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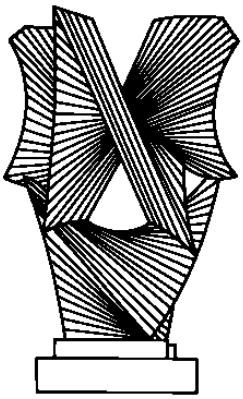

FORUM CHOICE FOR TERRORISM SUSPECTS

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THE LAW SCHOOL
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FORUM CHOICE FOR TERRORISM SUSPECTS

AZIZ Z. HUQ†

ABSTRACT

What forum should be used to adjudicate the status of persons suspected of involvement in terrorism? Recent clashes between Congress and the president as to whether the status of terrorism suspects should be determined via Article III courts or military commissions have revived the debate about this venue question. The problem is typically framed as a matter of legal doctrine, with statutory and doctrinal rules invoked as dispositive guides for sorting suspects into either civilian or military venues. This Article takes issue with the utility of that framing of the problem. It argues that the forum question can more profitably be analyzed through an institutional-design lens. A key institutional-design decision is whether and when to create jurisdictional redundancy. When, that is, should the existence of overlapping jurisdictions vest the government with a threshold choice of forums or an option to retry a suspect who has been acquitted in an initial process? Jurisdictional redundancy is pervasive. But conventional wisdom suggests that it is unwise. This Article demonstrates, however, that overlap among forums has complex direct and indirect effects on the accuracy and cost of terrorism-related adjudication. The Article presents a comprehensive framework for analyzing redundancy by exploring how redundancy influences error rates, system-maintenance costs, externalities, information production, and incentives. Applying this framework, I contend that the conventional wisdom is flawed. Pervasive redundancy has surprising merit in contrast to two leading reform proposals that would eliminate most jurisdictional overlap.

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INTRODUCTION

A central, seemingly intractable controversy in national-security law is the choice of forum for adjudicating the status of terrorism suspects. Consider the arrest of Ahmed Abdulkadir Warsame. An alleged liaison between al Qaeda and the al Shabaab organization of Somalia, Warsame was seized in April 2011 aboard a fishing skiff in the Gulf of Aden.[1] After two months' imprisonment on a Navy vessel, the Somali national was moved to Manhattan for a criminal trial in federal district court.[2] Instead of inspiring praise, news of his capture and pending prosecution drew criticism from those who argued that Warsame belonged in a military forum.[3] The Warsame case is only the latest installment in an increasingly heated debate about forum choice for terrorism suspects. That debate has proved particularly vexing because suspects linked to al Qaeda and other transnational groups are seized in a bewildering variety of circumstances, leading to puzzles not only about the relevant forum but also about the relevant facts on which forum choice should turn. Imagine, for example, that Warsame had been captured off the coast of Florida, just outside U.S. territorial waters. Or that he had been arrested upon entering the country at Miami International Airport, with explosives on his person. Or that, upon being pulled from a Yemeni fishing vessel, Warsame had fished from his pocket a U.S. passport. In each case, the geography of capture, the suspect's citizenship, and his or her alleged actions could vary in ways that are potentially relevant to the forum-choice question.

There is scant domestic consensus on how to allocate suspects among venues to evaluate their long-term detentions.[4] President

1. Ken Gude, *Conservatives Outraged over Prosecution of Terror Suspect*, CTR. FOR AM. PROGRESS (July 6, 2011), http://www.americanprogress.org/issues/2011/07/warsame_trial.html.

2. *Id.*

3. Charlie Savage, *U.S. Tests New Approach to Terrorism Cases on Somali Suspect*, N.Y. TIMES, July 7, 2011, at A10.

4. I use the terms "forum" and "venue" interchangeably in this Article without intending to draw on their technical legal meanings.

Obama and his opponents in Congress have disagreed sharply on forum choice not only for suspects seized extraterritorially, such as Warsame, but also for those arrested in the United States.[5] The Obama administration has endorsed criminal prosecution in Article III courts for some suspects[6] and at one point even threatened to veto defense appropriations bills containing riders that would limit such proceedings.[7] By contrast, many in Congress favor either the use of military commissions as authorized by a 2009 statute[8] or detention in military custody without any criminal process.[9] These disagreements initially yielded a protracted interbranch stalemate.[10] In late 2011,

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5. *See, e.g.*, Halimah Abdullah, *McConnell Says Kentucky Could Face Attack if Terror Suspects Are Held Here*, LEXINGTON HERALD-LEADER, June 15, 2011, http://www.kentucky.com/2011/06/14/1774656/mcconnell-says-kentucky-could.html (describing Senator. Mitch McConnell's argument that terrorism suspects arrested in the United States should not be tried in the United States); Mitch McConnell, Op-Ed., *The Right Place To Try Terrorists*, WASH. POST, June 22, 2011, at A17; Charlie Savage, *Attorney General and Senator Clash on Where To Try Terror Suspects*, N.Y. TIMES, June 17, 2011, at A20 (discussing an argument between the Obama administration and Senator McConnell over whether suspects captured on American soil should be prosecuted in America or at Guantánamo Bay Naval Base); Charlie Savage, *Developments Rekindle Debate over Best Approach for Terrorist Suspects*, N.Y. TIMES, Oct. 13, 2011, at A14 (noting some arguments between conservatives and President Obama over forum choice).

6. The Obama administration has taken this position with respect to at least those suspects who are detained inside the United States. *See* John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Strengthening Our Security by Adhering to Our Values and Laws, Remarks at Harvard Law School (Sept. 16, 2011), *available at* http://whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an ("[I]t is the firm position of the Obama Administration that suspected terrorists arrested inside the United States will—in keeping with long-standing tradition—be processed through our Article III courts.").

7. *See, e.g.*, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 1540—NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012, at 2–3 (2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1540r_20110524.pdf ("The Administration strongly objects to the provisions that limit the use of authorized funds . . . regarding prosecution of detainees. . . . If the final bill presented to the President includes these provisions . . . , the President's senior advisors would recommend a veto."); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: S. 1867—NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012, at 2–3 (2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s_20111117.pdf (repeating the veto threat).

8. Military Commissions Act of 2009, Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2574 (codified at 10 U.S.C. § 948a–950t (Supp. IV 2010)).

9. *See, e.g.*, Walter E. Kuhn, *The Terrorist Detention Reform Act: Detention Policy and Political Reality*, 35 SETON HALL LEGIS. J. 221, 269–70 (2011) (endorsing continued use of military detention); *see also infra* Parts I.C–D, IV.A–B.

10. The executive branch has made two failed attempts to resolve the stalemate. First, on November 13, 2009, the Departments of Justice and Defense announced charges against five

Congress enacted a series of ambiguously worded provisions in a military appropriations bill.[11] These novel provisions might make the executive's use of Article III forums more difficult, but they do not conclusively resolve the forum-choice debate.[12] Throughout these controversies, however, one point of general agreement has persisted: a belief that the jurisdictional arrangements that had long obtained in the post-9/11 decade were "dysfunctional."[13]

The question of forum choice typically is framed as a question of law. In particular, the inquiry is framed as turning upon whether, under international or domestic law, a suspect can or should be categorized as a "criminal" or a "combatant".[14] Those who read the law to categorize alleged terrorists such as Warsame as combatants

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Guantánamo detainees in federal court and against five others in military commissions. Press Release, U.S. Dep't of Justice, Departments of Justice and Defense Announce Forum Decisions for Ten Guantánamo Bay Detainees (Nov. 13, 2009), *available at* http://www.justice.gov/opa/pr/2009/November/09-ag-1224.html. The decision to use Article III courts was so controversial that the administration backed down. *See* Editorial, *Cowardice Blocks the 9/11 Trial*, N.Y. TIMES, Apr. 5, 2011, at A22. ("That retreat [from trying Khalid Sheikh Mohammed in New York City] was a victory for Congressional pandering and an embarrassment for the Obama administration, which failed to stand up for it."). Second, on January 22, 2010, an interagency task force on Guantánamo announced a series of forum choices. GUANTANAMO REVIEW TASK FORCE, FINAL REPORT, at ii (2010), *available at* http://www.justice.gov/ag/guantanamo-review-final-report.pdf. Its judgment has never been operationalized.

11. *See* National Defense Authorization Act for Fiscal Year 2012 (NDAA 2012), Pub. L. No. 112-81, §§ 1021–1034 125 Stat. 1298 (2011). This law is discussed *infra* at text accompanying notes 312–22.

12. *See infra* Part IV.

13. Editorial, *What To Do with Terror Suspects*, WASH. POST, July 5, 2011, at A10.

14. *See, e.g.*, Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 770–71 (2011) (noting the distinction between possible categories for suspected terrorists); *see also* Gregory Maggs, *Assessing the Legality of Law Enforcement Measures Without Characterizing Them as Law Enforcement or Military Action*, 80 TEMP. L. REV. 661, 663 (2006) (noting questions about whether military or criminal law applies to certain defendants); Benjamin J. Priester, *Who Is a Terrorist? Drawing the Line Between Criminal Defendants and Military Enemies*, 2008 UTAH L. REV. 1255, 1257 (distinguishing between criminal defendants and military enemies); Karl S. Chang, *Enemy Status and Military Detention in the War Against al-Qaeda*, 47 TEX. INT'L L.J. (forthcoming 2012) (arguing that the type distinction in international law is not combatancy but enmity). International law, however, is more complex than this dichotomy suggests: "[t]reaties long have recognized that a state may detain without trial not only opposing armed forces, but also civilians and others who pose threats to its security." Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT'L L. 403, 403 (2009); *see also* Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT'L L. 369, 373–74 (2008) (arguing that the debate about the combatant/civilian line is "stale" and arguing that human-rights law provides a new perspective on the proper scope of permissible detention authority under international law).

see military jurisdiction as proper.[15] Those who insist that "[t]errorism . . . is a crime [that] has historically been addressed through criminal prosecution," by contrast, view Article III courts as the appropriate forum as a matter of law.[16] On both sides, legal categories are invoked as guideposts for matching suspects such as Warsame exclusively to one or another forum.[17] The literature therefore focuses closely on the procedural rules and substantive law employed in a given venue.[18] But the ensuing legal line-drawing exercises have proved divisive and inconclusive. Conventional legal analysis has failed to supply clear answers.[19] This failure is not surprising. The legal categories of "combatant," "criminal," and

15. *See, e.g.*, Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307, 351 (2003) (arguing that if the "military approach" to anti-terrorism prevails, the United States "will understand that religious fundamentalists who attack military targets in the Middle East or elsewhere and defend their homeland are, in essence, soldiers"); Josh Tyrangiel, *And Justice For . . .*, TIME, Nov. 26, 2001, at 66 (describing President Bush's characterization of terrorists as soldiers as a justification for the use of military commissions).

16. David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 728 (2009); *see also* RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS (2008) (discussing the history of cases addressing terrorism in Article III courts); Michael Ratner & Jules Lobel, Comment, *Don't Repackage Gitmo!*, NATION, Dec. 25, 2008, at 8 (criticizing arguments "that holding some terror suspects without trial or charges is necessary"); Jameel Jaffer & Ben Wizner, *Don't Replace the Old Guantánamo with a New One*, SALON (Dec. 9, 2008, 6:58 AM EST), http://www.salon.com/2008/12/09/guantanamo_3/singleton. ("The class of people who cannot be prosecuted [in Article III courts] but are too dangerous to let go is either very small or nonexistent.").

17. Not all scholars and commentators draw absolute positions. Some make fine-grained distinctions between suspects based on the locus of capture or the substance of accusations to ascertain who is a "criminal" and who is a "combatant." Professors Gabriella Blum and Philip Heymann allocate suspects to criminal or military venues based on their locus of capture. GABRIELLA BLUM & PHILIP B. HEYMANN, LAWS, OUTLAWS, AND TERRORISTS: LESSONS FROM THE WAR ON TERRORISM 105 (2010). Benjamin Wittes, by contrast, relies on a suspect's status and behavior. BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR 146 (2008).

18. For recent examples of excellent treatments of substantive and procedural issues, see, respectively, Chesney, *supra* note 14, at 805–48; and Matthew C. Waxman, *Guantánamo, Habeas Corpus, and Standards of Proof: Viewing the Law Through Multiple Lenses*, 42 CASE W. RES. J. INT'L L. 245 (2009). For a review of the uses of law enforcement by a former assistant attorney general for national security, see David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT'L SECURITY L. & POL'Y 1 (2011).

19. *See, e.g.*, Tom Toles, Editorial, *A Framework for Detainees*, WASH. POST, Mar. 21, 2011, at A20 ("Just days after President Obama issued an executive order to govern long-term detentions at the U.S. Naval Base at Guantanamo Bay, Cuba, Republican members of the House and Senate shot back by offering their own, strikingly different proposals."); Jack Goldsmith, Op-Ed., *A Way Past the Terrorist Detention Gridlock*, WASH. POST, Sept. 10, 2010, at A25 (identifying the political deadlock).

"terrorist" are not natural classifications. Their boundaries have turned out to be controversial on normative and legal grounds—probably irredeemably so. The utility of static legal rules is also vulnerable to erosion by fast-moving circumstances. For instance, rapid changes to al Qaeda's organizational structure have cast doubt on the durability of longstanding legal typologies.[20] Ultimately, substantive legal categories are unlikely to generate clear jurisdictional lines that will enable the allocation of different suspects to distinct venues.[21]

This Article presents an alternative approach to the problem of forum choice for terrorism suspects. Its central premise is that the decision about how to adjudicate the status of suspected terrorists can be approached as a problem of institutional design rather than as a matter of pure legal doctrine. An institutional-design perspective asks how to "divid[e] the government into units that will provide the best possible set of public policies and government services."[22] It treats policy outcomes as a function of the architecture of adjudicative institutions.[23] The pivotal difference between the doctrinal and institutional-design approaches can be captured pithily in the following way: legal analysis hinges on *how a particular suspect should be categorized*. Is Warsame a criminal or a combatant? By contrast, an institutional-design analysis takes a step backward in time from the

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20. *See* Leah Farrall, *How al Qaeda Works: What the Organization's Subsidiaries Say About Its Strengths*, FOREIGN AFF., Mar.–Apr. 2011, at 128, 136–37 (describing changes to al Qaeda); Keith Johnson, *Officials Spotlight Domestic Terrorism Threat*, WALL ST. J., Feb. 10, 2011, at A5 ("[L]one-wolf extremists with little or no formal connection to al Qaeda have proliferated and are potentially plotting small-scale attacks in the U.S[.], officials said.").

21. This difficulty is quite apart from the problem of how to sort suspects prior to any threshold adjudication of status. That is, are suspects to be slotted into different venues based on what the suspect has conceded or what the government has alleged? Surprisingly, there is no crisp judicial treatment of this nettlesome question.

22. David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 958 (2004). Institutions can be defined broadly as "clusters of norms with strong but variable mechanisms of support and enforcement that regulate and sustain an important area of social life." DIETRICH RUESCHEMEYER, USABLE THEORY: ANALYTIC TOOLS FOR SOCIAL AND POLITICAL RESEARCH 210 (2009). I use the term here to refer to "formal institutions that are legally binding." *Id*. at 212.

23. *See* Raaj Kumar Sah & Joseph E. Stiglitz, *The Architecture of Economic Systems: Hierarchies and Polyarchies*, 76 AM. ECON. REV. 716, 716–17 (1986) (arguing that the institutional architecture of complex institutions, and in particular their use of functional redundancies, influences outcomes); *see also* Todd L. LaPorte & Paula M. Consolini, *Working in Practice but Not in Theory: Theoretical Challenges of "High-Reliability Organizations*," 1 J. PUB. ADMIN. RES. & THEORY 19, 21–22 (1991) (describing research into optimal organizational form in contexts in which system failures are associated with unacceptably high costs).

moment of capture. It looks instead at *how the government's choice should be structured ex ante* to elicit the best outcomes—a question that is peripheral to dominant doctrinal modes of analysis. An institutional-design inquiry, unlike a doctrinal analysis, thereby aims to capture both direct and indirect connections between forum choice and policy goals. By refocusing the debate away from legal doctrine onto the causal consequences of unexamined architectural choices, an institutional-design lens usefully sidelines highly disputed normative questions about the character of terrorism as either war or crime. It instead generates a set of metrics that all sides of the debate should find acceptable and brings to the surface issues and mechanisms that have been obscured by a relentless focus on existing doctrine.

More specifically, I contend that a central institutional-design choice is whether or not to create *jurisdictional redundancy* in forum choice for terrorism suspects. Redundancy, as I use the term in this Article, means that for any suspect, the government has an overlapping set of venue options. Redundancy can take two forms. First, when a suspect such as Warsame is seized, the law could vest the government with a choice between different forums initially. Second, it could give the government an option to invoke a substitute venue should an initial forum fail to validate the government's threshold detention. For example, if Warsame is acquitted in an Article III court, the law might allow him to be tried subsequently by a military commission. In other words, redundancy can be either simultaneous or sequential. Jurisdictional redundancy of both stripes is ubiquitous in the existing institutional framework for terrorist detention. Leading reform proposals, however, aim to eliminate most redundancy in favor of jurisdictional parsimony.[24] One conclusion of my analysis is that the wholesale elimination of redundancy may be undesirable, although the effects of more modest jurisdictional modifications are far less clear.

Legal and institutional studies in other contexts have identified the value of redundancy as an element in institutional design.[25]

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24. *See infra* Part IV.A–B.

25. For a model of political redundancy, see Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. POL. SCI. 274 (2003). For an analysis of redundancy in a different national-security context, see Scott D. Sagan, *The Problem of Redundancy Problem: Why More Nuclear Security Forces May Produce Less Nuclear Security*, 24 RISK ANALYSIS 935 (2004). For analysis in the corporate-form context, see generally Eric Maskin, Yingyi Qian & Chenggang Xu, *Incentives, Information, and Organizational Form*, 67 REV. ECON. STUD. 359 (2000); and Yingyi Qian, Gérard Roland & Chenggang Xu, *Coordination and Experimentation*

Analysis of redundancy is also familiar to public-law scholars, some of whom, because of their exposure to the legal-process school, have been acclimatized to think about the law in terms of interactions among diverse government institutions.[26] In the 1960s and 1970s, jurisdictional overlap provided a lens for assessing the overlap of state criminal adjudication and postconviction collateral review in habeas corpus by federal courts.[27] More recently, scholars of the federal administrative state have remarked upon the ubiquity of jurisdictional redundancy in the regulatory state, giving rise to literature on the effects of overlapping jurisdictions.[28] Collectively, these streams of scholarship provide rich tools for thinking about the institutional-design problem in terrorist detention. But although some scholars have exploited these tools to think in innovative ways about the national-security bureaucracy,[29] no one has applied them to the specific forum-choice question respecting terrorism suspects.

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in M-Form and U-Form Organizations, 114 J. POL. ECON. 366 (2006). Redundancy of a different kind has been explored in the criminal-law literature on overcriminalization. *See, e.g.*, Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 230 (2007) (discussing redundancy in the coverage of state and federal criminal law).

26. *See* William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, at lx (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("In a government seeking to advance the public interest, each organ has a special competence or expertise, and the key to good government is not just figuring out what is the best policy, but figuring out which institutions should be making which decisions and how all the institutions should interrelate.").

27. *See, e.g.*, Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981) (defending the existence of jurisdictional overlap).

28. The most recent contributions in the law literature are Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201 [hereinafter Gersen, *Overlapping and Underlapping Jurisdiction*]; Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 315–23 (2010) [hereinafter Gersen, *Unbundled Powers*]; and Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 185, 218–44 (2011). *See also* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. (forthcoming 2012). For an excellent survey of the political-science literature, see JONATHAN B. BENDOR, PARALLEL SYSTEMS: REDUNDANCY IN GOVERNMENT 24–65 (1985). For examples of the important work done on redundancy in other contexts, compare Nancy Staudt, *Redundant Tax and Spending Programs*, 100 NW. U. L. REV. 1197, 1201 (2006) (cautiously endorsing a role for redundancy in institutional design), with Weisbach & Nussim, *supra* note 22, at 999–1006 (arguing that economies of scale make consolidation of some social-welfare programs in the Internal Revenue Service valuable).

29. *See, e.g.*, Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1684–91 (2006) (focusing on how centralized the intelligence function should be).

The dearth of scholarship on the terrorist-detention question is a further reason to attend to overlap in institutional design. Jurisdictional redundancy turns out to be a unifying variable that is uniquely positioned to explain how forum choice influences policy outcomes. Moreover, most or all pending reform ideas concerning terrorism forum choice are, in effect, suggested adjustments to the quantum of extant jurisdictional redundancy in the terrorist-detention system. Bills that preclude the transfer of detainees at the Guantánamo Bay Naval Base for trial in the United States, for example, *narrow* jurisdictional overlap.[30] Adding conspiracy offenses to the list of substantive crimes that can be tried by a military commission,[31] by contrast, *increases* the overlap between military and civilian systems. Changes to procedural rules will also increase or decrease the executive's choice between forums and can therefore be recharacterized as adjustments to jurisdictional overlap.[32]

Overlap among venues appears at first blush a peculiar, even counterintuitive, design choice that reformers would be wise to oust—as many indeed hope to do. Redundancy might be taken as an invitation to the government to engage in abusive behavior. Or it might be attacked as a waste of resources. Why establish a multiplicity of forums when a single forum could be modified to account for the new policy demands of post-9/11 national security? Perhaps the answer is simply that increasingly outdated and irrelevant constitutional rules have guarded some forums from reform while placing no constraints on the creation of new forums.[33] Perhaps as a result of such perverse jurisdictional entrenchment, creating a new forum is easier than altering the rules of an existing one. Perhaps the

30. *See, e.g.*, Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4137, 4351 (prohibiting the expenditure of Pentagon funds on detainee transfers).

31. *See* 10 U.S.C. § 950t(29) (Supp. IV 2010) (allowing conspiracy prosecutions in military commissions).

32. Some scholars have made the distinct point that the military and Article III criminal systems are converging in substantive predicates and procedural constraints. Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1080–81 (2008). Convergence entails common procedural and substantive standards, conditions that are neither necessary nor sufficient to establish jurisdictional overlap. Professors Chesney and Goldsmith's useful article, as a result, does not discuss overlap as that term is used here.

33. That is, redundancy is the product of "institutional *development* rather than institutional *choice*." PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS 15 (2004).

net effect is a costly and needless multiplicity of forums that ought to be extinguished.

This story contains a grain of truth, but not much more. Path-dependent historical developments likely play a role in shaping forum choice, and overlapping jurisdictions create some risk of abuse. But this story also radically oversimplifies. It fails to capture important benefits of redundancy and elides important tradeoffs in the choice between jurisdictional parsimony and redundancy. Channeling the government into one forum, I argue, results in policy outcomes that are very different from the outcomes of jurisdictional redundancy, and it is far from clear that the ensuing changes would all be for the better. A central task in institutional design is analyzing, rather than taking for granted, the complex and multiple mechanisms that connect jurisdictional choice to policy outcomes. In this endeavor, my analysis takes the central policy goals in terrorist detention to be captured by labels of *accuracy* and *cost minimization*—an assumption that I defend at greater length in Part III. Within this framework of analysis, the government wishes to detain the correct people, however defined, by applying the law correctly to the facts, and it wishes to do so with a minimum of transaction costs. Beyond transaction costs, detaining the wrong people has two potential downstream costs: the dissipated liberty interests of the incorrectly detained and the marginal increase in the risk of terrorism imposed when the government fails to detain the correct person.

This Article argues that jurisdictional redundancy has both direct and indirect costs, only some of which are accuracy related. Changes to jurisdictional specifications induce immediate changes to error rates, marginal government expenditures, and public externalities. But they also have indirect effects of a lesser magnitude: they influence the principal-agent relationship between Congress and government officials and change the way information about terrorism is gathered and disseminated. Compounded over time, even indirect effects may work major reallocations in national-security policy.

By examining the direct and indirect links between jurisdictional redundancy and policy outcomes, this Article provides a generally applicable framework for the analysis of the forum-choice question for terrorism suspects. It does so, moreover, without reliance on contested assumptions about the relative priority of liberty or security. Nor does it draw on controversial legal assumptions about

the content of constitutional norms.[34] I make no claims here, for example, about the proper measure of due process, the necessary allocation of authority among the branches, or the appropriate moral censure to be directed at those accused of terrorism. Such claims would be necessarily controversial. The constitutional norms at issue are generally poorly defined.[35] The basic normative issues are highly divisive. Yet even bracketing these issues, it is still possible to capture many of the relevant normative concerns by focusing parsimoniously on questions of accuracy and other costs.[36]

Applying this analytic framework to pending reform proposals, I reach a conclusion that is at odds with the conventional wisdom. Rather than deploring overlap and celebrating singularity, I argue that the status quo will be hard to improve upon solely by eliminating any quantum of systemic redundancy. Counterterrorism, I conclude, is a domain in which redundancy is likely to have far more benefits than costs.[37]

The Article is organized as follows. Part I motivates the analysis by specifying the historically plural pathways for terrorist detention. Part II explains why jurisdictional redundancy is an appropriate lens for the analysis. It provides a precise and intuitive definition of "jurisdictional redundancy" and demonstrates the ubiquity,

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34. I bracket the question of who should make the choice of institutional design, Congress or the executive. That is a separate inquiry that raises distinct and complex questions.

35. Further, as I argue elsewhere, abstract principles of structural constitutionalism supply unreliable guides for current policymaking. *See* Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. (forthcoming Aug. 2012) (arguing against the use of structural inferences from separation-of-powers principles to policy outcomes in the counterterrorism domain).

36. I do not intend to suggest that normative considerations of fairness, justice, and reciprocity are unimportant, only that it is far more useful to analyze institutional-design choices in quantifiable metrics of accuracy and costs. Arguments couched in terms of normative terminology in the counterterrorism domain risk lapsing into declamatory solecisms with almost no tractable analytic content.

