah at “black sites” in Thailand and subjected him to a torture program best described as sadistic science experiments.\textsuperscript{106} The Office of Legal Counsel approved of ten EITs for use in Zubaydah’s interrogation, including waterboarding, but his interrogators employed nauseatingly creative torture methods to supplement these approved techniques.\textsuperscript{107} The interrogation team captured all of his torture sessions on video.\textsuperscript{108} In 2005, the head of the CIA’s clandestine service ordered the destruction of those tapes, admitting that “the heat” that CIA officials would take over destroying the tapes “is nothing compared to what it would be if the tapes ever got into the public domain . . . .” It would be ‘devastating to us.’\textsuperscript{109}

Considering the rampant dread of a second 9/11 attack, one might attempt to forgive these officials’ transgressions as necessary for the greater public good. But despite President Bush declaring Zubaydah a “top operative” of al-Qaeda, a Senate Report reveals that as early as 2002, the CIA acknowledged the detainee did not belong to al-Qaeda.\textsuperscript{110} When Bush learned of the falsity of his statements, he asked former CIA Director George Tenet, “‘I said he was important’ . . . . ‘You’re not going to let me lose face on this, are you?’”\textsuperscript{111} From this perspective, it appears that Zubaydah remains a “forever prisoner” at Guantanamo because of the danger he poses, not by what he may do to the United States, but by what he might say about his treatment by the American authorities.\textsuperscript{112}

\begin{thebibliography}{112}
\bibitem{105} Id.
\bibitem{106} Id.
\bibitem{107} SENATE REPORT, supra note 57, at xiv.
\bibitem{108} Smith, supra note 104 (describing techniques including forcing Zubaydah to remain in a tight box for over 11 days and defecate on himself, hanging from the wrists, forced nudity, sleep deprivation, and playing rock songs on repeat); SENATE REPORT, supra note 57, at vii).
\bibitem{110} Id.; SENATE REPORT, supra note 57, at 430.
\bibitem{111} Church, supra note 109.
\bibitem{112} Smith, supra note 104.
\end{thebibliography}
C. The Torture Program

In criticizing the post-9/11 actions of the executive branch, the CIA torture program requires mentioning. The CIA detained at least 119 individuals in secret “black sites” located in foreign countries, many of whom were subsequently transferred to Guantanamo Bay. Of these, the CIA tortured at least thirty-eight. Commissioned to investigate the CIA’s use of torture following 9/11, the Senate Select Committee on Intelligence released an inflammatory report in 2014 (Senate Report) concluding that “[t]he CIA’s Detention and Interrogation Program damaged the United States’ standing in the world, and resulted in other significant monetary and non-monetary costs.” The report admonished the CIA for its misrepresentations, highlighting three particularly concerning areas of deception. First, confinement conditions were much graver than the CIA represented to other agencies. Second, the CIA greatly overstated the efficacy of EITs in gathering intelligence; interrogators rarely obtained information through torture, but when they did, it often proved to be inaccurate or fabricated. Third, two psychologists hired by the CIA to develop EITS essentially had no experience with interrogations or specialized knowledge of al-Qaeda. The Senate Report exposed the executive branch’s sins to the American public and the international community. The Obama administration banned the use of EITs in 2009, and it is almost universally accepted that the CIA’s use of torture seriously jeopardized American interests. Today, even the government’s harshest critics affirm that America is no longer torturing detainees in interrogations. However, this sadistic experiment recklessly imperiled the United States’ counterterrorism efforts. Some detainees who were likely guilty of terrorism-related crimes can never be brought to trial, as the use of torture tainted the only evidence against them.

113. Senate Report, supra note 57, at vi.3 (Foreword).
114. Id. at xv.
115. Id. at xxv.
116. Id. at v.
117. Id. at xiii.
118. Id. at xi–xii.
119. See generally Senate Report, supra note 57, at xi–xii.
120. Id. at vii.
If the United States intends to correct the reputational damage that the torture program caused, it must do better than respond to this dilemma with the proposition of “forever prisoners.” In adherence to international rule-of-law standards, we must either try these individuals or set them free.

The advent of terrorism cast a shadow of fear upon the American public. In this darkness, the executive branch misused the powers granted to it by the Constitution and Congress’s AUMF. It unapologetically violated the rights of foreign nationals and jeopardized American civil liberties. It sought to undermine the Judiciary and disrupt the delicate checks and balances axiomatic to American democracy. These actions severely threatened our diplomatic relationships with foreign nations and risked the safety of our own troops. Notably, in an effort to identify a scapegoat for the attacks, the executive branch denied the victims of 9/11 the justice and closure they deserve.

II. PROSECUTING TERRORISM IN FEDERAL COURTS

A. The Competency of the Federal Courts

That the federal courts have the capacity and acumen necessary to prosecute alleged acts of international terrorism is not a novel contention. Historically, courts did not differentiate crimes relating to terrorism from other criminal offenses. Federal prosecutors tried, juries convicted, and judges sentenced international terrorists regularly in nondescript proceedings largely parallel to quotidian criminal trials. Even in high-profile and complex cases involving defendants from several foreign states, federal courts exhibited...
extreme prudence in balancing parties’ rights and national security concerns. Responding to the 1993 bombing of the World Trade Center, federal prosecutors in New York uncovered three related criminal conspiracies and conducted a sequence of trials ending with the convictions of all twenty-five defendants. In April 2001, only four months before 9/11, a federal court in California found one of the organizers of the failed Millennium plot guilty on nine counts of criminal activity. Despite the recent successes of federal terrorism prosecutions, the Bush administration chose to create the novel system of military commissions to try the organizers of the 9/11 attacks, seeking to maintain Executive control over the trials.

When President Obama took office in 2009, he pledged to close Guantanamo Bay and made clear that he intended to supplement the inefficient military commissions with trials in Article III courts. His administration initiated the first proceedings in civilian court against a GTMO detainee in the 2010 trial of Ahmed Ghailani, whom officials apprehended in 2004 for his involvement in the 1998 bombings of U.S. Embassies in Tanzania and Kenya. A federal jury in the Southern District of New York found Ghailani guilty of conspiring to destroy U.S. property and buildings. The Obama administration and human rights groups lauded the trial as a victorious example of Article III courts’ ability to secure a life sentence in a terrorism case while maintaining rule of law and constitutional

132. Id. at 1–2.
safeguards. Alternatively, proponents of the Military Commissions labelled the prosecution a “reckless experiment” and a “total miscarriage of justice,” bemoaning the jury’s acquittal of all but one of 225 counts against him. This ironic criticism ignores that in a five-week trial, the Southern District of New York secured the same number of successful convictions-by-trial that the military commissions amassed since their creation in 2001.

The Obama administration faced incredible backlash when it announced its intention to transfer the five 9/11 plotters currently detained at Guantanamo Bay to New York courts for trial. Congress swiftly reacted by passing legislation prohibiting the use of federal funds to transfer GTMO detainees to the United States, which effectively hindered any further federal prosecutions of GTMO detainees. President Obama yielded to this pressure and agreed to try the five defendants by military commission. Within that system, the case against the 9/11 defendants “has spun its wheels for more than a decade with no trial in sight.” The ineptness of the military commissions encumbers 9/11 victims’ hopes for justice. Despite the unexpected pleas of even some of the military commissions’ original architects, Congress refuses to lift the restrictions on detainee transfer.

B. Concerns About Federal Courts Are Overstated

The last two decades have revealed that the executive branch exaggerated many of the alleged weaknesses of Article III courts in prosecuting terrorism cases. Oft repeated by supporters of the military commissions, these concerns include: (1) the protection of

139. Id.
140. Deborah Feyerick, Landmark terrorism trial ends in acquittal on all but 1 count, CNN (Nov. 19, 2010), https://www.cnn.com/2010/CRIME/11/17/ny.terror.trial/index.html (quoting statement by Keep America Safe, an organization cofounded by Liz Cheney, which “called on Obama to end this reckless experiment. Reverse course. Use the military commissions at Guantanamo that Congress has authorized.”) (quotations omitted).
141. Al Bahlul, 840 F.3d at 759.
142. Masters, supra note 3.
144. Masters, supra note 3.
146. Id. (explaining how William Barr, who originally suggested the use of military tribunals to the Bush Administration, asked Republican lawmakers to overturn the transfer ban).
147. Brief, supra note 93, at 4; ZABEL & BENJAMIN, supra note 5, at 2.
classified information implicating national security interests, (2) the potential inadmissibility of battlefield evidence, (3) the ability to procure valuable intelligence, (4) the security of the courthouse and the jury, and (5) the risk that constitutional safeguards could lead to dismissal on procedural grounds or technicality.\textsuperscript{148} Contrary to these concerns, federal courts repeatedly handle these delicate cases with “expertise and competence.”\textsuperscript{149} Unlike the fledgling military commissions system, civilian courts benefit from a “reservoir of judicial wisdom as well as a broadly experienced bar,” and have amassed years of experience in prosecuting sensitive criminal matters.\textsuperscript{150}

One of the core characteristics of the justice system following the advent of terrorism is its adaptability; evolving statutes and courtroom procedures ensure the proper balancing between parties’ rights and protecting national security.\textsuperscript{151} This exact concern was in legislators’ minds when the Classified Information Procedures Act (CIPA) was passed in 1980.\textsuperscript{152} The statute “ease[s] the tension between a defendant’s Sixth Amendment right to a public trial and the government’s interest in protecting classified information.”\textsuperscript{153}

CIPA mandates that courts follow certain procedures when either the prosecution or the defense intends to introduce classified information.\textsuperscript{154} If a defendant requests such evidence during discovery, the presiding judge has the discretion to issue a non-disclosure order, protective order, or turn the evidence over to the defendant in a sanitized form.\textsuperscript{155} If a party decides to use the sensitive information at trial, “the judge and the lawyers for both sides . . . attempt to craft substitutions for the classified evidence.”\textsuperscript{156} Although these proceedings ensure the safeguarding of sensitive information and occur in secured locations within the courthouse, many concerned with national security question its adequacy in preventing leaks of sensitive information.\textsuperscript{157} A case study by Human Rights First analyzed over one hundred cases involving international terrorism and reported that they were unaware of “a single terrorism case in which

\textsuperscript{148} Schaffer, supra note 85, at 1474.
\textsuperscript{150} ZABEL & BENJAMIN, supra note 5, at 3.
\textsuperscript{151} Id.
\textsuperscript{152} The Classified Information Procedures Act (CIPA), 18 U.S.C. app. 3.
\textsuperscript{153} Rufener, supra note 72, at 180.
\textsuperscript{154} Id.
\textsuperscript{155} ZABEL & BENJAMIN, supra note 5, at 9.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at 88. Other critiques surround CIPA’s inefficiency, as procedural protocols substantially slow proceedings. In comparison, however, military commissions proceedings do not fare much better, with trials stagnated for years by pretrial proceedings and interlocutory appeals. DASKAL & VLADÉK, supra note 59, at 18.
CIPA procedures have failed and a serious security breach has occurred.\textsuperscript{158} By preventing the unnecessary or inadvertent disclosure of such information, CIPA has become vital in securing prosecutions that implicate national security concerns.\textsuperscript{159}

The statute is not immune to criticism from defense counsel either, many of whom believe it impedes defendants’ ability to confront the evidence against them.\textsuperscript{160} Nonetheless, courts repeatedly uphold the constitutionality of the statute and, in comparison with military commissions, federal courts employing CIPA procedures are significantly better at protecting the substantive rights of defendants.\textsuperscript{161}

Another concern repeated by critics of Article III courts is the potential for chain-of-custody disputes that could arise under the Federal Rules of Evidence.\textsuperscript{162} Because terrorism cases may involve evidence collected in the active theater of war, it is nearly impossible to secure search warrants and ensure that evidence is collected, labelled, handled, and passed along in the manner typically required by law enforcement officials in ordinary criminal cases.\textsuperscript{163}

However, a review of international terrorism prosecutions debunks these concerns in two ways. First, the Federal Rules of Evidence “generally provide a common-sense, flexible framework to guide the decision whether evidence is admissible in court.”\textsuperscript{164} Judges may authenticate evidence by a party providing “evidence sufficient to support a finding that the matter in question is what its proponent claims,” a burden lower than a showing by a preponderance of the evidence.\textsuperscript{165} Further, the Human Rights First study found no known case where evidence central to the prosecution’s case was deemed inadmissible due to authentication issues.\textsuperscript{166}