37. There is a related set of problems about duplication and exceptionalism. For example, rather than creating interjurisdictional redundancy, an institutional designer might wish to create jurisdictional redundancy within a specific court system by establishing a specialized Article III bench for terrorism cases or by increasing the number of levels of appellate review. *Cf.* Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 381 (1995) (arguing for investments in appellate review rather than a better trial process because "litigants possess information about the occurrence of error and appeals courts can frequently verify it"). Or the institutional designer might think it preferable to opt out of current jurisdictional arrangements entirely by the simple expedient of transferring suspects to third countries. To maintain tractability in the analysis, I have chosen not to address these extensions. My aim here is more narrow; I identify redundancy as an important parameter, and I nudge readers toward a more positive assessment of redundancy than is standard in the literature.

pervasiveness, and durability of such redundancy. Part III is the core of the Article. It presents a comprehensive typology of redundancy's effects on policy outcomes. By systematically exploring mechanisms that link redundancy to policy outcomes, I provide a vocabulary for identifying the downstream consequences of changing forum-choice rules. I begin by focusing on the direct effects of jurisdictional specifications on accuracy and cost. I then consider indirect effects. Finally, Part IV applies the analytic framework developed in Part III to two popular reform ideas. The reform proposals I address are extreme in the sense that they wholly militate against the existence of any redundancy. Whatever uncertainty exists about more modest marginal changes to jurisdictional specifications, I contend that the wholesale elimination of redundancy is unlikely to have desirable effects.

I. PLURAL PATHWAYS IN TERRORIST DETENTION

Imagine that federal authorities have identified, and wish to detain for a protracted period, a person they suspect is linked to a terrorist group. Perhaps, like Warsame, the person was detained overseas in a place over which no functioning state exercises legal control.[38] Perhaps he was detained on U.S. soil upon arrival at an international entry point after having attempted to commit an act of terrorism en route.[39] Or perhaps he was arrested in the Philadelphia suburbs for plotting attacks on Danish cartoonists perceived to have given religious insult.[40] Whatever the circumstances of a suspect's seizure, the government almost always has a range of venue choices. Depending on the available evidence about a suspect, the suspect's nationality, the locus of capture, and other factors, federal authorities can select from the following forums to make determinations about the suspect's potential long-term detention: Article III criminal

38. This is not an implausible scenario given the al Qaeda presence in both Yemen and Somalia. *See generally* STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., AL QAEDA IN YEMEN AND SOMALIA: A TICKING TIME BOMB (Comm. Print 2010) (chronicling the movement of al Qaeda militants to Yemen and Somalia, areas with weak central governments).

39. *See, e.g.*, Press Release, White House Office of the Press Sec'y, White House Review Summary Regarding 12/25/2009 Attempted Terrorist Attack (Jan. 7, 2010), *available at* http://www.whitehouse.gov/the-press-office/white-house-review-summary-regarding-12252009-attempted-terrorist-attack (describing an attempt by the Nigerian Umar Farouk Abdulmutallab to explode a bomb on a Detroit-bound airplane).

40. Charlie Savage, *American Indicted on Terror Charges in Plot To Kill Swedish Cartoonist*, N.Y. TIMES, Mar. 10, 2010, at A14 (describing the arrest of Colleen LaRose, a.k.a. "JihadJane").

detention, material-witness detention, immigration-related detention, military detention for the purpose of prosecution in a military commission, and detention as an "enemy combatant."[41]

This Part maps these options as a prelude to defining and exploring the effects of jurisdictional redundancy.[42] The government's choice set can be reduced to two dimensions: First, should a detention be civilian or military? Second, should a detention turn on a criminal conviction or not? Table 1 summarizes the ensuing choice set.

Table 1. The Government's Choice Set in Terrorist Detention

	Non-Criminal	Criminal
Civilian	• Immigration-related detention • Material-witness detention	• Article III criminal prosecution for a terrorism offense • Article III prosecution for non-terrorism offenses • Extradition[43]
Military	• Enemy-combatant detention	• Military commission[44]

41. The government's choice set is likely to be smallest when the suspect is a U.S. citizen detained in the United States. But even here, noncriminal detention under the material-witness statute, 18 U.S.C. § 3144 (2006), and perhaps military detention may be available as a matter of current law.

42. I do not include venue options employed by other nations but not by the United States, such as a civilian system specifically designed for terrorist detention. I also do not address the question of why the government should use process at all. The government currently does not use process in all cases. For example, in Iraq and Afghanistan, no formal process external to the detaining entities is used. The U.S. targeted-killing program also operates without external oversight. Yet a wholesale move away from some degree of process seems unlikely. Process seems desirable as a sorting device to minimize errors, as a way to ensure internal discipline within the government, and as a means of minimizing reputational harms and maintaining rule-of-law values.

43. The forum-choice analysis here is artificially cabined to American options. It would be possible to expand the analysis by including the possibility of opt-outs to other jurisdictions. Such transfers, however, seem to me to be relatively rare—or at least I have seen little evidence that they are occurring. To speculate, this may be because some states, such as those in Europe, demand compliance with costly legal rules to effect a transfer whereas others, such as Syria, Jordan, and other historical partners in intelligence cooperation, are not necessarily reliable or stable partners given the changes to Arab political regimes since the beginning of 2011.

44. There is a second military venue—the courts-martial system established under the Uniform Code of Military Justice. *See* 10 U.S.C. § 818 (2006) (vesting courts-martial with general jurisdiction over any person amenable to trial under the laws of war). But this possibility has not been raised seriously in ongoing debates about terrorist detention, and so it is not analyzed here.

The pathways identified in Table 1 differ along several dimensions. First, each has a different jurisdictional trigger.[45] Immigration detention, for example, is available only for noncitizens, whereas the criminal law can be applied to both citizens and noncitizens. Second, each venue is also linked to distinct substantive grounds for detention. The reach of federal criminal law or immigration law[46] is, for instance, distinct from that of the military commissions.[47] Third, each venue employs different procedural rules. Criminal processes tend to give more robust protections to detainees than noncriminal processes—for example, through the imposition of a higher burden of proof on the government, the defendant's constitutional right to counsel, and the application of more stringent evidentiary rules regarding hearsay.[48]

The procedural and substantive differences among pathways, however, should not be exaggerated. Professors Robert Chesney and Jack Goldsmith cogently argue that the gaps have narrowed such that a focus on the incremental differences in procedural and substantive-law frameworks may obscure more significant functional congruence among the various bundles of procedural and substantive rules employed in different forums.[49] Professors Chesney and Goldsmith are surely right to some degree, although significant procedural differences still distinguish venues. Extending their insight, I argue that it is profitable to focus on the institutional architecture of forum choice rather than on discrete procedural or substantive differences.

A threshold caveat to the analysis is in order. As Table 1 indicates, my focus in this Article is the *government's* forum-choice architecture and its relationship to officials' incentives and behavior. The analysis might be extended in two ways: First, I could account for the possibility of officials' ultra vires options, such as the use of clearly illegal forms of detention or transfer. For the purposes of this

45. For example, the statutory authority for immigration courts is provided in 8 U.S.C. § 1329 (2006), for military commissions in 10 U.S.C. § 817 (2006), and for criminal trials in 18 U.S.C. § 3231 (2006).

46. *See* 8 U.S.C. § 1227 (2006) (listing the grounds for deportation).

47. *See* 10 U.S.C. § 950t (Supp. IV 2010) (listing offenses).

48. Article III courts also provide more robust protections than military commissions. For a helpful primer on the procedural differences between military commissions and Article III courts, see JENNIFER K. ELSEA, CONG. RESEARCH SERV., R40932, COMPARISON OF RIGHTS IN MILITARY COMMISSION TRIALS AND TRIALS IN FEDERAL CRIMINAL COURT 8–24 (2010).

49. Chesney & Goldsmith, *supra* note 32, at 1800–01; *see also* ELSEA, *supra* note 48, at 1–7 (noting the remaining differences).

analysis, however, I have chosen to make the assumption that officials are relatively law-abiding. Second, I could incorporate the detainee's choice set. At first blush, it might appear that detainees have little freedom of choice because they never select the forum used for their status adjudication. Nevertheless, several forms of strategic behavior by detainees are conceivable. First, they might attempt to evade military jurisdiction by seeking injunctive relief in federal court.[50] Second, they might invoke a federal court's jurisdiction to relitigate previously rendered status determinations following a release.[51] Third, the availability of habeas corpus review of military detention might itself be seen as a form of redundancy that allows detainees to allocate resources strategically between first-round and second-round reviews.[52] In light of these possibilities, one could imagine jurisdictional schemes that vest detainees with a wider range of options as a means of encouraging Pareto-optimal deals. Consider, for example, the operation of plea agreements in counterterrorism cases in which leniency is exchanged for valuable information.[53] Could that model be extended to allow trades of information for procedural protection? Or would such a system have perverse and undesirable outcomes? Although I recognize the importance of these questions, I do not address them here. I focus on interactions between institutional design and *government* behavior, interactions that are both less studied and arguably more consequential for the basic architecture of forum choice.

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50. *See, e.g.*, Khadr v. Bush, 587 F. Supp. 2d 225, 230 (D.D.C. 2008) (rejecting a detainee's request for a stay of military-commission proceedings).

51. *See, e.g.*, Ali v. Rumsfeld, 649 F.3d 762, 771 (D.C. Cir. 2011) (rejecting damages actions on qualified-immunity grounds).

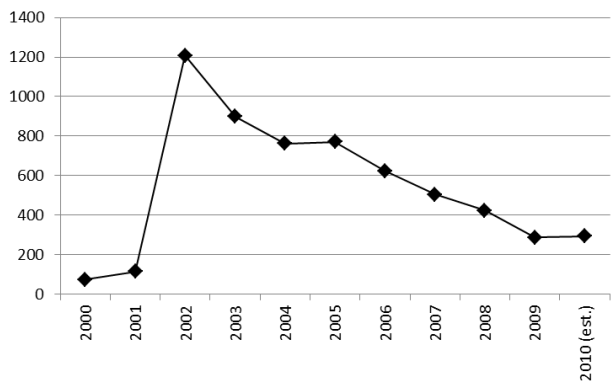
52. *See, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229, 2270 (2008) (discussing a detainee's right on review to supplement the record with exculpatory evidence not previously presented in prior proceedings). Given the stakes for individual defendants, however, I am skeptical that adding civilian court review to a military hearing would have much marginal effect on a defendant's efforts in a first-round review process.

53. One study found that 59.8 percent of terrorism prosecutions between 2001 and 2009 ended in plea deals. *See* RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS: 2009 UPDATE AND RECENT DEVELOPMENTS, at 9 fig.7.

A. Article III Criminal Prosecutions

Notwithstanding controversy over its continued use in the terrorism context,[54] the criminal-justice system has been the most numerically significant terrorist-detention tool outside of the active battlefields in Iraq and Afghanistan. One empirical study identifies 998 defendants who were indicted in what the U.S. Department of Justice characterized as "terrorism prosecutions" between September 2001 and September 2010.[55] Of that number, 87 percent of the defendants were convicted on at least one charge.[56] Another study, analyzing data from the Executive Office for U.S. Attorneys, identifies 8896 individuals referred for terrorism-related prosecution between fiscal years 2004 and 2008.[57] The frequency of terrorism trials, however, has not been constant across time, as Figure 1 illustrates.

Figure 1. Terrorism Prosecutions Filed in Federal Court[58]



54. *See, e.g.*, Eric H. Holder, Jr., Attorney Gen. of the U.S., Statement of the Attorney General on the Prosecution of the 9/11 Conspirators (Apr. 4, 2011), *available at* http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110404.html (noting opposition to the use of Article III courts in certain high-profile cases). For a perspective on battlefield detentions in Iraq, see Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003–2010*, 51 VA. J. INT'L L. 549 (2011). My own experience as counsel for U.S. detainees in Iraq is not wholly consistent with Professor Chesney's presentation, but his article nonetheless contains many valuable insights.

55. CTR. ON LAW & SEC., N.Y. UNIV. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2010, at 4 (2010), *available at* http://www.lawandsecurity.org/Portals/0/documents/01_TTRC2010Final1.pdf.

56. *Id.*

57. *Who Is a Terrorist?: Government Failure To Define Terrorism Undermines Enforcement, Puts Civil Liberties at Risk*, TRAC REP. (Sept. 28, 2009), http://trac.syr.edu/tracreports/terrorism/215.

58. *As Terrorism Prosecutions Decline, Extent of Threat Remains Unclear*, TRAC REP. (May 18, 2010), http://trac.syr.edu/tracreports/terrorism/231.

Use of the criminal system for counterterrorism peaked in 2002 and declined sharply thereafter. Nevertheless, the volume of prosecutions in 2012 is still about three times pre-2001 levels.

What offenses are charged in these prosecutions? Material-support offenses play a major role.[59] One analysis of "the [fifty] highest-profile non-financial" terrorism cases in the post-9/11 decade finds that 80 percent of convictions involved one of the four federal material-support offenses.[60] Congress first enacted a material-support prohibition in 1994 to criminalize knowingly aiding or abetting enumerated terrorist acts, which were defined in relation to offenses that were already enumerated in the U.S. Code.[61] Congress added a second material-support crime in the Antiterrorism and Effective Death Penalty Act of 1996.[62] This second material-support offense applies to knowingly aiding foreign organizations designated as "terrorist" by the secretary of state.[63] After being whittled down through First Amendment challenges,[64] the provision that prohibits providing material support to designated groups survived a constitutional challenge in the Supreme Court in 2010.[65] After the September 11 attacks, Congress further amended the material-

59. *See* Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 446–92 (2007) (reviewing the use of material-support statutes).

60. CTR. ON LAW & SEC., *supra* note 55, at 6, 13 fig.14.

61. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, sec. 120005(a), § 2339A, 108 Stat. 1796, 2022–23 (codified as amended at 18 U.S.C. § 2339A (2006)). The statute defines terrorist acts by reference to other provisions in the U.S. Code. A common material-support theory will allege violations of 18 U.S.C. § 956 (2006), which criminalizes the conspiracy to murder, maim, or injure persons in a foreign country. *E.g.*, Indictment at 1, United States v. Mohamed, No. 0:09-cr-00352-RHK-JJG (D. Minn. Nov. 17, 2009) (charging material support under 18 U.S.C. § 956(a)(1)(2006)).

62. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 303(a), § 2339B, 110 Stat. 1214, 1250 (codified as amended at 18 U.S.C. § 2339B).

63. *See* 8 U.S.C. § 1189(a)(1), (d)(4) (2006) (vesting the secretary of state with designation authority).

64. *See, e.g.*, Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137–38 (9th Cir. 2000) (invalidating two varieties of material support as impermissibly vague).

65. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2710 (2010) (rejecting the plaintiff's challenge to the applications of 29 U.S.C. § 2339B (2006), one of several material-support provisions); *cf.* Aziz Z. Huq, *The Institution Matching Canon*, 106 NW. U. L. REV. (forthcoming 2012) (exploring the difficulty of reconciling *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, with standard First Amendment doctrine).

support statute to extend its reach to terrorism financing[66] and attendance at foreign terrorist training camps.[67] By expanding the statute along these dimensions, Congress ensured that the material-support prohibition—like prohibitions dealing with other terrorism-related offenses—applies without regard to citizenship[68] or geography.[69] Thus, a May 2011 indictment lodged in the U.S. District Court for the Western District of Kentucky charged two noncitizens with raising money in Kentucky and planting explosives in Iraq—all under a material-support rubric.[70] This indictment suggests how varied the actus reus requirement for material support can be. In addition, it is very difficult to challenge the designations of organizations as "terrorist" for the purpose of the material-support statutes.[71]

Absent evidence of a terrorism offense, prosecutors also exploit the wide array of regulatory and financial offenses that are available under federal law to secure what some have called "pretextual" convictions.[72] Like the famous tax prosecution of Al Capone, pretextual prosecutions employ one of the federal law's diverse semiregulatory offenses, such as wire fraud or making misrepresentations to a federal official, to impose hefty penalties on

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66. Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Pub. L. No. 107-197, tit. II, sec. 202(a), § 2339C, 116 Stat. 724, 724–27 (codified as amended at 18 U.S.C. § 2339C (2006)).

67. Material Support to Terrorism Prohibition Enhancement Act of 2004, Pub. L. No. 108-458, tit. VI, subtit. G, sec. 6602, § 2339D, 118 Stat. 3761, 3761–62 (codified at 18 U.S.C. § 2339D (2006)).

68. The offense of treason may be limited by citizenship. *But see* Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 877–78 (2006) (suggesting English precedent for the prosecution of aliens for treason). Even if treason is limited to citizens, the substantively cognate sedition conspiracy, 18 U.S.C. § 2384 (2006), can be used against noncitizens. *See* United States v. Rahman, 189 F.3d 88, 103, 111–16 (2d Cir. 1999) (per curiam) (discussing the relation of treason to seditious conspiracy).

69. *E.g.*, 18 U.S.C. §§ 2339B(d), 2339C(b)(2), 2339D(b) (2006).

70. Indictment at 1–4, United States v. Alwan, No. 1:11 CR-13-R (W.D. Ky. Apr. 14, 2011), *available at* http://assets.nationaljournal.com/pdf/Unsealed_Alwan_Hammadi_Indictment.pdf; *see also* McConnell, *supra* note 5 (noting the nationalities of the defendants).

71. *See, e.g.*, Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 162 (D.C. Cir. 2003) (rejecting a challenge to the designation). *But see* People's Mojahedin Org. of Iran v. U.S. Dep't of State, 613 F.3d 220, 225–28 (D.C. Cir. 2010) (finding in favor of a designated organization).

72. *E.g.*, Daniel C. Richman & William J. Stuntz, Essay, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 618–24 (2005).

defendants.[73] Warsame, for example, was charged with use or possession of a firearm in connection to a crime of violence, an offense with a mandatory minimum sentence of thirty years.[74] Because the substance of federal criminal law is expansively defined,[75] pretextual prosecutions are easy to gin up.[76] Factoring in terrorism-related sentencing enhancements, the resulting penalties can be daunting.[77]

B. Noncriminal Civil Detention

Even in the absence of criminal culpability, Article III courts can be tools for detention based on federal immigration powers or the statutory authority to detain "material witnesses." These forms of civil detention do not entail the searching burdens of proof imposed by the criminal law but also do not permit imprisonment for years—as opposed to mere days or months.[78] Both were employed extensively after September 2001. A Department of Justice inspector general's report found that at least 1182 noncitizens had been held under immigration powers in relation to post-9/11 investigations.[79] This expansive use of immigration powers was facilitated by both the existence of reserve capacity within what was then the Immigration

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73. *See, e.g.*, 18 U.S.C. § 1001(a) (prohibiting efforts to conceal material facts).

74. Press Release, U.S. Attorney's Office for the S. Dist. of N.Y., Accused al Shabaab Leader Charged with Providing Material Support to al Shabaab and al Qaeda in the Arabian Peninsula 3 (July 5, 2011), *available at* http://www.justice.gov/usao/nys/pressreleases/July11/warsameindictmentpr.pdf (describing the indictment).

75. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001) ("American criminal law, federal and state, is very broad; it covers far more conduct than any jurisdiction could possibly punish.").

76. *See, e.g.*, United States v. Arnaout, 282 F. Supp. 2d 838, 843 (N.D. Ill. 2003) (discussing a plea agreement to wire-fraud charges after material-support charges were dropped).

77. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2011) (describing a terrorism-related sentencing enhancement).

78. Unlike in the United Kingdom, technological restraints are not used as substitutes for detention in the security context. *Compare* Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1328–45 (2008) (discussing such restraints), *with* Sec'y of State for the Home Dep't v. AF, [2010] A.C. 2 (H.L.) [64] (appeal taken from Eng.) (establishing a balancing test to determine whether detainees have the right to information about the reasons for their detention).

79. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 1 & n.2 (2003), *available at* http://www.justice.gov/oig/special/0306/full.pdf; *see also* Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94, 99 n.7 (D.D.C. 2002) ("On November 5, 2001, [the Department of Justice] indicated that 1,182 people had been detained."), *aff'd in part, rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003).

and Naturalization Service as well as by a series of regulatory changes. These regulatory changes included loosening the requirement that immigration detainees be charged within forty-eight hours of their arrest[80] and expanding the use of closed deportation hearings.[81] The immigration-detention power has not been applied as extensively since 2002, but the Department of Homeland Security (DHS) has developed a supplemental suite of terrorism-related tools to integrate into routine immigration law enforcement. These tools include a targeting of general enforcement resources toward certain nationalities,[82] a "voluntary" program of call-in interviews that has led to 3216 noncitizens' being questioned on national-security matters,[83] and a tracking-and-registration program that requires nationals of twenty-five majority-Muslim countries to register their entries and exits and report for periodic interviews.[84]

The relative desuetude of emergency-detention powers does not mean that immigration powers have run their course as counterterrorism tools. To the contrary, tools developed after 2001 remain on the rack for later use.[85] In April 2011, the DHS announced the termination of its tracking-and-registration program but cautioned that "the underlying . . . regulation . . . remain[s] in place in

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80. *See* Disposition of Cases of Aliens Arrested Without Warrant, 8 C.F.R. § 287.3(d) (2011) (providing an exception to the forty-eight-hour requirement for "emergenc[ies] or other extraordinary circumstance[s]"). These expansions of immigration powers allow the negative inference that there was unused legal authority and institutional capacity within the immigration system before September 2001.

81. Memorandum from Michael Creppy, Chief Immigration Judge, to All Immigration Judges & Court Adm'rs 4 (Sept. 21, 2001), *available at* http://www.cnss.org/creppy%20memo.pdf.

82. Memorandum from Larry Thompson, Deputy Attorney Gen. of the U.S., to Comm'r, Immigration & Naturalization Serv., Dir., Fed. Bureau of Investigation, Dir., U.S. Marshals Serv., & U.S. Attorneys 1 (Jan. 25, 2002), *available at* http://news.findlaw.com/hdocs/docs/doj/abscndr012502mem.pdf.

83. U.S. GEN. ACCOUNTING OFFICE, GAO-03-459, JUSTICE DEPARTMENT'S PROJECT TO INTERVIEW ALIENS AFTER SEPTEMBER 11, 2001, at 5 (2003), *available at* http://www.gao.gov/new.items/d03459.pdf.

84. The National Security Entry and Exit Registration System (NSEERS) was initially applied only to nationals of Iran, Iraq, Libya, Sudan, and Syria, but was extended through three subsequent regulations. *See* Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 2363, 2364 (Jan. 16, 2003) (enumerating previous iterations of the policy).

85. For examples of post-9/11 regulatory changes that remain in effect, see, for example, 8 C.F.R. § 287.3(d) (2011) (allowing noncitizens to be arrested without being charged, provided that an immigration charge is lodged within a "reasonable period of time"); and *id.* § 10003.19(i)(2) (allowing for automatic stays of release orders when immigration authorities appeal a grant of release on bond).

the event a special registration program is needed again."[86] Constitutional constraints on the conscription of immigration law as an emergency-detention power are also weak. In two cases in 2001 and 2003, respectively, the Supreme Court endorsed limited postadjudicative detention of noncitizens deemed removable and preadjudicative detention in the absence of individualized bond determinations.[87] Since then, a majority of the Court has expressed "no surprise" that security-related immigration measures have "a disparate, incidental impact on Arab Muslims."[88] Such implicit endorsement of disparate impact, coupled with the Court's default reluctance to probe officials' motives,[89] eliminates most equality-related constraints on the use of immigration powers.

Unlike immigration powers, the federal courts' authority to detain witnesses with "material" evidence related to a "criminal proceeding" extends across citizenship boundaries and might conceivably be applied extraterritorially.[90] After September 2001, it was used to detain at least seventy persons in alleged relation to criminal trials or grand-jury investigations.[91] Developing jurisprudence casts some doubt on the breadth of material-witness

86. Letter from Margo Schlanger, Officer for Civil Rights & Civil Liberties, U.S. Dep't of Homeland Sec., to Colleagues (Apr. 27, 2011) (on file with the *Duke Law Journal*).

87. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court endorsed the detention for up to six months of an alien found deportable, *id.* at 705, whereas in *Demore v. Kim*, 538 U.S. 510 (2003), the Court authorized preadjudication detention without individualized determinations of flight risk, *id.* at 557–58.

88. Ashcroft v. Iqbal, 129 S. Ct 1937, 1951 (2009).

89. *See, e.g.*, Ashcroft v. Al-Kidd, 131 S. Ct. 2074, 2081 (2011) (stating, in a challenge to the allegedly racially discriminatory use of the material-witness statute, that the Court "has almost uniformly rejected invitations to probe subjective intent," and declining to do so in that case).

90. *See* 18 U.S.C. § 3144 (2006) (stating that "the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person"); *cf.* Judiciary Act of 1789, ch. 20, 1 Stat. 73 (granting like power). Pursuant to the Federal Rules of Civil Procedure, "[a] witness . . . detained under 18 U.S.C. § 3144 [2006] may request to be deposed by filing a written motion and giving notice to the parties," after which the court "may discharge the witness." FED. R. CIV. P. 15. There is no obvious reason that Ahmed Warsame, for example, could not have been held as a material witness for some period of time, perhaps in relation to criminal cases against other members of al Qaeda.

91. HUMAN RIGHTS WATCH, WITNESS TO ABUSE: HUMAN RIGHTS ABUSES UNDER THE MATERIAL WITNESS LAW SINCE SEPTEMBER 11, at 1–5 (2005), *available at* http://hrw.org/reports/2005/us0605/us0605.pdf; *see also* United States v. Awadallah, 349 F.3d 42, 52–60 (2d Cir. 2003) (holding that the material-witness power extends to grand juries as well as criminal trials). In *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074 (2011), the material-witness statute was applied to a U.S. citizen. Although I am not aware of any extraterritorial use of the statute, no clear reason suggests that it could not be used extraterritorially.

detention for future national-security ends. Hearing a Fourth Amendment challenge in 2011, the Supreme Court rejected the argument that allegations of pretextual use of the material-witness statute could be sufficient to overcome the qualified immunity of cabinet-level officials.[92] But four Justices expressed concerns about what Justice Kennedy framed as the question of "when material witness arrests might be consistent with statutory and constitutional requirements."[93]

C. Military Commissions

In November 2001, President Bush established unusual adjudicative bodies called military commissions and vested them with trial jurisdiction over noncitizen members of al Qaeda and others who had "engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States."[94] Proceedings were slow to begin.[95] In June 2006, after a desultory number of commission hearings, the Supreme Court invalidated the president's executive order authorizing the military commissions on the ground that it exceeded the limited statutory authority for such commissions in the Uniform Code of Military Justice.[96] Congress responded in 2006 with a new legislative authorization for the commissions, albeit one that contained more robust procedural protections for defendants.[97] In 2009, Congress followed up with further rules that were even more

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92. *Al-Kidd*, 131 S. Ct. at 2079, 2085 (dismissing the petitioner's action under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) on this basis).

93. *Id*. at 2086 (Kennedy, J., concurring); *see also id*. at 2090 (Sotomayor, J., concurring) ("Whether the Fourth Amendment permits the pretextual use of a material witness warrant for preventive detention of an individual whom the Government has no intention of using at trial is . . . a closer question than the majority's opinion suggests.").