Second, this concern is unfounded because the United States apprehends very few of these defendants on the battlefield.\textsuperscript{167} In relation to Guantanamo Bay prisoners, one study suggests that “86% of detainees were not apprehended on any battlefield”; instead, bounty hunters turned over many men in exchange for large bounties offered

\textsuperscript{158}. Id. at 9.
\textsuperscript{159}. Id. at 85.
\textsuperscript{160}. Id. at 88.
\textsuperscript{161}. ZABEL & BENJAMIN, supra note 5, at 84.
\textsuperscript{162}. Schaffer, supra note 85, at 1474 (“[R]elaxed evidentiary rules of military courts are more likely to prevent this from happening.”).
\textsuperscript{163}. ZABEL & BENJAMIN, supra note 5, at 107 (“It would provoke laughter to suggest that soldiers in Desert Storm should have obtained search or arrest warrants before capturing Iraqi soldiers and their equipment.”) (internal quotations omitted).
\textsuperscript{164}. Id. at 10.
\textsuperscript{165}. F ED. R. EVID. 901(a); ZABEL & BENJAMIN, supra note 5, at 108.
\textsuperscript{166}. ZABEL & BENJAMIN, supra note 5, at 10.
\textsuperscript{167}. Id. at 10.
by the United States.\textsuperscript{168} Although this poses its own unsettling evidentiary concerns, it seemingly dispels the myth that U.S. forces collect evidence for terrorism prosecutions in the midst of flying bullets and enemy threats.\textsuperscript{169} Regardless, any reliable evidence collected abroad may be presented in federal courts after authentication, and evidentiary concerns are not likely to cripple prosecutorial efforts in federal terrorism trials.

Security risks do not pose a significantly higher threat in terrorism trials than in the complex trials of criminal conspiracies and violent offenses that federal courts regularly hear. Apprehension surrounding the safety of a courtroom and its occupants is not peculiar to terrorism trials; federal courts face this threat in trials involving cartels, gangs, and criminal syndicates.\textsuperscript{170} Although no courthouse is immune to attacks by a defendant’s collaborators or sympathizers, officials may, and often do, employ additional security measures to protect courthouses and their occupants in such trials.\textsuperscript{171}

Lastly, concerns that upholding Constitutional rights might necessitate dismissals are premised on the alarming sentiment that terrorism defendants do not deserve due process rights. The Supreme Court explicitly rejected this contention in \textit{Hamdi} by holding that even unlawful combatants deserve the protections of due process.\textsuperscript{172} Regardless, analyses of terrorism cases reveal that judges approach and consider Constitutional challenges through a flexible framework.\textsuperscript{173} For example, in cases with alleged speedy trial violations, judges permit delays if the case is particularly complex, which international terrorism cases almost always are.\textsuperscript{174} \textit{Miranda} challenges also do not pose an insurmountable bar in prosecuting such cases; interrogations by foreign officials do not require a \textit{Miranda} recitation, but when U.S. officials conduct interrogations abroad, they must afford some \textit{Miranda}-adjacent statement to the detainee.\textsuperscript{175} Even where federal courts have withheld testimony because officials violated this requirement, the decision did not thwart prosecutorial efforts.\textsuperscript{176} Lastly, while many lament the possibility of terrorism

\begin{flushleft}
\textsuperscript{168} Brief, \textit{supra} note 93, at 12.
\textsuperscript{169} \textit{Id.} at 13.
\textsuperscript{170} \textit{Zabel} \& \textit{Benjamin, supra} note 5, at 123.
\textsuperscript{171} \textit{Id.} at 123 (describing a garden variety of security measures available in terrorism trials, including sequestering juries, additional physical restraints, and armed guards).
\textsuperscript{172} \textit{Hamdi}, 542 U.S. at 507.
\textsuperscript{173} \textit{Zabel} \& \textit{Benjamin, supra} note 5, at 1.
\textsuperscript{174} \textit{Id.} at 11.
\textsuperscript{175} \textit{Id.} at 102.
\end{flushleft}
defendants pleading guilty to lighten their sentences, such bargaining would provide the government a valuable opportunity to gather otherwise inaccessible intelligence.\textsuperscript{177}

Although some seek to differentiate terrorism from traditional crimes tried in civilian courts, history reveals that Article III courts are more adept at trying such cases than military commissions.\textsuperscript{178} Courts consistently adopt reasonable and flexible approaches to address the idiosyncrasies implicit in terrorism trials. Military courts, historically excellent at swiftly prosecuting crimes of war, are simply unsuited for the modern-day War on Terror.

\textbf{C. Federal Courts Should Depoliticize Terrorism Prosecutions}

Although demonstrably capable of prosecuting cases involving national security concerns, federal courts are not immune to the moral panic surrounding terrorism. The way federal courts currently handle terrorism prosecutions is not faultless. While many who favor Article III courts over military commissions praise the availability of a host of broad federal anti-terrorism statutes, this Note contends that the use of these political and amorphous statutes damages federal courts’ reputation of constitutional adherence.\textsuperscript{179}

Two favorite tools of prosecutors in federal terrorism trials are the “material support” statutes codified at 18 U.S.C. §§ 2339A and 2339B.\textsuperscript{180} Congress enacted each of the two sections following terrorist attacks in the 1990s, passing § 2339A after the 1993 World Trade Center bombing and § 2339B, as a part of the Antiterrorism and Effective Death Penalty Act (AEDPA), after Oklahoma City bombing of 1995.\textsuperscript{181} The two sections cover two different types of conduct. Section 2339A, effectively a “terrorism aiding and abetting statute,” criminalizes providing support in furtherance of a specific terrorist act.\textsuperscript{182} Broader and more frequently used by prosecutors is § 2339B, which makes the provision of any support to a designated foreign terrorist organization a crime, regardless of the donor’s intent.\textsuperscript{183} Both statutes raise specific concerns which will be addressed individually below.

\textsuperscript{177} ZABEL & BENJAMIN, supra note 5, at 11.
\textsuperscript{178} Schaffer, supra note 85, at 1474.
\textsuperscript{179} ZABEL & BENJAMIN, supra note 5, at 6.
\textsuperscript{180} 18 U.S.C. § 2339A & B; ZABEL & BENJAMIN, supra note 5, at 31–32.
\textsuperscript{182} ZABEL & BENJAMIN, supra note 5, at 32.
\textsuperscript{183} 18 U.S.C. § 2339(a)(1).
Federal prosecutors use the aid-and-abet statute, 18 U.S.C. § 2339A, against individuals who provide support material support or resources in furtherance of a specific terrorist act, regardless of whether the entity is a designated Foreign Terrorist Organization (FTO).184 “Support” encompasses the provision of currency, financial securities or services, lodging, training, expert advice, safe houses, false documents, communications equipment, weapons, lethal substances, personnel, and transportation.185 Explicitly exempted from this list is the provision of medicine and religious materials.186 However, a court determined that the attempted provision of medical services by a doctor did not qualify for the exception.187 Courts also broadly interpret what the provision of “personnel” means within the statute, leading to controversial results.188 For instance, a federal court in New York held that Abdel Rahman’s attorney constituted “personnel” under the statute when he relayed messages to Rahman’s collaborators in the Islamic Group, a Egypt-based terrorist organization, and a Reuters reporter in Cairo.189

Equally contentious is the government’s reliance on the statute to fill the gap left by other inchoate crimes, such as conspiracy and attempt.190 Whereas the invocation of those offenses requires a predicate offense, § 2339A does not.191 Proponents of the material support statute point to United States v. Lakhani to illustrate this advantage, as a conspiracy charge was unavailable because the person the defendant conspired with was a government informant.192 However, this advantage is often overemphasized. In Lakhani, for example, the sentencing judge could have surpassed the eventual sentence of forty-seven years without the material support charge.193

Even more controversial is the later-enacted statute, 18 U.S.C. § 2339B, which criminalizes knowingly “providing material support

184. ZABEL & BENJAMIN, supra note 5, at 32.
186. Id. at 5.
187. Doyle, supra note 185, at 335–36 (“The doctor, who never actually succeeded in providing medical services to al Qaeda, was convicted for conspiring to and attempting to provide material support and sentenced to twenty-five years’ imprisonment.”).
188. ZABEL & BENJAMIN, supra note 5, at 32.
189. Id. at 32–33.
190. Id. at 32–33.
191. United States v. Lakhani, 480 F. 3d 171 (3d Cir. 2007).
192. Id. at 174.
193. Id. at 186 (Finding Lakhani’s sentence reasonable, because the sentencing judge could have imposed the statutory maximum for the convicted crimes, which was sixty-seven years; instead, the judge permitted the defendant to serve the two money laundering counts concurrently, which lowered his sentence to forty-seven years.). (Without the material support conviction, which carries a maximum sentence of fifteen years, he still could have been sentenced to fifty-seven years’ imprisonment.)
Legislators intended “to fill a perceived gap in the terrorism laws that allowed terrorist organizations to receive funds or other material support from donors who intended their contributions to be used to support humanitarian causes.” This means that an individual may be liable under § 2339B, regardless of the intention behind their support, so long as they knew the organization was a designated FTO or that the organization engages in terrorist activity. The Secretary of State has “unfettered authority” to designate groups as FTOs; the classification can be premised on secret evidence that is nearly impossible to rebut. Further, defendants may not object to such a designation at trial; while defendants “claim[] that the inability to contest an element of a criminal offense infringes on their due process rights,” federal courts have upheld the constitutionality of the statute.

Other criticisms arise from challenges by defendants alleging the statute violates freedom of association. Courts also rejected this argument, claiming that 2339B does not criminalize belonging to an organization, only providing support to it. The act expands accomplice liability to an alarming degree. For instance, Shukri Abu Baker, a Palestinian American represented by Nancy Hollander, founded the Holy Land Foundation (HLF), which eventually became the largest Muslim charity in America. In 2001, the Treasury Department identified HLF as a “Specially Designated Terrorist” and three years later, Attorney General John Ashcroft indicted seven of HLF’s officials. After an initial mistrial, Baker was found guilty of providing material support to Hamas and sentenced to sixty-five years in prison. Although the prosecution never connected one of the zakat committees (local charities) funded by HLF to Hamas, the Court of Appeals upheld his conviction; Baker remains in prison.

194. 18 U.S.C. § 2339(B).
195. ZABEL & BENJAMIN, supra note 5, at 34.
196. Id.
198. ZABEL & BENJAMIN, supra note 5, at 35.
199. Id.
200. Id.
203. Id.
The material support statutes, lauded for their expansiveness, are so broad they fail to effectuate justice.

Outside of a couple of these politically inspired statutes, prosecutors in terrorism cases also levy routine criminal offenses against defendants on a regular basis. A study reviewing twenty-four years of federal terrorism trials identified three prosecutorial strategies commonly exercised in these trials: 1) “conventional criminality,” in which the prosecutor invokes typical criminal charges and remains silent on any perceived link to terrorist organizations; 2) “political innuendo,” where prosecutors again use typical charges but either implicitly or explicitly link the defendant to a terrorist group or ideology; and 3) “explicit politicality,” where criminal charges uniquely focus on a defendant’s connection to terrorism, such as conspiracy or sediton cases. The study determined that “[t]he more politicized the prosecution strategy, the more likely the case will go to trial.”

For example, cases where prosecutors used an “explicit politicality” strategy doubled the prospect of acquittal. Further, research revealed that while terrorism cases yield a conviction rate ten percent lower than the federal courts’ average, cases tried by a “conventional criminality” strategy generated a nearly identical rate to the average. Overall, the study supports the contention that treating terrorism cases like quotidian criminal cases strengthens prosecutorial efforts and leads to more convictions.

Thus, while federal courts continue to be the best venue for terrorism trials, prosecutors should exercise tact and remain apprehensive of how over-politicization could negatively affect a case’s disposition. An over-reliance on offenses like the material support statutes to secure otherwise unachievable convictions threatens the legitimacy of the criminal justice system and could lead to unjust results. Moreover, depoliticizing terrorism trials benefits prosecutors by increasing conviction rates and allowing federal courts and juries to make decisions about the guilt or innocence of crimes they are more attuned to.