94. Military Order of November 13, 2001, 3 C.F.R. 918, 919 (2002), *reprinted in* 10 U.S.C. app. at 856, 857 (2006).

95. *See generally* David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 147–68 (2008) (describing the promulgation of rules and initial hearings).

96. Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006); *see also* Glazier, *supra* note 95, at 173 (listing ongoing proceedings in June 2006).

97. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C. (Supp. IV 2010)); *see also* Robert Chesney, *The Least Worst Venue*, FOREIGN POL'Y (Jan. 21, 2011), http://www.foreignpolicy.com/articles/2011/01/21/the_least_worst_venue (noting "substantially greater" procedural protections).

hospitable to defendants.[98] The progressive melioration of defendants' entitlements within the commission structure means that the gap between criminal procedural rights available in Article III courts and those of the commissions has diminished. The principal remaining procedural gaps concern the potential admission of some hearsay evidence—including, at least potentially, the use of evidence derived from torture or degrading treatment—and the possible admission of defendants' involuntary statements.[99]

Like immigration detention under Article III, the military-commission route is not universally available. The 2009 statute limits commission jurisdiction to any "unprivileged enemy belligerent."[100] This category is defined to include persons who are "part of al Qaeda" or who "engaged in hostilities against the United States."[101] Congress has further specified that offenses can be tried by commission only "if . . . committed in the context of and associated with hostilities."[102] One odd consequence of this jurisdictional rule is that it forces military prosecutors to provide proof of a defendant's connections to a terrorist group in every case, a requirement that a civilian prosecutor using the tools described in Part I.A would often not have to satisfy. Somewhat counterintuitively, a military commission may sometimes require the introduction of *more* classified evidence than would a parallel civilian prosecution.

Despite their potential jurisdictional breadth, military commissions have been used to process only a trivial number of suspected terrorists. Between 2006 and 2009, only six individuals were sentenced in the statutory military commissions—four after plea bargains.[103] Despite this less-than-stellar record, enthusiasm for commissions is unflagging. In April 2011, under pressure from Congress, Attorney General Eric Holder referred six more cases

98. Military Commissions Act of 2009, Pub. L. No. 118-84, tit. XVIII, 123 Stat. 2574 (codified at 10 U.S.C. §§ 948a–950t (Supp. IV 2010)).

99. *See* ELSEA, *supra* note 48, at 10–11, 19–20 (comparing procedural safeguards among the different courts concerning the right to remain silent and the right to examine adverse witnesses); *see also* 10 U.S.C. § 949a (Supp. IV 2010) (granting the secretary of defense the authority to promulgate procedural rules for the commissions that deviate from general courts-martial rules, but also constraining such authority).

100. 10 U.S.C. § 948b(a).

101. *Id.* §§ 948a(7)(A), (C), 948c.

102. *Id.* § 950p(c). The statute further defines hostilities to include "any conflict subject to the laws of war." *Id.* § 948a(9).

103. Carol Rosenberg, *Terror Trainer Admits Role in al Qaeda Conspiracy*, MIAMI HERALD, Feb. 16, 2011, at A4.

involving alleged high-level al Qaeda leaders and the perpetrators of the 2000 attack on the U.S.S. Cole to military commissions.[104] A June 2011 decision from a military appeals court endorsed the use of material-support offenses in a military context.[105] If upheld on appeal, this ruling would mean that the substance of military-commission jurisdiction and criminal terrorism prosecution would be close to coextensive in some ways.[106]

D. Military Detention of Enemy Combatants

In contrast to its sparing use of military commissions, the government initially relied heavily on military detention under the September 2001 Authorization for Use of Military Force (AUMF).[107] Until 2008, AUMF-related detentions of so-called enemy combatants were conducted without judicial process.[108] Many military detainees were held at the Guantánamo Bay Naval Base in Cuba.[109] From 2002 to 2004, it is unclear whether detainees obtained meaningful judicial process beyond what was accorded on the battlefield. In 2004, when judicial review appeared imminent, the military began convening internal hearings called "Combatant Status Review Tribunals" (CSRTs) to review individual cases.[110] By then, Guantánamo had

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104. Holder, *supra* note 54 (listing five referrals); Press Release, U.S. Dep't of Def., DOD Announces Charges Sworn Against Detainee Nashiri (Apr. 20, 2011), *available at* http://www.defense.gov/releases/release.aspx?releaseid=14424.

105. Defendants convicted under the 2006 military-commissions statute on material-support grounds challenged their convictions by arguing that the law of war contained no such offense. In June 2011, the en banc United States Court of Military Commission Review—issuing its very first opinion—rejected those arguments, drawing on evidence of the criminalization of analogous conduct through international conventions and by international criminal tribunals. United States v. Hamdan, 801 F. Supp. 2d 1247, 1312–13 (Ct. Mil. Comm'n Rev. 2011); *see also* United States v. Al Bahlul, No. CMCR 09-001, 2011 WL 4916373, at *38 (Ct. Mil. Comm'n Rev. Sept. 9, 2011) (upholding a second conviction on material-support grounds).

106. Military commissions, like civilian criminal trials, allow for the death penalty. Carol Rosenberg, *No Plans Yet for Detainee Executions*, MIAMI HERALD, Mar. 11, 2011, at A5.

107. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)). *See generally* Aziz Z. Huq, *What Good Is Habeas?*, 26 CONST. COMMENT. 385 (2010) (summarizing the history of Guantánamo detentions).

108. The first adjudication on the merits of the status of a Guantánamo detainee was in *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008).

109. A global network of other facilities also existed. For a useful survey, see JONATHAN HAFETZ, HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA'S NEW GLOBAL DETENTION SYSTEM 31–45 (2010).

110. *See* Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf (relaying an "Order Establishing Combatant Status Review Tribunal"). The Wolfowitz

already attracted much public criticism, and the Supreme Court had issued opinions that allowed detainees there to bring habeas corpus challenges to their detentions.[111] The establishment of CSRTs did not stanch criticism. To the contrary, criticism continued on the ground that the CSRTs had been organized to produce the results that government officials sought ex ante.[112] Since 2008, pursuant to procedural rules crafted by the district courts, litigation has proceeded in Washington, D.C., federal courts respecting the legality of those detentions.[113]

The extension of habeas corpus jurisdiction to Guantánamo and a plethora of challenges in the lower courts have not, however, meaningfully changed patterns of detentions at the Cuban base in the way some hoped and others feared.[114] In the aggregate, 779 people have been detained at the Guantánamo Bay Naval Base, of whom 600 have been released.[115] That is, military detention—at least outside the formal theaters of conflict in Iraq and Afghanistan—has not been as *numerically* significant as Article III criminal prosecutions, even if it has received much more media attention. Figure 2 illustrates

memorandum was a preemptive response to the possibility of judicial review created by *Rasul v. Bush*, 542 U.S. 466 (2004).

111. In *Rasul v. Bush*, the Court held that detainees at the Cuban base could employ statutory habeas jurisdiction to challenge the lawfulness of their detentions. 542 U.S. at 480. In 2005 and 2006, Congress attempted to extinguish that jurisdiction, only to have the Court reject those efforts on Suspension Clause, U.S. CONST. art. I, § 9, cl. 2, grounds. Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008).

112. *See* Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantanamo: The* Boumediene *Decision*, 2008 SUP. CT. REV. 1, 43 (noting the concern that CSRTs were organized to produce specific results); *see also* Reply to Opposition to Petition for Writ of Certiorari at 2, Al Odah v. United States, 127 S. Ct. 3067 (2007) (mem.) (No. 06-1196), 2007 WL 922261, at *2 (arguing that "[a]ny review process . . . that limits the court to determining whether the jailor has followed its own rules, and precludes an inquiry into whether the rules themselves are adequate and more than an empty shell, cannot be an adequate or effective substitute for habeas").

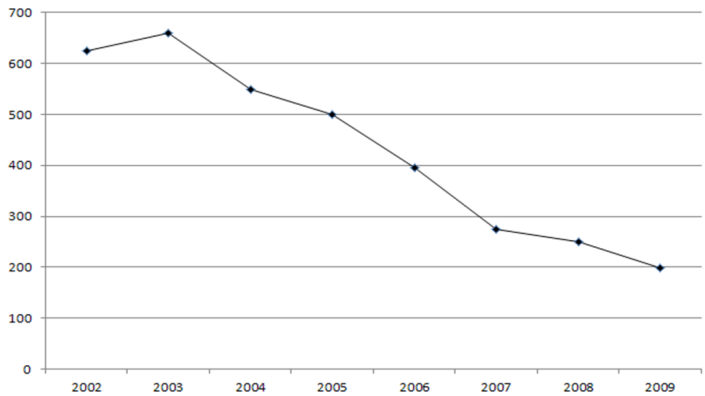
113. *See In re* Guantanamo Bay Detainee Litig., Misc. No. 08-0442 (TFH), Civil Action Nos. 02-cv-0828 et al., 2008 WL 4858241 (D.D.C. Nov. 6, 2008) (setting out the procedural framework for the litigation), *amended by* Zadran v. Bush, Civil No. 05-CV-2367 (RWR), 2009 WL 498083 (D.D.C. Feb. 25, 2009).

114. Huq, *supra* note 107, at 402–04. The fruitlessness of judicial review is unlikely to change soon. One judge on the U.S. Court of Appeals for the District of Columbia Circuit—which has become the de facto final court of review in detainee cases—has cautioned that, whatever legal standards are used, he "doubt[ed] any of [his] colleagues [would] vote to grant a petition if he or she believe[d] that it [were] somewhat likely that the petitioner [was] an al Qaeda adherent or an active supporter." Esmail v. Obama, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring).

115. *The Guantánamo Docket*, N.Y. TIMES, http://projects.nytimes.com/guantanamo (last updated Feb. 15, 2012).

Guantánamo's changing population. Like criminal and immigration law, military detention saw its greatest use in 2002 and experienced a decline in popularity thereafter.

Figure 2. Number of Prisoners Reported at Guantánamo[116]



Although courts have not changed the aggregate dynamics of military detention, politics has. In January 2009, President Obama promulgated an executive order that envisaged an eventual end to detention operations at Guantánamo.[117] Political opposition to his proposal was distilled into appropriations riders that prohibited transfers of prisoners from the base.[118] And Obama's meliorist procedural changes, such as a new system of periodic internal review, have had scant impact on the release rate so far.[119]

116. This chart reports biannual changes in the Guantánamo detainee population based on Pentagon press statements. That is, I have taken Pentagon statements from the beginning and the middle of each calendar year—or as close as are available—and reported the detainee population on these dates. For more details on data, including sources and more detailed reporting of the same data, see Huq, *supra* note 107, at 402–04.

117. Exec. Order No. 13,492, 3 C.F.R. 203, 203 (2010).

118. *See, e.g.*, Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4137, 4351 (prohibiting the expenditure of Pentagon funds on detainee transfers); Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, § 14103, 123 Stat. 1859, 1920 (same). *See generally* Peter Finn & Anne E. Kornblut, *How the White House Lost on Guantanamo*, WASH. POST, Apr. 24, 2011, at A1 (describing efforts in Congress to oppose detainee transfer).

119. *See* Exec. Order No. 13,567, 76 Fed. Reg. 13,277, 13,277–79 (Mar. 7, 2011) (establishing "Periodic Review Board[s]" to conduct counseled annual status hearings). Since Congress has prohibited transfers from the base, *see supra* note 118 and accompanying text, the executive order has not had any effect on releases.

The future substantive breadth of military detention is not clear. It is settled that the AUMF allows detention of both citizens and noncitizens.[120] Some circuit court precedent also endorses detention of citizens seized in the United States.[121] Since March 2009, the Department of Justice has argued that it is lawful to detain

> persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, . . . persons who harbored those responsible for those attacks[, and] . . . persons who were part of, or *substantially supported*, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners.[122]

That definition was reiterated in the National Defense Authorization Act for Fiscal Year 2012 (2012 NDAA), which "affirm[ed]" the executive's authority to detain, inter alia, persons "who planned, authorized, committed, or aided" the September 11 attacks and anyone who "was a part of or substantially supported al Qaeda, the Taliban, or associated forces that are engaged in hostilities in aid of such enemy forces."[123] The "substantially supported" language of the 2012 NDAA creates broad latitude for military detention. Before the

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120. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 517–19 (2004) (plurality opinion) ("Congress has in fact authorized [a citizen's] detention, through the AUMF.").

121. *See, e.g.*, Padilla v. Hanft, 423 F.3d 386, 393–95 (4th Cir. 2005) (holding that the AUMF authorizes the president to detain a U.S. citizen as an enemy combatant even if the citizen is arrested on U.S. soil).

122. Ahmed v. Obama, 613 F. Supp. 2d 51, 54 (D.D.C. 2009) (emphasis added) (quoting Respondent's Revised Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 3, In Re: Guantanamo Bay Litigation, 613 F. Supp. 2d 51 (D.D.C. 2009) (Nos. 05-1347 (GK), 05-1601 (GK), OS-1678 (GK), and 06-1684 (GK)), ECF No. 174).

123. National Defense Authorization Act for Fiscal Year 2012 (NDAA 2012), Pub. L. No. 112-81, § 1021(b)(1)–(2) (2011), PL 112-81 (Westlaw). The provision goes on to disclaim any attempt "to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force" or to "affect existing laws or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States." *Id.* § 1021(d)–(e). There is an obvious puzzle as to how these caveats can be squared with the statute's new definition of military-detention authority. One way of reconciling the different parts of the statute is to observe that Congress basically codified the judiciary's construction of the 2001 AUMF as applied to overseas captures and detentions, including judges' reliance on "the law of war," *id.* § 1021(c), while leaving open those question that have divided federal courts, such as the scope of military-detention authority in the United States. This was not the only proposed change to detention authority. *See, e.g.*, Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010, S. 3081, 111th Cong. § 5 (2010) (proposing expansion of the enemy combatant category to include citizens).

2012 NDAA's enactment, the D.C. Circuit suggested that it would accept even more ambitious claims of detention authority.[124] The D.C. Circuit also suggested that it would demand only a preponderance of the evidence to uphold the government's decisions to detain suspects.[125]

* * *

In sum, the government's choice set with respect to terrorist detention can be separated into the four quadrants illustrated in Table 1 for the purpose of analysis. Empirical data suggests that Article III criminal prosecution has been the workhorse, although military detention of enemy combatants frequently has been used. Overall, the volume of detention has declined as 9/11 has receded in time.

II. THE UBIQUITY OF JURISDICTIONAL REDUNDANCY

Part I emphasizes the heterogeneity of long-term terrorist-detention options. This Part identifies jurisdictional redundancy as a common thread weaving together those multiple pathways of terrorist detention.

A. Defining Jurisdictional Redundancy

As used in this Article, the term "jurisdictional redundancy" refers to the government's option to subject the same individual to two or more different adjudicative venues for the purpose of determining the legality of continued detention. I also assume here that forums behave independently of each other. It is a sign of redundancy that the government must decide which of multiple venues to use to adjudicate the status of a suspected terrorist.[126]

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124. *See, e.g.*, Al-Bihani v. Obama, 590 F.3d 866, 872 (D.C. Cir. 2010) (suggesting that the AUMF allows the detention of any person who can be tried in a military commission); *see also* Uthman v. Obama, 637 F.3d 400, 402 (D.C. Cir. 2011) (suggesting that anyone who "purposefully and materially support[s]" al Qaeda can be detained); *accord* Hatim v. Gates, 632 F.3d 720, 721 (D.C. Cir. 2011) (per curiam). Case law in the D.C. Circuit defining the scope of AUMF-related detention has basically ignored the Fourth Circuit's holdings in *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), and *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007).

125. *E.g.*, *Uthman*, 637 F.3d at 403 n.3; Al-Adahi v. Obama, 613 F.3d 1102, 1104–05 (D.C. Cir. 2010); Awad v. Obama, 608 F.3d 1, 11 & n.2 (D.C. Cir. 2010).

126. This is not the only way to define overlap, but it is the definition most useful in the context. For instance, Professors Sah and Stiglitz distinguish between polyarchies, in which there are several competing decisionmakers, and hierarchies. Sah & Stiglitz, *supra* note 23, at

Redundancy can take two forms: *simultaneous* or *sequential*.[127] First, two jurisdictional pathways can be *simultaneous substitutes*, such that the government must opt between them. For example, press reports suggested that when the government identified a group of suspected terrorists in Lackawanna, New York, in 2002, senior policymakers deliberated as to whether to channel them into the criminal-justice system or the military-detention system before the suspects had been arrested.[128] Second, jurisdictional pathways can be *sequential complements*. In those situations, the government has the choice to use a second forum once a first adjudication comes to an unsuccessful close. Thus, if the initial forum does not yield the outcome sought by the government, government officials retain the option of switching to another jurisdictional pathway. Although I discuss some examples in the next Section, notice that if one of the Lackawanna suspects had been acquitted, the government might have invoked sequential redundancy by switching the suspect into military detention.

Jurisdictional redundancy requires the government to have at its disposal multiple institutions capable of undertaking similar adjudicative functions. This requirement suggests that at any given time there is reserve capacity in the overall system that can be tapped even if it is not continuously in use.[129] Stated differently, the use of jurisdictional redundancy suggests that the government has the power either to expand the use of existing forums or to create new ones to address emergent exigencies.

B. Examples of Jurisdictional Redundancy

Jurisdictional redundancy is a pervasive feature of the government's choice set in dealing with a terrorist suspect. The ubiquity of jurisdictional redundancy can be documented by

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716. The design choices in this adjudicative context do not exactly map onto these categories, but they are similar.

127. *See* Allan W. Lerner, *There Is More than One Way To Be Redundant: A Comparison of Alternatives for the Design and Use of Redundancy in Organizations*, 18 ADMIN. & SOC'Y 334, 336 (1986) (offering a typology of redundant institutional-design choices and comparing their advantages and disadvantages).

128. Michael Powell, *No Choice but Guilty*, WASH. POST, July 29, 2003, at A1 (describing how Article III criminal prosecution was chosen).

129. Martin Landau, *Redundancy, Rationality, and the Problem of Duplication and Overlap*, 29 PUB. ADMIN. REV. 346, 349 (1969) (characterizing redundancy as the addition of "reserve power" that can act as a "safety-factor"). Not all forms of overlap lead to redundancy of this kind: it is possible to describe a mandatory hierarchical structure, such as a trial proceeding followed by a mandatory appeal, as containing redundancy. Sah & Stiglitz, *supra* note 23, at 716.

cataloging cases in which suspects have been moved from one jurisdictional channel to another—cases involving the sequential use of two forums. In all of these cases, it is worth emphasizing that the government had an initial choice between pathways as contemporaneous substitutes. Although this choice is implicit in the structure of the law, in most instances, no extrinsic evidence of active consideration of the various options is publicly available because of classification rules.

1. *From Article III Criminal Proceedings to Immigration Removal Proceedings.* Immigration authority has been invoked when a criminal prosecution against a noncitizen fails to produce a conviction and double-jeopardy rules preclude criminal retrial. Haitian national Lyglenson Lemorin, for example, was arrested based on allegations that he and five other members of a Moorish Science Temple sect had conspired to attack the Willis Tower in Chicago and various Federal Bureau of Investigation buildings nationally.[130] After he was acquitted of criminal charges, Lemorin was placed in removal proceedings and then deported based on substantially the same factual allegations.[131]

But the government does not always prevail in a second and subsequent proceeding of this sort. In another case, a University of South Florida student was charged with transporting explosives after being arrested with model-rocket propellant.[132] After being acquitted of a material-support offense, the student was placed in deportation proceedings but ultimately was found not deportable.[133]

2. *From Immigration Detention to Article III Criminal Proceedings*. When immigration powers are employed as a first-

130. After two mistrials, Lemorin's five codefendants were convicted in 2009. Vanessa Blum, *5 of Liberty City 6 Guilty*, CHI. TRIB., May 13, 2009, § 1, at 14. News reports refer to the Sears Tower, which has since been renamed.

131. *See* Lemorin v. U.S. Attorney Gen., 416 Fed. App'x 35, 38–39 (11th Cir. 2011) (per curiam) (finding Lemorin removable); Jay Weaver & Jacqueline Charles, *Virtual Hookup Connects Grieving Haitian Father to Miami Family*, MIAMI HERALD, Apr. 16, 2011, at B4 ("Although Lemorin was acquitted, immigration authorities still deemed him a 'national security' threat under the U.S. Patriot Act passed after the Sept. 11, 2001 terrorist attacks.").

132. Jay Weaver, *'Double Jeopardy' for Accused*, MIAMI HERALD, Aug. 31, 2009, at B1.

133. *Id.* Another possible interaction between the criminal and immigration systems arises when deportation is part of a plea agreement. *See, e.g.*, Spencer S. Hsu, *Former Fla. Professor To Be Deported*, WASH. POST, Apr. 18, 2006, at A3 ("Former Florida professor Sami al-Arian pleaded guilty to one count of conspiring to provide support to a Palestinian terrorist organization and agreed to be deported from the United States in a deal with federal prosecutors . . . .").

round response to a security emergency, a downstream method of dealing with those detained is Article III criminal prosecution. Given how well suited immigration powers might seem for pretextual temporary detention—at least of noncitizens—it is perhaps surprising how infrequently such pretextual detention occurs. After the immigration roundups that followed the September 2001 attacks, civil removal proceedings tended to be the principal alternative to release, and a June 2003 Department of Justice investigation into the detentions identified only twelve cases in which an immigration detainee had been charged criminally.[134]

3. *From Article III Criminal Proceedings to Enemy-Combatant Detention or Military-Commission Jurisdiction.* Persons originally seized in the United States on suspicion of terrorism were later detained as enemy combatants in only two cases. In both cases, the suspects, U.S. citizen José Padilla and Qatari national Ali Salah al-Marri, were initially held in the criminal-justice system. Upon his arrival at O'Hare International Airport in Chicago, Padilla was first detained as a material witness in anticipation of an indictment but was then transferred into military custody as an "enemy combatant."[135] Similarly, after his arrest in Peoria, Illinois, al-Marri was subject to multiple, superseding federal indictments, first in Illinois and then in New York, before being designated an "enemy combatant." Following this designation, the indictment against him was dismissed with prejudice.[136] As of 2012, the Padilla and al-Marri cases were outliers. Nevertheless, the government has the option, at least on paper, to follow the precedent set by those cases. Operative precedent in the five states that make up the Fourth Circuit permits the government to detain citizens, at least in some circumstances, as enemy combatants even within the United States.[137]

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134. OFFICE OF THE INSPECTOR GEN., *supra* note 79, at 30.

135. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 571 (S.D.N.Y. 2002), *aff'd in part, rev'd in part sub nom.* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 542 U.S. 426 (2004).

136. Al-Marri v. Wright, 487 F.3d 160, 165 (4th Cir. 2007) (recounting the charging history and dismissal). The author of this Article was counsel to al-Marri.

137. *See* Padilla v. Hanft, 423 F.3d 386, 391 (4th Cir. 2005) (concluding, by analogy to the facts in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion), that Padilla's detention was authorized). Depending on which facts in *Padilla* are emphasized, the opinion might be read to apply narrowly to a small class of cases in which a suspect arrives after having been on a foreign battlefield, or broadly, whenever someone enters the United States with instructions from a proscribed terrorist organization.

A variant on this move is the shift from Article III indictments to charges before a military commission. The so-called 9/11 coconspirators were initially indicted in the Southern District of New York. In April 2011, Attorney General Eric Holder filed a *nolle prosequi* motion seeking dismissal of those indictments in light of legislative restrictions on transfers of Guantánamo detainees for trial in federal court.[138] In effect, the five detainees covered by his motion were plucked out of pending Article III criminal adjudication with the expectation that they would eventually be placed into military-commission proceedings. The potential for such transfers was amplified by a June 2011 ruling from the U.S. Court of Military Commission Review that the offense of material support, although never charged previously in a war-crimes tribunal, furnished a lawful ground for a military conviction under Congress's power to define and punish offenses against the law of nations.[139] That ruling, although subject to appeal to the D.C. Circuit and the Supreme Court, is significant because it diminished the possibility that members of al Qaeda who are alleged to have participated indirectly in the 9/11 attacks, but not traditional military operations, will be found to be beyond military-commission jurisdiction.

4. *From Enemy-Combatant Detention or Military-Commission Jurisdiction to Article III Criminal Proceedings*. The border between Article III criminal jurisdiction and military jurisdiction is permeable in both directions. After being classified as enemy combatants seized in the United States, Padilla and al-Marri both left military detention only upon indictment in federal court.[140] Although al-Marri pled guilty to material-support charges, Padilla stood trial and was convicted of offenses related to a conspiracy to provide support for jihad in places outside the United States, such as Kosovo and Chechnya, throughout the 1990s.[141] From 2009 to 2010, the Obama administration appeared

138. United States v. Mohammed, No. (S14) 93 Cr. 180 (KTD) (S.D.N.Y. Apr. 4, 2011), *available at* https://webspace.utexas.edu/rmc2289/Nolle%20and%20Unsealing%20Order%20-%204-4-11.pdf.

139. United States v. Hamdan, No. CMCR 09-002, 2011 WL 2923945, at *15 (Ct. Mil. Comm'n Rev. June 24, 2011).

140. Al-Marri was charged on both material-support and conspiracy counts. Indictment, United States v. Al-Marri, No. 09-CR-10030 (C.D. Ill. Feb. 26, 2009), *available at* http://graphics8.nytimes.com/packages/pdf/topics/budget/al-Marri.pdf.

141. Padilla v. Hanft, 432 F.3d 582, 584–85 (4th Cir. 2005). Padilla was later found guilty on all counts. United States v. Hassoun, No. 0:04-cr-60001-MGC, 2007 WL 2349148 (S.D. Fla. Aug. 16, 2007).

poised to transfer a significant tranche of Guantánamo detainees to the continental United States for trial in federal court. Legislative and popular opposition, however, induced the Obama administration to change course.[142] Only one detainee, Ahmed Khalfan Ghailani of Tanzania, was eventually transferred from Cuba for an Article III criminal trial.[143]

It is also worth noting that a detainee can be exposed to military-commission jurisdiction and then shifted to enemy-combatant detention. Hence, the Supreme Court emphasized in the course of invalidating military commissions created by presidential order that dismissal of a commission proceeding did not impinge on the military's authority to hold a detainee as an enemy combatant.[144] In subsequent military-commission proceedings, the government has conspicuously emphasized its authority to continue holding even those defendants acquitted by the tribunals.[145]

5. *From Military Detention to Immigration Proceedings.* A noncitizen detained as an enemy combatant has never been exposed later to immigration proceedings. But one case—Yaser Hamdi's—is a variant on this possibility. Hamdi, a U.S. citizen suspected of having fought for the Taliban in Afghanistan, initially was held in military detention as an enemy combatant. As part of his release agreement, he agreed to be stripped of citizenship and removed from the United

142. Finn & Kornblut, *supra* note 118.

143. Ghailani was convicted on one count of conspiring to destroy buildings and property of the United States and acquitted on 248 other counts. United States v. Ghailani, 761 F. Supp. 2d 167, 170 (S.D.N.Y. 2011) (rejecting a postconviction challenge based on sufficiency of the evidence).

144. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 635 (2006) ("It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm.").

145. *See, e.g.*, Government Response to Defense Motion for Appropriate Relief To Determine if the Trial of This Case Is One from Which the Defendant May Be Meaningfully Acquitted at 6, United States v. Hussayn (Mil. Comm'n Oct. 27, 2011) (on file with the *Duke Law Journal*) ("Should the accused be acquitted following a trial by military commission, the government could, as a legal matter, continue to detain the accused during hostilities . . . ."). This has the odd consequence of eliminating defendants' incentives to participate in military-commission proceedings. If military detention can continue after acquittal, it follows a fortiori that it can continue after the end of a commission sentence. Hence, the fact of being sentenced *vel non* may have no impact on a defendant's expected liberty. Even from the government's perspective, there is something perverse about this situation. In effect, the only social value of a relatively expensive and time-consuming commission proceeding may be symbolic, since it has no necessary effect on the duration of detention. Under these conditions, there is a legitimate question whether noncapital commissions have social value at all.

States.[146] In effect, Hamdi traded military detention for expulsion and permanent exile from the United States.

C. Legal Barriers to Jurisdictional Redundancy

Both simultaneous and sequential forms of redundancy can arise only if legal obstacles to the availability of alternative jurisdictional pathways are dismantled. Three potential legal obstacles exist. None is robust. Rather, counterterrorism legal doctrine is structured so as to allow redundancy.

A first barrier to redundancy might be found in the Fifth Amendment's Double Jeopardy Clause.[147] It is possible to imagine an expansion of that rule to preclude a second government effort to adjudicate terrorist status in a different forum. But in cases in which a previous federal criminal adjudication has occurred, courts have declined to find a double-jeopardy bar to subsequent federal immigration proceedings even if the first trial concerned the same primary conduct as the second.[148] The same would likely hold true if an Article III proceeding were to be followed by enemy-combatant detention. There also seems to be no bar under double-jeopardy principles to employing military detention even after a prosecution—whether civilian or military—has reached a final result that dissatisfies the government.[149]

A variant on the double-jeopardy problem has arisen in cases in which detainees, such as Ali Salah al-Marri, were moved from the Article III criminal process to a military system after indictment. In those cases, the government has had to accept dismissal of an initial indictment with prejudice as the cost of transfer.[150] This means that offenses included in the first indictment are no longer available

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146. Motion of Defendant To Stay Proceedings at 8, Hamdi v. Rumsfeld, No. 2:02CV439 (E.D. Va. Sept. 24, 2004).

147. *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .").

148. *See, e.g.*, Lemorin v. U.S. Attorney Gen., 416 Fed. App'x 35, 40 (11th Cir. 2011) (per curiam) (rejecting the double-jeopardy argument against the use of immigration powers after criminal process). In some cases, counsel's failure to advise a criminal defendant of the "automatic" immigration consequences of a plea agreement may constitute ineffective assistance of counsel under the Sixth Amendment. Padilla v. Kentucky, 130 S. Ct. 1473, 1478, 1483 (2010).

149. *See* sources cited *supra* notes 144–45.

150. *See, e.g.*, Al-Marri v. Hanft, 378 F. Supp. 2d 673, 674–75 (D.S.C. 2005) (noting dismissal with prejudice).

against the same defendant.[151] Any such dilemma was evaded in al-Marri's case because the first indictment charged fraud-related offenses, whereas the later indictment charged material-support offenses.[152] In other words, the breadth and redundancy of existing criminal law may mitigate the barrier imposed by prejudicial dismissal of a threshold indictment.[153] Like other criminal-procedure entitlements, double-jeopardy protection has been effectively sapped by prosecutors' growing ability to leverage the growing breadth of substantive criminal law.[154]

Double jeopardy might have more bite when a military commission is employed after a defendant has been acquitted in an Article III criminal proceeding. But its application is unclear even in those situations. Although the statutory protection against retrial in a military commission is ambiguous,[155] ordinary double-jeopardy principles at least suggest that a second trial by the same sovereign would be prohibited.[156] The issue, however, has never been litigated, and its ultimate resolution is not free from doubt. It is not clear, for example, whether Fifth Amendment protections shelter noncitizens at Guantánamo, where the military commissions are currently located. D.C. Circuit precedent suggests that that tribunal will be inhospitable to such constitutional claims.[157] It is thus likely that the

151. *Cf.* United States v. Welborn, 849 F.2d 980, 983–84 (5th Cir. 1988) (distinguishing the effect of a dismissal with prejudice from that of a dismissal without prejudice). The prejudicial effect of an earlier dismissal is distinct from double-jeopardy concerns. *See* United States v. Terry, 5 F.3d 874, 876 (5th Cir. 1993) ("The government contends that [the defendant] waived any jeopardy contention he may have had by acquiescing in the [FED. R. CIV. P.] 48(a) dismissal . . . . This dismissal did not bar retrial.").

152. *See* ZABEL & BENJAMIN, *supra* note 51 at 57 n.19 (describing both indictments and listing charges).

153. *See* Brown, *supra* note 25, at 230 (discussing redundancy in the criminal law).

154. *See* Richman & Stuntz, *supra* note 72, at 592 (noting the expansion of prosecutorial power "whenever . . . multiple criminal offenses can be charged . . . and . . . the difference between the potential sentence for the potential top count and the sentence available for lesser charges is substantial"); *id.* at 618–24 (discussing the use of "pretextual" charges in terrorism cases).

155. The military-commissions statute provides that "[n]o person may, without his consent, be tried by a military commission under this chapter a second time for the same offense." 10 U.S.C. § 949h (2006). This provision is ambiguous because it might apply when the first adjudication was before a military commission, but not when the first adjudication was before an Article III court.

156. *See* United States v. Lara, 541 U.S. 193, 197 (2004) (explaining the separate-sovereign requirement of double-jeopardy protection).

157. *See* Rasul v. Myers, 563 F.3d 527, 531 (D.C. Cir. 2009) ("[T]he law of this circuit . . . holds that the Fifth Amendment does not extend to aliens or foreign entities without

government would be able to construe the military-commission statute as permitting relitigation of charges that have already been rejected by an Article III court or jury.[158]

The second potential legal barrier pertains to physical or psychological mistreatment in the first forum. Criminal defendants have unsuccessfully asked courts to treat prolonged military detention, allegations of torture, or evidence of other forms of mistreatment during military or CIA custody as a bar to further adjudication. Ahmed Ghailani, the Tanzanian al Qaeda member alleged to have participated in the 1996 bombings in Nairobi and Dar-es-Salaam, argued that the Sixth Amendment's guarantee of a speedy trial precluded criminal prosecution after a five-year detention in CIA and military custody.[159] The district court disagreed, although it distinguished between CIA detention and detention in military custody, holding that only the latter counted toward the speedy-trial clock.[160] Ghailani also contended that his alleged torture while in CIA custody had been "so fundamentally unfair" that his indictment should be dismissed.[161] The district court also rejected that argument.[162] Similar efforts by enemy combatants to turn their treatment in military custody into a shield against future prosecution have been rebuffed.[163]

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presence or property in the United States."). *But see* Boumediene v. Bush, 128 S. Ct. 2229, 2277 (2008) (holding that the Suspension Clause extends to the Cuban base). *Rasul*, however, did not concern private litigants who had at one point been in the United States and then had been moved to Guantánamo, a fact that might change the analysis.

158. Moreover, some evidence exists to show that the government takes the position that double-jeopardy protection does not prevent a person acquitted in an Article III criminal proceeding from being retried in a court-martial. *See* Nicholas Schmidle, *Three Trials for Murder: In the Name of Justice, Did the Military Sidestep Double Jeopardy?*, NEW YORKER, Nov. 14, 2011, at 56 (recounting one such case).

159. United States v. Ghailani, 751 F. Supp. 2d 515, 520 (S.D.N.Y. 2010).

160. *Id.* at 554–59; *see also* Barker v. Wingo, 407 U.S. 514, 521 (1972) (setting forth a four-part balancing test for violations to the right to a speedy trial). In applying this analysis, the Court has endorsed delays of up to 7.5 years, suggesting that speedy-trial restraints are weak. *See, e.g.*, United States v. Loud Hawk, 474 U.S. 302, 315–17 (1986) (holding that the defendant had failed to bear the "heavy burden of showing an unreasonable delay" necessary to support his speedy-trial claim). The district court's holding creates an odd and perhaps undesirable incentive for the government to resort to CIA detention in lieu of military detention when it wishes to employ the criminal process subsequently.

161. United States v. Ghailani, 751 F. Supp. 2d 502, 504 (S.D.N.Y. 2010).

162. *Id.*

163. *See, e.g.*, United States v. Padilla, No. 04-60001-CR, 2007 WL 1079090, at *2–6 (S.D. Fla. Apr. 9, 2007) (rejecting a detainee's motion to dismiss a federal indictment based upon the

Third, the Constitution might impose limits on jurisdictional redundancy by mandating the use of an Article III forum in a certain class of cases. The debate on this issue has focused on the border between Article III criminal jurisdiction and various forms of military jurisdiction in cases that arise within the United States.[164] Yet courts have found it difficult to limn the boundary between Article III and military jurisdiction with precision. The Constitution's criminal-procedure rules are silent as to their zone of application. Textual arguments for limiting military jurisdiction are hence elusive. Moreover, the Supreme Court historically has seemed of two minds about limiting military jurisdiction. Some precedent seems to prohibit the use of military jurisdiction within the territory of the United States absent active hostilities, whereas other cases seem to endorse such a measure.[165] Lower courts have drawn inconsistent and incompatible lessons from this precedent.[166] Nor has the Supreme Court evinced any inclination to settle the matter. During the 2000s, the Supreme Court passed up three opportunities to provide a definitive gloss on the AUMF's application within the United States.[167] It seems unlikely that the Court will take up the issue any time soon. Thus, the boundaries between jurisdictional pathways are likely to remain unsettled.

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claim that he had been subjected to outrageous government conduct while in the custody of the military authorities so as to make his continued federal prosecution a violation of due process).

164. *See, e.g.*, Al-Marri v. Pucciarelli, 534 F.3d 213, 219 (4th Cir. 2008) (en banc) (Motz, J., concurring) (developing an argument that some detentions in the United States must be accomplished by civilian, and not military, process), *vacated as moot sub nom.* Al-Marri v. Spagone, 129 S. Ct. 1545 (2009).

165. *Compare Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 136 (1866) (purporting to limit military jurisdiction within the United States when civilian tribunals are open), *with Ex parte* Quirin, 317 U.S. 1, 48 (1942) (allowing the exercise of military jurisdiction over a citizen seized within the United States). The permissible scope of martial law is another question that has not been settled. *Compare* Duncan v. Kahanamoku, 327 U.S. 304, 324 (1946) (narrowly reading the authorization of wartime martial law in Hawaii), *with* Moyer v. Peabody, 212 U.S. 78, 85 (1909) (broadly endorsing the use of martial law).

166. For example, in the most recent merits consideration of the substantive law of domestic military detention, the en banc Fourth Circuit fragmented into seven separate opinions with no clear majority holding on the scope of appropriate detention authority. *Al-Marri*, 534 F.3d at 216.

167. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2277 (2008) (declining to define the limits of permissible detention authority); Rumsfeld v. Padilla, 542 U.S. 426, 450–51 (2004) (declining to rule on the merits of an enemy-combatant detention); Hamdi v. Rumsfeld, 542 U.S. 507, 522 n.1 (2004) (plurality opinion) (noting that "the permissible bounds of the [enemy-combatant] category will be defined by the lower courts as subsequent cases are presented to them").

It is not simply that the law does not limit redundancy. Relevant statutory frameworks aid and abet it. The legislative framework for counterterrorism, for example, ensures a common focus on specific organizations. Congress has established a single mechanism for designating "foreign terrorism organizations" (FTOs).[168] Pursuant to this mechanism, the secretary of state had designated forty-nine entities as of early 2012, including al Qaeda and the Taliban.[169] FTO status establishes an element of both the crime of material support and grounds for security-related deportation.[170] Both al Qaeda and the Taliban are also organizations encompassed by the September 2001 AUMF. Their members, as well as some domain of affiliates, can be tried before a military commission—if they are noncitizens[171]—and detained as enemy combatants—perhaps regardless of their citizenship. All four jurisdictional pathways in Table 1 thus share a common factual element in terms of the particular entities Congress has singled out as terrorist organizations. Untangling the role of FTO designation across these systems would be costly and would entail simultaneous reworking of multiple regulatory frameworks. For this reason, FTO designation likely will remain a pivotal cog in the machinery of counterterrorism law, thereby promoting jurisdictional redundancy.

Redundancy also is fostered by a growing convergence on the scope of primary conduct that permits detention. Courts in both civilian and military contexts have drawn a line between behavior that is *coordinated* with a designated entity—which can trigger detention—and behavior that is *independent* of such an entity—which cannot. On the civilian side, the Supreme Court has read the material-support statute to criminalize conduct coordinated with a designated entity, but not conduct undertaken independent of that entity.[172] Glossing the AUMF, the D.C. Circuit has sketched a similar

168. *See* 8 U.S.C. § 1189(a)(1), (d)(4) (2006) (granting the secretary of state, in consultation with the secretary of the treasury and the attorney general, authority to designate an organization an FTO upon finding that it is foreign, engages in "terrorist activity" or "terrorism," and thereby "threatens the security of United States nationals or the national security of the United States").

169. *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE (Jan. 27, 2012), http://www.state.gov/g/ct/rls/other/des/123085.htm.

170. 8 U.S.C. § 1182(a)(3)(B)(i)(II). Section 1182(a)(3)(B) contains several other terrorism-related grounds of deportation.

171. 10 U.S.C. §§ 948a(1), 948b(a) (Supp. IV 2010).

172. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2723 (2010). For further discussion of the line separating coordinated speech from independent speech, see Aziz Z. Huq,

outer boundary to enemy-combatant detention. In one case, it distinguished a person who was "part of" al Qaeda—and was hence amenable to detention—from someone who engaged in the "purely *independent* conduct of a freelancer"—who was not.[173] Only immigration law sweeps more broadly. Title 8 of the U.S. Code enables the deportation of the "representative[s]" and "member[s]" of a terrorist organization[174] without evidence of any coordinated action and also directs that the "spouse or child" of any alien found deportable on certain terrorism-related grounds be removed.[175] It is unclear if this latter provision has ever been used. In practice, immigration law seems to employ roughly the same boundaries as the criminal law or enemy-combatant detention.

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In sum, changes to the legal framework of terrorist detention in case law and at least some legislation have trended toward greater redundancy.[176] The overlap among forums for terrorism suspects, as a result, is pervasive.

III. THE EFFECTS OF JURISDICTIONAL REDUNDANCY ON TERRORIST-DETENTION POLICY

Jurisdictional redundancy may be ubiquitous, but is it desirable? Would it be better, as many believe, to channel particular classes of terrorism suspects instead into a single forum? These questions are not rhetorical. Commentators and legislators have proposed small and large changes that would reduce or eliminate swatches of

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Preserving Political Speech from Ourselves and Others, 112 COLUM. L. REV. SIDEBAR 16 (2012), http://www.columbialawreview.org/assets/sidebar/volume/112/16_Huq.pdf.

173. Salahi v. Obama, 625 F.3d 745, 752–53 (D.C. Cir. 2010) (emphasis added) (quoting Bensayah v. Obama, 610 F.3d 718, 725 (D.C. Cir. 2010)); *accord* Hatim v. Gates, 632 F.3d 720, 721 (D.C. Cir. 2011) (per curiam).

174. 8 U.S.C. § 1182(a)(3)(B)(i)(IV)–(V) (2006). At least one court of appeals, ruling on a different provision of the code, has expressed concerns about the government's use of "guilt by association" as a theory of removal. Yusupov v. Attorney Gen. of the U.S., 650 F.3d 968, 983 (3d Cir. 2011) (rejecting the government's theory as to why a noncitizen was not entitled to the withholding of removal based on his association with other suspected terrorists and citing constitutional concerns).

175. 8 U.S.C. § 1182(a)(3)(B)(i)(IX) (2006) (finding removable "the spouse or child of an alien who is inadmissible under [the terrorism-related part of the Code], if the activity causing the alien to be found inadmissible occurred within the last 5 years").

176. One exception to this trend is the imposition of legislated restrictions on transfers from Guantánamo for criminal prosecution. *See supra* note 118.

jurisdictional overlap by channeling suspects into one venue or by creating a new and exclusive venue tailored to the terrorism context.[177] These proposals reflect a pervasive but largely unexamined assumption that redundancy is undesirable.

This Part provides a framework for analyzing how jurisdictional redundancy influences policy outcomes. It focuses on how such overlap influences, either directly or indirectly, two clumps of values related to *accuracy* and *cost minimization*. By "accuracy," I mean to capture a detention system's ability to reach particularized judgments as to specific detainees that are factually accurate applications of a governing legal standard.[178] Accordingly, accuracy decreases as either the rate of false positives or the rate of false negatives increases. By "cost-minimization," I mean a residual category of other government and private expenditures related to the operation of a detention system. Using these labels, I aim to capture in the analysis not only transaction costs immediately attendant to the ongoing management of various forums but also the potential downstream costs of false negatives and false positives that accrue to government or private parties. The latter category includes, for example, the cost to detained individuals of an erroneous deprivation of liberty and the cost to public safety from an erroneous release decision. By framing the analysis in terms of accuracy and cost minimization, I aim to tally in rough form the most important policy gains and losses related to the operation of a terrorist-detention system.

My analysis focuses on accuracy and cost minimization on the assumption that these are generally uncontroversial and important goals. It is, to be sure, possible to posit other goals for a detention system. Some, for example, might prioritize fairness, individual constitutional rights, or the rule of law and so demand that legal rules be publicly and comprehensively specified in advance of their application. Others might view terrorism as so beyond the pale that the law should express without reservation the judgment that terrorists do not deserve the same rights and privileges as common criminals.[179] Either way, the aspirations of detention law would be starkly normative. Claims about fairness, the rule of law, or

177. *See infra* Part IV.A–B.

178. My nomenclature is inexact insofar as "accuracy" more precisely means "accuracy-related costs." But I prefer inexactitude here to prolixity or verbal infelicity.

179. For a relatively mild statement of this position, see Andrew C. McCarthy, *Terrorism on Trial: The Trials of al Qaeda*, 36 CASE W. RES. J. INT'L L. 513, 518 (2004).

existential threats are not easily translated into analytically tractable forms. This uncertainty creates a temptation to use such concerns as trumps to forestall careful analysis. Even if nuanced normative analysis is possible, large disagreement about first principles means that such normative questions are not a useful starting point for policy analysis. Further, many normative qualities are captured in a consequentialist analysis of errors and costs. It is unclear whether much is added by recasting these concerns in overtly normative garb. In short, I take the goal of a terrorist-detention system with a low rate of errors and a low operating cost to be a plausible first-cut target for institutional-design analysis on the ground that any more specification of goals would be controversial and analytically opaque.[180]

This Part therefore begins by asking how jurisdictional redundancy affects accuracy and cost *directly* in light of existing jurisdictional specifications. Using existing jurisdictional arrangements as a focus for analysis, it first demonstrates that the relationship of jurisdiction to error rates and costs is surprisingly complex. Hence, the shift from Article III exclusivity to jurisdictional plurality since the beginning of the twenty-first century has had more reticulated effects than have been generally perceived. After addressing direct effects, I turn to two secondary mechanisms through which jurisdictional redundancy *indirectly* influences accuracy and cost: its influence on agency costs and on information flows. Together, the analysis of both direct and indirect effects provides a general framework for analyzing the forum-choice question. This analysis demonstrates that "[s]pecific institutional arrangements invariably have multiple effects."[181] Conventional doctrinal approaches to the forum-choice question, by contrast, do not account for plural effects.

Two threshold caveats are important to state here. First, as should be evident from my specification of policy goals, my analysis makes only weak assumptions about social welfare and government incentives. Thus, I assume it is desirable that some persons who pose some risk of violent harm should be detained on consequentialist

180. One potential concern is that I am stacking the analytic deck, so to speak, by omitting deontological concerns. But such concerns—much like accuracy and cost-minimization concerns—can cut strongly in both directions. It is therefore unlikely that a close focus on consensus-animated goals has a skewing effect on the analysis.

181. PIERSON, *supra* note 33, at 109; *see also* ROBERT JERVIS, SYSTEM EFFECTS: COMPLEXITY IN POLITICAL AND SOCIAL LIFE 3–12 (1997) ("In a system, the chains of consequences extend over time and many areas: The effects of action are always multiple.").

grounds.[182] I take no position on the contested and difficult question of how much risk is necessary to warrant detention. I also assume that it is undesirable to detain individuals on the false belief that they are connected to terrorism. I rely on no assumption here about how these different goals should be weighted or aggregated. At the same time, I make no assumption that government officials are either well intentioned, and hence will always and necessarily reduce terrorism risks without unnecessary costs, or badly intentioned, such that they are systematically interested in empire building, shirking, or disregarding constitutional interests. As a matter of naïve empiricism, I suspect that a mixture of both good and bad types can be found within existing governments. The analysis instead proceeds from the perspective of an institution designer working behind something of a veil of ignorance. From this perspective, it is likely wise to assume that electoral competition will throw up both good and bad types. Hence, institutions must be designed with both the best and the worst of times in mind.[183]

Second, a focus on the policy effects of jurisdictional redundancy is not unprecedented in public law. Overlap has been recognized as a central problem in both federal jurisdiction and administrative law. In the federal courts scholarship, the question of redundancy has arisen in debates about the appropriate scope of federal court collateral review of state court criminal judgments.[184] Scholars such as Professor Paul Bator and Judge Henry Friendly disagree with Professors Robert Cover and T. Alexander Aleinikoff about the costs and benefits of duplicative federal review of state court criminal processes.[185] Their debate turns on the relative costs and benefits of

182. This is not intended to be a controversial position. Our system of pretrial bail, the detention of an enemy state's soldiers in wartime, and the detention of the seriously psychologically ill are all forms of incapacitation on consequentialist grounds that have wide support in principle, even if specific applications are controversial.

183. One might counter that electoral incentives will push even bad types to minimize terrorism risk. But that is not at all clear insofar as terrorism risk has a long duration, with harms materializing long after the salient actions would need to be taken. As a consequence, a rational actor may slack off knowing that her successor will pay the political price.

184. Such review is an exercise of 28 U.S.C. § 2241 (2006), as modified by 28 U.S.C. § 2254 (2006). *See* Felker v. Turpin, 518 U.S. 651, 662 & n.4 (1996) (noting that § 2254 "specifies the conditions under which . . . relief may be granted" when § 2241 jurisdiction is invoked by a state convict).

185. *Compare* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 454 (1963) (arguing that "if one set of institutions has been granted the task of finding the facts and applying the law and does so in a manner rationally adapted to the task, in the absence of institutional or functional reasons to the contrary we

sequential redundancy with a second forum that specializes in federal constitutional questions.[186] Subsequent administrative-law scholars have recognized the ubiquity of overlap in the federal regulatory state. This overlap means that responsibility for a policy matter is often shared by multiple agencies.[187] In the courts, judges respond to the resulting interagency tensions by applying a presumption that Congress assigned law-interpreting authority to one agency alone.[188] But administrative-law scholars have questioned this approach. They have developed theories of why Congress might favor jurisdictional redundancy.[189] Their analysis, however, has generally focused on regulatory, rulemaking jurisdiction, not on the kind of adjudicative

should accept a presumption against mere repetition of the process on the alleged ground that, after all, error *could* have occurred"), *and* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970) (arguing that "convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence"), *with* Cover, *supra* note 27, at 649–80 (concluding that "[i]nterest, [i]deology, and [i]nnovation . . . constitute justifications for the jurisdictional redundancy which characterizes our federalism"), *and* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1045 (1977) (arguing that jurisdictional redundancy "fosters greater certainty that constitutional rights will not be erroneously denied"). The view of Professor Bator and Judge Friendly largely prevailed. *See, e.g.*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101–108, 110 Stat. 1214, 1217–26 (codified as amended in scattered sections of 21 and 28 U.S.C. (2006) and FED. R. APP. P. 22) (imposing multiple restrictions on federal habeas review).

186. *See, e.g.*, Cover, *supra* note 27, at 657 (identifying "[i]nterest, [i]deology, and [i]nnovation" as relevant effects of jurisdictional overlap).

187. *See* Freeman & Rossi, *supra* note 28 (enumerating areas of overlap); George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315, 315–16 (1987) (identifying workplace and mine safety as areas of regulatory activity "divided between two wholly separate, independent agencies").

188. *See, e.g.*, Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 153 (1991) ("[W]e presume . . . that Congress intended to invest interpretive power in the administrative actor in the best position to develop [historical familiarity and policymaking expertise]."); ETSI Pipeline Project v. Missouri, 484 U.S. 495, 505 (1988) (examining a conflict between the secretary of the interior and the secretary of the army).