III. The “Terrorism” Label and Islamophobia

Rhetoric surrounding “terrorism” has grave consequences that spread far beyond the courtroom. Even prior to 9/11, many Americans

204. See Hollander, The Holy Land Foundation Case, supra note 201, at 60.
205. See SHIELDS ET AL., supra note 7, at ii.
206. Id. at vi–vii.
207. Id. at vi.
208. SHIELDS ET AL., supra note 7, at vii.
209. Id. at viii.
210. Id. at 106.
associated “terrorism” with the Islamic faith.\textsuperscript{211} This is based on two false narratives; first, that “terrorists are always (brown) Muslims,” and second, that “white people are never terrorists.”\textsuperscript{212} Media portrayals bolster this fiction; films and television shows regularly depict Arab or Muslim men as terrorists or other stock villains.\textsuperscript{213} The level of anti-Muslim sentiment in America prior to the War on Terror, however, is beyond comparison to the full-scale epidemic of hatred that erupted following September 11, 2001.\textsuperscript{214}

A. Post-9/11 Islamophobia

After 9/11, prejudice against Muslims no longer manifested itself simply through distasteful movie depictions; it mutated into full-scale violence against Muslim Americans and “Muslim-looking” Americans.\textsuperscript{215} The eight weeks following 9/11 saw over one thousand crimes carried out against Arabs, Muslims, and South Asians.\textsuperscript{216} Nineteen individuals were murdered and countless others suffered assaults and vandalism to their homes, businesses, and places of worship.\textsuperscript{217} Crusaders burned crosses outside of an Islamic center in Maryland and fire bombed mosques.\textsuperscript{218} One Muslim woman was called an “terrorist pig” before her attacker stabbed her.\textsuperscript{219} Hate speech accompanied both violent attacks and isolated incidences of harassment and intimidation.\textsuperscript{220}

Mark Stroman, who murdered two innocent men as “revenge” for 9/11, stated after his arrest: “I did what every American wanted to do but didn’t.”\textsuperscript{221} In reality, most civilized Americans denounced such violence.\textsuperscript{222} However, many accepted the underlying sentiment behind these attacks as “a regrettable, but expected, response” to 9/11, “sympathiz[ing] and agree[ing]” with the “displaced anger.”\textsuperscript{223}

\begin{itemize}
  \item 211. Corbin, \textit{supra} note 11, at 458–59.
  \item 212. \textit{Id.} at 457.
  \item 213. \textit{Id.} at 458–59.
  \item 215. Ahmad, \textit{supra} note 9, at 1262–63 (describing a Hindu pizza delivery driver beaten because his attackers thought him to be Muslim).
  \item 216. \textit{Id.} at 1261–62; \textit{see also} Daryll Fears, \textit{Hate Crimes Against Arabs Surge, FBI Finds}, WASH. POST (Nov. 26, 2002), https://www.washingtonpost.com/archive/politics/2002/11/26/hate-crimes-against-arabs-surge-fbi-finds/a3a0c56-f324-4688-bf4a-872c2db6e4a [https://perma.cc/CNQ4-DP4C] (The final months of 2001 saw a 1500 percent increase in individuals perceived as Muslim).
  \item 217. Ahmad, \textit{supra} note 9, at 1261–62.
  \item 218. \textit{Id.} at 1263, 1265.
  \item 219. \textit{Id.} at 1263.
  \item 220. \textit{Id.} at 1265.
  \item 221. \textit{Id.} at 1299.
  \item 222. \textit{Id.} at 1299.
  \item 223. Ahmad, \textit{supra} note 9, at 1264.
\end{itemize}
Knowing that the September 11th hijackers would never face retribution, the public coped with the tragedy by shifting blame to Muslim Americans, most of whom shared nothing in common with the perpetrators except their religion and the color of their skin.\textsuperscript{224} A salient air of fear and rage replaced social niceties during this time. Neighbors and coworkers of Muslim Americans sent in tips about their acquaintances, now perceiving regular activities as suspicious causes for concern.\textsuperscript{225} Airline workers moved Muslim travelers to other flights, pandering to the fears expressed by other passengers.\textsuperscript{226} This attitude is further reflected in post-9/11 national polls, which displayed a dramatic shift in public consensus on the issue of racial profiling, which the majority now considered “a good thing.”\textsuperscript{227} A 2002 poll revealed that a majority of Americans supported “closing the border to all would-be entrants from Arab countries.”\textsuperscript{228} This prejudice permeated all aspects of public life. A federal prosecutor recounts potential jury members’ treatment of an Arabic defendant on trial in July 2002:

\begin{quote}
[S]ome of these potential jurors showed a Queen of Hearts–like willingness to skip the deliberations altogether and to convict the defendant of wrongdoing with which he was not even charged, \emph{terrorism}, based upon the only two things that [they] then knew about him: his name and what he looked like . . . . [T]hey refused to accept that a criminal prosecution of a young Arabic male in July of 2002 was unconnected to terrorism.\textsuperscript{229}
\end{quote}

The jury’s treatment of the defendant, without knowing his national origin or religious conviction, is unsurprising. Post-9/11 America saw the re-racialization of Muslims, Middle Easterners, and Arabs, who were grouped together, “identified as terrorists[,] and disidentified as citizens.”\textsuperscript{230} The revelation of such prejudice during jury selection does not raise novel concerns; after all, the purpose of jury selection is to root out bias, which, as non-state actors, jurors

\textsuperscript{224}. See Ellmann, \textit{supra} note 12, at 328 (statement of Stuart Taylor, reporter) (“[O]ffensive or not, the only profiles likely to be effective against a well-trained terrorist are those triggered by traits that he cannot change or easily conceal.”); see also Michael Wilson, \textit{Evangelist Says Muslims Haven’t Adequately Apologized for Sept. 11 Attacks}, N.Y. TIMES (Aug. 15, 2002), https://www.nytimes.com/2002/08/15/us/evangelist-says-muslims-haven-t-adequately-apologized-for-sept-11-attacks.html [https://perma.cc/SEN8-T5F9].

\textsuperscript{225}. Ahmad, \textit{supra} note 9, at 1276.

\textsuperscript{226}. Ellmann, \textit{supra} note 12, at 345.

\textsuperscript{227}. Volpp, \textit{supra} note 214, at 1577.