189. *See, e.g.*, Gersen, *Overlapping and Underlapping Jurisdiction*, *supra* note 28, at 211–16 (criticizing the exclusive-jurisdiction presumption); *see also* Andrew B. Whitford, *Adapting Agencies: Competition, Imitation, and Punishment in the Design of Bureaucratic Performance*, *in* POLITICS, POLICY, AND ORGANIZATIONS: FRONTIERS IN THE SCIENTIFIC STUDY OF BUREAUCRACY 160, 162–64 (George A. Krause & Kenneth J. Meier eds., 2003) ("Agencies will respond to comparison, competition, and information revelation because of the real world implications of failure."). A related, but not identical, variation on the overlap question inquires into when private actors should be able to enforce statutory commands in addition to administrative agencies. *See generally* Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive To Use the Legal System*, 26 J. LEGAL STUD. 575 (1997) (examining the benefits and drawbacks of private enforcement).

jurisdiction at issue here.[190] These advances in administrative law, in turn, have drawn on theories developed in the organizational-design literature about how to identify the optimal quantum of redundancy in complex administrative systems, such as public-transportation networks and cislunar exploration.[191] Neither the federal courts nor the administrative-law scholarship speaks directly to the problems of designing a terrorist-detention system. Both though attest to the significance of jurisdictional redundancy in complex regulatory situations. Both also provide hints of how overlap might influence policy outcomes in the national-security domain.[192]

A. Accuracy Effects of Redundancy

Redundancy in jurisdictional specification creates options for the government along two dimensions. First, when the government initially detains a person, it might have a choice among different forums. Second, if a chosen forum does not yield the outcome that the government sought, the government may be able to employ a second forum. In both cases, the availability of options has an effect on the government's strategy. This effect in turn influences the frequency and type of errors. To understand the connection between jurisdictional choice and accuracy, it is therefore necessary to clarify

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190. *See* Cover, *supra* note 27, at 654–57 (noting that jurisdictional redundancy does not raise the same questions as policymaking redundancy).

191. Beginning in the 1960s, organizational theorists demonstrated that reserve capacity has significant positive effects on system outcomes. Early research focused on public-transit systems. One early study of redundancy demonstrated that the "loosely coupled" and "jurisdictional[ly] fragment[ed]" public-transit system of the San Francisco Bay area was substantially better able to deal with unexpected shocks, such as major accidents and natural disasters, than a more streamlined arrangement would have been. Martin Landau, *On Multiorganizational Systems in Public Administration*, 1 J. PUB. ADMIN. RES. & THEORY 5, 7, 10 (1991). Subsequent studies focused on other complex government systems, such as the National Aeronautics and Space Administration's space-shuttle program, which is also designed to avoid extremely costly failures. *E.g.*, Larry Heimann, *Understanding the* Challenger *Disaster: Organizational Structure and the Design of Reliable Systems*, 87 AM. POL. SCI. REV. 421 (1993); *see also* Sagan, *supra* note 25, at 944–45 (questioning "the common, but false, intuition that actions taken to improve security will always have a positive effect").

192. The question of jurisdictional overlap also arises in the literature on federal courts' choice of law in diversity cases under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), in which fairness and forum shopping are also central concerns. *See generally* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 590 (6th ed. 2009) (summarizing the arguments). Extended treatment of the analogy is inapt since the disaggregated strategic choices of multiple plaintiffs would be modeled differently from the actions of the unitary government actor at issue here.

how redundancy channels government action and to examine how the resulting changes in government strategy influence error rates.

1. *The Government's Use of Redundancy.* I begin by examining the immediate uses of redundancy from the government's perspective. Consider first how the government can employ simultaneous overlap to limit some errors. Despite Professors Chesney and Goldsmith's claim about the convergence in substantive and procedural rules used in different forums,[193] gaps between the procedural frameworks of criminal and noncriminal detention, the first and second columns of Table 1, remain. In addition, some differences remain between Article III criminal trials and military commissions.[194] As a result, the choice of forums presents the government with some opportunity for *positive jurisdictional arbitrage*—the selection of the forum with the lowest costs in terms of the evidence and effort needed to secure detention.[195] Jurisdictional arbitrage allows the government to match suspects to forums based on the kind of inculpatory evidence available or the nature of the charges against the person. When inculpatory evidence has been collected on the battlefield or from a foreign sovereign that wishes to remain anonymous,[196] such arbitrage allows the government to secure detention through low-process channels on a case-by-case basis. Using these tactics, the government can preserve the availability of rigorous forms of adjudication, such as Article III criminal trials, without having to bear the costs of release as a result of exogenous

193. Chesney & Goldsmith, *supra* note 32, at 1800–01.

194. For example, a federal court must determine that a criminal defendant's confession was voluntary before admitting it. 18 U.S.C. § 3501 (2006). By contrast, the military commissions are instructed not to admit confessions elicited by torture or cruel, inhuman, or degrading treatment. 10 U.S.C. § 948r(a) (Supp. IV 2010). But a military judge can admit a statement if it is reliable and sufficiently probative if it was made "incident to lawful conduct during military operations at the point of capture or during closely related combat engagement, and the interests of justice would best be served by admission of the statement into evidence." *Id.* § 948r(c).

195. For a similar use of the same term in the context of arbitrage at the international level between different jurisdictions, see Eugene Kontorovich, *"A Guantánamo on the Sea": The Difficulty of Prosecuting Pirates and Terrorists*, 98 CALIF. L. REV. 243, 269 (2010).

196. *See* John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operation in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201, 212 (2011) ("States may capture nonstate fighters on or adjacent to the battlefield in circumstances where evidence collection either cannot occur or cannot be a priority. Sources of evidence may also include intelligence sources that cannot be subjected to the rigors of confrontation without compromising sources and methods.").

circumstances beyond its control in cases in which those rigorous forms would yield unsatisfactory outcomes.

Such redundancy may be especially important in times of emergency. Redundancy allows the government to parcel out tasks in new ways if one jurisdictional channel is overloaded or otherwise unavailable. Emergencies are also moments when catastrophic harms may be more likely. As a result, the burden imposed by reserve capacity in ordinary times may be offset by its heightened utility during emergencies. Excess capacity—such as that created in the area of the government's immigration powers—provided one way for the government to mitigate the possibility of bad outcomes even though it also required bearing the long-term costs of maintaining an oversized standing corps of immigration officials and adjudicators.[197] This effect of redundancy is a positive one.

Sequential overlap has a different use: it mitigates the risk that the forum initially chosen will yield a false acquittal.[198] It thereby serves as insurance. In the case of Lyglenson Lemorin, for example, the government turned to the immigration system after failing to secure its desired outcome through the criminal-justice system.[199] The availability of immigration detention mitigated the cost to the government of a failure to convict on criminal charges. The trajectory of the Padilla and al-Marri cases illustrates use of sequential redundancy to mitigate a different risk of forum failure. In both cases, the government had transferred the suspects out of military detention at the cusp of Supreme Court review of their cases.[200] The government thereby avoided the risk of an adverse legal judgment that might have restrained its options in future cases. Redundancy in these cases provided insurance not against terrorist events but against adverse legal outcomes. Like the option created by simultaneous overlap, this insurance effect may be especially important in the aftermath of an

197. Professor Cover argues that the same is more generally true with respect to the creation of special commissions and other bodies designed to check the results of a criminal process. Cover, *supra* note 27, at 656 ("Ad hoc 'jurisdictional' redundancy is commonly demanded when questions of factual error assume massive political significance.").

198. *See* Landau, *supra* note 129, at 349 (discussing how redundancy can result in increased liability within complicated systems). The sequential redundancy created by habeas jurisdiction under 28 U.S.C. § 2254 (2006) serves the same function of error correction.

199. *See supra* text accompanying note 131.

200. *See supra* text accompanying notes 144–45.

exogenous shock.[201] The more risk-averse a system's designers are, the higher the option's value will be.

Commentators have noted this function of sequential redundancy but have not asked how its existence affects the detention system as a whole.[202] Three complicating downstream effects are worth emphasizing. First, the use of sequential or simultaneous redundancy may mitigate pressure to ease procedural rules or expand the substantive reach of the first-choice forum. For example, if officials knew that they had the possibility of immigration detention or enemy-combatant detention as a backup, they would have less incentive to press federal judges or Congress for changes to Article III criminal process. In this way, the mere possibility of sequential overlap—even without its frequent use—provides some breathing room for the robust protections of rights in the Article III criminal context.

Second, sequential redundancy creates a moral-hazard problem for prosecutors and investigators.[203] By reducing the costs of failure in the first-choice forum, it blunts the incentive for officials to prosecute a case vigorously in that context. Underinvestment in the first-choice forum increases the need for subsequent recourse to the second-choice forum. Because the government may not prevail in every case in the second-choice forum, a less-than-vigorous prosecution in the first-choice forum may incrementally raise the possibility of a policy failure overall. It is not clear how large this moral-hazard problem is on the ground. Reputational and normative constraints may sufficiently bind officials and mitigate any slackening of effort induced by sequential overlap.[204]

Third, simultaneous redundancy opens up the possibility that the selection of the threshold forum will be motivated initially not by

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201. *See, e.g.*, Landau, *supra* note 191, at 5, 10–11, 15–16 (emphasizing the importance of reserve capacity in transit systems during emergencies); Staudt, *supra* note 28, at 1213 (making the same point with regard to the provision of social-welfare goods).

202. *See, e.g.*, Cole, *supra* note 16, at 695–96 (noting the potential "perverse effect" of limiting counterterrorism to Article III criminal prosecutions).

203. "Moral hazard is the . . . tendency of an insured to underallocate to loss prevention after purchasing insurance." KENNETH S. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY 14 (1986).

204. By analogy, the obligation to provide disaster relief may not be needed to induce optimal precautions against terrorism because such "precautions are already encouraged by political self-interest and, no doubt, by a deeply held commitment to the safety of the country." Saul Levmore & Kyle D. Logue, *Insuring Against Terrorism—And Crime*, 102 MICH. L. REV. 268, 311 (2003).

public-policy concerns but by considerations of electoral politics.[205] That is, the moment of choice for the executive can become an opportunity for political mobilization by critics of an administration who argue that a president is either too soft on terror or an incipient abuser of constitutional liberties. Rather than being the output of reasoned deliberation, decisions under these conditions may flow from raw partisan political calculation. And the problem may be endemic. That is, any kind of forum optionality creates the opportunity for not only rational deliberation but also distortive politicization.

How important are these collateral effects of sequential redundancy on the ground? The data presented in Parts I and II suggest that these effects are real but less frequently encountered than might be expected. Recall that the main channel for terrorist detentions has been the Article III criminal process. Immigration detention and enemy-combatant detention were relied upon most heavily in the direct aftermath of 9/11. Since then, the government has relied on them less and less.[206] The heavy reliance on alternatives to the Article III criminal process after 9/11 is consistent with organizational theorists' insight that reserve capacity is most valuable in the wake of exogenous shocks and is less utilized as governance systems find a new equilibrium that accounts for the shock.[207] Some evidence also suggests that the government has exploited sequential overlap, both to prevent the release of a dangerous suspect and also to forestall an adverse litigation outcome that, in its view, would have had costly repercussions.[208] But any moral-hazard effect from the existence of redundancy appears to be tamped down by reputational and normative constraints. Department of Justice lawyers, in other words, still prosecute terrorism-related cases vigorously even though the cost of their mistakes is buffered by other parts of the jurisdictional system.[209] Similarly, at least through the Bush

205. *Cf.* Kuhn, *supra* note 9, at 224 ("Undoubtedly, for some in Congress, detention policy is worth more as a political issue than as a potential policy accomplishment.").

206. *See supra* Part I.

207. *See* Landau, *supra* note 191, at 12 ("Were we to remove all [redundancy] . . . we would get a brittle structure incapable of coping with surprise . . . .").

208. *See supra* Part II.B.

209. The availability of pretextual charges may also have a buffering effect within the criminal-justice system. That is, prosecutors can supply their own insurance by charging suspects with ancillary offenses.

administration, initial forum selections did not appear to catalyze political firestorms that distorted venue choices.

In short, redundancy provides a mechanism for the government to mitigate the cost of shortfalls in evidence or adjudicative failures in a first-choice forum. Used to this end, redundancy likely has downstream effects on the rate of change to procedural rules and on prosecutors' incentives. Based on these mechanisms alone, the effect of redundancy on accuracy might be positive, especially if prosecutors are subject to exogenous pressures to adhere to professional norms. But these mechanisms alone do not provide a complete picture. Other connections between redundancy and accuracy cut in the other direction.

2. *The Complex Effects of Redundancy on Error Rates*. The government's observed use of redundancy highlights one set of mechanisms linking jurisdictional specification and error rates. But more careful analysis suggests others. Simultaneous and sequential forms of redundancy have distinct effects on error rates. Their net effect can be understood only by disaggregating two different sorts of errors at issue. To conclude simply that jurisdictional arbitrage and do-overs reduce errors overall is to move too quickly.

It is standard in the many fields of systems analysis to refer to two different kinds of errors that can arise in complex systems designed to pick out individuals with hard-to-observe traits from a larger population. First, in a Type I error, the government chooses to act when it should not have done so, generating a false positive. Second, in a Type II error, the government fails to act when it should have done so, producing a false negative.[210] Simultaneous and sequential forms of overlap influence false positives and false negatives differently. The two kinds of redundancy are therefore worth distinguishing and considering separately.

With the use of simultaneous overlap, error rates are a simple function of the government's choice of forum. The existence of overlap changes error rates only to the extent that the government engages in jurisdictional arbitrage and that the procedures in the two forums are different. At the opening of this Part, I sketch an optimistic story of the government's matching cases to venues based

210. *Cf.* Heimann, *supra* note 191, at 422 ("[I]f NASA decided not to launch a mission that was technologically sound, then it would have committed a type II error."). I will refer for simplicity's sake to false positives and false negatives for the remainder of the discussion.

on exogenous constraints, an opportunity made possible by the availability of positive jurisdictional arbitrage.[211] But it is possible to imagine a darker story of negative jurisdictional arbitrage. For example, imagine the government matches cases to forums based not only on the strength of available evidence but also upon purely endogenous factors. This strategy may well have a perverse effect. Suspects against whom the evidence favoring detention is weak will be funneled to a low-process pathway. Suspects against whom the evidence favoring detention is strong will remain in a high-process forum. As a result, both groups of suspects will be detained at roughly equal rates, even though suspects against whom the evidence is weak should be detained less frequently. On the whole, the system will predictably have a high level of false positives and a low level of false negatives. In other words, procedural arbitrage made possible by simultaneous overlap may be either desirable or pernicious. How it is assessed may depend on the reasons for the government's matching decision. If the government is responding to exogenous constraints, one might view it in a positive light, but if the government is making choices endogenously based on its own exertion of effort, the results may be undesirable.

A further analytic wrinkle meriting notice here is that the costs of a false negative's taking the form of a conviction may be greater than the costs of a false negative's taking the form of a simple detention decision. This possibility exists because a formal conviction may be more difficult or more politically costly to undo than an ongoing detention. Perhaps offsetting this effect, there may be more procedural avenues built into the system to challenge false convictions than to challenge flawed detentions.

The effects of sequential overlap are even more complex. It is worth looking first at its effect on a single case and then asking separately whether it has dynamic effects over time. Start with the simple case of a one-shot use of sequential overlap. When the government has the option of using sequential overlap to mitigate the risk of failure in a first forum, it will opt for a second round of adjudication only when it fails to secure detention in the first round. The asymmetrical stacking of processes by the government will have divergent effects on the rate of false positives and the rate of false negatives. On the one hand, false negatives will arise only when both

211. *See supra* Part III.A.1.

the first and the second process fail to produce the desired result. The rate of false negatives in a system with sequential overlap will therefore be the mathematical product of the probabilities of failure at each stage. For example, imagine a highly simplified situation in which both forums erroneously acquit with a probability of 0.5. If the government chooses to take two bites at the apple, the risk of a false negative in a given case drops to 0.25—the product of 0.5 and 0.5. In short, in the context of false negatives, sequential overlap will be considerably less error-prone than a single-shot system.[212]

On the other hand, the government's use of sequential overlap creates a system in which false positives may be obtained in both the first and second rounds. Imagine, again hypothetically, that both forums have a 0.5 probability of convicting an innocent person. If the government always turns to the second forum when the first forum has failed to produce a conviction, the chance of convicting an innocent person would increase to 0.75—the 0.5 risk of wrongful conviction in the first forum, added to 0.25, the product of 0.5 and the 0.5 risk of wrongful conviction in the second forum. Rather than mitigating the likelihood of error, sequential overlap has the effect of increasing the probability of a false positive in relation to the base rate of error in either forum standing alone.[213]

Sequential redundancy thus has different effects on false positives and false negatives. It increases the former at the same time that it decreases the latter. Assessing the desirability of jurisdictional overlap therefore turns on an evaluation of the relative welfare costs of false negatives and false positives. This comparison is beyond the scope of this Article, but it is worth noting that false negatives are not self-evidently more costly than false positives. There is a tendency to assume that a false negative will have a catastrophic cost—for example, another attack similar in scale to 9/11. But not all terrorist attacks are 9/11. Since 1970, only 118 incidents of terrorism worldwide have killed more than one hundred people. This number represents 0.12 percent of the 98,000 terrorist events in that period.[214] Although

212. For situations in which multiple venues have divergent error rates—for example, of 0.1, 0.25, and 0.5—adding unrestrained sequential overlap among the three venues would not necessarily reduce error rates compared to those yielded by exclusive use of the most accurate forum.

213. For a formal statement of this point, see Heimann, *supra* note 191, at 426.

214. *See Advanced Search*, GLOBAL TERRORISM DATABASE, http://www.start.umd.edu/gtd/search (open "Casualties" tab; select Casualty Type: "Fatalities Only" and Number of Casualties: "101+"; follow "Search" hyperlink).

always morally deplorable, terrorism is not categorically catastrophic in simple numeric terms. Furthermore, false negatives matter most when a terrorist organization is unable to substitute for the detained attacker. If a terrorist organization is able to substitute a new operative for a captured one, the expected value of a capture for the government falls.

The possibility of a do-over in a second forum influences outcomes through a second, dynamic mechanism that manifests only over time. Previous scholarship has established that in adjudicative systems with asymmetrical appeal rules—such as those that allow one side but not the other to appeal—the structure of appellate review will change the substantive legal standard in a predictable direction. For example, in the patent context, an asymmetrical appeal rule governing decisions by the Patent and Trademark Office has led to a drift in the legal standard. This phenomenon has been termed "patent inflation" by one scholar.[215] An analogous mechanism might result from the operation of sequential overlap in the context of terrorism-related detention because only the government can choose to invoke the second forum's jurisdiction.

Here is how an analogous mechanism might work, *mutatis mutandi*, in the terrorism context:[216] In a system in which one forum operates as a backup for a primary forum, the government decides which cases go to the second forum. The government will present there only cases that it has lost in the first forum. Its selection of cases in consequence will include a disproportionate number in which the evidence against the suspect is weak. The median case filed in the second forum will be weaker than the median case drawn from the pool of all potential cases. Consider how this dynamic affects the legal standard used in the second-choice forum. In each of the possible second-choice forums, panels of judges use a system of internal precedent that sets a factual benchmark for what justifies detention. Each of the possible second-choice forums also has a pool of adjudicators that is heterogeneous. In this pool, there will be pro-detainee and pro-detention panels of judges. Assuming that panels

215. Jonathan Masur, *Patent Inflation*, 121 YALE L.J. 470, 470 (2011).

216. The following builds on Professor Masur's pathmarking analysis, although it is worth noting that he identifies effects in the first-round forum that are absent here. *See id.* at 510–12 (showing how a permissive ruling in the second-round forum, the Federal Circuit, allows the first-round forum, the Patent and Trademark Office, to further push the boundaries of permissive patent rulings). Further, my analysis focuses on two separate forums, not two venues linked by a hierarchical appeals structure.

are drawn at random, the joint effect of (a) an asymmetrically distributed stream of cases—with more hard cases for the government than easy cases—and (b) heterogeneous judges will be to move the detention benchmark in a pro-detention direction over time. Pro-detention panels will be more likely than pro-detainee panels to shape precedent because more hard cases for the government than easy ones will come before the court, and therefore panels will hear more close cases in which the legal rule could be shifted in the government's direction. Over time, this process will repeat as the government continues to exploit sequential redundancy, and the law will gradually shift in the government's favor. This shift will exacerbate the other effects I have noted. It will, that is, further increase the number of false positives and further decrease the number of false negatives. Assuming an exogenously defined standard of detention, this change in the law will yield a higher probability of false positives than false negatives over time. How strong this inflationary effect may be will depend, among other things, on the measure of sequential redundancy and the variance in the government's first-round choice of forum.

The relationship between jurisdictional redundancy and accuracy, in short, is more complex than generally believed. Simultaneous and sequential forms of overlap have different effects. Their influence on false positives and false negatives must be considered separately. In addition to its effects in discrete cases, sequential overlap has a subtler effect over time via potential changes to the relevant legal standard. How these effects are evaluated, of course, depends on how false positives and false negatives are assessed and on which are seen as more costly.

B. The Costs of Redundancy

An intuitive objection to redundancy is on the basis of cost. Maintaining two systems is often assumed to be more expensive than maintaining one, if only because one system necessarily will lie fallow occasionally. In the jurisdictional context, this observation requires a caveat and some extensions. The government's decision to maintain spare capacity is not always meaningfully more expensive. But creating new reserve capacity can impose costs not only upon government but also upon third parties. A full accounting of the social cost of jurisdictional redundancy therefore must address both the potential costs internalized by the government and the potential

externalities—costs imposed upon third parties—especially those that government is unlikely to account for in its policy determinations.

1. *Costs to Government*. Jurisdictional redundancy is created either by expanding the authority of existing forums or by creating new ones.[217] An example of the first is the immigration system's deployment after 9/11 to pick up some terrorist-detention functions.[218] An example of the second is the military-commission system. These two methods of creating overlap have distinct cost profiles.

Expanding existing jurisdictions is relatively inexpensive because the fixed costs of running the forum have already been expended. The change in variable costs from the new responsibilities is not zero—regulations must be promulgated and agency staff reassigned, for example—but it is likely to be low. Every time the government begins a new action in a forum, it incurs some costs. But again, the marginal cost of each new action is likely to be relatively low. Supplementing existing institutions with new responsibilities is therefore a reasonably cost-effective strategy from the government's perspective.

Creating redundancy from scratch is a different matter. Institutional innovation is typically motivated by a belief that new entities will yield dramatically better or cheaper policy outcomes.[219] But designing and implementing a new institution is costly. Lawyers and policymakers must be reassigned from their ordinary tasks and given new and unfamiliar responsibilities. Other policies and projects lose resources. Jurisdictional innovation may trigger political resistance by existing stakeholders based on fears that it will be used to circumvent binding constitutional precommitments. Adjudication is sufficiently complex that designers of new institutions must either expend considerable time and effort or live with legal uncertainty regarding process and outcomes. These costs create a double bind for institutional designers. The more effort those designers expend on specifying rules and resolving uncertainties, the more time and resources a startup demands. The less effort they expend on clarifying

217. This distinction is similar to the one drawn by Professor Lerner between "duplication," which involves parallelism of functions, and "overlap," which assumes different units assigned a range of functions. Lerner, *supra* note 127, at 336–37, 342.

218. *See supra* text accompanying notes 78–84.

219. *See, e.g.*, Kevin E. Lunday & Harvey Rishikof, *Due Process Is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 CAL. W. INT'L L.J. 87, 100–04 (2008) (proposing that only a national-security court can provide the optimal mix of legitimacy, procedural rigor, and specialization).

institutional parameters, the greater the frictional costs of gaining institutional momentum. Borrowing rules from existing institutions is no panacea: the greater the borrowing, the less innovative the new institution will be and the less will be gained in improved policy outputs. The upside of institutional startups is therefore constrained by the attendant costs.

Experience with military commissions suggests that startup costs in the context of national security can be substantial. The relatively slow startup of procedures in military commissions is best explained in terms of the tradeoff inherent in institutional startups.[220] To be sure, military commissions had been used periodically since the Revolutionary period.[221] But the military commissions envisaged by President Bush's November 2001 executive order were in many ways a novelty.[222] As such, they created additional uncertainty about procedural and substantive rules that were already subject to contestation under international and domestic law. Among the confusion-inducing procedural issues raised in early proceedings were fights about the joinder of different trials, the possibility of self-representation and related questions of defendants' competency, and the standard for judicial recusal.[223] Initial rulings on procedural ambiguities seemed to be "ma[de] . . . up" as the proceedings unfolded;[224] prosecutors protested and sought transfer on ethical grounds, with some accusing the commissions of lacking fundamental fairness;[225] and commission judges evinced what one military lawyer labeled "an embarrassing lack of knowledge about the law of war."[226]

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220. Delay cannot be explained by detainees' challenges; detainees were only assigned counsel in 2003 and charged before the commission in June 2004—almost three years after the November 2001 order. Glazier, *supra* note 95, at 157–58.

221. *Cf.* Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 720–25 (2002) (describing Revolutionary War usage of military commissions).

222. To be sure, no innovation was needed to expose al Qaeda members to military criminal process even in 2001. *Cf.* 10 U.S.C. § 818 (2000) (vesting courts-martial with general jurisdiction over any person amenable to trial under the laws of war).

223. Glazier, *supra* note 95, at 163–66.

224. Deborah Pearlstein, *Four Issues of Concern*, HUMAN RIGHTS FIRST (Aug. 23, 2004), http://www.humanrightsfirst.org/2004/08/23/four-issues-of-concern.

225. *See, e.g.*, *Legal Issues Surrounding the Military Commissions System: Hearing Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 16–18 (2009) (statement of Lieutenant Colonel Darrel J. Vandeveld) (recounting his experience as "a prosecutor in the Office of Military Commissions in Guantanamo Bay from May 2007 through December 2008" who underwent a "profound change of heart and mind when [he] realized through firsthand observation and through [his] own

Congressional intervention did not mitigate these procedural problems. In June 2007, the newly reconstituted commissions, acting on the basis of the 2006 statutory authorization, dismissed all charges against the two remaining defendants. The commissions explained that the defendants had been found by earlier military hearings to be "enemy combatants" but not "alien unlawful enemy combatants," which was the category used in the 2006 statute's threshold jurisdictional provision.[227] That is, describing the commission's jurisdiction, Congress had employed a jurisdictional neologism that was inconsistent with the definitions of enemy combatant that had previously been employed by the military. It took a costly and time-consuming appeal to the Court of Military Commission Review to resolve the confusion. That court found that the jurisdictional defect could be remedied through supplemental factfinding by the military commission itself.[228] The delay, uncertainty, and sheer cost of these proceedings could have been avoided had the government chosen to invoke longstanding court-martial jurisdiction over war crimes rather than to create military commissions from scratch. Alternatively, the government could have expended significant additional resources at the outset to generate comprehensive rules and regulations. Unlike military commissions, courts-martial could have drawn on decades of clarifying precedent about process and substance in a way that military commissions could not. But that path was not taken. Instead, military tribunals struggled for almost a decade with few convictions, none of which involved noteworthy defendants.[229] The accumulated

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actions that what [he] was seeing at Guantanamo was not at all consistent with our core values of justice and due process of law").

226. Glazier, *supra* note 95, at 162.

227. *See* United States v. Hamdan, No. 04-0004, slip. op. at 2 (Mil. Comm'n June 4, 2007) ("The 2004 CSRT determination that the accused is an 'enemy combatant' was made for the purposes of determining whether or not he was properly detained, and not for the purpose of determining whether he was subject to trial by military commission." (quoting Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 3, § 948d(a), 120 Stat. 2600, 2603)).

228. United States v. Khadr, No. CMCR 07-001, slip op. at 19–25 (Ct. Mil. Comm'n Rev. Sept. 24, 2007), *available at* http://www.scotusblog.com/archives/CMCR%20ruling%209-24-07.pdf.

229. For an exemplary account of military commissions published in these pages, see David J.R. Frakt, *Mohammed Jawad and the Military Commissions of Guantánamo*, 60 DUKE L.J. 1367 (2011). More generally, none of the defendants before military commissions so far, perhaps with the exception of Ali Hamza Ahmad Suliman al-Bahlul, have been alleged to have had substantial authority within al Qaeda. *See The Guantanamo Trials*, HUMAN RIGHTS WATCH, http://www.hrw.org/features/guantanamo (last visited Mar. 19, 2012) (listing defendants who have appeared before the military commission and providing case summaries).

force of path-dependent learning, in other words, may cut against institutional innovations.

The costs of creating redundancy from scratch are greatest in the early days of a new institution. In the terrorism context, this reality means that the costs are greatest when the policy need is most acute—in the immediate wake of a crisis. As Part I demonstrates, it was in the immediate aftermath of the 9/11 attacks that a need for new jurisdictional capacity was felt. Yet that moment was precisely when the commissions were hamstrung and contributed little but legal uncertainty and fodder for law reviews.

The perceived difficulties of terrorism adjudication have prompted some commentators to propose creation of a new "national security court" that blends traits of the Article III criminal-justice process with aspects of military adjudication.[230] This new institution is lauded as a "third way" to "get us out of the quicksand we find ourselves in regarding detainees."[231] Proponents assert that the innovation would "strike the balance between national security, human rights, and due process."[232] Unlike military commissions, however, a national-security court would lack even a de minimis historical pedigree.[233] Its designers would need to grapple with the full panoply of procedural and substantive questions that Article III courts have largely addressed and that military commissions are beginning to resolve. Past experience suggests that the resulting startup costs would be very high. A "fresh start"[234] thus has a large price tag that advocates of national-security courts have failed to address. Worse, beyond platitudes about a "third way," advocates of institutional innovation do not adequately explain how their new

230. *See, e.g.*, GLENN SULMASY, THE NATIONAL SECURITY COURT SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR (2009) (arguing for the creation of a court that balances national-security concerns and due-process rights); Lunday & Rishikof, *supra* note 219 (proposing the creation of an Article III court to address the difficulties in terrorist detention). For an analysis of other nations' experiences with specialized security-related courts, see Laura K. Donohue, *Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law*, 59 STAN. L. REV. 1321, 1324–29 (2007); and Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British, and Israeli Experiences*, 102 MICH. L. REV. 1906 (2004).

231. SULMASY, *supra* note 230, at 157, 193.

232. *Id*. at 175.

233. For an argument that even the November 2001 commissions possessed such legitimacy, see Curtis A. Bradley & Jack A. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249 (2002).

234. Glenn M. Sulmasy & Andrea K. Logman, *A Hybrid Court for a Hybrid War*, 42 CASE W. RES. J. INT'L L. 299, 319 (2009).

forum would be a marked improvement on the existing combination of overlapping forums. Given the high costs of institutional startup, the burden should be on the advocates to show why their proposal is plausible, let alone justified.[235]

2. *Third-Party Effects.* Adding jurisdictional redundancy to the status quo also imposes costs on third parties beyond the sheer dollar price to the government. First, it imposes costs on all those exposed to the system. Second, it may have wider, more systemic effects on the general population. Such costs are often discounted or ignored in the public debate because they are diffuse and are often imposed on politically marginalized constituencies, but there is no ex ante reason to dismiss them as trivial.

The most powerful objection to jurisdictional arbitrage and sequential overlap is that they enable circumvention of individual constitutional rights, a result that saps public confidence in constitutional constraints and thus imposes demoralization costs. By switching from the Article III criminal process to a less demanding forum, the government is able to secure detention without complying with otherwise-mandatory constitutional safeguards.[236] Circumvention arguments assume a domain of cases in which a defendant is entitled to an Article III criminal process before suffering certain kinds of liberty deprivation. The Supreme Court, despite having hinted that such a limit might exist, has never defined the zone of exclusive Article III criminal jurisdiction.[237] The circumvention argument has its greatest force in contexts in which the application of constitutional protections is uncontested, such as the detention of U.S. citizens within the United States. It has its least force when a person is seized in a context in which the application of domestic criminal law is more

235. The central claim of such proposals is that a new tribunal would strike a better "balance" between liberty and security interests. SULMASY, *supra* note 230, at 175. But the optimal balance of those values is deeply contested, and advocates of national-security courts fail to supply an account of the optimal balance.

236. Criminal-law scholars have expressed a concern that prosecutors will evade criminal-procedure rules by turning to the civil law or broadening the substantive scope of the criminal law. *E.g.*,William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 1, 17–18 (1996). The evidence compiled in Part I suggests both dynamics are discernible in the terrorist-detention domain.

237. *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (noting that noncriminal detention is permissible only "in certain special and 'narrow' nonpunitive 'circumstances'" (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992))); *see also Foucha*, 504 U.S. at 83 (invalidating a Louisiana statute that authorized civil commitment on a finding of dangerousness without requiring a finding of mental illness).

contested. Battlefield seizures of noncitizens overseas arguably exemplify this second type.

Circumvention objections have been raised unsuccessfully against military detention[238] and immigration detention.[239] In the context of immigration, the Court rejected the circumvention argument early in the twentieth century.[240] That holding seems unlikely to be revisited. In the context of military detention, the law with respect to seizures in the United States is unsettled.[241] Military detention of suspects seized outside the United States raises no constitutional red flag. Lower courts also have allowed executive detention within the United States, although those rulings have been hotly contested.[242]

Although they are perhaps unlikely to prevail in federal court, circumvention arguments identify a cost attached to jurisdictional redundancy. The visible use of overlapping jurisdiction undermines confidence in the value of constitutional rights. It may induce in the general public a belief that constitutional entitlements are fragile and easily gamed by the very government they are designed to restrain.[243] In other contexts, manifest disregard of constitutional rights has been thought to have demoralizing effects, as people cease to enjoy the possession of constitutional rights when they cease to believe those rights are valuable.[244]

In addition, past acts of circumvention have undermined the government's credibility with the judiciary. To the extent that such credibility is a valuable political asset to the government, circumvention may narrow the government's options in subsequent

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238. *See, e.g.*, Daniel Moeckli, *The US Supreme Court's 'Enemy Combatant' Decisions: A 'Major Victory for the Rule of Law'?*, 10 J. CONFLICT & SECURITY L. 75, 79 (2005) (arguing that "the designation as 'enemy combatants' seems to have been mainly designed to circumvent the procedural safeguards applicable in normal criminal procedures").

239. *See, e.g.*, Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1581 (2008) (expressing concern about circumvention risk through state enforcement of federal immigration law).

240. Bugajewitz v. Adams, 228 U.S. 585, 591 (1913).

241. For example, see the fractured opinions in *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc), *vacated as moot sub nom.* Al-Marri v. Spagone, 129 S. Ct. 1545 (2009).

242. *E.g.*, *id.*

243. To be sure, it is also possible that the public will feel more secure because they believe that the only persons susceptible to the new forms of adjudication are minorities or noncitizens.

244. *Cf.* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1210–11 (1967) (introducing the idea of demoralization costs with respect to owners when property is condemned and with respect to others who believe as a consequence that their property is less secure).

cases when a policy failure would be more costly.[245] Consider the example of José Padilla, first detained as a material witness, then as an enemy combatant, and finally switched back to the Article III criminal process. When the Department of Justice sought to end Padilla's challenge to his military detention and obviate Supreme Court review, it filed a motion for vacatur of the Fourth Circuit's ruling on Padilla's habeas petition. The circuit court declined. Explaining the refusal, Judge Michael Luttig expressed concern that "intentional mooting by the government of a case of this import out of concern for Supreme Court consideration" was not a "legitimate justification but [an] admission of attempted avoidance of review."[246] He further warned of damage to "the government's credibility before the courts" from the perception that jurisdictional arbitrage was based on mere "expediency."[247] That is, the exploitation of jurisdictional redundancy can influence judicial as well as popular perceptions of the legitimacy of policies in ways that limit the government's future jurisdictional options.

A second externality, also denominated in terms of public demoralization, is worth mentioning. Scholars of criminal law have observed that the growing duration and uncertainty of the criminal process have made the "[p]rocess . . . the [p]unishment" for those exposed to the possibility of criminal penalties.[248] For most people, the uncertainty of possible criminal punishment and the anxiety engendered by waiting are substantial. In the national-security context, those costs are aggravated in two ways: First, pretrial detainees in terrorism cases often are held under highly restrictive conditions pursuant to "special administrative measures" that significantly limit human contact and mobility.[249] Second—and more importantly here—sequential overlap dramatically increases the

245. *See generally* Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865 (2007) (developing the importance of credibility for an executive otherwise unconstrained by law).

246. Padilla v. Hanft, 432 F.3d 582, 585 (4th Cir. 2005).

247. *Id*. at 587.

248. *See generally* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CIRCUIT COURT 199–243 (1979) (developing this argument with respect to the ordinary criminal process).

249. *See* 28 C.F.R. § 501.3 (2011) (authorizing the attorney general to require "special administrative measures" that limit human contact when it is "reasonably necessary to protect persons against the risk of death or serious bodily injury"); *see also* United States v. Hashmi, 621 F. Supp. 2d 76, 79–80 (S.D.N.Y. 2008) (describing the use of special administrative measures in a terrorism case).

potential duration and uncertainty of the criminal process for anyone exposed to the first-choice process. Defendants in criminal terrorism proceedings, for example, must account for the possibility that even if they prevail in an Article III criminal process, they still may be detained and subjected to another process in which they have fewer procedural protections. Across the board, this uncertainty imposes a toll on defendants quite apart from the cost of false positives. The shadow of sequential overlap, moreover, may induce some defendants to enter plea agreements accepting responsibility for offenses that a rational calculation of their exposure under the criminal law would not have induced.[250]

Two objections to consideration of these costs are worth noting. First, some of the enumerated externalities arise even in the absence of formal redundancy if only a low-process venue is used. Hence, one might say that they are effects of opting for low process rather than effects of redundancy. But the analysis of institutional arrangements is not done in a vacuum. Rather, it requires an accounting of changes from the status quo. It is plausible to take the near-exclusive Article III criminal jurisdiction in 2001 as a baseline to evaluate changes in jurisdictional design. To the extent that these externalities follow from new and emerging forms of redundancy, it would be misleading to ignore them because to do so would undercount the costs of novel forms of redundancy.

Second, these externalities do not necessarily arise simply because redundancy exists. If redundancy exists but is used infrequently, as was arguably the case a decade after the September 2001 attacks, these externalities may be minimal. People are rarely demoralized by powers that remain latent. Process cannot be the punishment if it is typically in desuetude. Only as redundancy is increasingly used will these powers begin to be felt. Stated otherwise, the cost curve for these externalities is concave, with small marginal increases initially and large marginal increases as the amount of systemic redundancy increases.[251] This cost curve contrasts with the distribution of the accuracy-related costs of increasing redundancy in

250. *See, e.g.*, Eric Lichtblau, *1996 Statute Becomes the Justice Department's Antiterror Weapon of Choice*, N.Y. TIMES, Apr. 6, 2003, at B15 ("Mr. Brown said his client had decided to plead guilty after prosecutors suggested that Mr. Mosed [one of the Lackawanna suspects] could be declared an enemy combatant and be held indefinitely without a lawyer, or be charged with treason and face execution.").

251. Similarly, the accuracy and start-up costs identified in Parts III.A and III.B are likely to have concave cost curves.

relation to insurance and moral-hazard effects. These costs increase convexly as the use of redundancy is increased, with the greatest costs accruing with the first uses of redundancy. This difference in cost curves plays a role in Part IV's assessment of proposals to eliminate redundancy.

3. *The Interaction of Accuracy and Cost Effects.* Accuracy and cost effects may interact such that sequential redundancy is most likely to be invoked when accuracy costs are at their nadir and social-welfare gains at their peak. To see this relationship, assume that the government incurs some minimal cost associated with adjudication. Trials of whatever kind are costly in terms of the manpower needed to gather evidence and to present it in the correct form. These costs plausibly influence when and how often the government considers invoking sequential redundancy. Provided the marginal cost of a second adjudication is not zero, the government also has some incentive to turn to a second forum when the expected value of detention is high rather than low. That is, there is at least some reason to think that the marginal costs of invoking redundancy will encourage its efficient use. For example, the government may use sequential redundancy when it has inculpatory information that it cannot disclose to first-round adjudicators. In this way, the interaction between accuracy and cost effects would conduce to a desirable allocation of adjudicative resources because government would employ the second forum if and only if it were valuable to do so. The force of this logic, though, depends on what the government values. If the government values the elimination of terrorism risk, the logic holds. If, however, the government values detention for some other reason—say, because it seeks to avoid embarrassment or to maintain its credibility as "tough on terror"—the salutary dynamic does not hold.

4. *Summary.* Accuracy and cost are typically understood to be important variables in the analysis of a terrorist-detention system. This Section has demonstrated that redundancy has complex direct effects on cost and accuracy. Redundancy does not always mitigate the risk of policy failure and increase the risk of abusive government behavior. And redundancy is not always associated with new expenses. Rather, it is necessary to clarify the precise kind of redundancy at issue and then to be clear about the relative costs of false positives and false negatives.

But this analysis of the direct effects of redundancy is incomplete. Indirect mechanisms that link jurisdictional specifications to policy outcomes of cost and accuracy also exist. The magnitude of these indirect effects, to be sure, is likely to be smaller than that of the direct effects, although perhaps not inframarginal. Indirect effects on institutional incentives and cultures may also compound over time, eventually working major changes to the distribution of policy outcomes. The balance of this Part turns to those indirect mechanisms and considers how redundancy influences agency relationships and information flows.

C. Principal-Agent Costs

An agency problem arises when a principal delegates a task to an agent but cannot fully monitor the amount of effort the agent uses to complete the task.[252] Political scientists have pointed out that agency costs are a pervasive problem in government.[253] To address the slack that results from using agents, a principal must employ some costly mix of incentives and monitoring. As a result, agency relationships create costs that limit the achievement of policy goals, and, thus, institutional designs that control agency costs improve outcomes.

The terrorist-detention context does not escape the problem of agency costs. Adjudicators in federal courts and other forums are the agents of legislators and presidents who set the terms of substantive policy in the security domain insofar as they are tasked with the execution of a statutory command.[254] So too are the intelligence agencies. Adjudicators and agencies, however, are only imperfectly responsive to their elected principals. In part, this insulation from political influences is due to Article III's life-tenure rules and the regulatory protections for Article I judges. And in part, it exists because elected principals have limited information about their agents' performance, whereas agents have their own policy preferences.[255] Elected officials would prefer for adjudicators and

252. For a good introduction to agency problems, see generally Eric A. Posner, *Agency Models in Legal Scholarship*, *in* CHICAGO LECTURES IN LAW AND ECONOMICS 225 (Eric A. Posner ed., 2000).

253. *See, e.g.*, Gary J. Miller, *The Political Evolution of Principal-Agent Models*, 8 ANN. REV. POL. SCI. 203, 207, 209–10 (2005) (noting agency cost problems specifically in the context of presidential power and congressional oversight).

254. Judicial review of constitutional matters is, of course, another story.

255. *See* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 40 (1993) ("[T]he conditions of judicial

intelligence agents to apply specific substantive criteria to evaluate risks when they make detention decisions and to conform to certain constitutional values. But elected officials cannot directly ascertain whether adjudicators' or agents' behaviors align with these preferences. The adjudicator and the agent have better information than the elected principal about whether a particular risk threshold has been crossed or whether a constitutional right was triggered in a given case. All else being equal, greater agency slack entails less accuracy and higher costs.

Jurisdictional redundancy could influence agency costs in two ways: First, it might create competition among forums, competition that in turn might foster incentives for adjudicators to conform to the wishes of democratic principals. Second, redundancy could enable a form of "costly signaling" that would provide Congress with information about the performance of the intelligence agencies. The effects of redundancy on agency costs are an indirect channel through which institutional design influences policy outcomes.

1. *Competition Among Forums.* From an adjudicator's perspective, the most important and immediately observable effect of jurisdictional redundancy may be that it destroys any monopoly that an adjudicator might claim on the novel and important subject matter of terrorism. Redundancy instead induces competition among forums. Congress, adjudicators, and government litigators may respond to this competition in ways that influence policy outcomes.

Consider the matter first from the perspective of Congress. On the one hand, jurisdictional redundancy may make oversight more costly. The multiplicity of operational entities devoted to adjudication makes it more difficult to ascertain why policy goals are not being achieved.[256] For example, overall underenforcement might be due to the rigidity of constitutional rights in the Article III context, or it might be a result of errors by immigration judges. Identifying the least

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employment enable and induce judges to vote their personal convictions and policy preferences—or in a word their values.").

256. *See* Gersen, *Unbundled Powers*, *supra* note 28, at 327 (noting that "eliminating overlapping responsibility for a given task . . . links institutional effort to policy success, which provides greater institutional clarity and, as a result, a stronger foundation for electoral control").

costly and most effective reform is also more difficult when there are many, rather than few, potential culprits.[257]

But on the other hand, jurisdictional competition might also reduce the costs of monitoring.[258] A multiplicity of adjudicative tools addressing the same task can, under some circumstances, make monitoring less costly by allowing "yardstick competition" among entities engaged in similar tasks.[259] To see this, imagine a principal supervising the work of one administrative-law judge who handles benefits claims. If the principal does not have information about the underlying rate of valid claims or the time needed to process valid and invalid claims, she may have difficulty knowing when to sanction or praise the judge. By contrast, if the adjudicator has a dozen judges, a supervisor could create a data set that enabled more informed oversight through intragroup comparisons. To be sure, yardstick comparisons may be more difficult when the different forums used for determining terrorism status employ distinct procedures and substantive definitions. And the possibility of deliberate procedural arbitraging of cases between forums also may undermine simple interjurisdictional comparisons. Nevertheless, in contrasting Article III criminal courts and military commissions, a rational legislator might set aside these differences as noise and review those forums' respective performances when addressing specific legal issues, such as the secrecy problems implicated by classified evidence or the handling of evidence from other detainees in military custody. Direct comparisons of how different forums address similar problems may yield evidence that informs decisions about which forums to prefer moving forward. In this way, yardstick comparisons are both possible and potentially conducive to clear judgment.

Now consider the matter from the perspective of the adjudicator. Here, the effect is more straightforward: redundancy creates an incentive for the adjudicator to conform to the preferences of the principal. Some adjudicators view terrorism as a high-priority, prestigious bailiwick.[260] Capturing that jurisdiction promotes the flow

257. This is known as a "team production" problem. Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 779–83 (1972).

258. William A. Niskanen, *Bureaucrats and Politicians*, 18 J.L. & ECON. 617, 636–37 (1975).

259. *Cf.* Maskin et al., *supra* note 25, at 360 ("[Y]ardstick competition between two regions will be more effective in providing incentives than that between two ministries.").

260. This is not true of all federal judges. *See, e.g.*, Esmail v. Obama, 639 F.3d 1075, 1077–78 (D.C. Cir. 2011) (Silberman, J., concurring) (expressing doubts as to whether federal judges

of resources and prestige both to their institutions and to themselves individually. But adjudicators may also be poorly equipped to handle this jurisdiction. For example, they may lack background knowledge about terrorism or about the geopolitical conditions that are relevant to threat assessments for specific suspects.[261] Or they may be ill informed about relevant bodies of law.[262] Under either of these conditions, agency costs arise because the adjudicator cannot pursue the goals of the democratic principal without some number of errors.

The incentives created by competition among forums can, however, be used to eliminate such deficiencies and thereby to reduce agency costs. Scholars of administrative law have observed that "the assignment of jurisdiction can be used to create incentives for [decisionmakers] to invest in the development of expertise."[263] For example, judges who wish to keep jurisdiction over terrorism-related cases may be prompted to invest in gaining expertise about the laws of war or the geopolitics of the Afghan-Pakistan theater to deflect criticism that they are ill suited to determine the status of terrorism suspects. Such specialization is not without precedent. In the habeas context, some supporters of federal habeas review of state criminal convictions note that it was particularly beneficial because of federal judges' ability to specialize in a smaller class of constitutional questions. Advocates of a robust § 2254 habeas functionality contend that habeas "isolat[es]" federal rights "from other elements in the criminal process," and thus make their vindication more likely.[264]

Related to expertise is innovation. Most of the potential forums for terrorism adjudication, such as Article III courts and the immigration bench, are generalist institutions. Their procedural frameworks are not tailored to the terrorism context. Competition can be used to induce adjudicators in these forums to develop procedural tools specifically crafted to handle terrorism-related adjudication. In the Article III context, some judges have recognized the possibility of competition from other forums and, in the same

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should evaluate terrorism risk in individual cases). If more judges had Judge Silberman's attitude, redundancy might have the pernicious effect of enabling shirking.

261. This may be particularly true of immigration judges. *See, e.g.*, Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005) (listing twelve examples in which the Seventh Circuit criticized the decisions of immigration judges).

262. *See, e.g.*, Glazier, *supra* note 95, at 162 (describing military-commission judges' lack of knowledge about the law of war).

263. Gersen, *Overlapping and Underlapping Jurisdiction*, *supra* note 28, at 213.

264. Cover & Aleinikoff, *supra* note 185, at 1045.

breath, have expressed a willingness to tailor rules to the security context. In a complex and controversial 2008 terrorism prosecution, for example, a panel of the Fourth Circuit acknowledged the wide disagreement over "the precise extent to which the formal criminal-justice process must be utilized when those suspected of participation in terrorist cells and networks are involved" but emphasized in the same passage that "the criminal-justice system does retain an important place in the ongoing effort to deter and punish terrorist acts . . . [and] is not without those attributes of adaptation that will permit it to function in the post-9/11 world."[265] The circuit court thereby recognized the pressure of interforum competition and simultaneously signaled a willingness to innovate in response.

A study by the Federal Judiciary Center suggests that the Fourth Circuit is not alone. The study enumerates dozens of procedural innovations developed through common-law adjudication in response to the distinctive aspects of terrorism cases.[266] In the aforementioned 2008 case, for example, the Fourth Circuit rejected arguments that statements made by the defendant to Saudi interrogators should be suppressed because of the presence of U.S. officials in that interrogation.[267] The court thereby lowered the expected cost of international collaboration among security agencies and made it easier to triage terrorism cases into the Article III criminal context. In the same decision, the Fourth Circuit also endorsed innovative procedures to allow depositions of Saudi officials in Riyadh via videoconference with the defendant in the United States.[268] The court concluded that videoconferencing vindicated the defendant's Confrontation Clause[269] interests while preserving the secrecy interests of Saudi officials.[270] Other courts have also found ways to

265. United States v. Abu Ali, 528 F.3d 210, 221 (4th Cir. 2008).

266. *See* ROBERT TIMOTHY REAGAN, FED. JUDICIAL CTR., NATIONAL SECURITY CASE STUDIES: SPECIAL CASE-MANAGEMENT CHALLENGES, at vii (2010), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/ts100222.pdf/$file/ts100222.pdf (indexing the procedural issues addressed in the cases studied).

267. *Abu Ali*, 528 F.3d at 228–30 & n.5.

268. *See id*. at 239–43 (approving of depositions in which the defendant participated through remote video link as consistent with the Confrontation Clause, U.S. CONST. amend. VI); *see also* United States v. Marzook, 435 F. Supp. 2d 708, 749 (N.D. Ill. 2006) (endorsing a streamlined suppression hearing in which the defendant's ability to question foreign intelligence officials was curtailed).

269. U.S. CONST. amend. VI ("[T]he accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

270. *Abu Ali*, 528 F.3d at 242.

accommodate confrontation rights while also honoring the confidentiality concerns of foreign intelligence agencies.[271] Access to exculpatory but classified evidence in the government's possession also has posed nettlesome constitutional problems under the Sixth Amendment's Compulsory Process Clause.[272] At least one federal court has found a way to craft procedures that purport to enable constitutionally sufficient access to such witnesses without compromising secrecy.[273]

Judges are not the only engine of interjurisdictional competition. Prosecutors can also elicit innovation. For example, the criminal division of the Department of Justice has approached Congress to seek amendments to substantive criminal law or criminal procedures that would enable more use of the Article III criminal process.[274] These officials are especially sensitive to the problem of underlap, a situation in which a particular jurisdiction does not encompass a case that officials believe should be regulated.[275] As administrative-law scholars have suggested, jurisdictional competition can "produce desirable incentives" to identify and mitigate underlap.[276] Hence, Justice Department lawyers have an incentive—sharpened by jurisdictional competition—to draw to Congress's attention situations in which they lack the ability to prosecute persons believed to pose serious threats so as to maintain their institutional primacy on counterterrorism matters.[277] For example, in December 2004, Congress responded to Justice Department requests to amend the

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271. *See, e.g.*, United States v. Yousef, 327 F.3d 56, 145 (2d Cir. 2003); *accord Marzook*, 435 F. Supp. 2d at 749.

272. *See* U.S. CONST. amend. VI ("[T]he accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . .").

273. United States v. Moussaoui, 365 F.3d 292, 312–17 (4th Cir.) (holding that the defendant's compulsory-process-right could be satisfied by his obtaining summaries of interrogations from the government), *amended by* 382 F.3d 453 (4th Cir. 2004).

274. *Cf.* Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 77–78 (2005) (drawing proposals for statutory reform from Justice Department testimony).

275. *See* Gersen, *Overlapping and Underlapping Jurisdiction*, *supra* note 28, at 213 (describing the concept of "underlapping jurisdiction").

276. *Id*.

277. Even after a decade of expansions in the federal criminal law of counterterrorism, such gaps still exist. Eric Schmitt & Mark Mazzetti, *Obama Adviser Outlines Plans To Defeat al Qaeda*, N.Y. TIMES, June 30, 2011, at A12 (describing Vice Admiral William H. McRaven's statements concerning a class of terrorism suspects who are detained, initially held on Navy vessels while the Justice Department identifies any authority to detain, and, in some cases, released for absence of such authority).

material-support statute to encompass training in foreign terrorist camps, a need identified through earlier prosecutions.[278] Although prosecutorial incentives may not always conduce to maximal social welfare, this instance seems to be one in which they can play a useful role in raising institutional-design questions worthy of congressional attention.