\textsuperscript{228}. Ellmann, \textit{supra} note 12, at 345.


\textsuperscript{230}. Volpp, \textit{supra} note 214, at 1575.
are allowed to express.231 Far more concerning is how anti-Muslim sentiment manifests itself through the words and policies of government officials bound by the Constitution.232

B. The Government’s Perpetuation of Anti-Muslim Bias

While officially, the U.S. government condemned post-9/11 attacks on Muslims, one author explains how government policies, in effect, legitimized such unlawful behavior:

The hate violence can be read as a referendum on what would be politically palatable with regard to governmental responses to September 11, authorizing incursions on previously settled rights and expectations in the name of national security. That so many people gave violent expression to their anger about the [9/11] attacks provided a measure of political cover for state action far less extreme than extra-judicial killings, but far more extreme than might have been tolerated previously: racial profiling, immigrant detention, immigration restrictions, and abrogation of due process. By this account, the people have spoken, many of them with their firearms and fists . . . . Indeed, we should understand the hate killings after September 11 as the first “collateral damage” in the war on terrorism.233

1. Islamophobia in Official Government Action

In the aftermath of 9/11, Muslims in America faced not only physical violence, but political and legal violence as well.234 Both 2001 and 2002 saw mass deportations of immigrants from Muslim-majority countries.235 Even today, Muslim American communities are subjected to “high levels of racial profiling and surveillance [monitoring].”236 In comparison to the over-policing of African American communities in the United States, one author writes “‘[f]lying while Muslim’ has joined ‘driving while Black’ to describe the extra burden Muslims . . . face in day-to-day living.”237 Counterterrorism measures almost exclusively target the Muslim population, perpetuating stereotypes that “encourage[] suspicion and hostility” towards Muslims,

231. Leiken, supra note 229, at 502–03.
232. Ahmad, supra note 9, at 1325–26.
233. Id. at 1325–26.
234. Id. at 1262.
235. Id. at 1276.
236. Volpp, supra note 214, at 1579 (describing how the DOJ used racial profiling in a “dragnet” seeking to interview more than 5,000 investigatory interviews of young men from Middle Eastern or Islamic Countries).
237. Corbin, supra note 11, at 480–81 (footnotes omitted).
despite attacks by other radical groups often having higher death tolls.\textsuperscript{238} The government justifies this oversurveillance with the narrative that Islamic terrorism is the greatest threat to the American public, an explanation that implicitly reinforces notions that Muslims are inherently un-American.\textsuperscript{239}

As stated in the Introduction to this Note, the United States distinguishes between international and domestic terrorism.\textsuperscript{240} The FBI differentiates the two by focusing on the source of the perpetrator’s ideology; whereas international terrorism either involves or is inspired by a FTO, domestic terrorism is committed “in furtherance of ideological goals stemming from domestic influences, such as racial bias and anti-government sentiment.”\textsuperscript{241} In practice, this means that Muslim perpetrators are almost always labelled “international terrorists,” and non-Muslims as “domestic terrorists.”\textsuperscript{242}

However, officials must oftentimes manipulate logic to make such characterizations fit. First, “ideologies and ideological movements are not cabined by national borders . . . . [w]hite supremacist, anti-Semitic, fascist, and ethno-nationalist groups in the United States regularly associate with like-minded groups in Canada, Europe, Russia, and elsewhere.”\textsuperscript{243} Thus, the assumption that non-Muslim terrorists have no link to international groups or ideologies is a fallacy. Second, the Justice Department often goes through great lengths to characterize American Muslim perpetrators as “international terrorists,” oftentimes relying on flimsy evidence such as “visiting a website or watching a video.”\textsuperscript{244} If there is absolutely no proof to sustain this characterization, the DOJ compromises by labelling them as “homegrown violent extremists,” rather than “domestic terrorists,” a term typically reserved for white offenders.\textsuperscript{245} The Justice Department jumps through such hoops to attach these labels because, unsurprisingly, far more resources are available for investigating crimes of international terrorism than domestic terrorism.\textsuperscript{246}

As there is a general discomfort around even labelling mass attacks as “domestic terrorism,” all of the above circles back to the consensus that the “terrorist” label is reserved almost exclusively for

\begin{itemize}
\item \textsuperscript{238} Id. at 460, 482.
\item \textsuperscript{239} German & Robinson, supra note 35, at 4.
\item \textsuperscript{240} Id. at 3.
\item \textsuperscript{241} Michael C. McGarrity & Calvin A. Shivers, Confronting White Supremacy, Federal Bureau of Investigation, Statement Before the House Oversight and Reform Committee, Subcommittee on Civil Rights and Civil Liberties (June 2, 2019).
\item \textsuperscript{242} German & Robinson, supra note 35, at 2.
\item \textsuperscript{243} Id. at 3 (footnotes omitted).
\item \textsuperscript{244} Id. at 4.
\item \textsuperscript{245} Id.
\item \textsuperscript{246} Id. at 2.
\end{itemize}
Muslim perpetrators. This is further illustrated by the government’s use of the Antiterrorism and Effective Death Penalty Act (AEDPA). Congress passed AEDPA in the aftermath of the Oklahoma City bombing, orchestrated by white domestic anti-government extremists. Since its passage, however, the law has been employed “almost exclusively” against Muslim defendants.

In the years following 9/11, the U.S. government has employed its official definitions, laws, and policies to justify a state-sponsored witch hunt against Muslims in America. As one acclaimed scholar of immigration law eloquently notes, “[i]n simultaneously advocating policies of colorblindness for citizenry while engaging in racial profiling for noncitizens, and publicly embracing all religions while particularly privileging Christianity, the administration has, in the name of democratic inclusion, disingenuously excluded.”

2. Unofficial Governmental Prejudice

While official governmental policies often restrict the liberties of Muslim Americans, several reports reveal that many state actors operating unofficially regularly engage in cruel language, physical abuse, and flagrant religious intolerance. Although President Bush desperately avowed that the United States was not at war with Islam, certain actions and statements by military and public officials revealed that many did not share this understanding.