To be sure, innovation may be undesirable. Reasonable people may differ as to whether the aforementioned procedural modifications conform to constitutional criminal-procedure commands. Some might argue that the compromises subtly corrode the Article III criminal-justice system's hard-earned reputation for evenhandedness and integrity. Others would go further, claiming that this reputational cost may undermine public confidence in the justice system in a way that undermines trust in government, perhaps with the consequence of dampening public cooperation with police. Those who see such modifications as violations of core constitutional rights will accordingly count interjurisdictional competition as a cost and not a benefit. Resolution of that normative question, however, is beyond the scope of this Article. Whatever the case, the point here is that Congress can induce either more or less innovation by either dialing up or down the amount of jurisdictional redundancy.[279] Thus, redundancy is a means of reducing agency costs.

2. *Informed Oversight.* Elected politicians and senior policymakers can use jurisdictional specification not only as a tool to control the agency costs associated with adjudicators but also to gain better insight into how well line agencies responsible for investigation and interdiction are performing their tasks. Changes to jurisdictional redundancy may also enable political-branch overseers to gain more confident knowledge of the threat environment.

Politicians and senior policymakers who allocate resources and answer other broad policy questions have imperfect knowledge both

278. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6602, 118 Stat. 3638, 3761 (codified at 18 U.S.C. § 2339D (2006)) (establishing a crime for receiving "military-type training" from a "designated terrorist organization"); *see also Aiding Terrorists: An Examination of the Material Support Statute: Hearing Before S. Comm. on the Judiciary*, 108th Cong. 12 (2004) (statement of Christopher A. Wray, Assistant Att'y Gen., Criminal Division, Department of Justice) (stating that "training to commit terror under certain circumstances may not be a crime, which just stands logic on its head," and urging a change in the law).

279. Whitford, *supra* note 189, at 164 (noting how interagency competition can "reveal[] information").

of the scale of the terrorism threat and of the performance of line security agencies. Because much of these agencies' threat information derives from the national-security apparatus, the two kinds of uncertainty are likely correlated. The sixteen intelligence agencies cooperate in periodic production of a National Strategy for Counterterrorism for the White House.[280] But it may be hard for Congress and the White House to know whether to discount the claims and assessments made by the intelligence community—and if so, in which direction to do the discounting.[281] As a consequence, democratic principles may be especially vulnerable to the whims of their putative agents in the national-security domain when it comes to evaluating those agents' performances. The less trustworthy the agents, the less reliable the principal's epistemic base.

Jurisdictional design provides ways for policymakers to elicit information about agency performance to make more informed judgments. Two potential mechanisms merit highlighting here. First, forcing an agency to justify its initial detention decisions before a neutral and independent decisionmaker may supply information about how accurate the agency is in identifying terrorist risks.[282] A demand for external verification also may have a disciplining effect in anticipation of front-end agency decisions. An agent that is aware that its decisions must be justified after the fact has an incentive to exercise more care than an agent subject to no post hoc control. To that end, it may be desirable to supplement the internal determination offered by the immigration service or the military with a procedurally robust forum independent of the agency making the threshold detention decision—such as an Article III court. Provided that the independent adjudicator and the investigating agency do not share "strongly correlated biases," senior policymakers could secure some insight into how accurate the agency is in its threat assessments by looking at how often the agency prevails upon review.[283] A high

280. *E.g.*, NATIONAL STRATEGY FOR COUNTERTERRORISM (2011), *available at* http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf.

281. Consider, for example, the debates about estimates of Iran's nuclear capabilities.

282. *Cf.* Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1145 (1990) ("If Congress observes that an agency has a particularly poor litigating record in the federal courts, it may take corrective action . . . .").

283. Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1464 (2011); *see also* Krishna K. Ladha, *The Condorcet Jury Theorem, Free Speech, and Correlated Votes*, 36 AM. J. POL. SCI. 617, 625–30 (1992) (showing that a group of decisionmakers with a shared school of thought may have a lower probability of making a correct decision than any one decisionmaker alone).

rate of reversal would, all else being equal, signal a systemic problem. This kind of stacking of internal with external process may be an appropriate tactic for legislators to adopt if, for example, Congress is concerned that some agents are "zealots" who pursue their mission without regard to false positives.[284]

Second, and alternatively, senior policymakers might exploit jurisdictional redundancy by drawing inferences from how agencies choose among forums. Procedural hurdles can serve as "costly signal[s]" to political overseers about the underlying value that their agencies attach to different outcomes.[285] An agency decision to opt for the most procedurally onerous pathway is evidence that the agency has engaged in a diligent and thorough investigation and is confident about its conclusion. The choice of a costly forum thereby allows overseers to "draw[] inferences about the costs the agency incurred" in detaining a suspect and about "how valuable" the agency believes its detention decision to be.[286] An agency's persistent decision to employ more procedurally onerous pathways may suggest that it has greater confidence in its own detention decisions. By contrast, a choice to employ a less procedurally demanding path may be evidence that an agency is less confident about its judgment or that the agency is slacking in a way that may be systematically undesirable. Senior policymakers can make such inferences only when two conditions are met. Agencies must have a choice between high- and low-process avenues. Further, agencies also must have some motive to conform to elected officials' preferences—for example, to demonstrate competence and thereby secure future flows of funding. Jurisdictional redundancy enables these conditions to be met. In so doing, it creates a body of evidence—the pattern of choices made by agencies as among different adjudicative pathways—that provides political overseers with useful information about whether agencies

284. *See* Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873, 874, 886 (2007) (arguing that agencies will be staffed by individuals with outlying policy preferences in comparison to those held by members of Congress).

285. *See* Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753, 771–75 (2006) ("[T]he costly signaling theory of hard look judicial review postulates that when courts scrutinize agency records, they are drawing inferences about the costs the agency incurred in generating the record. These cost estimates are useful to the court because they indicate how valuable the regulation is to the agency.").

286. *Id.* at 775. This mechanism works when judicial and agency policy preferences are positively correlated. *Id.* at 779.

are expending effort on accuracy as opposed to, say, maximizing the sheer volume of detention.[287]

Congress's use of jurisdictional redundancy as a mechanism to elicit information about agency performance also has doctrinal implications. Many commentators have argued that judicial deference to agency judgments of law and fact is warranted especially in the national-security context.[288] But this deference may have a perverse effect. If the political branches obtain information about the reliability of agency judgments through robust judicial review of detention decisions, judicial deference will likely align agencies' and courts' biases in a way that eliminates epistemic gain. Deference, in other words, saps the information-forcing effects of judicial review not only directly, by undermining courts' willingness to identify instances in which the agency has erred, but also indirectly, by disabling the agency from demonstrating its own credibility through its choice of forum for adjudicating terrorism suspects. The persistence of jurisdictional redundancy therefore suggests that deference to agency findings in national-security cases may sometimes be systemically costly.

D. Intelligence Gathering and Deterrence

The second indirect effect of jurisdictional choice on outcomes arises through its effect on information flows. Institutions are usefully seen as "systems for managing information" because they provide mechanisms to aggregate information, generate incentives to gather

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287. There are many contexts in which Congress expressly mandates the production of data about the rate at which agencies employ certain tools. *See, e.g.*, Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, sec. 101, § 707, 122 Stat. 2436, 2457–58 (codified at 50 U.S.C. § 1881f (Supp. III 2010)) (mandating biannual reports to Congress). The animating logic of such reporting requirements is that Congress needs to have data about different statutory tools' being employed to make judgments about how to tailor government powers in the future. My argument on detention is that data about the comparative use of different forums may provide Congress with information about the kinds of persons being detained and the effort being expended by agencies on such persons. This information may allow Congress, for example, to infer that it needs to impose more or less onerous regulations on the agency's front-end interdiction powers.

288. *See, e.g.*, Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1218 (2007) ("In our view, the executive should [with respect to the war on terror and the AUMF] usually be entitled to interpret genuinely ambiguous provisions as it sees fit, subject to the qualifications that its interpretations must be reasonable and that Congress must specifically authorize intrusions on constitutionally sensitive interests.".

and convey information, and serve as platforms to disseminate data.[289] A "failure to consider how legal institutions affect incentives to acquire information may lead to incomplete or misguided recommendations for institutional reform."[290] This Section explores two effects of institutional design that are related to information flows. First, it examines the negative effect of redundancy on the incentives of agents to gather accurate information in timely and cost-effective ways. Second, it discusses the inverse correlation between jurisdictional redundancy and marginal deterrence. In both cases, the effect under discussion can be discerned whenever a low-process venue is added to the mix. They are both properly considered redundancy-related effects because they arise through the addition of low-process venues to the status quo. Ignoring such effects would implausibly omit certain costs associated with creating new redundancy, biasing the analysis in favor of such overlap. And, to anticipate an argument developed in Part IV, both become acutely relevant in the context of proposals to eliminate jurisdictional overlap.

1. *Information Acquisition.* An underexplored effect of institutional design is its effect on the incentives of agents to gather accurate information in timely and cost-effective ways. The information necessary to create accurate counterterrorism measures is costly to acquire. The government's agents must therefore expend effort to obtain information. But there is no guarantee that even experienced intelligence agencies will allocate resources wisely. For example, on the eve of 9/11, the CIA's al Qaeda unit was relatively underfunded.[291] Jurisdictional specification matters because "public decisionmakers' expertise about policy decisions is often endogenous (produced by factors internal to the legal-institutional system) rather than exogenous."[292] Changes to the contours of jurisdiction have consequences for the stock of expertise within government because those contours influence the upstream incentives of investigating

289. ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL 9 (2007).

290. Stephenson, *supra* note 283, at 1426 (exploring connections between institutional design and information acquisition); *see also* Sah & Stiglitz, *supra* note 23, at 716–17 (examining the effects of the "architecture" of an organization—*i.e.*, "how the decision-making authority and ability [are] distributed within a system").

291. TIM WEINER, LEGACY OF ASHES: THE HISTORY OF THE CIA 478 (2007).

292. Stephenson, *supra* note 283, at 1426.

officials as to how and when to gather evidence. They do so in large part because different forums permit detention based on different kinds of factual showings of dangerousness—thereby inducing different levels of investment in information acquisition.

Consider the following mechanism linking jurisdictional redundancy to decisions about how information is acquired. Government officials' strong incentives to prevent terrorist events give them powerful motives to avoid false negatives. But officials' attitudes to false positives are more ambiguous. It would be surprising if officials systematically prized liberty over security goals. It might be that fiscal constraints provide officials with a reason to avoid false positives, but this possibility seems unlikely. And officials generally do not share the fiscal goals of government.[293] Even if they did, the fiscal constraints upon national-security agencies seem in practice exiguous. Scant evidence suggests that the war on terrorism will be penny-pinched to death. Several Supreme Court and appellate court judgments also suggest that officials have little reason to fear that excessive security-related detentions will result in personal tort liability.[294] All else being equal, it therefore seems likely that officials' incentives will be asymmetrical. More care will be taken to avoid false negatives than to avoid false positives. This dynamic will, in turn, lead officials to select investigative tools that err on the side of false negatives and not false positives. They may rely, for example, on coercive interrogation methods that minimize false negatives but tend to produce an undesirable number of false positives, rather than relying on more time-consuming methods that limit both.

Jurisdictional redundancy can exacerbate this asymmetrical set of incentives. Consider a situation in which officials know that the government has the option of selecting among different forums with procedural constraints of varying intensity. Given that knowledge, the officials may opt to use methods that predictably yield high numbers of false positives in the expectation that the low-procedure pathway

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293. *See* Daryl Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 370–71 (2000) (expressing skepticism about the incentive effects of government tort judgments).

294. *See, e.g.*, Ashcroft v. Iqbal, 129 S. Ct. 1937, 1954 (2009) (dismissing for failure to state a claim a damages action by a former immigration detainee against two high-level federal officials); Arar v. Ashcroft, 585 F.3d 559, 563 (2d Cir. 2009) (en banc) (dismissing a suit because of the insufficiency of the allegations and the absence of a *Bivens* remedy); El-Masri v. United States, 479 F.3d 296, 300 (4th Cir. 2007) (affirming the district court's dismissal based on the "state secrets" doctrine).

can be used to process those cases.[295] For example, if officials were to know that the government exercised a choice between Article III criminal process and enemy-combatant detention in practice—either as a consequence of simultaneous overlap or sequential overlap—they would have no reason to correct for a skewed collection of information. They would rely on less accurate forms of evidence, knowing that the weakest cases will be triaged into a military forum in which evidentiary rules are thinner. As a result, jurisdictional redundancy may increase the rate of false positives indirectly by changing the incentives of investigating officials. This effect obtains only, however, if redundancy is used rather than latent. When redundancy largely lies fallow—as it historically has—it is not clear that it has a deleterious effect on incentives in this way.

By contrast, when investigating agents know that the status of a suspect will likely be determined in a forum that accepts only high-quality information, they have a greater incentive to collect information that does not suffer from pro-detention biases. In this way, the elimination of jurisdictional overlap in favor of a high-process channel may increase the accuracy of detention decisions. Eliminating a high-process forum in favor of a low-process forum, on the other hand, has no such salutary accuracy effect.

Jurisdictional redundancy's effect on information acquisition may be undesirable even if false positives are not seen as having a significant welfare cost. When officials know that their judgments will not be subject to stringent ex post verification, they also may allocate their investigative resources in undesirable ways. For example, they may focus investigative resources not on populations that present the greatest risk but on populations that promise the largest number of detentions, understood to include both true and false positives, so as to demonstrate their proficiency and effectiveness.

Furthermore, over time the absence of disciplining post hoc review may have the effect of corroding investigative skills. That is, the absence of disciplining review either by an Article III or an Article I adjudicator over time will result in a withering of investigative skills, as agencies increasingly resort to overinclusive

295. This is another example of the general problem that arises when agents are delegated multiple tasks and have preferences as between those tasks that are inconsistent with the preferences of the principal. *See generally* Bengt Holmstrom & Paul Milgrom, *Multitask Principal-Agent Analyses: Incentive Contracts, Asset Ownership, and Job Design*, 7 J.L. ECON. & ORG. (SPECIAL ISSUE) 24 (1991) (analyzing an agent's decisionmaking process when the agent has more than one task to perform).

investigative techniques. There is some evidence for this dynamic in the criminal law. For example, Professor Jonathan Simon argues that widening opportunities for severe criminal punishments based on possession of small amounts of narcotics has dulled police officers' incentives to develop or retain investigative skills.[296] Making arrests for possession offenses is far easier, Simon contends, than investing in hard and potentially unrewarding investigations. In the national-security context, these asymmetrical preferences for investigative techniques may be corrected by directing cases into a forum with stringent exclusionary rules. For example, an absolute rule against evidence gained by torture or cruel and inhumane treatment by either U.S. officials or other states' officials might induce long-term investments in intelligence relationships and methods that do not rely on such practices and that gain more reliably valuable information.

Jurisdictional redundancy's effect on information acquisition moves through the channels of dissipated skills and lost opportunities. Accordingly, this effect is hard to quantify, just like the analogous de-skilling effect in law enforcement. Government insiders, of course, are unlikely to supply candid assessments of the problem. Indeed, they may not even discern it. Although it is hard to estimate, redundancy's impact on incentives to develop and retain investigative skills may nonetheless undermine policy outcomes in the long term.

2. *Marginal Deterrence.* One possible function of a terrorist-detention regime is to deter potential terrorist recruits. Jurisdictional redundancy can create impediments to effective marginal deterrence. To obtain optimal deterrence, "[a] system of punishment should impose heavier penalties for more serious crimes in order to coerce criminals into committing less serious crimes."[297] Absent the calibration of punishment in light of the severity of the offense, marginal deterrence is lost. As George Stigler famously explained, "If

296. Jonathan Simon, *Recovering the Craft of Policing: Wrongful Convictions, the War on Crime, and the Problem of Security*, *in* WHEN LAW FAILS: MAKING SENSE OF MISCARRIAGES OF JUSTICE 115, 117 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2009) ("[T]he culture of investigation inside American policing has become reliant on forced confessions and other forms of 'junk evidence' as a by-product of its long, dirty war on drugs." (footnote omitted)).

297. John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1066 (2009).

the thief has his hand cut off for taking five dollars, he had just as well take $5,000."[298]

The law of counterterrorism is already rife with rules that confound marginal deterrence. For example, the material-support statute encompasses a vast domain of conduct related to FTOs, from the donation of de minimis funds to the construction and delivery of explosive devices. The statute's penalty provisions impose a maximum fifteen-year sentence.[299] A potential life sentence may be authorized if the material support can be connected to a specific act of violence that results in loss of life.[300] This use of a high and fixed penalty for a large set of varied acts has a perverse consequence. Those who give a small amount of material support may reasonably believe that because they are already exposed to such significant punishments, like Stigler's thief, they have little else left to lose.[301] The same problem arises with enemy-combatant detention. Recall that under the precedent of the D.C. Circuit, the government may detain as an enemy combatant almost anyone who acts in a coordinated fashion with al Qaeda.[302] Potential sympathizers with al Qaeda, once they have interacted with the group, have no incentive to avoid accelerated participation with it. Paradoxically, this phenomenon might diminish recruitment costs for terrorist organizations that can generate diffuse sympathy for their ultimate aims but that have difficulty persuading fellow travelers to make serious sacrifices for the cause.[303] To say the least, it is an odd result when the law works to encourage people to *deepen* their links with terrorism.

A possible objection to this marginal-deterrence logic would begin from the premise that terrorists are not rational actors and so are not amenable to deterrence effects. Anecdotal evidence from terrorism cases might be marshaled to suggest the dominance of

298. George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 527 (1970); *see also* Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1245 (1985) ("[R]aising the sanction with the expected harmfulness of acts gives parties who are not deterred incentives to do less harm.").

299. 18 U.S.C. § 2339B(a)(1) (2006).

300. *Id.*

301. This holds constant the likelihood of interdiction.

302. *See supra* text accompanying notes 172–73.

303. Al Qaeda in particular has suffered severe "[r]ecruitment difficulties" since 9/11. CHARLES KURZMAN, THE MISSING MARTYRS: WHY THERE ARE SO FEW MUSLIM TERRORISTS 11–12 (2011). Sympathy for the organization's goals appears to be much more widespread than willingness to act on its behalf.

ideological motives over rational strategic calculations.[304] And translating moral antipathy toward terrorism into the assumption that terrorists themselves are beyond the bounds of rational action is also tempting. But both of these causal inferences should be resisted. Empirical studies of terrorist groups, including al Qaeda, show that the objection to the notion of terrorist rationality is dramatically overstated.[305] Those studies demonstrate that individual terrorists are overwhelmingly rational, in the sense of making judgments about the appropriate means to their chosen ends, however morally objectionable their goals or methods might be. To translate reflexively a commonly shared moral repugnance toward acts of terrorism into an empirical belief about the underlying means-end rationality of its perpetrators is to mistake an ethical judgment for a judgment about the mechanisms of the social world in a way that hinders understanding and prediction.

To summarize, jurisdictional redundancy can amplify and extend counterterrorism law's marginal-deterrence problem. Just as the sweep of the material-support statute or AUMF-related detention blunts the possibility of marginal deterrence, so too jurisdictional redundancy between the Article III criminal process and military detention of enemy combatants diminishes marginal deterrence. Preservation of marginal-deterrence effects may thus provide a post hoc justification for the decisions of both the Bush and Obama administrations to rely almost exclusively on criminal law within the United States and to avoid the use of military detention.

* * *

In this Part, I have tried to illuminate the complexity of the institutional-design question in forum choice for terrorism suspects. To that end, I have described several direct and indirect mechanisms that link jurisdictional choices to socially desirable and undesirable outcomes. If nothing else, my aim here has been to show that a narrow focus on procedural detail and substantive rules is insufficient to understand and answer the forum-choice question. Especially to the extent that the procedure and substance of diverse jurisdictional

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304. *See* Monica Davey, *Would-Be Plane Bomber Pleads Guilty, Ending Trial*, N.Y. TIMES, Oct. 13, 2011, at A17 (recounting a plan by a terrorism defendant made in the midst of trial, seemingly on ideological and not consequentialist grounds).

305. *See* Aziz Z. Huq, *The Signaling Function of Religious Speech in Domestic Counterterrorism*, 89 TEX. L. REV. 833, 879 n.243 (2011).

pathways appear to be converging,[306] the mechanisms I have identified here may be the more appropriate locus of inquiry.

IV. DEFENDING JURISDICTIONAL REDUNDANCY

Part III develops a typology of costs and benefits related to jurisdictional redundancy. This Part applies those arguments to two prominent proposals that were under discussion in early 2012, at the time of this Article's preparation. Both proposals largely hold the designs of specific institutions constant but streamline forum choice. One would force near-exclusive employment of Article III criminal process, whereas the other would insist on the exclusive use of military commissions in a large set of cases. Contrary to the conventional wisdom that either one or another of these proposals must be desirable, I suggest that both streamlining proposals have underappreciated costs. The dominant jurisdictional architecture since 9/11, in which redundancy has been rife but selectively invoked, may seem ad hoc, but that status quo may have considerable underappreciated virtues. As a result, a move toward either one of the two posited versions of exclusive jurisdiction would be unlikely to produce desirable outcomes in either the short or the long term.[307]

As an initial matter, I shall state clearly the limits of the analysis developed in this Part. Both of the proposed reforms discussed below are distinctive in that they involve the almost wholesale excision of redundancy from the extant jurisdictional system. They are, in other words, corner solutions to the forum-choice problem: either no Article III jurisdiction or no military jurisdiction. That proposals are radical in this way, rather than finely tailored, creates an opportunity for analysis even in the absence of more comprehensive institutional and empirical information. Even if reaching a precise assessment about any and all marginal change to the detention system is too epistemically demanding, making a judgment about whether a radical

306. *See* Chesney & Goldsmith, *supra* note 32, at 1080–81 ("[T]he two systems . . . have converged on procedural and especially substantive criteria for detention.").

307. To reach an accurate assessment of how eliminating redundancy influences outcomes, it would be necessary to isolate that change from other effects in order to avoid confounding results. One would have to alter redundancy without altering the median quantum of process used in the system. One of the proposals discussed below—recourse to Article III courts only—roughly has this property. But the other—recourse to military forums only—does not. That alternative would lead on average to a drop in the procedural rigor of hearings. Even controlling for the change in median procedural rigor, however, I argue that the latter change still would be undesirable.

transformation toward either one of these two corner solutions would likely yield net gains or net losses is nonetheless feasible. Working within the constraints of available data and employing what I hope are plausible and uncontroversial empirical claims, I contend that it is possible to say, at least as a first rough approximation, whether these particular jurisdictional-design recommendations are likely to be socially desirable or not. My aim here is not, however, to provide a comprehensive evaluation of all conceivable adjustments to terrorism-related jurisdiction. I therefore make no claim here about optimal jurisdictional specification.

A. Limiting Jurisdiction to Article III Tribunals

The first, albeit less politically feasible, proposal on forum choice is to channel all terrorism suspects into Article III courts or, if they cannot be tried in that forum, to release them.[308] Advocates of this approach tend to categorically disfavor military commissions and contend that the Article III criminal process is the sole legitimate and proper adjudicative venue. The scope of such proposals is not always free of ambiguity. For example, it is not always clear whether the proposals would apply without any regard to geographical circumstances and, in particular, whether they would apply to battlefield captures. Politically savvy proponents of "Article III court only" proposals, however, are unlikely to argue that fighters seized on an active battlefield while deploying arms against American soldiers must always be channeled into a civilian forum. For the sake of evaluating this kind of proposal, I therefore assume that these proponents would allow the use of military forums in a narrow class of battlefield circumstances.

Would such a rationalization of extinguishing jurisdictional redundancy yield positive welfare effects? To be sure, the elimination of non-Article III jurisdiction would have benefits. It would, for example, reduce the number of false positives—as its advocates hope—and would also mitigate the demoralization costs among the public that are created by the specter of multiple adjudications. It

308. *E.g.*, Ratner & Lobel, *supra* note 16; *see also* Neil A. Lewis, *Try Detainees or Free Them, 3 Senators Urge*, N.Y. TIMES, Dec. 13, 2003, at A14 ("They may not have any rights under the Geneva Conventions as far as I'm concerned, . . . but they have rights under various human rights declarations. And one of them is the right not to be detained indefinitely." (quoting Senator John McCain) (internal quotation marks omitted)).

might even force agencies to engage in more accurate information gathering ex ante.

But it is also likely that the proposal would have effects that run counter to the intentions of its advocates. Extinguishing the redundancy that obtains from military forums would eliminate the possibility of positive jurisdictional arbitrage and the use of a second forum as a safety valve, at least in the absence of an immigration violation on the suspect's part. Doing so raises the stakes in any given trial. When there is reason to believe that a suspect presents a credible risk but the admissible evidence is weak for reasons unrelated to the government's investigative effort, a judge is under implicit or explicit pressure to bend procedural rules in deference to the government. This situation does not necessarily generate pressure to innovate in positive ways. Rather, it may translate into pressure upon risk-averse judges to grant more leeway to the government. More deference from judges would undermine the checking function Article III judges are supposed to play in terrorism cases. It would also compromise the information-forcing role of judicial review. Such pressures also may yield procedural rollback not only in terrorism-related cases but across the body of criminal litigation to the detriment of criminal suspects. Criminal-procedure rights, after all, are transubstantive, and courts may bend generally applicable rules rather than allowing suspected terrorists to evade punishment or crafting ad hoc terrorism exceptions to constitutional rights. Although causation is hard to establish, judicial changes to Fourth Amendment and Confrontation Clause protections after 2001 may fairly be seen as evidence of precisely this sort of transubstantive slackening of constitutional criminal-procedure protections.[309]

The Article III-only proposal might be self-defeating in another way. By eliminating the insurance option created by redundancy and by streamlining existing reserve capacity, the proposal may make the jurisdictional system as a whole more vulnerable to failure in the teeth of an exogenous shock. The failure of such a system to interdict a terrorist who goes on to commit a serious attack would quite likely induce a political reaction that would undo the reformers' goals.

309. *See* Michigan v. Bryant, 131 S. Ct. 1143, 1157–60 (2011) (interpreting expansively the emergency exception to the Confrontation Clause); Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 190–91 (2004) (holding that statutes requiring suspects to identify themselves during police investigations did not violate the Fourth Amendment).

The gain from elimination of a military option that is presently in rare use may be smaller than first appears for other reasons.[310] Recall that several redundancy-related costs have concave cost curves in relation to the extent to which redundancy is used. Absent heavy use, that is, jurisdictional redundancy may not generate large demoralization, de-skilling, or marginal-deterrence costs. Hence, redundancy in relative desuetude may not be as costly as is generally believed. By contrast, those costs with a convex curve—such as the high startup costs of military commissions and any attendant political-legitimacy losses—already will largely have accrued at the point that redundancy is eliminated from the system. The costs turn not on the use of a forum, but on its creation. Under such conditions, this second kind of costs represents what economists would call a set of sunk costs, which should be ignored for the purpose of forward-looking design decisions. Put these cost curves together, and it becomes apparent that eliminating rarely-used military jurisdiction may not bring large welfare gains because the costs of such jurisdiction have either been irredeemably expended or not yet accrued. In short, attention to the cost curves of redundancy-related harms suggests that it would likely be inefficient to expend the costs of moving from the status quo ante of pervasive but scantily used redundancy to one of exclusive Article III jurisdiction.

At the same time that it makes only ambiguous movement toward its putative libertarian goal, this proposal would have several unintended and undesirable policy effects: First, it would potentially reduce accuracy by eliminating opportunities to correct first-round false negatives. Second, it would eliminate competition-related incentives among forums that have fostered procedural innovation. Third, it would extinguish the government's choice as to whether or not to use a costly procedure in a given case. By cutting off a choice that has worked as a source of information for congressional overseers, the proposal may increase agency costs. Whereas under the existing scheme Congress can assess what proportion of cases are prepared on the basis of robust and relatively reliable evidence, as opposed to thinner records, in a world in which Article III jurisdiction were to be mandated, agencies simply would not press some cases. Any informational effects created by forum choice would evaporate.

310. *See supra* Part I.C.

In short, the gains from this proposed reform are far smaller than appear at first blush. Indeed, the proposal might even be self-defeating along the libertarian metric that its supporters purport to celebrate above other values.

B. Limiting Jurisdiction to Military Venues

The second kind of jurisdictional reform proposal, which aims to mandate the use of a military forum for some class of terrorism suspects, fares no better.[311] Like Article III-only proposals, it would fail to promote the security goals of its proponents while inflicting even more serious collateral harms on the ability of the detention system to promote desirable outcomes.

Proposals in this vein differ in their proposed scope and have a checkered history that culminated in the 2012 NDAA. In March 2011, Representative Howard P. "Buck" McKeon, then-chairman of the House Armed Services Committee, introduced the Detainee Security Act of 2011.[312] Section 4(a) of that bill would have required the president to hold in "military custody" any newly detained person "eligible for detention pursuant to the [AUMF]."[313] Representative McKeon summarized his position with a slogan: "No more mirandizing [*sic*] terrorists. No more trials in downtown Manhattan."[314] His explanation did not, however, clarify the precise metes and bounds of his bill. Because there is more than residual

311. Congress has in the past made jurisdictional changes respecting detainees' access to federal court. *See, e.g.*, Detainee Treatment Act of 2005, Pub. L. No. 109-148, tit. X, § 1005(e), 119 Stat. 2739, 2741–43 (codified as amended at 10 U.S.C. § 801 and 28 U.S.C. § 2241(e) (2006)) (stripping statutory habeas jurisdiction in challenges of Guantánamo detentions). The proposals discussed here would limit the choice set of the government and not the choice set of the detainee.

312. Detainee Security Act of 2011, H.R. 968, 112th Cong. (2011).

313. *Id.* sec. 4(a), § 130e(a). Representative McKeon also introduced the Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010, H.R. 4892, 111th Cong. (2010). Section 4 of that bill would have barred the use of any "funds appropriated or otherwise made available to the Department of Justice" to prosecute a person falling into a category roughly homologous to enemy combatant. *Id*. § 4; *see also id.* § 6(10) (defining the category of "unprivileged enemy belligerent").

314. Daniel Halper, *Rep. Buck McKeon's Foreign Policy Address*, WKLY. STANDARD BLOG (Nov. 15, 2010, 2:00 PM), http://www.weeklystandard.com/blogs/rep-buck-mckeons-foreign-policy-address_516881.html.

uncertainty about the scope of the AUMF, the domain of cases that the McKeon proposal would have encompassed is not clear.[315]

A variant of the McKeon proposal was introduced in the Senate in October 2011. Senator Kelly Ayotte unsuccessfully proposed a floor amendment to then-pending military-appropriations legislation that would have barred any appropriations for the criminal trials of individuals "determined to be" either members of or part of al Qaeda or an affiliate or otherwise a participant in "an attack or attempted attack" on the United States.[316]

Both the initial McKeon and the Ayotte proposals would have eliminated all jurisdictional redundancy in some class of cases—and my aim here is to analyze the welfare effects of such a move. It is worth emphasizing that subsection D of the 2012 NDAA, in which an eventual compromise was struck, has a very different effect from either the McKeon or the Ayotte provision. Section 1022 of the 2012 NDAA, to be sure, appears to be a mandatory-military-detention rule on first reading. But this impression is misleading. That provision instead imposes procedural obligations on the executive, but it does not, in fact, require long-term military detention in any case. For this reason, that provision leaves open the central questions discussed in this Article.

Section 1022 applies to a subset of individuals who may be detained in military custody under the AUMF if they are "captured in the course of hostilities" authorized by the AUMF.[317] It commands

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315. *See supra* notes 164–67 and accompanying text. The McKeon proposal recrafts the scope of the AUMF in section 5 but does not, in so doing, resolve the question of geographic scope.

316. 157 CONG. REC. S6729–30 (daily ed. Oct. 19, 2011) (amendment text); *see also* 157 CONG. REC. S6845–46 (daily ed. Oct. 20, 2011) (vote count). The Ayotte amendment is poorly drafted even if one agrees with its policy goals. For example, its reference to "attack[s] . . . against the United States," 157 CONG. REC. S6730 (daily ed. Oct. 19, 2011), could be read to reach any assault on a federal official, whether a postal worker or an FBI agent. Senator Ayotte has defended her proposal on the ground that "informing an enemy combatant of his or her 'right to remain silent' is contrary to the essential goal of obtaining critical intelligence necessary to finding other terrorists and preventing future attacks." Kelly Ayotte, Opinion, *Job 1: Stopping Future Terror Attacks*, CONCORD MONITOR, Oct. 27, 2011, http://www.concordmonitor.com/article/288349/job-1-stopping-future-terror-attacks. It is hard to see how an objection to the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), which operates before a trial occurs and which has a public-safety exception, conduces to a categorical objection to Article III trials. Senator Ayotte's justifications for her proposal also entirely fail to address why it is desirable to eliminate optionality from the existing system.

317. *See* National Defense Authorization Act for Fiscal Year 2012 (NDAA 2012), Pub. L. No. 112-81, § 1022(a)(2) (2011), PL 112-81 (Westlaw) (defining the scope of application as reaching anyone who is "a member of, or part of, al-Qaeda or an associated force that acts in

the "Armed Forces of the United States" to "hold" that person "in military custody pending disposition under the law of war."[318] A separate statutory provision defines "disposition under the laws of war" to include "[d]etention under the law of war without trial until the end of the hostilities authorized by the [AUMF];" military-commission trial; "trial by an alternative court or competent tribunal having lawful jurisdiction;" or "[t]ransfer to the custody of control of the person's country of origin, any other foreign country, or any other foreign entity."[319] The provision directs the executive to promulgate procedures for accomplishing such disposition, but it also contains three caveats. First, it "does not extend to citizens of the United States" or to "a lawful resident alien of the United States on the basis of conduct taking place within the United States, except to the extent permitted by the Constitution of the United States."[320] Second, the president may waive the mandatory rule by filing a written certification with Congress that the "waiver is in the national security interests of the United States."[321] Finally, § 1021 does not "affect the existing criminal enforcement and national security authorities of the [FBI]."[322]

Section 1022 does not accomplish the McKeon-Ayotte goal of mandating military detention, even setting aside its exceptions for citizens and some lawful resident aliens, for at least two reasons.[323] First, § 1021 defines "disposition under [the] law of war" to include triage to any of the forums discussed in this Article and includes

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coordination with or pursuant to the direction of al-Qaeda" and who has also "participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners"). Section 1022(a)(2) thus describes a subset of the persons who can be detained under the detention authority listed in section 1021(b), which is drafted in the disjunctive and not the conjunctive.

318. NDAA 2012 § 1022(a)(1). The term "hostilities" is defined in the Military Commissions Act of 2009, 10 U.S.C. § 948a–950t (Supp. IV 2010), as "any conflict subject to the laws of war", *id.* § 948a(9). This definition is ambiguous because it is not clear what the relevant unit of analysis is for conflicts. For example, should one look at the Afghan theater as a single conflict, as the Supreme Court did when considering the lawful duration of a battlefield detention? Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion) (suggesting that Hamdi could be held only until the end of the Afghan conflict in which he had been seized). Or should one consider all U.S.-al Qaeda interactions as a single conflict? The statute is not clear on this point.

319. NDAA 2012 § 1021(c)(1)–(4).

320. *Id.* § 1022(b)(1)–(2).

321. *Id.* § 1022(a)(4).

322. *Id.* § 1022(d).

323. I set aside here the possibility that the term "hostilities" should be read narrowly. *See supra* note 318.

immigration proceedings and Article III criminal trials as "competent tribunal[s] having lawful jurisdiction."[324] This definition means that a person can be designated as fitting under § 1022 and immediately funneled into a nonmilitary forum without having spent any actual time in military custody. In effect, all Congress has done in these cases is to interpose another level of bureaucracy in the detention process. Although bureaucratic controls or procedural rules can sometimes be justified as means of eliciting information or preventing arbitrary actions, § 1022 has neither of these effects.[325] To the contrary, it is hard to see it playing any useful function warranting its costs in cases in which Article III trial is the chosen disposition.

Second, there is no reason that a § 1021 determination need ever be made in some significant number of cases. Critically, the statute does not impose a temporal constraint on how quickly the determination needs to be made once a suspect has come to the government's attention. To read the statute to implicitly impose such a time limit would not only supplement the text with an atextual triggering rule, but it would also undermine "the existing criminal enforcement and national security authorities of the Federal Bureau of Investigation [and] other domestic law enforcement agenc[ies]."[326] Many suspects who fall within the scope of § 1022 inevitably will have been identified in the course of FBI investigations. To require the Bureau to cease abruptly an ongoing investigation, detain a suspect, and hand him over to the military, even if agents reasonably believe that pursuit of the investigation will lead them to more important suspects, is to compel an obviously counterproductive result. The ability of agents to pursue such investigations to the point of negotiating plea deals with such persons obviates the need for a § 1022 determination. Rather, civilian law enforcement would move directly to an enumerated "disposition under the laws of war"—*i.e.*, a plea colloquy before a federal judge. Assuming compliance with the statute's ultimate command of appropriately disposing of suspects in an enumerated fashion, it is hard to see why the statute should be read in such cases to impose a mechanical "determination" that can only have the effect of disrupting the successful attainment of law-

324. NDAA 2012 § 1021(c)(3).

325. No argument was made during the legislative debates over the 2012 NDAA to the effect that government choices to use Article III should be made marginally more costly through the imposition of a layer of bureaucracy. Nor is it easy to discern any colorable policy justification for section 1022's effect along these lines.

326. NDAA 2012 § 1022(d).

enforcement goals. In sum, mandatory military detention is not yet the law of the land for any given class of suspects.

But would such a mandate of military detention improve net social welfare by increasing the accuracy and reducing the cost of terrorist-detention systems? The answer is no. Like proposals to channel all cases into Article III forums, proposals to make military detention exclusive would generate perverse and self-defeating results. Several negative downstream effects of mandatory military detention are worth stressing to illustrate this point.

First, it is ironic that one of the most important effects of mandating a military forum would be to eliminate the existing measure of sequential overlap that insures against false negatives. The evidence presented in Part I suggests that sequential overlap has been a largely successful strategy for eliminating false negatives. In tension with its advocates' goals, mandatory military detention may in this way eliminate a design feature of existing forum-choice arrangements that dampens the risk of a false negative. Oddly, proponents of military forums would eliminate the insurance effect of redundancy on the basis of precious little evidence that the Article III criminal system generates a significant rate of false negatives and some evidence that military adjudication has failed to sort accurately the pool of captured detainees, leading to the release of persons who have gone on to commit further acts of violence.[327] That is, there is very little evidence that Article III forums have failed to supply convictions in appropriate cases, and there is some evidence that military screening techniques have been inaccurate.

Second, eliminating sequential overlap would vitiate the salutary function played by redundancy as insurance against underlap. Even when a military forum has been used initially, Article III criminal jurisdiction can still play a backstopping role against legal risk, as demonstrated in the Padilla and al-Marri litigations. The history of military commissions to date suggests that this kind of legal risk is

327. For a careful analysis of evidence of recidivism by enemy combatants suggesting that the worry is somewhat overstated, see Peter Bergen & Katherine Tiedemann, *Guantanamo: Who Really 'Returned to the Battlefield?,'* NEW AM. FOUND. (July 20, 2009), http://counterterrorism.newamerica.net/publications/policy/guantanamo_who_really_returned_battlefield (discussing recidivism rates among enemy combatants who have been detained). It is also important to observe that what is commonly called recidivism may be nothing of the kind. Instead, it may be evidence of what might be termed a criminogenic effect from enemy-combatant detention. In other words, the fact that those who are erroneously detained at first are exposed to radicalizing influences within a detention facility and then released.

hardly minimal. That is, it seems plausible to imagine that a significant number of al Qaeda suspects who are alleged to have had a leadership or logistical role in past terrorist attacks, but not an operational role, will be amenable to trial in a military commission only for inchoate offenses such as "providing material support" or "terrorism."[328] Significant uncertainty remains and has been flagged by a plurality of the Supreme Court, as to whether these offenses are indeed violations of the laws of war that may be tried by military commissions.[329] Although the Court of Military Commissions Review has held that material support is a war crime, its opinion may be vulnerable.[330] Proponents of exclusive military-commission jurisdiction thus press their case at a time when the constitutionally permissible ambit of those tribunals is unclear and when it is possible that the latter will be circumscribed to exclude the allegations against many detainees. In the absence of certainty that a single forum can constitutionally adjudicate all known terrorism cases, mandating that cases be tried in one forum seems singularly unwise.[331]

Third, the proposal would mitigate the epistemic benefits of existing simultaneous redundancy much in the same way that Article III-only proposals would. It would eliminate the information-forcing effects of forum choice, undermining the ability of Congress to draw inferences from the jurisdictional options selected by its agents in the bureaucracy. And it would furthermore extinguish competition among forums that has previously fostered procedural innovation.

Fourth, mandating use of a military forum would directly and immediately amplify the rate of false positives by exchanging the use of a lower-process forum such as enemy-combatant detention for a

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328. *See* 10 U.S.C. § 950t(24) (Supp. IV 2010) (defining the "material support" offense); *id.* § 950t(25) (defining the "terrorism" offense).

329. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 611 (2006) (plurality opinion) (suggesting that conspiracy offenses are not violations of the laws of war).

330. *See* United States v. Hamdan, No. CMCR 09-002, 2011 WL 2923945, at *44 (Ct. Mil. Comm'n Rev. June 24, 2011) (holding that material support was a violation of the laws of war prior to the enactment of military-commissions legislation in 2009); *accord* United States v. Al Bahlul, No. CMCR 09-001, 2011 WL 4916373, at *29–53 (Ct. Mil. Comm'n Rev. Sept. 9, 2011). These opinions rest their conclusions largely on evidence of international treaties that urge states to enact municipal criminal statutes and on various domestic criminal laws. It is not clear that independent evidence of the status of material support under international law is strong, or even tenable.

331. A more cynical view may be that it is precisely in order to impose moral and psychological pressure on judges to find military commissions capable of prosecuting material-support offenses that proponents of the military-only route are now pressing their case.

higher process forum such as Article III criminal process. Strictly speaking, this effect is not a consequence of the loss of redundancy per se. Rather, it follows from the diminished median level of procedural robustness in the detention system.[332] But it is nonetheless a consequence of the mandatory-military-forum proposals in relation to the status quo. In the longer term, the inflationary effect of mandating military process on false positives may be even greater. Such proposals undermine investigating agencies' long-term incentives to preserve investigative expertise and to gather accurate information. They do so by effectively scaling back restrictions on morally dubious investigative shortcuts such as the use of cruel and inhumane treatment in interrogations.[333] It is no small irony that what is touted as a pro-security move would likely inflict serious harm over time to the government's capacity to meet security goals through targeted and effective investigations.

Fifth, mandatory military detention would eviscerate what remains of marginal deterrence, with similarly perverse consequences. Rather than dissuading fellow ideologues from more active support of terrorism, it may well be that the effect of mandatory military jurisdiction would be to extinguish incentives to refrain from terrorism once any expression of support had been made. Strategic terrorist groups will leverage this leveling effect by broadening the ideological grounds of their appeal. They will seek to persuade a greater number of potential recruits that their existing political sympathies already expose them to military detention. This hypothesis is not wholly without support: studies of past counterterrorism efforts link the militarization of counterterrorism policy to boosted terrorism recruitment.[334] And a moment's reflection

332. I am grateful to William Hubbard for pressing me on this distinction.

333. Such methods obviously may raise normative concerns. Without detracting from those concerns, I mean to set them aside for the purpose of this analysis.

334. A study of British counterterrorism policies in Northern Ireland found that of six high-visibility initiatives, one had had an observable deterrent effect, whereas five had had no discernible deterrent effect. Two others had had no statistically significant impact, whereas three of the intrusive policies had been associated with significant increases in violence. Gary LaFree, Laura Dugan & Raven Korte, *The Impact of British Counterterrorist Strategies on Political Violence in Northern Ireland: Comparing Deterrence and Backlash Models*, 47 CRIMINOLOGY 17, 25–35 (2009). Similar effects have been identified in the aftermath of the 2003 U.S. invasion of Iraq. *See* Ronald Fischer, Charles Harb, Sarah Al-Sarraf & Omar Nashabe, *Support for Resistance Among Iraqi Students: An Exploratory Study*, 30 BASIC & APPLIED SOC. PSYCHOL. 167, 173 (2008) ("The data presented here suggest that support for violence is strongly influenced by a national struggle against a foreign occupation force.").

on the moralistic arguments made on behalf of terrorist causes suggests that it would be hazardous to assume that a strictly inverse relationship exists between the state's use of force and the proclivity to turn to arms.

Finally, such proposals would impose high demoralization costs and extinguish constitutional rights related to the criminal process in at least some class of cases arising in the United States, further reducing recruitment costs for terrorist groups.

In sum, it is hard to see many, or even any, compensating virtues of proposals that would eliminate all jurisdictional overlap in favor of a military venue. Such proposals might provide their advocates in Congress with a warm glow from the sense of being tough on terrorism. But the proposals will do little to improve security in the short term, and in the long term are likely to impose large welfare costs on future political generations.

C. In Defense of the Status Quo

Change is fashionable for politicians and pundits. But in this case, the conventional wisdom about the dysfunctionality of existing forum choices for terrorism suspects may be off the mark. A comprehensive assessment of the status quo, to be sure, rests on difficult empirical assessments beyond the grasp of this Article. But preliminary grounds can be offered for believing that the post-9/11 jurisdictional status quo leverages many of the advantages of redundancy without incurring some of the related costs. At least in comparison to corner solutions mandating a single forum, the status quo does not look so bad.

It is worth recalling that the jurisdictional status quo has largely endured through both a Republican and a Democratic presidency.[335] Both administrations converged on a status quo in which redundancy exists but is invoked only infrequently. Both made vigorous use of the federal criminal and immigration systems. And both preserved the military option, although neither relied upon it much after 2004, outside of the battlefields in Iraq and Afghanistan. Notwithstanding its aggressive, unilateralist image, the Bush administration did not push the boundaries of jurisdictional choice as far as it could have. It employed military detention in the United States for only two

335. *See* Jack Goldsmith, *The Cheney Fallacy*, NEW REPUBLIC (May 18, 2009, 12:00 AM), http://www.tnr.com/article/politics/the-cheney-fallacy ("The new administration has copied most of the Bush program, has expanded some of it, and has narrowed only a bit.").

suspects and exposed only a handful of suspects to military tribunals. It thus preserved the benefits of Article III while maintaining military detention in reserve.[336]

Notwithstanding its libertarian rhetoric, the Obama administration has not abandoned the Bush administration's jurisdictional claims. To the contrary, the Obama White House has been careful to preserve operational flexibility.[337] In a September 2011 speech at Harvard Law School, President Obama's assistant on homeland security and counterterrorism endorsed not only Article III courts but also some "reliance upon military detention" and emphasized the "place in our counterterrorism arsenal" of "reformed military commissions."[338] A former assistant attorney general for national security also has opined that although "[t]here is no inherent tension between national security and the criminal justice system . . . our criminal justice system has [its] limits, and is not always the right tool for the job."[339] Although the government has not specified all the boundaries of these tools' usage with precision, it appears that at least some forums overlap with the scope of other forums.[340] The Obama administration also has been complicit in the preservation of military commissions. Its lawyers have continued to defend aggressively the military detention of enemy combatants in terms only slightly at odds with those offered by the Bush administration. Rather than retiring immigration and criminal-law powers, the White House in Democratic hands has preserved and

336. For an endorsement of the use of criminal process from a former official in the Bush administration, see Charles D. Stimson, *What We've Learned About Terror Trials from the Underwear Bomber*, FOXNEWS.COM (Oct 12, 2011), http://www.foxnews.com/opinion/2011/10/12/weve-learned-about-terror-trials-from-underwear-bomber.

337. *See, e.g.*, Exec. Order No. 13,492, 3 C.F.R. 203, 205–06 (2010) (requiring the secretary of defense and others to participate in a detainee review process to determine, among other things, "whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release").

338. Brennan, *supra* note 6.

339. David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT'L SECURITY L. & POL'Y 1, 78 (2011); *see also* Jeh C. Johnson, Gen. Counsel, U.S. Dep't of Def., Speech to the Heritage Foundation 3–5 (Oct. 18, 2011), *available at* http://www.lawfareblog.com/wp-content/uploads/2011/10/20111018_Jeh-Johnson-Heritage-Speech.pdf (arguing that "[t]he military should not, and cannot be, the only answer [to al Qaeda]" and defending the use of Article III courts).

340. The exception is the Obama administration's commitment to process "suspected terrorists arrested inside the United States . . . through our Article III courts." Brennan, *supra* note 6.

defended those powers, for example by defending their aggressive use before the Supreme Court in cases such as *Humanitarian Law Project v. Holder*.[341] Yet at the same time, and like the Bush administration, the Obama administration generally has refrained from stretching the boundaries of military detention beyond its postemergency uses.

Given this de facto, if implicit, consensus between two administrations of dramatically different ideological stripes on the utility of jurisdictional redundancy, it may be that arguments in favor of preserving the forum status quo are not quite as outlandish as they may appear at first blush. Equally, the reliance of both administrations on established forums, rather than novations such as the much-hyped national-security courts, counsels against high expectations for entirely novel forums.[342]

The fact that two administrations with strikingly divergent normative commitments and distinct political constituencies converged on an approach involving significant, but sparingly used, redundancy is telling. The combination of excess adjudicative capacity and cautious usage may indeed maximize the advantages of redundancy while minimizing its costs. On the one hand, the government benefits from the possibility of procedural arbitrage and from the safety net supplied by sequential redundancy, allowing it to minimize false negatives. On the other hand, it does so without incurring the fiscal costs of creating new forums or imposing demoralization costs associated with visible circumvention of Article III. As to agency costs, judges operate under the shadow of jurisdiction flight, and they thus have persisting incentives to innovate in ways that accommodate the complexities of terrorism cases. At the same time, even when they perceive no way of innovating without violating core normative commitments, those judges are not in a bind. They need not fear catastrophic harms from the rigid application of constitutional rules because of the system's reserve capacity. Investigating agencies also have some choice between low- and high-process channels such that their forum-choice decisions convey information to political overseers. At the same time, the employment of Article III as a strong default jurisdictional option preserves marginal deterrence and generates incentives for investigators to obtain good information and maintain their investigative skills.

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341. Humanitarian Law Project v. Holder, 130 S. Ct. 2705 (2010).

342. For a fuller development of the grounds for this skepticism, see *supra* text accompanying notes 230–35.

Attention to the full spectrum of costs and benefits associated with forum choice, in sum, suggests that the status quo of pervasive redundancy is surprisingly attractive.[343] At the very least, proponents of reform have not identified and analyzed all costs and benefits in a way that can justify their proposals for change. They have failed, in other words, to ask the right institutional-design questions in thinking about forum choice.

CONCLUSION

The choice of forum for terrorism suspects is usefully conceived as a question of institutional design rather than as a matter of legal doctrine. It is not sensible to craft policy in this domain simply by applying cumbersome tools of legal doctrine while ignoring the complex effects of jurisdictional specification. Nor is it sensible to craft policy by focusing on individual cases, like Warsame's, as opposed to attending carefully to the complex direct and indirect effects of institutional-design choices embedded in existing structures. The right question to ask is not "Where should Warsame be tried?" It is "What options should the government have ex ante in dealing with his case?" That is, the right question focuses on how the legal framework of adjudicative institutions defines and channels the government's choices—a question that must be answered long before Warsame's shallow *dhow* comes into sight. Attention to this institutional-design question suggests that the existence of redundancy in Warsame's case—exemplified by his seriatim exposure to military and then civilian detention—may have desirable net consequences.

Failure to attend to institutional-design effects, by contrast, has blinded commentators to important questions. Leading reform proposals on the left and the right are consequently myopic and rife with unintended and unanalyzed effects. Partisans on both sides of the aisle focus on one variable in a complex optimization puzzle with many moving parts. They fail to see how jurisdictional redundancy influences, among other things, error rates, innovation, investigators' incentives, marginal deterrence, and information flow. Taking account of these complex effects suggests that the considerable jurisdictional redundancy that characterizes the status quo, if not

343. This tracks one analyst's conclusion in the administrative-law context. *See* Marisam, *supra* note 28, at 183–84 ("[T]he costs of avoiding duplicative delegations ex ante are too great . . . . [I]t is efficient to let some duplication persist.").

ideal, may still be relatively desirable as one of the better possible frameworks for dealing with the nettlesome problems of forum choice for terrorism suspects.

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