Hate speech from public officials abounded in the weeks following 9/11. On a radio broadcast, Louisiana Congressman John Cooksey commented “any person who has ‘a diaper on his head and

247. Corbin, supra note 11, at 462 (describing one Congressman who claimed that white violence “is just different”); see also Shereen Marisol Meraji, When Should We Label Something Terrorism?, NPR (Sept. 10, 2021), https://www.npr.org/sections/code switch/2021/09/10/176167881/when-should-we-label-something-terrorism [https://perma.cc/CG2B-8BPU] (statement of a Pan-African studies professor, explaining that “[t]he terrorist label has been used against Black and Muslim-identified Americans as an excuse to surveil and criminalize those communities . . . while . . . ‘white supremacist terrorists’ are organizing coup attempts on social media platforms with few repercussions.”).


249. Corbin, supra note 11, at 460.

250. Id. at 460.

251. Id. at 1583.

252. Id. at 1583 (footnotes omitted).


254. S LAli, supra note 18, at 261; Ellmann, supra note 12, at 345.

255. Ellmann, supra note 12, at 345.
a fan belt wrapper around the diaper’ needs to be singled out for questioning.”\textsuperscript{256} House Representative Chambliss, expressed a desire to “just turn [the sheriff] loose and have him arrest every Muslim that crosses the state line.”\textsuperscript{257} This rhetoric was not constrained to obsolete legislators from conservative states. Attorney General John Ashcroft, who at the time was the figurehead for the entire Justice Department, insultingly declared, “Islam is a religion in which God requires you to send your son to die for him. Christianity is a faith in which God sends his son to die for you.”\textsuperscript{258} To see public officials, all of whom have sworn an oath to uphold the Constitution, openly and unapologetically disparaging their faith undoubtably raised concerns amongst Muslim Americans about their continuing liberty in the United States.

Shielded by the secrecy of Guantanamo Bay, the subject of Islam constantly subjected detainees to the odium of prison guards and interrogators.\textsuperscript{259} Mohamedou Ould Slahi recounts the treatment of Islam throughout his time as a “Special Project”: “[I]n the secret camps, the war against the Islamic religion was more than obvious. Not only was there no sign to Mecca, but the ritual prayers were also forbidden . . . . [p]ossessing the Koran was forbidden. Fasting was forbidden. Practically any Islamic-related ritual was strictly forbidden.”\textsuperscript{260}

When Mohamedou later asked the prison guards why they executed these orders, all of which violated the laws of war, one guard responded, “I know I can go to hell for what I have done to you.”\textsuperscript{261} At GTMO, guards also desecrated the Koran in front of the detainees and forced them into sexual acts that violated their religious beliefs, practices mirrored by the guards at the Abu Graib prison facility in Iraq.\textsuperscript{262} The level of prejudice at military facilities after 9/11 is evinced by a bone-chilling statistic: of the 780 men that have passed through (or remained within) Guantanamo’s gates, every single one was Muslim.\textsuperscript{263}

\begin{footnotesize}
\textsuperscript{256} Id. at 345.
\textsuperscript{257} Singh, supra note 253, at 26.
\textsuperscript{258} Ellmann, supra note 12, at 345 n.111.
\textsuperscript{259} SLAHI, supra note 18, at 261–62.
\textsuperscript{260} Id. at 261–62.
\textsuperscript{261} Id. at 231.
\textsuperscript{262} Id. at 342. At Abu Graib, U.S. military officials tortured and raped several detainees, leading to the deaths of an unknown number (one confirmed). The Abu Graib scandal inspired several self-described jihadists to retaliate against the United States, including the beheading of an American businessman that occurred shortly after the scandal’s newsbreak. Brian Whitaker & Luke Harding, American beheaded in revenge for torture, THE GUARDIAN (May 12, 2004), https://www.theguardian.com/world/2004/may/12/iraq.alqaida [https://perma.cc/9GXX-TD4F].
\textsuperscript{263} Masters, supra note 3.
\end{footnotesize}
Religious discrimination proved only slightly tempered at U.S. penitentiaries. Javaid Iqbal, a Pakistani American, was one of 184 “high-interest” detainees at a New York detention center.\textsuperscript{264} The correctional officers at the facility assaulted him, ordered arbitrary strip and body-cavity searches, and refused to feed him adequate food.\textsuperscript{265} The guards also berated him, calling him a terrorist and a “Muslim killer” and “refused to let him and other Muslims pray because there would be ‘[n]o prayers for terrorists.’”\textsuperscript{266} The Supreme Court, although expressing concern with Iqbal’s allegations, dismissed his complaint on procedural grounds.\textsuperscript{267}

While some might attempt to defend anti-Muslim sentiment in a New York prison in 2001, shortly after the 9/11 attacks, this prejudice persists today.\textsuperscript{268} In 2018, when a Muslim inmate on death row requested his imam’s presence at his execution, prison officials denied his request despite regularly allowing Christian chaplains to be present in the execution chamber.\textsuperscript{269} The Supreme Court again refused to hear the merits of the case, vacating the petitioner’s stay of execution because his complaint was untimely.\textsuperscript{270} Even with glaring Constitutional (and criminal) violations against them, Muslim Americans consistently suffer from unlawful state action without recourse.

C. Islamophobia in America as It Exists Today

Fifteen years following the 9/11 attacks, the Trump administration once again demonized the Islamic faith through its rhetoric and policies.\textsuperscript{271} While on the campaign trail, Donald Trump used demagogic language to reinvigorate fear of Muslims among the American public.\textsuperscript{272} He enlisted this propaganda to garner support for his “Muslim Ban,” formally declaring he was “calling for a total and complete shutdown of Muslims entering the United States.”\textsuperscript{273} Trump stayed

\begin{footnotesize}
\begin{enumerate}
\item Ashcroft v. Iqbal, 556 U.S. 662, 668 (2009).
\item Id. at 669.
\item Id.
\item Id. at 662.
\item Dunn v. Ray, 139 S. Ct. 661, 661 (2019).
\item Id.
\item Id.
\item Corbin, supra note 11, at 476.
\item Id.
\end{enumerate}
\end{footnotesize}
true to his campaign promise, issuing two Executive Orders banning
the entry into the United States of individuals from several Muslim
countries. 274

After federal courts enjoined the enforcement of both orders, the
Trump administration again attempted to limit the entrance of
individuals from predominantly Muslim Countries with Procla-
mination No. 9645. 275 Alleging that the proclamation was based on reli-
gious animus, the state of Hawaii sued for injunctive relief, and the
Supreme Court granted certiorari. 276 With a five-to-four majority,
the Supreme Court decided to subject President Trump’s procla-
mation to rational basis review, a notoriously deferential standard of
review. 277 Under this standard, the Court determined the President
had the statutory authority to limit the entry of foreign nationals if
he determined entry would be “detrimental to the interests of the
United States.” 278

The dissent backfired, claiming that the Proclamation was a
“repackaging” of the Trump campaign’s promised “Muslim ban,”
“masquerad[ing] behind a façade of national-security concerns.”
279 Trump effectively validated this characterization of the Proclamation
when, in previous interviews, he explained that the Proclamation
used tempered language because “[p]eople were so upset when [he]
used the word Muslim.” 280 In bolstering the dissent’s opinion that
the Proclamation “runs afoul of the [First Amendment] Establish-
ment Clause’s guarantee of religious neutrality,” Justice Sotomayor
cited several of President Trump’s inflammatory statements regard-
ning Muslims and the Islamic faith. 281 Such examples include a 2016
statement by President Trump where he stated he believed “Islam
hates us.” 282 Around the same time, he demanded “surveillance of

274. Protecting the Nation From Foreign Terrorist Entry Into the United States,
13209 (2017).
277. Acevedo, supra note 273, at 235–36 (“By employing a formalistic application of
the rational basis test while ignoring the context of the passage of the law, [the Court]
weakened constitutional protections for religious minorities . . . diminish[ing] the Con-
istitution’s ability to prevent future witch-hunts. A simple solution would be to take
government officials at their word: if a president is honest enough to say that he is
targeting a religious group, then the Court ought to believe him.”) (emphasis added)
(footnotes omitted).
278. 8 U.S.C. § 1182(f).
280. Id. (internal quotations omitted).
281. Id. at 2434.
282. Id. at 2436 (internal quotations omitted).
mosques in the United States” and blamed “terrorist attacks on Muslims’ lack of ‘assimilation’ and their commitment to ‘sharia law.’”

The boldness of these inflammatory public statements depicts the pervasiveness of anti-Muslim sentiment in the United States.

Notably, the dissent pointed to Masterpiece Cakeshop, decided a few weeks prior, which held that a state civil rights commission violated the First Amendment’s Free Exercise Clause when it determined a Christian baker violated a state anti-discrimination law.

The Court held that certain commissioners’ statements revealed that the “Commission’s treatment of . . . [the baker’s case displayed] a clear and impermissible hostility toward [his] sincere religious beliefs” and failed its obligation to act with religious neutrality.

The dissent rightfully juxtaposed the majority’s treatment of the “less pervasive” statements made by the civil rights commission with the Hawaii v. Trump decision, which “set[] aside the President’s charged statements about Muslims as irrelevant.”

The Court’s contradictory holdings in these two cases sent a message to Muslim Americans that was resoundingly clear: anti-faith bias is easier to condemn when it involves a religion the conservative majority can relate to.

In Trump v. Hawaii, the Supreme Court accepted the government’s claim that the Proclamation was premised on national security, rather than religious animus against Muslims. This deference to the executive branch on issues relating to national security is the same tool that, since 2001, different administrations have used to surveil, police, torture, and detain Muslims.

These claims of national security, however, have been overstated, hyperbolic, and misleading. To illustrate this, although Trump’s first Executive Order cites the 9/11 attacks as justification for the Muslim ban, none of the countries barred from entry were the home countries of any of the 9/11 hijackers.

Fully grasping the moral panic surrounding terrorism

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283. Id. at 2436.
286. Trump, 138 S. Ct. at 2447 (Sotomayor, dissenting).
287. Id. at 2447 (Sotomayor, dissenting) (“[I]t tells members of minority religions in our country ‘that they are outsiders, not full members of the political community.’”).
288. Id. at 2421–22.
289. See German & Robinson, supra note 35, at 4 (explaining that FTO designation permits deep probes under FISA); see also John C. Yoo, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States, at 16 (Mar. 14, 2003) (“[I]t is well established that the sovereign retains the discretion to treat unlawful combatants as it sees fit.”).
in post-9/11 America, politicians have long understood that the mere mention of the attacks will amass widespread support for policies that are chiefly unrelated.291

The American government, its officers, and the public all perpetuate the stereotype that associates terrorism with the Muslim religion. Attacks perpetrated by Muslims generate 357 percent more media coverage than similar attacks perpetrated by non-Muslims.292 Over two decades have passed since the 9/11 attacks, and still, Americans remain “tragically tolerant” of Islamophobia in our polity.293 If an end to the War on Terror is attainable, it is only through the engagement and reinclusion of Muslim American communities, which can only be accomplished through the eradication of harmful discourse surrounding “terrorism”.294

CONCLUSION

“Terrorism” is a political term, not a criminal act. It is a term that has been used to quash political dissent, commit human rights abuses, and discredit opponents.

In the two decades since 9/11, the moral panic in America surrounding terrorism has led to several unsavory consequences. First, it permitted the Government to egregiously violate the integrity of hundreds of foreign nationals by imprisoning them for years in Guantanamo Bay, a detention facility with an indelible past marred by torture. Second, it emboldened the executive branch to threaten the checks and balances inscribed in our Constitution, which the Bush Administration did by stripping federal courts of their ability to prosecute those responsible for the 9/11 attacks. These insults to the judicial branch have proven to be unfounded; federal courts remain open and ready to hear cases involving terrorism. However, attempts to relate substantive crimes to “terrorism” politicizes trials,
jeopardizing defendants’ rights and the prosecution’s chances at success. Third, sensationalizing the threat of “terrorism” has imperiled the livelihoods of Muslims in both America and abroad. It stigmatizes their religion and renders them victims to discrimination by the government and the public.

After the attacks of September 11th, Americans waited in horror, anticipating another attack. The U.S. government launched a witch hunt against an unknown number of enemies. Little did we realize, however, long before the first detainees were surreptitiously flown into Guantanamo Bay, a great threat had already planted its seed in the homeland: fear. The moral panic surrounding terrorism continues to chip away at the liberties, values, and equality that Americans hold so dear.

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